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Age Discrimination Law—Mandatory Retirement of Judges: Law and Policy—Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990)

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Age Discrimination Law—MANDATORY RETIREMENT OF JUDGES: LAW AND POLICY—*Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990)

INTRODUCTION

On his seventieth birthday, Judge Nugent swam 1,000 yards—the 4,000th yard he swam that week.[1] However, Judge Nugent did not go to work on his birthday, nor any subsequent day. If he did, he would relinquish all his annual compensation, salary, or retirement compensation.[2] Judge Nugent and three colleagues, believing the assumption of disability and incompetence triggered by the celebration of a seventieth birthday to be unfair and arbitrary, challenged the Missouri constitutional provision that mandated their retirement at age seventy in *Gregory v. Ashcroft*.[3]

Unlike United States Supreme Court justices and other article III judges who are appointed for life,[4] many state court judges are re-

1. Minneapolis Star Tribune, Mar. 18, 1991, at 10Ke, col. 1.

2. "[A]ny judge who becomes eligible after August 13, 1988 for annual compensation, salary or retirement compensation . . . but fails to retire on or before his seventieth birthday shall automatically waive all such annual compensation, salary and retirement compensation." MO. ANN. STAT. § 476.683 (Vernon Supp. 1991) (enacted 1988). *See also* MO. CONST. art. V, § 26(1) (1976).

3. 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

4. Lifetime tenure for "good behavior" is guaranteed by article III of the United States Constitution. *See* U.S. CONST. art. III, § 1. Critics of lifetime tenure have identified past instances of advanced "senility, broken health and physical disability" on the federal bench. *See, e.g.*, Atkinson, *Retirement and Death on the United States Supreme Court: From Van Devanter to Douglas*, 45 UMKC L. REV. 1, 2-3 (1976). Justice William O. Douglas' tenacity in holding his seat is often identified as an egregious example of the problems that can result from lifetime appointment. "A toughened survivor of polio and a near drowning in childhood, plus an almost fatal riding accident and a weakened heart while on the court, he had been partly paralyzed by a

quired to retire at a specified age. Twenty-nine states have enacted statutory or constitutional provisions forcing their trial and appellate judges to retire, usually at age seventy.[5] Repeated challenges to the legality of these mandatory retirement provisions have focused on the application of the Federal Age Discrimination in Employment Act (ADEA)[6] and on the constitutional guarantee of equal protection. Almost uniformly, these challenges have failed, primarily because the retirement plans were deemed to be a legitimate way to accomplish the proper state goals of ensuring a qualified and efficient judiciary and providing opportunities for younger lawyers to attain judgeships.[7]

Proponents of mandatory retirement assert that it allows for the impersonal removal of older judges and avoids the difficulty of determining which judges are senile and which are not. The existence of these mandatory retirement provisions presumes that an individual's physical and mental abilities progressively degenerate upon reaching a certain age.[8] Empirical evidence, however, does not establish that advanced age and senility are synonymous.[9] Chronological age

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stroke [in 1974] and was confined to a wheelchair." *Douglas Finally Leaves the Bench*, TIME, Nov. 24, 1975, at 69. Justice Douglas continued to participate in the Court's business, although his appearances on the bench for oral argument were constantly interrupted either by spasms of pain or by falling asleep. Finally, on November 12, 1975, Justice Douglas retired at the age of 77, concluding nearly 37 years of service on the Court. *Id.*

5. *See* CONFERENCE OF STATE COURT ADMINISTRATORS & NATIONAL CENTER FOR STATE COURTS, STATE COURT ORGANIZATION 1987 (1988) (survey of state appellate and trial court requirements and qualifications for justices and judges).

6. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1988).

7. *See, e.g.*, EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988) (Massachusetts' constitutional provision requiring mandatory retirement of judges at age 70 upheld.); *Gregory*, 898 F.2d at 598 (Missouri constitutional provision requiring mandatory retirement of judges at age 70 upheld.).

In contrast, Judge Clarence C. Newcomer of the U.S. District Court for the Eastern District of Pennsylvania ruled that Pennsylvania's constitutional requirement that judges aged 70 or over must retire or accept reduced pay and benefits violates the equal protection guarantee of the United States Constitution. Sabo v. Casey, 757 F. Supp. 587 (E.D. Pa. 1991). The State of Pennsylvania claimed that this provision increased available judicial manpower at a time of an escalating case load and reduced senility on the state bench. The *Sabo* court determined that Pennsylvania's justification for the provision was a legitimate state goal. *Id.* at 603. The court found that the means used to achieve the goal, however, were not rationally related to the stated goal. *Id.* Rather, the Court decided that the "transparent objective of the constitutional provision [was] to obtain judicial services without paying the full costs of those services." *Id.* Thus, the Pennsylvania provision "constitutes purposeful and invidious discrimination." *Id.*

8. Finkelstein, *Minimum Physical Standards—Safeguarding the Rights of Protective Workers Under the Age Discrimination in Employment Act*, 57 FORDHAM L. REV. 1053, 1074 (1989).

9. *See* Staudinger, Cornelius & Baltes, *The Aging of Intelligence: Potential and Limits*,

alone does not determine a person's functional ability. These arguments for mandatory retirement fail to consider the value of a judge's accumulated wisdom and experience on the bench, and that each person ages differently.[10]

Federal circuit courts are currently in conflict on the issue of whether a state can require mandatory retirement of its judges.[11] The United States Supreme Court will have an opportunity to resolve this conflict when it reviews the Eighth Circuit Court of Appeals' decision in *Gregory v. Ashcroft*, which upheld a Missouri constitutional provision requiring retirement of some of its judges at age seventy.[12]

This Case Note focuses on the application of the ADEA to state judiciary through an analysis of the circuit courts' interpretations of the ADEA's exceptions for "policy-makers." Additionally, this Case Note examines the constitutional arguments concerning forced retirement of the judiciary. The Case Note then suggests that the Court apply an intermediate level scrutiny in evaluating the equal protection challenge to mandatory retirement provisions where, as here, a state's objective is based on an outdated and erroneous stereotype that "frequently bears no relation to ability to perform or contribute to society."[13] Age, like gender, is an "immutable characteristic" that is determined solely by the accidental timing of one's birth and bears little relationship to one's ability to perform.[14] Therefore, any discriminatory state law provisions based on age

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503 THE ANNALS 43, 45 (1989) [hereinafter *Aging of Intelligence*] (providing empirical evidence of effects of aging on intelligence and ability).

10. Finkelstein, *supra* note 8, at 1075; *see also Aging of Intelligence*, *supra* note 9, at 46.

11. *See infra* notes 57-75 and accompanying text.

12. Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990). Mandatory retirement is a sensitive subject for the Supreme Court. The following four justices are 70 or older: Justices Thurgood Marshall, Harry Blackmun, Byron White, and John Paul Stevens.

13. Frontiero v. Richardson, 411 U.S. 677, 686 (1973). In *Frontiero*, the Supreme Court struck down gender classifications that allowed a married serviceman to receive increased allowances whether or not his wife was dependent on him, but allowed a married servicewoman to receive additional allowances only if her husband was dependent on her. The Court concluded that such discrimination had the effect of putting women "not on a pedestal, but in a cage." *Id.* at 684. The Court observed: "As a result [of reliance on outdated stereotypes], statutory distinctions . . . often have the effect of invidiously relegating the entire class . . . to inferior legal status without regard to the actual capabilities of its individual members." *Id.* at 686-87. Although *Frontiero* included gender classifications among suspect classifications, thus triggering strict scrutiny, later gender discrimination cases have relied on intermediate scrutiny for this classification. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Bowen, 429 U.S. 190 (1976). Intermediate scrutiny seems equally applicable to age-based classification.

14. *Frontiero*, 411 U.S. at 686.

should be viewed with the same intermediate level of scrutiny as applied to those based on gender. This Case Note concludes with suggestions of less restrictive alternatives to mandatory retirement that will ensure preservation of a highly qualified and competent judiciary, without violating equal protection guarantees or imposing the heavy burden of forced retirement on qualified, competent, but older, judiciary.

I. *GREGORY V. ASHCROFT*

In *Gregory v. Ashcroft*,[15] the Eighth Circuit evaluated article V, section 26(a) of the Missouri Constitution, which mandates the retirement of state judges, other than municipal judges, at age seventy.[16]

Missouri divides its judiciary into two categories. In the first category, a judge is elected in the same manner as all other state officials—by state partisan elections.[17] In the second category, pursuant to the Missouri Non-Partisan Court Plan (Plan), judges are appointed by the governor.[18] Under the Plan, the governor appoints judges to the appellate courts, and to circuit courts in metropolitan St. Louis and Kansas City.[19] Following the expiration of their appointed terms, these Plan judges are periodically listed on election ballots. They face a "yes" or "no" vote on whether each judge shall be retained in office.[20] Neither Plan nor non-Plan judges are restricted in the number of terms they may serve if retained by voters, by any authority other than the mandatory retirement provision of the Missouri Constitution.[21]

Judges Gregory, Nugent, and Greene, plaintiffs in *Gregory*, are Plan

15. 898 F.2d 598 (8th Cir. 1990). Defendant in this action is John D. Ashcroft, Governor of the State of Missouri, in his official capacity.

16. Article V provides in pertinent part: "All judges other than municipal judges shall retire at the age of seventy years . . . ." MO. CONST. art. V, § 26(1) (1976).

17. MO. REV. STAT. § 478.010 (1978). "Any person desiring to be an independent candidate for any office to be filled by voters throughout the state, . . . or circuit judge district, shall file a petition with the secretary of state." *Id.* § 115.321(1). "[A]ll candidates for elective office shall be nominated at a primary election . . . ." *Id.* § 115.339.

18. Article V provides in pertinent part:

> Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the court of appeals, or in the office of circuit or associate circuit judge within the city of St. Louis and Jackson [C]ounty, the governor shall fill such vacancy by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a non-partisan judicial commission . . . .

MO. CONST. art. V, § 25(a) (1976).

19. *Id.*

20. MO. CONST. art. V, § 25(c)(1) (1976).

21. Gregory v. Ashcroft, 898 F.2d 598, 599 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

judges. They argue that, as Plan judges, they are entitled to ADEA protection because they are "employees" of the state and because no exception to the ADEA applies to them.[22] They argue that, because they were appointed by a governor instead of "elected to public office,"[23] they are outside the ADEA's exception for elected officials. Second, the judges maintain that Plan judges are not exempted from ADEA protection as "appointee[s] on the policy-making level."[24] Finally, they contend that Missouri's mandatory retirement provision is not a rational method of regulating the judiciary to serve the state's goal of maintaining a highly qualified and vigorous state judiciary and, therefore, mandatory retirement violates equal protection guarantees.[25]

The State of Missouri contends that Plan judges are not protected by the ADEA since they are not "employees."[26] Missouri argues that the judges are not deprived of equal protection guarantees because age is not a suspect classification, and there is a rational basis for requiring mandatory retirement.[27]

The district court upheld the mandatory retirement provision on several grounds. Mandatory retirement ensures a vigorous judiciary, opens state court benches to younger lawyers, makes it easier to administer pension plans, and eliminates the difficulties of determining

22. Judge McHaney, an elected judge, does not fall within the scope of the ADEA. *See* 29 U.S.C. § 630(f) (1988) (Under ADEA, the term " 'employee' shall not include any person elected to public office in any State . . . ."). Thus, Judge McHaney did not pursue the ADEA claim and joined only in the constitutional claim.

23. Plan judges are initially appointed by the governor and are retained in office by voters pursuant to the Plan. The Plan judges are not considered to have been "elected to public office" for purposes of the ADEA. The Equal Employment Opportunity Commission (EEOC) has taken the position that a state judge "who is appointed by the governor or the legislature but [who] must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office' " and would thus be outside the ADEA's exception for elected officials. *Gregory*, 898 F.2d at 600 n.3 (quoting EEOC Opinion Letter to Rep. Claude Pepper, *reprinted in* EEOC Compl. Man. (BNA) at N:1001 n.2 (Apr. 7, 1987)). The district court agreed with the EEOC's opinion. *Id.* Because neither side presented this issue to the circuit court, the Eighth Circuit assumed, for the purposes of *Gregory*, "that state judges selected according to [the Plan] are appointed and not 'elected' within the meaning of the ADEA." *Id.*

24. *Gregory*, 898 F.2d at 601. The judges focused their argument on their roles as interpreters of the law rather than as makers of the law. *Id.*

25. *Id.* at 604. The judges argued that the mandatory retirement provision deprived them of due process. The Eighth Circuit noted that the judges had not articulated what fundamental right had been denied. Thus, the *Gregory* court refused to address the issue. *Id.* at 604 n.6.

26. Gregory v. Ashcroft, 52 Fair Empl. Prac. Cas. (BNA) 540, 541 (E.D. Mo. 1990).

27. *Id.*

whether older judges are competent.[28]

The Eighth Circuit affirmed,[29] finding that the judges were excluded from the ADEA definition of "employee"[30] because they were "appointee[s] on the policy-making level."[31] Further, the court upheld the constitutionality of the mandatory retirement provision, holding that it did not violate the plaintiffs' rights to equal protection.[32] The court held that age was not a suspect classification[33] and that there was no fundamental right to government employment per se.[34]

Instead, the *Gregory* court applied a rational basis test to the equal protection claim.[35] The court concluded that Missouri had demonstrated a rational basis for its distinction between judges and other state officials or employees to whom no mandatory retirement age applies.[36] The court noted that even if it disagreed with the purported rationales for mandatory judicial retirement at age seventy, the rational basis test foreclosed the court's imposing its views on a state that believed it had legitimate reasons for requiring the mandatory retirement of its judiciary.[37] The Supreme Court granted the judges' petition for certiorari.[38]

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28. *Id.* at 544 (citing O'Neil v. Baine, 568 S.W.2d 761, 766-67 (Mo. 1978)).

29. Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

30. "Employee" is defined under the ADEA as:

> [A]n individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (1988).

31. *Gregory*, 898 F.2d at 603.

32. *Id.* at 606.

33. *Id.* at 604. The judges conceded that age classifications are not subject to "heightened scrutiny for constitutional infirmity . . . ." *Id.*

34. *Id.* at 604 n.6 (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)). If a fundamental right or suspect class is involved, the court will exercise strict scrutiny, and the statute is almost always struck down. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1452 (2d ed. 1988). The rational basis test gives great deference to the legislature's judgment, and the court will uphold a state statute if the statute and the results to be obtained serve any conceivable public purpose. *Id.* § 16-3, at 1443.

35. *Gregory*, 898 F.2d at 604.

36. *Id.* at 605-06.

37. *Id.* at 606.

38. Gregory v. Ashcroft, 111 S. Ct. 507 (1990).

II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Background

The ADEA, enacted through the power given to Congress under the commerce clause,[39] prohibits workplace bias based on age for every worker forty years or older.[40] The statute's primary purpose is to ensure that employers base employment decisions on objective, age-neutral criteria, such as individual ability, and not on subjective, stereotypic and unsubstantiated age-based presumptions.[41] Thus,

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39. The commerce clause provides in pertinent part:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8.

The ADEA originally included the requisite findings to base the legislation on the commerce clause:

> (a) The Congress hereby finds and declares that—
>
> . . . .
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a)(4)(1988).

The ADEA defines "commerce" to include "trade, traffic, commerce, transportation, transmission or communication among the several States." *Id.* § 630(g).

40. *Id.* § 631(a). The original Act protected employees only up to age 65 years and excluded from protection persons elected to public office and persons appointed on a policy-making level. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 11(b), 12, 81 Stat. 602, 605, 607 (1967) (current version at 29 U.S.C. § 631(a) (1988)). In 1974, Congress amended the ADEA to include state and local governments, and to provide substantive protection to most federal employees. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a), 88 Stat. 55, 74 (1974) (current version at 29 U.S.C. § 631(a) (1988)). In 1978, Congress again amended the Act, expanding the age group protected against discrimination from age 65 to 70, prohibiting mandatory retirement of most employees under age 70, and making significant procedural clarifications and modifications. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189-91 (1978) (current version at 29 U.S.C. § 631(a) (1988)). Effective January 1, 1987, Congress made the ADEA applicable to all employees age 40 or over by eliminating the upper age limit altogether. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342, 3345 (1986) (codified at 29 U.S.C. § 631(a) (1988)).

41. The express purposes of the ADEA are: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1988). The abolishment of retirement for the majority of employees has had little impact on the 40-year trend toward early retirement. Almost two-thirds of older workers retire before age 65. In 1987, 54.4% of people age 55 to 64 were in the labor force compared to 11.1% of people age 65 and over. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2307, LABOR FORCE STATISTICS DERIVED

the Act prohibits employment decisions based on general assumptions concerning the existence of degenerative aging and its effects on individual performance and ability.[42] The ADEA explicitly excludes from its protection those employees working in occupations where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ."[43] Also excluded from the ADEA's protection are elected officials and their personal staffs, their policymaking appointees and their immediate advisors.[44]

B. The Exceptions

The courts, when interpreting the coverage and exemptions of the ADEA, broadly define the class of individuals who are entitled to the ADEA's protections.[45] Conversely, the courts narrowly construe the ADEA's exceptions.[46] This narrow construction is especially significant when a person is forced to retire.[47]

Because the individual states establish and maintain court systems that are independent from the federal system,[48] congressional regu-

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FROM THE CURRENT POPULATION SURVEY, 1948-87 151-53 (1988) [hereinafter STATISTICS].

42. *See* Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 755 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983) (Wauwatosa, Wisconsin, city ordinance requiring assistant fire chief's retirement at age 55 did not constitute a bona fide occupational qualification and thus violated ADEA).

43. 29 U.S.C. § 623(f) (1988).

44. *Id.* § 630(f).

45. *See, e.g.*, EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983) (Salaried officers of nonprofit society who performed traditional employee duties were employees covered by ADEA.).

46. *See, e.g.*, Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 410 (1985) (Age-60 retirement requirement for flight engineers held to violate ADEA.).

47. *See id.*

48. Although not raised in *Gregory*, federal legislation has been challenged under the tenth amendment as an infringement of a state's immunity from federal regulation of certain core functions. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In *Garcia*, the Court noted that the purpose of tenth amendment immunity "is not to preserve 'a sacred province of state autonomy,' " or to carve out express areas of state sovereignty. *Garcia*, 469 U.S. at 550 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)). In rejecting precedent that supported state sovereignty, the *Garcia* court insisted that this did not mean that there were no limitations on the federal government's right to use its delegated powers. Rather, "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. Some indications that the structure of the federal government has been constitutionally arranged so as to protect state sovereignty are: the requirement that each state have two Senators, the fact that the states are given general control over electoral

lation of a state's judicial requirements constitutes a significant intrusion into a state-dominated affair.[49] Explicit congressional intent to preempt such traditional areas of state law must be shown before the ADEA can be applied to these areas.[50]

In enacting the ADEA, Congress defined the protected "employee" very broadly,[51] but established several exceptions:

> [T]he term "employee" shall not include any person elected to public office in any State or political subdivision in any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the

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qualifications for federal elections, and the fact that the states have a special role in presidential elections by means of the electoral college. Thus, the Court relied on the political process and not the judiciary to preserve state powers. *Id.* at 551.

In *Garcia*, the court cited with approval *EEOC v. Wyoming*, in which the extension of the ADEA to cover state and local governments was held to be a valid exercise of Congress' power. *Id.* at 547 (citing EEOC v. Wyoming, 460 U.S. 226 (1983)). Justices Burger, Powell, Rehnquist and O'Connor dissented in *EEOC v. Wyoming* and would have held the ADEA unconstitutional as applied to the states. *EEOC v. Wyoming*, 460 U.S. at 251 (Burger, C.J., Powell, J., Rehnquist, J., O'Connor, J., dissenting). The dissent stated that the Constitution does not grant the national government the power to impose "detailed standards governing the selection of state employees . . . ." *Id.* Nor does the Constitution "grant to the National Government the power to impose such structures on the states either expressly or by implication." *Id.*

Another attempt to invoke the restraints of the tenth amendment to the ADEA was initiated in a recent post-*Garcia* case, EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990). Justice Louis P. Peck, an appointed justice of the Vermont Supreme Court, challenged the provision of the Vermont Constitution requiring mandatory retirement of all judges at age 70 on the basis that this provision violated the ADEA. The Second Circuit Court of Appeals rejected the state's contention that the tenth amendment precluded application of the ADEA to state-court judges. *Id.* at 802. The Second Circuit, relying on *Garcia*, held that state interests are properly protected by procedural safeguards which are inherent in the federal system rather than by limitations on federal power imposed by the judiciary. *Id.* Thus, where the national political process is not defective, the tenth amendment is not involved. *Id.* (citing South Carolina v. Baker, 485 U.S. 505, 513 (1988)). Based on the federal courts' decisions, it appears that the tenth amendment places few, if any, practical limitations on the exercise of federal power under the commerce clause on matters of state sovereignty.

49. The supremacy clause of the Constitution ensures that a federal statute takes precedence over even a state constitutional provision. U.S. CONST. art. VI, cl. 2. Thus, a state cannot impose requirements that violate federal anti-discrimination statutes or constitutional provisions.

50. *See* United States v. Bass, 404 U.S. 336, 349 (1971). The *Bass* Court held that section 1202(a) of the Omnibus Crime Control and Safe Streets Act, which provides that a person convicted of a felony "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm . . ." did not reach the "mere possession" of firearms because there was no clear statement of Congress' intention to intrude into traditional state criminal jurisdiction. *Id.* at 350.

51. 29 U.S.C. § 630(f) (1988).

constitutional or legal powers of the office.[52]

Thus, the broad definition of "employee" under the ADEA has two basic exceptions. First, it does not apply to elected officials, including elected judges.[53] Elected officials must rely on the fourteenth amendment's equal protection guarantee in their fight against mandatory retirement. Second, the ADEA does not apply to certain individuals who work for elected officials.[54] The types of employees falling under this second exception, and thus excluded from the Act, are: (1) any person chosen by an elected official to be on that person's staff; (2) an appointee on the policymaking level; or (3) "an immediate adviser with respect to the exercise of the constitutional or legal powers of the office."[55] Whether *appointed* judges fall within this second exemption and thus outside of the Act's protection is unclear. Resolution of this question turns on whether a judge appointed to office is involved in "policymaking."[56] The issue of whether judges are policymakers lies close to the heart of the judicial function.

C. *Application*

The circuit courts have expressed differing opinions[57] in interpreting the legislative intent concerning the ADEA exception for policymakers.[58] In *Gregory v. Ashcroft*,[59] the Eighth Circuit determined that Congress intended courts to apply a flexible standard in determining who is not an "employee." The *Gregory* court did not explicitly limit

52. *Id.*

53. *Id. See supra* notes 22-23 and accompanying text.

54. 29 U.S.C. § 630(f) (1988).

55. *Id.*

56. *See id.*

57. *Compare* Gregory v. Ashcroft, 898 F.2d 598, 603 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) *and* EEOC v. Massachusetts, 858 F.2d 52, 55 (lst Cir. 1988) (holding that the ADEA does not apply to appointed judges because Congress did not intend to overrule the intent of the people of the state) *with* EEOC v. Vermont, 904 F.2d 794, 798 (2d Cir. 1990) (holding that the Vermont Constitution's provision mandating retirement of state court judges at age 70 violated ADEA because state judges did not fall within the policymaking appointee exception).

58. The legislative history of the ADEA exemptions provides:

> It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees intent that this exemption shall be construed *narrowly*.

JOINT EXPLANATORY STATEMENT OF MANAGERS AT THE CONFERENCE ON H.R. 1746 TO FURTHER PROMOTE EQUAL EMPLOYMENT OPPORTUNITIES FOR AMERICAN WORKERS, 92d Congress, 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2179, 2180 (emphasis added).

59. 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

the ADEA exception to policymakers but applied it to all those at "the policymaking level."[60]

In applying this standard, the Eighth Circuit agreed with the First Circuit, reasoning that "judging" is the equivalent of " 'lawmaking to fill the interstices of authority found in constitutions, statutes, and precedents.' "[61] The *Gregory* court observed that it would be irrational to exclude elected state judges but to protect appointed judges from mandatory retirement because the powers and responsibilities of appointed and elected judges are identical.[62] Additionally, the *Gregory* court compared the phrase " 'on the policy-making level' " to such phrases as " 'exercise of discretion' " and " 'exercise of judgment,' " finding that all three phrases describe the performance of most judges.[63]

Similarly, the First Circuit rejected the argument that the ADEA overruled a Massachusetts constitutional provision mandating retirement of state judges at age seventy in *EEOC v. Massachusetts*.[64] Applying a flexible standard, the court held that the legislative history of the ADEA did not provide a clear statement that Congress "intended to overrule the clear intent of the people of a state in an area intimately and fundamentally related to that state's self-governance."[65] The panel recognized that judicial policymaking "is unlike that done in the executive and legislative branches of government. It nevertheless requires the same kind of decisionmaking, and the same kind of forward thinking that is required of 'appointees on the policy making level' in those other two branches of government."[66] The First Circuit determined that judges, although at times "thought to act as somewhat mechanized law-and-fact processors, scientifically applying settled principles of law to established fact patterns," nonetheless, are policymakers.[67] The court held that each judge, acting "as a separate and independent judicial officer, is at the very top of his

60. *Id.* at 603.

61. EEOC v. Massachusetts, 858 F.2d 52, 52 (1st Cir. 1988) (quoting EEOC v. Massachusetts, 680 F. Supp. 455, 462 (D. Mass. 1988)); *Gregory*, 898 F.2d at 601.

62. *Gregory*, 898 F.2d at 603 n.5. Arguably, all elected officials are subject to the electoral process and are thus tested at the polls. *See* 118 CONG. REC. S4492 (1972) (discussion between Senators Williams and Ervin regarding intention of exceptions to definition of employer). Congress may not have intended to interject the federal courts into this testing process. Rather, Congress may have intended to leave this core function to each state's political process. Just as elected judges are evaluated individually by voters, appointed judges may be evaluated individually and should not be subject to arbitrary termination on reaching a specific age.

63. *Gregory*, 898 F.2d at 601 (quoting *EEOC v. Massachusetts*, 858 F.2d at 55 (quoting *EEOC v. Massachusetts*, 680 F. Supp. at 462)).

64. 858 F.2d 52 (1st Cir. 1988).

65. *Id.* at 53.

66. *Id.* at 55.

67. *Id.* at 54-55.

particular 'policymaking' chain of command, responding . . . only to a higher appellate court."[68]

In contrast to the First and Eighth Circuits' interpretations, the Second Circuit came to the opposite conclusion, finding that appointed Vermont judges were shielded from mandatory retirement by the ADEA in *EEOC v. Vermont*.[69] The Second Circuit narrowly read the ADEA exceptions.[70] It determined that the exceptions did not apply to state court judges because, based on the exceptions' content and structure, Congress meant the policymaker category to comprise only those policymakers working "closely with and [who were] accountable to the [elected] official who appointed them."[71] The placement of the policymaking appointee category between the categories of personal staff and immediate advisors strongly suggested to the Second Circuit that this exclusion was limited to persons who had a relationship with or who were accountable to an elected official.[72] The court concluded that this relationship was essential to determining the scope and meaning of "appointee on the policymaking level."[73]

The court, in *EEOC v. Vermont*, further concluded that even if appointed judges are within the type of appointees referenced in the ADEA, they are not "policymakers" within the meaning of the statute. Instead, such judges resolve disputes and interpret policies established by the legislative and executive branches. Even when courts must determine legal principles or reconcile conflicting legal principles, the courts' primary function is to "fathom the nature and contours of policies established by the legislative and executive branches rather than to create or fashion new policy."[74] Therefore, Vermont's appointed judges were held to be "employees" within the meaning of the ADEA and were entitled to its protections.[75]

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68. *Id.* at 56.
69. 904 F.2d 794 (2d Cir. 1990).
70. *Id.* at 798.
71. *Id.* at 800.
72. *Id.* at 799-800.
73. *Id.* at 800.
74. *Id.*
75. *Id.* at 801. The exception for appointees found at 29 U.S.C. § 630(f) (1988) is identical to the exception for appointees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (1988). The only difference between the ADEA and Title VII definitions of employee results from a 1984 amendment to the ADEA covering United States citizens employed overseas. *See* Amendments of Older Americans Act, Pub. L. No. 98-459, 98 Stat. 1767, 1792 (1984) (codified at 29 U.S.C. § 630(f) (1988). During Senate debate on the definition of employer for Title VII purposes, concern for the exception of elected officials and certain of their appointees arose. Congressional concern focused on the broad coverage effected by the definition of employer in the bill so that the amendment would be "broad enough . . . to cover [employees such as] Governors of States, State supreme court justices, State legisla-

The Second Circuit held that appointed state court judges are protected by the ADEA because they are interpreters of legislative enactments and executive orders rather than makers of those laws. This holding is consistent with the historical view that the judiciary is independent of and separate from both the legislative and executive branches. This view was first expressed by Alexander Hamilton in *The Federalist*:

> The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgement; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgements.[76]

The framers sought to maintain the independence of the judiciary by limiting judges' roles to resolution of actual cases or controversies. Thus the federal courts cannot issue advisory opinions which give hypothetical advice about particular legislative or executive action.[77]

The framers' concerns with maintaining the separation of powers are echoed by the Supreme Court and the Missouri state courts.[78] Courts must apply the laws written and enacted by legislatures and leave to those legislatures the fundamental issues of public policy.[79] Although a court may consider policy implications, a judge's role as an integral part of a separate and independent branch of government is limited to interpreting executive or legislative policies, not to the development of those policies.[80]

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tors, and so forth." 118 CONG. REC. 4096 (1972) (remarks of Sen. Ervin). Senator Ervin proposed an amendment to exclude those elected officials and certain of their appointees. These appointees were described during the Senate debate as those "who are in a close personal relationship and an immediate relationship with [the elected official]." *Id.* at 4492-93.

76. THE FEDERALIST No. 78, at 490 (A. Hamilton) (B. Wright ed. 1961).

77. *See* Flast v. Cohen, 392 U.S. 83, 94-95 (1968). The policy that prohibits federal courts from giving advisory opinions is implied in article III of the Constitution. *Id.*

78. *See* Morrison v. Olson, 108 S. Ct. 2597 (1988) (Powers vested in Special Division do not violate article III, under which executive or administrative duties of a nonjudicial nature may not be imposed on article III judges.); Buckley v. Valeo, 424 U.S. 1, 120-44 (1976) (Because tasks performed by Federal Election Commission were executive in nature, Congress had no constitutional right to appoint its officers); *In re* Pate, 107 S.W.2d 157, 161 (Mo. Ct. App. 1937) (Each of the three branches of government may exercise only the powers given that branch.).

79. *See* Brinkmann v. Common School Dist. No. 27, 238 S.W.2d 1 (Mo. Ct. App. 1951), *aff'd*, 255 S.W.2d 770 (Mo. 1953).

80. State v. One "Jack and Jill" Pinball Machine, 224 S.W.2d 854, 859 (Mo. Ct. App. 1949).

III. CONSTITUTIONALITY OF MANDATORY RETIREMENT

Even if state judges are outside the protection of the ADEA, as the First and Eighth Circuits have held, the equal protection clause of the fourteenth amendment may offer safeguards against forced retirement for both appointed and elected judges.[81] Although the minimal rational basis test has been applied to age discrimination cases in the past, the use of an intermediate standard of review may be more appropriate. In other words, a statute's age-based classification should be substantially related to an important governmental objective to pass judicial scrutiny.[82] Application of an intermediate standard of review would challenge rather than perpetuate the outdated and unfounded stereotypes on which age-based classifications are founded.

The Supreme Court issued its first opinion on mandatory retirement in *Massachusetts Board of Retirement v. Murgia*,[83] which involved a state law requiring retirement of state police at age fifty. The Court summarized its standard of review in equal protection cases: "Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."[84] The Court concluded that mandatory retirement at age fifty for state police under the Massa-

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81. The equal protection clause provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Forced termination of a person's employment based solely on age may also run afoul of the ninth amendment's declaration that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* amend. IX. The ninth amendment suggests "that the set of rights protected by the Constitution is not closed and that judges may be authorized to protect these 'unenumerated' rights on occasion." Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 1 (1988). The right to choose and follow a profession has been recognized as one of these unenumerated, extra-Constitutional, fundamental rights "retained" by the people. *Id.* at 32 n.106 (citing W. MURPHY, J. FLEMING & W. HARRIS, AMERICAN CONSTITUTIONAL INTERPRETATION 1083-84 (1986)). *See also* L. TRIBE & M. DORF, ON READING THE CONSTITUTION 110-11 (1991).

82. This test is derived from Craig v. Boren, 429 U.S. 190, 197 (1976). *See infra* text accompanying notes 98-102.

83. 427 U.S. 307 (1976).

84. *Id.* at 312 (footnotes omitted). The exercise of fundamental rights, one of the two criteria allowing for strict scrutiny review, involves those rights that are explicitly or implicitly guaranteed by the Constitution. In cases where fundamental rights or liberties are at issue, the court will use the strict scrutiny standard of review. Consequently, the Court will determine whether the legislature's classification is necessary to promote a compelling or overriding governmental interest. *See generally* L. TRIBE, *supra* note 34, § 16-7, at 1454 (Legislative classifications are unconstitutional

chusetts' statute neither interfered with the exercise of a fundamental right nor operated to the disadvantage of a suspect class.[85] It then applied minimal scrutiny and upheld the statute.

Whether *Murgia* is dispositive of the constitutionality of all other mandatory age retirement laws is open to question. The law enforcement profession under consideration in *Murgia* involved physical fitness and the physical protection of the public as opposed to mental capacity. The police officers' duties involved vigorous physical demands and the effective level of protection afforded the public was dependent upon each officer's physical abilities. By applying the lowest level of scrutiny, the Court avoided considering the merits of the arguments proposed by those opposing mandatory retirement. Instead, the Court found that the state's goal of assuring the physical preparedness of the police force was legitimate. The *Murgia* Court also concluded that, because "physical ability generally declines with age," mandatory retirement of police officers was rationally related

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if they distribute burdens or benefits in a manner inconsistent with fundamental rights without a compelling governmental justification.).

As noted in *Murgia*, those cases involving a suspect class also require an increased level of scrutiny and a compelling governmental interest. *Murgia*, 427 U.S. at 312. Laws that classify individuals on the basis of race or national origin are suspect. *See generally* L. TRIBE, *supra* note 34, § 16-13, at 1465-66, § 16-14, at 1466-74 (discussing reasons for using strict scrutiny). Although it could be argued that a classification based on age is always "suspect," to qualify for suspect class treatment under a strict scrutiny standard, prior cases have consistently required "traditional indicia of suspectness." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). These "traditional indicia" include: that the disadvantaged class be a "discrete and insular minorit[y]," United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938), and that the class has historically been treated in a purposefully unequal way, or placed in a position of political powerlessness. *Rodriguez*, 411 U.S. at 28. While admitting that the state could have chosen to individually test for fitness past age 50, in *Murgia* the Court refused to find that people over age 50 constitute a "discrete and insular" group worthy of extraordinary protection from the political process because "[old age] marks a stage that each of us will reach if we live out our normal span." *Murgia*, 427 U.S. at 313-14.

85. *Murgia*, 427 U.S. at 313. One commentator disagrees with the Court's conclusion. Professor Abramson notes that "[t]he right of the individual to engage in any lawful occupation has been repeatedly recognized by the Supreme Court as falling within the concept of 'liberty' articulated in the fourteenth amendment." Abramson, *Compulsory Retirement, the Constitution and the Murgia Case*, 42 MO. L. REV. 25, 49 (1977). Professor Abramson claims that the Court stumbled on the question of employment as a fundamental right and states:

> While the elderly are not in the same class as those individuals classified on the basis of race, they are arguably subject to discrimination when they are denied an important benefit such as employment. The Court's decision . . . [that the right to work is not fundamental] disregards the significant nature of the benefits denied and the hardships which may result.

Id. at 50. *See also* Comment, O'Neil v. Baine: *Application of Middle-Level Scrutiny to Old-Age Classifications*, 127 U. PA. L. REV. 798, 801 n.16 (1979).

to that goal.[86]

Justice Marshall, dissenting in *Murgia*, urged application of a "flexible equal protection standard" using a heightened level of scrutiny that may have invalidated the statute.[87] Justice Marshall complained that "pigeonholing fails to consider openly the character of the classification in question, the relative importance to individuals in the class discriminated against of 'the governmental benefits that they do not receive, and the state interests asserted in support of the classification.' "[88] Dissenting in both *Murgia*[89] and *Vance v. Bradley*,[90] Justice Marshall argued that mandatory retirement provisions warrant more than minimal equal protection review because of the importance of the interests at stake and the prevalence of discrimination against the elderly.[91]

The intermediate standard of review proposed by Justice Marshall would rebut the strong presumption of constitutionality that exists under the rational basis test. It also would forbid the use of an arbitrary age-based classification system.[92]

A. Background

The Supreme Court has been reluctant to apply the rubber-stamp of minimal review or the death-blow of strict scrutiny in all situations. Therefore, a third intermediate level of analysis has been used.[93] The Court recognizes that the all-or-nothing choice between

86. *Murgia*, 427 U.S. at 315. *See generally* Comment, *supra* note 85, at 798 (discussing the judicial history of mandatory retirement in the United States).

87. *Murgia*, 427 U.S. at 325 (Marshall, J., dissenting).

88. Comment, *supra* note 85, at 805 (quoting *Murgia*, 427 U.S. at 318 (Marshall, J., dissenting)).

89. 427 U.S. at 318.

90. 440 U.S. 93 (1979).

91. In *Bradley*, the Court again considered an equal protection challenge to a mandatory retirement rule. The challenge related to the Foreign Service retirement system which affected federal employees and stressed the absence of any comparable requirement for federal Civil Service employees. Following the standard of review established in *Murgia*, the Court rejected the constitutional challenge in *Bradley*. The *Bradley* Court held that when the challenged legislative classification is based on age, only the rational basis test need be applied. Justice White, writing for the majority, explained the propriety of minimum rationality review by noting that "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id.* at 97.

92. A state's constitution may be construed as guaranteeing the citizens of its state even more protection than federal provisions. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (lauding activism of state courts in their expansion of individual rights under state constitutions).

93. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (intermediate scrutiny applied to classification based on gender); Craig v. Boren, 429 U.S.

minimum rationality and strict scrutiny does not suit the broad range of situations arising under the equal protection clause. The Court has invoked this intermediate level of scrutiny in cases where classifications are based on characteristics determined at birth.[94]

In cases involving discrimination based on gender and illegitimacy, for instance, the Court has used this intermediate level of equal protection analysis, applying a heightened, although not strict, scrutiny. As stated in *Murgia*, the strict scrutiny test requires that the legislature's provisions be necessary to serve a compelling state interest.[95] In contrast, the rational basis standard merely requires that judicial inquiry be limited to whether the statutory scheme is rationally related to a legitimate state purpose. Unlike either of the previous tests, the intermediate level of review has been used to discern whether a discriminatory provision serves an important or significant governmental objective and whether the classification is "substantially related" to achieving that objective. In this middle-level review, the legislative objective must be important and the court may scrutinize the ends and means of the challenged statute, instead of merely pronouncing it valid or invalid under traditional analyses.[96]

Almost every governmental interest urged in support of a statute can be deemed "important" and therefore sufficient to meet the first prong of this intermediate scrutiny test. The requirement that the

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190 (1976) (intermediate scrutiny applied to classification based on gender); Mills v. Habluetzel, 456 U.S. 91 (1982) (intermediate scrutiny applied to classification based on illegitimacy).

This middle-level review is not always candidly admitted by the Court and often has been hidden behind a mask of purported minimum rationality. It has been argued that the use of intermediate scrutiny is unacceptable because the triggering mechanism for heightened scrutiny is hidden. This concealment confuses legislatures and lower courts, leaving the courts unaccountable for their decisions and free to attach their own values onto the equal protection clause. Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 800-02 (1987). The following cases, cited in Note *supra*, at 779, 785, are examples of the Court's use of intermediate scrutiny under the guise of the rational basis label: City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (Mental retardation is not quasi-suspect classification.); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (Guarantees of equal protection were violated by unequal division of benefits between similarly situated residents.); Williams v. Vermont, 472 U.S. 14 (1985) (In-state and out-state residents must be treated similarly as to automobile tax.); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (Discriminating against nonresidents is not legitimate state purpose.); Zobel v. Williams, 457 U.S. 55 (1982) (No legitimate interest is served in distinguishing between residents based on the length of time they have lived in the state.).

94. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (applying intermediate level scrutiny to gender); Trimble v. Gordon, 430 U.S. 762 (1977) (applying intermediate level scrutiny to illegitimate children).

95. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

96. Plyler v. Doe, 457 U.S. 202, 218 n.16 (1982). *See also* Note, *supra* note 93, at 784.

means chosen be "substantially related" to the end has had considerably more effect. The second prong of the intermediate scrutiny standard of review is more likely to be satisfied if there are no better alternatives available to carry out the asserted objectives.[97]

This intermediate standard was formulated in *Craig v. Boren*,[98] a successful challenge to a gender-based classification. In *Craig*, an Oklahoma statute prohibited the sale of 3.2% beer to males under age twenty-one and females under age eighteen.[99] The Court pronounced that statutes incorporating "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[100] The court determined that the state's concern for traffic fatalities did not justify the distinction drawn between males and females in the sale of 3.2% beer.[101]

Although the *Craig* Court did not specifically state that it was formulating a new standard of judicial review, the concurring and dissenting opinions viewed the majority as having formulated a third, middle-level of scrutiny. The majority's close examination of evidence provided by the state to support its argument that the statute was necessary to prevent traffic fatalities evidenced a departure from the standard of review typically applied when "fundamental" constitutional rights and "suspect classes" were absent. The majority in *Craig* sharply criticized what it called outdated misconceptions and over-broad generalizations about females and their use of alcohol as "loose-fitting" characterizations that could not support, because of their factual inaccuracy, the statute under review.[102]

Classification of persons based on gender is analogous to classifications of persons based on age.[103] Both classifications have been

97. *See* Trimble v. Gordon, 430 U.S. 762 (1977). The Court rejected a statute that barred illegitimate children from inheriting from their natural fathers under intestacy statutes. The *Trimble* Court held that a more limited rule could have been formulated, such as one excluding only those illegitimate children whose paternity had not been established during prior court proceedings. *Id.* at 772. Such a limited rule would have met the state's objectives of barring false claims and easing the judiciary's burden of resolving paternity claims during estate proceedings. Yet, the rule would have disadvantaged only some illegitimate children. *Id.* at 776.

98. 429 U.S. 190 (1976).

99. The Oklahoma statute stated: "It shall be unlawful for any person . . . to sell, barter or give to any minor any beverage containing more than one-half of one percent of alcohol measured by volume and not more than three and two-tenths (3.2) percent of alcohol measured by weight." *Id.* at 191 n.1 (quoting OKLA. STAT. tit. 37, § 241 (1958 and Supp. 1976)).

100. *Id.* at 197.

101. *Id.* at 201-03.

102. *Id.* at 199.

103. Robert N. Butler, founding director of the National Institute on Aging, has defined "ageism" as:

subjected to stereotypes. Women have been perceived primarily as wives and dependents who lack business sense, the weaker sex whose place is "in the home" rather than in the "marketplace and world of ideas."[104] Similarly, older individuals have been perceived as incompetent, with deteriorating abilities.[105] These "loose-fitting" and stereotypical characterizations are incapable of supporting state constitutional or statutory schemes that are, ultimately, premised on their accuracy. Age, like gender, is an immutable characteristic determined solely by the accidental timing and circumstances of birth. Consequently, discrimination based on age violates a basic concept of our society "that legal burdens should bear some relationship to individual responsibility . . . ."[106] Age, like gender, is in most instances irrelevant to one's ability to perform. Therefore, the intermediate scrutiny test, which is applied to gender classification, should be applied to discriminatory provisions based on age classification.[107]

B. Intermediate Scrutiny Applied

The intermediate level of scrutiny requires that the means chosen bear a fair and substantial relationship to a legitimate state end.[108] The *Gregory* court acknowledged several important reasons for the

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> a systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills . . . . Ageism allows the younger generation to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.

Butler, *Dispelling Ageism: The Cross-Cutting Intervention*, 503 THE ANNALS 138, 139 (1989) (footnote omitted).

104. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975). The Court invalidated Utah's differential age-of-majority statute, notwithstanding the statute's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds. *Id.*

105. *See infra* note 112 and accompanying text.

106. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972) (applying this reasoning to illegitimate children).

107. It has been suggested that the proper standard of review should be strict scrutiny because the effect of mandatory retirement laws on the judiciary is to inhibit access to the ballots and to limit voting rights—both of which are fundamental rights requiring a higher standard of review. In an amicus curiae brief filed with the United States Supreme Court in *Gregory v. Ashcroft*, Judge John W. Keefe concluded that Missouri's mandatory retirement law "is not necessary to promote any articulated compelling state interest, is not drafted in the least drastic means and cannot withstand strict scrutiny." Brief of Amicus Curiae in Support of Petitioners, The Honorable John W. Keefe, Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (brief filed with Supreme Court).

108. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

mandatory retirement provision for state judges.[109] These reasons were articulated by the Missouri Supreme Court more than twelve years earlier in *O'Neil v. Baine*.[110] The purported justifications for mandatory retirement include:

> (1) the "interest in a judicial system of the highest caliber which justifies" the withdrawal from the bench of the group of judges in which disabilities related to aging are most likely to occur;
> (2) "the advantages of an objective line 'to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not;' "
> (3) the judicial opportunities opened up to younger lawyers with "fresh ideas and techniques;"
> (4) "the interest in assuring 'predictability and ease in establishing and administering judge's pension plans.' "[111]

The *Gregory* court noted that other courts had approved similar justifications for mandatory retirement, including the elimination of the " 'unpleasantness of selectively removing aged . . . judges;' "[112] the treatment of " 'judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode;' "[113] and elimination of " 'the anguish, time, delay, expense, and embarrassment of the supervision and removal of older judges of failing competence pursuant to an evaluation process.' "[114]

In *Gregory*, neither the district court nor the Eighth Circuit examined whether Missouri's reasons were supported by data or by stereotypes. In adhering to the rational basis test, the court reasoned that the legislature could assume that mandatory retirement serves this goal despite empirical evidence showing that age has no bearing on performance.[115] Had the court applied the intermediate standard

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109. Gregory v. Ashcroft, 898 F.2d 598, 605 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

110. 568 S.W.2d 761, 766-67 (Mo. 1978).

111. *Gregory*, 898 F.2d at 605 (quoting *O'Neil*, 568 S.W.2d at 766-67).

112. *Id.* (quoting Malmed v. Thornburgh, 621 F.2d 565, 572 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980) (The Third Circuit held that it was not irrational for Pennsylvania to be concerned with the senility of its judges and upheld a state constitutional provision requiring state judges to retire at age 70.)).

113. *Id.* (quoting Trafelet v. Thompson, 594 F.2d 623, 627 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979) (The Seventh Circuit held that the Illinois Compulsory Retirement of Judges Act, which automatically retires a judge after the first general election following his 70th birthday, does not violate either the United States or the Illinois Constitution.)).

114. *Id.* (quoting Apkin v. Treasurer and Receiver General, 401 Mass. 427, 435-36, 517 N.E.2d 141, 146 (1988) (The Massachusetts Supreme Court held that the ADEA does not preempt the mandate of the state constitution that judges must retire at the age of 70.)).

115. *Id.* at 606. The *Gregory* court stated: "One might disagree with some or all of

of review, the court could have focused on these rationales and their supporting evidence or lack of evidence.[116]

Medical research challenges the *Gregory* court's first assumption that disabilities appear at age seventy.[117] Recent studies show no decline in average intelligence, at least until age eighty. In fact, it appears that some intellectual functions remain stable with age while others may actually improve.[118] The presumption of incompetency at age seventy is also rebutted by the existence of a federal judiciary which is not subject to mandatory retirement. The ages of the fifty-six judges within the Eighth Circuit's district courts range between forty-three and eighty-eight.[119] This wide range in age evidences a balance between the fresh ideas of younger judges and the wisdom of experienced judges.

Further, Missouri has shown its willingness to continue to employ judges past the age of seventy by its practice of granting senior status to certain judges—giving them the same powers as active judges.[120] This undermines the state's argument that only those judges who are under age seventy have the abilities needed to maintain a high caliber judiciary. This line, drawn at age seventy, bears no relationship to performance and is as unrelated to the state's purpose of a qualified judiciary as a line drawn at age thirty.[121]

The state's second reason for mandatory retirement, the avoidance of tedious and perplexing decisions regarding a judge's abilities,[122] is also inconsistent with its actual practice. Missouri has in place a commission on retirement, removal and discipline of its judi-

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these rationales on either empirical or philosophical grounds and yet be unable properly to conclude that a state which thinks otherwise lacks a rational basis for its mandatory retirement rule for judges." *Id.*

116. One court applied the rational basis test and found that the mandatory retirement system was not rationally related to the state's objectives of increasing available judicial manpower or eliminating the embarrassment of removing a senile judge. *See* Sabo v. Casey, 757 F. Supp. 587, 604 (E.D. Pa. 1991).

117. Robert N. Butler, founding director of the National Institute on Aging, asserts that "senility is not inevitable with age; rather, it is a function of a variety of brain diseases, most notably Alzheimer's disease and multi-infarct dementia." Butler, *supra* note 103, at 142. Butler suggests that the belief that all old people are senile and debilitated is a myth stemming from our fear of aging. *Id.* at 146.

118. "[T]here is also evidence that healthy older adults can improve their intellectual performance following cognitive training and may even demonstrate superior performance in select domains such as knowledge about their profession or life matters." *Aging of Intelligence*, *supra* note 9, at 44.

119. *See generally* I Almanac of the Federal Judiciary, 1-45 (1991).

120. MO. CONST. art. V, § 26(3) (1976).

121. "[I]t is always important to remember that persons of the same chronological age are not identical as to their mental status. There are 70-year-olds who function like 30-year-olds and vice versa." *Aging of Intelligence*, *supra* note 9, at 46.

122. *See* Gregory v. Ashcroft, 898 F.2d 598, 605 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

ciary.[123] The commission was formed to "receive and investigate all requests and suggestions for retirement for disability, and all complaints concerning misconduct of all judges, members of the judicial commissions, and of this commission."[124] The commission has the authority to require that the state supreme court retire any judge who is incapable of discharging the duties of judicial office with efficiency because of permanent physical or mental disability.[125] Disabilities may include the commission of a crime, misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency, and any offense involving moral turpitude or oppression in office.[126] Thus, there is an alternative already in place to ensure the quality of all Missouri judiciary that is less restrictive than mandatory retirement. A rule of mandatory retirement at age seventy is unnecessary because the commission is constitutionally mandated to vigilantly evaluate and remove judges who are mentally or physically unfit, regardless of age.

The uncomfortableness encountered by legislative or judicial committees making these judgments must be weighed against the unfairness of the restrictions placed on qualified judges who reach the age of seventy. By attempting to draw an objective line at age seventy, the state is avoiding individualized treatment of older employees, an action which Congress has determined to be against public policy.[127] Efficiency should not be substituted for fairness. By requiring retirement at a specified age, this class of people are denied access to full employment. Productive and capable employees are being excluded because of assumptions based on stereotypes regarding their performance.

The state's third purpose in requiring retirement of its judges is to encourage the placement of younger judges on the bench.[128] However, demographic evidence indicates that the older population has increased far more rapidly than the rest of the population for most of this century and the number of youth entering the labor market has

123. Mo. CONST. art. V, § 24 (1970, amended 1976).

124. *Id.* § 24(1).

125. *Id.* § 24(2).

126. *Id.* § 24(3).

127. Employment opportunities are not to be denied to a person because of stereotypes about a group to which that person belongs. H.R. REP. No. 756, 99th Cong., 2d Sess. 5 (1986). During oral argument before the Supreme Court on March 18, 1991, Justice Stevens questioned whether Missouri could justify a mandatory retirement age of 50. When Deputy Attorney General James B. Deutsch responded "yes," Justice Stevens suggested retirement at age 35. The Deputy Attorney General agreed that, although retirement at age 35 would move judges through the system even faster, this would be too fast. 59 U.S.L.W. 3685 (April 9, 1991).

128. Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

declined significantly.[129] America is growing older. In the last two decades, the 65-plus population grew by 56% while the 16-64 population increased by only 38%.[130]

Even if mandatory retirement ensures the input of new ideas and promotional opportunities for younger persons, it also deprives the court of the talents of its most experienced legal minds. Further, this purpose assumes that younger judges are more able, intelligent, creative, dedicated, and productive than older judges.[131] However, older judges, who have established track records of performance and commitment, typically have greater independence than their younger associates and no longer need to be students in the workplace. "They can afford to be teachers . . . ."[132]

The state's final reason for imposing mandatory retirement is the resulting administrative ease of handling pension plans.[133] Again, this purpose is refuted by Missouri's actual treatment of other state employees. Like most states, Missouri administers pension plans covering employees who are protected from mandatory retirement under the ADEA. There is no reason why the administration of pension plans for judges would be any more difficult. Further, administrative ease and convenience are not sufficient reasons to discriminate based on gender,[134] nor should they be relied on to discriminate based on age.

IV. Alternatives to Mandatory Retirement

The existence of less restrictive alternatives casts doubt on whether the relationship between the mandatory retirement provisions and the desired results set forth by Missouri is substantial. In addition to the safeguards of judicial quality already in place in Missouri,[135] another alternative to mandatory retirement is legislation that would require a judge who wishes to continue employment past age seventy to take physical and mental ability examinations. The

129. The number of people age 16-19 entering the labor force declined from 9,351,000 in 1977 to 7,988,000 in 1987. Statistics, *supra* note 41, at 77.

130. The 65-plus population grew from 18,029,000 in 1967 to 28,108,000 in 1987 (a 56% increase). The population in the 16-64 age group grew from 111,845,000 in 1967 to 154,645,000 in 1987 (a 38% increase). *Id.* at 16, 38.

131. Schrank & Waring, *Older Workers: Ambivalence and Interventions*, in 503 The Annals 113, 117 (1989).

132. *Id.*

133. *See* Gregory v. Ashcroft, 898 F.2d 598, 605 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

134. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971). The Court held a statute preferring men over women as administrators of estates unconstitutional, rejecting the contention that the preference for men reduced the workload of the courts by eliminating hearings on the merits. *Id.* at 76-77.

135. *See supra* text accompanying notes 124-27.

evaluation process could also include a study of the judge's judicial performance. Under this scheme, the assumption of disability at age seventy would be a rebuttable presumption. This rebuttable presumption of disability would meet Missouri's objectives of ensuring a qualified judiciary and yet would not disadvantage judges who wish to remain on the bench and who are fully capable of doing so. Such an evaluation process would incorporate an element of fairness into the retirement provision and promote the retention of personal dignity and individuality while responding to governmental concerns regarding judicial proficiency. This program would also treat elected and appointed judges similarly and allow an exception to the general rule of arbitrary imposition of incapacity at age seventy.

It can be argued that this proposal of individualized testing at age seventy would cause embarrassment to unqualified judges who challenge the mandatory retirement provision. Although the Constitution provides equal protection to all persons, it does not provide a right to avoid embarrassment. The potential for embarrassment to both judges and the reviewing committee is a necessary cost to ensure that fully competent judges are provided an opportunity to remain on the bench past an arbitrary age limit.

Another alternative is to formulate clear public standards for judicial competency, including the public's right to be informed about judges' illnesses and their effect on the work of the court. Internal and informal mechanisms, such as peer group pressure, would be exerted on judges who are incapable of performing up to these standards. Moreover, the mass media would exert pressure on disabled judges to abdicate their seats. Clear public standards for judicial competency ensure that voters are not denied the opportunity to reelect competent judges simply because they are over seventy.

Missouri's objectives of maintaining a high quality judiciary are important. However, the existence of less restrictive alternatives indicates that the method chosen to ensure the quality of the state's judiciary—the imposition of mandatory retirement at age seventy—lacks a fair and substantial relationship to that goal and thus cannot withstand the intermediate scrutiny test.

CONCLUSION

A tenaciously held principle of our society arising out of the Constitution itself, is that each person should be treated as an individual, rather than as a statistic or as a stereotypic member of a group. Yet, mandatory retirement treats all judges who reach the age of seventy as if they were incompetent. To assume that seventy-year-old judges are unfit to perform their judicial duties, simply because some persons of like age have certain characteristics, is to condemn by statistical stereotype. By upholding mandatory retirement at a specific age,

the Court would be adhering to "an obsolete scheme of retirement reflecting an ancient, illogical and now repudiated policy,"[136] and substituting chronological age for individualized physical/mental evaluation. Mandatory retirement itself, at any age, can have devastating effects on an individual's mental and physical ability.[137] Remaining active and involved as one grows older contributes to the maintenance and even improvement of intellectual functioning.[138]

Older citizens suffer from discrimination based on generalizations that are inaccurate for many, if not most. The increasing sensitivity of legislators to their plight, evidenced by the enactment of the ADEA and similar state statutes, has eliminated age discrimination for some.

As they discuss *Gregory*, each Supreme Court Justice need only look to his or her right or left to discover that age itself is not an accurate indicator of judicial ability.

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136. Brief of Amicus Curiae in Support of Petitioners, Joint Appendix at 9, Gregory v. Ashcroft, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990) (brief filed with Supreme Court).

137. *See* Somers, *Social, Economic, and Health Aspects of Mandatory Retirement*, 6 J. OF HEALTH, POLITICS, POLICY & LAW 542, 547 (1981).

138. Butler, *supra* note 103, at 146.