October 1981

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OF AGE AND THE CONSTITUTION

HOWARD EGLIT*

Ours, like all cultures, is a society in which age distinctions are widely employed as mechanisms of social control.1 Decisions regarding the allocation of public resources, the extension and denial of public benefits, the imposition of legal disadvantages and the relaxation of legal responsibilities are commonly based on the age of the individual who is at the target end of these determinations.2

Many age distinctions ensconced in laws and regulations are no doubt the product of happenstance, rather than careful plan or analysis.3 Nonetheless, given their prevalence in our statutes, given their

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1. American society is hardly unique. Age as a determinant of status and of the rights and responsibilities attendant thereon is common in all cultures. See, e.g., 3 M. RILEY, M. JOHNSON & A. FONER, AGING AND SOCIETY 402 (1972).


Less overt, but equally significant decisions are made on the basis of age in other settings. Hospital emergency room services are denied the aged in favor of younger patients when medical personnel and supplies are scarce. See Sudnow, Dead on Arrival, in SOCIOLOGICAL REALITIES 225, 227 (I. Horowitz & M. Strong eds. 1971). Public mass transit systems operate buses whose steps are too high for the mobility impaired—who are often elderly—to mount, and subways whose lack of elevators or escalators likewise bar their use by such persons. See U.S. DEPT OF TRANSP., TRAVEL BARRIERS (1970). See also Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977). Children are punished for acts—school truancy, for example—which if perpetrated by adults would carry no condemnation. Federally financed programs designed for the general population disproportionately underserve the elderly. See U.S. COMM’N ON CIVIL RIGHTS, AGE DISCRIMINATION STUDY 10-21 (1977). The mass media typically portray the elderly in negative roles and negative terms. See generally J. TEBBEL, AGING IN AMERICA: IMPLICATIONS FOR THE MASS MEDIA (NCOA Monograph No. 2, 1976).

3. A classic example of the unreflective ways in which age distinctions are injected into our
permeation of our general social attitudes, and given their persistence, age criteria must be satisfying certain social and political needs. Some of these needs are obvious, even if not often articulated. For one, reliance upon age categorizations facilitates decisionmaking. Rather than a program administrator having to engage in the time-consuming and costly exercise of determining whether a given individual does or does not fit into a programmatic charter, he can rely upon a clear, indisputable fact—the age of the person involved. In a society such as ours, heavily larded with bureaucratically administered programs extending benefits and entitlements, the accompanying dollar and time savings can be enormous.

Not only do the bureaucrats gain; there are advantages for the individual as well. Certainly, use of age distinctions enables speedier decisions than would individualized treatment. There are even some gains in fairness which likely accrue from employing age criteria, for statutes is provided by the recollections of Wilbur Cohen, one of the chief legislative aides involved in the drafting of the landmark Social Security Act of 1935. Cohen has written:

The simple fact is that at no time in 1934 did the staff or members of the Committee on Economic Security deem feasible any other age than 65 as the eligible age for the receipt of old age insurance benefits. There is, therefore, very little material available to analyze the economic, social, gerontological, or other reasons for the selection of this particular age. . . . The committee made no detailed studies of alternative ages or of any proposals for voluntary retirement at earlier ages or of compulsory retirement or of any flexible retirement program in relation to the disability of an individual.

. . . It was understood that a reduction in the age below 65 would substantially increase costs and, therefore, might impair the possibility of successful acceptance of the plan by Congress. A higher retirement age, of say 68 or 70, was never considered because of the belief that public and congressional opposition would develop against such a provision in view of the widespread unemployment that existed.


Age 65 as a significant touchstone had apparently first risen to the level of government consciousness in the late 19th century, in Bismarck’s Germany, when the first national social welfare program was devised and that age was utilized. The Social Security Act’s adoption of that age line, little analyzed as it was, succeeded in making age 65 a demarcation of considerable significance throughout our society:

The age of 65 has more or less come to be considered as the age of entering old age in American society. It seems likely that the Social Security Act of 1935 did more to define this limit than any other single event. Probably most private pension schemes adopted or proposed since that date have taken the age of 65 as the date of retirement. Compulsory retirement requirements have become much more frequent since 1935, and they often adopted 65 years as the age of effectuation. . . . Thus a legal definition helped to differentiate more sharply a social category.


A move away from the critical significance of age 65 has gained momentum in recent years. In 1978 Congress amended the Age Discrimination in Employment Act of 1967 to extend its hitherto limited coverage only of persons 40-65 to include individuals up to age 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (codified at 29 U.S.C. § 631 (Supp. III 1979)).
use of the unarguable factor of age mitigates the potential for discretionary injustice which is inherent when a bureaucratic system is called upon to render judgments in a context which leaves room for subjective evaluation. Added to these advantages for the individual are the likely benefits which follow for society as a whole from an age-reliant system: so long as a system works the same for all people by unswervingly using the objective factor of age as the basis for decisionmaking, the appearance of justice is generated and maintained—a not inconsiderable plus in a society increasingly suspicious of government.

Age lines adopted in statutes and regulations also serve to translate social attitudes into legal norms, thereby presumably satisfying more intangible, but nonetheless real, societal needs. Delineation of groups by their ages serves to facilitate the expression of certain felt perceptions about those groups: the notion that children may, and should, properly be subjected to both social protections and controls because they are physically, emotionally and intellectually immature; the perception on the one hand that older people have had their day in the sun and thus may properly be moved out of the way, and on the other hand that the aged are deserving of society’s helping hand; the belief that adults in the youthful and middle-aged ranges should not be dependent, but rather should shoulder their responsibilities without special government aid.

There are, of course, very significant arguments that go in the other direction, identifying ageism as a significant, sometimes even intolerable, vice. The use of age lines serves to facilitate stereotyping, which leads to the treating of people in ways which ignore their individual capacities and merit; to label someone as “old” or “young” is to be able to set him at arm’s length, which in turn eases mistreatment: he is not one of “us,” he is one of “them.” Age distinctions thus undermine basic social concepts of equality and individual worth. And what makes ageism particularly bad is that, like racism and sexism, it segre-

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4. Throughout this article “ageism” will be used to denote the use of age-based distinctions and perceptions to impose negative consequences upon the target of such distinctions and perceptions. Some ascribe the coining of the term to Dr. Robert Butler. See, e.g., R. BUTLER, WHY SURVIVE? BEING OLD IN AMERICA 11 (1975). He confined it, however, to prejudice and stereotyping directed against the old. This article views ageism in broader perspective, deeming the term applicable in all contexts—with reference to the young as well as the elderly.

5. Numerous studies suggest that society in general stereotypes aging and the aged with negative evaluations. The stereotype reflects the expectation that old age is a time characterized by a decreasingly active role in life, economic insecurity, loneliness, resistance to change, poor health, and failing mental and physical powers. In short, old age is not seen as conducive to feelings of adequacy, adjustment, usefulness, and security. Peters, Self-Conceptions of the Aged, Age Identification, and Aging, 11 GERONTOLOGIST 69, 72-73 (Pt. II, Winter 1971) (citations omitted).
gates the individual on the basis of a characteristic which he himself has not chosen, and which he has no power to change. This flies in the face of fundamental societal values: "[l]egal burdens," the Supreme Court has said, "should bear some relationship to individual responsibility or wrongdoing."6 Inevitably, then, unfairness works hand-in-glove with age distinctions: some who are otherwise qualified will be denied, some who are otherwise deserving will be rejected, because an age-gearied system of social ordering leaves no room to consider individual abilities and needs.

Ageism takes more tangible tolls as well. Age-based mandatory retirement, for example, deprives society of the productivity of still able and willing workers.7 Not only do they no longer contribute goods and services; they become consumers of governmental assistance and users of entitlements, such as Social Security, which they might otherwise not have to turn to.8 Indiscriminate age lines may also generate other costs which a more finely tuned system could avert: reduced mass transit fares, for example, are made available to persons over 60, whether or not they are actually needy.9 Thereby a benefit extended because of a perception of financial need is perverted by reliance upon a criterion—age—which is not necessarily a good predictor of economic distress.

7. One estimate is that in 1972, the mandatory retirement of older workers accounted for a loss of about 0.3% of the total gross national product—i.e., $3.4 billion. Given the vast growth in the GNP, the total dollars lost is now much higher, even assuming that the percentage rate has not also increased. See Schulz, The Economics of Mandatory Retirement, INDUS. GERONTOLOGY 1, 7-8 (Winter 1974).
8. The increasing burden of Social Security payments for workers has been a matter of growing public attention and concern. The costs of the Social Security system, maintained by a regressive tax, are rising at a rate in excess of salaries. This is due to the twin burdens of inflation, to which Social Security benefits are now geared, and the allegedly progressively deteriorating dependency ratio, which measures the number of unemployed relying upon those who are still in the work force.

Actually, the figures are not as distressing as they are sometimes portrayed to be. The rising costs of benefits to the retired are mitigated to some degree by the decreasing costs of child rearing, given reduced birthrates. Whether workers psychologically perceive the two types of costs as equivalent and therefore can regard the shift in dependents from youngsters to oldsters as essentially a wash is problematic, however. See P. Drucker, THE UNSEEN REVOLUTION 49 (1976). Moreover, an increasing number of early retirees skew the dependency ratio by injecting into dependent status a larger than otherwise expectable number of older individuals. See Economics of Aging: Toward a Full Share in Abundance, Hearings Before the Subcomm. on Employment and Retirement Income of the Senate Special Comm. on Aging, 91st Cong., 1st Sess., Pt. 9 app. A, Employment Aspects of the Economics of Aging 1307, 1316-17 (1970). See generally U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SER. P-23, NO. 59, DEMOGRAPHIC ASPECTS OF AGING AND THE OLDER POPULATION IN THE UNITED STATES (1976); J. SCHULZ, THE ECONOMICS OF AGING 6-8 (1976).
Even granting that age distinctions are common throughout all societies,\(^{10}\) it does not follow that customs and mores of past days and of simpler cultures are appropriate in our society today.\(^{11}\) And whatever one's conclusions about the benefits and detriments of age categorization, the day when we could simply accept our age-infused social system in a matter-of-fact manner is behind us. Political and social sensitivities have been triggered both by increasingly aggressive interest groups, most significantly those representing seniors,\(^{12}\) and by the superficial similarities between the readily identified evils of racism and sexism, on the one hand, and ageism on the other. As a consequence, legislatures and judges have had to begin to come to grips with the phenomenon of ageism.\(^{13}\)

The purpose of this article is to explore the treatment by the courts of age distinctions under the Constitution. The temptation in articles of this nature is to offer the answer—the solution which, if only legisla-

\(^{10}\) See note 1 supra.

\(^{11}\) It has been observed as to the old that:

In essence, our culture is presently creating a new life-era—a new phase of considerable duration in the life cycle—but, as yet, has not developed any major institutions that can give purpose and meaning to life in these extended 20 or 30 years. In many simpler cultures, the old are the about-to-die. It seems that something of this code still lingers, atavistically, with us, despite the fact that our so-called "dying" people may go on living far beyond the formally defined onset of such a status. Clark, The Anthropology of Aging: A New Area for Studies of Culture and Personality, in MIDDLE AGE AND AGING 433, 438 (B. Neugarten ed. 1968).

The roles of the young are likewise changing, and subject to further change in light of developments in our society. Adolescence, or extended youth, has been extended through the middle 20s for many persons, given their need to continue attending professional schools during those years. See generally K. Keniston, Youth and Dissent (1971). Perhaps, then, raising the age of legal adulthood ought to be contemplated rather than—as evidenced by the twenty-sixth amendment's lowering of the voting age to 18—decreasing it. Contrarily, given technological advances, there is warrant for abolishing at least some of the impositions which traditionally have accompanied childhood status. For example, the day of the computer operated automobile may be fairly near. Will it still make sense to condition drivers' licensure on attainment of age 16, as most states do, given the fact that it could be the computer that drives the car, rather than the person behind the steering wheel? Or, should mandatory schooling requirements be relaxed, given the fact that portable pocket calculators can do all the mathematical computations one once had to learn in the schoolroom by memorization of multiplication tables, etc.?

\(^{12}\) As to the political activism of seniors' groups generally, see H. Pratt, The Gray Lobby (1976).

\(^{13}\) The most common focus in the legal literature insofar as age-related discrimination is concerned is the practice of mandatory retirement. A number of reasoned disapprobations have been set forth. See Note, Mandatory Retirement—A Vehicle for Age Discrimination, 51 CHI.-KENT L. REV. 116 (1974); Note, The Constitutional Challenge to Mandatory Retirement Statutes, 49 St. John's L. Rev. 748 (1975). The problem with most of these efforts is that the authors, while deploiring ageism in the employment context, fail to take cognizance of the fact that ageism is rampant. In the field of employment itself, for example, child labor laws restrict youngsters. Other laws have an impact upon young adults. See note 2 supra. Generally, the articles do not acknowledge the potential consequences of their arguments; they do not address the possibility that to damn age discrimination against the old may ineluctably lead to condemnation of all uses of age distinctions, no matter where in the age continuum the victim stands.
tors and judges had the wisdom of the author—would satisfy all problems. Some suggestions will be made, since the temptation is too great to resist, and in any event, the conventions of the genre call for such. By no means, however, is this article presented as the final word by this author on the complexities of ageism in America. It will succeed enough if it at least serves as a vehicle for generating heightened realization of the prevalence of age distinctions in our society, and for enhancing sensitivity to the gains and losses which follow from the phenomenon.

One preliminary caveat is in order. This article is primarily directed to discrimination claims made by adults, or by individuals close to the age of majority who contend that their incipient adulthood is imminent enough to warrant accelerated entrance into adult status. Nonetheless, a coherent analysis of age distinctions and their constitutional status should take into account the obvious: all of us, children and adults, are possessed of age. It may not be possible to devise a formula whereby ageism can be encompassed within a perfect unified schemata, given the fact that there are in real and perceptible terms significant differences between children and adults. But if that seamless theory is unattainable, at the least, the segregation of youngsters from adults for purposes of discussing ageism must be justifiable and justified.

AGE LINES IN THE CONSTITUTION

The United States Constitution explicitly addresses age distinctions at only a few junctures. This sparsity of reference need not occasion particular comment, however; the language of the Constitution is for the most part that of grand generalities.

In four instances the Constitution sets age qualifications for the holding of public office: the President must be at least 35, as must be the Vice-President as well; senators must have attained age 30; and age 25 is the minimum required for representatives. The debates of the drafters reveal that little attention was paid to the setting of these

15. The twelfth amendment specifies that:
   [N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President.
   U.S. Const. amend. XII.
age lines; only the age 25 standard occasioned any comment at all.\(^1\) One can momentarily speculate as to the drafters' concern with federal elected officials not being too young. Few people lived to see their 60s and 70s in eighteenth century America; thus the problem of superannuated presidents and legislators likely did not loom as a significant realistic problem. Moreover, older people were accorded a certain degree of veneration; old age was not regarded as a basis for scorn or condescension.\(^19\)

Article III of the Constitution embodies an implicit rejection of age distinctions by virtue of its guaranteeing life tenure to federal judges, an obvious barrier to mandatory retirement for the federal judiciary.\(^20\) Here, of course, a primary concern of the drafters was to assure the independence of these officials by insulating them from the pressures of running for office and of risking job loss as a result of public displeasure with their decisions.

Shortly after the Civil War, the fourteenth amendment was adopted, designed to secure for the newly freed slaves the rights they so long had been denied. Section 2 of the amendment authorizes the reduction of a state's representation in the Congress in the event the right to vote of any male 21 years old is abridged. This was of course intended as a disincentive to the southern states' impairing the franchise of blacks. The use of age 21 occasioned no particular thought; that was the universally accepted age of majority and so was naturally employed.\(^21\)

In 1971 the Constitution was amended by the addition of the twenty-sixth amendment, which bars both the federal government and the states from setting a voting age higher than 18.\(^22\) Clearly this


\(^{19}\) See generally D. Fischer, Growing Old in America 26-76 (exp. ed. 1978).

\(^{20}\) U.S. Const. art. III, § 1. Congress has provided that chief judges of federal district courts and federal courts of appeals may not exceed age 70. 28 U.S.C. §§ 45(a), 136(a) (1976). They may of course continue serving as judges, however. For a considerable period of time the American Bar Association has played an informal role in approving selections for the federal judiciary; only recently the ABA abolished the rule which it had employed whereby it would not give its imprimatur to nominees for initial appointment who were over the age of 64. See Legal Times of Wash., Dec. 22, 1980, at 28.

\(^{21}\) See note 160 infra.

\(^{22}\) Congress had earlier attempted to achieve this end by statute. In Oregon v. Mitchell, 400 U.S. 112 (1970), a majority of the Court upheld the legislation insofar as it regulated national elections, but it struck down the federal effort to reach exercise of the franchise in state elections. Id. at 117-18. The Court never questioned that some age line could be drawn; the issue before it was one of power: did the federal legislature have the authority to set age standards for state elections? The Court answered in the negative, and the adoption of the twenty-sixth amendment quickly followed.
amendment for the first time expresses in the body of the Constitution a sensitivity to ageism. The argument that if young men 18 to 21 were old enough to die in Vietnam they were old enough to participate in their country's political processes was a compelling and winning one.

Direct challenges to these age limits set by the Constitution have not been made. Nor are these particular constitutional provisions at the core of the concerns generated about perceived age discrimination. Rather, it is the equal protection clause of the fourteenth amendment which generally has served as the fulcrum for constitutional attacks on ageism. On occasion, the amendment's due process clause also has been relied upon as a basis for mounting challenges to age distinctions. And in the particular context of jury selection, the sixth amendment, which has been incorporated through the fourteenth amendment's due process clause so as to be applicable to the states, has served as a source of constitutionally based argumentation.

Because the jury selection case law is a discrete and confined body of judicial treatment, it can be addressed relatively quickly before turning to the broader-ranging reach of the due process and equal protection provisions.

**JURY SELECTION AND AGEISM**

Underrepresentation of both the young and the old as jurors is a common feature of both federal and state petit and grand juries. There are several causes. Many statutes set explicit age minima for the jury venire; some also set maxima. Sometimes informal selection practices operate in an exclusionary manner, even without any statutory basis. Often, the elderly are by statute or practice allowed to voluntarily excuse themselves from jury service.

23. The first eight amendments to the Constitution only apply to actions of the federal government. The fourteenth amendment speaks directly to the states, and to the governmental entities subordinate to them—counties, cities, etc. By means of the fourteenth amendment's due process clause, most of the guarantees of the first eight amendments have been incorporated through that clause and made applicable to the states. See generally G. Gunther, Cases and Materials on Constitutional Law 492 n.4 (10th ed. 1980).


27. See, e.g., United States ex rel. Chestnut v. Criminal Court, 442 F.2d 611, 614 n.3 (2d Cir.), cert. denied, 404 U.S. 856 (1971).

Other ostensibly age-neutral devices have age-related impacts. Students are often allowed to excuse themselves, as are mothers with small children; in both instances the consequence is to remove from the jury pool people at the low end of the age spectrum. Voter registration lists are often used for the preparation of the jury venire. Since as a group the young do not register in as great a degree as do older citizens, reliance upon such lists leads to low numbers of the young in the venire. Moreover, delays in updating jury lists have the consequence of excluding the newly registered 18-year-olds whose names do appear on the voter rolls. Indeed, delays in excess of three years have been tolerated, thus resulting in the exclusion of young men and women 18 through 20 or 21, all of whom had registered since the last updating.

Two arguments relevant to age-based exclusions have been addressed by the courts. The first is that age lines in and of themselves are unconstitutional. As to this approach, the courts have usually been hostile whenever the claimants are young. The case law as to the old is meager, but a little more positive. But as to both groups, judicial exploration of the issues has been particularly absent—blunt assertions have been the norm. Thus, for example, in *King v. Leach* the court simply stated, "Advanced age alone is not ground for disqualification


30. See, e.g., United States v. Test, 550 F.2d 577, 595 (10th Cir. 1976); United States v. Eskew, 460 F.2d 1028, 1029 (9th Cir. 1972).


37. A number of courts have stated in passing that while elderly jurors may voluntarily excuse themselves under the applicable statute involved in the case before the court, such persons are not, by virtue of their age, subject to disqualification if they choose to sit. See, e.g., Williams v. State, 67 Ala. 183 (1880); Thomas v. State, 144 Ga. 298, 87 S.E. 8 (1915); Davison v. People, 90 Ill. 221 (1878); State v. Anderson, 384 S.W.2d 591 (Mo. 1964).

38. 131 F.2d 8 (5th Cir. 1942).
of a juror."\(^{39}\) And in *United States v. Duncan*,\(^{40}\) the court, looking to the claims of younger potential jurors, unreflectively asserted: "We know of no good reason why the Congress cannot require as a qualification for jury service, the minimum degree of experience and maturity presumptively represented by being 21 years old."\(^{41}\)

Undoubtedly, the lower courts' unthoughtful responses to direct attacks on age exclusions follow from the equally thoughtless dicta uttered by the Supreme Court. In its first decision addressing the makeup of juries in light of the then newly adopted fourteenth amendment, the Court in *Strauder v. West Virginia*\(^{42}\) stated: "We do not say that . . . a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to . . . persons within certain ages, . . . ."\(^{43}\) That notion has since been repeated as dictum.\(^{44}\)

The second constitutionally based approach to ageism in the jury context has focused on the exclusion of given age groups, rather than on the alleged unlawfulness of age distinctions *per se*. Here there is considerably more case law, albeit largely consistent in its rejection of the ageism claims. This tack springs from the principle which the Supreme Court has established both under the sixth amendment\(^{45}\)—which applies to federal and state petit juries in criminal cases—and under the equal protection clause—which has been applied to petit and grand juries, both civil and criminal.\(^{46}\) Juries must be made up of a "fair cross section of the community."\(^{47}\) The premise underlying this

39. *Id.* at 9.
40. 456 F.2d 1401 (9th Cir.), *vacated on other grounds*, 409 U.S. 814 (1972).
41. *Id.* at 1405.
42. 100 U.S. 303 (1879).
43. *Id.* at 310.
45. The sixth amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed . . . .

U.S. CONST. amend. VI.
46. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that the sixth amendment's impartial jury guarantee was applicable to the states through the due process clause of the fourteenth amendment. *Id.* at 149.
48. Application of equal protection clause principles to criminal grand juries is addressed in a number of decisions. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482 (1977); United States v. Duncan, 456 F.2d 1401 (9th Cir.), *vacated on other grounds*, 409 U.S. 814 (1972).
constitutionally based demand that the jury must represent a fair cross section is an obvious one, as set forth by the Court in speaking about criminal petit juries:

The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. 50

Claims of age discrimination have focused on one particular element in the equation for determining whether the fair cross section principle has been violated: is the selection process characterized by the absence of a cognizable group, i.e., a group distinctive enough so that its absence cuts against the jury being able to represent a fair cross section of the community? 51 There is near unanimity in the courts' rejection of cognizability claims based on the argument that the exclusion of a given age group adulterates the fair cross section principle. 52 Most often, such claims have charged unconstitutional absence of the young;

50. 419 U.S. at 530 (citation omitted).
51. An often-quoted federal district court opinion has offered a three-part definition of cognizability:
A group to be "cognizable" . . . must have a definite composition. That is, there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of juries hearing cases in which group members are involved. That is, the group must have a community of interest which cannot be adequately protected by the rest of the populace.


United States v. Butera, 420 F.2d 564 (1st Cir. 1970), is the one federal court exception to the general consensus. The Butera decision did not rest on constitutional grounds, but rather on the supervisory authority of the federal courts of appeals over the federal district courts. Id. at 568.

In Hamling v. United States, 418 U.S. 87, 137 (1974), the Supreme Court assumed for the purpose of getting to the main issue—i.e., whether a delay in updating the master jury wheel, made up of registered voters, constituted a constitutional violation since this had the effect of excluding young, newly enfranchised voters—that the young are an identifiable group. The Court
sometimes the group has been defined in specific age parameters, such as those 18 to 20 or 21 to 24, or even those 18 to 39; sometimes, the claim has simply charged exclusion of "the young." United States v. Ross exemplifies the standard response:

[T]he parameters of such a group ["young people"] are difficult to ascertain, as evidenced by the widely varying ages which have been used to define it, and . . . its membership and their values are constantly in flux. There appears to be no factor other than age which defines this group, and we can perceive no reason to arbitrarily single out a narrow group of "young persons" as opposed to "middle-aged" or "old" persons for purposes of jury service.

The old have fared little better under the cognizability requirement, although the case law is much more meager. In King v. United States, for example, the court addressed the exclusion of those both under 25 and over 70, and stated:

The difference in viewpoint between ages 21 and 25 would not seem to us of any great significance. Nor would there seem to be any substantial effect upon the composition of a jury as a result of eliminating persons over 70 as might be competent to stand duty. We regard it as highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a mere few years older or a few years younger.

Social scientists, of course, might well disagree. There is documentation supporting the notion that the young can be characterized by distinctive values, attitudes and experiences, which conceivably could play a role in jury decisionmaking. Attitudes toward draft evasion, toward the use of drugs, and regarding premarital sexual activities are obvious examples of issues which may arise in criminal and civil cases where young jurors may hold different views than do their elders. Similarly, it is not purely imaginative to suggest that the aged, as a group, likewise entertain certain particularized attitudes and views and reflect certain distinctive experiences which set them somewhat apart. Thus,

held that the showing of delay, with its consequences, did not establish a prima facie case of discrimination. It did not hold that the young are a cognizable group.

State court rulings finding age groups to be cognizable are very rare. See, e.g., State v. Willis, 33 Ohio Misc. 159, 293 N.E.2d 895 (Akron Mun. Ct. 1972); State v. Holmstrom, 43 Wis. 2d 465, 168 N.W.2d 574 (1969).

53. See the decisions cited in note 52 supra.

54. 468 F.2d 1213 (9th Cir. 1972), cert. denied, 410 U.S. 989 (1973).

55. Id. at 1217.

56. 346 F.2d 123 (1st Cir. 1965).

57. Id. at 124.

58. See Zeigler, supra note 24.

lawyers for plaintiffs litigating employment discrimination cases, for example, under the Age Discrimination in Employment Act of 1967, as amended, might find the presence of older jurors a plus, given the nature of the claims being made.

One problem, of course, is to define age-identified groups in sufficiently distinctive ways so that they are discrete enough to be deemed cognizable. Even if one were to accept the notion that the young as a group are distinct, where would one draw the line between the young and the not-young? Who is old, and who is not? These problems may not be insurmountable, of course. A law which bars those 70 and over from jury duty has by its terms defined the group—it is not just an amorphous collection of seniors, it is those over a specific age. Even here, however, there is some difficulty in debunking the King court's observation that the views of those 70 and over are not likely to be significantly different from those of people aged 60 through 69; and if that is so, the cognizability battle is lost.

There are other problems, as well, which are of a more profound nature. If one espouses as an ideal a society which rejects ageism, there is something a little perverse in also contending that juries must be carefully structured so as to represent given age groups. While the benefits of the fair cross section principle are obvious and understandable, the pursuit of that principle could have the untoward effect of emphasizing, rather than undermining, age group separation, thereby enhancing the likelihood of age discrimination generally.

Still another troubling factor here is that of practicality. Once one proceeds down the path of recognizing some age groups as cognizable, can one really stop? May it not become necessary to assure that each jury has at least one person aged 18 to 25, another aged 26 to 34, still another who falls in the 35 to 44 age range, and so on? Obviously, such a course is impossible, and so it may be necessary to reject at the outset age as a juridically relevant factor in determining cognizability.

The bottom line, in any event, is that in the context of jury selection, age distinctions are alive and well.


61. A distinction has been drawn between the "young-old" (ages 55 to 75) and the "old-old" (ages 76 and over). See Neugarten, Age Groups in American Society and the Rise of the Young-Old, 415 Annals 187 (1974).
Equal Protection and Due Process

Equal Protection Theory

The base line for all considerations under the Constitution is that the laws and regulations which government adopts must be rational. The Constitution, in other words, does not comprehend irrationality. In most instances, laws are presumed to be constitutional; they need only meet a standard of minimum reasonableness to survive challenge under the equal protection clause. This standard does not require that a law be the wisest or the least burdensome or the only means for legislators to deal with a problem; it only asks whether a reasonable person could have devised that particular law. As applied by the courts, this approach is almost always fatal to the challenger’s case: almost all laws are rational, even though the drafters may have misunderstood the empirical data or may have voted on the basis of bias or misinformation.62

During the Warren Court era, an alternative line of analysis under the equal protection clause gained prominence.63 In certain instances, the courts will demand more than mere rationality. Here, the burden will be upon the state to justify its law rather than, as under the mere rationality test, it being upon the plaintiff to prove irrationality. More than that, the state’s burden is to establish that the interest it seeks to serve through its law is a compelling one, and that the means used to achieve that interest—i.e., the law in question—is necessary to its achievement.64 In contrast to the minimum rationality test, whose application almost inevitably leads to survival of the statute, the compelling interest test almost invariably produces the opposite result—the law’s demise. Even if an interest can be shown to be compelling, it is very rare that the particular means used to achieve that interest are necessary—that is, the least restrictive alternative.65

A trigger for application of this more rigorous compelling interest test is the presence of a suspect classification or a fundamental interest. Race had been early fitted within the first category, albeit without use...

65. There are only a few instances in which a law has survived this trenchant analysis. In Korematsu v. United States, 323 U.S. 214 (1944), the Court, applying this standard, sustained the conviction of an American of Japanese descent for violating a World War II military order which barred such individuals from certain West Coast areas. See also Hirabayashi v. United States, 320 U.S. 81 (1943). These decisions are explicable, and perhaps only justifiable, in light of the national security concerns involved.
initially of the particular appellation of suspectness. National origin also is deemed to be a suspect classification. That about ends the list, however. Alienage is sometimes considered suspect, sometimes not. Intimations that illegitimacy would gain this status have been rejected. Gender has thus far not mustered sufficient support to enter the list, although the Supreme Court has accorded it a status which evokes a test more stringent than mere rationality. Age, as will be discussed later, has failed.

Just what the critical elements of suspectness are is not an altogether clear matter. In San Antonio Independent School District v. Rodriguez, involving an unsuccessful challenge to disparate financing of state public education, the Court offered a synopsis of its precedents in outlining criteria of suspectness:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

While the decision offers three ostensibly independent indicia of suspect classifications, others have been suggested by members of the Court and commentators, such as the fact of the trait on which the disparate treatment is based being immutable or the trait being one

68. In Graham v. Richardson, 403 U.S. 365 (1971), the Court had held that classifications based on alienage were suspect. In Foley v. Connellie, 435 U.S. 291 (1978), however, without overruling Graham, the Court emphasized that it had "never suggested that . . . legislation [affecting aliens] is inherently invalid, nor have we held that all limitations on aliens are suspect." Id. at 294. In situations involving the state's constitutional prerogatives, i.e., the vote, the holding of political office, and employment in occupations which involve "discretionary decisionmaking, or execution of policy, which substantially [affect] members of the political community," there need only be a showing of "some rational relationship between the interest sought to be protected and the limiting classification." Id. at 296.
72. Id. at 28.
73. In Frontiero v. Richardson, 411 U.S. 677 (1973), where a plurality contended that sex should be recognized as a suspect classification, the four justices making the argument highlighted several elements building up to suspectness: "a long and unfortunate history of . . . discrimination," id. at 684; "gross, stereotyped distinctions," id. at 685; "pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." Id. at 686. Perhaps most conclusively, the Frontiero plurality added:

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the
which engenders social stigma. Moreover, while the three factors listed in *Rodriguez* were stated in the disjunctive, it is not clear whether any one of them would be sufficient standing on its own to invoke the mantle of suspectness. In any event, while superficially appearing to provide some certitude simply because they are asserted in serial form, in firm and assured language, these criteria in fact are clearly susceptible to subjective interpretation: one judge's "history of purposeful unequal treatment" may be in another judge's reading a relatively innocuous past.

The nature of fundamental interests also is marked by some considerable ambiguity. The Court has asserted that the importance of the interest is not a determinative criterion; rather, an interest which is fundamental is one which is either explicitly or implicitly guaranteed by the Constitution. Rights guaranteed by the Bill of Rights—most of which concern criminal defendants—are obviously explicit; thus, they are included within the list. But in addition, there is a vague group of rights falling under the rubric of "liberty" whose deprivation the due process clause directly governs. Some of these were set forth in *Meyer v. Nebraska*, with no particular emendation:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility,..."

*Id* at 6:36-87.

74. In University of Cal. Bd. of Regents v. Bakke, 438 U.S. 265 (1978), Justice Brennan, concurring in part and dissenting in part with three of his colleagues, stressed stigmatization as a critical element in the suspectness equation. *Id* at 327 (Brennan, J., concurring in part and dissenting in part). This of course was a crucial linchpin in the Court's damning of the separate but equal doctrine in *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The Bakke foursome concluded that benign racial classifications which have an adverse impact upon whites should not be dealt with in terms of the compelling interest test because such categorization does not impose stigma upon its victims. 438 U.S. at 361-62.

75. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). This definition is apt both for the equal protection and due process clauses.

76. The fourteenth amendment's due process clause provides:

[N]or shall any State deprive any person of life, liberty, or property without due process of law;...

U.S. CONST. amend. XIV, § 1. A like provision, applicable to the federal government, is contained in the Fifth amendment.

77. 262 U.S. 390 (1923).

78. *Id* at 399. The critical matter, of course, is what level of judicial scrutiny a liberty interest will elicit. In the *Meyer* Court era, the "right to contract" and the "right to engage in the
Privacy in procreative matters has also since joined the list under the aegis of concerns falling within "liberty." 79

As a practical matter, since most of these rights arise directly under the due process clause or, as with the Bill of Rights, are incorporated through that provision so as to be made applicable to the states, claims based on their alleged deprivations will not ordinarily appear in an equal protection context. If the right exists, its infringement alone—without a showing of inequality in that some are accorded the right and others are not—will suffice to make the plaintiff's case. 80 If the right does not exist, it will not come into being for equal protection purposes any more than for due process purposes. Thus, the equal protection tack is either unnecessary or will be unavailing.

The Warren Court, however, looked to the equal protection clause as a source of certain fundamental interests which do not otherwise appear in the Bill of Rights, the due process clause, or any other part of the Constitution. These include equality of access to the franchise 81 (there is no right to vote per se), 82 and an ill-defined notion of freedom from indigence-related disparities in the criminal justice system. 83

The difficulty obviously lies in separating the suspect and the fundamental, on the one hand, from the legally less compelling, on the other. And the critical significance of this determination, of course, re-
suits from the difference in the test—compelling interest or mere rationality—which will follow.

The inflexibility of the Court's two-level, outcome-determinative approach—requiring the courts to either take the major step of invoking statute-destroying strict scrutiny on the one hand, or simply to leave the litigant to minimum rationality, statute-supportive analysis on the other—not surprisingly has generated considerable discomfort both on the Court and outside it. The argument is made, with impressive strength, that a more finely tuned option should be available. The most vocal proponent on the Court for this course has been Justice Marshall, who has regularly called for a sliding scale assessment of equal protection claims—an assessment taking into account in a flexible and more sensitive manner the clashing individual and governmental interests at stake.84

Both Justice Marshall and commentators have further emphasized that in practice, in any event, the Court has indeed moved on occasion to a posture somewhat between the polarities of virtual judicial abdication under the guise of the minimum rationality test, and the draconian impress of strict scrutiny. This was initially done somewhat covertly with regard to gender discrimination;85 ultimately, the Court openly admitted to the intermediate level of analysis which it had been applying.86 From time to time, in other areas also, the Court seemingly has employed a more rigorous approach than that which would be called for by the mere rationality precedents, this approach involving a more demanding inquiry into the actual rationality of the challenged law,87 as well as, at times, an apparent requirement that the purposes of the law be articulated by its proponents, rather than conjectured upon by the courts.88

A key difficulty with this "rationality with bite" approach89 is that, outside the now openly acknowledged special case of gender distinctions, it seems to have no consistency behind it: there seem to be no criteria discernible for predicting when the Court will, or will not, employ a more-than-minimum rationality, less-than-rigorous strict scrutiny analysis. What is clear is that the Court itself has been unwilling

85. See Reed v. Reed, 404 U.S. 71 (1971).
89. This terminology is adopted from Gunther, supra note 63, at 20-21.
to openly embrace this intermediate approach, although lower courts have commented upon and applied it.90

**Due Process**

There was a time when reliance upon the due process clause by the courts to look at a law's ultimate wisdom and merit was a relatively common practice. *Lochner v. New York*91 is typically cited as a premier example of the substantive due process era: the Court confirmed a right of contract in the due process clause which certainly was not discernible on the face of the fourteenth amendment, and it thence proceeded to strike down a state law regulating the wages and hours of workingmen—a law which, as the reasoning went, interfered with this liberty of contract. While the Court claimed to be examining the law's means in terms of simple reasonableness, it actually looked to the statute's ends, substituting its judgment for that of the legislature as to the wisdom of the policy embodied in the statutory language.

This aggressive use of the due process clause in economic regulation cases died in the 1930s, and has yet to be resurrected.92 Today, statutes and rules regulating economic affairs are examined by the courts, when they are confronted with due process-based challenges—e.g., claims that the affronting provisions are depriving the grievants of their property or liberty unfairly—with the familiar minimal rationality test.93

Despite its demise in economic affairs, however, the due process clause still retains considerable vigor. Substantive due process applies in the expanding area of privacy rights—most particularly, privacy in matters touching the marital relationship and procreation, e.g., abortion,94 contraception95 and sexual privacy.96


91. 198 U.S. 45 (1905).


As a source of procedural protections, the due process clause is very much alive, if not altogether well. Through it, most of the Bill of Rights' guarantees applicable to criminal defendants vis-à-vis the federal government have been made applicable to the states as well. Moreover, the clause has served as the source of procedural correctness in civil settings far afield from criminal matters. Here, the Court has confirmed that some (or many) procedural steps must accompany—either before or after the fact—the deprivation of liberty and property interests. In recent years, however, the Court has narrowly interpreted the notion of liberty interests, thus cutting down on the potential application of the procedural guarantees of the due process clause. As for property interests, the Court has made clear that these do not spring from the Constitution itself; rather, they are created by statute, custom or contract. And in creating such interests, the state can place limits upon them; thus, while tenure in an educational institution constitutes a property interest, it can be circumscribed by a mandatory retirement requirement, with the result that no procedural rights are due when the tenured professor reaches the mandatory retirement age triggering the termination of his tenure.

Apart from this development of doctrine regarding liberty and property interests in the civil context, the Supreme Court for a brief period in the early 1970s expanded the reach of the due process clause by condemning irrebuttable presumptions. Here the notion was that in certain instances nothing short of individualized treatment was acceptable, at least absent very compelling reasons justifying something less. A law which proceeds by generalization—e.g., "all persons who speed are bad drivers, and thus will be ticketed," or "all emitters of more than five particulates of sulfur are deemed polluters"—without affording the individual who runs afoul of the generalization any opportunity to rebut the application of that law as applied to him, is unconstitutional.

98. In determining how much process is due in a given setting, three factors must be taken into account, according to the Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976):
First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
100. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972).
101. Cf. Bishop v. Wood, 426 U.S. 341 (1976) (police officer's discharge upheld because the permanency of his employment was made subject to the condition of it being terminable at the will of his employer, thereby precluding his having a property interest).
OF AGE AND THE CONSTITUTION

unless the generalization embodied in the law is necessarily and universally true, or there is no alternative to such law.102

The irrebuttable presumption doctrine—of particular, albeit fleeting, importance to age discrimination claims103—has severe problems, problems which have lead to its demise in considerable measure104 and its almost certain rejection within the context of age discrimination.105 For one, the notion of irrebuttable presumptions is too open-ended;106 a host of laws and regulations can be characterized, because they regulate by generalizations, as containing such presumptions: a statute which penalizes the emission of more than X parts per million of a given particulate embodies an irrebuttable presumption that X + 1 parts per million particulates is dangerous; a law which limits Medicare payments for cosmetic surgery can be described as a law embodying an irrebuttable presumption that such surgery is not meritorious; and so on. This being the case, legislatures could conceivably be largely disabled from enacting laws, since each legislative measure would run afoul of the doctrine.

APPLICATION OF EQUAL PROTECTION AND DUE PROCESS DOCTRINES TO AGE DISTINCTIONS

Mandatory Retirement

Challenges to age distinctions under the equal protection clause have arisen in a number of contexts: college rules requiring students under a certain age to live in school housing;107 exclusion of children under 5 from public school kindergarten;108 exclusion of persons too young or too old from juries;109 curfews imposed upon teen-agers;110

103. See text accompanying notes 157-59 infra.
104. In Weinberger v. Salfi, 422 U.S. 749 (1975), the Court held that the doctrine was not properly applicable to legislation regulating social and economic welfare matters. Id. at 769-70.
105. See, e.g., the Court's disposition in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), discussed in text accompanying notes 114-21 infra.
106. Even assuming that this open-endedness were not in itself a fatal flaw, there is an additional anomaly embodied in the doctrine. To survive challenge as an irrebuttable presumption, the law in question must be shown to be necessarily and universally true in fact, unless it can be shown that there is no alternative to the particular law as formulated. See Vlandis v. Kline, 412 U.S. 441, 452 (1973). This is a virtually impossible standard to satisfy; moreover it seems strange that the test which would apply for the survival of often relatively mundane statutes and regulations is stiffer even than that imposed under the equal protection clause when a race classification is at issue, or under the due process clause when a fundamental right is at stake. Yet this is the situation, of course, created by deployment of the irrebuttable presumption doctrine.
109. See text accompanying notes 42-44 supra.
involuntary disqualification of the under-age from voting and both the under-age and those too old from political officeholding. It is in the field of employment, however, that probably the most extensive body of case law—and certainly that most thorough in its analysis of ageism—has developed.

Two decisions by the Supreme Court have addressed age-based mandatory retirement, and have upheld its constitutionality. Both employed the minimum rationality test; both demonstrated great willingness to bow to legislative choice as to setting forced retirement for public employees; and both decisions ignored the seeming aptness of the irrebuttable presumption doctrine. They leave virtually no room for successful future challenges to mandatory retirement; indeed, the breadth of the decisions makes successful equal protection or due process challenges to age distinctions in any context extremely dubious.

The first decision was Massachusetts Board of Retirement v. Murgia. At issue was a state law requiring the retirement of uniformed state police officers at age 50. The Murgia Court readily rejected the argument that the compelling interest test should apply; rather, it concluded that there was no right to "governmental employment per se," and it debunked the contention that classifications based on age are suspect. It is this latter enterprise which is, of course, of particular interest here. The Court asserted:

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities . . . . [O]ld age does not define a "discrete and insular" group, . . . in need of "extraordi-

111. See text accompanying notes 165-68 infra.
112. See text accompanying notes 170-72 infra.
115. Id. at 313.
nary protection from the majoritarian political process.” Instead, it marks a stage that each of us will reach if we live out our normal span.\textsuperscript{116}

Having dispensed with the claims which would have invoked the compelling interest test, the Court easily found the law to be acceptable under the standard minimum rationality approach. The aim served was protection of the public through assurance that police are physically able;\textsuperscript{117} the evidence in the trial court had established that physical ability generally declines with age. Thus, even though Officer Murgia himself was physically fit, a statute ousting him and all others at age 50 was certainly rational, even if individualized treatment was sacrificed in the name of generalization:

That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State “does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.”\textsuperscript{118}

Only Justice Marshall dissented. Even he, however, was unwilling to argue that age classifications are suspect.\textsuperscript{119} As he saw it, employment is an important enough interest that the Court should have been more sensitive to the deprivations imposed by the Massachusetts statute.\textsuperscript{120} He argued for his sliding scale test, which escapes the virtually outcome-determinative minimum rationality standard, and which could thus encompass the importance of the individual interest at stake. He made one further notation of relevance, also. Inasmuch as the occupation at issue in the case was a physically rigorous one, the door was still open, he maintained, for a different treatment of mandatory retirement laws when they arise in less physically demanding circumstances.\textsuperscript{121}

\textsuperscript{116} \textit{Id.} at 313-14 (citation omitted).
\textsuperscript{117} \textit{Id.} at 314.
\textsuperscript{118} \textit{Id.} at 316 (footnote omitted).
\textsuperscript{119} \textit{Id.} at 325 (Marshall, J., dissenting).
\textsuperscript{120} \textit{Id.} at 323 (Marshall, J., dissenting).
\textsuperscript{121} \textit{Id.} at 327 n.8 (Marshall J., dissenting). This point was developed by the Seventh Circuit in Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977), \textit{cert. denied}, 440 U.S. 945 (1979), the only still extant federal court decision holding on constitutional grounds \textit{for} the mandatory retiree, a high school biology teacher. The decision is likely of little vitality in the Seventh Circuit anymore, in light of a later decision, Trafelet v. Thompson, 594 F.2d 623 (7th Cir.), \textit{cert. denied}, 444 U.S. 906 (1979), in which the court upheld the forced retirement of judges, while totally ignoring its earlier ruling.
Three years later the Court decided *Vance v. Bradley.* If anything, it revealed an even greater willingness on the Court's part to accept mandatory retirement. In upholding, by an eight to one vote, a federal statute requiring foreign service officers to retire at age 60, the Court stated: "[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." In thence finding the statute to be rational, the Court was willing to accept the justification that the law, by ousting older employees, properly served to make room for promotion of younger officers. As for the argument that there was an insufficient relationship between age 60 and reduced physical and mental potential, the Court was not about to demand any examination by the courts of the accuracy of the age-ability correlation:

In an equal protection case of this type, . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. . . . [A]ppellees were required to demonstrate that Congress had no reasonable basis for believing that . . . at age 60 or before many persons begin something of a decline in mental and physical reliability. Appellees have not satisfied these requirements. . . . [T]hey admit that

123. *Id.* at 97.
124. The Court stated:
Congress was intent not on rewarding youth *qua* youth, but on stimulating the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available. . . . Aiming at superior achievement can hardly be characterized as illegitimate, and it is equally untenable to suggest that providing promotion opportunities through the selection-out process and through early retirement does not play an acceptable role in the process.

440 U.S. at 101. The Court went on to reason that "the compulsory retirement age assures room at the top at a predictable time; those in the ranks know that it will not be an intolerable time before they will have the opportunity to compete for maximum responsibility." *Id.* at 103 n.20.

In *Schlesinger v. Ballard,* 419 U.S. 498 (1975), the Court upheld the Navy's up-or-out system, established by statute, whereby officers who did not receive promotions within a certain number of years were subjected to mandatory discharge. The system was avowedly designed to make room for younger officers for whom, unless longer term personnel were removed, there would be no room in the upper ranks. *Id.* at 502. The plaintiff, ousted in accordance with the statutory scheme, argued gender discrimination, claiming that he had been unconstitutionally victimized because women officers were afforded a longer period of time within which to secure the promotion which would avert discharge. The Court rejected his claim. *Id.* at 508-09.

No contention was made that unlawful age discrimination was involved. And in fact such a claim would have been difficult to maintain: the up-or-out system was keyed to length of time in service, not age. Moreover, as the plaintiff pointed out, men and women of the same age would be treated differently, this fact attenuating thereby any charge of ageism. At most, there was some age-correlated impact: typically, the officers who had served the longest would be the older ones. But this correlation was coincidental; the system could have the same impact on the 40-year-old with extended service as on the 50-year-old. See also *Norman v. United States,* 392 F.2d 255 (Ct. Cl. 1968), *cert.* denied, 393 U.S. 1018 (1969), upholding a like statutory scheme.
age does in fact take its toll, and that Congress could perhaps have rationally chosen age 70 as the cutoff. . . . And we have noted the commonsense proposition that aging—almost by definition—invariably wears us all down. . . . All appellees can say to this is that "[i]t can be reasonably argued that, given modern societal facts," those between age 60 and 70 are as reliable as those under age 60. . . . But it is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment represented by this statute.125

Given Murgia and Vance, it is hardly surprising that constitutional challenges in the lower federal courts and in the state courts to age discrimination in mandatory retirement settings have been almost universally unavailing.126 Justice Marshall's effort to leave the door open for physically undemanding occupations has failed, as have all other ploys:127 retirement has been imposed without constitutional impediment on judges,128 schoolteachers129 and governmental bureaucrats,130 as well as on police officers131 and fire fighters.132

In some respects, criticism of the Murgia decision—from which the result in Vance inevitably followed—is beside the point. The decision is an accomplished fact, and there is nothing since to suggest that

125. 440 U.S. at 111-12 (citations and footnotes omitted).
126. Actually, in Vance the plaintiffs did not argue that all age cutoffs were invalid; they contended that treating foreign service officers, who were forced to retire at age 60, differently than other federal civil service employees, who at the time were not required by statute to retire until age 70, violated equal protection. Given that age is not a suspect classification, this differential fell under the minimum rationally standard. The Vance Court's language is so broad, however, that it not only speaks to differentials as between two groups of employees, each required to retire at some age, but it also goes to mandatory retirement generally.

Challenges to employment restrictions flowing from the individual's being too young—which generally preclude Murgia and which are comparatively rare—have also failed. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944); Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913); Walden-El v. Brennan, 205 Misc. 351, 125 N.Y.S.2d 95 (Sup. Ct. 1953), aff'd, 283 A.D. 771, 128 N.Y.S.2d 578 (1954); People ex rel. Moriarty v. Creelman, 206 N.Y. 570, 100 N.E. 446 (1912). See generally Annot., 152 A.L.R. 579 (1944).


the Court has had second thoughts, as evidenced by Vance itself. Nonetheless, the ruling is significantly flawed, and it cannot be passed by without highlighting the problems.

The Court's treatment of the suspect classification argument was remarkably brief. The brevity is itself noteworthy—whatever the protestations of opponents of ageism, the vice of age discrimination clearly was not one which the Murgia Court, at least, saw as sufficiently significant to evoke much attention.\textsuperscript{133} In any event, the ruling is more interesting for what the Court did say than for what it did not. Clearly, a history of mistreatment is a basic element in establishing suspectness. In the case of racial minorities, this factor is generally readily perceivable—certainly no one would question the long and invidious history of deprivation imposed upon blacks in this nation. For some justices, women as a group possess a similarly bleak past.\textsuperscript{134} In Murgia, the Court found this element lacking; the elderly do not exhibit a "history of purposeful unequal treatment"\textsuperscript{135} akin to that experienced by racial and ethnic minorities, nor, obviously, even a history of denial approaching that of women.

The Court's conclusion is difficult to dispute. The elderly are victimized in a variety of ways, and have been for a long time; nonetheless, their group history does not reveal a litany of violence, disenfranchisement and subordination equivalent to that of racial minorities or women. This is not to say that older people do not have significant and real grievances; it is to say, however, that those grievances do not arise out of, or reveal, the same background of iniquity.

Even granting the correctness of the Court's assessment, one may rightly ask whether the Court could have done a better job of substantiating its position. The answer it arrived at is not so overwhelmingly obvious that some annotation was not in order. And indeed, had the Court essayed the task, it would have found that the treatment of the old is clearly not all of a beneficent piece. Few historical studies exist. Those that do have their imperfections. But at least one historian has concluded that contrary to what is perhaps the generally accepted mythology, the elderly were not, in our nostalgically recalled past, consistently the objects of veneration. Rather, "late in the eighteenth century,

\textsuperscript{133} Indeed, the Murgia decision was handed down in a per curiam ruling, \textit{i.e.}, the Court's opinion did not bear the name of its author. This typically is regarded as a signal that the decision is not considered a particularly important one, or that its resolution is particularly easy. \textit{See} L. Hodder-Williams, \textit{The Politics of the Supreme Court} 96 (1980).

\textsuperscript{134} \textit{See} the opinion of Justice Brennan, joined by three other Justices, in Frontiero v. Richardson, 411 U.S. 677 (1973).

\textsuperscript{135} 427 U.S. at 313.
...[t]he social status of the aged, which had risen for nearly two hundred years, began to fall instead.”136 And “during the nineteenth century, expressions of hostility to old age grew steadily stronger in America...”137 While in this century a change in attitudes towards the aged occurred again, it was not one elevating them in status, but rather one involving the perception of the elderly as powerless and dependent. The old came to be seen as a social problem, needful of society's aid—a perception, in other words, of old people as less than full and equal participants in, and contributors to, the social fabric.

One need not equate the treatment of the old with that of blacks, then, to nonetheless conclude that the old indeed do bear some aspects of second class citizenship, so far as social attitudes regarding their roles in society are concerned and so far as those attitudes translate into official and unofficial treatment.138

A second element of suspectness asks that the group at issue be one saddled with disabilities. Again, the Murgia Court was readily satisfied that the aged missed the mark. They were right, but again too cavalierly so. As with the matter of past history, so too with the present posture of the old: while they are victims on occasion of disadvantage imposed because of age, they lack that pervasive, multifaceted texture of burdens which characterizes the truly suspect—e.g., racial and ethnic minorities.139 Still, there is enough documentation to warrant at least some hesitancy in concluding that all is right with the world of seniors; enough so, certainly in the eyes of Congress, which has passed a number of legislative measures designed to combat age discrimina-

137. Id. at 225. Henry David Thoreau, writing in Walden, revealed his perception of the aged: “I have lived some thirty years on this planet, and I have yet to hear the first syllable of valuable or even earnest advice from my seniors. They have told me nothing and probably cannot tell me anything, to the purpose.” H.D. Thoreau, Walden 9 (J. Shanley ed. 1971). See generally B. Strong, Aging and the Law, Part XVI, History of Aging (1979) (curriculum materials developed by Senior Adults Legal Assistance, Palo Alto, Cal.)
138. Eighty years before the Murgia decision, the Court itself perhaps implied a perception that age attitudes had some correlation with other negative biases:

The State may not say that all white men shall be subjected to the payment of the attorney’s fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification.

Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 155 (1897).
139. Indeed, in some respects the elderly have been very successful. At the beginning of 1979, there were at least 48 major federal programs designed for their benefit. See House Select Comm. on Aging, Federal Responsibility to the Elderly, Comm. Pub. No. 95-167, 95th Cong., 2d Sess. 2-3 (Comm. Print 1979). “Others, using a narrower definition of the term ‘program’ have listed as many as 134.” Neugarten, Policy for the 1980s: Age or Need Entitlement?, in National Journal Issues Book 48, 50 (1979) [hereinafter cited as Policy for the 1980s].
Where the Murgia Court clearly did go astray, it seems, was in its assertion that the elderly have not "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." Again, no authority was cited for this pronouncement. More important, the very fact of the law at issue in the case would seem to belie the Court's unreflective statement. The whole thrust of the legal attack on mandatory retirement, and on age discrimination in employment generally, is bottomed on a proposition which the Court unblinkingly and unthinkingly rejected: ageism perpetrated against seniors constitutes a unique disability built on a stereotype which is unrelated to older workers' abilities. Indeed, there is a very


141. 427 U.S. at 313. Forty years earlier, in Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935), the Court, as yet uncommitted to a deferential role in scrutinizing economic regulations, was considerably less willing to engage in unsubstantiated speculation about the performance of older workers. In Alton, the Court struck down the newly enacted Railroad Retirement Act. Among the unsuccessful justifications offered by the government in support of the law was the contention that the pension payments required by it would have the benefit of easing older workers out of their jobs. To this Justice Roberts responded: "This view assumes they will be retained for years and are incompetent to do what they are now doing. Evidence is lacking to support either supposition." Id. at 352.

142. Former Secretary of Labor W. Willard Wirtz reported to Congress in 1965 that "[p]hysical capability is by far the most prominent single reason advanced for imposing upper age limits [on employment]." U.S. SEC'y OF LABOR, THE OLDER AMERICAN WORKER 8 (1965). As a matter of hard data, the generalization that older workers cannot, and do not, perform as well as their younger colleagues appears fallacious. See generally Kelleher & Quirk, Age, Physical Capacity and Work: An Annotated Bibliography, INDUS. GERO NT OLOGY 80 (Fall 1973); Drucker & Moore, Mandatory Retirement: Past, Present and Future of an Anachronism, 5 W. ST. U. L. REV. 1, 5-6 (1977); Note, Age Discrimination in Employment, 50 N.Y.U. L. REV. 924, 935-36 (1975); Note, Age Discrimination in Employment: The Problem of the Older Worker, 41 N.Y.U. L. REV. 383, 396-99 (1966); Note, The Constitutional Challenge to Mandatory Retirement Statutes, 49 ST. JOHN'S L. REV. 748, 773-77 (1975). Indeed, this generalization contradicts a number of private and governmental studies establishing the contrary. The Committee on Aging of the American Medical Association reported, for example:

[Useful working life (and not merely life) is being prolonged. If capable, workers should be allowed to work if they so desire, even beyond the usual retirement age . . . workers between 60 and 75 years of age are not only proving to be capable of working in many occupations; they actually excel younger persons because of their superior judgment, experience, and safety of performance. Advances in technology that have taken away much of the physical stress of work tend in many instance [sic] to place a premium on the abilities that many older workers possess.

American Medical Ass'n, Employment of Older People 10 (n.d.) (pamphlet published by AMA Committee on Aging) (quoting from Special Committee of the Gerontological Society, Report, 9 GERON TOLOGIST 23 (Pt. II, Winter 1969)).

More pointedly, a study of 132,316 workers in New York State's public agencies (which utilized age 70 as the mandatory retirement age even before lower ages were barred by the Age Discrimination in Employment Act Amendment of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189
respectable body of data which undercuts the canard, which the Court apparently accepted, that ability declines with age. Aging, rather, is an individualized process, and generalizations about ability to perform being correlated with age are inept and inapt. In fact, there are more individual variations within a given age group than there are between age groups.143

(codified at 29 U.S.C. § 631 (Supp. III 1979)), which raised the statute's coverage to age 70), established that workers over 65 are "about equal to" and sometimes "noticeably better" than younger workers in job performance. Improving the Age Discrimination Law, A Working Paper of the Senate Special Comm. on Aging, 93d Cong., 1st Sess. 15 (1973). "They are at least as punctual in reporting to work, have fewer on-the-job accidents and are less often absent from work because of illness, accidents or unexplained reasons." Id. Accord, U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, RESEARCH MATERIALS 87 (1965).


Older workers, it appears, are not only able to produce a volume of work equal to that produced by younger employees, but in some circumstances they even outproduce their younger counterparts. See Age Discrimination in Employment: Hearings of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 370-71 (1969). One study of female federal employees established:

Among women, there was very little variation in average output per man-hour among the different age groups except that output was significantly below average for the youngest, for whom the lack of experience was apparently an important factor. . . .

. . . In the Federal Government, women employees aged 65 and over had the highest average relative to the base group of women 35 to 44 years old. Kutscher & Walker, Comparative Job Performance of Office Workers by Age, 83 MONTHLY LAB. REV. 39, 40-41 (1960).

Similarly, the scientific studies disclose that the stereotype of the older person with limited or declining mental and intellectual abilities is false. Intellectual ability can increase for virtually as long as the individual lives—on up through the 70s, 80s, and even 90s. Thus, a summary of a number of studies conducted as to older people's mental and intellectual abilities reported:

News reporters never tire of pointing out that Golda Meir works 20-hour days, yet is in her mid-70s, and a grandmother. Time, in a recent story on William O. Douglas, noted that the blue eyes of the 75-year-old Justice "are as keen and alert as ever. So, too, is his intellect." This sort of well-intended but patronizing compliment betrays a widespread assumption that intelligence normally declines in advanced adulthood and old age, and that people like Meir and Douglas stand out as exceptions.

In our opinion, general intellectual decline in old age is largely a myth. During the past 10 years, we and our colleagues, . . . have worked to gain a better understanding of intelligence in the aged. Our findings challenge the stereotyped view, and promote a more optimistic one. We have discovered that the old man's boast, "I'm just as good as I ever was," may be true, after all. Baltes & Schaie, The Myth of the Twilight Years, PSYCHOLOGY TODAY 35, 35 (March 1974). See also Green, Age, Intelligence and Learning, INDUS. GERONTOLOGY 29 (Winter 1972); TOWARD AN INDUSTRIAL GERONTOLOGY (H. Sheppard ed. 1970); Withers, Some Irrational Beliefs About Retirement in the United States, INDUS. GERONTOLOGY 23, 27 (Winter 1974); Note, Mandatory Retirement—A Vehicle For Age Discrimination, 51 CHI.-KENT L. REV. 116, 119 (1974); Note, Age Discrimination in Employment, 50 N.Y.U. L. REV. 924, 935 n.64 (1975); Note, The Constitutional Challenge to Mandatory Retirement Statutes, 49 ST. JOHN'S L. REV. 748, 775 (1975).

Given the breadth of data, it appears clear that whatever the predominance of mandatory retirement as a practice in the workplace, its sustaining primary logic—the supposed incompe-
Now, it may well be that the courts generally do not want to arbitrate as to conflicting scientific data. It may be beyond their ken to determine whether, as to a given job, data showing some heightened risk of cardiovascular crises is offset by compensating benefits resulting from older employees' heightened caution. The institutional inability of the courts to cope with the problem thus leads to endorsement of the minimum rationality test, given that it enables judicial abdication. Confession of inability or indifference, however, is at least more honest and accurate than is the kind of self-serving, unsubstantiated pronouncement uttered by the *Murgia* majority.

Finally, the *Murgia* Court offered some reasoning both obvious and subtle. It stated that "even old age does not define a ‘discrete and insular’ group, . . . in need of ‘extraordinary protection from the majoritarian political process.’" This is because old age simply "marks a stage that each of us will reach if we live out our normal span." At one level, of course, the Court had it right; short of the (usually) worse alternative, old age awaits us all. The significance of this observation, however, was not explained by the Court, although fleshing it out is not so difficult.

The first notion buried in the Court's statement is recognition of the fact that any given age is not immutable. The 5-year-old grows to be 10, the 50-year-old advances to 55 and 60 and beyond. Thus, age is a quality different from race and gender, which are unchanging and unchangeable, and so the unfairness of imposing burdens based on race and gender is attenuated in the age context. A law which discriminates against blacks can never be eluded by its targets, nor will it ever harm the sentence of the older worker—is not persuasive. This data, by the way, applies equally to skilled workers as to the unskilled:

Actual records of work performed showed greater differences in productivity within age groups than among different ages. Large proportions of workers in the older groups exceeded the average performance of younger workers. Moreover, older workers had a steadier rate of output. Results were similar for every occupational group surveyed—office workers, operatives, and mail sorters—as well as for higher versus lower skilled workers, and time versus incentive workers.


This is not to say that there is no association between age and ability; the flaw comes in trying to generalize from specific instances of illness or weakness or inefficiency to the broad class of those over 65 or 70 or whatever. See generally Note, *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 U.C.L.A. L. REV. 549, 552-53 (1976); Fozard & Cart, *Age Differences and Psychological Estimates of Abilities and Skills*, INDUS. GERONTOLOGY 75, 86 (Spring 1972).

144. 427 U.S. at 313 (citation omitted).
145. Id. at 313-14.
whites. A law which makes an age distinction, however, need not victimize forever. It can be outgrown.

As far as it goes, this reasoning makes sense. Indeed, it is at the core, perhaps, of accepting laws which limit and control children. A law which bars youngsters under age 16 from obtaining drivers' licenses may be discriminatory, particularly in the eyes of 14- and 15-year-olds, but at least it is not permanently inescapable. The logic, however, breaks down in the context of laws such as the very one before the Murgia Court—i.e., laws which impose disadvantages for being too old. We do, after all, only grow in one direction—older. Thus, there was nothing that Officer Murgia could ever do to overcome the barrier to employment erected by the out-at-50 statute. He was never going to become less than 50. Thus, it is not right to reason that a given group, defined by its being too old for whatever is the privilege or benefit claimed, is altogether different than other groups readily recognized as being defined by the immutable characteristic of race or gender. To the extent, then, that immutability is a significant factor in the suspectness equation—and it is—people deemed too old do have a better claim on securing at least some enhanced constitutional status than the Murgia Court was willing to acknowledge.

The question of immutability merges into the other notion encased in the Court's reasoning about the old not being a discrete and insular group needful of judicial protection. The notion goes thusly: judicial intervention is most needed when the political process is working in such a manner that those who are the subjects of laws do not have a voice in their enactment, or at least an effective voice. For blacks, for example, majoritarian democracy is a risky enterprise; they simply do not have the numbers to win in the political process. More than that, because they are a minority—and the typical legislature will be made up of a majority of whites—there is the real risk that those in power will rather blithely impose deprivations on those who are powerless. After all, we know that human nature is flawed; thus, white

147. See note 73 supra. See also notes 208-20 infra and accompanying text.
148. This notion was articulated by Chief Justice Stone in his famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938), and formed the basis for the development of the heightened scrutiny approach accorded certain interests and classifications in the Warren Court era. This notion, however, certainly has not carried the day in all contexts, for numerous groups finding themselves to be minorities are accorded nothing more than the mere rationality test. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
149. See generally Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 933-35 (1973). This idea that the minority group, or the group without political power, is needful of special judicial protection, or that at least the judiciary should scrutinize carefully those
legislators, who can never be black, may have little pause in passing legislation which disadvantages blacks, inasmuch as the inequity thus created can never directly impinge on those passing the law. Here, then, is the juncture at which the courts should be most suspicious, for if blacks cannot secure relief in the judicial forum, they are defenseless. Thus, racial classifications are suspect, with the result that the courts will look upon them with particular cynicism and demand rigorous justification if they are to survive.

But we all will become old, the *Murgia* Court tells us. Thus, the same risk that inheres in a white-dominated legislature passing legislation affecting blacks does not pertain. Human nature dictates that people watch out for themselves, so legislators are hardly likely to pass laws which harm the old, given that they themselves will ultimately join the club of people whom they are now victimizing.

There is a further amplification of this theme. Few white legislators may have close personal or even professional contacts with blacks: thus they may too readily view blacks as somehow alien, with the consequence that a kind of political xenophobia arises which insulates the consciences of the whites when they pass race-based laws. On the other hand, we all have, or had, a mother and a father; given the growing numbers of particularly old people, many adults even have grandmothers and grandfathers still living. This fact, then, further undercuts the likelihood of pernicious ageist legislation, since the legislator who votes to disadvantage the elderly is likely to be harming his own.

The *Murgia* majority's rather cryptic assessment of *realpolitik* has its problems. One flaw lies in the Court's failing to take into account the psychology of youth, and even of middle age. The "non-old" do not expect to grow old. Of course they know that that fate lies ahead, as an intellectual matter. But as a factor which governs their actions today, it is a reality which is in some manner ignored or suppressed.

laws which impact adversely upon the powerless, is of course not limited to equal protection doctrine. Under the commerce clause, judicial analysis of state regulation regards the disenfranchisement of those affected by a commerce-regulating law as a significant element in the determination of the legitimacy of the law. See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), too, the Court developed this concept in considering the legitimacy of a state law taxing a national bank, in a situation where those subjected to the tax—the national citizenry whose bank it was—had no vote in the state legislative forum, wherein the tax was adopted.

150. The greatest rate of population growth is in the age group 75 and over. U.S. DEP'T OF HEW, STATISTICAL REPORTS ON OLDER AMERICANS: SOME PROSPECTS FOR THE FUTURE ELDERLY POPULATION (1978).

151. See S. de BEAUVIOR, THE COMING OF AGE 13 (1972):

When we look at the image of our own future provided by the old we do not believe it: an absurd inner voice whispers that *that* will never happen to us—when *that* happens it
Thus, to confidently rely upon the self-interest of the future old is to take a stance not quite fitting with the reality of the presently "non-old"; from their perspective, the old are in many ways "them," and not "us."

Another defect in the Court's posture lies in its apparent analysis of how legislation comes to be. The underlying implicit assumption seems to be that a legislator makes a choice—either to hurt the old or not. But, in fact, as to any given piece of legislation there may be a variety of factors which complicate the computation. Mandatory retirement laws, for example, are not simply products of a choice between harming seniors or not doing so. Into the mix go arguments that mandatory retirement is needed to make room for the young; to get rid of deadwood; to make it easier for employers to terminate employees without having to engage in costly individualized testing; to make it easier for employees who are actually declining to avoid being forced to admit that fact by giving them the excuse that an immutable retirement requirement was the sole basis for their ouster; and so on. A legislator called upon to vote for or against a mandatory retirement law, then, may recognize that it is harmful to older people and yet he may still vote for it because it serves other ends which he considers worthy. And he may do so even while realizing that he harms his father today, and himself tomorrow.

Finally, there is the fact that legislation is selective. Even a legislator who appreciates in a directly felt way the fact that he will become old still may vote for a law forcing the retirement of police officers at age 50 or at age 60, given that he neither is, nor ever intends to be, a police officer himself. The club of retired police is not one which, in fact, he will be joining.

Having said all that, there is still difficulty in persuasively maintaining that the old are powerless, and therefore in need of extraordinary protection. Their numbers are certainly considerable.

will no longer be ourselves that it happens to. Until the moment is upon us old age is something that only affects other people.


153. Older Americans constitute approximately 11% of the population and in some states this proportion is even higher. In 1975 nine states had more than 12% older persons: Florida (16.1%), Arkansas (12.8%), Iowa (12.7%), Kansas, Missouri and Nebraska (12.6%), South Dakota (12.5%), Oklahoma (12.3%), and Rhode Island (12.2%). California and New York each have more than two million older citizens, and more than one million reside in each of five states—Pennsylvania, Florida, Texas, Illinois and Ohio. Senate Special Comm. on Aging, Part I—Developments in Aging: 1975 and January-May 1976, S. Rep. No. 94-998, 94th Cong., 2d Sess. xv (1976).
Moreover, older Americans constitute the fastest growing segment of the population. Between 1970 and 1979 the over-65 population grew by 23.5%, whereas the under-65 population increased by only 6.3%. Given that many elderly are not isolated from the political mainstream, their voices obviously can be, and are being, heard. They have, as a matter of fact, been strikingly successful in securing government benefits and assistance.

As for the irrebuttable presumption doctrine, the Murgia Court made no mention of it. This could not have been mere accident. The lower court, in ruling for the state trooper, had explicitly relied upon Cleveland Board of Education v. LaFleur, a key irrebuttable presumption decision. Moreover, just two years earlier, Chief Justice Burger and Justice Rehnquist had strongly dissented in LaFleur, gloomily prognosticating that the logic of the majority opinion, which struck down mandatory pregnancy leaves for school teachers because such a requirement left no room for individual determination of whether a given teacher was physically capable of performing her job, would inevitably lead to the demise of mandatory retirement laws. Surely, their prophecy could not have been forgotten, wrong though it proved to be. The Murgia Court's silence undoubtedly imparted a message: if the irrebuttable presumption doctrine was not otherwise dead, it at least had nothing to offer for the analysis of age distinctions.

Voting and Candidacy

As already noted, the most thorough analysis—albeit cursory—of the constitutionality of age distinctions under the equal protection clause has developed in the context of employment discrimination. It should be clearly understood, however, that use of the minimum ra-

156. See note 139 supra.
159. Id. at 659 (Rehnquist, J., dissenting).
tionality test to measure alleged age-based wrongs is not confined to that sphere alone. To enhance that understanding, one can look to another arena where the use of age distinctions is common, and challenges similarly treated—restrictions on the franchise and public officeholding.

A particularly consistent—and obvious—use of an age cutoff in our society has been reliance upon attainment of a certain age, almost invariably age 21, as the trigger for securing the franchise. It is only since adoption of the twenty-sixth amendment that the voting age has been lowered nationwide to age 18. Even that development did not suggest a social rejection of age distinctions; rather, it simply established an earlier date for the onus of an age barrier to fall away.

A corollary to the use of an age requirement for voting has been employment of age criteria as predicates for running for, and holding, public office. Here, there has been more variation, with age 21 not holding such complete preeminence as the critical demarcation. Moreover, there also has been some use of age maxima, whereby individuals who are too old are barred from office. This, of course, is a use of age distinctions which is not found in the voting context.

On a number of occasions the Supreme Court in dicta has observed that age restrictions on the franchise are acceptable. Thus, even though the Court has established that equality of access to the franchise is a fundamental interest, which would ordinarily evoke the compelling interest test, lower courts—taking their cue from that dicta—have applied the mere rationality test. In Ymca Vote at 18

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160. As to the development of age 21 as the common age for attainment of the franchise, see Forkosch, The Inability of Congress to Impinge on State Power to Set Electoral Age Qualifications, 47 CHI.-KENT L. REV. 83, 93-111 (1970); James, The Age of Majority, 4 AM. J. LEGAL HIST. 22 (1960).

161. The twenty-sixth amendment provides:

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XXVI.

162. See notes 14-17 and accompanying text supra.


164. See, e.g., Trafeflet v. Thompson, 594 F.2d 623 (7th Cir.), cert. denied, 444 U.S. 906 (1979) (elected state court judges forced to retire at age 70).


Club v. Board of Elections,\textsuperscript{167} for example, the federal district court simply asserted that the state has a valid interest in protecting the integrity of the franchise through the "intelligent use of the ballot,"\textsuperscript{168} an interest furthered by a minimum age requirement.

The case law concerning candidacy for the holding of public office has been equally unresponsive to discrimination contentions. Two tacks have been generally pursued. It has been argued that the age-barred candidate is denied equal protection because of the disparate treatment accorded him, as compared to age-qualified office seekers. A related contention is that voters who support the aggrieved potential candidate are constitutionally injured, since they are precluded from voting for the candidate of their choice. Since there is no fundamental right to be a candidate\textsuperscript{169} and since age is not deemed to be a suspect classification, differential treatment of political aspirants or officeholders who are of different ages evokes only the minimum rationality test; thus, the first tack has been unavailing. Accordingly, in Trafelet v. Thompson,\textsuperscript{170} the United States Court of Appeals for the Seventh Circuit readily upheld a state law requiring the retirement of state court judges (who were elective officials) at age 70:

The legislature could rationally have justified treating judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode. Although the defenders of the statute were not required to establish by evidence a rationality that is obvious from the common experience of mankind, . . . they nevertheless did so. . . . It is irrelevant that evidence was adduced to rebut this data: " . . . It is not within the competency of the courts to arbitrate in such contrariety."\textsuperscript{171}

Insofar as the discrimination claim is bottomed on the alleged deprivation of the fundamental interest in equality of access to the franchise of the voters denied their candidate, the courts, looking to the Supreme Court dicta that age restrictions as to voters need only be addressed under the rationality test, have similarly examined candidate restrictions in this light and have found them satisfactory.\textsuperscript{172}

\begin{itemize}
  \item \textsuperscript{167} 319 F. Supp. 543 (S.D.N.Y. 1970).
  \item \textsuperscript{168} Id. at 546.
  \item \textsuperscript{170} 594 F.2d 623 (7th Cir.), cert. denied, 444 U.S. 906 (1979).
  \item \textsuperscript{171} Id. at 627 (citation omitted) (quoting from Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916)). But see Daley v. Farm Credit Admin., 454 F. Supp. 953 (D. Minn. 1978).
\end{itemize}
The Special Place of Children

In *Massachusetts Board of Retirement v. Murgia* and *Vance v. Bradley* the Court addressed claims of age discrimination raised by people who claimed they were denied equal protection by virtue of being deemed too old. In the voting cases the claims were made, again typically on equal protection grounds, by plaintiffs just short of the age of legal maturity. And in the jury cases, too, the claimants typically were individuals who were adults or on the verge of adulthood; many of those cases, of course, arose under the sixth amendment, although a number likewise invoked the equal protection clause.

Younger individuals—children—have increasingly come before the Court also. It is safe to say that for equal protection purposes, childhood status is not deemed to be a suspect classification. The Court has not so held, but its decisions can leave little doubt in that regard. Perhaps because of this perception, it has been due process analysis which has typically been employed by the Court. In other words, claims by children of denial of privacy rights or of rights allegedly protected by the first amendment have not been treated by examining whether the disparity in treatment as between children, on the one hand, and adults on the other, raises an equal protection problem; rather, the Court has looked to the right at issue and assessed whether a child can lay claim to it as a matter of fairness.

In some instances, such claims have succeeded. Children clearly are not outside the constitutional pale; they do have rights under the first amendment; they have privacy rights; they have valid procedural due process claims in both civil and criminal settings. At the same time, however, it is clear that these rights are of a lesser di-

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175. *See* notes 160-68 and accompanying text *supra*. In some cases, first amendment arguments were also made. *See*, e.g., Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973).
176. *See* notes 24-61 and accompanying text *supra*.
178. Of course, in some instances equal protection analysis simply would be inappropriate. In the high school setting, for example, one would not be able to argue a denial of equal protection arising out of summary expulsions, since all students were treated the same. Lack of procedural due process would be the ground for attack. *See* *Goss v. Lopez*, 419 U.S. 565 (1975).
mension for youngsters; children may be subjected to impositions and restrictions which, if they were placed upon adults, would not stand.\textsuperscript{183} Justice Powell, writing for himself and three other members of the Court in \textit{Bellotti v. Baird}, \textsuperscript{184} a decision addressing the constitutionality of a parental consent requirement for minors to obtain abortions, explained the rationale for this diminished status under the Constitution:

\begin{quote}
[T]he status of minors under the law is unique in many respects. . . .

The unique role in our society of the family, . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.\textsuperscript{185}
\end{quote}

One can disagree with specific rulings by the courts. It seems safe and proper to conclude, however, that there are real and tangible differences between children and adults—differences which at least on some occasions properly translate into disparity of treatment and of rights and responsibilities. The problem for the ardent opponent of ageism is to mount an attack on age distinctions which takes cognizance of this reality. It is common enough to contend, for example, that mandatory retirement is a vice; indeed, this is the ageist practice which has most caught the fancy of commentators. Complexity intrudes, however, in drawing some respectable limit to the arguments made against the forced ouster of older workers from their jobs. For if the use of an age line is deemed improper as a basis for determining who may work and who may not when the victim is old, may it not follow that child labor laws, indeed any laws using age lines, to distribute rights and privileges and responsibilities, are imperiled?

Of course, one can simply say that children are different, and therefore differential treatment is acceptable. But that is really too shallow; one could say, also, that old people are different. What one would wind up with would be a debate among social scientists, with judges being called upon to make fine calibrations between differing theories of childhood development, age identification, psychomotor functioning and the like. It is preferable to attempt to place children,

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\textsuperscript{184} 443 U.S. 622 (1979).

\textsuperscript{185} \textit{Id.} at 633-34 (citations omitted). The Court struck down the law, but a majority was in accord that restrictions not supportable vis-a-vis adults could be imposed upon immature minors.
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youths, young adults, middle-aged adults and elders, within some unified schemata which recognizes that they all are subjected to age distinguishing, and which further allows for some assessment of when age distinctions are tolerable and when they are not.

The Special Problem of Special Benefits

One of the perturbing aspects of any campaign against ageism resides in the potential for tunnel vision on the part of those who condemn the vices of discrimination. Most commonly, protests against age discrimination emanate from those who are advocates for seniors. That they have legitimate grievances need not be contested. There is enough in our laws, practices and attitudes to confirm that the elderly indeed are victims of negative stereotyping and pejorative regard by those younger than they.

The problem is that at the same time as they suffer, the elderly also benefit. Indeed, so do children, who are also the subjects of advocacy by special interest groups seeking vindication of rights. Both the particularly young and the old are the recipients of benefits and entitlements which are bestowed upon them because they are old or young: there are a host of governmental programs specifically designed for, and confined to, children\textsuperscript{186} and the elderly.\textsuperscript{187} A persuasive empirical case can be made, then, that the true victims of ageism are those between approximately ages 22 and 60; they are the ones ineligible for subsidized mass transit fares, and special job training programs, and specialized medical support programs, and so on.

If one wants to argue that ageism is a vice of constitutional dimensions, one can hardly escape confronting this reality. Indeed, it is likely correct to say that almost every age-correlated benefit for one person can be characterized as a deprivation for another. After all, cannot the 40-year-old welfare mother, with three children and no husband, legitimately decry as age discriminatory a reduced fare plan operating in her city's mass transit system which extends a subsidy to those under 18 and over 60, while closing her out and thus requiring her to pay full fare each day as she takes public transportation in search of a job? Cannot the 55-year-old identify as ageism the Social Security system's minimum age requirement for eligibility—a requirement which excludes him from benefits for several more years?

\textsuperscript{187} See note 139 supra.
In brief, if the advocates against ageism seriously want to urge the abolition of age distinctions as a primary mechanism of social control, they had best consider that they may have to give up some good for the sake of obtaining an end to the bad. That is so, at least, unless one can fashion a respectable analysis which finds some meaningful difference between age lines which are employed to benefit the old or the young (and which thereby necessarily burden those in between) and age lines which impose deprivation upon them.

**SYNTHESIS**

It belabors the obvious to observe that the courts have been consistently unsympathetic to constitutionally based claims of age discrimination. Why this is so is not entirely clear. In some measure, undoubtedly, the courts' indifference simply reflects their perception of the problem: for them ageism is just not a vice, or at least not enough of an evil to warrant judicial intervention. If the legislatures want to rely upon the use of age distinctions, so be it; the most the courts will do is to ask if such uses are rational, a question which carries with it almost inevitably an affirmative answer.\(^8\)

But there are undoubtedly other factors at work. One particular problem centers on defining the victims. The *Murgia* Court, for example, was clearly troubled by the fact that the class for which the police officer contended was unclear in its parameters. It observed that “[t]he class subject to the compulsory retirement feature . . . consists of . . . officers over the age of 50. [The law] cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life.”\(^1\)\(^8\)\(^9\) Likewise, in the jury cases, the courts have been resistant to viewing the young as a cognizable group because they do not find them to be a distinctive enough collection of individuals.

There is a real problem here, no doubt. Typically, a racial group is readily identifiable. So, too, are ethnic groups, and men and women are likewise distinct. When one starts speaking of age, however, ambi-

\(^{188}\) On very rare occasions an age line will fail to survive even under the rationality test. *See*, e.g., Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980); Daley v. Farm Credit Admin., 454 F. Supp. 953 (D. Minn. 1978).

\(^{189}\) 427 U.S. at 313. Actually, the Court itself manufactured unnecessary confusion. The Court opened its discussion of suspectness by addressing “the class of uniformed state police officers . . . .” *Id.* It then turned to the “treatment of the aged,” which was then followed by discussion of “[t]he class subject to the compulsory retirement feature . . . [as consisting] of uniformed state police officers over the age of 50.” *Id.* Thus, the Court seemed to want to focus on police officers as a group, the aged as a group, and police officers over 50 as a group. *See* Branch v. Du Bois, 418 F. Supp. 1128 (N.D. Ill. 1976), characterizing *Murgia* as having held that “state uniformed policemen were not a suspect class . . . .” *Id.* at 1133.
guity intrudes—"young," "middle-age," and "old" are all vague appellations. There is little clarity as to criteria for identifying those common elements which combine, in the first instance, to signify the group's very existence, save for the fact of age alone. Indeed, some have urged that we must start redefining the middle-aged and the elderly—there are the "young old," aged 55 to 74, and the "old-old," aged 75 and over. Thus, for a court to announce that a given age group is suspect is to ask it first to identify a group whose very contours are unclear. Granted, this need not always be a major problem; undoubtedly we can all agree that certain groupings are obvious. Those over 80, say, are unquestionably old; those under 15 are unquestionably young; those aged 13 or so to 19 or so are adolescents. But at the edges the matter of definition, and consequent exclusion or inclusion in the group, is a complicated one: is a 65-year-old man "old," or is he in late middle age? No certain answer ensues, and the problem is compounded further by changing social realities. In 1890, for example, almost seventy percent of all men over age 65 worked; apparently they were not old in the sense of employability, at least. But today, the percentage of employed older workers is far, far less—twenty percent. Given this statistic, superannuation apparently arises at a relatively early age. On the other hand, a 65-year-old white male today has a statistically predicted future life span of 13.9 years. On that basis, perhaps he should not be deemed old.

A second problem lies in the fact that age distinctions do serve some socially beneficial functions. They make life easier for government bureaucrats; they save the costs which would be incurred by individualized treatment; they even may avert injustices which might arise through abuses of discretion were a system of individualized treatment to supplant our age-geared society. Granted, the valuing of these benefits will be a function of perceived evil: certainly, were like justifica-

190. One authority, pointing to such factors as subjection to discrimination, high visibility, and their functioning as a subgroup, has concluded that "[i]n many respects the aged show characteristics of a minority group." Breen, The Aging Individual, in HANDBOOK OF SOCIAL GERONTOLOGY 145, 157 (C. Tibbitts ed. 1960). Another expert disagrees: "From the standpoint of conceptual clarity and empirical fact, the notion of the aged as a minority group does not increase understanding. It obscures it." Streib, Are the Aged a Minority Group?, in MIDDLE AGE AND AGING 35, 46 (B. Neugarten ed. 1968).


192. CRITERIA FOR RETIREMENT 12-13 (G. Mathiasen ed. 1953).

193. SENATE SPECIAL COMM. ON AGING, PART I—DEVELOPMENTS IN AGING: 1979, S. REP. No. 96-613, 96th Cong., 2d Sess. xlvi (1980). The figure for women is 8.3%. Id.

194. Id. at xxviii.
tions to be offered for using gender distinctions, they would be rejected, given that the courts are persuaded that gender discrimination is too invidious to be tolerated in the name of bureaucratic expediency.\textsuperscript{195} In other words, these "benefits" of age lines are at least in part perceived as benefits because the evil they perpetrate is not perceived as invidious.

A third, related problem arises out of the fact that age distinctions serve a multiplicity of purposes, and arise in a multiplicity of settings. In the employment arena, for example, mandatory retirement may be justified as a means to rid the workplace of deadwood; to reduce the costs which would otherwise accrue from an individualized testing approach to firing; to protect the feelings of superannuated employees who actually are declining, but would rather have an impersonal system of ouster remove them than submit to the degrading experience of being told they are lapsing into inability; and to make room for younger employees. Age restrictions are imposed upon the franchise ostensibly to assure competency by those voting. Exclusion from juries apparently is premised on the same goal. Curfews imposed on youngsters are bottomed on concerns for their safety.\textsuperscript{196} Driver licensure limits emanate from concerns both about the driver's safety and that of the public.\textsuperscript{197} Given these disparate aims, all served ostensibly by age restrictions, the courts necessarily may find themselves—were they to venture into the thicket—called upon to make judgments whose difficulties they would just as soon forego.

Still another difficulty lies in the fact that no particular age line is likely to be better than another. Assuming a court were disposed to find constitutional fault with a given age distinction, yet at the same time the court were willing to tolerate some age cutoff, it would have no readily obvious means to serve both ends. For example, if one accepts the notion that some age minimum is acceptable for eligibility for licensure to drive, one is hard pressed to establish that age 16 is inappropriate, whereas age 15 or 14 or whatever is not. Thus, unless a court is prepared to abolish the age limitation entirely, it will find itself in difficult straits. Of course, this problem would become particularly acute were a court to hold that age is a suspect classification. It is unlikely that a state could ever justify the particular age line drawn as being

\textsuperscript{195} See, e.g., Reed v. Reed, 404 U.S. 71, 76 (1971) (sex discrimination).


necessary to achieve whatever compelling interest it was that it sought to serve. 198

Finally, there is the risk that an unrefined condemnation of ageism will accomplish too much. One can insist that age discrimination visited upon adults is generally bad and yet accept differential treatment of youngsters. But an undifferentiated judicial posture, subjecting all age distinctions to rigorous examination, may wind up undermining those laws and practices which embody this felt distinction between adults and non-adults. Moreover, those who suffer from discrimination—particularly seniors and children—also benefit from it; yet rejection of the bad may necessitate loss of benefits as well.

Given these complexities, even the court concerned about the unfairness which age discrimination may impose in a given case likely will take the course of simply assessing the challenged law or regulation under the minimum rationality test. The test is tantamount to judicial abdication in most instances, of course, but it is at least a device which relieves the courts of resolving what may be unsolvable problems and which enables them to avoid a variety of undesirable ramifications.

Having said all that, there is still a nagging argument to be made that age discrimination is not innocuous, that it does defy basic notions of equality and justice by imposing treatment based on a characteristic which is immutable at any given point in time and over which the individual has no control. One can reject equating ageism with racism and sexism, yet still conclude that age discrimination is a practice to be avoided when possible. The task is to determine whether, if this sense of injustice has any persuasiveness, there is some means to enable the courts to be more sensitive, without engaging them in all the difficulties which may lie in wait.

Unfortunately, the choices are limited, and even no tentative solution is entirely palatable. One could succumb to the temptation of contending that all age classifications should be suspect. This is an unwinnable tack, of course, given Murgia. Moreover, it is one which likely should be unwinnable. Ageism simply is not as pernicious as is racism. Granted, this is a judgmental assertion. Some may disagree. But, if a history of degradation, and the elements of isolation, stigma

198. Justice Stewart, concurring and dissenting in Oregon v. Mitchell, 400 U.S. 112 (1970), observed: "To test the power to establish an age qualification by the 'compelling interest' standard is really to deny a State any choice at all, because no State could demonstrate a 'compelling interest' in drawing the line with respect to age at one point rather than another." Id. at 294 (Stewart, J., concurring in part and dissenting in part).
and powerlessness have significance in identifying those most in need of judicial interventionism—and they do—most age categorizations simply miss the mark.

Moreover, the costs of declaring age to be a suspect classification—even assuming one could define which age group one was talking about with sufficient definitiveness—would be too great. Virtually no law can withstand the scrutiny of the compelling interest test; certainly that is so in the case of age distinctions. How, for example, could a government agency ever establish to the satisfaction of this legal test that age 65 is constitutionally acceptable as the standard eligibility age for Social Security, or that age 5 is the proper age for allowing enrollment in grammar school, or that age 70 is the right line to draw for imposed retirement? Even if one were to assume that the agency could establish a compelling interest for having some eligibility or exclusionary standard, it could never establish that the particular age used was necessary to achieving that interest, as opposed to age 63 or 67 for Social Security, or age 4 or 6 for kindergarten.

Some might say that the consequent collapse of age-based laws would be all to the good—be done with age distinctions once and for all. The problem would be that enormous social and economic costs would ensue. Assuming that the purpose of Social Security is to help replace retirees’ lost work income, one would have to devise an individualized test to assess need, administer it and provide for administrative appeals of adverse determinations, if the use of the simple criterion of age were to be abolished. The same administrative complexities would ensue in a variety of settings—driver licensure, voting, curfews and so on. The task of devising adequate tests would be onerous at best; the expense would be staggering; the wait for final decisions inordinate. Injustices would still occur, given the opportunities for bureaucratic mistakes and outright abuse.

A second choice is the minimum rationality test—the approach prescribed by Murgia and Vance, and that which is employed throughout equal protection case law whenever age distinctions are relied upon. In almost every instance, the age line at issue will survive. Thus, this standard is a prescription for maintaining the status quo, and for not responding to the unfairness inherent in ageism. Because it is too insensitive to the vices of ageism, this standard—at least if used indifferently in all instances—is inadequate.

A third option would be to utilize a mechanism of analysis less rigorous than the compelling interest test, yet not as lenient as the mini-
mum rationality standard. Justice Marshall, for example, proposed a three-part inquiry in *Murgia*, looking to "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification."^{199}

Justice Marshall's approach undoubtedly reflects a greater sensitivity to the potential abuses of age distinctions than does the minimum rationality test. That is praiseworthy. Whether in the judicial forum it is particularly workable is a different matter. Social Security provides a good testing ground. Under Justice Marshall's formula, one could first readily conclude that the importance of receiving financial benefits is certainly an important individual interest. On the other hand, the state interests in ensuring the financial stability of the system, as well as in avoiding the considerable costs which would be associated with a test measuring a given individual's need for benefits to replace lost work income—presumably the only adequate alternative to the age criterion—would make the state's case for continuing reliance upon the age line a very strong one. One is left with the unguided task, then, of choosing as to which interest is more persuasive. Here, the test breaks down; it offers little guidance, after all.

Given the foregoing standard approaches to constitutional interpretation, it may well be wise to conclude that the courts and the Constitution are just not equipped to deal with age distinctions. This need not devastate opponents of ageism, of course. There is, after all, still the option to seek redress and to prevent wrong in the legislative forum. It may be too late in the day to dispense with age as the criterion for eligibility in the Social Security system, but that does not mean that legislators cannot be sensitized to the sometime problems of ageism, and be urged to use age lines carefully and thoughtfully in drafting new laws and revising old ones.

**A Refined Assessment of Ageism**

Perhaps, however, total surrender to the notion that the courts should play no role under the Constitution is not called for. There are some guidelines which are justified by the peculiar nature of age classifications and which, if carefully utilized, can avert, in some settings at least, the traps and ambiguities of an unrefined, generalized condemnation of age distinctions.

^{199} 427 U.S. at 318 (Marshall, J., dissenting).
The first postulate is that unadorned age distinctions have no redeeming merit. There is enough risk of unfair treatment following from the use of age differentiations embedded in statutes and regulations to warrant the conclusion that an age distinction is irrational if it serves no purpose other than as an arbitrary expression of a legislature's desire to use age lines. Thus, the age distinction must have some other basis apart from simply serving as a demarcation to separate the eligible from the ineligible. Accordingly, age 16 as the signal event for driver licensure eligibility must (and does) serve some substantive end, such as separating the potentially dangerous drivers from the (hopefully) safe ones. Age 65 in the Social Security setting must be justified, as it can be, by pointing to the need to approximate—admittedly in a very inexact manner—that point in time when physical decline is likely to warrant relieving workers from their previous toils, or that point when society is willing to encourage older people to make room for younger workers by making elders' departures from the work force financially feasible.

A second postulate is that it is the user of the age line which should bear the burden of justification. Obviously, in most instances the age line in question still will survive. But at least it will be the user of the age line which will have the task of disclosing its purpose, thereby unveiling purely arbitrary age distinctions laid down for no other purpose than that of making such distinctions. There is nothing novel, of course, about this prescription. The Supreme Court has hinted at it by sometimes asserting, albeit with no consistency, that even under the rationality approach the burden rests with the defender of the challenged law to articulate a justification for it.200 Similarly, commentators have urged this course.201 What is new here is the assertion that age-based classifications should always be deemed to raise enough of a problem, even in the abstract and without looking to particularly odious examples of discrimination, so as to warrant this much more than standard mere rationality discourse. For not even asking that much, the Murgia and Vance Courts were, at the outset and independent of any more specific defects in the decisions, simply too lax.202

Third, ageism should, and properly can, be acknowledged as a phenomenon whose invidiousness varies with the setting. All race dis-

201. See, e.g., Gunther, supra note 63, at 20-24.
202. Actually, in Murgia the Court did perhaps opt for this course. See 427 U.S. at 313-14. The subsequent Vance Court, however, clearly rejected it. See notes 123-25 and accompanying text supra.
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crimination is bad, and evokes the compelling interest test; all gender discrimination is sufficiently dubious that it warrants the intermediate test which demands a showing of an important governmental interest and that the law used to achieve that interest is substantially related to the interest. All age distinctions, on the other hand, do not constitute condemnable discrimination. More particularly, such distinctions which distinguish those deemed too young are tolerable and acceptable. There are two reasons for this perception. First, age, notwithstanding its permanence on any given day of a person's life, nonetheless is over time a constantly changing quality. The pertinence of this is particularly apt as to children, because the unfairness of deprivation imposed because of an immutable characteristic is tempered by the fact that youngsters will outgrow their age-based disabilities. Indeed, as to any limitation imposed for being too young, whether the target of that limitation is a child or a young adult or a 55-year-old, this holds true. In contrast, race and gender are unchanging. Second, race and gender are characteristics which are irrelevant insofar as issues of competency, judgmental capacity, physical ability and emotional and psychological maturity are concerned. Lack of age can bear relevance to these qualities: the use of age as a basis for treating minors differently than adults is grounded in reality and that reality is not one shaped, in the main, by unfounded biases or thoughtless traditions.

Granting the variability in seriousness of age distinctions, there still are times when ageism's bite is particularly pernicious, and cannot be countenanced. The fourth postulate, then, is that when age is used as a basis for depriving a person of a right which is secured under the Constitution and which, but for his age, he could successfully claim, the standard of scrutiny which that right ordinarily evokes should apply to the age distinction now tied up with that right. For example, the Court has held that limitations on the ability of a woman to obtain an abortion elicit strict judicial scrutiny under the due process clause. Accordingly, restrictions imposed on minors who seek abortions—such as the requirement of parental consent—likewise should be examined under this standard. If there is no compelling interest for treating youngsters differently than adult women, the law should fall. In many instances, of course, the state will be able to come forth with a compel-

ling interest—protection of the child and of family interests. The difficult task will be that of establishing that the use of any particular age line to distinguish between those who must secure parental consent and those who must not is necessary to achieving that interest. Likely, the state could not succeed: there is no good reason for setting age 15 as the critical point of demarcation rather than 14 or 16. Because of this, but more importantly because of the fact that age distinctions imposed upon children are generally more tolerable, the state should not be held to a necessity standard vis-a-vis the specific age lines employed. It should be sufficient that the state demonstrate that some fencing out or fencing off of juveniles is necessary to achieve its interest, without it having to further establish that the exact age demarcation used is also necessary. There is no warrant, however, for relaxing the necessity element entirely insofar as adults are concerned, as discussed below. Thus, if the rationality test would normally apply absent the age factor, it would apply here also, except that it would be modified so as to require that the proponent of the law bears the burden of justification. If the compelling interest test would normally apply, absent the age factor, so too would it apply here, with the one caveat that where the compelling interest standard is elicited, the state need not establish that the specific age line used is necessary to achieving that interest when non-adults are the grievants.

The fifth postulate focuses mainly on adults. It has already been suggested that age distinctions for the sake of age distinctions and nothing more should be deemed irrational; it has further been suggested that as to any age distinction the burden should be on its user to justify it. Over and above these initial predicates, it should be recognized that age distinctions which penalize someone for being too old are more invidious, and thus should elicit more stringent judicial scrutiny, than those which penalize for being too young. This postulate should apply whether it is a constitutional right which is being manipulated on the basis of age, or a claim short of that. Obviously, given the prior discussion, impairment of a constitutional right which would ordinarily evoke the compelling interest test should likewise do so in this context. However, rather than the necessity prong of that test being relaxed when an age distinction bars those too old, the state indeed should have to show that its age line is necessary. And even in settings where the compelling interest test would not apply, the mere rationality standard should not suffice—the first two postulates make that clear already. Rather, in such context, the user of the age line should be held to the test of establishing an important government interest, and further es-
establishing that the means used—i.e., the age distinction—are substantially related to that end.

The test proposed is that which the Court has devised for examining gender discrimination. Given the foregoing discussion, it may be legitimately asked why, if age discrimination generally is not equivalent to gender discrimination, the standard set forth for the latter is properly applicable to the former. The answer turns on the element of permanency: when an age line is used as a criterion for imposing a burden or denying a benefit because one is too old, that distinction is one which indeed is, like gender (and race for that matter), immutable. There is no way for an individual to become younger. Thus, a statute which bars the hiring of individuals over 35 as fire fighters, or a law which ousts workers at age 70, is one whose onus can never be escaped. It is because of this finality that the tougher test set forth in the gender cases aptly applies here.

Granted, this logic has its flaws. The 14-year-old who desperately wants to drive but who is denied licensure until he is 16 is subjected to a discrimination which cannot, through anything within his control, be overcome. For him, on any given day, his age on that day is immutable, too. The savings, however, is that at least he will outgrow his disability. The 35-year-old applicant for the fire fighter's job, or the 70-year-old workman still wanting to work, will not.

Obviously, immutability is posited here as a critical factor in the equation which leads to enhanced judicial scrutiny of laws and regulations which exclude or deprive because of the individual being deemed too old. Yet an argument based on the immutability criterion alone is one whose logic may go too far. We are all possessed of a number of immutable characteristics: height, eye color, general facial structure and intelligence are attributes over which, to varying degrees, the individual has little, perhaps even no, control. If immutability were to be the sole and sufficient basis for enhanced concern under the Constitution, presumably laws keyed to any one of these characteristics would evoke special judicial solicitude—an eventuality both dubious on its own merits, and certainly unlikely to be accepted by the courts, in any event.

Laws which exclude or deprive for being too old, however, typically carry with them at least two special aspects which separate them from those which classify on the basis of eye color, intelligence or the like. The first of these is the matter of stigma. Group, or individual,

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denigration has consistently been one of those factors which has
loomed significant in the Court's assessment of the invidiousness of
classifications. In Brown v. Board of Education,208 for example, in
which the Court struck down the separate-but-equal doctrine, the
Court reasoned that "[t]o separate [children] from others of similar age
and qualifications solely because of their race generates a feeling of
inferiority as to their status in the community that may affect their
hearts and minds in a way unlikely ever to be undone."209 Similarly,
Justice Brennan, writing for himself and three other Justices in Univer-
sity of California Board of Regents v. Bakke,210 reasoned that the white
plaintiff's claim of unconstitutional exclusion from the medical school
to which he had applied and which utilized a preferential admissions
system for minorities should fail because the racial classification at is-
sue—a classification which only disadvantaged whites—did not pro-
duce stigmatization.211

Ours is a society in which being labeled elderly is stigmatizing. It
is a commonplace to observe that we live in a "youth culture," where
the young are glorified and old age is ignored, suppressed or derided.
The evidence is abundant. In common parlance, "old" is used as an
epithet: someone who is young and acts offensively may be called a
"son of a bitch," but no reference is made to his age; someone who is
old and acts in like manner is an "old fart" or an "old bastard." The
young adult who acts silly may be chided; the older person who acts
frivolously is an "old fool." Stereotypes about competency are encap-
sulated in the saw about an old dog being unable to learn new tricks.
Colloquialisms suggesting the negative nature of old age are com-
mon.212 In brief, old is undesirable.

There is even some stigma which often attaches when we say that a
40-year-old is too old to play baseball, or a 36-year-old is too old to be
hired as a fire fighter, or a 30-year-old is too old to work as a lingerie
model. In each setting, there is the inference that the person is not as
good as he or she used to be; that the individual once was up to par,
was at peak performance or appearance level, and now no longer is.213

209. Id. at 494.
211. Id. at 373-76.
212. "Our colloquialisms reveal a great deal: once you are old you are 'fading fast,' 'over the
hill,' 'out to pasture,' 'down the drain,' 'finished,' 'out of date,' an 'old crock,' 'fogy,' 'geezer' or
213. Obviously, the stigmatization theme does not always aptly apply to sustain the argument
that being deemed too old is a stigmatizing experience. In Blue v. University Interscholastic
League, 503 F. Supp. 1030 (N.D. Tex. 1980), for example, 19-year-olds were excluded from high
Thus, the immutable factor of being too old is translated into a basis for stigmatization—a translation far less common with regard to characteristics such as eye color or height or length of ear lobes or a variety of other physical characteristics. And stigmatization is a crucial factor in constitutionally based assessment of classifications.

The second element in this analysis looks to the characteristic of being too old and its relationship to the ability to perform or contribute to society. This factor was addressed, albeit without significant exposition, by the four-judge plurality in *Frontiero v. Richardson* who joined to argue that gender is a suspect classification—a conclusion which failed to capture a majority there, and which has not prevailed since. In urging that position, Justice Brennan, writing for the four-some, urged that immutability was one of the key factors warranting special judicial concern regarding legislation based on gender classifications. At the same time, he sought to cabin the thrust of his argument by drawing a distinction between gender and other immutable characteristics:

[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

On the merits, Justice Brennan’s assertion is troubling. With atypical insensitivity, and without support in either scientific or social science data, he simply tossed outside the pale of judicial concern millions of individuals who are mentally and physically disabled. He succumbed to stereotypes, without any examination of them: those who are of lesser intelligence, or who are in some manner physically impaired, were thoughtlessly accepted as not being able to perform or contribute to society to the same degree as are the “normal.” The point

214. Undoubtedly there are some immutable characteristics which are used as a basis for stigmatization. Stupidity is not generally an attribute to which one aspires; being labeled “dumb” is certainly denigrating. Lack of pleasing physical appearance can also generate negative reactions by observers. These realities do not, however, undercut the fact that being denominated too old is also stigmatizing. To the contrary, they encourage giving greater consideration to whether the courts have been insufficiently sensitive in these areas as well. Justice Brennan sought to deal with the intelligence characteristic in *Frontiero v. Richardson*, 411 U.S. 677 (1973). See text accompanying note 216 infra. Whether he did so successfully is debatable. See text following note 216 infra.


216. *Id.* at 686-87.
here, however, is not to assess the unprotected status of the dull or handicapped. As a formulation endorsed by four Justices, this rationale has relevance to treating with special scrutiny laws and regulations which deprive those deemed too old. That relevance follows from the fact that, whatever the problematic nature of his assertion, certainly the formulation offered by Justice Brennan, if accorded some credence, sustains the argument that deprivation based on being too old cannot cavalierly be condoned. For it is rare that the characteristic of too many years will bear a relation to ability to perform or contribute to society. In many instances, that conclusion can be empirically supported. Indeed, in Murgia, for example, the Court readily acknowledged that the plaintiff himself was fully qualified to perform his job.217 Numerous studies about the performance abilities of older persons sustain that assessment in other settings.218 And, of course, laws excluding those too old will not necessarily just be limited to mandatory retirement contexts. Some laws, for example, bar the hiring of fire fighters or police officers who are over a certain age, such as 29 or 35.219 Federally funded research programs may exclude researchers over a certain age, say 30 or 40; federal grants may likewise bar all save the young. It would be difficult to seriously contend that such exclusionary age-based restrictions actually reflect the individual's ability to perform or contribute to society. At most, they reflect some judgment about the relevance of age to a particular activity—a judgment which, given the hardship imposed, should be put to a more rigorous test than mere rationality.

Given the typically inexact congruity, then, between the immutable factor used as the basis for classification—i.e., being too old—and its relationship to ability to perform or contribute to society, Justice Brennan's formulation, applied in the age context, further militates in favor of special judicial solicitude.220

218. See notes 142-43 supra.
220. What makes generalizations based on being too old further inappropriate, particularly as contrasted with barriers erected for those too young, is the presence of a useable track record which can readily be substituted in most instances for generalization. Presumably, for example, state police officers are retired at age 50 in Massachusetts because on the basis of experience it can be established that there is some sort of gradual decline which is perceptible and measurable. Legislators or administrators thus have an information base on which to ground their age exclusion. Where that base is persuasive, the exclusion perhaps can stand; where it is not, the exclusion should not continue. In contrast, exclusions for being too young are, in the nature of things, unsupported by such an experiential predicate. We engage in the statutory assumption that generally teenagers under age 16 are too young to drive; we cannot verify that with a large body of
How, then, would these five postulates work in context? One can take age restrictions on the franchise as a testing ground. Persons under the age of 18 are denied the vote—something which they have never had in the first instance. Presumably, the age demarcation is imposed for some reason other than just the whimsical desire to use age distinctions; it likely would be justified by the state as serving to assure competency in the voting booth. While there is no right to vote per se, there is a right to equality of access to the franchise, and thus the strict judicial scrutiny test should apply in examining this justification to determine whether there is a compelling interest. Presumably, the state can demonstrate a compelling interest in assuring the competency of voters and in assuring that those who vote are not too susceptible to the emotional, financial and other influences of other individuals, e.g., parents. That should be sufficient; the state need not show that age 18 is the necessary means to achieve that interest.

As for age restrictions on candidacy, there is no constitutional right to run for, or hold, political office. There is, however, a fundamental interest possessed by voters—again in the pursuit of their claim to equality of treatment in the franchise—to be able to have their candidates on the ballot without undue barriers. Here it may well be, given again the application of the compelling interest element, that a law which bars over-age candidates may fail, for the state should be hard pressed to establish that it has a compelling interest in assuring that voters only have so-called competent candidates for whom they may vote. Indeed, there is a powerful argument to be made that the state has no business filtering out from the political processes those whom it does not think will do a good job. That is a determination best left to those entering the voting booth. Certainly, in any event, the particular maximum age lines chosen could not survive as being necessary to achieving the state’s interest.

Mandatory retirement can also be scrutinized under this formula. data, since we have not undertaken to see whether indeed the assumption is true by allowing a large test group of under-16-year-olds to drive.

Thus, there is less warrant for holding the legislator or administrator accountable, since he cannot be charged with ignoring, or relying upon, experience as the basis for his decision. Of course, there is something of a catch-22 situation here; the exclusion of those too young is supportable because there is no contrary experience warranting striking down the exclusion, and the reason there is no contrary experience is because of the existence of the exclusion in the first instance. Even granting that, the important point is that the predicates for exclusions based on the individual being too old can be readily verified in most instances, simply because we will typically have a comparison group of those who are approaching and just below the critical age whose performance or suitability can be judged in the flesh, so to speak. Thus, judicial deference to legislative judgments need not be readily accepted as a posture necessitated by the difficulties of making thoughtful assessments of age distinctions which have an impact on those too old.
There is no right to government employment, the *Murgia* Court has held. Thus, it would be the intermediate, gender discrimination-derived test which would apply to measure the constitutionality of a law forcing ouster at a given age—such as 70. Sometimes the government entity might be able to show an important interest—making room for the young, assuring the competency of the work force or some other justification. Assuming it could do so (and this assumption is qualified by the further assumption that sometimes the agency will in fact fail at this first stage), the next task will be for the agency to establish that use of age 70 is substantially related to achieving that end. This will require the agency to come forward with data to show, in the context of the making-room-for-the-young justification, for example, that indeed ouster at 70 has a substantial relationship to that end. Are there, for example, data showing that the removal of Mr. X will lead to the promotion of a younger man who would not, but for Mr. X’s removal, be otherwise able to rise? Or, if the removal of incompetent employees is the end sought, are there data showing that age correlates with ability and, more particularly, that age 70 correlates with a discernible decline? In pursuit of this analysis, the defender of the policy will not, however, have to show that its policy embodies the least restrictive alternative, an aspect of the compelling interest test. Thus, it will be able to prevail if it adduces significant data of the nature noted, without having to further show that individualized testing is impossible.

Had the *Murgia* Court employed this analysis, it might well be that Officer Murgia still would have lost, given the rigors of the job and the data adduced in the trial court showing a rise in cardiovascular problems with age.221 But given this test, employees in less rigorous occupations might well prevail, and thus one could get to more sensitive individualized treatment of people, rather than utilizing the mere rationality approach which ousts the contemplative judge and the academician, along with the police officer and the fire fighter.

What of special benefits—programs and entitlements extended typically to the young and the old? Insofar as a claim of discrimination is made by one who is denied for being too young, the foregoing analysis seems to work without much problem. But benefits extended to the young occasion some pause. Here, the argument would go, there is discrimination for being too old. A law which bars those over age 19 from a government subsidized medical screening program, for example, works adversely as to the interests of the 23-year-old. Under the

foregoing formulation such a law would evoke the intermediate level of scrutiny, and it just might happen that the government agency would be unable to show an important justification for the law and/or that the age 19 cutoff is substantially related to an important interest, if one is established. The same fate could befall a law which limits an adult education program to those under age 45 or a policy excluding those over 19 from public high school enrollment. This is not, of course, to say that such results are inevitable; but they certainly are possible. They are tolerable, as well. And they are so because, ultimately, deprivation imposed for being too old imposes a loss—in terms of justice—which outweighs the added costs which expanded programs would require.

Do these five principles solve all problems? Clearly they do not. But they do afford a means for courts to address ageism with some greater sensitivity without—in a good many instances—having to get caught up in the difficulties of assessing alternatives, without having to make as many unguided choices between individual interests in individualized treatment and governmental interests in efficiency, and so on. Permanency of deprivation is the key. It is the factor which separates, in the first instance, tolerable age distinctions from those which warrant a suspicious examination. Permanency accommodates the distinction between adults and children, and permanency triggers recognition of the odiousness of condemnable distinctions made against adults for being too old as opposed to distinctions made regarding adults not yet old enough.

Ideally, of course, legislators should not stop where the Constitution halts. Courts may not be able to do more under the Constitution, but lawmakers can become sensitive to all age distinctions, asking whether as to the given issue before them there is some other alternative which more justly reflects the actual programmatic and legislative goals being sought. With subsidized public mass transit fares, for example, the careful legislative draftsman could ask whether, if the basis for such a benefit is financial need, an arbitrary age line indeed serves the purpose of selecting out those who are in need. If there is a

222. It may be possible to show, for example, that the diseases which the medical screening program is designed to identify are limited to youngsters, and that the only reason those even as old as 17, 18 and 19 are included is to catch the very rare aberrant case. It may be possible to show, in the high school example, that the age exclusion is correlated with child labor laws; if those over 19 can work in the same occupations as adults, there is then a substantial relation between the age 19 limit and the interest in providing education to those otherwise barred from equal opportunity (on the basis of age) in the job market.

223. See Policy for the 1980s, supra note 127.
better way, that way should be given serious consideration; the legislator can make the decision whether the public is prepared to bear the costs of an individualized means test here. As sensitivity to ageism increases, perhaps there will be occasions, after all, when legislators will be willing to have society absorb these costs, rather than relying upon the unrefined standard of age. That would be all to the good.