DOES AGE OF THE JUDGE MATTER? EXPLAINING APPELLATE COURT DECISION MAKING IN AGE DISCRIMINATION CASES

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ABSTRACT

The federal Courts of Appeal have become the court of last appeal for most cases at the federal level. Unlike the Supreme Court the Courts of Appeal do not enjoy discretionary power over their docket. Together this means that the Courts of Appeal will continue to impact public policy through their decisions and interpretations. The importance of this role requires the careful study of the decision making process used by the judges. Several models exist in the political science literature that seek to explain the process. One model suggests that ideology is the primary factor in judicial decision making on the Appeals Court. Another model suggests that personal attributes of the individual judges play a part in their voting patterns. In this research I test several personal attributes and find evidence to support the personal attributes model and find no significant support for the ideology model. In age discrimination cases the age of the judge matters to the outcome of the case.

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Introduction

Like discrimination that is based on race, gender, or ethnicity, age discrimination is largely due to the stereotypical idea that age reduces both the cognitive and productive abilities of workers (Roscigno et al. 2007). With improvements in nutrition and health care, this stereotype is quickly becoming implausible. Americans are living longer, healthier lives. Gregory examined lifespan information and found that in 1983, people over 65 outnumbered teenagers. He went on to predict that by 2025, teens would be outnumbered 2-1 by those 65 or older. He further predicted that "nearly all middle-aged or older employees will experience some form of age related employment discrimination" (2001, 1). This discrimination will primarily take the form of premature separation from employment. In tough economic times, this can take the form of reduction in force (RIF) actions where employees are unilaterally terminated, or it can simply be the forced retirement of individuals. Businesses forced to reduce their employment roles often look to the most senior staff for the first cuts (Valletta 1999). This could be a result of the higher wages and benefits costs that older workers may accrue, or it could be the result of stereotypical attitudes by younger managers about senior employees. Roscigno et al. (2007) pointed to seven studies that all found substantial evidence of ageist preconceptions. "The literature is clear that biases and preconceptions among the general population exist, and that respondents are relatively unabashed in their views of older Americans" (2007, 314). Swift (2006) surveyed business managers and found a distinct preference for younger workers despite the fact that older workers had fewer turnovers, greater job commitment, and less absenteeism than younger workers. Whether forced job separations result from ageist stereotypes or the honest effort to save the most money from job cutting measures, long-term employees are bearing the brunt of continuing job cuts (Roscigno et al. 2007). As our society continues to age and businesses respond to a slumping globalized economy, we can expect a worsening of the age discrimination problem as long-term employees continue to be seen as the best place to make necessary payroll reductions. As these trends continue, it is likely that the number of age discrimination cases filed will continue their meteoric rise (Henry and Jennings 2004, Levitz and Shishkin 2009).

Public law scholars have put forth several competing theories of judicial decision making. The most prominent judicial decision making theories examine the role of law and precedent, policy preferences of the judge (judicial ideology) and personal characteristics or attributes of the judge (Gibson 1978, Mishler William and Sheehan, 1996, Segal and Spaeth 2002). Research into these factors has provided evidence that policy preferences are significant predictors of judicial behavior. Segal and Spaeth (2002) found that personal policy preferences were the strongest predictor of judicial voting behavior. Maveety (2006) found that individual political ideology was an important aspect of court rulings. Peresie (2005) found that gender influences voting behavior in a significant manner. Manning, Carroll, and Carp (2004) first

tested the idea that age may be one such significant factor. The literature strongly supports the idea that personal characteristics do play a part in determining how judges vote. In light of this evidence it is prudent to further investigate what personal characteristics are important to judicial outcomes.

The objective of this research is to investigate the role that personal characteristics play in judging. Since increasing age is eventually a factor in every judge's life it is crucial to understand what role, if any, judicial age plays in their decisions. To narrow the scope of this question, this research focuses on whether judicial age influences decisions in age discrimination cases at the U.S. Court of Appeals level. Prior research by Manning, Carroll, and Carp (2004) examined the role of age in decision making at the U.S. District Court level (federal trial courts). The authors found that age (measured as age cohorts) made a significant impact on judicial decisions. Their results showed that in the district courts older judges had higher predicted probabilities of voting for the claimant in age discrimination cases. To strengthen the understanding of the influence of age on judicial decision making and to make an original contribution to this body of work, this research tests a similar research question on a different set of judges; that is the federal appellate courts.

In the sections that follow I describe the problems leading toward an increase in age discrimination cases and provide a short overview of age discrimination legislation and judicial interpretations. Following that is an overview of judicial decision making theories that have been applied to the federal appellate courts. I then turn to a summary of the methodology and data used in this research and then explain the findings and present some preliminary conclusions.

The Increasing Relevance of "Ageism" in Employment: Literature Review

The average age of U.S. citizens is increasing at a rapid rate. U.S. Census Bureau estimates show that both the number of people in the United States over the age of 60 and the average age increased every year between 2000 and 2007. Neumark declared that an aging population will create a "significant public policy challenges over the next few decades" (2009, 42). As the nation ages, so does the work force. According to the U.S. Department of Labor Statistics, over 40% of people older than 55 are still in the work force as of January 2009. Five years earlier, 36% of people over 55 were still employed. Nine years before, only 32% were still working (Levitz and Shishkin 2009). Unfortunately, as people are living longer their opportunities to work are limited given the current economic downturn which is forcing businesses to shed employees. These forced separations have lead to a dramatic increase in employment age discrimination claims.

The Equal Employment Opportunity Commission (EEOC) is the federal agency now tasked with investigating discrimination claims. Their records show a 29% increase in age discrimination cases between September 2007 and September 2008 (Levitt and Shishkin 2009). During that same time frame, reported cases of racial and disability discrimination increased by only 10% and 11% respectively (Levitz and Shishkin 2009).

As the U.S. economy continues to decline businesses will continue to shed employees. As this happens, many more employers and ex-employees may be enmeshed in age discrimination suits. The recent increase in these cases, the rising average age of citizens, and the sagging economy combine to create a public policy crisis for productive senior citizens. This problem is exacerbated by other public policies including higher age thresholds for full retirement benefits from Social Security, tighter Medicare budgets, and climbing health care costs, which together place tremendous pressure on people to remain in the workforce longer than previous generations. Typically though, employees with the longest tenure tend to be the most expensive to businesses in both salaries and benefits. Older workers are caught between the financial necessities of continued employment and market forces that encourage the disemployment of older workers. Beyond the needs of individuals lies a dramatic societal impact that requires a cohesive set of public policies. Neumark suggested that the study of employment of older citizens is important "because continued employment implies lower dependency ratios, greater income, more tax revenues, and decreased public expenditures on health insurance, retirement benefits, and income support" (2009 42). Gregory likened the termination of older workers to the "industrial equivalent of capital punishment" due to the difficulty of finding new employment (2001 7). These individual and societal level problems clearly demonstrate the need for further study of this problem and for the creation of a unified public policy to deal with it effectively.

The problem of age related employment discrimination originated as primarily a professional white-male phenomenon.[1] More recent research shows a different trend in the demographics of age discrimination plaintiffs.[2] While these studies showed some variance in the demographics of the actual plaintiffs in age discrimination cases, they all pointed to some consistent results. Over the course of three decades, research has shown that managerial or skilled workers are the most likely to file age discrimination grievances. In the past, white males were more likely to be plaintiffs, but as women and minorities establish themselves in these positions; their likelihood of being affected by age discrimination has also increased (Donohue and Siegelman 1991, Henry and Jennings 2004). Another statistic that has remained fairly constant is the fact that employers win most cases filed under ADEA (Neumark 2003, Rutherglen 1995, Donohue and Siegelman 1991, and Schuster and Miller 1984). Neumark (2003) found that in 1999, more than 85% of age discrimination cases did not produce enough evidence of employer misdeeds to prove a violation occurred.

Legislative Background of ADEA

The 1960s have come to be known as the civil rights decade due to monumental changes in legislation and an increasingly popular consciousness of equality. The Civil Rights Act (CRA) of 1964 forbids employment discrimination on the basis of race, gender, or national origin. Although it has been amended several times, the relevant section of the CRA, Title VII, was never expanded to include age as a protected classification. This omission left older workers

[1]Schuster and Miller (1984) found that 57% of age discrimination cases were brought by professional employees and 67% were brought by white males.

[2] Oyer and Schaefer (2002) found an increase in the number of women and minorities filing age discrimination claims.

vulnerable to discriminatory employment actions. Recognizing this deficiency, Congress enacted the Age Discrimination in Employment Act of 1967[3] (ADEA). This federal statute dealt with discrimination, although in these cases, the primary basis for discrimination was not stereotypes based on skin color but on age. Many of the same activities made illegal by Title VII were also illegal under the ADEA (Neumark 2003). The ADEA forbids the discriminatory use of age to hire, fire, provide, or withhold job related benefits. Age discrimination differs from other forms of discrimination because it compares people not to others who happen to share some common trait, but compares them only to their former selves. Congress recognized this form of discrimination existed and so set up three broad goals for the ADEA law. Onken paraphrased the goals found in the preamble of the law as "ADEA intended to (1) promote employment in older workers, (2) prohibit arbitrary age discrimination, and (3) help employers find ways of meeting problems arising from the impact of age on employment" (2001, 4). These goals are at odds with the policy choices made in the Social Security Act of 1935 which created financial incentives for people to exit the workplace at a preselected age and fostered the idea that older employees are economically dependent on younger ones (Onken 2001). Like the other civil rights protection laws the ADEA was patterned after, it contained some serious flaws that weakened the law.

As originally written, the ADEA contained anti-discrimination provisions that were partially lifted from Title VII of the CRA of 1964. The administrative enforcement provisions were copied from the Fair Labor Standards Act (FLSA) of 1938 and charged to the Wage and Hour Division of the Federal Department of Labor. When Congress blended the parts of these two very different laws, it created a hybrid law which provided little specifics on coverage and gave enforcement responsibilities to an agency with no experience in discrimination cases.

The assignment of the enforcement duties to the Department of Labor (DOL) was the result of a political deal made to mollify critics of the law who wanted to limit the reach of the original ADEA (Neumark 2009). In 1979 the enforcement mechanism for ADEA was shifted to the EEOC because of the better fit with that agency's mission and role in enforcing civil rights legislation. The EEOC had already gleaned valuable experience in pursuing discrimination cases of other types.

The hybridization of the ADEA caused the courts severe difficulty discerning congressional intent (Onken 2001, Neumark 2003). Gillen pointed out that the "fundamental problem with the EEOC's enforcement of the ADEA is the problematic nature of the original legislation" (1996, 94). The U.S. Courts of Appeal have reached very different decisions in ADEA cases because of varying interpretations of congressional intent. The central question in this debate is whether disparate impact is allowed in ADEA claims. Disparate impact was an outgrowth of the Civil Rights Act of 1964's Title VII provision which indicates that while an action may not be intentionally discriminatory, it may have discriminatory effects in operation. In the Second, Eighth, and Ninth circuits, plaintiffs in ADEA cases are allowed disparate impact claims just as in Title VII actions. The First, Third, Sixth, Seventh, and Tenth circuits treat ADEA actions differently and do not allow disparate impact claims (Marino 2003). Luce calls the issue of disparate impact "one of the most controversial issues in employment law" (2004, 436). The confusion eventually reached the Supreme Court as Justice O'Connor argued for the

[3] The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (Dec. 15, 1967), codified as Chapter 14 of Title 29 of the United States Code, 29 U.S.C. § 621 through 29 U.S.C. § 634 (ADEA).

majority in *Kimel* that if Congress had wanted the disparate impact standard to be used in ADEA cases, it would have included it in the language of the law.[4] Chief Justice Rehnquist also argued in the denial of certiorari for *Geller* v. *Markham* (1980) that the Court had not officially recognized the disparate impact idea for ADEA cases.[5] Disparate impact theory has been codified into the Title VII protections against other forms of discrimination, but Congress has refused to add the same idea to protections to the ADEA. As long as Congress does not officially accept or deny disparate claims, the issue will continue to be bantered around by the courts.

Another weakness in the law is that it never addresses how the courts should enforce the law. This ambiguity is certainly not unique to the ADEA, but when combined with the hybrid nature of the law, it was a clear sign that Congress abdicated the actual policy-making to the courts while providing no guidelines to unify the court's decisions. With so little information on which to establish Congressional intent, the courts are allowed wide leeway in their own interpretation of the intent and purpose of the law. Congress passed the Civil Rights Act of 1991 (CRA 1991) as a response to two of the Rehnquist Court's decisions limiting the application of the original ADEA law tenets. In *Ward's Cove Packing Co.* v. *Antonio* (1989) the court limited the claimant's use of disparate impact. In *Patterson* v. *McLean Credit Union* (1989) the Supreme Court refused to extend the prohibitions against discriminatory contracts found in the Civil Rights Act of 1866 (CRA 1866) to post-hiring racial discrimination. The CRA of 1991 reversed the attempts by the Rehnquist Court to limit age discrimination suits. It also gave claimants the rights to a trial by jury and provided limited damages for emotional distress for successful claimants.

Even though Congress has revisited the ADEA provisions through amendments and additional clarifying laws, and has changed the agency charged with its enforcement, the federal courts have had a stronger voice in defining the actual role and scope of the ADEA in society.

Federal Courts' Role in Implementing the ADEA

Various federal courts have strengthened and weakened the age discrimination protections afforded by the ADEA. The federal courts played such a large part in the actual implementation and interpretation of the ADEA protections because of the ambiguous statute that codified a relatively less recognized form of discrimination (Neumark 2003), and it did not define any specific measure to determine if the discriminatory actions had actually occurred (Gutman 2000). These two weaknesses in the original law have created a plethora of cases seeking to resolve these and other issues. The federal courts have been forced by the vague language in the legislation to determine through cases a necessary standard of evidence, statistical methodology used to determine some aspects of age discrimination, and although there have been numerous cases dealing with the ADEA, space limitations require discussion of only the most relevant cases which had the largest impact.

Insert Table 1 About Here

[4] *Kimel* v. *Florida Board of Regents* (2000).

[5] For the full text of Chief Justice Rehnquist's dissent, see http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=451&invol=945.

In the U.S. Supreme Court (USSC) case of *Griggs* v. *Duke Power Co.* (1971), the idea of disparate impact was introduced into the ADEA realm. This meant that rather than having to prove discriminatory intent, plaintiffs could support the idea that policies that appear to be neutral can have an adverse impact on older workers (Neumark 2003). In *Griggs,* the Court recognized two primary points. The intent of individuals and firms is difficult to prove, and most of the evidence that proved discriminatory intent was under the control of the employers. The effect of this case was to require that businesses which used tests to award or withhold advancement or other benefits must prove that the instruments do not have an unintentional adverse impact. Most evidence in disparate impact cases comes from statistical analysis, not from physical evidence of discrimination. Disparate impact theory was being allowed by the federal courts in other types of discrimination cases, so *Griggs* was not considered highly controversial at the time but did make it easier for complainants to file age discrimination lawsuits.

McDonnell Douglas v. *Green* (1973) was another landmark case pertaining to discrimination cases. Although *McDonnell Douglas* was not specifically an age discrimination case, it did become precedent for them. In the *McDonnell Douglas* case, the USSC added an additional step to the normal trial procedures that allowed plaintiffs to address the employer's claims that the actions taken were not discriminatory but were done for acceptable business reasons (Belz 1991). This additional step placed the burden of proof back on the employer to explain what acceptable business reasons supported their decision. The outcome of *McDonnell Douglas* combined with the clarifications in *Texas Department of Community Affairs* v. *Burdine* for discrimination cases in general was the establishment of rules of evidence and the associated burden of proof for intentional discrimination (Neumark 2003). Under what became known as the *McDonnell-Burdine* standards, the plaintiff attempts to establish a prima-facie case for discriminatory intent on the part of the employer. Then the employer is allowed to provide proper justification for the employment actions. At this point, the burden of proof is on the employer to show that their actions were nondiscriminatory. The plaintiff then has another opportunity to show that the employer's claims of nondiscrimination are false. The additional third step in the amended trial process is the direct result of the *McDonnell-Burdine* standard. In *Mastie* v. *Great Lakes Steel Corp.* (1976), the Supreme Court allowed employers to consider the employment costs of older workers when preparing reduction in force actions. The Justices decided that businesses could consider, on an individual basis, that older workers may be more expensive in terms of salary and benefits than younger ones. However, these factors could not be justification for the mass removal of older workers. *Mastie* is considered to have had the effect of easing the burdens that had been placed on employers in previous court cases. This idea was revisited in *Metz* v. *Transit Mix Inc.* (1987) where it was ruled by the 7th Circuit that making retention decisions based on the higher costs of older workers violated the intent of the ADEA. Another twist on this same question arose in *Hazen Paper Co.* v. *Biggins* (1993). In this decision, the USSC ruled that while ADEA was designed to reduce age discrimination based on stereotypical ideas about age and its degenerative effects on employees, some factors that are closely correlated with age can be considered in employment decisions. Seniority often correlates to age and is commonly associated with higher wages, entities can use seniority and its associated higher labor costs to determine who gets terminated. Additionally, Justice O'Connor, writing for the majority, stated that the Court had never officially accepted the idea of disparate

impact in ADEA cases. The USSC did instruct lower courts to be cautious in applying this decision and to look for evidence that employment decisions are based on age rather than seniority. The *Hazen* ruling had the effect of putting a damper on disparate impact claims under the ADEA (Neumark 2009).

Since the ADEA did not specifically enumerate what constituted discriminatory behavior, the federal courts were required to make these decisions. The concept of disparate treatment was established in *International Brotherhood of Teamsters v. United States* (1977). In disparate treatment claims, the plaintiffs seek to prove intentional discrimination occurred. If they cannot, the three-tiered trial guidelines established in *McDonnell* are used to determine if any discrimination actually occurred. The important facet of this case was that disparate treatment theory became established as prohibited acts under the ADEA.

The 2nd Circuit ruled in *Geller* v. *Markham* (1981) that "a plaintiff can establish a violation of ADEA simply through a showing of disparate impact" (Krop 1982 839). In 2002 the issue of disparate impact was again revisited in *Adams* v. *Florida Power Co.* The 11th Circuit Court of Appeal ruled that disparate impact cannot be used as the basis for liability under the ADEA. The Supreme Court refused to grant the certiorari petition on the question, so the decision stood for a short time. In 1989 the USSC decided in *Ward's Cove Packing Co.* v. *Antonio* that businesses could offer legitimate business plans to negate claims of disparate impact by employees.

In 2005, after the passage of the CRA of 1991, the USSC reaffirmed the concept of disparate impact in *Smith* v. *City of Jackson Mississippi* but required a higher standard than is allowed in Title VII cases. The *Smith* case required clarification due to oversight that was remedied in *Meacham* v. *Knolls Atomic Power Laboratory (KAPL)* (2008). With these two decisions the Supreme Court put to rest the Courts of Appeals difference of opinion about the use of disparate impact claims under the ADEA. The most important aspect of these decisions was that defendants bear the burden of proof to show their employment actions or decisions were reasonable. Plaintiffs do not have to prove that their actions were unreasonable. These decisions will likely make it easier for plaintiffs to bring cases under the ADEA, particularly cases pertaining to hiring practices (Neumark 2009). In the most recent Supreme Court decision on disparate impact claims, *Gross* v. *FBL Financial Services* (2009), the Court ruled that the text of the ADEA does not include any language that supports burden-shifting to defendants. This majority decision with two dissents appears to have cast a heavy blow to plaintiffs in an already difficult arena. Unlike other areas of discrimination where the federal courts have continually expanded protections against discriminatory practices age discrimination protections have been alternatively strengthened and weakened depending on which court is making the decision.

Implementing Agencies

The Equal Employment Opportunity Commission's (EEOC) role has been expanded to include administration of the ADEA, the Equal Pay Act of 1963, and the Americans with Disabilities Act of 1990. Complaints about the agency allege that the agency is either too expansive and too powerful or is underfunded and without sufficient powers to carry out their vast responsibilities (Wood 1990). Gillen revisited Senate hearings about the EEOC and found

evidence of uninspiring agency management which provided very little training for enforcement of the ADEA. In a survey of EEOC employees taken in 1988, over one-half of all respondents indicated they did not "understand the requirements of their jobs" (Gillen 1996 89). Gillen also documented a decline in employment at the EEOC from 1980 to 1990 when cases were increasing at an average of 30% per year. The combined effects of these problems led to a dismal success rate in age discrimination cases. Gillen found that only "around 18%" of complaints litigated by the EEOC from 1988 through 1993 ended in a decision favorable to the plaintiff (1996 95). Brody and Chang (2008) argued that the more recent USSC decisions have generally been favorable to employees which may help the EEOC find more ligation success and may change the very clear advantage that employers currently hold in age discrimination suits. However, their study was published before the *Gross* v. *FBL Financial Services* (2009) decision which casts serious doubt on the entire burden-shifting legal scenario modeled after the Title VII discrimination suits. Neumark (2009) found no reason to believe that the balance of power would swing away from employers particularly in light of the conservative majority on the Supreme Court.

Unlike court decisions in other areas of discrimination which have had the effect of continuously expanding coverage and application of anti-discrimination laws, age discrimination decisions have alternatively expanded and contracted the coverage of the ADEA. The disagreements about the role of disparate impact within the courts have regularly changed both the level and burden of proof necessary for ADEA suits and created discontinuity in age discrimination policy. This discontinuity provides the justification for further research into the factors that impact judicial decision making.

Appellate Court Decision Making Theory

The federal judicial system is hierarchical in nature which, in theory, the Courts of Appeal are obligated to follow precedent and direction set by Supreme Court (Epstein 1995). Johnson (1987) argued it was the Supreme Court's reasoning in a decision rather than fear of reprisal that encouraged the lower courts to follow their decisions. This idea is reflected by Sunstein et al. (2004) who suggested that Supreme Court review was so rare that most Appeals Court judges are more concerned with dissenting opinions than review. In his data the lower courts followed the directives from the Supreme Court only 54% of the time. The concept of the separation of powers ingrained in the Constitution also suggests the federal courts will be constrained by Congress which creates and funds the federal court budgets and determines the size of the Supreme Court. The Constitution also allows Congress to rewrite laws overturned by the federal courts. Together these factors seem to suggest that the lower federal courts will defer to the Supreme Court and to Congress and be constrained in their decisions by fear of reprisals. Cross (2003) finds no evidence to support the institutional constraint theory that the Courts of Appeal are limited in their decisions by either Congress or the Supreme Court.

Cross (2007) also identifies the litigant as a potential constraint on the lower federal courts. Certainly the litigants provide the courts with their only vehicle for deciding issues. Unlike the Supreme Court, the Courts of Appeal must take every case that is appealed to them. This lack of control over their agenda means that appeals court judges do rely on litigants to properly bring issues before them. This theory suggests that litigants may assume control over

the agenda of the Courts of Appeal. Cross goes on to mention that while this theory has begun to be studied by economists it has not been examined at any length by political scientists. Using the plethora of evidence from the agenda-setting literature it certainly seems plausible that litigants do influence decision making on the Courts of Appeal by manipulating cases on the docket. This theory deserves further research by political scientists.

Panel effects are another phenomenon thought to influence judges on the Courts of Appeal. Under this theory, judges may be influenced in a variety of ways by the other judges on the panel. The median voter theory is a panel effect which suggests that in democratic decision making the median voter position will be the outcome. The median voter theory has several underlying assumptions including majority rule and the idea that each participant has only one preferred ideological position. These assumptions discount the possibility of persuasion or other interaction effects by other judges. While this theory finds much support in the social sciences, it is typically applied to Congress; it could be applied to the Courts of Appeal. To apply this theory to appeals court judges one must accept the assumption that the decision is purely ideological (Cross 2007). With all the potential factors that play into judicial decisions It is very difficult to accept the median voter theory because of its underlying assumptions. Another panel effect that may influence decision making at the appeals court level is the ideological diversity effect. Sunstein et al. (2004) tested the theory that ideology may impact judge panels in a variety of ways depending on the random assignment of individual judges to three judge panels. The attitudinal model that is most often applied to the Supreme Court suggests that Justices have fairly fixed attitudes about issues and those attitudes guide their decisions. Sunstein et al. suggest that ideology in random judge panels influences decisions differently. Under this theory, the decisions from judge panels may be influenced by ideology in three primary ways. If the three judge panel shares the same political philosophy they are relatively free to shape the decision in a manner that furthers their political goals. They call this ideological amplification where the shared ideologies encourage the judge panels to further their political philosophy. This aspect most closely resembles the attitudinal model. However, Sunstein et al. also investigated panels that had different political ideologies. Ideology could also be dampened if a lone Republican is placed on a panel with two Democrats. In this scenario the Democrats could still create an ideological decision but then may risk a dissent by the Republican on her ideological grounds. The lone Republican is virtually assured not to create an ideological decision but also discourages the Democrat judges from doing the same.

Another theory of Appeals Court decision making is based on the personal attributes of the individual judges. This theory suggests that the personal characteristics of a judge influence their ultimate decisions in court cases. Fahrang and Wawro (2004) found evidence to support their claims that the presence of women on judge panels changed the predicted voting probabilities even if she was the minority opinion voice. Kaheny et al. (2008) found that the stage of a judge's career had an impact on their decisions, suggesting that judges that are very early or late in their careers will vote in much more predictable patterns. Miller and Bornstein (2006) examined the impact of a judge's religion to predict votes in death penalty cases. Their research reflects those of many other authors finding a link between one of the most personal characteristics and voting. Manning et al. (2004) reported that race and gender affected the decisions in cases having to do with these same issues. They based their study of age effects on age discrimination cases on the idea that personal characteristics will be important in cases that

reflect those attributes. While these studies tend to focus on how personal attributes impact decisions in specific areas the weight of evidence is too great to ignore. Personal attributes may not be the only factors influencing judicial decisions, but in certain types of cases, they do impact the decisions rendered (Cross 2003, and Sunstein et al. 2008). Cross (2007) suggested that the impact of personal attributes is most clearly defined in civil rights litigation. He went on to say that since the limited studies on the personal attributes model showed significance that the subject deserved continued study. As age discrimination cases are the fastest growing area in civil rights cases further examination of the role of judge age is warranted.

Research Design

This study is guided by the tenets of the personal attribute model of judicial decision making which suggests that personal factors influence judicial decision making. This research expands on earlier work by Manning, Carroll, and Carp (2004) which examined the decision making process of U.S. District Court judges between 1984 and 1995 in order to determine if the age of judges influenced their decisions in age discrimination in employment cases. They found evidence to support their assertions that age and ideology were influencing factors for district judges. Manning, Carroll, and Carp divided the judges into three equal age cohorts and found a significant difference in the way the youngest and oldest judges' vote in age discrimination cases. The oldest cohort was over twice as likely to render a pro-plaintiff vote as the youngest cohort. Personal ideology also was a significant factor in the way judges decided with Democrat judges almost 10% more likely to vote for the plaintiff. While Manning, Carroll, and Carp (2004) were not the first to study age and decision making, they were the first published research to specifically link judge age and voting habits. Epstein and Martin (2004) replicated Manning, Carroll, and Carp's work and questioned the use of age cohorts in their research design. Epstein and Martin pointed to various different age cohorts which did not return significant results as the basis for their refutation of Manning, Carroll, and Carp's findings.

This research is designed to further the study of the effects of judicial age on voting behavior at the federal appellate level. The primary contribution of this research is to test the tenets of the personal attributes model of appeals court decision making. Although Manning et al. (2004) have conducted research testing age effects on age discrimination cases; this study is different in that no arbitrary age cohorts were used and the dataset is widely available from JRI for replication. This negates the claim by Epstein and Martin (2004) that the age cohort grouping influences the results. The age effect found here builds on and expands the earlier research but avoids a potential source of criticism in the cohort selection. Replicating the findings of Manning et al. on a different set of judges and cases provides further support that age is an important factor in deciding age discrimination cases.

The objective of this research is to test whether personal attributes influence appellate court decision making. The central question is does age play a significant role in how judges on the U.S. Courts of Appeal vote in age discrimination cases? More specifically, does age of the judge have a significant impact on the outcome of age discrimination cases? This research is important to the public law literature because it sheds insights on the controversy between political scientists and legal theorists about the primacy of judicial ideology or legal factors in explaining judicial decision making. The research is also significant in that it suggests that the

dominant model of judicial decision making, policy preferences, is limited in our understanding of appellate court decision making in certain areas of judicial policy.

This study offers two major hypotheses guiding this research:

Hypothesis 1. Older appellate court judges are more likely to support the claim of denied rights in age discrimination cases.

Hypothesis 2. The ideology of the appellate court judge will play an identifiable role in judicial decision making. Conservative judges will be less likely support a claim of persons claiming their rights were withheld in age discrimination cases.

Data and Methods

The data for this study are taken from the Judicial Research Initiative (JRI).[6] The codebook for the dataset includes the results of the reliability testing for each included variable. The original dataset has been expanded and updated to include information on judges' votes from 1925-2004. Songer chose to begin the dataset in 1925 because it was the beginning of the Supreme Court's discretionary power over its case load and the creation of a new version of the Federal Record. The dataset does not include every appeals court case but instead is a randomized sample of cases. The Appeals court data includes records of judges' votes and other information pertinent to individual cases. To determine personal characteristics of judges the appeals court dataset was merged with the Attributes (Auburn) dataset at the JRI.

The influence of additional background variables were tested in this analysis. Individual characteristics of the judges included were race, gender, political party of the judge and of the president that nominated them, the district court they were elevated from, the religion, if any, observed by the judge and two variables for age. This selection of these variables was a reflection of the need to determine which, if any, personal characteristics influenced judicial decisions. The race and gender variables were included to control for the effects of these demographics on age discrimination cases.[7] Political ideology is commonly thought to be an important factor in judicial decision making so it was included as a control variable. The previous district court (origin) variable was added as a control for the division that exists within the district courts about the admissibility of disparate impact in age discrimination cases. The proxies for judicial ideology may not be perfect but Pinello (1999) found over 140 books, articles, and papers from dozens of authors that link judicial party affiliations with their judicial ideology. Some scholars assign an ideology score to judges based on their voting behavior. Pinello (1999) argued that ideology drives decisions so political affiliation is a valid self-selected measure of judges' political ideology. To buttress this variable choice the political party of the

[6]Donald Songer originally gathered data from decisions of the U.S. Courts of Appeals through a National Science Foundation grant. Kirk Randazzo of the University of South Carolina now maintains several judge level datasets at the Judicial Research Initiative.

[7]Other research has shown minority judges to vote differently in civil rights cases. Their inclusion controls for the possibility of these factors influencing these decisions. See Manning et al. (2004), Farang and Wawro (2006) for the study of these effects.

nominating president was also included in the model.[8] Religion was included in the model because it too is a personal characteristic that may influence judge votes. To avoid the criticism levied at Manning, Carroll, and Carp (2004) there were no age cohorts created for this study, instead I used the judge's year of birth as a proxy for their age. This provided a cleaner measure of age that avoided any arbitrary assignment of age cohorts. To further test for age effects on judicial decisions I included the judge's age when they were commissioned to the appeals court. This provided another test of the manner in which judge age may be related to the decision making process in age discrimination cases.

The dependent variable in this research was coded as a binary outcome of the judge's vote with 1= a vote for the claimant and 0= a vote against the claimant. For this type of dependent variable a logistic regression model is the best choice. This method allows for the interpretation of predicted probabilities of voting behavior. The case outcome variable was originally created by the author by reading the cases and reporting each individual outcome. He then created four outcome categories. The first category (0) was a finding against the plaintiff in the case, the second category (1) was finding for the plaintiff, the third category (2) was a mixed decision, and the final category (3) was undetermined outcome. The dataset contained over 61,000 observations and outcome categories two and three made up less than .5% so they were dropped from consideration in this study. The original data included additional categories for undetermined outcome and combined outcome. In these cases either the research could not tell which party was favored in the decision or that both plaintiff and defendant were favored. Since neither of these two outcome possibilities occurred in age discrimination cases they were dropped in favor of the binary logistic model of analysis which allowed for focusing the analysis on specific outcomes in discrimination cases. Excluding the other types of cases left 184 age discrimination cases where the outcome was determined. Logistic analysis was used to test the relationships and predicted probabilities were generated from that to determine how demographic differences would affect appellate judges' propensity for voting for the claimant.

Findings

Manning et al. (2004) examined District Court judges to determine if age was a factor in judicial decisions in age discrimination cases. Instead of examining the actual individual judge's age for their study, the authors divided the judges into three age cohorts. They admit that their grouping was somewhat arbitrary with the youngest cohort starting with the average age of judges when nominated to the federal bench.[9] Their results showed that the older cohorts had a significantly higher predicted probability of finding for the claimant in age discrimination cases. However, Epstein and Martin (2004) were quick to criticize the Manning et al. results on the basis of their choice of age cohorts. They claimed that the Manning et al. results were entirely based on the specific age groups they tested. Epstein and Martin were able to get non-significant results by selecting different age groupings.[10] The model for this research was patterned after the

[8] Cross party nominations are rare (less than 10%) as presidents seek to nominate judges with similar political philosophies (Epstein 1995).

[9] For the specific discussion of age cohort decisions see Manning et al. (2004 p. 6).

[10] Epstein and Martin used the Manning et al. (2004) dataset and found 23 plausible age groupings. Of these only 2 returned significantly higher age related judge votes.

Manning et al. study but eliminating the potential criticism of the use of age cohorts. In this research I used the actual year of the judge's birth for the age variable to avoid the contention of data manipulation. To further distinguish this research and as an independent test of the impact of judicial age on votes in age discrimination cases a different dataset was selected. The results of the logistic regression used in this research paralleled the Manning et al. results and found age to be a significant factor in pro-plaintiff decisions in age discrimination cases. For each additional year of age the predicted probability of the judge voting for the plaintiff increased significantly.

Insert Table 2 About Here

As shown in Table 2, the coefficient for the age variable is signed in the expected direction and is statistically significant at the 95% confidence level. Age had a statistically significant impact on the decision making process in age discrimination cases in the federal Courts of Appeal. For each successive year of birth, as judges age decreases, the odds of voting for the plaintiff in age discrimination cases decreases by 3.5%. Although this is not a large effect for each year, the cumulative effect on the outcome of these cases is much greater. Moving from the youngest to the oldest judge changes the predicted probability of voting for the plaintiff in age discrimination cases by 45%. Younger judges voted in a significantly different manner in age discrimination cases than older judges. These findings reflect and support those of Manning, Carroll, and Carp (2004) for the district court. The results here also support Hypothesis 1 of this research that decisions in age discrimination cases are impacted by the judges' age. See Table 3 for the predicted probabilities of judicial voting for the plaintiffs in age discrimination cases.

Insert Table 3 About Here

This significant linkage between age and judicial votes in age discrimination cases provides support for the idea that judicial backgrounds influences case outcomes. Due to the narrow focus of this research solely on age discrimination cases, it may not be fair to say that judicial characteristics influence every decision but they have been shown to have a measurable effect in these cases. To clarify, the relatively low adjusted R^2 value indicates that age is not the only or even primary determinant of judicial decision making, only that older judges have higher predicted probabilities for voting for age discrimination claimants.

According to both the attitudinal and strategic judicial decision-making models ideology plays a significant role in voting behavior.[11] Manning et al. (2004) found that political ideology along with judge age made a significant impact on judicial decisions in age discrimination cases at the federal district court level. However, in this research on the federal appeals court, political party affiliation, the proxy used for judge ideology,[12] did not reach significance. Cross suggested that ideology may not be as important on the Courts of Appeal because of sheer number of individuals involved and because their decisions are almost always a three person panel and

[11]Mishler and Sheehan (1996), Segal and Spaeth (1993), Hettinger, Lindquist, and Martinek (2004), make a case that the attitudinal model is the primary determinate of judicial decisions.

[12] See Cross (2000, p 1538-39) for a thorough discussion of the merits of using of political party and party of the nominating president as proxy for the judge's political ideology.

these factors combined minimize any one predisposition (2007, 70). Because judicial ideology did not reach significance at the 95% confidence level, hypothesis #2 must be rejected. However, the fact that ideology is not a significant factor in voting in age discrimination cases indicates that voting is not significantly affected by an expected tendency for liberal judges to be inclined to vote for plaintiffs. Clearly, the ideology of the judge is not the deciding factor in these cases.

There were slight differences between the parties in the predicted probabilities of pro-plaintiff voting. A white, male, Republican judge had a predicted probability of voting for the claimant 34% of the time while white, male, Democratic judges had a slightly higher predicted probability of pro-plaintiff voting (39%). These findings refute the commonly held notion that Democratic judges are more sympathetic to discrimination plaintiffs (Manning et al. 2004, Sturm 2001, Rutherglen 1995). In a surprising twist, ideology resulted in different outcomes for women. White male Republican judges had the lowest predicted probability of a pro-plaintiff vote in age discrimination cases while white male Democratic judges favored the plaintiff a predicted 5% more often. However, in women these roles reversed with white, female, Republican judges having a predicted probability of voting for the claimant 38.2% of the time. Minority female Democratic judges voted pro-plaintiff in 33.9% of these discrimination cases. These findings should be considered in light of the low, but rising, representation rates of females and minorities on the court.

Conclusion

The federal courts have continued to provide unified support for plaintiffs in race and gender discrimination cases. That trend has not extended to age discrimination cases where federal courts of different levels and districts have provided very different levels of support and even varying standards of evidence for these cases. This lack of consensus on the federal courts on even the most basic attributes of age discrimination cases indicates that judges are voting in these cases based on something(s) other than legal precedent. The personal attribute model of judicial decision making suggests that jurists' votes in some specific circumstances are influenced by background factors. In this research, age proved to be one of those personal characteristics that affected judicial outcomes in age discrimination cases. Older judges are more likely to favor plaintiffs in age discrimination cases. It could be that older judges are more likely to have experienced some similar effects of ageism. The exact nature of this relationship is beyond the scope of this preliminary research but suggests the need for additional research in this area. No claim is made here that age is the only factor in the decision making process, only that it is a significant factor in age discrimination cases.

In public law research, ideology is generally accepted to be a strong determinant of judicial behavior. This research did not find ideology to be a significant factor of judicial decision making in age discrimination cases at the appellate level. This lack of significance of attitudinal factors provides a measure of support for the personal attributes model of judicial decision making. Continued empirical support for the personal attributes model could provide additional evidence of the need for further diversity on the federal bench.

This study's results do not support the findings of Mishler and Sheehan (1996) and of Segal and Spaeth (1993) that ideology remains very stable over time. In age discrimination cases,

at least, judges' attitudes do seem to modify over time. These ambiguous results combined with the discontinuity in age discrimination cases provide ample evidence that the topic deserves further scholarly research. The generalizability of this study may not reach beyond age discrimination cases but could be improved with the creation of a better fitting model and replication. This work could be extended to the U.S. Supreme Court or state supreme courts to investigate whether the age effect still holds as it has in the federal district and appellate courts.

TABLE 1
Key ADEA Court Decisions

Year	Case	Impact
1971	*Griggs* v. *Duke Power Co.*	Borrowed disparate impact from Title VII.
1973	*McDonnell Douglass* v. *Green*	Established burden of proof for intentional discrimination.
1976	*Mastie* v. *Great Lakes Steel Co.*	Allowed employer to use salary and benefits costs on individual basis.
1977	*Intl. Brotherhood of Teamsters v. U.S.*	Established concept of disparate treatment.
1981	*TX. Dept. Community Affairs* v. *Burdine*	Established burden of proof for intentional discrimination.
1987	*Metz* v. *Transit Mix Inc.*	Replacing employee due to higher salary violates intent of ADEA.
1993	*Hazen Paper Co.* v. *Biggins*	Employment decisions could be made on factors correlated to age.
2005	*Smith* v. *City of Jackson Mississippi*	Reaffirmed the concept of disparate impact included a higher standard than in Title VII.
2008	*Meacham* v. *Knolls Atomic Power Lab*	Revisited a flaw in the standards in *Smith.*
2009	*Gross* v. *FBL Financial*	Never officially allowed any burden-shifting to the employer (reversed a trend that allowed disparate impact claims).

TABLE 2

Logit Coefficients for the Likelihood of a Pro-Plaintiff Decision by Appeals Court Judges in Age Discrimination Cases, 1967-2004

Independent Variable	Coefficients (Standard Error)
Year of Birth	-.035* (.018)
Age on Court	-.061 (.034)
Political Party	-.178 (.231)
Party of Nominating President	-.394 (.405)
Race	.367 (.542)
Gender	-.145 (.707)
Religion	-.012 (.026)
Origin (previous district)	-.249 (.135)
Intercept	29.23
Log Likelihood	-116.12
Pseudo R2	.05

Source: Judicial Research Initiative

*Significant at 0.05

N = 184

TABLE 3

Predicted Probabilities

Personal Characteristic	Predicted probability of voting for the Claimant in age discrimination cases
White, male Republican	34%
White, male Democrat	39%
White, female Republican	38.2%
Minority, female Democrat	33.9%
Minority, male Democrat	30.7%
Minority, male Republican	27%

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