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Judicial Independence, Age-Based BFOQs, and the Perils of Mandatory Retirement Policies for Appointed State Judges

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McFadden: Judicial Independence, Age-Based BFOQs, and the Perils of Mandator

**JUDICIAL INDEPENDENCE, AGE-BASED BFOQs,
AND THE PERILS OF MANDATORY RETIREMENT
POLICIES FOR APPOINTED STATE JUDGES**

CHRISTOPHER R. MCFADDEN*

I. INTRODUCTION 82

II. A BRIEF OVERVIEW OF THE JUSTIFICATIONS FOR MANDATORY
RETIREMENT POLICIES 88

III. INAPPLICABILITY OF THE “POLICYMAKER” EXCEPTION 90

IV. BFOQ ANALYSIS: THE ESSENCE OF THE JUDICIAL FUNCTION
AND THE RELEVANCE OF AGE 98

 A. *The First Prong: Defining the “Essence” of The Judicial Power
 and Its “Reasonably Necessary” Qualifications* 99

 1. *Judging Independently and Free from the Appearance
 of Bias* 100

 a. *Resolving Cases Accurately and Acceptably* 100

 b. *Participation in the Decisionmaking Process* 102

 c. *Equality Among Litigants* 103

 2. *Threats to Judicial Independence and the
 Appearance of Fairness* 104

 B. *Mandatory Retirement Undermines Values Inherent
 in the Judicial Function* 107

 1. *Limiting Public Censure of the Judiciary* 107

 2. *Keeping with the Times* 110

 3. *Efficient Administration of Justice* 116

 C. *Young Age Is Not “Reasonably Necessary” for Independent
 Adjudication* 117

V. BFOQ ANALYSIS: THE IMPRACTICABILITY PRONG AND THE RISK OF
JUDICIAL MISBEHAVIOR 122

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VI. MANDATORY RETIREMENT POLICIES ARE NOT PREFERABLE
ALTERNATIVES TO IMPEACHMENT 127

VII. CONCLUSION 134

I. INTRODUCTION

Mandatory retirement policies have become increasingly fashionable, despite the general ban on age discrimination established by the Age Discrimination in Employment Act of 1967 (ADEA).¹ Over the past fifteen years, courts have sanctioned mandatory retirement policies in numerous industries by ruling that age is a bona fide occupational qualification (BFOQ) “reasonably necessary to the normal operation of the particular business.”² More recently, Congress and various administrative agencies have exempted entire occupational categories from coverage under the ADEA.³ This exclusionary trend runs contrary to the goals of the ADEA to promote employment of older workers based on their ability, prohibit arbitrary age-based employment policies, and help employers and workers in every segment of the economy find integrative solutions to the problems arising from an increasingly older labor market.⁴ The message of the ADEA, as well as similarly-oriented state age discrimination laws, is that employers should make employment decisions on an individualized basis rather than use generalized, over-inclusive age-based policies and preferences.⁵

Appointed state judges are among those workers who are susceptible to mandatory retirement rules. In *Gregory v. Ashcroft*⁶ the Supreme Court held that appointed state judges do not fall within the ADEA’s definition of “employees” because they are high-ranking government policymakers.⁷ As a result, they are not protected by federal law prohibiting age-based workplace

1. 29 U.S.C. § 623(f)(1) (1994).

2. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (involving appointed state judges); *Williams v. Hughes Helicopters, Inc.*, 806 F.2d 1387 (9th Cir. 1986) (involving helicopter test pilots); *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408 (11th Cir. 1986) (involving airline flight engineers); *EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986) (involving police); *see also State ex rel. Keefe v. Eyrich*, 489 N.E.2d 259, 261 (Ohio 1986) (stating “we take notice that mandatory retirement is becoming more popular with both the public and private sectors”).

3. *See, e.g.*, Age Discrimination in Employment Act, Pub. L. No. 104-208, § 101(a), 110 Stat. 3009-23 (1996) (codified at 29 U.S.C. § 623(j) (1999)) (extinguishing liability for prior age discrimination in hiring of firefighters); *Prof'l Pilots Fed'n v. FAA*, 118 F.3d 758 (D.C. Cir. 1997) (approving agency’s expansion of mandatory retirement rules in aviation industry).

4. 29 U.S.C. § 621(b) (1994).

5. *See id.* § 623(f).

6. 501 U.S. 452 (1991).

7. *Id.* at 452.

discrimination. Moreover, because age is not considered a suspect class under the Equal Protection Clause of the Fourteenth Amendment, states may set mandatory age-based retirement policies for their appointed judges unless the states cannot articulate any rational basis for doing so.⁸ Under this deferential standard of review, provisions imposing mandatory judicial retirement policies have been uniformly upheld,⁹ and approximately thirty states, including South Carolina, use them today.¹⁰

Nevertheless, even though many states have mandatory judicial retirement policies, the public has become increasingly critical of them. While no one disputes that states have an important interest in maintaining a judiciary fully capable of performing its duties, critics have argued that mandatory retirement

8. See *id.* at 470 (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976); *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

9. See, e.g., *Zielasko v. Ohio*, 873 F.2d 957 (6th Cir. 1989); *Hatten v. Rains*, 854 F.2d 687 (5th Cir. 1988); *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir. 1980); *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir. 1979); *Rubino v. Ghezzi*, 512 F.2d 431 (2d Cir. 1975); *Boughton v. Price*, 215 P.2d 286 (Idaho 1950); *Saetre v. State*, 398 N.W.2d 538 (Minn. 1986); *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. 1978) (en banc); *Grinnell v. State*, 435 A.2d 523 (N.H. 1981); *Diamond v. Cuomo*, 514 N.E.2d 1356 (N.Y. 1987) (per curiam); *Maresca v. Cuomo*, 475 N.E.2d 95 (N.Y. 1984); *State ex rel. Keefe v. Eyrich*, 489 N.E.2d 259 (Ohio 1986); *In re Stout*, 559 A.2d 489 (Pa. 1989); *Gondelman v. Commonwealth*, 554 A.2d 896 (Pa. 1989); *Nelson v. Miller*, 480 P.2d 467 (Utah 1971); *Aronstam v. Cashman*, 325 A.2d 361 (Vt. 1974).

10. See ALA. CONST. amend. 328, § 6.16 (age 70); ALASKA CONST. art. IV, § 11 (age 70); ARIZ. CONST. art. VI, §§ 20, 39 (age 70); COLO. CONST. art. VI, § 23(1) (age 72); CONN. CONST. art. V, § 6 (age 70); FLA. CONST. art. V, § 8 (age 70, except for judges on temporary service or finishing half-completed term); HAW. CONST. art. VI, § 3 (age 70); LA. CONST. art. V, § 23(B) (age 70); MD. CONST. art. IV, § 3 (age 70); MASS. CONST. pt. 2, ch. 3, art. I (age 70); MICH. CONST. art. VI, § 19 (age 70); MO. CONST. art. V, § 26(1) (age 70); N.H. CONST. pt. 2, art. 78 (age 70); N.J. CONST. art. VI, § 6, ¶ 3 (age 70); N.Y. CONST. art. VI, § 25(b) (last day of December after reaching age 70); OHIO CONST. art. IV, § 6(C) (no election or appointment if age 70 on or before day assumes office); OR. CONST. art. VII, § 1(a) (end of year after reaching age 75, but state may fix age to not less than 70); TEX. CONST. art. V, § 1-a(1) (age 75, but state may fix age to not less than 70); VT. CONST. ch. 2, § 35 (end of year after attaining 70); WASH. CONST. art. IV, § 3(a) (end of year after attaining age 75, but legislature may fix age to not less than 70); WYO. CONST. art. V, § 5 (age 70); D.C. CODE ANN. § 11-1502 (1981) (age 74); 705 ILL. COMP. STAT. 55/1-1 (West 1999) (age 75); IND. CODE ANN. § 33-2.1 to 5.1 (Michie 1998) (age 75); IOWA CODE ANN. § 602.1610 (West 1996 & Supp. 2000) (age 75 for justices holding office before July 1, 1965; age 72 for justices holding office after July 1, 1965; age 72 for all others except associate juvenile or probate judges 72 or older as of July 1, 1996); MINN. STAT. ANN. § 490.121(12) (West 1999) (last day of month in which justice attains age 70); N.Y. JUD. LAW § 23 (McKinney 1983) (end of year in which judge attains 70); N.C. GEN. STAT. § 7A-4.20 (1999) (last day of month in which justice attains age 72); S.C. CODE ANN. § 9-8-60(1) (Law. Co-op. 1986 & Supp. 1999) (age 72); S.D. CODIFIED LAWS §§ 16-1-4.1, 16-6-31 (Michie 1995) (January following general election after reaching age 70); UTAH CODE ANN. § 49-6-801(1) (1998) (age 75); VA. CODE ANN. § 51.1-305(B1) (1998) (twenty days after general assembly next convenes following 70th birthday). See generally Carol B. Trask, Note, *Mandatory Retirement of Judicial Appointees*-In re Stout, 63 TEMP. L. REV. 349, 354 n.42 (1990) (listing statutes related to mandatory retirement).

policies run counter to this interest. Judge Richard Posner of the Seventh Circuit Court of Appeals has remarked that “[t]he remarkable thing about judges . . . is not that they hang on to their jobs to such advanced ages but that they perform them creditably, and indeed sometimes with great distinction, at advanced ages.”¹¹ Judge Posner writes that “judges can perform creditably at advanced ages because to be a good judge requires good judgment, and judgment is a function of age and experience”;¹² therefore, “a mature professional judgment is central to the concept of a wise judge, and the intellectual and dispositional qualities that go to create such a judgment plainly improve with age up to a point . . . and then plateau until senility.”¹³ This supports the statement that “our best judges are the most experienced ones.”¹⁴

In recent years, opponents of mandatory retirement policies have repeatedly urged their state legislators to upwardly adjust their state’s retirement age or to abolish the policies altogether.¹⁵ These efforts have been remarkably unsuccessful.¹⁶ The lack of success is not surprising given that the elderly often have difficulty mobilizing significant cross-generational support for measures protecting them as a class.¹⁷

But while activists have sought legislative repeal of mandatory retirement policies, these activists, along with scholars and commentators, have apparently

11. RICHARD A. POSNER, *AGING AND OLD AGE* 181 (1995).

12. *Id.* at 192.

13. *Id.* at 194.

14. Editorial, *Positions Given on Amendments*, BATON ROUGE ADVOC., Oct. 20, 1995, at 8B.

15. See, e.g., Leslie L. Anderson, *Age Discrimination: Mandatory Retirement from the Bench*, 20 LOY. L. REV. 153 (1974); Scott Makar, *In Praise of Older Judges: Raise the Mandatory Retirement Age?*, 71 FLA. B.J. 48, 48 (1997); Jeffrey M. Shaman, *Supreme Court Upholds Mandatory Retirement of State Judges*, 75 JUDICATURE 222 (1992); Gary Spencer, *Reform of Judicial Retirement Sought: Task Force Recommends New Senior Judge Status*, 222 N.Y. L.J. 57 (1999); Daniel Webster & Donald L. Bell, *First Principles for Constitution Revision*, 22 NOVA L. REV. 391, 423 (1997); *Judicial Term Limits Proposal*, ROCKY MTN. NEWS, Apr. 4, 1995, at 12A; *Legislature '97*, BATON ROUGE ADVOC., Mar. 28, 1997, at 14A; *Mid-America Report*, KAN. CITY STAR, Nov. 18, 1999, at 1.

16. See, e.g., Dina A. Ellis, *Bereano, Election Top News of '94*, BALT. DAILY REC., Dec. 30, 1994, at 1 (reporting on defeat of referendum to raise Maryland’s mandatory retirement age from 70 to 75); *Murphy Bill Would Help Justice Smith*, ATLANTA J. AND CONST., Feb. 5, 1991, at D-3 (reporting on Georgia governor’s prior veto of legislation designed to eliminate mandatory retirement age).

17. Professor Tribe has argued that the elderly should be treated as a “semi-discrete” minority group or as a “quasi-suspect class” either because they are not seen as a significant political force or because legislators do not empathize with many of their concerns. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-31, at 1593-94 (2d ed. 1988); see also Julie R. Steiner, Comment, *Age Classifications and the Fourteenth Amendment: Is the Murgia Standard Too Old to Stand?*, 6 SETON HALL CONST. L.J. 263, 280-83 (1995) (discussing Justice Thurgood Marshall’s view that age classifications should be subjected to heightened scrutiny because of the nation’s history of discrimination based upon age).

overlooked an independent means of redress: their own individual *state employment laws* forbidding age discrimination. State age discrimination laws typically fill in the gaps left by the ADEA's incomplete coverage. These laws recognize the important state interest in eradicating age discrimination, and they allow for generalized age-based employment policies only in narrow circumstances.¹⁸ Thus, in the absence of a contrary state constitutional provision or state law exception, appointed judges¹⁹ may be able to invoke their state's age discrimination laws against forced retirement.

This Article addresses a question often overlooked by commentators: How and why might a state's age discrimination laws be invoked to invalidate mandatory judicial retirement policies?²⁰ Part II briefly highlights the reasons for mandatory retirement ages and discusses why states still use them today. Then, this Article's challenge to mandatory retirement policies begins with Part III, which argues against the *Gregory*²¹ Court's conclusion that appointed state judges are "policymakers."²² Thus, even if a state's anti-age discrimination law exempts policymakers from coverage, Part III contends that appointed judges should not fall within this exempted category of employees.

Parts IV and V discuss and counter the BFOQ defense used to justify mandatory retirement policies for appointed judges by examining each prong

18. Numerous states with appointed judges have human rights laws that prohibit age-based discrimination in the workplace unless age is a BFOQ reasonably necessary to the operation of the business. *See, e.g.*, D.C. CODE ANN. § 1-2503(a) (1981); 705 ILL. COMP. STAT. 5/2-101 (1999); IND. CODE ANN. § 22-9-2-1 (Michie 1997); IOWA CODE ANN. § 216.6(1)(a) (West 1996); MINN. STAT. ANN. § 181.81(1) (West 1993); N.Y. EXEC. LAW § 296(3-a)(d) (McKinney 1993); N.C. GEN. STAT. § 143-422.2 (1999); S.C. CODE ANN. § 1-13-80 (Law. Co-op. 1986); VA. CODE ANN. § 2.1-725 (Michie 1995).

19. More than thirty states appoint judges at various levels within their judicial system. *See* LYLE WARRICK, AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 19-35 (2d ed. 1993). This Article presumes that elected judges, like all other elected officials, would be expressly exempted from coverage. Therefore, this Article does not address possible applications of anti-discrimination law to elected judges.

20. Commentators have devoted their attention exclusively to whether judges should qualify for the "policymaking" exception without considering whether age is a BFOQ reasonably necessary for judging. *See* Alan L. Bushlow, Note, *Mandatory Retirement of State-Appointed Judges Under the Age Discrimination in Employment Act*, 76 CORNELL L. REV. 476 (1991); Laura A. Popovitch, Comment, *EEOC v. State of Vermont: Are Appointed State Judges "Employees" Under the ADEA?*, 20 MEMPHIS ST. U. L. REV. 697 (1990); Tina E. Sciocchetti, Comment, *Mandatory Retirement of Appointed State Judges—Age Discrimination*, 85 NW. U. L. REV. 866 (1991); Darlene M. Severson, Note, *Mandatory Retirement of Judges: Law and Policy—Gregory v. Ashcroft*, 17 WM. MITCHELL L. REV. 858 (1991); Lawrence A. Walke, Comment, *Extending Protection Under the Age Discrimination in Employment Act to Appointed State Judges*, EEOC v. State of Vermont, 69 WASH. U. L.Q. 359 (1991). *But cf.* Thomas Alden Hauser, Note, *Mandatory Retirement of State Judges and the Age Discrimination in Employment Act*, 51 U. PITT. L. REV. 973, 975 (1990) ("No court, state or federal, has interpreted the BFOQ exception to include judges.").

21. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

22. *Id.* at 485.

of the BFOQ test.²³ Under the first prong, Part IV defines the “essence” of the judicial function as the adjudication of cases and controversies independently and free from the appearance of bias²⁴ and then explains why three of the leading justifications for mandatory retirement actually undermine these values and should be rejected.²⁵ Part IV further argues that old age is a poor predictor of judicial ability.

Part V considers mandatory retirement policies in the context of the second, “impracticability” prong. Courts allow employers to use generalized age-based policies if individualized treatment is impractical. This determination necessarily involves questions of efficiency. Individualized treatment is impractical if it cannot be done at a reasonable social cost. In other words, courts will not require individual treatment if it is too expensive, too time consuming, or too imprecise of a predictor of employee performance to be useful. At the same time, however, age discrimination laws establish a strong presumption in favor of individual treatment. Courts are reluctant to substitute an imperfect, generalized employment policy for an equally problematic individualized one unless the former is more efficient than the latter.²⁶ Furthermore—and this point is often overlooked—courts generally accept an employer’s use of a mandatory, generalized employment policy only if it is a more acceptable and efficient alternative than individualized analysis.²⁷ Therefore, one may concede that impeachment is an impractical method for removing incompetent judges without necessarily resigning oneself to accepting mandatory retirement policies as an acceptable alternative.

Finally, Part VI shows that mandatory retirement policies force judges to vacate the bench at an age when many would prefer continued employment, and this creates the potential for bias. Eminent observers including Chief Justice Rehnquist have warned of the evils associated with the rising number

23. The BFOQ test has two prongs. The first prong requires that the state (1) define the “essence of the business” at issue; and (2) show that the essence of the business operation (the judiciary) would be undermined if the state-employer did not make employment decisions based on age. *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 412-13 (1985). The second prong requires that the state show that older judges are unable to perform their job functions or that “it is ‘impossible or highly impractical’ to deal with the older employees on an individualized basis.” *Id.* at 414. Courts generally accept an employer’s use of a mandatory, generalized, employment policy only if it is a more acceptable and efficient alternative than individualized analyses. See *EEOC v. City of Linton*, 623 F. Supp. 724, 726 (S.D. Ind. 1985); see also *infra* text accompanying notes 228-89 (discussing the framework used for determining whether individualized treatment is impractical). Part IV will discuss the first prong of the BFOQ analysis and Part V will discuss the second prong.

24. See *infra* note 96 and accompanying text.

25. See *infra* text accompanying notes 139-99.

26. See *infra* text accompanying notes 230-61.

27. See, e.g., *EEOC v. City of Linton*, 623 F. Supp. 724 (S.D. Ind. 1985) (holding employer must either show factual basis for practice or no possible alternative). See also *infra* text accompanying notes 230-94.

of judges who treat the judiciary as “a stepping stone to a lucrative private practice.”²⁸ On more than one occasion, judges have encountered a barrage of criticism when they chose to leave office and accept employment with private firms only a short time after ruling in favor of those firms’s clients.²⁹ Regardless of whether or not the judge’s subsequent employment was a quid pro quo for the favorable ruling, the judge’s actions raised an impermissible appearance of bias.

By drawing upon simple economic behavior theory, Part VI shows that mandatory retirement policies create the same potential for bias or the appearance of bias that troubles Justice Rehnquist. The policies force judges to vacate the bench at an age when many would prefer continued employment. As a result, the policies either tempt, or appear to tempt, judges to decide cases for or against a particular litigant in order to possibly obtain future favors, employment, or other consideration from the litigant. The structure of the legal order with its differential posture on appellate review and widespread indeterminacy of legal principles on most matters, gives these trial judges and appellate judges ample room within which they can engage in biased decision making. This potential is magnified because objectively correct decisions are rarely identifiable, and the judge’s ruling will stand absent clear error.³⁰ For these reasons, although mandatory retirement may initially appear to be acceptable because it eliminates the need for impeachment in reality it is wholly unacceptable, for it undermines the state’s interest in independent adjudication, free from all appearance of bias.

In a judicial system that must avoid not only misbehavior but also the appearance of misbehavior, mandatory retirement policies threaten to undermine all of our system’s basic values. When viewed in this light, a court has no reason to agree with a state’s preference for mandatory retirement, and the impracticability prong of the BFOQ test should not be satisfied.³¹

28. EMILY FIELD VAN TASSEL, FEDERAL JUDICIAL CENTER, WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992, 40 (1993).

29. *See id.* at 16-17; *see also infra* text accompanying notes 277-79 (noting criticisms that arise when judges leave the bench for private practice).

30. *See infra* text accompanying notes 275-76.

31. Although this Article is designed to support attacks on mandatory retirement policies on state law grounds, the materials cited herein sometimes draw upon federal courts’ interpretations of the ADEA. On the one hand, many state anti-discrimination laws are modeled after the ADEA, and courts have construed state provisions in accordance with similar provisions in the federal statute. *See, e.g.,* Fink v. Kitzman, 881 F. Supp. 1347, 1360 (N.D. Iowa 1995); Smith v. K-Mart Corp., 899 F. Supp. 503, 506 (E.D. Wash. 1995); Winston v. Me. Tech. Col. Sys., 631 A.2d 70, 74-75 (Me. 1993); N.C. Dep’t of Corr. v. Gibson, 301 S.E.2d 78, 83 (N.C. 1983); Grimmwood v. Univ. of Puget Sound, 753 P.2d 517, 520 (Wash. 1988). But on the other hand, state courts are unconstrained by federal interpretations and are free to pursue their own courses of action. The Supreme Court’s recent holding in *Kimel v. Fla. State Bd. of Regents*, 528 U.S. 62 (2000), that the Eleventh Amendment bars application of the ADEA to state employers

Mandatory retirement policies are outdated relics of a more intolerant era, and they have no place in modern society. Unless state legislatures expressly exempt their appointed state judges from their state's laws against age discrimination, courts should find the mandatory retirement policies invalid.

II. A BRIEF OVERVIEW OF THE JUSTIFICATIONS FOR MANDATORY RETIREMENT POLICIES

As noted earlier, at least thirty states have policies prescribing mandatory retirement ages for appointed state court judges.³² These retirement policies are found in state constitutions or have been enacted by statute.³³ Most states have preserved the same retirement ages for dozens of years, if not more. Whether it is New Hampshire (whose retirement age of 70 has been around since 1792)³⁴ or Ohio (which in 1968 became one of the most recent states to require mandatory retirement),³⁵ states have consistently refused to upwardly adjust the ages to keep pace with concurrent advances in human life expectancies.³⁶

Historical materials do little to explain why seventy is seen as a magic number. Most justifications are little more than stereotypes. For example, in *Nelson v. Miller*³⁷ the Supreme Court of Utah pointed to absolutely no evidence that seventy-year-old judges perform their essential job functions less capably than their younger colleagues. Nevertheless, the court upheld the determination of the legislature because it felt that "in the society of today mandatory retirement has become a way of life."³⁸ In *O'Neil v. Baine*³⁹ the Supreme Court

further underscores the freedom that public bodies have to develop their own rules covering workplace age discrimination. Thus, in the post-*Kimel* world, this Article's analysis should be viewed as a guidepost, allowing for state-by-state adjustments where necessary, rather than a definite plan of attack.

Two additional points are also worth noting. First, if a state's age discrimination statute conflicted with a mandatory retirement provision, courts would have to determine whether the statutes could be read in harmony or if one would necessarily trump the other. This Article presents arguments that would support granting greater weight to the state's anti-discrimination law; however, state courts would be free to reject this analysis. Second, because the argument in this Article is based on statutory construction, it could become moot if the legislature were to redraft an anti-discrimination statute out of disagreement with the ruling of the judiciary. This is the nature of statutory interpretation, however, regardless of the issue at stake. The materials presented in this Article are nonetheless relevant to any conceptual, textual, and theoretical discussion of this topic.

32. See sources cited *supra* note 10.

33. See sources cited *supra* note 10.

34. See *Grinnel v. State*, 435 A.2d 523, 525 (N.H. 1981).

35. See *State ex rel. Keefe v. Eyrich*, 489 N.E.2d 259, 260 (Ohio 1986).

36. See *infra* text accompanying notes 163-65 (discussing changes in life expectancy and mortality rates).

37. 480 P.2d 467 (Utah 1971).

38. *Id.* at 473.

39. 568 S.W.2d 761 (Mo. 1978) (en banc).

of Missouri similarly upheld the state mandatory retirement law, without regard to the plaintiff judge's ability, on the grounds that "age seventy is an age—a time of life—which is recognized by society as being 'about' the time when the physical and mental processes weaken among many men and women."⁴⁰

Of course, prevailing social norms alone will not defeat a claim based on age discrimination law. Courts have repeatedly held that employers must present a factual basis for claiming that employees can no longer perform their essential job functions once they reach a certain age.⁴¹ The lack of any factual basis for mandatory retirement policies is why they have been eliminated in so many areas under which the ADEA extends coverage, and why they cannot be rightfully applied to appointed state court judges.⁴²

But even if supporters of mandatory retirement policies could offer satisfactory explanations about why they have chosen any particular retirement age, the next step would be to analyze why states claim the policies are necessary to facilitate effective judging. States offer three basic reasons. First, they argue that mandatory retirement maintains public confidence in the judiciary by eliminating the need for impeachment hearings of incompetent elderly judges. Supporters of this argument allege that such hearings damage the public's perception of the judiciary by raising doubts about the integrity and fitness of all judges.⁴³ Second, states argue that mandatory retirement policies promote justice by allowing for the appointment of younger judges who are more representative of the state's prevailing demographics and mores.⁴⁴ Finally, states argue that the policies advance judicial economy by allowing for continuous, efficient retirement and replacement of appointed judges.⁴⁵ In essence, states which support mandatory retirement policies contend that the policies minimize public censure of the judiciary, allow judges to keep with the times and maximize efficiency.

Because generalized retirement policies are offered as alternatives to an individualized assessment of each judge's fitness and competence, they should be analyzed within the framework of the BFOQ exception to a state's age discrimination law. However, none of the justifications in support of the policies are sufficiently compelling to warrant invoking the BFOQ exception for they fail to accommodate the judiciary's unique role within our society as a counter-majoritarian institution.⁴⁶ As this Article explains in later detail, such justifications are premised upon notions of efficiency or are designed to

40. *Id.* at 767.

41. *See, e.g.,* *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (holding that employer must show factual basis for belief of necessity of age-based employment criteria).

42. *See infra* Part IV.C.

43. *See infra* Part IV.B.1.

44. *See infra* Part IV.B.2.

45. *See infra* Part IV.B.3.

46. *See infra* text accompanying notes 89-91, 95-143.

appease the public generally. Thus, the justifications threaten to undermine the core values of the judicial system, which are protected only through the use of cumbersome, and often inefficient, checks and balances designed to eliminate all aspects of public opinion from consideration.⁴⁷ If judges are to remain independent, avoid the appearance of impropriety, and foster the values that litigants place in the judicial system, then policies such as mandatory retirement, which is primarily designed to enhance the judiciary's representativeness and efficiency, must be rejected. The costs flowing from such policies overwhelmingly outweigh any benefits derived from them.⁴⁸

III. INAPPLICABILITY OF THE "POLICYMAKER" EXCEPTION

State laws against age discrimination usually exempt from coverage any employee who is "an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office."⁴⁹ Policymakers must typically function at the "highest levels of the departments or agencies" within the state.⁵⁰ In order to avoid what it felt were potential Tenth Amendment problems, the Supreme Court in *Gregory v. Ashcroft*⁵¹ broadly construed the definition of "policymaker" to exempt state judges from ADEA protection.⁵² Essentially, the Court was worried that extending the ADEA to state judges would have allowed for Congress to legislate in a sensitive area of particular state concern. Such a result, the Court felt, might have upset the balance of power in federal-state relations.⁵³

Federalism concerns are not raised, however, when a state court interprets its own statutes. Not only is the issue uncomplicated by federal intervention, but the state courts are determining how their own legislature has addressed an issue of particular state concern. Here, judicial review vindicates state sovereignty by seeking to give full effect to a state's compelling interest in eradicating age discrimination in employment. It is not problematic for state courts to determine that the "policymaking" exception in a state's age discrimination law has a different meaning than what the Supreme Court concluded Congress meant when it used a similar term in the ADEA. Different

47. See *infra* text accompanying notes 72-91.

48. See *infra* Parts IV-VI.

49. 29 U.S.C. § 630(f) (1994).

50. Sciocchetti, *supra* note 20, at 878.

51. 501 U.S. 452, 467 (1991).

52. *Id.*

53. See *id.* at 457-70. For the views of the *Gregory* petitioners' counsel of record on this issue, see Bruce Dayton Livingston, *Gregory v. Ashcroft: The Supreme Court Announces a New Rule of Statutory Construction in Deference to Constitutionally Recognized Principles of Federalism*, 11 ST. LOUIS U. PUB. L. REV. 243 (1992) (presenting the views of the *Gregory* petitioners' counsel on this issue).

statutory interpretations are expected and anticipated given our nation's system of dual sovereignty.

Dual sovereignty is based on the premise that states will serve as "laboratories of democracy" and will respond to unique local concerns in a way that Congress, with its more national focus, is comparatively less equipped to do.⁵⁴ Such a system of government exists to encourage innovation and experimentation among states.⁵⁵ If courts construing state statutes merely incorporate the reasoning of federal courts in interpreting similar federal statutes and all state legislators simply follow the lead of Congress when writing them, then the principal benefits of dual federalism will remain unrealized. Indeed, as Justice Brennan once commented, differences of opinion between federal and state courts "present no threat to enforcement of national standards Nor should these developments be greeted with dismay by conservatives; the state laboratories are once again open for business."⁵⁶

While the *Gregory* Court ultimately held that judges are "policymakers" as defined by Congress in the ADEA,⁵⁷ a more reasoned analysis, freed from the politics of federalism, should inescapably counsel against the conclusion that appointed state judges are policymakers within state agencies or departments. The analysis should begin with the words of the statute itself. As a matter of plain language, almost every action could be considered "policymaking," for a "policy" is broadly defined as a "definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions."⁵⁸ Commentators have noted that unless this exception for policymakers is to render age discrimination laws meaningless, it should be limited in application only to those appointed officials who are policymakers first and foremost.⁵⁹ If a state adopted this limited construction of "policymakers," it might reasonably apply only to elected officials, administrative agents, close advisors, staff members, and others relied upon by such elected officials to implement and develop their programmatic proposals.

54. See *New State Ice Co. v. Leibmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting) (coining expression "laboratories of democracy").

55. See *id.*

56. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986); see also Christopher R. McFadden, *The Wisconsin Bear Arms Amendment and the Case Against an Absolute Prohibition on Carrying Concealed Weapons*, 19 N. ILL. U. L. REV. 709, 719-23 (1999) (analyzing legislative history and arguing that state constitution amendment should not be interpreted with reference to similar provision in federal constitution).

57. 501 U.S. at 464-67; 29 U.S.C. § 630(f) (1994) ("The term 'employee' means . . . an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.").

58. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 910 (1987).

59. See Sciocchetti, *supra* note 20, at 873-82.

Should judges be included on such a list? One might argue that judges serving on a state supreme court are policymakers because they exercise supervisory and administrative powers over lower courts. This definition is more narrow than that adopted in *Gregory*, it would protect lower-ranking judges from age discrimination, but not their higher-ranking brethren. Nevertheless, there is no legitimate reason for adopting such a definition. The most obvious problem is that the policymaking exception, under state statutes patterned after the ADEA, was specifically intended to embrace only those policymakers working within “departments or agencies.”⁶⁰ Departments and agencies are commonly associated with the executive branch of government, not the judicial branch.⁶¹

Moreover, despite the fact that some appointed state supreme court judges exercise supervisory and administrative powers, their primary job function is to adjudicate cases and controversies. Other duties are additional or ancillary.⁶² A definition of a “policymaker” as a public servant with *any* degree of administrative authority has no logical stopping point, for within *every* agency that makes policy *every* employee plays some role in developing and implementing that policy. For example, imagine a state utility commission with an appointed regulatory commissioner and a civil service system of hiring and promoting. Unless the commissioner makes and executes each decision herself—which is an extremely unlikely proposition given the scope and complexity of the modern administrative state—the commissioner will delegate authority to the agency’s employees. They will then delegate responsibility to their underlings and so forth. No doubt, every significant employee within the agency fulfills numerous other job functions that are not directly related to implementing policy. Yet, if we are to subscribe to the notion that every employee who has a hand in policy development is a policymaker, then the entire civil service should be exempted from all state age discrimination laws. This chain of events has never come to fruition in any state across the country, and no court has ever required it. The inference, therefore, is that employees who engage in some degree of policymaking should not be considered “policymakers” unless the policymaking is an essential job function. Because there is no principled reason for finding appointed state judges to be “policymakers” while finding non-judicial employees in similar circumstances

60. *Id.* at 878.

61. *See, e.g., Schabarum v. Cal. Leg.*, 70 Cal. Rptr. 2d 745, 756 (Cal. Ct. App. 1998) (observing that administrative agencies are a part of the executive branch).

62. *See infra* text accompanying notes 139-54 (discussing need for narrow definition of “essential job functions”). *But cf. Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (“Separation of powers . . . is not mandatory in state governments.”).

to be fully protected from age discrimination, such an interpretation of “policymaker” should not stand.⁶³

Some courts have gone even one step further. Rather than viewing judges as employees who occasionally and indirectly exercise nominal administrative power, these courts have ruled that the principal duties of state judges are policymaking ones.⁶⁴ This is because judges supposedly rely on policy when interpreting statutes or filling in gaps in legislation, and such decisions involving statutory interpretation may have political implications. As a matter of reality, this argument has some merit. The legal realist critique of the classical legal tradition has laid bare the myth that legal principles can be deduced through categorical reasoning and abstract logical formalism. Since the days of its pioneer, Karl Llewelyn, legal realism has placed a premium on legal analysis in terms of public policy, ethical, and institutional concerns. Its influence has permeated legal discourse, with the result that many today view the law in terms of its social consequences and recognize its instrumental power to shape society.⁶⁵ According to Professor Singer, “we are all realists now,”⁶⁶ and judges surely are no exception.

But while judges may be legal realists, it does not follow that they should be classified as policymakers. When judges interpret statutes, they do so not as authors and creators of policy, but as reviewers of policies already established by the legislative and executive branches. As the Second Circuit held in *EEOC v. Vermont*⁶⁷ when it considered the essence of the judicial function, “The

63. Earlier this year, the Supreme Court held that the Eleventh Amendment bars application of the ADEA to state government employees and thereby shifts responsibility for protecting those employees to the states themselves. *See Kimel v. Fla. St. Bd. of Regents*, 120 S.Ct. 631, 650 (2000). Protection can arise only under each individual state’s anti-discrimination laws. Thus, the *Kimel* decision makes clear the relevance of this Article to contemporary discourse concerning the proper scope of state employer-employee legislation.

64. *See, e.g., Gregory v. Ashcroft*, 898 F.2d 598, 601-02 (8th Cir. 1990), *aff’d*, 501 U.S. 452 (1991); *EEOC v. Massachusetts*, 858 F.2d 52, 55 (1st Cir. 1988); *EEOC v. Illinois*, 721 F. Supp. 156, 159 (N.D. Ill. 1989); *Apkin v. Treasurer & Receiver Gen.*, 517 N.E.2d 141, 143 n.5 (Mass. 1988); *In re Stout*, 559 A.2d 489, 496 (Pa. 1989).

65. There is abundant discussion of the American legal realist movement. Some excellent general materials include *AMERICAN LEGAL REALISM* (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1607-11 (1995). *Cf.* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 10-30 (1992) (discussing basic principles and tenets of classical legal jurisprudence).

66. Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

67. *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990), *overruled by Gregory v. Ashcroft*, 501 U.S. 452 (1991).

principal business of the courts is the resolution of disputes. . . .”⁶⁸ According to the court:

In some cases, the courts resolve those disputes merely by applying established legal principles; in others, they must determine what legal principles apply when there is a lacuna in the law or determine how seemingly conflicting legal principles are to be reconciled. Even in the latter type of case, however, the courts are called upon primarily to fathom the nature and contours of the policies established by the legislative and executive branches rather than to create or fashion new policy. Though such a judicial decision may thus state or clarify policy, any such statement or clarification is merely ancillary to the resolution of a particular controversy between parties.⁶⁹

The Second Circuit correctly recognized that legal clarifications take place in accordance with constitutional mandates or legislative decrees.⁷⁰ The notion that a judge acts effectively as a legislator or an executive is wholly contrary to the framers’ understanding of the judiciary.⁷¹ While a judge has certain discretionary authority, her foremost consideration is to effectuate the spirit and intent of the legislature.⁷² Long ago, Alexander Hamilton argued in *The Federalist Papers* that “[t]he courts must declare the sense of the law” and must not substitute “will instead of judgment.”⁷³ The principle that the legislature makes laws and the judiciary hears controversies arising under them is fundamental to our entire system of separation of powers. According to James Madison, “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.”⁷⁴

68. *Id.* at 800.

69. *Id.* at 800-01.

70. *Id.* at 800.

71. THE FEDERALIST NO. 47, at 338 (James Madison) (Clinton Rossiter ed., 1961).

72. *See, e.g.,* *Rockefeller v. Commissioner*, 676 F.2d 35, 36 (2d Cir. 1982) (stating a court must look to legislative intent when interpreting statutes); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16 (1997) (discussing principle that “the judge’s objective in interpreting a statute is to give effect to ‘the intent of the legislature’”); *Id.* at 16-41 (advocating a textualist approach towards statutory interpretation).

73. THE FEDERALIST NO. 78, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

74. THE FEDERALIST NO. 47, at 338 (James Madison) (Clinton Rossiter ed., 1961) (quoting Montesquieu).

Judges do not write the laws, and they are not free to transform the laws beyond what they already are. Moreover, “the judiciary derives no logical or moral authority to invalidate the actions of the majoritarian branches on grounds other than inconsistency with constitutional dictates.”⁷⁵ Because there is no judicial role in authoring the policy in the first instance, there is no legitimate basis for holding that judges are policymakers. Logic and experience both counsel against such a definition.⁷⁶

Admittedly, one could argue that judges “make laws” when they expound upon their state’s common law. Even H.L.A. Hart, one of the leading modern positivists, has recognized that adjudication can involve choosing among legal precedents that are “indeterminate; they will have what has been termed an *open texture*.”⁷⁷ In deciding these cases, Hart argues, the judge must determine which rule best fits the given situation by “striking a balance, in the light of circumstances, between competing interests”⁷⁸—a process that is strikingly analogous to legislating.⁷⁹ But even if one adopts this starkly political definition of common-law judging, one need not agree that judges are policymakers. To the contrary, it remains quite reasonable to maintain that common-law judges are merely effectuating the community’s inarticulate yet preexisting, universally held values and standards.⁸⁰ Indeed, Professor Eisenberg writes that

75. Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 17 (1987).

76. See *infra* text accompanying notes 87-91.

77. H.L.A. HART, *THE CONCEPT OF LAW* 124 (1961).

78. *Id.* at 132.

79. The language of the New York Court of Appeals in *Woods v. Lancet*, 102 N.E.2d 691 (N.Y. 1951), provides an appropriate example of the recognition of common-law judicial discretion. In creating a tort action for children who suffered fetal injuries, the court stated:

Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor . . . ? Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. . . . [W]hile legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than “with some outworn and antiquated rule of the past.”

Id. at 694 (emphasis added) (citations omitted); see also William E. Nelson, *The Integrity of the Judiciary in Twentieth-Century New York*, 51 RUTGERS L. REV. 1, 18-22 (1998) (discussing impact of legal realist movement upon New York Court of Appeals decisions).

80. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 151-54 (1988) (noting that judges pronounce common law in light of pre-existing doctrine and social norms). Professor Eisenberg believes that common-law rules must conform to what he has described as the standards of social congruence, systemic consistency, and doctrinal stability. See *id.* at 43-49. For early American debates about the role of the common law in a democratic republic, see STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY*, 178-200 (3d ed., 1995) and materials therein.

a judge's ruling will be "so drained of normativity that it will have little or no legal or moral force" unless it conforms to the community's endogenous codes of conduct.⁸¹

Moreover, in pronouncing the common law, the judge's ruling in a particular case binds no one beyond the individual litigants.⁸² The decision can never become a general rule of law if the legislature preempts it with a contrary statutory mandate. Thus, the legislature always remains in control of lawmaking, and courts have power only to adjudicate particular cases and controversies. Given that the Constitution's framers nonetheless viewed the judiciary as a non-legislative branch,⁸³ there is no obvious reason to classify common-law judges as policymakers under today's age discrimination laws.⁸⁴

Above all, if the policymaking exception is to remain a narrow one, it should be limited "to deny protection from age discrimination only to policymaking appointees working closely with, and held accountable to, the officials who appointed them."⁸⁵ According to one commentator, "Judges are appointed by elected officials, but do not collaborate or work closely with them, and are in no way answerable to them."⁸⁶ Courts act as a constitutional check against the illegitimate acts of the majoritarian branches, and judges can perform this duty only by asserting their independent judgment. As a result, while elected officials and appointed judges both work within the same tripartite government, their purposes often conflict. Certainly, judges do not work closely with elected officials to implement the officials' overall goals—that type of activity is decidedly executive in nature.

One travels down a dangerous road by designating judges as policymakers. Alexander Hamilton remarked that the judiciary, which lacks any power to enforce its judgments, is the "weakest of the three departments of power" and

81. EISENBERG, *supra* note 80, at 153.

82. The rule of *stare decisis* counsels that the underlying principle of the decision should remain binding, but subsequent courts can distinguish or distance the application of the principle to particular cases. See SCALIA, *supra* note 72, at 7 (discussing the evolution of common law). In that sense, the ruling is essentially an individual order rather than a rule with generalized applicability. See generally GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 10-21 (1998) (explaining differences between rules and orders in the context of administrative law). A rule "functions in most ways like a statute" and has general applicability and future effect. *Id.* at 10. An order applies to discrete, identifiable groups of individuals and "functions in most ways like a court judgment," generally resolving only the issue presented in a particular case. *Id.* at 10-11.

83. See *supra* text accompanying notes 70-74.

84. Moreover, common-law judging is but one of the judge's multitude of duties. The judge also determines matters of public, private, and constitutional law. Any expansion of the term "policymaker" beyond reference to true legislators could easily be stretched to include almost any governmental employee, thereby obliterating what is supposed to be a narrow exception to the general prohibition against age discrimination. See *supra* text accompanying notes 62-63.

85. Sciocchetti, *supra* note 20, at 879.

86. *Id.* at 882.

is “in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches.”⁸⁷ The judiciary is able to render impartial opinions and to command the respect of the coordinate branches of government, which are called upon to give court opinions force and effect—only because the judiciary remains truly distinct and independent of the other branches.⁸⁸ Viewing the judiciary as an administrative functionary rather than a separate branch of government threatens its integrity by blurring its special institutional role and structure. Its decisions lose their moral force and, hence, their legitimacy. If judges are policymakers subservient to the political branches, how can they command the prestige necessary to check the exercise of majoritarian will in excess of constitutional power? And if judges are not truly independent, then who will judge the judges?

Viewing judges as policymakers also degrades the legislative and executive branches by implying that an unelected, unaccountable judiciary can perform the manifestly political functions reserved for those branches most directly responsible to the public will. As a result, the legislature’s own authority might be undermined, or, on the other hand, the legislature might choose to delegate large chunks of decisionmaking authority to the judiciary rather than make the decisions itself, particularly on controversial issues. In either situation, either the legislature or the judiciary would enjoy less autonomy and command less respect. The Constitution’s carefully chosen and crafted system of tripartite government would effectively be dismantled.

The preceding formalistic interpretation of the separation of powers doctrine is susceptible to criticism by scholars who hold more functionalist views.⁸⁹ A typical attack would be similar to Professor Alfange’s argument that formal separation of powers theories “severely hinder the quest for ‘a workable government’ with no appreciable gain for the cause of liberty or efficiency.”⁹⁰

87. THE FEDERALIST NO. 78, at 491 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton continued:

‘[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers’. . . . [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments. . . .

The complete independence of the courts of justice is peculiarly essential in a limited Constitution.

Id. (citation omitted).

88. See Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DEPAUL L. REV. 299, 302-03 (1990).

89. See Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 477-78, 490-505 (1991) (detailing and critiquing alternative models of separation of powers).

90. Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670 (1990); see also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1525 (1991) (asserting

Such criticism, however, overlooks that it is impossible to predict precisely at what point the intermingling of the various branches would undermine fundamental political values of government. The danger to liberty would be incremental—eventually the judicial branch either would have acquired an excess of authority or would have lost much of its requisite integrity. Responsibility for the overall harm could not be attributed to any single branch. Yet it is for this very reason that prophylactic separation of powers protections exist in the first place. They are designed to prevent damage to the political framework before serious harm can occur. According to Professor Redish, “[T]o criticize formalism for producing overly mechanical results or for failing to produce recognizable gains misses the point of the preventive methodology inherent in our separation of powers theory.”⁹¹ No one knows when the protections will be needed, but they can never contribute to the defense of the political order once they are gone.

It bears repeating that a state legislature could expressly exempt appointed judges from age discrimination laws. Such an exemption would contradict the expressed state interest in avoiding workplace discrimination, but would not have the additional costs which might accompany a judicial decision that defines judges as policymakers. Yet, by this point, it should be clear that precisely because of the logistical and practical dangers inherent in such a definition, the BFOQ’s “policymaking” exception should not be construed to include appointed state judges. If a state were to press forth with its mandatory retirement policy in the face of a concurrent age discrimination law, it should have to prove that age is a BFOQ reasonably necessary to judicial decisionmaking and that other means of removing individual judges, such as impeachment, are impractical. Part IV explains that this cannot be done.

IV. BFOQ ANALYSIS: THE ESSENCE OF THE JUDICIAL FUNCTION AND THE RELEVANCE OF AGE

A state must satisfy both prongs of the BFOQ test to successfully invoke the “policymaking” exception. First, the state must show that “‘the *essence* of the business operation would be undermined” if it did not make employment decisions based on age.⁹² Second, the state must show (1) that members of the affected class are unable to perform the job, or that “it is ‘impossible or highly

separation of powers “tends to produce excessively mechanical results”); Lloyd N. Cutler, *To Form a Government, in SEPARATION OF POWERS—DOES IT STILL WORK?* 1, 1 (Robert A. Goldwin & Art Kaufman eds., 1986) (claiming that separation of powers inhibits government’s ability to “propose, legislate, and administer a balanced program for governing”).

91. Redish & Cisar, *supra* note 89, at 477.

92. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976) (quoting *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971)).

impractical' to deal with the older employees on an individualized basis";⁹³ and (2) that a generalized mandatory retirement policy is a more acceptable alternative.⁹⁴

In order to help determine the "essence" of the judicial function, this Part begins by considering the underlying values and norms of the judicial system. After all, without a clear understanding of the judiciary's role in society, we cannot determine a judge's essential duties. Subpart A of this Part explains that the essence of the judicial function is to adjudicate matters independently and free from the appearance of bias and examines important aspects of judicial decisionmaking as well as threats to this function. Having defined the judicial function in Subpart A, Subpart B shows how several public policy justifications used by some courts in upholding mandatory retirement policies have actually undermined the values discussed in Subpart A. These justifications either misinterpret the plain meaning and intent of age discrimination laws or compromise the judiciary's counter-majoritarian institutional role. In any event, regardless of the justification one chooses, Subpart C suggests that youthfulness is not reasonably necessary for accurate judging and thus, under the first prong of the BFOQ analysis, the essence of the business operation would not be undermined if the state employer did not make employment decisions based on age.

A. The First Prong: Defining the "Essence" of The Judicial Power and Its "Reasonably Necessary" Qualifications

An occupational qualification is not essential to the operation of a business unless it is necessary in all situations.⁹⁵ This Article defines the essence of the judicial power as the independent adjudication of cases and controversies free from the appearance of bias.⁹⁶ Such a definition recognizes that a judge does

93. *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (quoting *Tamiami*, 531 F.2d at 235).

94. *See, e.g.*, *EEOC v. City of Linton*, 623 F. Supp. 724, 726 (S.D. Ind. 1985) (stating that an employer must prove there was "no acceptable alternative" to better advance the employer's goal); *see also infra* text accompanying notes 256-94 (discussing effects of generalized mandatory retirement policies). This second requirement—that the generalized policy be more acceptable than individual analysis—is often overlooked, yet is crucial to this Article's discussion of mandatory retirement policies. Therefore, Part VI is reserved for a fuller discussion of this requirement.

95. *See* 1 HOWARD C. EGLIT, *AGE DISCRIMINATION* § 5.05, at 5-22 (2d ed. 1997).

96. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases . . . [and] to Controversies . . ."); *see also* *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) (defining "Cases"); *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911) (defining "Controversies").

more than simply make decisions; a judge must make them in a certain way.⁹⁷ No one could maintain that a judge who bases her rulings on racism, for example, or in exchange for a \$200 bribe, is fulfilling her duties acceptably. Such a judge would not fulfill one or more of the following three essential values that litigants place in the judicial system: (1) seeing a case decided accurately and acceptably; (2) participating in the decisionmaking process; and (3) receiving an equal opportunity to present their case.⁹⁸ The realization of these three values all depends entirely on a judge's impartiality and ability to avoid the appearance of bias in her decisionmaking.

1. *Judging Independently and Free from the Appearance of Bias*

a. *Resolving Cases Accurately and Acceptably*

A judge must act independently and avoid the appearance of bias in her rulings if the parties are to realize their interests in receiving a fair and accurate ruling. Various commentators have argued that essentially a trial is a search for the truth, and all of the procedural safeguards and truthseeking devices of a trial are wasted if the judge bases her findings on factors other than the evidence presented.⁹⁹ But even if the judge reaches an accurate result, the Supreme Court has recognized that she neither "satisf[ies] the appearance of justice"¹⁰⁰ nor "generate[s] the feeling, so important to a popular government, that justice has been done"¹⁰¹ if either party has reasonable doubts about her independence. Regardless of whether any particular judge can resist the temptation to allow personal interests to sway the resolution of a dispute, the perception-of-fairness value demands that the judge be enjoined from deciding a case if she has even the slightest identifiable potential bias.

For instance, imagine a rape trial in which certain pieces of evidence were vigorously disputed. Imagine further that the victim was the judge's sister. Their familial relationship could help further accuracy interests, for it would

97. Courts have long recognized that a job's essence may include a requirement that it be performed in a certain manner. *See, e.g., Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (asserting that the essence of aviation industry is to "transport passengers safely from one point to another").

98. *See generally* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475-91 (1986) (discussing multiple values inherent in our judicial system).

99. *See id.* at 476 ("According to the instrumental conception of due process, the purpose of the clause is to ensure the most accurate decision possible. The due process protections such as notice, hearing, and right to counsel are valuable because they contribute to the goal of accuracy.").

100. *In re Murchison*, 349 U.S. 133, 136 (1955).

101. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

give the judge a clearer insight into the various aspects of the sister's lifestyle, background, and behavior that might be in dispute. However, even if the judge carefully weighed the evidence, treated both parties equally, and allowed each party to speak its mind before finding the defendant guilty, it is unlikely that the defendant would feel he had received a fair trial. Regardless of the accuracy of the ruling, the parties could not know whether it was based on the evidence or the judge's biases.¹⁰²

Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors. Indeed, the panoply of restrictions that the Model Code of Judicial Conduct imposes on judges are all based upon the premise that judges must not hear cases in any situation when their impartiality might reasonably be questioned—even if the judge is not biased in fact.¹⁰³ Moreover, it is not surprising that the Supreme Court has repeatedly stressed the need for such prophylactic rules designed to minimize the appearance of bias. When the Court considered a challenge to rules regarding disqualification of judges, it explained that such “stringent rule[s] may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”¹⁰⁴

In other words, judicial independence and an absence of improper appearances are both necessary to exercise the judicial function properly, yet neither is sufficient alone. No judge can fulfill her essential job functions if there are doubts about her independence. When there is doubt about the judge's impartiality, then not even the most elaborate procedural safeguards—such as notice, opportunity for comment, cross examination, and the litigants' ability to choose their own attorney—will satisfy concerns of the public about having cases decided accurately and acceptably.

102. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 2(B) (1999) (“A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.”); *id.* Canon 3(E) (requiring judge to disqualify herself if she has economic or personal bias in the matter); see also *In re Kading*, 235 N.W.2d 409, 418 (Wis. 1975) (upholding family-based conflict of interest rules imposed on state judges because “a judge would be just as likely to lose his impartiality if his spouse or children owned assets which would be materially affected by the outcome of a case, as he would if he himself owned those assets”).

103. See generally MODEL CODE OF JUDICIAL CONDUCT (1999) (placing many restrictions upon judges). See also Christopher R. McFadden, Comment, *Integrity, Accountability, and Efficiency: Using Disclosure to Fight the Appearance of Nepotism in School Board Contracting*, 94 NW. U.L. REV. 657, 669-71 (2000) (discussing the importance of minimizing the appearance of impropriety in government).

104. *In re Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

b. Participation in the Decisionmaking Process

A judge who is biased or appears to be biased also jeopardizes the judge's own ability to promote the goal of participation.¹⁰⁵ Professor Michelman explains that "the individual may have various reasons for wanting the opportunity to discuss the decision with the agent."¹⁰⁶ He continues:

Some pertain to external consequences: the individual might succeed in persuading the agent away from the harmful action. But again a participatory opportunity may also be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential.¹⁰⁷

Aside from this psychological benefit, Michelman also sees a societal benefit in participation. Allowing an individual to participate in the proceedings, he argues, counters the perception of secrecy or self-interest in government.¹⁰⁸

Michelman's emphasis on participation only makes sense, though, if one assumes that the individual harbors some hope of bringing about substantive change in the judge's action or attitude. The ability to persuade, in turn, presupposes the existence of a persuadable decisionmaker to take account of the individual's arguments and concerns. Imagine a situation in which the judge announces pre-trial that she has absolutely made up her mind on the merits of the case and will not reconsider her decision. Does participation in this instance afford any meaningful opportunity for persuasion? What is gained by allowing for participation after the decision has been effectively made? Perhaps there is societal benefit in letting individuals vent their frustrations. Yet to the degree this interest is recognized, it is done in a context in which the litigants almost certainly are unaware that they are merely letting off steam. Thus, the litigants are misled into believing they have a participatory role, when in reality they do not. They are not communicating with the judge so much as talking to the judge

105. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The Supreme Court has characterized the "two central concerns of procedural due process" as "the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Id.*

106. Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in *DUE PROCESS: NOMOS XVIII* 126, 127 (J. Roland Pennock & John W. Chapman eds., 1977).

107. *Id.* at 127-28.

108. See *id.* at 126-28.

or at the judge. There is no reason to believe that, at the end of the day, the litigants will have developed any positive feelings towards the judicial system or disposed of any feelings about the judge's own secretive, self-interested tendencies.

Even as Michelman defines the participatory value, participation means "full and frank interchange,"¹⁰⁹ and thus focuses on the litigant's opportunity to inform the judge in the hopes of changing her decision. While it cannot be said that a judge's perceived bias precludes *any* chance of persuading the judge, persuasion is certainly far less likely. A system that values participation cannot be squared with a judge who is not truly independent. Indeed, the Court has recognized that the "requirement of neutrality in adjudicative proceedings safeguards . . . the promotion of participation and dialogue by affected individuals in the decisionmaking process."¹¹⁰

Clearly, an individual cannot fully realize the value of participation in a legal system based on persuasion when a judge appears biased or prejudiced. Conversely, a judge with an apparently open mind leaves each litigant believing that her claim will receive some degree of thoughtful reflection, regardless of the eventual ruling. Thus, an independent adjudicator—both in appearance and in fact—is essential to the adversary system. An independent adjudicator helps insure that each litigant will receive at least a minimal amount of meaningful attention and consideration.

c. Equality Among Litigants

Finally, a judge must avoid all hints of bias if she is to promote equality. According to Professor Mashaw, equality dictates that "the techniques for making collective decisions not imply that one person's or group's contribution—facts, interpretation, policy argument, etc.—is entitled to greater respect than another's merely because of the identity of the person or group."¹¹¹ A judge who seems to reflexively credit police testimony over the words of a criminal, for example, or who requires all minorities to sit at the back of the courtroom, violates this norm. Professor Summers has also discussed this norm, insisting that the question of procedural fairness (or equality) is wholly separate from the question of who wins or loses.¹¹² He explains:

109. *Id.* at 128.

110. *Marshall*, 446 U.S. at 242 (1980) (citing *Carey v. Piphus*, 435 U.S. 247, 259-62, 266-67 (1978)).

111. Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 899 (1981).

112. Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 25 (1974).

[A]n adjudicator might choose to hear only one side . . . via both oral and written briefs, but the other [side] via only written briefs. . . . Whether the advantaged party wins or loses, the procedure itself is unfair, for the adjudicator does not accord equal procedural rights to parties similarly situated in relevant respects.¹¹³

Summers' argument, however, begs the question: Why are parties concerned about this procedure unless it is symptomatic of deeper unfair or irrational biases, which, in turn, might alter the case's outcome? To be sure, a broadly defined interest in equality pervades all rules governing society, ranging from the general edict, "do unto others as you would have done unto you," to the more specifically tailored prohibitions against workplace discrimination. To the extent that equality has special value within the judicial system, Professors Redish and Marshall have commented that "equality would seem to be part of a broader concern for reaching an accurate result."¹¹⁴ Just as an irrational adjudicator undermines equality, an independent, unbiased adjudicator facilitates it. Redish and Marshall have concluded, "Use of a non-independent adjudicator represents the essence of procedural inequality: even if the parties are equally afforded every other procedural protection, the most rudimentary equality cannot be achieved if the adjudicator is subject to irrational factors that skew her decisionmaking towards one of the litigants."¹¹⁵ Put another way, the decisionmaking process is meaningless unless each litigant has an equal opportunity to argue before a judge who avoids all impropriety and appearance of impropriety. Only through true independence can a judge foster the goals of equality, participation, and accurate decisionmaking.

2. *Threats to Judicial Independence and the Appearance of Fairness*

For purposes of a BFOQ analysis, the question is: What threatens a judge's independence or raises the appearance of bias? Old age, as explained in later detail, does not.¹¹⁶ A judge's potential financial interest in a case, however, most certainly does. No man is to be a judge in his own cause. This rule has been an essential tenet of the common law for nearly four centuries. As early as 1610, in the famous *Dr. Bonham's Case*,¹¹⁷ Lord Coke held that a

113. *Id.*; see also *id.* at 21-22 (discussing value of equality to due process calculus).

114. See Redish & Marshall, *supra* note 98, at 485.

115. *Id.*

116. See *infra* text accompanying notes 174-80, 200-24 (affirming that old age is not related to decline in judicial ability).

117. 77 Eng. Rep. 646 (C.P. 1610).

statute did not allow a judicial body to receive one-half of the fine it assessed against the defendant.¹¹⁸ Lord Coke construed the statute narrowly to reach this result because, had he not, it would have been “against common right and reason, or repugnant, or impossible to be performed.”¹¹⁹

The principle that a judge may not serve two masters, especially if one is economic self-interest, supports the lifetime tenure and salary provisions of our federal constitution¹²⁰ and provided the basis for the Supreme Court’s holding in *Tumey v. Ohio*¹²¹—the first American decision on the necessary conditions of judicial independence. In *Tumey* the Court overturned the conviction of a man who had been found guilty of liquor possession by Mayor Pugh of North College Hill, Ohio, who was serving a dual role as mayor and town liquor commissioner.¹²² State law and local ordinances provided that, upon conviction, one-half of the defendant’s fine went to the village.¹²³ Of that sum, the mayor would be reimbursed for his own expenses incurred while judging the case.¹²⁴ The Court unanimously found the laws unconstitutional.¹²⁵ The Court stated that “Officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided” whenever they face “possible temptation to the average man as a judge.”¹²⁶

Though the Court found no evidence remotely suggesting that Judge-Mayor Pugh’s ruling was anything but fair, it recognized that judges must not decide cases when circumstances objectively increase the likelihood of bias or the appearance of bias.¹²⁷ If one accepts Alexander Hamilton’s argument that “[i]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will,”¹²⁸ then it is reasonable to conclude that any financial temptation, regardless of how indirect or insubstantial, could possibly tempt or appear to tempt any judge, even if only on a subtle or subconscious level.

Beginning with this premise, various commentators have argued for automatic disqualification whenever a judge has any financial interest in the

118. *Id.* at 646-47.

119. *Id.* at 652; *see also* *Tumey v. Ohio*, 273 U.S. 510, 525 (1927) (“There was at the common law the greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesimal . . .”).

120. *See* U.S. CONST. art. III, § 1; *see also* THE FEDERALIST NOS. 78, 79, 80 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing need for lifetime salary and tenure provisions).

121. 273 U.S. 510 (1927).

122. *Id.* at 514-15, 535.

123. *Id.* at 517-18.

124. *See id.* at 521-22.

125. *Id.* at 523.

126. *Id.* at 532.

127. *Toumey*, 273 U.S. at 535.

128. THE FEDERALIST NO. 79, at 497 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

matter before the court.¹²⁹ Congress also has expressed concern over the corrosive effects money has on judicial independence. In civil cases, federal law requires that “[a] judge who owns a single share of stock in a large corporation may not hear a suit for a few hundred dollars against it.”¹³⁰ When redrafting 28 U.S.C. § 455, the federal judge disqualification statute, a House of Representatives joint committee report observed that “a judge’s direct economic or financial interest, *even though relatively small*, in the outcome of the case may well be inconsistent with due process.”¹³¹

As Congress recognized, courts have disqualified judges in various instances where the judge’s actual pecuniary interest was nominal. A typical case is *United States v. Nobel*.¹³² In *Nobel*, the Third Circuit held that a trial judge should have recused himself from a case involving the robbery of a bank in which he owned stock.¹³³ The court based its ruling on the importance of eliminating all appearances of impropriety.¹³⁴ It stressed that maintaining a “strict overarching standard” of integrity required no less.¹³⁵ According to the court, “[O]ne of the principal functions of a judicial disqualification statute is to maintain public confidence in the integrity of the judicial process, which in turn depends on a belief in the impersonality of judicial decisionmaking.”¹³⁶ Any room for financial interest in the outcome of a case would undermine that impersonality.¹³⁷

Part VI will more fully discuss the merits of mandatory retirement policies as an alternative to impeachment.¹³⁸ The point here is to support the definition of the judicial power’s essence as “the adjudication of cases and controversies

129. See, e.g., Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. L. REV. 662, 698-99 (1985) (discussing automatic disqualification statute and rationale); Andrew L. Wright, Comment, *Invested in the Outcome: When the Judge Owns Stock in the Victim of the Crime*, U. CHI. LEGAL F. 481, 488-98 (1998) (discussing the implications of appearing before a judge who has an interest in the case’s outcome).

130. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 238 (1987) (discussing application of 28 U.S.C. § 455(b)(4) (1982)); see also *Tatum v. S. Pac. Co.*, 58 Cal. Rptr. 238, 239-40 (Ct. App. 1967) (disqualifying judge for ownership of stock in corporate defendant); Steven Lubet, *Beyond Reproach: Ethical Restrictions and the Extracurricular Activities of State and Federal Judges* 17 (Am. Judicial Soc’y 1984) (“[T]he risk of partiality would seem to be no greater in the case where the judge is employed by a business than when the judge is a substantial investor or shareholder.”).

131. Wright, *supra* note 129, at 495 (emphasis added).

132. 696 F.2d 231 (3d Cir. 1982).

133. *Id.* at 235-36.

134. *Id.*

135. *Id.* at 236.

136. *Id.* at 235.

137. See also *infra* text accompanying notes 262-94 (discussing this point in the context of the merits of mandatory retirement policies as an alternative to impeachment).

138. See *infra* text accompanying notes 262-94.

independently and free from the appearance of bias.” The next section will consider and reject three policy-based arguments that states have used to justify upholding mandatory retirement policies under the rational basis standard of review. While these states have urged that special employment rules should apply to judges because of the unique roles judges hold in society, the next Subpart argues that all of these arguments are seriously flawed.

B. Mandatory Retirement Undermines Values Inherent in the Judicial Function

1. Limiting Public Censure of the Judiciary

Various court decisions have viewed a judge’s essential job function so broadly as to allow BFOQ defenses based upon the state’s interest in limiting public censure of the judiciary.¹³⁹ The Vermont Supreme Court, for example, reasoned that because impeachment raises concerns about “the purity, the integrity, and the impartiality of the courts,” mandatory retirement is not an irrational method for avoiding the slightest possibility of impeachment of elderly judges.¹⁴⁰ This reasoning suggests that mandatory retirement policies should survive BFOQ scrutiny upon proof that one elderly judge’s impeachment might cause public concern about the integrity and competence of all other judges. In the words of the Ohio Supreme Court, “[T]he citizens of the state have a right to expect that the process of removing intellectually deficient jurists will not evolve into the embarrassing spectacle of having the aged, infirm, or senile judge forcibly removed from the bench.”¹⁴¹

These opinions underscore the fact that judges are guardians of the public trust and, like all other public servants, are held to the highest ethical standards. The damaging consequences of judicial misbehavior are felt on two levels. On the first level, the judge jeopardizes the ability of individual litigants to realize their due process values. The trial becomes a meaningless, irrational exercise that lacks any meaningful litigant participation, is unable to reach accurate results, and appears blatantly improper. On another level, through a corrupt judge’s own behavior, the judge undermines the confidence in her rulings that is necessary for them to be obeyed by the parties or enforced by the coordinate branches. As noted earlier, without the respect of the coordinate branches or,

139. See, e.g., *Malmed v. Thornburgh*, 621 F.2d 565, 572 (3d Cir. 1980) (upholding mandatory retirement policies because, in part, the legislature placed “a premium on avoiding the unpleasantness and public humiliation” of impeachment); *State ex rel. Keefe v. Eyrich*, 489 N.E.2d 259, 261 (Ohio 1986) (commenting that the public expects that judges be removed without “the embarrassing spectacle” of impeachment); *Aronstam v. Cashman*, 325 A.2d 361, 366 (Vt. 1974) (stating disciplinary control and impeachment cause a loss in public confidence).

140. *Aronstam*, 325 A.2d at 365 (quoting *Cady v. Lang*, 115 A. 140, 142 (Vt. 1921)).

141. *Keefe*, 489 N.E.2d at 261.

ultimately, the people, our well-ordered system of liberty may well degenerate into anarchy.¹⁴²

Yet, without trivializing the high social costs resulting from impeachment of malfeasant judges, the issue of whether age can be considered a BFOQ reasonably necessary for independent adjudication is a separate question. The rationale for mandatory retirement to avoid public demoralization of impeachment runs as follows: Older judges are more likely to become ineffective or incompetent judges; incompetent judges are more likely to be impeached; and impeachment threatens public confidence. Therefore, every older judge should be made to retire before being impeached.

This argument has several problems. Initially, as a matter of empirical analysis, there is little evidentiary support that mental condition is a factor. Senility or other age-induced incompetence has played almost no role, if any, in any impeachment proceeding.¹⁴³ Rather, impeachments have almost exclusively been for bribery, fraud, or other crimes of moral turpitude.¹⁴⁴ To be sure, it is possible to argue that elderly judges do become senile but are not impeached only because of the difficulties of mounting a successful impeachment. But this argument, too, is speculative. As explained later, increasing age does not seem to be correlated in any way with diminished judicial abilities.¹⁴⁵ Even if one feels that age produces incompetence, how does this affect the argument? If older judges are not impeached, then the public never has to endure an impeachment proceeding and therefore never suffers any of its deleterious ramifications. Thus, preemptive retirement of all judges will not avert this type of societal loss, for the loss will never be realized.

The crucial flaw with the impeachment-to-avoid-public-demoralization argument, though, is that it fails to ask the question: Why do we impeach judges in the first place? A judge is impeached for her own misbehavior. By committing misconduct, the judge has jeopardized her own ability to decide a case. It does not follow that any other judge has done similarly. If Judge A were impeached, Judge B would not be impeached simply because the two are friends. While judges are charged with acting in a way that will uphold the public trust, they are not responsible for the behavior of other judges.

Therefore, public opinion about the entire judiciary is completely irrelevant to whether an individual judge can perform the essence of the judicial function. When hearing a case, the judge is to banish all thoughts of public opinion and

142. See *supra* text accompanying notes 87-91.

143. See generally WILLIAM THOMAS BRAITHWAITE, WHO JUDGES THE JUDGES?: A STUDY OF PROCEDURES FOR REMOVAL AND RETIREMENT (1971) (surveying impeachment processes and trials in several states); ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS (1992) (discussing facts and circumstances surrounding impeachment of numerous federal judges).

144. See generally BRAITHWAITE, *supra* note 143; BUSHNELL, *supra* note 143.

145. See *infra* text accompanying notes 174-80, 200-224.

consider only the evidence properly admitted in the case.¹⁴⁶ Otherwise, the judge would not be able to perform her counter-majoritarian role. To say that public opinion is indispensable to judicial decisionmaking is to suggest that public opinion should be a factor in the judge's ruling—a position that is completely at odds with the role of the judiciary in our system of government.¹⁴⁷ Commentators have repeatedly noted that a judge cannot be removed from office simply because the public disagrees with some of the judge's rulings.¹⁴⁸ If this were not true, then the threat of unemployment would effectively undermine all of the protections designed to insulate judges from the populace.

If a judge cannot be impeached because of the judge's own unpopular rulings, then it should certainly follow that a judge should not be forced into retirement due to the actions of other judges, which are completely beyond an individual judge's control and unrelated to that judge's own ability. Forced retirement in these situations would sanction guilt by association and push many competent jurists into premature retirement due to the sins of their few incompetent colleagues. Such a view is nonsense. Courts have stated that the BFOQ defense should be “an extremely narrow exception” to the general prohibition against age discrimination.¹⁴⁹ Thus, the definition of an essential job function must also be narrowly tailored. Though the public demands “the highest possible standards for their judges,”¹⁵⁰ it is inconceivable how one judge's out-of-court behavior is more than tangential to the essence of the business involved—another judge's ability to resolve cases and controversies independently and free from the appearance of bias.

Indeed, the Supreme Court rejected an analogous argument in *International Union, UAW v. Johnson Controls, Inc.*,¹⁵¹ in which a battery manufacturer tried

146. See MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (1999) (“A judge shall not be swayed by . . . public clamor or fear of criticism.”).

147. See THE FEDERALIST NO. 78, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that judges should ignore popular opinion and consult nothing but “the Constitution and the laws”); see also *supra* text accompanying notes 62-89 (discussing the judiciary's role in government).

148. See, e.g., Jerome B. Meites & Steven F. Pflaum, *Justice James D. Heiple: Impeachment and the Assault on Judicial Independence*, 29 LOY. U. CHI. L.J. 741, 806 (1998) (arguing that political leaders who call for impeachment or removal of judges who render unpopular decisions “pose a far greater danger to our justice system than an angry, arrogant, and impolitic judge”); Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 689 (1999) (arguing that if a judge may be impeached because of “nothing more than the perceived incorrectness of his constitutional decisions, then a judge will always be potentially subject to external political pressure in his constitutional decisionmaking”).

149. *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)).

150. *Aronstam v. Cashman*, 325 A.2d 361, 364 (1974).

151. 499 U.S. 187 (1991).

to exclude all pregnant women from the assembly line. The employer argued for a BFOQ exception because the work jeopardized the safety of the pregnant workers' fetuses and safety was an essential job function.¹⁵² The Court disagreed. While recognizing that "[n]o one can disregard the possibility of injury to future children," it held that "the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery making."¹⁵³ Such an interpretation, the Court stated, would contradict "the language of the BFOQ and the narrowness of its exception."¹⁵⁴

If a BFOQ could be used to retire all employees simply because any one of them might misbehave, there would be no limits to such a definition and, therefore, no principled grounds upon which to limit the BFOQ exception. In every business and governmental agency, older workers are more likely to make more mistakes, move more slowly, or think less quickly than their younger counterparts. Customers or clients also are sensitive to the behavior of private or public employees. If all elderly judges could be forced to retire on grounds that one might not perform adequately, then workers in every other industry would be similarly vulnerable to mandatory retirement. Prohibitions against age discrimination would be nullified in short order. Therefore, such a justification for imposing mandatory retirement ages should fail.

2. *Keeping with the Times*

Other decisions have justified mandatory retirement policies because the policies create vacancies that allow for the appointment of women, minorities, and younger judges.¹⁵⁵ As a result, some feel that forced turnover will promote diversity by allowing the "infusion of 'new blood' knowledgable [sic] in modern trends in the law."¹⁵⁶ The First Circuit, for example, has apparently concluded that a forty-year-old person tends to view the world differently than a seventy-year-old person.¹⁵⁷ In refusing to apply the ADEA to Massachusetts state judges, the court stated that "generational differences in points of view are

152. *Id.* at 202-04.

153. *Id.* at 203-04.

154. *Id.* at 204.

155. *See, e.g.,* EEOC v. Massachusetts, 858 F.2d 52, 58 (1st Cir. 1988) ("The forced turnover may permit the appointment of judges that more closely reflect prevalent points of view, as well as the present societal makeup (and may even permit the state to redress past inequities)."); O'Neil v. Baine, 568 S.W.2d 761, 767 (Mo. 1978) (en banc) ("[A] state might prescribe a mandatory retirement for judges in order to 'open up' judicial opportunities for younger lawyers and to bring young persons with fresh ideas and techniques into the system.").

156. *Malmed v. Thornburgh*, 478 F. Supp. 998, 1010 (E.D. Pa. 1979), *rev'd on other grounds*, 621 F.2d 565 (3d Cir. 1980).

157. EEOC v. Massachusetts, 858 F.2d at 57 (refusing to apply the ADEA to appointed state court judges).

not fanciful.”¹⁵⁸ The court further stated that mandatory retirement “may permit the appointment of judges that more closely reflect prevalent points of view, as well as the present societal makeup”—goals that are “important state interests.”¹⁵⁹

It is possible that some individuals support mandatory retirement because they feel the policies will allow appointment of a younger, more diverse group of judges who may be sensitive to the needs of discrete and insular minority groups. For example, in the field of criminal law, social scientists have typically hypothesized that “African-American judges would be more liberal, and that liberal attitudes might make them ‘more sympathetic to criminal defendants than white judges are, since liberal views are associated with support for the underdog and the poor, which defendants disproportionately are.’”¹⁶⁰ Similarly, building upon Harvard psychologist Carol Gilligan’s “different voice” theory,¹⁶¹ researchers have suggested that women judges would be more likely to pursue flexible means of dispute resolution than their male counterparts, who ostensibly “tend to emphasize rights and rules” with rigidity.¹⁶² Women might, therefore, be more resistant than their male counterparts to applying the criminal sentencing guidelines, with the beneficiaries of such sentencing flexibility often being indigent or minority defendants.

Unfortunately, there is neither reason to believe that young or minority judges are more likely to have counter-majoritarian views than their older colleagues, nor that retirement policies, on a structural level, will have any influence on the beliefs of the appointing person or authority.¹⁶³ In fact, there are several reasons why mandatory retirement policies may well work against the cause of ideological diversity. Initially, the policies have the potential to remove from the bench as many supporters of counter-majoritarian views as they indirectly help to appoint, such as when a bulk of elderly judges are retired during a period when the appointing authority is not particularly sensitive to individual rights. Making matters worse, census data indicates that mandatory

158. *Id.*

159. *Id.* at 58; see also PETER H. IRONS, *THE NEW DEAL LAWYERS* 276 (1982) (discussing Franklin D. Roosevelt’s court-packing plan, justified partially on the grounds that the judiciary needs a “constant infusion of new blood”).

160. Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U.L. REV. 1377, 1454 (1998) (quoting Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 127 (1988)).

161. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 1 (1982).

162. Sisk et al., *supra* note 160, at 1451 (discussing the hypothesis that women tend to view “moral conflicts as a problem of care and responsibility in relationships” while “men tend to emphasize rights and rules” (quoting Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 129 (1993))).

163. See *id.* at 1456 (theorizing that judicial selection process may screen out candidates with atypical views); see also *infra* text accompanying notes 166-69.

retirement ages will likely remove seasoned minority and women judges from the bench prematurely. This data shows that sixty-five-year-old women and sixty-five-year-old men should expect to live 84.2 and 80.4 years, respectively.¹⁶⁴ Sixty-five-year-old Caucasians should expect to live 82.6 years, while sixty-five-year-old minorities should live to 81.5 years.¹⁶⁵ Since women live longer, mandatory retirement could disparately shorten the possible working life of women, on one hand, while not giving qualified men and women of all races the opportunity to continue working. If one believes that women and minorities are more sensitive to the concerns of litigants with similar backgrounds, then mandatory retirement may someday retire those judges most likely to view their cause favorably. Blanket, indiscriminate policies like mandatory retirement are poor instruments of social change.

In any event, it is more likely that the broad premise behind the “keep with the times” theory is that the rulings of the judiciary should not deviate too far from prevalent public opinion. After all, if the times do not change, then why are judges born later in time better than older ones? The “keep with the times” view therefore implies that judges should transform the law in response to what judges perceive to be the current moral, social, and economic climate. Thus, a judge’s ideology becomes the prime qualification for judging, and because this view assumes that age is a reliable predictor of a judge’s beliefs, it elevates age to BFOQ status.

This view has two obvious flaws. The first is that it is based on the questionable assumption that age directly influences judicial decisions. Repeated empirical analyses of such behavioral theories have been “largely disappointing,” leading many researchers to doubt their validity.¹⁶⁶ “A final inescapable conclusion about the explanatory power of the sociological background characteristics of [judges] is that they are generally not very helpful.”¹⁶⁷ Indeed, returning to the earlier point about the possible influences of race and gender upon a judge’s views of the federal sentencing guidelines, research has shown that neither factor is a driving force for judicial behavior.¹⁶⁸ This research is consistent with studies on the effect of judges’ social backgrounds in other areas of law. In the context of civil rights cases,¹⁶⁹ search

164. See Makar, *supra* note 15, at 49.

165. See *id.*

166. Sisk et al., *supra* note 160, at 1385 (reviewing numerous studies conducted over more than a generation of empirical scholars).

167. *Id.* at 1387.

168. See *id.* at 1451-59.

169. See, e.g., Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) (stating that judges’ characteristics or political parties have relatively little effect on the outcome of cases).

and seizure cases,¹⁷⁰ obscenity cases,¹⁷¹ or criminal sentencing prior to the adoption of sentencing guidelines,¹⁷² race and gender generally have had little explanatory value for judicial decisionmaking. The manifest weight of research supports the claim that in most cases “the law—not the judge—dominates the outcomes.”¹⁷³

There also seems to be little support for the position that older judges are less familiar with legal trends than their younger colleagues. Some court decisions sustaining mandatory retirement contain sheer speculation that a mandatory retirement policy “may”¹⁷⁴ or “might”¹⁷⁵ result in a more competent judiciary. Nevertheless, evidence leads to a contrary conclusion. A fuller discussion of the benefits derived from an experienced judiciary are discussed later,¹⁷⁶ but the findings of the Eastern District of Pennsylvania in *Malmed v. Thornburgh*¹⁷⁷ are relevant here. In *Malmed*, the court found absolutely nothing “to show that elderly judges are any less cognizant of modern legal trends than their younger counterparts.”¹⁷⁸ Rather, “the record contains numerous references to the benefits which the judicial system derives from the wisdom and experience of former and retired judges who serve as senior judges.”¹⁷⁹ The conclusion in *Malmed* is not surprising, especially in today’s legal era, in which, on one hand, cases are increasingly settled and trial skills are de-emphasized, while on the other hand, judges are exclusively devoted to developing and maintaining a broad range of caselaw and precedent. According to the court:

We are not concerned . . . with an occupation that requires sustained physical ability or stamina. . . . Rather, we

170. See, e.g., Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131-32 (1993) (noting relatively small difference between female and male judges’ decisionmaking in search and seizure cases).

171. See *id.*

172. See, e.g., Jason Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 314-20 (1981) (discussing conviction rates with respect to male and female judges); Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884, 888-91 (1978) (discussing conviction rates and sentencing with respect to black judges).

173. Ashenfelter et al., *supra* note 169, at 281.

174. EEOC v. Massachusetts, 858 F.2d 52, 58 (1st Cir. 1988).

175. O’Neil v. Baine, 568 S.W.2d 761, 767 (Mo. 1978) (en banc).

176. See *infra* Part IV.C.

177. 478 F. Supp. 998 (E.D. Pa. 1979), *rev’d on other grounds*, 621 F.2d 565 (3d Cir. 1980).

178. *Id.* at 1010.

179. *Id.*; see also LAWRENCE M. FREIDMAN, YOUR TIME WILL COME: THE LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT 99 (Soc. Research Perspectives: Occasional Reports on Current Topics No. 10, 1984) (arguing that the notion that “fresh blood” is needed for new ideas is “for most people simply a prejudice”).

are dealing with judges, a most unique and select class of individuals. The evidence before me showed that it is a serious mistake to consider the population as a whole when determining an age at which physical and mental abilities begin to deteriorate. . . . [P]ersons, such as judges, who have advanced education and who have succeeded in reaching the upper levels of their profession are likely to survive and retain their abilities for a substantially longer period of time than the population at large.¹⁸⁰

But even if youth enables judges to “keep with the times,” mandatory retirement policies might not promote that end. All but three states appoint judges for a period of years rather than life.¹⁸¹ While each reappointment decision already presents the opportunity to appoint individuals “who more closely reflect prevalent points of view, as well as the present societal makeup,”¹⁸² the judicial recruitment process tends to screen out candidates with rigid or unconventional views.¹⁸³ Because mandatory retirement policies do not change the incentive of the appointing person or agency, they will not diversify the judiciary unless they are accompanied by affirmative action policies or ideological litmus tests. In fact, in some situations, mandatory retirement policies risk *reducing* the judiciary’s racial or gender diversity rather than augmenting it. If a judge is forced to retire upon reaching a certain age, for example, rather than completing the judge’s entire term, then the successor might be chosen by a conservative administration that would not have been in power if the judge’s term had gone its full length. If fears of incumbent entrenchment are correct, there is an appreciable chance that mandatory retirement will simply lead to the perpetuation of judges of one particular ideology rather than a vast multitude.

Worse, supposing that a quota system were established and qualified judges could be found, supporters of mandatory retirement give no guidance as to how judges should reach the ends that society desires. Should a judge determine society’s prevalent points of view by rubber-stamping all of the legislature’s initiatives? Or should judges follow Professor Unger’s call to unilaterally undertake a “bold remaking of law, whether constitutional law or ordinary law” rather than wait for the majoritarian branches, which he believes

180. *Malmed*, 478 F. Supp. at 1014.

181. The three states are Massachusetts, New Hampshire, and Rhode Island. In addition, judges in New Jersey are eligible for lifetime appointment after first serving a seven-year term. See WARRICK, *supra* note 19, at 19-20 tbl.11 (Supreme Court Justices); *id.* 21-22 tbl.12 (Intermediate Appellate Court Judges); *id.* at 23-25 tbl.13 (General Jurisdiction Court Judges).

182. *EEOC v. Massachusetts*, 858 F.2d 52, 58 (1st Cir. 1988).

183. See Sisk et al., *supra* note 160, at 1456 n.288.

suffer from an “undemocratic taint” themselves?¹⁸⁴ If the latter, then how should judges determine the true voice of the people? With opinion polls? And at what point would a view be “prevalent”? When a majority agrees? An oppressed minority? When Professor Unger says? Proponents of these radical theories have produced no workable solution most likely because their proposals could never be reconciled with the role of the judiciary in our tripartite system of government.

Once it is accepted that a judge’s rulings should conform to popular sentiment, all of the values of procedural due process are jeopardized. The judiciary is unique “because of its consciously chosen, carefully protected unrepresentativeness.”¹⁸⁵ If the judiciary is to enforce counter-majoritarian constitutional norms, it must be shielded from encroachment by the majoritarian branches. At the same time, precisely because of its unrepresentativeness, the judiciary must not usurp the political branches’ functions and authority.¹⁸⁶ We need not reject behavior theory to see the difference between tolerating a judge’s inevitable subconscious biases and actively encouraging majoritarian-oriented decisionmaking. Quite simply, it is impossible to argue that a judge’s essential function is both to remain impartial and to produce results which please the majority. Defining the judge’s essential duties this way would violate separation of powers and constrain and preordain a judge’s rulings. The result, history has shown, may well be arbitrary and oppressive.¹⁸⁷

At best, mandatory retirement policies are designed to facilitate result-oriented judging, with judges keeping a careful eye on the views of the populace. At worst, as this Article explains in later detail, mandatory retirement policies create incentives for judges to decide cases based upon the judge’s own self-interest.¹⁸⁸ Any possible benefits are speculative, while all the harmful ramifications are all too obvious: namely, the values of participation, equality, accuracy, and appearance of fairness are all placed beyond reach. For these reasons, the argument that mandatory retirement policies will enable judges to “keep with the times” is not sufficiently compelling to justify their adoption.

184. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 118 (1996).

185. Redish, *supra* note 88, at 302.

186. *See id.* at 302-03.

187. *See* THE FEDERALIST NO. 47, at 338 (James Madison) (Clinton Rossiter ed., 1961) (“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of an *oppressor*.” (citing Montesquieu)).

188. *See infra* Part VI.

3. *Efficient Administration of Justice*

Finally, some cases have implied that a mandatory retirement policy is appropriate if it promotes judicial efficiency by assuring “ease in establishing and administering pension plans,”¹⁸⁹ or by reducing “delays in the administration of justice caused by death or disabling illness of sitting judges.”¹⁹⁰

Avoiding unnecessary expenses is certainly important to any public employer. Citizens bemoan higher tax burdens while politicians pledge to run government like a business.¹⁹¹ However, these considerations are insufficient to justify a BFOQ. The efficiency argument amounts to the proposition that an employee’s essential job functions are whatever an employer deems necessary to maximize profits. This position was summarily rejected in *Wilson v. Southwest Airlines Co.*¹⁹² Southwest supported its policy with surveys indicating that attractive flight attendants were essential to customer satisfaction and stated that it would lose business unless it hired only women flight attendants.¹⁹³ However, the court refused to find that any particular gender was reasonably necessary to perform the job’s essential duties.¹⁹⁴ The court stated:

Without doubt the goal of every business is to make a profit. For purposes of BFOQ analysis, however, the business “essence” inquiry focuses on the particular service provided and the job tasks and functions involved, not the business goal. If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order.¹⁹⁵

Southwest Airlines involved a private airline that was seeking to maximize profits in a highly competitive industry. To the extent that age discrimination laws prevent employers from responding to negative societal stereotypes, such

189. *O’Neil v. Baine*, 568 S.W.2d 761, 766 (Mo. 1978) (en banc).

190. *Trafelet v. Thompson*, 594 F.2d 623, 629 (7th Cir. 1979).

191. The state “must remain a responsible steward of the public trust by maintaining an efficient and productive government.” *Peace v. Employment Sec. Comm’n*, 507 S.E.2d 272, 281 (N.C. 1998); see also *McFadden*, *supra* note 103, at 673 (arguing that efficiency is one essential component of governmental legitimacy). Regulations to minimize government waste are considered valid exercises of the state’s police power. See *Parks v. City of Warner Robins*, 43 F.3d 609, 614 (11th Cir. 1995).

192. 517 F. Supp. 292 (N.D. Tex. 1981).

193. See *id.* at 295-96.

194. *Id.* at 302-04.

195. *Id.* at 302 n.25.

as the view that only women flight attendants can attract business or that the elderly are unable to function in the workplace, the prohibitions will result in some loss of profits. Nevertheless, in the private sphere, efficiency concerns will not satisfy the first prong of the BFOQ test.¹⁹⁶

The analysis should not change when applied to public employers. It goes without question that an essential component of governmental legitimacy is the ability to provide services efficiently. However, government can internalize costs that would be insufferable in the competitive private sphere, for governmental bodies can tax constituents to defray those costs. While age discrimination laws may carry costs such as the impeachment of poor judges or the appointment of additional judges to help minimize existing caseloads, those costs reflect a determination by the legislature that such costs are necessary to further a compelling societal interest that outweighs considerations of efficiency. In other words, the policy considerations have already been weighed by the political branches, and they have arrived at the conclusion that any additional costs are justified. Courts have no authority to substitute their judgment for that of the legislature.

The efficiency argument is especially inappropriate as applied to the judiciary because prophylactic measures are essential in avoiding the appearance of bias in judicial decisionmaking. Thus, the *Model Code of Judicial Conduct*¹⁹⁷ is replete with regulations that prevent judges from hearing cases in a wide variety of situations, regardless of whether inaccurate rulings would result in fact.¹⁹⁸ These regulations necessarily prohibit a broad class of efficient, acceptable activity, and the benefits are often difficult to quantify, for one cannot tell if, when, or how often the regulations have actually been needed. An efficiency-oriented test will sacrifice many such protections because it “weighs an inevitable and immediately recognizable administrative cost against a largely prophylactic interest.”¹⁹⁹ But because such prophylactic measures are essential to maintaining public confidence, the efficient administration of justice cannot be deemed essential to the exercise of the judicial function.

C. Young Age Is Not “Reasonably Necessary” for Independent Adjudication

It is clear that the only viable definition of the judicial function is one that recognizes that judges must decide cases independently and free from the appearance of bias. States do not have a factual basis to support the belief that

196. See EGLIT, *supra* note 95, § 5.09, at 5-35.

197. MODEL CODE OF JUDICIAL CONDUCT (2000).

198. See, e.g., *id.* Canon 3(E).

199. Redish & Marshall, *supra* note 98, at 473.

increasing age jeopardizes a judge's ability to perform the essence of the judicial function.²⁰⁰ Therefore, this Subpart argues that states will be unable to meet the first prong of the BFOQ test. Some courts have erroneously found that the mere existence of a correlation between advanced age and declining mental skills sufficiently justifies the use of a mandatory retirement policy.²⁰¹ These courts have missed the point.²⁰² The relevant issue is whether any decline in judicial decisionmaking also compromises the judge's decisionmaking.²⁰³ It does not. Whatever may be said about the general population, research in the judicial arena suggests that old age and efficient judging go hand in hand. Judging is the type of occupation in which performance peaks later in life and remains stable until the onset of senility.²⁰⁴ The judiciary is not "the nation's premier geriatric occupation" without reason, and states have no basis for holding any presumption that older judges cannot fulfill their essential job functions.²⁰⁵

Initially, one should note that very few states establish an absolute retirement age that applies in all situations. Rather, many states force all judges to retire, but then recall judges to serve as "senior judges" who can choose the size and breadth of their caseload.²⁰⁶ Other states establish presumptive mandatory retirement ages yet still allow judges to complete their terms of office, even after reaching the designated age.²⁰⁷ In itself, this policy of retiring

200. See *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (requiring that an employer show factual basis for belief of necessity of age-based employment criteria). Though generalizations are not sufficient to support a BFOQ, some courts upholding mandatory retirement ages under the rational basis standard of review have justified their decisions in precisely such terms. See, e.g., *Trafelet v. Thompson*, 594 F.2d 623, 628 n.9 (7th Cir. 1979) (referring to an anecdote about a judge who refused to retire); *O'Neil v. Baine*, 568 S.W.2d 761, 767 (Mo. 1978) (en banc) (concluding that society's recognition that "physical and mental processes weaken" at age seventy is embodied in statutes and retirement systems); *Nelson v. Miller*, 480 P.2d 467, 473-74 (Utah 1971) (rationalizing that retirement is "a way of life").

201. See, e.g., *Trafelet*, 594 F.2d at 627 (referring to evidence of "an association between aging . . . and a decline in intellectual function and personality factors").

202. See Note, *Questioning Age-Old Wisdom: The Legality of Mandatory Retirement of Tenured Faculty Under the ADEA*, 105 HARV. L. REV. 889, 898 (1992) ("The argument that older employees are not as mentally sharp as younger employees holds true in every job that requires more than minimal intelligence.").

203. Because irrationality impairs independent thought, an irrational judge compromises all of our judicial system's values. See *supra* Part IV.A.1 (discussing the values of the judicial system).

204. See *infra* text accompanying notes 206-20.

205. POSNER, *supra* note 11, at 180; see also *infra* text accompanying notes 206-20 (explaining the advantages of a mature judiciary).

206. See Alice Ann Winters, *Judicial Retirement and Pension Plans* 1-85 (American Judicature Society 1961 and Supp. 1995) (compiling statutes of state pension plans). Cf. Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 412-14 (1990) (discussing contributions of senior judges to judicial system).

207. See sources cited *supra* note 10.

judges only to rehire them has obvious problems. After all, if a state employer can determine which individual judges are capable of continuing employment, then it raises doubts about its concurrent assertion that it needs a generalized policy due to the impracticability of individualized assessment.²⁰⁸

A state might respond with the argument that, while it is easy to determine which judges are capable of continuing work, it is much more difficult to impeach incompetent judges against their will. As a result, mandatory retirement may provide the only practical way to separate the wheat from the chaff. But this argument is unpersuasive, for a similar claim could be made in virtually every industry. For example, it is difficult to revoke an elderly professor's tenure status or to remove any employee within a close-knit corporation in which friendships may have developed that preclude completely impartial assessment. However, the thrust of age discrimination laws is to force employers to make individualized determinations despite the inconvenience or cost.²⁰⁹ Thus, even within states that use mandatory retirement policies, it is not clear that the policies are conclusive evidence of a presumptive link between old age and poor judging.

If the crucial analysis is whether elderly judges can perform their judicial duties competently, one might look to empirical data for guidance. Unfortunately, most courts and commentators have given this issue only cursory attention. Because courts have typically considered the permissibility of mandatory retirement policies under the lenient rational basis standard of review, their decisions are often bereft of empirical data. Additionally, no published studies have considered whether older judges, as a class, have difficulty remaining impartial and diligent in their duties.²¹⁰ Without the help of scientific data, previous discussions have often degenerated into battles of anecdotes, with opponents of mandatory retirement referring to the lengthy distinguished careers of the likes of Oliver Wendell Holmes, Louis Brandeis,

208. See EGLIT, *supra* note 95, § 5.05, at 5-22 (noting that an employer's use of exceptions "believe[s] the claimed need" for the general policy).

209. Certainly, the state could implement less restrictive, though equally effective, guidelines for reducing the work of overly-burdened judges. An obvious example would be to assign fewer cases to elderly judges or to adopt a senior status system similar to the one used by the federal government. See Feinberg, *supra* note 206, at 412-14.

210. Perhaps the only arguably relevant scientific data that currently exists are studies of university professors, whose jobs are analogous to those of judges because both involve intellectual abilities. In one 1985 study, older people scored lower on certain creativity tests, and in other studies, older professors generally have been less interested in academic research than their younger colleagues. See Note, *supra* note 202, at 898. But these studies may be of little value because judging involves application of existing precedent rather than creativity, judges are not expected to uncover and publish groundbreaking research, and judges may turn to their law clerks for aid with extraordinary matters.

or Learned Hand, while supporters refer to lesser-known judges who have tarried on the bench long past their prime.²¹¹

Judge Richard Posner has developed an alternative means of evaluating judicial performance, at least on the appellate level, by measuring the quantity and quality of a judge's written opinions.²¹² Judge Posner's studies suggest that increased age had no effect on the number of opinions written by federal appellate court judges appointed between 1955 and 1984.²¹³ The surveys also showed that the quality of opinions held constant, as measured by the number of citations to each opinion.²¹⁴ Equating citations with quality seems reasonable, for a citation signifies that later courts understood the earlier decision and grappled with its analysis. Also, assuming that courts are more likely to cite the opinions of respected judges above mundane ones, a steady citation rate across time signals that the work continues to be held to some degree of regard.²¹⁵ Moreover, Posner's data should basically hold true for a discussion of state judges' abilities. State judges are presumed equally competent to decide cases arising under federal law,²¹⁶ and they have even more expertise interpreting cases pursuant to their state statutes and common law.

Posner's research might initially seem somewhat surprising, given that the legal system places a premium on reasoning by analogy. Analogy is a branch of practical reasoning that draws on fluid intelligence, and fluid intelligence generally declines with age.²¹⁷ However, fluid intelligence is primarily associated with creativity rather than writing ability, and creativity plays only a marginal role in adjudication.²¹⁸ Rather, "[t]he distinguishing feature of most great judges, even those rightly pronounced 'brilliant,' has not been exceptional analytical power; it has been exceptional rhetorical power."²¹⁹ Rhetorical ability is primarily a function of crystallized intelligence, and it is one of the "least likely [abilities] to decline with age until senility sets in."²²⁰

211. Compare Makar, *supra* note 15, at 49 (criticizing states' mandatory retirement statute), with *Trafelet v. Thompson*, 594 F.2d 623, 628 n.9 (7th Cir. 1979) (upholding Illinois mandatory retirement provisions).

212. See POSNER, *supra* note 11, at 184-92.

213. See *id.* at 184-86. Judges normally write fewer opinions after taking senior status, but this is mainly because their workload decreases substantially. *Id.* at 186-87.

214. *Id.* at 183-84.

215. See, e.g., Mary Anne Bobinski, Comment, *Citation Sources and the New York Court of Appeals*, 34 BUFF. L. REV. 965, 965 (1985) (arguing that judges "are both seeking legitimacy and legitimizing the source used" by citing to a particular authority).

216. See *Testa v. Katt*, 330 U.S. 386 (1947) (holding that a state court must exercise subject matter jurisdiction over federal claims).

217. See POSNER, *supra* note 11, at 192.

218. See *id.* at 198.

219. *Id.*

220. *Id.* at 199.

Age is a poor predictor of judicial performance for numerous additional reasons. First, judges deciding between competing arguments often draw upon materials already circulated on diverse topics including political science, economics, religion, and philosophy. Thus, they must keep abreast of current intellectual trends and legal practices, and they must not be wedded to any particular ideology or the status quo. Older judges in no way fail to meet these requirements. Courts have found no evidence that “elderly judges are any less cognizant of modern legal trends than their younger counterparts,”²²¹ and research has shown that age is “seldom . . . of value in explaining judicial behavior.”²²² Second, generalized knowledge helps judges reflect upon the probable consequences of, and possible alternatives to a ruling. Such knowledge and wisdom is best acquired through life experience, which is positively correlated with age. “In short,” according to Judge Posner, “a mature professional judgment is central to the concept of a wise judge, and the intellectual and dispositional qualities that go to create such a judgment plainly improve with age up to a point . . . and then plateau until senility.”²²³ Finally, a judge’s familiarity with legal precedent, issues, and practices increases the longer she sits on the bench. The confidence accompanying this increased familiarity helps older judges reach decisions more quickly and efficiently than younger appointees.²²⁴

Supporters of mandatory retirement ages either ignore or fail to appreciate the benefits that older judges bring to adjudication. Yet, because of these benefits, states may not be able to show that youthfulness is reasonably necessary for effective, efficient, and impartial adjudication. Rather, forcing elderly judges into retirement can have much more deleterious social consequences than allowing them to continue serving until the completion of their terms. Obviously, additional research about the complex relationship between age and judicial ability would help courts and commentators make more informed decisions about whether mandatory retirement policies should satisfy the first prong of the BFOQ test. But regardless of whether a state could meet this burden, it would also have to prove that impeachment is such an impractical means of removing incompetent judges that it justifies a generalized mandatory retirement policy. The next Part argues that states cannot make such a showing.

221. *Malmed v. Thornburgh*, 478 F. Supp. 998, 1010 (E.D. Pa. 1979), *rev’d on other grounds*, 621 F.2d 565, 577 (3d Cir. 1980). Rather, the record contained “numerous references to the benefits which the judicial system derives from the wisdom and experience of former and retired judges who serve as senior judges.” *Id.* at 998.

222. Sisk et al., *supra* note 160, at 1459 (“Although early studies found a judge’s age to be significant . . . more recent empirical studies have seldom found age to be of value in explaining judicial behavior.”) (citations omitted).

223. POSNER, *supra* note 11, at 194.

224. *See id.* at 197.

V. BFOQ ANALYSIS: THE IMPRACTICABILITY PRONG AND THE RISK OF JUDICIAL MISBEHAVIOR

The second prong of the BFOQ test can be satisfied in two ways. An employer can either prove that it has “reasonable cause to believe . . . that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved” or that “it is ‘impossible or highly impractical to deal with the older employees on an individualized basis.’”²²⁵ Finally, although this point is far less obvious and has not been recognized by other commentators, courts will sustain the generalized policy only if it advances the employer’s goals in a more equal or more acceptable manner than the impractical individualized method.²²⁶

Although efficiency arguments have not been well received when used to define the essential functions of a business,²²⁷ courts determine a policy’s “impracticability” precisely in such terms. Without question, there are significant costs and, thus, inefficiency and impracticability are inherent in the impeachment process.²²⁸ However, mandatory retirement policies come at an even higher cost: they undermine the integrity and independence of the judiciary by giving soon-to-be retired judges financial incentives to decide cases based upon the judge’s self-interest rather than an impartial assessment of the evidence presented in court.²²⁹ As a result, the policies are poor alternatives to impeachment. They threaten the core values of our judicial system. State laws against age discrimination should not protect these policies, and the policies should find no countenance within impracticability prong of the BFOQ test.

The standard refrain is that utilitarian factors, such as cost, can never support finding individualized treatment impractical.²³⁰ However, this position ignores reality for *whenever* an employer is allowed to make generalized employment decisions, the court must have drawn the line based on some

225. *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976)) (alteration in original) (citation omitted). The employer must establish a “substantial basis” for its belief that individual testing is impractical. *Id.* at 422-23. It must meet this requirement and all other elements of the BFOQ test by a preponderance of the evidence. *See EGLIT, supra* note 95, § 5.05, at 5-18 to -19.

226. *See infra* Part V.B. The preceding discussion, *supra* Part IV.C., has shown that states would have grave difficulties demonstrating that substantially all older appointed judges could not perform their essential judicial duties.

227. *See supra* text accompanying notes 192-96.

228. *See infra* text accompanying notes 262-65.

229. *See infra* text accompanying notes 267-76.

230. *See EGLIT, supra* note 95, § 5.09, at 5-35 (stating that “the courts—with but one exception—have asserted that economic factors cannot be the basis for a BFOQ”).

utilitarian or efficiency-related justification.²³¹ To say that individualized treatment is impractical is akin to saying that it would be unreasonable to force the employer to make decisions in such a manner. Perhaps the method is too time consuming, too expensive, or too inaccurate. In other words, it is inefficient. Whatever the reason, individual determinations must therefore be “impractical” when they cannot be done at an efficient cost.

Efficiency is a term with many possible meanings. This Article adopts a definition similar to one articulated by Professors Freed and Polsby in an earlier essay considering the breadth and scope of Title VII’s BFOQ exception.²³² Freed and Polsby have argued that an efficient cost is one that minimizes two “risk costs” associated with the employment decision.²³³ Risk costs, however, have three components: (1) information costs, (2) the value of risks remaining because of imperfect knowledge, and (3) the cost of employee misbehavior in response to a given policy.²³⁴ Freed and Polsby explain the first two components of risk costs as follows:

The first component is *information costs*—that is, the costs the employer bears to acquire information that can be used to reduce risk. The second component is the *expected value of risks that remain because of imperfect knowledge*. In our context, the two components of risk costs will be the *out-of-pocket expense* of using a decision criterion and the *expected value of risks that remain* because a particular decision criterion does not perfectly disclose the information sought.²³⁵

Because Freed and Polsby do not discuss a third possible component of risk costs—the cost of employee misbehavior in response to a given policy—they apparently assume that this cost is zero.²³⁶

A simple example clarifies Freed and Polsby’s definition. Imagine that an employer is planning to hire a group of people to help move furniture. The employer is looking for people who can lift boxes that weigh as much as 300 pounds without dropping the box and ruining its contents. In other words, the employer seeks strong people do not have butterfingers. The *information costs* will be the costs of screening applicants for their ability to lift boxes without

231. See Mayer G. Freed & Daniel D. Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 3 AM. B. FOUND. RES. J. 583, 602 (1981).

232. See *id.* at 603.

233. *Id.*

234. See *infra* text accompanying notes 256-94.

235. Freed & Polsby, *supra* note 231, at 603 (emphasis added).

236. But see *infra* Part VI (discussing the costs of employee misbehavior resulting from mandatory retirement policies).

dropping them. It may be easy to determine whether an applicant can lift a 300 pound box: give her the box and ask her to pick it up. It is far more difficult, however, to determine whether the applicant has butterfingers—a test would involve repeatedly lifting boxes of different sizes and under different conditions. The employer could probably devise such a test, but it may be quite expensive. Thus, the employer's *risk costs* of hiring movers would be the costs of any screening tests, along with an estimate of the likelihood and possible damages that may result if the employee drops a box while on the job.

At some point, the employer has to decide upon the optimal balance between the information costs the employer will pay and the remaining risk costs the employer will accept due to imperfect knowledge. In the end, the employer may have to accept the fact that she cannot eliminate all risks of butterfingers movers, regardless of the informational costs she bears. The employer may then seek to substitute a generalized hiring policy to screen unsatisfactory employees. Unfortunately, this policy may eliminate many qualified employees, who would have passed an individualized test.²³⁷

Courts perform the same type of analysis when they determine whether to allow an employer to use a generalized age-based employment policy rather than an individualized one. Such analysis is implicit in *Western Air Lines, Inc. v. Criswell*,²³⁸ the Supreme Court's most extensive discussion of the impracticability prong. In *Criswell* the airline claimed that young age was a BFOQ reasonably necessary to the safe transportation of passengers because older pilots are more prone to sudden, debilitating illness than younger pilots.²³⁹ Therefore, the airline refused to employ flight engineers after their sixtieth birthday.²⁴⁰ Employee Criswell argued that regular, individualized tests could assess each employee's health and fitness; however, the airline maintained that such testing was impractical.²⁴¹ In response, the Court enunciated its well-known rule for determining whether individualized treatment or generalized treatment is required: "The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe [job performance]."²⁴²

In other words, generalized mandatory retirement policies should be sustained when (1) individual exams have high costs, (2) individual exams do not come close to eliminating all the risks of physical incapacitation, and (3)

237. See Freed & Polsby, *supra* note 231, at 603-04.

238. 472 U.S. 400, 414-17 (1985).

239. *Id.* at 404.

240. *Id.*

241. *Id.* at 405-08.

242. *Id.* at 413 (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976)).

the cost of the remaining risks is also extremely high. Where to draw the line, of course, cannot be precisely determined. It is a fact-based inquiry.

Nevertheless, lower courts have found their way the best they can.²⁴³ For instance, in *EEOC v. Missouri State Highway Patrol*²⁴⁴ the state argued for a BFOQ exception requiring state troopers to retire at the age of sixty, due to increased health risks that jeopardized their work ability.²⁴⁵ The state troopers suggested alternative individualized tests that could predict a trooper's health with reasonable accuracy.²⁴⁶ However, the costs of individualized testing were very high (as the tests were very expensive and carried "high risks of physical harm to the officers being tested"), and the risk costs were also high (as the tests had significant margins of error and could not easily predict serious risks of physical incapacitation).²⁴⁷ Because of the high costs and high remaining risk, the court upheld the mandatory retirement policy.²⁴⁸ Similarly, in *Professional Pilots Federation v. FAA*²⁴⁹ the pilots presented evidence that various tests could almost completely identify the potential for heart attacks, but the court sustained the airline's BFOQ defense.²⁵⁰ No tests could determine the risk of other ailments, and an airline disaster could jeopardize lives and property worth many millions of dollars.²⁵¹

On the other hand, in *EEOC v. City of Bowling Green*²⁵² the court enjoined a police department from using a mandatory retirement policy when the

243. See, e.g., *Prof'l Pilots Fed'n v. FAA*, 118 F.3d 758, 770 (D.C. Cir. 1997) (upholding the FAA's mandatory retirement program); *EEOC v. Miss. State Tax Comm'n*, 693 F. Supp. 516, 526-27 (S.D. Miss. 1987) (upholding mandatory retirement for officers), *rev'd on other grounds*, 848 F.2d 526, 533 (5th Cir. 1988), *vacated*, 873 F.2d 97, 100 (5th Cir. 1989); *Greer v. S.C. Wildlife & Marine Res. Dep't*, 632 F. Supp. 903, 907 (D.S.C. 1986) (upholding mandatory retirement of conservation officers); *EEOC v. City of Linton*, 623 F. Supp. 724, 726 (S.D. Ind. 1985) (striking down minimum age requirement of thirty-five to be hired as a police officer); see also *EEOC v. Mo. State Highway Patrol*, 748 F.2d 447, 453-55 (8th Cir. 1984) (upholding the mandatory retirement age of sixty for police officers); *Keating v. FAA*, 610 F.2d 611, 613 (9th Cir. 1979) (upholding FAA's mandatory retirement program); *EEOC v. City of Bowling Green*, 607 F. Supp. 524, 526 (W.D. Ky. 1985) (rejecting mandatory retirement of police officers at age of fifty-five); *EEOC v. Pennsylvania*, 596 F. Supp. 1333, 1344-48 (M.D. Pa. 1984) (upholding mandatory retirement of highway patrol officers), *rev'd on other grounds*, 768 F.2d 514, 518 (3d Cir. 1985), *vacated*, 829 F.2d 392, 396 (3d Cir. 1987); *EEOC v. City of St. Paul*, 500 F. Supp. 1135, 1140-43 (D. Minn. 1980) (enjoining fire department from enforcing mandatory retirement of fire chiefs at sixty-five).

244. 748 F.2d 447 (8th Cir. 1984).

245. See *id.* at 450-51.

246. See *id.* at 453.

247. *Id.*

248. See *id.* at 455 (finding the remaining costs were intolerable because "public safety and lives depend upon the capabilities of Patrol members").

249. 118 F.3d 758 (D.C. Cir. 1997).

250. See *id.* at 770.

251. See *id.* at 765.

252. 607 F. Supp. 524 (W.D. Ky. 1985).

individualized tests cost only \$5000 initially and another \$5000 each year, and all officers could be screened for all significant health risks with high levels of accuracy.²⁵³ And in *EEOC v. City of St. Paul*²⁵⁴ the court split the difference by requiring the city to perform widely-used, accurate tests of individual applicants for positions as fire department district chiefs, yet allowing the city to resort to a generalized age-based retirement policy, rather than spend more than \$230,000 each year on tests that were only somewhat reliable for predicting performance of firefighters.²⁵⁵ Presumably, the costs of acquiring information about the health of district chiefs were inexpensive and left risks of tolerable social cost, whereas tests for firefighters were quite expensive and had a high probability of expensive consequences resulting from a firefighter's sudden incapacitation at the scene.

It is important to note a point that other commentators have missed: when courts declare an individualized policy impractical, they necessarily allow its replacement with a less costly—and, therefore, more acceptable and efficient—alternative.²⁵⁶ In most cases, the comparative efficiency of the generalized policy will be obvious. After all, if individualized testing were not unduly burdensome, the employer would have no reason for abandoning it. Consider the generalized policies in *EEOC v. Missouri State Highway Patrol*²⁵⁷ and *Professional Pilots Federation v. FAA*.²⁵⁸ The policies are more efficient than individual treatment because they create no appreciable incentives for employee misbehavior. During their last few weeks of work, state troopers who are facing mandatory retirement have no reason to jeopardize public safety by shirking their patrol duties. If they ignore a distress call or behave recklessly when apprehending a suspect, then they can expect discipline, civil liability, or grave personal harm. Similarly, pilots have no added incentive to crash a plane, regardless of whether they are retiring voluntarily or mandatorily.²⁵⁹ To be sure, the prospect of a shortened career might induce some employees to steal from

253. *Id.* at 526.

254. 500 F. Supp. 1135 (D. Minn. 1980).

255. *See id.* at 1141-43.

256. *See EEOC v. City of Linton*, 623 F. Supp. 724, 726 (S.D. Ind. 1985) (rejecting BFOQ claim because “acceptable alternatives” would “better or equally advance” employer’s goal).

257. 748 F.2d 447 (8th Cir. 1984).

258. 118 F.3d 758 (D.C. Cir. 1997).

259. The employer, of course, is primarily concerned with minimizing the risks of sudden, incapacitating illness. This risk holds true in every industry. What is unique about mandatory retirement policies applied to states judges is that, unlike in other industries, the policies unnecessarily create incentives for intentional misbehavior in defiance of the essence of the job. *See infra* notes 268-94 and accompanying text.

their employers or use other measures to inflate their income while employed. But this risk can only be considered remote.²⁶⁰

In very limited situations, a generalized age-based BFOQ policy is so costly that it is no more acceptable than its individualized alternative. In these situations, courts should not abandon the preferred method of individual assessment because doing so will erode their state's age discrimination law.²⁶¹ The next section argues that mandatory retirement policies should not survive BFOQ scrutiny.

VI. MANDATORY RETIREMENT POLICIES ARE NOT PREFERABLE ALTERNATIVES TO IMPEACHMENT

Admittedly, impeachment or similar procedures²⁶² are severe obstacles to removing incompetent judges. Conviction normally requires a supermajority vote. Determinations of fitness are subjective, and politics or personal friendships may render accurate individual assessment impossible. For these reasons, since the earliest days of the republic, impeachment has been called "a bugbear, which has lost its terrors."²⁶³ It "is unlikely to be used except in the most extreme cases,"²⁶⁴ despite the fact that incompetent judges jeopardize life, liberty, and property of immeasurable value. Moreover, impeachment is begun after impropriety has already occurred. It cannot compensate those parties that have already been injured. Thus, states bear another risk cost of incompetent judges—possibly inaccurate prior rulings.²⁶⁵ In terms of the earlier analysis, individualized treatment of older judges carries high informational costs that leave a high risk of potentially high future damages. As a result, one might expect that states should be able to satisfy the impracticability prong.

However, mandatory retirement has the added cost of encouraging employee misbehavior that is detrimental to the essence of the judicial power. The potential for employee misbehavior is a cost that Professors Freed and Polsby have either overlooked or mistakenly assumed to be zero in all

260. If the risk is too high, employers may refuse to hire older employees, who would have the greatest incentives to shirk. Cf. EGLIT, *supra* note 95, at § 5.12 (discussing age limits as BFOQs for hiring). However, to the extent that the presumably rational employers in *Professional Pilots* and *Missouri State* did not opt for this provision, one may safely assume they viewed their employees' actions to be independent of the policy dictating their retirement.

261. See *supra* notes 4-5, 18, and accompanying text (discussing intent and purpose of age discrimination laws).

262. See, e.g., ILL. CONST. art. VI, § 15(b) – (g) (authorizing judicial review board to conduct public hearing and suspend or retire judges who are unable to perform official duties).

263. Robert Rantoul, Jr., Oration at Scituate (July 4, 1836), in PRESSER & ZAINALDIN, *supra* note 80, at 256.

264. *Trafelet v. Thompson*, 594 F.2d 623, 628 (7th Cir. 1979).

265. See *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972) (stating that potential for appellate relief does not cure problems created by an incompetent trial judge).

situations.²⁶⁶ Not so. Consider the following example: Judge Jones is nearing mandatory retirement. The final case on his docket is the civil case of *V v. XYZ Corp.* Victim *V* alleges that *XYZ* discriminated against her on the basis of sex, in violation of applicable state employment legislation. *V* claims that her supervisor created a hostile work environment by making numerous sexually suggestive comments over a period of several months. *XYZ* moves for summary judgment, arguing that no reasonable person would have considered these relatively isolated incidents sufficient to constitute harassment.²⁶⁷

Judge Jones is like most other judges. He realizes that he could rule either way. Case law in the controlling jurisdiction would justify granting or denying *XYZ*'s motion.²⁶⁸ Judge Jones has also noticed that *XYZ* is represented by *A*, one of the state's oldest, largest, and most prestigious corporate law firms. *A* pays one of the region's highest salaries and employs numerous attorneys on a part-time and "of counsel" basis. Over the years, many individuals, some of whom were in their golden years, have left public service and joined *A*, where they have enjoyed additional years of work as senior partners. *V*, on the other hand, is represented by an unremarkable sole practitioner with limited resources, no political or societal connections, and no desire to take on additional help.

In the end, with an eye towards future employment with *A*, Judge Jones writes a cogent, well-reasoned opinion granting *XYZ*'s motion for summary judgment. *V* files no appeal, and Judge Jones retires several months later. Firm *A* subsequently offers him a position as a senior partner, and he accepts.

Mandatory retirement policies may well encourage retiring judges to behave like Judge Jones. Most state policies force judges to retire when they are still willing and capable of continuing employment, either as a judge or an attorney.²⁶⁹ Even within the federal system, a disconcerting number of judges have left the bench to return to private practice, despite the absence of mandatory retirement and the existence of comfortable retirement plans. Seventeen of the twenty judges who left the bench during the 1970s accepted

266. See Freed & Polsby, *supra* note 231, at 602-05.

267. These facts are a slight modification of those in *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) in which the court reversed the judgment of the trial court in favor of employee.

268. Compare *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997) (en banc) (affirming grant of summary judgment for employer as to retaliation in violation of Title VII claim and intentional infliction of emotional distress claim), and *Baskerville*, 50 F.3d at 433 (reversing judgment for the employee plaintiff), with *Fall v. Ind. Univ. Bd. of Tr.*, 12 F. Supp. 2d 870, 884 (N.D. Ind. 1998) (denying University's summary judgment motion as to plaintiff's hostile work environment claim).

269. See VAN TASSEL, *supra* note 28, at 14-17, 40 (finding that some federal judges return to private practice despite government's generous retirement and pension plans). Cf. POSNER, *supra* note 10, at 193 ("[An] important asset of a judge is disinterest; and judges are less likely to decide cases with a view toward maximizing their future career opportunities, and are therefore more likely to decide cases impartially, the less of a future they have.").

other employment,²⁷⁰ and nine of the fourteen judges who retired between 1990 and 1992 returned to private practice or took full-time teaching positions.²⁷¹ The average age of judges who returned to private employment is sixty-nine, which is roughly equivalent to the mandatory retirement rule of age seventy, used by many states across the country.²⁷²

A state pension system normally will be much less attractive than the possible salary a retiring state judge could command in private practice.²⁷³ However, after spending years on the bench, a judge's prior client base may have withered away, thus creating prohibitive start-up costs to re-entering private, solitary practice. In addition, daily work and zealous client representation necessitates long, inflexible hours, with all its accompanying stress, uncertainty, and unpredictability. On the other hand, large firms with more significant profit margins may be willing to pay a retired judge premium wages for little work, in the hopes that the judge's reputation and connections will attract clients or otherwise prove valuable.²⁷⁴ A rational judge seeking to maximize future income would prefer employment with a large, private-sector firm and its guarantees of ample leisure time and premium wages, over retirement. The firm, likewise, would welcome the judge's addition. As a result, mandatory retirement policies encourage judges to decide cases in a manner that will curry favor with a particular litigant in the hopes of extracting future financial gain. Judges are tempted to behave this way because there is little cost in doing so. Trial judges have wide discretionary power, and their decisions must be sustained absent an abuse of discretion or clearly erroneous findings.²⁷⁵ Therefore, a judge can easily justify a ruling without risking reversal on appeal. Appellate court judges have no less discretion. In addition, if an appellate judge has strong feelings about a case, the fellow members of the panel normally let that judge write the court's opinion,²⁷⁶ thereby facilitating clandestine and biased judicial behavior. In short, neither a trial judge nor an appellate court judge has much incentive against deciding cases in a manner that will maximize the judge's own economic self-interest.

270. VAN TASSEL, *supra* note 28, at 14.

271. *Id.* at 40.

272. *Id.*; see also sources cited *supra* note 10.

273. See generally Winters, *supra* note 206, at 1-85 (compiling statutes detailing state judicial pension plans).

274. See Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1055 (1995) (arguing that judges value their reputation because it enhances their influence within the legal profession).

275. See, e.g., *Nat'l Oil & Gas, Inc., v. Gingrich*, 716 N.E.2d 491, 495 (Ind. Ct. App. 1999) (using clearly erroneous standard of review); *Porter v. Karivalis*, 718 A.2d 823, 826 (Pa. Super. Ct. 1998) (using error of law or abuse of discretion standard of review).

276. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 20 (1993).

Worse, even if the judge behaves with complete integrity, the existence of incentives for misbehavior raises the appearance of bias. For instance, when Judge Royce Savage left the federal bench in 1961, he drew widespread criticism because he accepted a position as general counsel to Gulf Oil Corporation, which he had acquitted of criminal antitrust charges less than two years earlier. The *New York Times* commented:

No one has suggested, nor is there the slightest grounds for thinking, that Judge Savage was moved by improper considerations in the anti-trust case; and there is no law against his now going to work for Gulf. Nevertheless, he showed poor judgment in doing so, because his action tends to lessen public confidence in the independence and integrity of the Federal Judiciary.²⁷⁷

When President Kennedy accepted Judge Savage's resignation, he expressed similar concerns:

The reason that [judges] are appointed for life is so that there can . . . be no actual improprieties [and] no appearance of impropriety. . . . I don't think that anyone should accept a Federal judgeship unless prepared to fill it for life because I think the maintenance of the integrity of the Judiciary is so important.²⁷⁸

When other judges have left the bench in similar circumstances, they too have been criticized for failing to avoid the appearance of impropriety.²⁷⁹

Additionally, wholly apart from the effects of mandatory retirement upon the judge in question, the policies have deleterious external consequences for society generally, such as skewing the potential supply and demand for judges who are nearing the state's retirement age. Imagine a state that appoints judges for six-year terms and requires them to depart at the age of seventy. Initially, if the appointing authority appoints, say, a sixty-four-year-old judge, the policy risks forcing the judge out just as the judge is beginning to mature and develop skills, confidence, and familiarity with the intricacies and novelties of the law.²⁸⁰ Conversely, the appointing authority may be reluctant to appoint individuals between the ages of sixty-four and seventy out of fear that the judge

277. VAN TASSEL, *supra* note 28, at 16 (citing DAVID STEIN, JUDGING THE JUDGES, 8-9 (1974)).

278. *Id.* (alteration in original).

279. *See id.*

280. *See supra* text accompanying notes 217-24.

will not be around long enough to make a lasting impression upon the legal landscape. Moreover, one must wonder who would be willing to take the appointment only to be retired shortly thereafter. Given the high intellectual and occupational start-up costs inherent in becoming an effective judge, some individuals may simply continue in private practice rather than disrupt their careers at a late stage in their lives. On the other hand, those who accept the positions may be those who are uninterested in developing the skills needed for excellent judging but see no better alternative. Mandatory retirement policies simply do not further the core values of the judicial system.

If mandatory retirement policies are so harmful, then why do so many states have them? There are two main reasons. First, the government, unlike a private employer, has weak incentives for curtailing possible misbehavior. In fact, the government itself may be the beneficiary of a judge's "end game" biases. A judge nearing completion of her term might seek to ingratiate herself with the state in order to get a different government appointment after leaving the bench.²⁸¹ The judge, of course, would prefer private, large-firm employment, but the judge might be so unattractive to private employers that government employment would be the only viable option. Second, in cases involving private parties, litigants bear the costs of "end game" biases, not the government. Conversely, the legislative and executive branches derive ample benefit from appointing new judges, either to repay their political allies or to attempt to shape public policy in accordance with their views.

It is no secret that politics influences the judicial selection process.²⁸² Rick Swanson and Albert Melone, in a review of Illinois Supreme Court decisions, have shown that a judge's political affiliation strongly predicts the judge's subsequent rulings.²⁸³ The benefits of the appointment power probably outweigh any possible political fallout, for the quality of an elected official's judicial appointments is probably an insignificant issue in most campaigns. In any event, some states have legislative commissions that assist with judicial selection.²⁸⁴ As a result, with additional actors deciding the composition of the judiciary, elected officials can assume even less accountability for the opinions

281. Therefore, the judge would most favor the state in criminal cases when the state is a party and public opinion magnifies pressures to convict. The bias towards the government might be minimized if a state enacted a revolving door provision forbidding judges from accepting government appointments for a fixed period of time following retirement.

282. See, e.g., John Gibeaut, *Bench Battle*, A.B.A. J., Aug. 2000, at 42, 42 (examining the political ramifications of challenging an incumbent judge); Jack Van Doren, *Is Jurisprudence Politics by Other Means? The Case of Learned Hand*, 33 NEW ENG. L. REV. 1, 14 (1998) (stating that those who select judges are aware of and act on political influence).

283. See Rick A. Swanson & Albert P. Melone, *The Partisan Factor and Judicial Behavior in the Illinois Supreme Court*, 19 S. ILL. U. L.J. 303, 313-30 (1995).

284. See WARRICK, *supra* note 19, at 19-35 (collecting provisions for judicial appointment).

of the judiciary, even though political considerations may have influenced the composition of the appointment commissions themselves. The situation is markedly different from that which prevails in the competitive marketplace, where employers are harmed by and vicariously liable for the misbehavior of their employees. Elected officials within state government often suffer none of the consequences of judicial misbehavior, so they have no true incentive to minimize biased judicial decisionmaking.

Some might say that these concerns are obsolete because *every* judge who does not enjoy lifetime tenure and salary provisions feels some degree of pressure to decide cases in ways that will please the judge's appointer. Given this observation, one might argue that the poor incentive structure of mandatory retirement may be of little concern. Given that some elderly judges will be ready to retire anyway, while judges eligible for reappointment are more likely to seek an additional term of office, mandatory retirement may be the least detrimental of all judicial employment policies. Put another way, the social costs of mandatory retirement may not be very high because soon-to-be-retired judges might behave independently of the policy.

There are two responses. The first is: so what? If a state constitution requires repeated, periodic reappointment of a judge, then the resulting bias from this selection process simply cannot be eliminated. As others have observed, "Reality forces us to tolerate some bias [in the judicial sphere]. The degree of bias we are willing to tolerate should be limited, however, by our ability to avoid it."²⁸⁵ However, to the extent that a mandatory retirement policy is not constitutionally protected, it is avoidable. Regardless, given the emphasis of the judicial system on avoiding the *appearance* of impropriety, the low potential for true misbehavior is irrelevant.

The second response attacks the argument on its own terms. The truth is that mandatory retirement policies probably create a higher potential for biased decisionmaking than periodic reappointment of all eligible judges. If a judge seeks reappointment at the end of his term, various informal forces discourage irrational or biased behavior.²⁸⁶ A judge's reputation, popularity, and prestige are functions of competence, and "if he isn't on the ball this soon becomes known and he gets a bad reputation in the legal community."²⁸⁷ The appointing authority, in turn, would face political pressure not to re-appoint him. On the other hand, a judge facing mandatory retirement would be less concerned with her reputation among other judges than with her ability to gain favor with a prospective employer and to lure or maintain favor with prospective clients. Given the indeterminacy of law and a judge's widespread discretion, a judge

285. Redish & Marshall, *supra* note 98, at 492.

286. See Posner, *supra* note 276, at 13-15.

287. *Id.* at 7.

can find for either party without risking appellate reversal or even triggering suspicion.

It is also true that every judge who *voluntarily* retires might use her discretionary powers to decide cases in ways that will endear her to potential future employers. However, mandatory retirement policies introduce bias with potentially higher social costs.²⁸⁸ First, mandatory retirement policies tend to force judges to retire when they can still enter private practice, rather than at an age when they would definitely prefer retirement. This increases the number of judges who may behave improperly and the number of opportunities to do so. Second, while a judge's personal retirement decision may occur unexpectedly, the dates and names of judges who will be forced to retire is public knowledge. As a result, mandatory retirement policies might encourage "judge shopping," whereby firms with attractive employment opportunities seek out those judges they believe are most susceptible to coercion. Judge shopping is a species of forum shopping, which has been criticized for creating additional litigation costs and unfair tactical advantages.²⁸⁹ Such a regressive policy benefits deep-pocketed corporations represented by major, established firms at the expense of the poor, weak, and oppressed whose counsel is comparatively less equipped.

Perhaps the bias and appearance of impropriety created by an ill-advised mandatory retirement policy is weaker than what confronted the judge in *Tumey v. Ohio*,²⁹⁰ who stood to receive a direct, easily identifiable financial benefit in exchange for his decisions.²⁹¹ However, the *Tumey* Court was not concerned with *actual* bias.²⁹² Rather, it focused on insuring that judges perform their essential job functions free from all "possible temptation to the average man as a judge."²⁹³ Because any reasonable potential for financial benefit raises the potential for biased or apparently biased decisionmaking, mandatory retirement policies undermine a judge's ability to effectively exercise the essence of judicial power. As Judge Abner Mikva of the District of Columbia Court of Appeals noted, a judgeship "is supposed to be the last stop on the road. A judge shouldn't be thinking about going back to work for a law firm that's coming before him."²⁹⁴ Indeed, even the appearance that the

288. A bias resulting from a judge's freely chosen decision to retire, like the bias inherently fostered in the reappointment process, is unavoidable. On the other hand, a mandatory retirement policy injects bias into situations where it would not exist.

289. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1507-17 (1995) (discussing the advantages of transfer for defendants over forum-shopping plaintiffs).

290. 273 U.S. 510 (1927).

291. See *supra* text accompanying notes 120-26.

292. *Tumey*, 273 U.S. at 532.

293. *Id.*

294. VAN TASSEL, *supra* note 28, at 40.

judge is basing rulings on the possibility of future self-interest is wholly anathema to our system of justice.

For all these reasons, mandatory retirement is not an acceptable alternative to impeachment. A court would grievously err to sustain the policies in the face of a state's laws against age discrimination. Trading a cumbersome individualized employment practice for an equally flawed generalized practice furthers neither the goals of anti-age discrimination legislation nor the administration of justice. If a state legislature wants to exempt appointed judges from its general policy against age discrimination and is willing to jeopardize the independence of the judiciary by doing so, then it should author an express exemption to that effect rather than seeking to invoke the narrow BFOQ exception.

VII. CONCLUSION

More than 200 years ago, Alexander Hamilton criticized New York state's requirement that judges retire at age sixty.²⁹⁵ "I believe there are few at present who do not disapprove of this provision," Hamilton wrote. "There is no station in relation to which [mandatory retirement] is less proper than to that of a judge."²⁹⁶

This Article has shown that state statutes against age discrimination in employment may finally provide a weapon for attacking mandatory retirement policies. Judges should not be viewed as policymakers who are exempt from protection under state law. A state cannot prove that age is a BFOQ reasonably necessary for judging cases independently and free from the appearance of bias. Finally, mandatory retirement policies are not practical alternatives to the individualized inquiries required by impeachment. A state, of course, could continue implementing its mandatory retirement policy by expressly exempting appointed judges from its age-based anti-discrimination laws. But that would be unwise, for the policies, though perhaps well-intentioned, threaten judicial independence. Rather than reinstating an obviously flawed policy, states should recommit themselves to selecting qualified judges, freeing the judges from political pressures, and removing the very rare incompetent judge in their midst. This would promote everyone's interests in judicial independence, accountability, and efficiency. It also would further society's important interest in ending age-based discrimination in employment.

295. THE FEDERALIST NO. 79, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

296. *Id.*