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THE AGE DISCRIMINATION ACT AND YOUTH

LEE E. TEITELBAUM*

There has been for some time a sense that assurance of equal rights, benefits and opportunities is primarily a matter of national rather than local responsibility—a sense strengthened if not created by the campaign against racial discrimination conducted by federal agencies against reluctant and often hostile local authorities. The burden of enforcing claims to racial equality rested primarily with the federal courts, at least initially. Congress was viewed, probably accurately, as limited in its ability to act by its representative character and by judicially imposed limitations on its power to act except where federal interests were substantially involved. It was accordingly the federal judiciary that led the national struggle against racial inequality, first by striking down discriminatory laws and practices¹ and then by confirming congressional power to address racial discrimination through legislation that might earlier have been considered an unconstitutional invasion of state prerogatives.²

The principal congressional function in dealing with racial discrimination during this time lay in implementing constitutional decisions that invalidated inequalities of treatment based on color. This was surely an important role for Congress to perform, since it could broadly address practices that the courts could adjudicate only on a case-by-case basis.³ Nevertheless, enactment of antidiscrimination legislation was largely responsive to judicial action in the field, or at least

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2. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964), upholding congressional power under the commerce clause to prohibit racial discrimination in places of public accommodation through heightened deference to congressional findings that certain activities have a “substantial” effect on interstate commerce.

3. Constitutional adjudication primarily involves judgments about the validity of particular laws, leaving it to local authorities to work out how any invalidity will be cured. The local solution may, of course, be challenged if it is not thought satisfactory, but the process of doing so is necessarily fragmentary and laborious. Congress, in contrast, could and did address programs broadly and its decisions were given detailed articulation through administrative interpretation and enforcement.
did not embody a different notion of equality than that evolved by the courts.

Recently, however, Congress has come to be viewed as an independent vehicle for eliminating perceived inequalities in the treatment of groups, rather than merely as an enforcement agency for court decisions. Both political and doctrinal reasons account for this shift. The former include a decrease in the activism of the Supreme Court together with an increase in the amenability of Congress to appeals from organized and politically visible minority groups. The doctrinal limitations on judicial action have always been present. “Discrimination,” in the sense of differential treatment of groups, is not usually or even presumptively invalid as a constitutional matter. Many laws “discriminate” in some way, and most are subject to successful challenge only when they are invidious in the sense of arising from plainly improper motivation or, what suggests the same thing, are arbitrary in that the classification used lacks factual relationship to accomplishment of some legitimate state purpose. Moreover, unless laws incorporating unequal treatment restrict the exercise of a “fundamental right” or rely upon a “suspect classification” such as race or national origin, a heavy burden lies upon litigants to show that the statutory differentiation is “irrational” in light of the governmental purposes it purports to serve.

Accordingly, constitutional attacks on laws or practices that do not employ a suspect classification or trench upon fundamental rights will rarely have the success experienced by challenges to racial discrimination. Congressional intervention is now sought, not to implement some constitutionally-established interest in equality, but to declare such an interest independent of constitutional doctrine. The power of Congress in this respect is considerable. It can directly require a state to provide equal opportunities where the activity affects interstate commerce. Even when it lacks direct power, Congress can condition the receipt of federal funds by state and local governments on such action. To the

4. “Fundamental rights” are a judicially-created class of interests entitled to special protection against governmental interference. Among these rights are the franchise, Wesberry v. Sanders, 376 U.S. 1 (1964); certain claims of privacy, Roe v. Wade, 410 U.S. 113 (1973); and freedom of speech and the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969).

5. Suspect classifications focus on groups that have historically been subject to discriminatory treatment and are powerless to affect the political decisions upon which this treatment depends. Race and alienage are the traditional categories. See Loving v. Virginia, 388 U.S. 1 (1967) (race); Hernandez v. Texas, 347 U.S. 475 (1954) (alienage).

very great extent that state and local entities depend upon federal assistance, the passage of federal laws insisting upon equal treatment of some group by recipient agencies will have much the same effect as a direct declaration of a national policy of equality. Thus, federal legislation has gone far toward reducing discrimination against women in education, employment and other activities without either a federal Equal Rights Amendment or true "strict scrutiny" of laws treating men and women differently. Similarly, efforts to reduce "discrimination" against the physically and mentally handicapped have generally been directed to Congress, which has responded with laws requiring not only "even-handed" treatment but the provision by states of a variety of resources to assure that handicapped persons will be able to participate "equally" in educational and other opportunities.

The Age Discrimination Act of 1975 represents a similar appeal for an independent congressional declaration of rights to equality that could not have been secured generally through constitutional litigation. As with physical and mental disability, as well as with gender for some considerable time, there was good reason to think that statutes or practices differentiating by age would rarely be invalidated. This perception was, it should be said, accurate. In *Massachusetts Board of Retirement v. Murgia*, decided the year after passage of the Act, the Supreme Court made clear that its short list of "suspect classifications" would not be extended to include old age. Under a relaxed standard of review, the Court upheld against equal protection claims a rule requiring retirement of uniformed police at age 50, finding that the practice rationally furthered a legitimate governmental objective of

7. Craig v. Boren, 429 U.S. 190 (1976), affords a middle-level scrutiny for classification involving gender, and even that level was declared only after much of the congressional activity had already taken place.


10. These disabilities have never been held to require strict scrutiny, and relief from unequal treatment has come from Congress rather than the courts. See generally Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016.

11. The Supreme Court vacillated for some time on the question of the standard for review of laws classifying by gender. No sex-based classification was declared invalid on equal protection grounds until 1971, Reed v. Reed, 404 U.S. 71 (1971), and the Court did not settle on a "middle" level of scrutiny for such classifications until 1976, Craig v. Boren, 429 U.S. 190 (1976). However, this case was decided after Title IX of the Education Amendments of 1972, prohibiting sex discrimination in federally assisted educational programs, had been adopted by Congress. 20 U.S.C. §§ 1681-1686 (1976).


13. The Court explained that "old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political processes.'" 427 U.S. at 313 (citation omitted).
assuring physical fitness among its uniformed police force. As is always true under a "rational basis" standard, the desirability and wisdom of the state practice was not before the Court:

"[W]e do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and humane system could not be devised." . . . We decide only that the system enacted by the Massachusetts Legislature does not deny apellee equal protection of the laws.\(^{14}\)

Although the Supreme Court has not spoken so directly concerning the constitutional status of youth rather than old age, it is clear that this condition will likewise be excluded from strict scrutiny. The Court has routinely held that states have broader power to regulate the behavior of children than that of adults\(^{15}\) and has indicated as well that even laws restricting fundamental liberties will be subject to a standard of review somewhat below traditional strict scrutiny when young people are involved.\(^{16}\)

Since age distinctions by themselves would ordinarily be upheld as a constitutional matter,\(^{17}\) it fell to Congress to address discrimination on this basis. The primary thrust of the Age Discrimination Act was addressed to discrimination against the elderly who, it was believed, frequently lacked access to services and opportunities available to other groups.\(^{18}\) Like other congressional nondiscrimination laws, the Act's most obvious purpose was to clarify and implement congressional intent regarding allocation of resources by agencies relying on federal funding and particularly to declare an intention that older qualified persons should not be denied access to those resources.\(^{19}\) It is also probable that, like other such laws, the Act has a second and broader purpose: to declare as a matter of principle that age, like race or sex, should not be used as a ground for treating people differently, at least when differential treatment is disadvantageous. To be sure, the extent of agreement regarding this latter goal is unclear; however, there is con-

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17. Of course, if age limitations are also related to some other characteristic, such as gender, unequal treatment may be struck down. *See*, *e.g.*, *Stanton v. Stanton*, 421 U.S. 7 (1975).
siderable evidence to suggest that this statute was viewed as an early salvo in a general campaign against age discrimination.\textsuperscript{20} The House Report, in particular, contains a direct statement that "ageism" (its term) is as intolerable as "racism" and "sexism" and expresses the hope that passage of the Age Discrimination Act would demonstrate that "our government believes that an individual should be judged on his or her merits and not on the basis of such irrelevant factors as age, sex, race, color, religion, or national origin."\textsuperscript{21} It is also relevant to this latter purpose that the Act closely resembles other federal statutes that plainly seek to eliminate particular forms of discrimination as a matter of national policy.\textsuperscript{22}

To this point, the Age Discrimination Act is an interesting but hardly novel example of recent strategies for pursuing claims to equality. The ADA possesses, however, a feature that is not found in other such laws: it extends not only to the politically visible group which sought its passage—the elderly and their spokesmen\textsuperscript{23}—but to an even larger group that was not represented before Congress, the young. In terms, the Age Discrimination Act prohibits "unreasonable discrimination" against all age groups by federally supported programs,\textsuperscript{24} a breadth of coverage that was clearly intentional.\textsuperscript{25} What is not clear is why the drafters of the legislation decided to include discrimination against youth in the Act; debates and committee reports are entirely silent on this subject beyond the fact that the law is indeed intended to ban all age discrimination.

Left to speculation, several hypotheses of varying likelihood and cogency might explain the reach of the Act. It may have seemed inap-

\textsuperscript{20} The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976), was the first effort in the area, but addressed only discrimination against older persons between the ages of 40 and 65. 29 U.S.C. § 631 (1976). The Act was amended in 1978 to increase the age limit to 70. 29 U.S.C. § 631(a) (Supp. II 1978).


\textsuperscript{23} It has been suggested that the elderly group, unlike any other minority groups, has a substantial constituency outside its own ranks: those who near old age. Schuck, supra note 22, at 41, (quoting P. DRUCKER, \textit{THE UNSEEN REVOLUTION} 178 (1976)).

\textsuperscript{24} 42 U.S.C. § 6101 (1976) states that:

\begin{quote}
It is the purpose of this chapter to prohibit unreasonable discrimination on the basis of age in programs or activities receiving Federal financial assistance.
\end{quote}

appropriate to prohibit a wrong against one end of the age continuum without showing the same concern for the treatment of those at the other end. Perhaps the Act itself would have appeared guilty of age discrimination had it been limited to older persons. Beyond an interest in symmetry, Congress may also have believed that children are subject to discrimination in the delivery of services in the same ways, and to the same extent, as older citizens. While there was no evidence on this point before the legislature, there was little hard evidence before them generally. However, the existence of age discrimination was assumed and, on that assumption, the United States Civil Rights Commission was ordered to conduct an empirical study documenting its extent and character. The drafters presumably anticipated that the Commission would find inequality in treatment of both old and young people, an expectation supported to some degree by the general experience that we routinely and cheerfully treat children differently from adults for almost every social purpose. Finally, we must suppose that Congress considered the situation of young and old people sufficiently similar that both could appropriately be covered by a single declaration of national policy.

The Age Discrimination Act announces, then, a policy of treating young people (and old people) equally with the rest of the population, as other nondiscrimination laws do for the constituents they address. The following discussion explores the premises of such a policy, and particularly of the notions that young people are indeed denied "equality" and that they are entitled to equal treatment in the same way that adults and elderly people may be said to be so entitled. Ultimately, it will appear that these premises cannot be justified, at least in the context of a general nondiscrimination statute. To the extent that the Act is intended to assure that children receive an appropriate share of societal goods and services, it offers no definition by which one could conclude that they do not fairly receive those services. To the extent that it is designed to declare that children are generally entitled to treatment as the equals of other age groups, there is every reason to doubt that such a declaration was meant sincerely. And, finally, to the extent that the Act directly associates provision or denial of services with equality of treatment, the law is inaccurate.

The Age Discrimination Act and the Definition of Equality

The shift from constitutional to legislative declarations of equal treatment, of which the Age Discrimination Act is one instance, involves more than a choice among differentially responsive agencies. Legislative establishment of rights to equality reflects fundamentally different considerations than those ordinarily raised by constitutional adjudication. The fourteenth amendment does not itself contain a normative statement of the meaning of equality. At the most, the equal protection clause embodies a threshold proposition that like cases should be treated in like manner, except perhaps when fundamental rights or suspect classifications are touched upon. While this principle is of great importance, it does not serve as a substantive definition of equality. It does not, for example, tell us which cases are like and which are unlike, for what purposes dissimilarities are relevant, whether there are respects in which all persons must be treated alike, or answer a host of other distributive questions. The task of resolving these specific issues is ordinarily left to state law or practice, which establishes the meaning of equality for a particular purpose. The court's function in a constitutional challenge is only to decide whether the state definition of like and unlike groups is one that could reasonably have been reached. Equal protection is thus served when a state has chosen any plausible notion of equality, and not only when it has chosen the best or wisest (or even a good and wise) definition from among alternative possible formulations.

Congressional nondiscrimination legislation, on the other hand, does purport to define a norm of equality to which state agencies relying on federal funding must conform. It is not enough that the latter has adopted a rule or practice that is a rational interpretation of the meaning of equality; its interpretation must also coincide with Congress' own notion, as expressed in the statute itself or through administrative regulations. This difference is reflected in the nature of the issue before courts called upon to decide whether a state practice conforms to congressional requirements. The court is not limited to asking, as it is with constitutional claims, whether the state rule is rational given the state's purpose for acting, but now inquires into the consistency of that rule with the congressional understanding of equality.

27. But see Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977), suggesting that the equal protection clause substantively assures rights to equal citizenship.

Accordingly, legislation of this kind must be viewed as an independent statement of rights to equality which will be more or less binding on a variety of state and local governmental activities. Plainly, what a non-discrimination act promises by way of equality for the groups it addresses is a matter of considerable national importance.

It would, therefore, be useful to settle on what Congress meant by equality for young and old persons in connection with the Age Discrimination Act. The most convenient approach would lie in reference to the definition of discrimination employed by Congress. However, the Age Discrimination Act itself provides little guidance regarding the nature of the condition—"unreasonable discrimination"—that it undertakes to address. While "reasonable" use of age criteria is allowed, the statute provides no basis for telling when an age distinction is "reasonable" and when it is not.

The first, somewhat official, effort to define discrimination expressly in connection with the Age Discrimination Act is found in the study conducted at Congress' direction by the Civil Rights Commission.29 Formally, the Commission took age discrimination to mean "any act or failure to act, or any law or policy that adversely affects an individual on the basis of age."30 This seems, however, a less than useful definition for several reasons. In the first place, the statutory notion of "reasonableness" was eliminated, almost without discussion. In the second, the resulting standard has small literal or conceptual meaning. Viewed literally, it is hard to see how people can be affected, adversely or not, on the basis of age. They may, however, be denied something on the basis of age, which adversely affects them, and this will be taken as the meaning of the Commission's definition. A second problem in meaning is raised by the focus on harm to individuals. Initially, it may seem that the Commission only defined as discrimination an act that could be shown to have worked actual harm to an individual. This would be far too narrow a notion of discrimination, and is plainly inconsistent with the broad operational definitions adopted by the Com-


In fairness, it should be said that the Commission was handed an extraordinarily difficult assignment. Not only was the statute itself of little help in defining the nature of the investigation, but few programs had collected data in such a way that program performance by age could be determined or compared with data from other programs.

30. AGE DISCRIMINATION (PART I), supra note 29, at 3; AGE DISCRIMINATION (PART II), supra note 29, at 5.
Accordingly, the most sensible reading of the standard for discrimination is that it includes any act, omission, law or policy that denies persons, on the basis of age, services they may be said to deserve.

This last construction is also consistent with the Commission's operational definition of discrimination, which means little more than a count, by age group, of beneficiaries of programs and a comparison of the age distribution of actual beneficiaries of a program with the distribution of those thought eligible for that program. In the case of multiple service programs, discrimination was examined by comparing by age the number of beneficiaries served by the various components of the program.

The difficulty is that discrimination, so defined, provides no conceptual boundaries. A mathematical or literal notion of equality, granting a proportionate share of benefits to all persons or groups in the population, is only sensible (if at all) where there is no limitation to the benefits granted. It is sometimes said that this is true for political benefits, such as the franchise, which can be given equally to all without cost to any other person. Even that decision, it should be added, does not indisputably provide "equality," since a case can be made that there are some persons (e.g., children or aliens) who are not equal in their capacity to vote and therefore cannot properly be treated as equal for this purpose. In the almost universal situation where resources are indeed limited or where grants of liberties to some involve costs to others' interests, strict proportionality of distribution would often be thought wrong and unequal. Suppose, for example, that a medical services program could provide treatment for 1,000 people suffering from a disease which is potentially fatal in young persons but only uncomfortable in older people. The Commission's definition would apparently count as discrimination a decision to reserve this medication for younger patients. To do so, however, treats as "equal" people whose needs are very different. It is not a useful notion of equality that treats in the same way a person who is gravely ill and one who is not.

31. The operational definitions of discrimination adopted by the Commission include, among other things, any situation where (1) the age distribution of program beneficiaries differs from the distribution of those eligible to benefit; (2) the age distribution of applicants differs from the age distribution of those eligible to benefit; (3) the age distribution of those receiving benefits differs from the age distribution of those applying; and (4) where a program provides more than one service, the extent to which the age distributions of the separate services' beneficiaries differ from one another. AGE DISCRIMINATION (PART II), supra note 29, at 6.

32. See note 31 supra.

33. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977) [hereinafter cited as DWORKIN].
To hospitalize the latter because we would hospitalize the former is merely unnecessary; to divide the only available dose of medicine between them is considerably worse.\textsuperscript{34}

It should be added that the Commission's study could not accurately answer even the question it put to itself regarding proportional distribution. Its inquiry focused on nine specific programs, each of which was examined as if its services were the exclusive source of assistance for persons with the problems to which the programs were directed. No attention was directed to the other agencies that might also supply services that were comprehended by the program under investigation, a circumstance that might justify the latter in concentrating (\textit{i.e.}, allocating disproportionately) its resources to otherwise unserved age groups. Moreover, the Commission did not consider the total resources devoted to various age groups for all purposes by all programs. Given finite governmental wealth, proportionate distribution might well be said to be provided if all groups received their appropriate rate of the total available wealth or of the total available opportunities for wealth. Under the operational and formal definitions used, however, it would seemingly be discriminatory for either young or old persons to be denied age-proportionate access to a single program, even if that same group received 75\% of all governmental resources distributed to the population.

A third official definition of equality under the Age Discrimination Act is found in the regulations adopted by the then Department of Health, Education and Welfare to implement the Act.\textsuperscript{35} These regulations begin with a general statement of the prohibition against discrimination on the basis of age and then set out a number of qualifications to the general rule. Most notably, the Act is interpreted as not applying to age distinctions used to confer special benefits on members of particular age groups, an endorsement of “affirmative action”\textsuperscript{36} which raises its own questions of equality when large shares of a finite pool of resources are allocated to one group or another. Moreover, the general rule is subject to significant exceptions for programs which “reasonably” use age as an indicator of other characteristics that are relevant to

\textsuperscript{34} This suggests the necessary connection between equality and justice. We are not concerned with a mathematical notion, but rather with distributions that comport with a sense of fairness. It has been agreed since the time of Plato and Aristotle that “literal” or mathematical equality is an inadequate definition of equality for purposes of law and justice. \textit{See} Vlastos, \textit{Justice and Equality}, in \textit{Social Justice} 31, 31-34 (R. Brandt ed. 1962). \textit{See also} Stone, \textit{Equal Protection and the Search for Justice}, 22 \textit{Ariz. L. Rev.} 1 (1980).


\textsuperscript{36} \textit{Id.} § 90.3.
the program but cannot directly be measured on an individual basis, or which use non-age factors that are associated with age but bear a direct and substantial relationship to the normal activity of the program. Plainly, the HEW regulations reflect a very different understanding of discrimination from that of the Civil Rights Commission, and rely on broad exceptions to escape the stringency of the Commission’s approach. It is fair to ask, however, whether the Department has supplied a useful notion of discrimination beyond that which courts would apply. To the extent that age is often a “reasonable” measure or approximation of maturity, knowledge, strength, agility, need or any other characteristic that might be relevant to some agency’s operation, the Act as interpreted would add little to what constitutional scrutiny accomplishes beyond, perhaps, strengthening the degree of relationship required. While there presumably exists some congressional definition of “reasonableness” that might differ from the Constitution’s “rationality,” the regulations thus far do not clearly indicate what that definition might be.

We are left, therefore, without any consistent or sure sense of what discrimination and equality mean within the context of the Age Discrimination Act. Lacking such a meaning, it is impossible to talk about what the Act contributes to defining the places of young and old people in society. It would perhaps seem appropriate, therefore, to substitute for these official definitions some other, generally agreed meaning of equality and examine the significance of age discrimination legislation on that basis. The difficulty with this approach is that “equality” can mean a number of different things, any of which Congress might or might not have intended. While it is fair to criticize a legislative body for having failed to articulate the norms it imposes, it is less so to choose some particular normative statement that Congress might not itself have chosen and criticize the statute from that perspective.

Accordingly, it seems best to use what may be regarded as a minimal or threshold statement of the meaning of equality, expecting that Congress might have meant at least this when it acted. In this connection, it seems safe to assume that the thrust of the Age Discrimination Act, like most non-discrimination legislation, is to say that although it may be rational for some purpose, and therefore constitutional, to treat members of some group differently from the rest of the population, it is wrong in policy to do so (at least when that would be disadvantageous

37. Id. § 90.14.  
38. Id. § 90.15.
to members of the group). This group should, therefore, ordinarily be treated as if its defining characteristic—race, gender, handicap or, in this case, age—does not exist or is not relevant to governmental action. There is, as we have seen, reason to believe that Congress meant to do just this: to declare that age should not be considered a relevant criterion for decision-making about people in federally-supported programs. That is not necessarily to say, as the Civil Rights Commission seems to have thought, that people of all ages must receive mathematically proportionate services or opportunities; rather, it implies that factors other than age must be used in deciding how persons should be treated. It is also plain that Congress believed such a declaration necessary because it understood that old (and young) people were excluded from fair consideration just because they were old or young, although such practices might formally be explained on other grounds (e.g., old people are less likely than younger people to be physically fit). In short, Congress seems to have perceived a disvaluing of people because of their age, and this at least it meant to prohibit, as it had prohibited the disvaluing of women and of members of minority racial groups.

If these modest assumptions are sound, the proponents of the Age Discrimination Act at least intended to declare the rights of young and old people not to be discounted in the process of decision-making. This intention provides only a minimal notion of equality; nonetheless, something very much like it has been described by Professor Dworkin as the commonly accepted basis of political morality:

Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life or one group’s is nobler or superior to another's. These postulates, taken together, state what might be called a liberal conception of equality. . . .

This notion of equality, it should be said, does not state a principle of distribution, but one of process. Professor Dworkin distinguishes between a right to equal treatment and the right to treatment as an equal.

39. See text accompanying note 21 supra.
40. DWORKIN, supra note 33, at 272-73.
The latter is an entitlement to equal concern and respect in decisions about the allocation of goods and opportunities, but does not imply that each person will receive a proportionate amount of goods. It is not right for the government to ignore the interests of the wealthy in deciding tax policy, but the right to be attended to does not mean that, on balance, other interests cannot require a higher tax upon the rich than the poor. The right to equal treatment—to equal distribution—is sometimes available, but is a derivative rather than the primary claim to equality; it is the right to treatment as an equal that must be accorded everyone by government.41

So minimal a definition of the right of equality can surely be criticized for failing to deal with distributive issues.42 In particular, it does not seem that the requirement of equality as a matter of process concerns itself much with whether there are “basic” or “primary” goods to which everyone is positively entitled, and what those goods might be.43 Nor does this principle offer a basis for evaluating particular allocative decisions as long as essential democratic process notions are satisfied. For our purposes, however, Professor Dworkin’s definition is helpful in indicating certain kinds of threshold questions that antedate consideration of distributive issues. Is it true that children are denied “equal concern” by governments, even assuming that older citizens are so denied? Is it true that “equal respect” means the same thing for children that it does for other members of the community? If these assumptions are not well founded, then there may be no need to consider the concededly harder question of remedies for our neglect of the young. And, as it happens, neither of these propositions is plainly founded in our experience or theory.

**Equality of Concern for Young and Old Persons**

We have postulated that equality requires governments to demonstrate equal concern and equal respect for all whom they govern. Although Professor Dworkin defines “concern” and “respect” separately,

41. *Id.* at 273.
43. This is not to say that Professor Dworkin would declare that there are no such goods. Indeed, he suggests that elementary (but not law school) education is something that must be provided for everyone because its lack may prevent persons from leading a useful life. DWORKIN, *supra* note 33, at 227. This suggestion in turn may indicate that certain allocations are related to respect and liberty insofar as they are necessary to allow all persons to formulate the life plans which entitlements to respect must honor. *See id.* *See also* RAWLS, *supra* note 42, at 507-10.
it is not clear how sharply he would differentiate their applications. It is, however, useful to treat these qualities separately in talking about young and old persons.

The principle that governments show equal concern for all groups in the community is most directly related to allocations of goods, services and opportunities, and has less to do with assurances regarding liberties. A central question, plainly, is whether it is necessary to declare, as we suppose the Act to have done, that young and old persons are entitled to that kind of equality. Such a declaration would be most appropriate, of course, if those administering federally-supported programs in fact displayed lack of interest in the well-being of the young or the elderly and, because of that disinterest, failed to allocate appropriate resources to them.

An argument can be made that a statement of this kind is important with respect to the elderly. Cultural attitudes towards older people are not so clear that affirmation of their right to equal concern is on its face unnecessary. It is certainly true that our Biblical traditions demand great respect for the aged: it was a great thing for Methuselah to survive longer than most empires. In the Middle Eastern tradition, age imports wisdom and experience, which in turn require veneration and deference. It is equally true, however, that few people now look forward to old age with enthusiasm; most of us attend more to the loss of faculties and health than to any anticipated increase in wisdom. Moreover, negative feelings about our own old age are supported by social values which emphasize strength and continued achievement. Older people have not done much for us recently, as the phrase goes; to the extent that they continue to occupy positions of power or hold wealth, they do so against the interest of those who believe themselves more vigorous, imaginative and productive. And, to the extent that older people do not have power or wealth, they are sometimes viewed as consumers of scarce resources that might better be used in other directions.44

Because there is at the same time a desire to remove the elderly from life schemes they have chosen and to view distributions of goods to them as wasteful, Congress might reasonably have assumed the federal programs would reflect these attitudes. Whether Congress was right in its apprehension regarding lack of concern for the elderly in the practices of federally-supported programs is another matter. Certainly they believed this to be so, and the Civil Rights Commission, for its

44. This summary draws heavily on P. Slater, Footholds 43-47 (1977).
part, reported that “discrimination on the basis of age is widespread.”\textsuperscript{45} The inadequacy of the Commission’s definition of discrimination and the scanty data available nevertheless justify caution in accepting this conclusion.\textsuperscript{46}

Whatever may be true of older citizens, however, it is hard to take seriously any suggestion that American society displays less than full concern for its young members. On the contrary, there is no group whose interests we have sought so hard to define and serve, or to whom we have distributed so much of our public resources. Foreign observers since the American Revolution have commented on the child-centered character of our culture,\textsuperscript{47} and it has become a commonplace that, shortly after the Civil War, America entered upon “the century of the child.”\textsuperscript{48} There is, moreover, no sign that our commitment to the young has waned. Just as children represent a kind of immortality for their parents, so they embody the general society’s hopes for improvement, if not perfection.

The American attitude towards children is not merely a matter of posture. We have created for young people a “right” to a prolonged adolescence,\textsuperscript{49} during which their maintenance is assured (through the family or, failing that, the juvenile court or other agencies), their education is provided through professional teachers, and a host of services is made available (voluntarily or involuntarily) to promote their development into “good, sound, adult citizenship.” Indeed, our public concern for children is such that child-rearing is only initially left to the family itself; a variety of public agencies stand ready to “support” it or replace it at the first indication of dysfunction.\textsuperscript{50}

It is true that this traditional American devotion to the welfare of children seems to be contradicted by the Civil Rights Commission’s undifferentiated conclusion of “widespread” age discrimination, since the Commission undertook to examine discrimination against young as

\begin{itemize}
\item \textsuperscript{45} \textit{AGE DISCRIMINATION (PART I), supra note 29, at 3. Indeed, the problem seemed so grave that the Commission recommended amendment of the Act so as to ban \textit{any}—not merely “unreasonable”—discrimination, claiming to find no situation where administrative action based on age could be regarded as reasonable. \textit{Id}. at 86-87.
\item \textsuperscript{46} For a general attack on the Commission’s methodology and conclusions, see Schuck, \textit{supra} note 22.
\item \textsuperscript{47} See, e.g., A. de Tocqueville, DEMOCRACY IN AMERICA 192-97 (H. Reeve trans. 1945).
\item \textsuperscript{48} See, e.g., 3 A. CALHOUN, A SOCIAL HISTORY OF THE AMERICAN FAMILY 131 (1917); Teitelbaum & Harris, \textit{Some Historical Perspectives On Governmental Regulations Of Children And Parents}, in \textit{BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT} 1, 20-31 (L. Teitelbaum & A. Gough eds. 1977) [hereinafter cited as \textit{BEYOND CONTROL}].
\item \textsuperscript{49} \textit{BEYOND CONTROL, supra} note 48, at 29-31.
\item \textsuperscript{50} \textit{See id.} at 20-31; C. LASCH, HAVEN IN A HEARTLESS WORLD (1975).
\end{itemize}
What is remarkable about the Commission's study, however, is not that it reveals inconsistency between our traditional concern for children and the practices of federally funded agencies, but that the data in fact reveal no lack of services for children, even using a methodology that counts every disparity in resource allocation as an instance of potential discrimination and that does not consider the services provided to children through public elementary and secondary education or the juvenile courts. Because the conclusion that young people are denied resources is impeached by the evidence adduced by the Commission, careful review of the Commission's findings seems warranted.

Title XX Funds

Title XX of the Social Security Act comprises much of what is considered "welfare," including Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), Medicaid, WRI (providing, among other things, family planning and protective services without regard to income), and Child Welfare Services (CWS). Although the Commission found age discrimination in several areas under Title XX programs, it is hard to see how young people suffered thereby. Overall, one-third of all recipients of funds in fiscal year 1976 were children. More particularly, 43% of all primary recipients of AFDC, 24% of all Income Eligible recipients, 57% of beneficiaries of WRI services, and 36% of Medicaid beneficiaries were young people. These programs made up 81% of all program commitments under Title XX. Indeed, the Commission's findings of discrimination against older persons seem to be explained by the heavy concentration of services for children.

54. Id.
55. Consider, for example, the testimony of Orlando Romero, Director of the Denver Department of Social Services:

What has happened is the workload we have been given in terms of child abuse and neglect and the areas of families, this has taken almost all our resources, and what we have basically said is that we will pay as much attention as we possibly can to the protection of the aged in terms of exploitation or abuse. We have tried to give emphasis to nursing home placement . . . and that's about the extent of it. The rest of the staff we have had has been pretty well delegated to the protection of children.

Age Discrimination (Part I), supra note 29, at 27.

This picture is further confirmed by examination of Title XX expenditures in 1977. During that fiscal year, 24.1% of the budget was devoted to child care, 8.2% to substitute care for children and 8.1% to protective services for children. Id. at 39, Table 1.3. Over 40% of the budget went...
CETA Programs

The Comprehensive Employment and Training Act of 1973 (CETA)\(^{56}\) is designed to support programs providing job training and employment opportunities for economically disadvantaged, unemployed and underemployed persons.\(^{57}\) While the Commission, on extremely doubtful information,\(^{58}\) concluded that age discrimination existed in several areas,\(^{59}\) what discrimination there might have been did not operate against young people. On the contrary, persons under 19 (as well as those between 19 and 21) appear to be significantly over-represented in the population served by CETA programs. Whereas youths under 19 composed 17.8% of the total unemployed population in 1977, about 31% of the enrollees under Title I of the act belonged to that age group.\(^{60}\) And, when figures for three CETA programs in 1976 were aggregated, a high rate of representation of young persons was also found. The youngest group made up 26.5% of all enrollees in these programs but constituted only 17.1% of the unemployed population, as defined for purposes of the Act.\(^{61}\) Testimony before the Civil Rights Commission suggested that program administrators considered youth more politically visible, more “appropriate” for CETA (as opposed to on-the-job) training, and in other ways more to be preferred as enrollees.\(^{62}\)

Food Stamps

Food stamp programs provide benefits to needy households,\(^{63}\) some of which overlap with the population receiving AFDC funds under Title XX. The data available to the Commission included only absolute numbers of participants by age; information concerning persons who were eligible on need grounds but did not participate was unavailable.\(^{64}\) Accordingly, no conclusions can be drawn about mal-

directly to child-serving programs, and children also received some significant parts of other programs.

57. Id. § 801.
59. Id. at 117.
60. Id. at 133. The high rate of service to young people was even greater in fiscal years 1975 and 1976. In the former, persons under 19 made up 18% of the unemployed population but 41.4% of Title I enrollees; in 1976, the figures were 17.1% and 35.9%. Id. at 140, Table 4.8.
61. Id. at 135, Table 4.5.
62. See id. at 140-43.
64. Age Discrimination (Part II), supra note 29, at 210.
distribution of food stamp funds. Plainly, however, the current programs serve the young to a considerable degree. Participants between the ages of 0-14 made up 41.4% of the population served in 1976, and youths between 15 and 19 composed another 11.7% of the benefitted population. In contrast, persons over 65 made up only 6.5% of the participants.65

Adult and Vocational Education

The Commission's investigation of educational opportunities focused on adult basic education,66 vocational education67 and higher education. The first of these has no relevance for children under 16,68 who are in any event subject to compulsory school attendance by state laws. The last is likewise of no immediate consequence for most young people, however much it may guide their choices and aspirations while in secondary school. Vocational education is available to youth as well as adults, but here the data were extremely sketchy. Again, however, these imperfect data indicated that resources are significantly concentrated on younger persons. Of the approximately 17 million persons expected to be enrolled in vocational education programs during the 1978-79 school year, it was projected that more than half (9.2 million) would be secondary education students.69

Vocational Rehabilitation

The vocational rehabilitation services programs authorize provision of grants to states to meet part of the cost of rehabilitating handicapped individuals for gainful employment.70 For each of the five years studied, between 13.4% and 14.2% of all participants were under 18 and another 10% to 11.5% were 18 or 19 years old.71 During that period, at least 23% of rehabilitated persons were 19 years of age or younger,72 while less than one-quarter of the participants were 45 years or older.73 This does not mean, necessarily, that there was age discrimination, because the program expressly emphasized service for the se-

65. Id. at 210-11.
69. AGE DISCRIMINATION, PART II, supra note 29, at 179.
71. AGE DISCRIMINATION, PART II, supra note 29, at 231, Table 7.1.
72. Id.
73. Id.
verely handicapped\textsuperscript{74} and data concerning severity of hardship was only available for persons between the ages of 20 and 64. It is clear, however, that a substantial number of persons 19 and younger, even if severely handicapped, would be too young to undertake vocational rehabilitation or would be engaged in school programs that did not focus on vocational rehabilitation. Moreover, despite a prohibition in federal regulations against the use of upper and lower age limits, a number of state agencies had adopted age floors in order to concentrate their efforts on persons for whom occupational objectives could be determined or who would be of employable age when rehabilitation was completed.\textsuperscript{75} The likelihood that persons under 14 or 16 were considered unready for vocational services heightens the significance of the large population under 19 years of age who participated in these programs.

\textit{Medicaid}

No evidence of discrimination against young persons under the Medicaid program\textsuperscript{76} appears from the report. While youth do not receive a large amount of Medicaid dollars, they make up a very large proportion (47.9\%) of all recipients.\textsuperscript{77} The reason for the disparity between dollars spent and number of beneficiaries is obvious; children under 21 have a lower rate of use of general hospital and skilled nursing home services.\textsuperscript{78} Moreover, special programs, such as early periodic screening, diagnosis and treatment (EPSDT), are specially available to young persons.\textsuperscript{79} While it has been claimed that children under 3 and over 6 are "underserved,"\textsuperscript{80} it is hard to view this circumstance as discrimination against young people as a class, although it may argue for greater outreach.

\textit{Community Health Services Program}

Authorized under Title III of the Public Health Service Act,\textsuperscript{81} this program provides a broad range of primary health and other services to residents served by community health centers.\textsuperscript{82} It is described as serv-

\begin{itemize}
  \item \textsuperscript{74} 29 U.S.C. \textsection 720(a) (1976).
  \item \textsuperscript{75} \textit{Age Discrimination (Part II)}, supra note 29, at 245-46.
  \item \textsuperscript{76} Title XIX of the Social Security Act, 42 U.S.C. \textsection 1396-1396j (1976).
  \item \textsuperscript{77} \textit{Age Discrimination (Part II)}, supra note 29, at 264.
  \item \textsuperscript{78} \textit{Id.}
  \item \textsuperscript{79} \textit{Id.} at 273-76.
  \item \textsuperscript{80} \textit{Id.} at 275.
  \item \textsuperscript{81} 42 U.S.C. \textsection 254(c) (1976).
  \item \textsuperscript{82} \textit{Age Discrimination (Part II)}, supra note 29, at 286.
\end{itemize}
ing primarily children and women,\textsuperscript{83} a description that seems borne out despite the lack of age data focusing directly on minority. In 1976, 31.3\% of all users were under 13, and presumably children between 13 and 18 made up some significant proportion of the 47.5\% of users between the ages of 13 and 44 (the next age category available).\textsuperscript{84} The assumption that children receive at least their share of services under this program is strengthened by the statements of directors of neighborhood health centers, interviewed in the field, who frequently reported that their programs leaned heavily toward serving children. The regional director of the United States Public Health Service in San Francisco spoke for many in saying that "it is just our belief that the payoff is a little better the younger you have intervention, vis-à-vis preventive activities."\textsuperscript{85} In fact, it appears that emphasis on prevention sometimes led to reserving certain services, such as dental care, entirely to the young.\textsuperscript{86}

\textit{Community Mental Health Centers}

The Commission did conclude that persons under 15 "are seriously under-represented among direct service recipients compared to their representation in the general population"\textsuperscript{87} in connection with services provided under the Community Mental Health Center Act.\textsuperscript{88} That act provides federal financial assistance to public and nonprofit agencies offering comprehensive mental health facilities to individuals.

The Commission's finding was based on the observations that children under 15 composed 28.6\% of the "catchment area" population (the population in the area served by a program), but only 13.4\% of new patient enrollments,\textsuperscript{89} and that as a general matter mental health services exist for something less than 10\% of the population under 18 in need of those services.\textsuperscript{90} This conclusion illustrates why the Commission's notion of discrimination is of doubtful value. Other commentators have already pointed out that inferring discrimination from differences between population and rates of participation is improper. Older people, it has been suggested, may need assistance but for their own reason may be reluctant to enter into a service that they perceive

\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 290. See also id. at 289-91.
\textsuperscript{86} Id. at 290-91.
\textsuperscript{87} Id. at 52.
\textsuperscript{88} 42 U.S.C. § 2689 (1976).
\textsuperscript{89} AGE DISCRIMINATION (PART II), supra note 29, at 65.
\textsuperscript{90} Id. at 82.
as stigmatizing or even threatening to their independence. 91 It is likewise doubtful that older people perceive themselves as needing mental health care to the extent that doctors so perceive them; consequently, the latter's estimates of "needs" bear no significant relationship to the likelihood that people will seek services.

These same points obtain with respect to young people, who may equally view mental health services as something to be avoided or, at least, not readily to be sought out. It is also important to talk accurately about the needs of young people for services, even from the point of view of service providers. The Commission quotes estimates that "10-12% of children and youth have psychological problems," 92 without specification of the gravity of the psychological problems of youth when compared with the mental health needs of other segments of the population. This is at best a careless use of evidence. Moreover, the Commission's conclusion regarding underrepresentation of young people in mental health services is impeached to some extent (although the Commission does not say so) by the data it uses to demonstrate discrimination against older persons. These figures indicate a sharp increase in new cases of psychopathology associated with age: whereas there are only 2.3 cases of psychopathology per 100,000 population for persons under age 15, the rate rises to 93 per 100,000 population for persons between 35 and 64 and to an astounding 236.1 cases per 100,000 for persons over 65. 93 If these data are useful at all, they suggest that children only rarely demonstrate the severest forms of mental health disorder and arguably do not need these services equally, except on the Commission's mechanical definition.

It further bears noting that the study does not consider adequately whether other sources of mental health treatment are available for children. In fact, school systems (through special education services, guidance and counselling programs and the like), juvenile courts and the general mental health system provide services for children which make reliance on community mental health services less necessary or likely. Because the focus of the Commission was limited to implementation of particular programs, however, this qualification on need went unmentioned.

Finally, confusion concerning the meaning of discrimination is revealed by an implication that parental consent requirements contribute

91. Schuck, supra note 22, at 52.
92. Age Discrimination (Part II), supra note 29, at 82.
93. Id. at 81.
to discrimination against young people. It is hard to see how one can claim discrimination against people who cannot or will not participate in a program. And, if the implication is that such requirements are frivolous and inappropriate, surely the basis for that suggestion requires more careful exploration than the Commission gives it. Indeed, nondiscrimination seems to require forcing people defined as needy by a program to participate in that program—a definition that has, as we will see, particular significance in connection with children.

Legal Services

The last program studied involved provision of legal services under the Legal Services Corporation Act of 1974. There were, as it happened, virtually no age data available; however, the Commission reported that most projects served relatively small proportions of clients between the ages of 6 and 15. Although the data presented is almost wholly anecdotal, it has what is sometimes called face validity—it seems right. A finding of discrimination in the administration of programs is, however, hard to justify on this basis. There was, in the first place, no information on need for legal services among this age group and there is every reason to think that very young persons are relatively infrequently involved with the legal system. Even where need exists (as with juvenile delinquency proceedings), the Commission has no information concerning the extent to which agencies it did not examine (public defender services or appointed counsel systems, for example) adequately served children. Moreover, the Commission, and many of the witnesses appearing before it, failed to distinguish between a need for legal services in the sense that there is an unmet right to assistance, and a need for legal services in the sense that the law does not, but should, provide a right to counsel in certain situations. Thus, while witnesses stated that they did not provide legal services to children for matters such as neglect proceedings and school disciplinary hearings, many jurisdictions do not provide for independent assistance for the child in those settings. Some part of the unmet "need" is not a conse-

94. Id. at 82-84.
96. AGE DISCRIMINATION (PART II), supra note 29, at 107-08.
97. Id.
98. Although authorities have recommended provision of counsel for children who are the subjects of neglect proceedings, e.g., IJA-ABA Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties 71-74 (1979), not all jurisdictions have adopted or practically implemented that procedure. And in school disciplinary proceedings, it is clear that schools are not constitutionally obligated to provide (or perhaps even allow) attorneys where short suspensions are involved. Goss v. Lopez, 419 U.S. 565 (1975).
quence of discrimination by agencies, but a consequence of the failure of the substantive law to agree that need exists for children in such matters.

It appears, therefore, that if the purpose of the Age Discrimination Act was to establish a principle that all people, regardless of age, are entitled to equal concern by government, it was unnecessary to include young people within the statute's coverage. The same conclusion would be reached if Congress simply intended to declare an intent that persons not be denied access to governmental resources because of their age. There is no evidence that children are in fact denied access to funds or services and considerable reason to think that they receive some kind of preference in that regard. Indeed, this last proposition is truer than even the Commission's data suggest. The Commission studied only nine programs, and its selection process emphasized the potential existence of discrimination. Had other programs been examined, the conclusion that children are an object of special social concern would have appeared even more strongly than it did in the data reported by the Commission. Federal programs directed especially toward young people would have counted, as would the vast resources invested at the state and county levels in elementary and secondary education programs, juvenile court services, and the like.

It is perhaps unnecessary to add that some groups of young people may not share equally in the general societal concern for youth. Children who have mental or physical handicaps, and even those who belong to racial or ethnic minorities, might present special needs that are insufficiently considered by governmental agencies, although this is not always true. In any event, to say that these special needs ought to be appreciated does not mean, certainly, that young people as a class suffer from lack of concern in American society.

**EQUALITY OF RESPECT AND THE AGE DISCRIMINATION ACT**

*The Idea of Equal Respect*

If children and young people are not subject to discrimination in the sense that they are denied a fair measure of government concern, it remains to ask if the Age Discrimination Act's extention to youth can be justified on the broader principle it seems to announce: the general equality of persons, regardless of age, within the political community. This principle differs from that of equal concern by demanding respect for the autonomy of persons as well as solicitude for their needs. It is possible to take full account of the suffering to which people are ex-
posed without according them respect as independent social actors. Indeed, the most paternalistic government may have such profound concern for the well-being of its members that it will protect them from making decisions that are injurious to their welfare. In doing so, however, government denies the value of its citizens' own views of their welfare and therefore treats them as instruments for the achievement of official concepts of how life should be lived.

It is not necessary for present purposes to explore fully the reasons for insisting upon recognition of the moral autonomy or personality of all members of the community; it is enough to say that non-utilitarians such as Professor Dworkin hold that governments must respect (and respect equally) the rights of people to determine how their lives should be lived. Concomitantly, government may not constrain these views, or count those who hold them less worthy, because the majority think these conceptions to be unwise or inutile. It would accordingly be wrong to say that blacks or homosexuals or Communists will be forbidden to marry or hold employment or receive welfare benefits because they have espoused or adopted a scheme for living which others think to be dangerous or evil. It does not follow, of course, that someone who holds these attitudes or belongs to such a group will receive any particular benefit or opportunity; equal respect is served when he or she is not discounted in the competition for these reasons.

In a real sense, nondiscrimination laws are vehicles for requiring something like the principle of equal respect in practical circumstances. It has already been suggested that equality of this kind does not determine any particular allocations but only requires that people not be foreclosed from them because their views of life and therefore they themselves are disvalued either generally or for purposes of the specific benefit in question. The difficulty, of course, is that the actual basis for decisions is rarely clear; it is hard to tell whether a person is denied an opportunity because of a legitimate preference (e.g., this applicant is

99. The sense of autonomy, of awareness of self as the initiator of action that makes some difference in the course of events, is taken by non-utilitarians as a central claim which must be respected by individuals and governments. This idea is derived from Kant's principle of the inherent worth and dignity of man and has been expressed by Professors Rawls and Fried in terms of "moral personality" and by Professor Benn as "natural personality." See Rawls, supra note 42, at 505-10; C. Fried, Right and Wrong 62-65 (1978); Benn, Personal Freedom and Environmental Ethics: The Moral Inequality of Species, in 2 Equality and Freedom 401, 408 (G. Dorsey ed. 1977). For both Professor Rawls and Professor Dworkin, the claim of everyone to moral personality lies at the base of the right to equality. See Rawls, supra note 42, at 505-07; Dworkin, supra note 33, at 272.

100. Dworkin, supra note 33, at 272-76.

101. Id. at 276.
incapable or less capable than other applicants) or because of some illegitimate preference. Where the applicant is a member of a group, the problem will be even greater to the extent that some plausible relation exists in fact between the group and the criteria for the opportunity. If women who seek an employment opportunity requiring strength or speed are denied that opportunity, it is difficult to say whether it was denied because these women were too slow or weak, which would not offend the principle of equal respect, or because, in the decision-maker's view, they had no business seeking work outside the home.

Taking the House Report at its word, the Age Discrimination Act did indeed declare that age, like race and sex, is an "irrelevant factor" which should not be relied upon in decision-making.\textsuperscript{102} Clearly, the House used this phrase as it has in other nondiscrimination laws, since it expressly analogized age to race, sex, national origin and religion. This apparently means that age should not be employed as a sufficient or even a presumptive criterion of access to benefits or opportunities. It is worth considering, however, how radical that proposition would be with respect to young people and ultimately whether it is likely that Congress meant to establish such a proposition as a matter of national policy.

\textit{Equality of Respect and Young People}

If there is any one thing that is clear about the cultural and legal position occupied by young people, it is that they are \textit{not} accorded the same respect enjoyed by adults in deciding how their lives should be lived. The view that children are dependent social actors is a cultural constant that finds expression throughout our positive law and in constitutional doctrine. Statutory and common law rules particularly exclude young people at various ages from every major decision other people make about their life plans, including marriage,\textsuperscript{103} employment,\textsuperscript{104} entrance into civil contractual relationships\textsuperscript{105} and the

\textsuperscript{102} See text accompanying note 21 \textit{supra}.

\textsuperscript{103} Typically, persons under 18 years of age are not allowed to marry, at least without parental permission. See H. CLARK, DOMESTIC RELATIONS 135-38 (3d ed. 1980); \textit{Uniform Marriage \\& Divorce Act} §§ 203, 208, 9A U.L.A. 102, 110 (1979).

\textsuperscript{104} Every state has laws prohibiting employment of children below a stated age in the general labor market and/or regulating the hours of employment available to minors. See A. Sussman, \textit{The Rights of Young People} 39-42 (1977).

\textsuperscript{105} See generally IA A. Corbin, Contracts § 227 (1963).
franchise. These and a host of other laws are explicitly founded on the belief that the judgments of young people, by reason of immaturity and inexperience, cannot be granted the respect which must be accorded those of adults. Whereas the ability to value choices rationally and to form even unwise schemes for living is conventionally recognized for adults, it is equally conventionally denied to youth.

The greatest instance of the special and unequal position of youth lies, however, not in these specific limitations on choice, although they are significant, nor even in the institution of compulsory education which mandatorily determines the greatest part of the daily life of youths under 16, but in the universal requirement that children submit to the authority of parents and persons in loco parentis. This requirement, which is expressed in juvenile codes creating jurisdiction over "incorrigible" and "runaway" children, places children in a true status condition, in which their behavior is not governed by generally applicable rules but by the private will of other individuals (their parents or guardians). It hardly requires stating that government by personal domination would violate any definition of equal respect.

106. The twenty-sixth amendment sets the age for voting in federal elections at 18. U.S. Const. amend. XXVI.
107. See, e.g., In re Barbara Haven, 86 Pa. D. & C. 141 (Orphans Ct. 1953), quoted in C. Foote, R. Levy & F. Sander, Cases and Materials on Family Law 613 (2d ed. 1976), discussing a state law providing that persons under 16 could only be married upon a finding of "special circumstances" by the Orphans Court:

[O]ur legislature enacted the current law, apparently concluding that one in the sunlight of youth, standing on the threshold of life, should not walk precipitously into the marriage chamber, but first should look with calm deliberation whether the step is both desirable and safe.

The statute in question... fulfills a two-fold function in protecting marriage as an estate and in placing a restraining hand upon the shoulder of impetuous youth.

See also McGuckian v. Carpenter, 43 R.I. 94, 110 A. 402 (1920) (infant may disaffirm contracts because he is entitled to protection against immaturity and improvidence which may lead him into making unwise bargains).

108. See Beyond Control, supra note 48, at Appendix, for a survey of various legislative treatments of noncriminal misbehavior by children.

109. "Status" is used here in the traditional sense of government by personal domination—that is, by the will of private parties—rather than government by the rule of law. The classic instance of status is, of course, the Roman family, where the father had entire power over the conduct and fate of those under his potestas. H. Maine, Ancient Law 133 (1864). Government by rule of law, in contrast, implies that the behavior and liberty of persons is governed by uniform and general legal commands; it is based expressly on the conviction that social order achieved by the personal domination of some individuals over others is intolerable. See Katz & Teitelbaum, Pins Jurisdiction, The Vagueness Doctrine, and the Rule of Law, 53 Ind. L.J. 1 (1977-78) [hereinafter cited as Katz & Teitelbaum]. This article also appears in Beyond Control, supra note 48, at 201.

110. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886): "[T]he very idea that one may be compelled to hold his life, or the means of living, . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." On the
Whereas government by generally applicable rules treats all persons equally and allows them, within defined and reviewable limits, to order their conduct as they like, status presupposes no equality of treatment. Decision-making is left to the discretion of private actors, who are free to determine their own agenda for those subject to that discretion. Thus, one child may be required to work after school by his parents and another forbidden to do so; one may be permitted to stay out until 10:00 p.m. and another only until 9:00. The only generally applicable rule for children is one of obedience to parental commands, and such a rule plainly represents the antithesis of respect for individual choices about how life should be lived.

The proposition that children do not have the same range of choice granted to adults also finds expression in constitutional doctrine. It is not true that children entirely lack rights to autonomy under the Constitution; indeed, the Supreme Court has held virtually all liberties recognized for adults to be applicable to children under some circumstances. Claims by young people to freedom of speech, to rights of choice in private areas of decision, and to liberty in connection with state-initiated deprivations of physical freedom have all received sympathetic attention by the Court.

On the other hand, it is also plain that while children are entitled to some measure of respect, their ambit of freedom is less extensive than that enjoyed by adults, particularly where matters of choice are directly involved. The narrower range of respect is reflected both in particular constitutional decisions and in the standards by which restrictions on liberty affecting children are measured. For example, it is generally true that, when “fundamental liberties” of adults are restricted by laws, the Court will bring strict scrutiny to the limitation and, in particular, will only sustain the law if the state can demonstrate that the restriction is necessary to accomplish some compelling governmental purpose. The Court has routinely observed, however, that

issue of personal domination and juvenile court status offense jurisdiction, see generally Katz & Teitelbaum, supra note 109.


even in these areas "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." 116

Thus, while children are not entirely without first amendment rights, the Court in Ginsberg v. New York 117 upheld a statute restricting the sale of sexually oriented material to minors which concededly would have been unconstitutional with respect to adults. Mr. Justice Stewart's concurring opinion explained this result in terms of a lesser ability of children to decide what they should and should not read:

I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults. 118

Other decisions have sounded the same theme. In Carey v. Population Services International, 119 the Court held that while a law prohibiting access to contraceptives implicated what is generally a fundamental privacy interest, it would not apply the same strict scrutiny to restrictions on access by children that would be used for adults. The test employed was not simply whether an adult could be denied the interest involved, but whether the privacy restriction served "any significant state interest . . . that is not present in the case of an adult." 120 This less rigorous standard of review is appropriate, the opinion explains, "both because of the State's greater latitude to regulate the conduct of children, and because the right of privacy implicated here is 'the interest in making certain kinds of important decisions' . . . and the law has generally regarded minors as having a lesser capability for making important decisions." 121

Thus, while children are not, as a constitutional matter, wholly lacking in autonomy, their decisions about how to conduct their lives are not uniformly entitled to the same deference that adults enjoy in


118. Id. at 649-50 (Stewart, J., concurring).


120. Id. at 693 (quoting Planned Parenthood v. Danforth, 428 U.S. at 75).

121. Id. at 693 n.15 (citations omitted). Only last term, the Court once again had occasion to reiterate its view that because "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," the state may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. Bellotti v. Baird, 443 U.S. 622, 635 (1979).
the face of state regulation. It may further be true that young people are entitled to very little deference when the agency imposing its judgments on the child is the family rather than the state. A long line of cases, beginning with *Meyer v. Nebraska*\textsuperscript{122} in 1923 and continuing through *Parham v. J.R.*\textsuperscript{123} last term, with many stops in between,\textsuperscript{124} has supported parental decision-making against government interference. With what seems to be increasing strength, the Court has emphasized the parental role in inculcating “our most cherished values, moral and cultural,”\textsuperscript{125} and declared that role to be established “beyond debate as an enduring American tradition.”\textsuperscript{126}

These cases go some distance toward confirming the proposition that children occupy a status in the true sense. Perhaps recognizing this result, the Court has also observed that the tradition of parental authority is consistent with and indeed necessary for the development of that individual autonomy which children will ultimately possess. “Legal restrictions on minors,” it remarked, “especially those supportive of the parental role, may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.”\textsuperscript{127} It is worth noting that this justification might well command the agreement of legal philosophers as well; certainly it resembles to an extent Professor Fried’s explanation of the notion of a right to familial control:

There are corresponding advantages to the child in recognizing family authority . . . . [The sense of ourselves as unique, particular beings] would be undermined if, for instance, we were bred “to order” according to some plan. The random biological hazard of our parents’ mating affirms that we belong to ourselves, for no one planned it. And our uniqueness is the sign of our individuality. Now, this conceptual advantage is carried forward by affirming that our parents not only conceived us but also transmitted through personal love our most primitive emotional formation. Belonging at first to our parents, whom we will replace, we have a chance of believing we belong to ourselves.\textsuperscript{128}

Since the purpose of this discussion is to describe the extent to which

\begin{footnotesize}
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\item 122. 262 U.S. 390 (1923).
\item 123. 442 U.S. 584 (1979).
\item 128. C. FRIED, RIGHT AND WRONG 155 (1978).
\end{itemize}
\end{footnotesize}
children are or are not treated as equals, now is not the occasion to raise doubts about the adequacy of this rationale. It is enough for the moment to observe that, while plenary control is entirely sensible for infants, an important part of growth and maturity lies in learning to make one's own decisions. A body of law that requires uniform obedience to the choices of others—even the choices of one's parents—seems hard to reconcile with the developed sense of autonomy we will shortly expect of a 16-year-old youth.\textsuperscript{129} At the same time, the existence of that body of law says much about the law's attitude toward claims by young people to determination of their own life plans.

Beyond question, then, to treat youth as an irrelevant or arbitrary factor for deciding on the treatment of persons would represent a radical departure from current laws, practices, and constitutional doctrines. It would accomplish with one stroke more than even the most committed proponent of "children's liberation" could have expected over years of advocacy. Of course, every nondiscrimination statute is intended to work a departure from tradition; it is precisely the existence of a tradition of unequal treatment that calls such laws into existence. And it is also true that the fact of constitutional sanction for unequal treatment does not demand congressional inaction. As we have seen, most recent nondiscrimination laws have been enacted because constitutional doctrine did not reach groups or practices thought to require protection or disapproval.\textsuperscript{130} Nevertheless, it is simply inconceivable that Congress genuinely meant to declare the foregoing laws and doctrines entirely wrong in policy and to say that age, or at least youth, cannot serve as a valid indicator of fitness for choice.

It is surely plain that our laws and attitudes are correct in treating youth as a relevant factor in connection with respect for choice. To a certain point, it is not only a good but a perfect indicator of the capacity to form intelligent views about how life should be lived. At the simplest level, we know to a certainty that very small children cannot survive apart from adult control and maintenance. They cannot feed themselves or secure food; they cannot cross streets safely or protect themselves from any other kind of harm they might encounter. Economically, young children have no place of any sort; they cannot produce or gain access unaided to consumer goods of any kind. Intellectually, even older children have small experience, undeveloped

\textsuperscript{129} See Katz & Teitelbaum, \textit{supra} note 109, at 17-20.

\textsuperscript{130} See text accompanying notes 6-8 \textit{supra}.
cognitive skills and immature moral judgment. Very young people are viewed in every culture as dependent social actors and, at least short of adolescence, are so treated out of obvious necessity rather than any subtler motive.

It is also true that as one goes from infancy to the last years of minority, youth is increasingly less well correlated with capacity to make important decisions. This is as it must be, since we expect that, upon reaching the age of 18 or 21, members of the community will have achieved the level of competence necessary for autonomous living. There is, however, a difference between saying that rules of thumb about capacity are imperfect and saying that they are forbidden. Perhaps if there were not good reasons in everyday experience for saying that age is, at least in some stages, an excellent indicator of capacity for choice, a rule prohibiting use of this characteristic would be entirely appropriate. So Congress has already determined for race and gender. Where, however, we know that age rules are at some levels entirely valid and that they are often accurate indicators at all levels, categorical prohibition of such rules makes little sense.

131. Young children typically have difficulty in seeing the temporal and causal relations between events. Those under eight, for example, often cannot order events chronologically or accurately judge duration. J. PIAGET, THE CHILD'S CONCEPTION OF TIME 10-29, 39-49 (1927); D. FLAPAN, CHILDREN'S UNDERSTANDING OF SOCIAL INTERACTION 3 (1968) [hereinafter cited as FLAPAN]. Moreover, children (perhaps even until they are 11 or 12 years old) frequently do not understand causal relationships in physical matters; they tend to view all events as willed action or do not see intermediate steps between apparent cause and effect. See J. PIAGET, THE CHILD'S CONCEPTION OF PHYSICAL CAUSALITY 242-95 (1930); FLAPAN, supra, at 57-63.


133. It might be suggested that the Age Discrimination Act's emphasis on individualized determination of capacity is sensible in view of the imperfect fit between age and voting laws, compulsory education laws, marital age restrictions and the like. Certainly some 17-year-olds are as competent to vote or marry as 18-year-olds who are entitled to engage in these activities, and equally surely some 15-year-olds are better suited to employment than to high school. This observation may argue for increased flexibility in some areas, but does not mean that rules of thumb regarding capacity are generally improper, even where we know they operate imperfectly.

The first reason for using rules of thumb has to do with the placement of a line at some age. Certainly no one would seriously suggest that a five-year-old be examined individually for capacity to marry; however, drawing the line above that point will operate unfairly unless it is drawn at so low a point that we can say with certainty that no younger person (or almost no younger person) can engage in the questioned activity. This means that the line must be located at so low a point that most of those just above the line will still in fact be incompetent for the purpose. Accordingly, it will be necessary to inquire into the capacities of large numbers of individuals.

This, in turn, presents several further problems. The first is one of convenience; a large and expensive apparatus will be necessary to examine individually all of those who seek to marry, vote, leave school, drive automobiles, leave home, drink alcohol and engage in any other activity now categorically prohibited to youth. Moreover, that task would be immensely difficult as well as inconvenient. In the first place, it is by no means clear that we know exactly what capacities we want to evaluate in connection with each of these activities; exactly what, after all, might competence to leave home, vote and marry entail? In the second place, we do not know how to measure these capacities with any degree of accuracy. While occasionally courts are called upon to deter-
To round out this argument, it may be worth observing that nothing in this philosophical notion of the right to respect is inconsistent with treating children differently from adults. The claim to equality of respect or moral personality is expressly founded on a notion of moral agency: that is, on the assumption that persons are rationally able to form life choices. However, it seems widely to be agreed that young people as a group lack the moral agency on which claims to autonomy are founded. Sometimes the proposition that children have no claims of this kind is made explicit. Mill, for example, observed that his doctrine of liberty "is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood." By the same token, H.L.A. Hart and Stanley Benn apparently agree that to speak of the "rights of animals or babies... makes an idle use of the expression, a right..." It is in their view inaccurate to confuse needs, which animals and children may have (and which it may be wrong to deny) with the notion of their possessing moral agency.

Perhaps more commonly, the exclusion of children from moral personality is simply assumed as a definitional matter. Professor Dworkin does not address particularly the place of young people within his scheme, but it seems fair to infer that, so far as children cannot in fact form rational choices about life, they lack the entitlement to respect upon which equality is based. Professor Fried would seemingly reach the same conclusion and, indeed, suggests that at least very young children can properly be viewed as extensions of their parents' personalities. It must follow that, to the extent children are viewed

mine the capacity of minors to marry, the standards to be used are generally vague and subjective; moreover, they are applied only after a full evidentiary hearing. Large-scale administration, in contrast, would suppose relatively specific criteria that could be ascertained easily and inexpensively. Finally, it should be clear that the problem of defining and measuring capacity really means setting definitions and standards for a variety of kinds of competence. Capacity to marry, to vote, to leave school and to leave home are all different notions which cannot be measured by a single device. If we are genuinely concerned about accuracy, it will be necessary to devise and administer valid and reliable tests that reflect each of the various kinds of capacities which young people might assert. This enterprise will frequently be beyond our own capacity, both technically and practically.

134. For a recent analysis and criticism of this conclusion, see L. Houlgate, The Child and the State 47-60 (1980).
137. Benn, supra note 136, at 406.
in this way, they claim no personality in their own right.\textsuperscript{139}

However one looks at it, therefore, it would be a genuinely remarkable step for Congress to declare that age is an "irrelevant factor" in the same way that sex, race, color or religion is irrelevant to governmental or individual decision-making. Perhaps it is or should be irrelevant with respect to all persons, however old, who have once reached the age of majority, although even that is a debatable question.\textsuperscript{140} To extend the same proposition to the cradle, however, contradicts custom, law and legal theory as well as daily experience. Despite the strong language of the House Report, it is ultimately impossible to believe that the Age Discrimination Act meant to declare that persons of all ages are entitled to decide upon their life plans, or even that they are all presumptively entitled to do so.

The incongruity of treating very young persons as if they were entitled to equal respect may account in part for the very general exceptions engrafted onto the Act\textsuperscript{141} and more fully articulated by the HEW regulations adopted in furtherance of the Act.\textsuperscript{142} These exceptions allow age to be taken into account when to do so is necessary to the normal operation of a program or statutory objective, or when a program undertakes to provide benefits or assistance to persons on the basis of age, or when age is related to some characteristic necessary to the accomplishment of the program's objectives and that characteristic is otherwise hard to measure. Liberally interpreted, such exceptions may well allow agencies to continue to use age classifications in much the way they have always been employed. But if such broad qualifications on a rule of equal respect are necessary to make the rule sensible, the significance of the rule disappears.

\section*{Two Further Assumptions of the Age Discrimination Act}

It was suggested early in this discussion that the Age Discrimination Act embodies a special strategy for dealing with perceived inequal-

\textsuperscript{139} Professor Rawls, it should be said, does view children as entitled to equal justice, because his formulation emphasizes as the criterion of personality potential rather than realized capacity to decide upon a life plan and to make moral judgments. This flows from the hypothetical nature of the contract from which principles of justice are derived; because there were no actual participants to the agreement, possession of mature facilities is unnecessary, as long as persons would at some time possess those faculties and thus, presumably, would reach the same conclusions as any other persons. \textit{See Rawls, supra} note 42, at 506-07. At the same time, it is also clear that surrogates will exercise the rights of children until their capacity is in fact realized, indicating that actual capacity has considerable importance in Professor Rawls' scheme.

\textsuperscript{140} \textit{See generally} Schuck, \textit{supra} note 22.


\textsuperscript{142} \textit{See} text accompanying notes 35-38 \textit{supra}.
ities of treatment. Although such legislation is sometimes passed only to implement requirements of equal treatment that courts have announced, it is often used to declare a national policy of equality where differential treatment would not ordinarily offend constitutional doctrine. The thrust of most nondiscrimination laws is to say that although it may be rational for some purpose, and therefore constitutional, to treat group X differently from the rest of the population, it is wrong in policy to do so (at least when that would be disadvantageous to members of group X). This group should, therefore, ordinarily be treated as if its defining characteristic does not exist or is not relevant to governmental action.

This is no trivial declaration for Congress to make, since it imposes on local authorities a principle of equality that they have not chosen and that would not be required of them as a federal constitutional matter. Presumably there must be firm national agreement that the group in question has been treated unfairly by prevailing practices and that a wise policy would be to provide group members with the concern and respect given other members of the community. Such an act should ultimately reveal through its terms or through administrative interpretation what “equal concern and respect” mean particularly, and at the least the need for and right to these attitudes ought to be clearly established.

It does not appear, however, that the drafters of the Age Discrimination Act looked carefully at what equality might mean in connection with young people. We have already seen that, if the Act was intended to declare that young people are entitled to the same concern for well-being that we show other members of society or to some “fair” share of societal benefits and opportunities, its extension to youth seems unnecessary. If the Act had a further purpose of announcing the entitlement of people of all ages to equal rights of autonomy and respect, it is hard to believe that Congress genuinely meant such a declaration to apply to children. Beyond these conclusions, there may be some value in exploring at least briefly two further assumptions that the Act might have indulged, to indicate why careful thought about the substantive nature of equality and about the special position of youth is important.

_The Assumption that Discrimination Against Young and Old Presents a Single Problem_

Perhaps the most obvious explanation for the scope of the Age Discrimination Act is that it proceeds from a set of false analogies
which can be expressed by the notion that discrimination against the old and the young are but parts of a single problem called "age discrimination." The first of these analogies is between old and young people. It appears that the Act assumed that if old people are treated differently because of age and it is wrong to so treat them, it must also be wrong to treat young people differently from others because of age. The second false analogy, which flows from the first, is that "age" is like race or sex for purposes of a discrimination act.

With regard to the first of these points, Congress presumably intended to remedy perceived failures in concern and respect for the elderly by declaring that their needs and choices about life could not properly be discounted on the sole basis that they were the needs and choices of old people. It was also perceived that young people's capacities for choice are likewise discounted on the basis of age, and therefore it seemed right to address the one together with the other. This analogy fails, however, because the situations of old and young people are not in fact very much alike. On the one hand, we have no cultural ambivalence about the value of young people in society; all of our clichés about their representing the "hope of tomorrow" and "our greatest natural resource" bespeak concern for their development and success. For the old, the situation is less filled with promise, and genuine concern for their well-being may indeed often be absent. On the other hand, the elderly as a group do have a valid claim to equal respect as autonomous social actors. Many children, in contrast, have not yet realized a capacity for self-determination, a fact which we know surely to be true of at least very young children. Young people present the classic case for paternalistic control, whereas old people—absent disability—represent the group from whom paternalism might most readily be expected.

The second false analogy is between "age" as a classification and "sex" and "race" as classifications. We know that the age discrimination law was modeled on sex and race discrimination statutes, and it is likely that Congress therefore assumed that what worked with the last two would also work with age. However, sex and race are not like age. The first two categories can be treated as a single issue because all members of a gender or racial group can be treated as identically situated with respect to the group characteristic in question. All women can be treated as equally women and all blacks or orientals as equally black or oriental (and as equally members of racial minorities). Accordingly, a rule addressed to these characteristics will mean the same

143. See text accompanying note 22 supra.
thing to all members of the group. Concomitantly, there is no competi-
tion within the group for the scarce benefits for which they will be eligi-
ble. To give women some opportunity gives all women equally that
opportunity, denying it to none. That is not to say that members of a
group will not compete among themselves for particular jobs and op-
portunities, but their competition will be personal rather than based on
factors related to gender or race.

The situation with age is different because the old and young are
not identical in their characteristics within the group. Few statements
would mean the same to both. A rule that "Age must not be considered
in employment" may mean something to a person of 60 or even 90
years but cannot mean the same thing to a 3-year-old. The same is true
for most categorical statements that might be made with respect to op-
portunities and autonomy.

Moreover, the Act's assumption about the need to assure equality
of concern for young and old people may have positively mischievous
results from the point of view of the elderly. Because the Act set out to
remedy what it thought to be inattention to the needs of both young
and old people, it forbade discrimination against those groups but ex-
pressly allowed programs that provide services to these groups to con-
tinue to do so, without regard to requirements of equal treatment.144

If young and old were identically situated with respect to need, or if re-
sources were unlimited, this approach would present no special
problems. However, we know that resources are in fact scarce, and
neither the Act nor the Commission's report provides any basis for say-
ing that the unmet needs of the young are as great as or greater than
those of the elderly. If, indeed, it is true (as seems to be the case) that
young people receive a very great portion of public wealth, it is possible
to argue that their inclusion in the statute serves to perpetuate existing
inequalities in resource allocation by allowing programs that prefer to
serve children to continue doing so at the expense of the elderly.

It should quickly be added that this argument may or may not be
correct. A variety of substantive conclusions about what equality
means can be reached. Plainly, relative need is a condition that can be
taken into account, as the distributive maxim, "To each according to
his needs" indicates.145 But the relative need of young and old for pub-
lic resources is a disputable matter. At the most general level, an advo-

145. See, e.g., Vlastos, Justice and Equality, in SOCIAL JUSTICE 31, 40 (R. Brandt ed. 1962), for
an argument that this maxim represents the most perfect form of equal distribution.
cate for the interests of children might point to the profound dependence of the young—their inability to secure their own needs for survival—and argue for an especially great need for public assistance on their part. He might also point out the existence of needs that are peculiar to the young, such as basic education, which must be satisfied. One who is particularly concerned with the welfare of the elderly might respond that older people are more gravely at risk than the young, since the latter ordinarily have the possibility of assistance from their families or relatives whereas older people who cannot assure their own survival have no recourse other than public assistance.

As one becomes more particular, matters become more rather than less disputable. Given scarce resources of any sort, priorities must be established which may have different meanings for different age groups. Reservation of medication for the gravely ill in preference to the moderately ill would occasion little argument, even if young people were more likely to be gravely ill than older people and even if older people would like to have the medicine to relieve their discomfort. Equality is done on the theory that young and old people as groups are not situated equally with regard to the distributional priority that has been established. Other kinds of priorities may occasion greater concerns. The view can be taken that it is more valuable to use scarce medical resources to prevent illness than to cure it,\(^{146}\) or to deal with curable rather than chronic and incurable diseases. These decisions might also allocate more services to young than to old patients and, in a situation of grave scarcity, might leave large numbers of old people unserved. Nevertheless, the fact of disproportionate allocation does not constitute “unequal treatment” if the priority decision is acceptable; as with the previous example, old and young people are not similarly situated with regard to their needs for preventive or remedial care. It is, of course, also arguable that the priority is “wrong” and should not have been included in the distributive framework, on the ground that the suffering of chronically ill older people should be given greater weight than efforts to prevent disease for persons who are not in fact yet ill.

If one includes criteria of equality other than need—and a case can be made for defining equality in terms of “value” or “merit” or

\(^{146}\) For instances of just such a decision, see text accompanying notes 85-86 supra.
“deserts”\textsuperscript{147}—the potential for conflict between young and old increases even further. It would, indeed, be possible to review the entire literature about what equality means, generally or in connection with specific kinds of activities (such as allocation of health care services)\textsuperscript{148} in deciding what distributions are appropriate for young and old people. The very fact that such an exercise could be undertaken reveals the flaw in considering young and old people as a single class for purposes of a law requiring “equal treatment.”

\textit{The Assumption that Provision of Resources Is a Sufficient Measure of Equality}

If the Age Discrimination Act’s inclusion of young people may come to be a source of regret for older citizens, there are also features that will not necessarily be welcomed by advocates of rights of youth. The Act seems to assume, and the Civil Rights Commission did assume, that proportionate provision of resources is a sufficient measure of equality. We have already explored some of the difficulties with that approach, but it should further be said that provision of resources may be inconsistent with affording recipients equality of respect. Children are the beneficiaries of the greatest part of every state and local budget through elementary and secondary education programs, juvenile court services and the like. They do not receive these benefits, however, because they apply for or want them, or even because these benefits are due to all members of society. Rather, children are provided education precisely because they are not equal to adults and because they “need” these services in order to become adults under current notions of responsible adulthood. And, because children are not equals, they have no right to say that they do not wish to accept the benefits provided them.\textsuperscript{149} Accordingly, the very circumstance that indicates “equality”

\textsuperscript{147} The following familiar distributive statements reflect other criteria that might be incorporated in a definition of equality:
- To each according to his need.
- To each according to his worth.
- To each according to his merit.
- To each according to his work.

Vlastos,\textit{ supra} note 145, at 35.

\textsuperscript{148} For an indication of the breadth and complexity of the issues within this single area, see, e.g.,\textit{ Ethics and Health Policy} (R. Veatch & R. Branson, eds. 1976);\textit{ Moral Problems in Medicine} (S. Gotovitz \textit{et al.}, eds. 1976); J. Katz & A. Capron,\textit{ Catastrophic Diseases: Who Decides What?} (1975).

\textsuperscript{149} The term “needs” can be used in two different senses. One suggests desires that should be satisfied (“A starving man needs food”); the second has no necessary connection with desire (“A mentally ill person needs electroconvulsive therapy”). These different senses say a great deal about the positions of the persons to whom they are applied. For a discussion of this difference of
for the Civil Rights Commission—provision of various kinds of services—may be a manifestation of the inequalities associated with youth when those services are mandatorily provided. If elderly people are not so thoroughly provided with services, it may be because they are unlikely to have such services imposed upon them according to an external notion of "need."

This is not to say that provision of these services to children may not be related to equality of needs and certainly does not imply that children ought to receive fewer of the resources available for distribution to the population. These decisions call for a highly refined notion of equality which the Age Discrimination Act does not offer and which there is not time here to explore. However, these observations do remind us that paternalistic as well as egalitarian schemes may devote resources to the well-being, as they define it, of those they govern, and that provision of resources cannot serve as a sufficient measure of equality of treatment.

CONCLUSION

It is possible to regret the fact that closer thought was not given by Congress to the complexities of dealing with atypical citizens, including children, in our society. As a general proposition, laws derive their model from the adult, competent person about whom categorical statements can readily be made. Having said, "All people should be allowed to do X," or "All people should be treated in Y fashion," one then turns to justifications for and limitations on that general proposition. This approach even applies to most nondiscrimination legislation, which deals with people who are politically marginal but otherwise fit the general model. Indeed, the principal thrust of such laws is to eliminate the political marginality of such groups on the assumption that their members will then be like the rest of the population.

Citizens who lack various kinds of capacities through immaturity, accident or congenital disability are special cases for law, in part just because the usual categorical statements cannot easily be applied to them. It will be important, as we deal more and more with the legal and social position of atypical citizens, to work out what equality means for them. Perhaps, as the Supreme Court has suggested with children, a very precise analysis of the kinds of opportunities, services and burdens is required before the meaning of fairness can be estab-

lished satisfactorily. What is clear is that the Age Discrimination Act, although it dealt with one group plainly comprised of atypical citizens (youth) and another that includes substantial numbers of (differently) atypical members of the community, failed to realize both the variety and the special character of the constituency it was addressing. In all likelihood, some good will nevertheless come of the Act in respect of older people, but its meaning for youth remains obscure because the meaning of youth was obscure to the drafters of the Act.