Comments on the Constitutional Law of Age Discrimination

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Age discrimination claims in our society have been treated generally as matters for private decision or legislative action. The judicial role has largely been restricted to interpretation and enforcement of statutes rather than independent action based on common law or constitutional authority. The age discrimination symposium in which this article appears has therefore focused on statutes. A number of legal writers and judges have nevertheless proposed the recognition of a constitutional law of age discrimination; the paper by Howard Eglit, conference director, is the most recent and ambitious of these proposals.

This article comments on the constitutional law of age discrimination. It begins with a summary of Eglit's thesis, followed by a discussion of several difficulties with it. Thereafter, his thesis is considered.

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against three requirements for any adequate theory of the constitutional law of age discrimination: first, any proposed new doctrine should be related to the current constitutional case law to demonstrate what continuities exist; second, a proposed constitutional doctrine should be clear as to its assumptions on the United States Supreme Court's role in social decisionmaking; and third, a proposed doctrine on age discrimination should be clear as to the phenomenon with which it is concerned. Although some references will be made in this article to the wider definition of "age discrimination" encompassing all age groups, most discussion will focus on the usual, narrower definition of "age discrimination," i.e., discrimination against the elderly.4

THE "IMMUTABILITY" THESIS

Eglit's paper is the most recent contribution to the growing literature on law and aging, in which age discrimination has been a major theme.5 His goal is a "unified theory"6 of the treatment by the courts of

4. Most age discrimination litigation has involved employment bars against the elderly—what I call the "age/work" effect. Other examples exist. For instance, age restrictions on the right to vote have been accepted in dicta in several Supreme Court cases. See, e.g., Hill v. Stone, 421 U.S. 289, 297 (1975). See also cases cited in Eglit, supra note 3, at 892-94. Only because children lack "full capacity for individual choice" may the state deprive them of the right to vote or to marry. Ginsberg v. New York, 390 U.S. 629, 650 (1968) (Stewart, J., concurring). The young have not been found to be a "cognizable" class whose omission from the jury venire is unconstitutional. See Hamling v. United States, 418 U.S. 87, 137 (1974) (assuming arguendo young new voters are a cognizable group, no discrimination was found). See generally Zeigler, Young Adults as a Cognizable Group in Jury Selection, 76 Mich. L. Rev. 1045 (1978); J. Van Dyke, Jury Selection Procedures 35, 331 app. H (1977); Eglit, supra note 3, at 866-71. The line of Supreme Court cases on abortions for minors has not yet made clear how age classification (as distinct from an unemancipated status) will be treated. See, e.g., H.L. v. Matheson, 101 S. Ct. 1164 (1981); Bellotti v. Baird, 443 U.S. 52 (1979); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976).


In an important article dealing with the statutory, rather than the constitutional, concept of age discrimination, Peter H. Schuck has argued that age groups, unlike racial minorities, have not been subjected to political disabilities or historical disadvantages that would justify regarding the outcomes of the political process as suspect. See Schuck, The Graying of Civil Rights Law: The Age Discrimination Act of 1975, 89 Yale L.J. 27, 37 nn.41-43 (1979). He also finds age-based categories too useful as allocative principles to regard a nondiscrimination principle properly applicable to age. Id. Schuck's statutory argument has implications for the constitutional issue, but consideration of his analysis is beyond the scope of this article and must await consideration in another context.

6. Eglit, supra note 3, at 863-64. A comprehensive constitutional law of age discrimination should analyze not just equal protection questions, but also the definition of substantive rights
age distinctions under the Constitution. A unified theory encompasses age distinctions affecting the young and the middle-aged as well as the elderly, age-based benefits as well as deprivations, and the full range of substantive areas, including voter eligibility, jury service and mandatory retirement.

Age-based deprivations imposed on the elderly have been treated by Congress as age discrimination in a variety of statutes, and there have been prior proposals for the judiciary to employ the age discrimination concept in a new equal protection doctrine. These proposals have so far been flatly rejected by the United States Supreme Court, notably in Massachusetts Board of Retirement v. Murgia and Vance v. Bradley. Several intellectual tasks confront one resubmitting such a proposal. One problem is to develop a principle explaining why the Court should recognize age-based classifications as suspect, particularly in a period when it is hesitant to undertake further expansion of


The attempt to establish such a unified theory is part of the process of recognition of a new topic in constitutional law—the constitutional law of age discrimination. This process compares with proposals to recognize the wider subject of law and aging as a new field within legal study, or gerontology as a discipline in itself. See Levine, Legal Education and Curriculum Innovation: Law and Aging as a New Field of Law, 65 MINN. L. REV. 267 (1981); Levine, Guest Editorial: Does Gerontology Exist?, 21 GERONTOLOGIST 2 (1981). To stake out such a separate topic, field or discipline has a self-fulfilling characteristic. The compilation of elements not previously considered under one category facilitates and stimulates further work in the area.

7. See Age Discrimination, supra note 1, at 50-57.
8. See note 2 supra.
11. Under the Warren Court in the 1960s,

[the familiar signals of “suspect classification” and “fundamental interest” came to trigger the occasions for a] . . . new interventionist stance. . . . Some situations evoked the aggressive “new” equal protection, with scrutiny that was “strict” in theory and fatal in fact; in other contexts, the deferential “old” equal protection reigned, with minimal scrutiny in theory and virtually none in fact.

Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as Gunther]. Gunther found in the cases of the Supreme Court's 1971 term a “new bite” for the “traditional toothless minimal scrutiny standard.” Id. at 18-20. Five years later, Scott Bice was able to conclude that the “Supreme Court may well have established, or be on its way to establishing, a three-tiered standard of review under the equal protection clause.” Bice, Standards of Judicial Review Under the Equal Protection and Due Process Clauses, 50 S. CAL. L. REV. 689, 706 (1977). While the lowest tier, “toothless minimal scrutiny,” continued to be used in many cases, gender was increasingly treated as a “semi-suspect” classification that elicited an intermediate level of scrutiny. This intermediate level was called “heightened scrutiny,” see Craig v. Boren, 429 U.S. 190 (1976); see also Rostker v. Goldberg, 101 S. Ct. 2646 (1981), or just “scrutiny.” See Orr v. Orr, 440 U.S. 268 (1979).
enhanced scrutiny. An additional problem for a unified theory is to explain whether age-based deprivations imposed on the young are more, less or equally acceptable compared to age-based deprivations imposed on the elderly. A third problem, especially troubling to advocates for the elderly, is to find a principled basis upon which to distinguish age-based deprivations imposed on the elderly, which they wish to condemn, from age-based benefits for the elderly, which they wish to preserve. On the face of it, it seems paradoxical to hold simultaneously to these positions.

The solution Eglit proposes is essentially that governmental deprivations are "semi-suspect" under current equal protection theory when the classification rests on a personal characteristic that has not been freely chosen and cannot be freely abandoned. "[Im]mutability is a significant factor in the suspectness equation," he says, and it is so central to his argument that, for convenience, Eglit's thesis will be referred to as the "immutability" principle. As applied to age discrimination, since an individual does not choose his age and cannot change it, both youth and old age might be thought suspect under Eglit's proposal. He does conclude that being elderly is an immutable characteristic, and thus that deprivations imposed because of advanced age qualify for at least the intermediate (semi-suspect) level of judicial scrutiny. As for being young, however, Eglit concludes that its use as a basis for a

12. By "enhanced scrutiny" is meant more scrutiny than the minimum rationality test provides, encompassing thereby both "strict" and "middle-tier" scrutiny. See note 11 supra.

It is a shame to speak of different tiers of scrutiny as if the Court were employing a mechanical system. John Ely puts it neatly when he reminds us that we speak of a "suspect" classification because it is le mot just. Ely, The Centrality and Limits of Motivation Analysis, 15 SAN DIEGO L. REV. 1155, 1158 (1978). The Court's variation in characterizing the several tests it uses may be more than imprecision, uncertainty or "elegant variation," see H. Fowler, A DICTIONARY OF MODERN ENGLISH USAGE 148-51 (2d ed. 1965), but a signal that its analysis is not one of rigid distinctions. The Court has warned us that the treaties may have it too neat, by using phrases like "so-called 'suspect' classification." Jiminez v. Weinberger, 417 U.S. 628, 631 (1974). As the Court recently said,

Announced degrees of "deference" to legislative judgments, just as levels of "scrutiny" which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. Simply labelling the legislative decision... "gender-based"... does not automatically guide a court to the correct constitutional result.


13. See Age Discrimination, supra note 1, at 62.


15. Id.
governmental deprivation invokes only a lesser quantum of scrutiny— a fourth level between the “intermediate” and “minimal” tiers that might be termed “somewhat suspect.” Benefits granted to the elderly can be conceptualized as relative deprivations imposed on the middle-aged and young; the less enhanced (“somewhat suspect”) level of scrutiny is required for such benefits under this analysis. Benefits for the young would be semi-suspect.

The conclusion that a deprivation imposed on those who are too young merits less scrutiny than a deprivation imposed on those who are too old is adopted by Eglit for several reasons. Most important, the deprivation is not immutable: the youngster will outgrow the age-based disability. “Permanency of deprivation is the key[,]” says Eglit. “It is the factor which separates, in the first instance, tolerable age distinctions from those which warrant a suspicious examination.” Additionally, lack of “congruity” and stigmatization are “special aspects”

16. In his article, supra note 3, at 910 n.220, Eglit states an additional reason why he regards “generalizations based on being too old [to be] inappropriate, particularly as contrasted with barriers erected for those too young, . . . .” Laws imposing disabilities on the old (like mandatory retirement at age 50) are grounded on an “information base” as to the past performance of the relevant group, while disabilities imposed on the young (like exclusion of those under age 16 from driving) have no such body of data available. In what Eglit terms a “catch 22” argument, the law excluding the young from the opportunity, which simultaneously prevents accumulation of data on their abilities, is accepted by him as tending to immunize the law from judicial review. “[T]here 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.” Id.

There are several objections to this differentiation of disqualifications imposed on the old and young. In both cases there is data available on those at the critical age. In both cases there is also data on those within the non-disqualified period that can be extrapolated, e.g., just as the performance curve on those 40 to 50 can be projected forward past 50, so too the performance curve on those 16 to 25 can be projected backwards. Moreover, in both cases the group subjected to the disqualification is available for testing. Furthermore, natural experiments may be available for study in other jurisdictions with different rules. Additionally, in both cases individualized determination is possible. In fact, in both of Eglit’s examples, the police retirement program with an age 50 retirement date and driver’s license programs with age 16 qualification rules, such individualized testing programs were in place.

Finally, the judicial decision to allow the legislature to act in the absence of data is one that logically follows the choice to apply a minimal rationality standard, and cannot serve to justify that choice; where intermediate scrutiny is applied, the government is expected to have a factual basis for its action. The point may be illustrated through comparison with Craig v. Boren, 429 U.S. 190 (1976), involving liquor law disabilities imposed on late adolescent boys. In the case as argued and decided, the disqualification was analyzed as gender discrimination, and struck down because the facts did not establish a close enough fit between the classification and the legislative purpose. The case could have been analyzed as age differentiation, and would have had to be analyzed as such if the legislature had applied the disqualification equally to late adolescents of both sexes. The facts gave as little support for the age differentiation as the sex differentiation. Once conceptualized as legislation aimed at youth, and recognized as based on weak factual support, whether the law stands or falls depends on the Court’s prior decision whether or not to apply to age discrimination the same standard of review accorded gender discrimination.

17. Eglit, supra note 3, at 905.
18. Id. at 913.
that he believes identify which immutable characteristics are impermissible bases for classification.\textsuperscript{19} Thus, he regards differential treatment of minors as grounded in reality in that lack of age has “congruity” to relevant characteristics such as judgmental capacity, physical ability and emotional and psychological maturity. By contrast, “it is rare that the characteristic of too many years will bear a relation to ability to perform or contribute to society.”\textsuperscript{20} Moreover, to be young is glorified in our society, he says, while being labeled elderly is stigmatizing.\textsuperscript{21}

The immutability principle reconciles Eglit’s intuitions on the problems stated above. He deems use of age-based classifications to be a “vice” contravening a fundamental value of our legal system; yet he nevertheless regards age-based deprivations imposed on children as “generally more tolerable”\textsuperscript{22} and treats benefits for the elderly as also more tolerable.

Eglit proposes five specific guidelines or “postulates” in his thesis which he suggests the courts should apply in deciding age discrimination claims under the equal protection clause. First, “unadorned age distinctions” without subordinating justification “have no redeeming merit.”\textsuperscript{23} Second, “the user of the age line . . . should bear the burden of justification.”\textsuperscript{24} Third, ageism, unlike racial and gender distinctions, is “a phenomenon whose invidiousness varies with the setting.”\textsuperscript{25} Fourth, 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.”\textsuperscript{26} The fourth principle is qualified, however, in that the selection of an age line for imposing disabilities on the young requires lessened justification. In line with that qualification, his fifth principle is 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.”\textsuperscript{27} These guidelines are discussed and criticized below.

20. \textit{Id.} at 910.
22. \textit{Id.} at 906.
23. \textit{Id.} at 904.
24. \textit{Id.}
25. \textit{Id.}
26. \textit{Id.} at 905.
27. \textit{Id.} at 906.
PROBLEMS WITH THE "IMMUTABILITY" THESIS

The Eglit paper is a complex and well documented one, but its thesis has several problems which deserve discussion. Descriptively, immutability has not been the touchstone by which the Supreme Court has consistently differentiated suspect from nonsuspect classifications, and prescriptively, it is neither a necessary nor a sufficient criterion for enhanced scrutiny. The immutability doctrine also, on analysis, is not derivable from the other values Eglit invokes. Moreover, much of Eglit's analysis is phrased in terms of an abstract definition of age, and its suspect nature as a classification per se; it is preferable to attend more to the social realities of the age classes differentially treated. Furthermore, while Eglit's chief interest is the elderly, a major proposal of his unified theory is that deprivations based on youth need not be treated as quasi-suspect; a study focused on the problems of youth might well reach a different conclusion as to them. Finally, the set of five guidelines proposed by Eglit are also problematic. Each of these points will now be elaborated.

Immutability as a Trigger

Immutability as a trigger of enhanced scrutiny is at the center of Eglit's thesis. In current Court opinions, however, a statute's use of an immutable characteristic as the basis for a legislative classification has not been treated as sufficient to invoke such scrutiny. Intellectual and physical disability, for example, have been offered in dictum as examples of unchosen and unchangeable personal characteristics that, if used as a basis for legislative classifications, are nevertheless to be subjected to only the lowest tier analysis. Nor has immutability been treated as a necessary condition for enhanced scrutiny. Alienage is a characteristic that is a product of previously chosen action or inaction, and that remains changeable. "[A]liens . . . in effect have chosen to classify themselves," the Court has observed. The characteristic has nevertheless frequently elicited enhanced scrutiny.

To turn to the question of what the Court should do, whether a characteristic is immutable or changeable has no necessary correlation with whether it is an appropriate or inappropriate basis for government-
tal action. One does not in fact suspect biased motives, expect the targeted class to experience a slur or detect a distortion of the political process, for example, if innate limits of strength are used to guide governmental selection of laborers, or if intelligence is used to guide governmental scholarship awards. On the other hand, even if the advent of new chemicals were to make skin color an easily mutable matter of choice,31 given our society's history, any governmental burdens imposed on the dark-skinned would still be highly suspect as discriminatory in purpose and in effect. Similarly, that religion is a matter of choice and mutable does not make it nonsuspect as a basis of governmental classification.32 Immutability is not an appropriate criterion of enhanced scrutiny, either in a descriptive account of what the Court has said and done or in a prescription of what the Court should do.

An "immutability plus" trigger is suggested by Eglit's added qualification that two "special aspects" distinguish immutable characteristics that are permissible bases of governmental classifications from the impermissible: whether or not the characteristic involves stigmatization, and whether or not it lacks "congruity" with the ability to perform or contribute to society.33 He offers arguments based on these special aspects as additional reasons for treating disabilities imposed on the elderly as gender discrimination is treated, and for tolerating disabilities imposed on the young.34

The "immutability plus" thesis also seems unsatisfactory both descriptively and prescriptively. It may be that one or both of the factors, or something like them, should trigger enhanced scrutiny, but it is not because they are "special aspects" of immutability. They are the basis for independent equal protection arguments unconnected with immutability. Moreover, there are other formulations—stereotyping and prejudice—overlapping those he offers, which are more useful, as discussed below.35 The concept of stigmatization which Eglit employs does not capture the reality of attitudes toward the elderly; ambivalence may be closer to the mark. Similarly, there is insufficient substantiation for his sharp differentiation that being too old is stigmatizing while being too young is not; for every phrase like "old fool" he mentions,36 our language also has one like "young fool." Nor

31. See J. Griffin, Black Like Me (1977 ed.).
33. Eglit, supra note 3, at 907-10.
34. Id. at 906.
35. See notes 131-39 & 150-57 infra and accompanying text.
36. Eglit, supra note 3, at 908.
has he made a convincing case that generalizations about youth are more accurate than generalizations about the elderly.

**Underlying Values**

The immutability principle is also insufficiently supported by Eglit’s declared underlying values. Legal arguments rest upon assumed values; the values underlying Eglit’s reasoning are stated by him in a number of phrases which bridge his basic posits and the working guidelines that ultimately rest upon them. In his major argument, he mentions various consequentialist considerations such as productivity, and also the “basic social concepts of equality and individual worth,”37 “basic notions of equality and justice,”38 the principle that people should be treated according to their individual “abilities and needs”39 rather than according to stereotypes, and the “fundamental societal valu[e]” that “legal burdens . . . should bear some relationship to individual responsibility or wrongdoing.”40 A value rejecting immutability is implied in the statement that “what makes ageism particularly bad is that, . . . it segregates the individual on the basis of a characteristic which he himself has not chosen, and which he has no power to change[,]”41 an idea otherwise stated as “a characteristic which is immutable at any given point in time . . . .”42 Elsewhere in his argument he suggests a revised version of this value by stating that “[p]ermanency of deprivation is the key.”43

There is a tension among Eglit’s several formulations of the values and principles he adopts. This section begins to work out the relationship among Eglit’s numerous implicit values, which are here termed “individual wrongdoing,” “individual responsibility,” “individual worth,” “congruity” and “equality,” and rejection of “immutability,” “permanency” and “stigmatization.” Eglit on occasion seems to use some of these ideas as more or less equivalent, but distinctions need to be made.

*Weber v. Aetna Casualty & Surety Co.*,44 a Supreme Court case on illegitimacy which Eglit quotes,45 declares the principle that legal bur-

37. *Id.* at 861.
38. *Id.* at 901.
39. *Id.* at 862.
41. *Id.* at 861-62.
42. *Id.* at 901.
43. *Id.* at 913.
44. 406 U.S. 164 (1972).
45. See note 40 *supra*. 
dens should bear a relationship to *individual wrongdoing*. That is a narrow individual responsibility value: one should be punished only for his own actions. Eglit's argument requires that he generalize that principle to say that both legal benefits and burdens be based upon individual choice, a broader *individual responsibility* value. His reasoning then requires one additional step to his *immutability* principle that legal benefits and burdens be allocated only on the basis of characteristics an individual has opted for and can opt out of; this additional step is required because a person may have voluntarily acquired characteristics which are thereafter unchangeable.

Eglit strays from his other underlying values in his revised definition of immutability as *permanency*. He regards childhood (or any stage with a maximum age limit) as a mutable characteristic because it is not permanent, and for that reason finds it a more appropriate basis of governmental classification than old age (or any stage with a minimum age limit), which is permanent. As he himself recognizes elsewhere, however, at any given point in time age is, of course, immutable; there can obviously be no individual responsibility for retaining that characteristic. His treatment of childhood as non-immutable because not permanent, and for that reason less suspect a category than old age, thus revises the definition of immutability to sever its value base in individual responsibility.

The immutability principle reflects quite a different value from that of *individual worth*—the notion that a person be treated according to individual capacities and merits; the difference is that a person has many attributes which he neither has chosen nor can change. Thus Eglit's approval of legal burdens placed on children rests in part on the individual worth value, reasoning that since children really do have limited capacities, it is proper to treat them thusly. Such treatment is not justifiable under the individual responsibility value since they did not choose to be children and cannot then choose to be adults. To be consistent as to the individual worth value, one would conclude, contrary to Eglit, that whether or not it is proper to treat elders as having limited capacities depends solely on whether or not in fact they do have such limits, without regard to whether or not they chose them or can abandon them.

The relationship of the *equality* value to Eglit's argument is a difficult one. Of course, one sense of equality is satisfied by treating all alike, and another is satisfied by treating like things alike. To do the

46. 406 U.S. at 175.
latter requires recognition of which characteristics are relevant and what categories adequately group together those persons who are sufficiently alike in that characteristic. The problem with age discrimination is that, contrary to Eglit, old age is indeed often a proxy for relevant characteristics (although a weak one), and age lines thus may define categories of persons appropriate for the questions at hand (although only somewhat so). Equality only requires that the invocation of age categories be restricted to those uses which accurately enough reflect personal characteristics relevant to the purpose at hand, thus corresponding to the individual worth value. It is inaccurate stereotypes which are rejected. On this reasoning, Eglit’s immutability principle cannot be derived from his equality value, because immutability is irrelevant to the accuracy of a categorization.

A value rejecting stigmatization, or “[g]roup, or individual denigration,” and one requiring “congruity” between a classification and relevant individual characteristics, are also implicit in Eglit’s argument about “special aspects” of certain immutable characteristics. Eglit’s argument can better be understood in terms of the individual worth value. Several writers have pointed out the significance of stigmatization for understanding race discrimination law.

47. Eglit, supra note 3, at 910. The general principle that those alike in relevant respects should be treated alike, Aristotelian in origin, has long been part of equal protection analysis. See Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341 (1949). The principle poses but does not solve the problem of classification.

48. Some of the case law under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979), suggests that, even under the strict statutory nondiscrimination rule, age may be used as a proxy for a relevant characteristic, and thus age classifications used in place of individualized determinations, in work at the core of some job and involving danger to life, where either of two situations exist: (a) age is an excellent proxy for the characteristic, in that substantially all members of the age group share the characteristic; and (b) age is a good proxy for the characteristic, and individualized determination is impracticable. See Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976); Equal Employment Opportunity Commission interpretations of Age Discrimination in Employment Act, 50 U.S.L.W. 2085 (August 11, 1981) (agency ruling).

49. Eglit, supra note 3, at 907-08.

50. See note 19 supra.


Stigma is an old concept in race discrimination cases. One of the grounds relied on in Strauder v. West Virginia, 100 U.S. 303 (1879), was that the statute was “practically a brand upon them ... an assertion of their inferiority.” Id. at 308. See also Plessy v. Ferguson, 163 U.S. 537, 560, 562 (1896) (Harlan, J., dissenting).

Analysis can focus either on “stigma” as felt by the victim class or on “stigma” as intended by the ruling class. See, e.g., Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 68 (1977) [hereinafter cited as Karst]. As to the victim’s perception of stigma, compare Plessy v. Ferguson, 163 U.S. at 551 (if segregation stigmatizes, it is “solely because the colored race chooses to put that construction upon it.”) with Brown v. Board of Educ., 347 U.S.
matization, however, is not a universal principle of our legal system. One of the primary functions of criminal law, for example, is to provide for stigmatization of criminals, and *Paul v. Davis*\(^5^2\) held that even governmental imposition of stigma when undeserved did not violate the due process clause. Undeserved stigmatization does nevertheless contravene the individual worth value. Moreover, to the extent that a law’s classification involves a stigmatized group, the law is likely to involve incorrect stereotyping, again violating the individual worth value. The “congruity” point similarly is a requirement that generalization be sufficiently accurate, another expression of the individual worth value. Stereotyping and prejudice are further discussed below.\(^5^3\) On analysis, neither Eglit’s stigmatization nor congruity points seems to support or derive from his central immutability value.

The discussion in this section has attempted to show that Eglit cannot derive an immutability doctrine from any of the other values he adopts, but only by directly assuming the value; the conclusion comes out of his machinery of analysis because that is what he started with. Those who do not choose to take the immutability value as an assumption will therefore be less convinced by Eglit’s rejection of age-based burdens on the elderly, as well as by his relative tolerance for age-based disabilities imposed on the young.

How then has immutability entered equal protection discussion?\(^5^4\)

...
Several suspect classifications, including race and gender, happen in fact to be immutable.\textsuperscript{55} Four Justices in \textit{Frontiero v. Richardson}\textsuperscript{56} did indeed argue that "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 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.'"\textsuperscript{57} Those Justices then went on to switch from an individual responsibility value to one of individual worth: "And what differentiates sex from such non-suspect 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."\textsuperscript{58} Both Eglit's immutability thesis and "the special aspect" qualifications are apparently derived from the \textit{Frontiero} reasoning.

Immutability is pertinent even if it is not "the key." People may feel a greater unfairness if disabilities are imposed on them due to characteristics never voluntarily adopted, an additional helpless rage if the characteristics are outside their control and a greater feeling of loss if the disabilities are permanent. Immutability is then relevant to legal analysis because it is an aspect of the harm imposed on victims of a classification to be considered by those who employ a form of balancing or sliding scale test.\textsuperscript{59}

\textit{Classifications and Classes}

An additional problem with the immutability thesis concerns the conceptual question in equal protection analysis whether to focus on the criterion for governmental classification or on the classes thus differentially treated. For example, is race a suspect classification or is it discrimination against blacks which is suspect? It is not clear which of the two approaches Eglit adopts. At some points he speaks of the criterion, age, in the abstract sense as a quality "all of us, children and adults, . . . possess[es],"\textsuperscript{60} but elsewhere he speaks of the classes when he

\textsuperscript{55} But see J. GRIFFIN, \textsc{Black Like Me} (1977 ed.); R. STOLLER, \textsc{Sex and Gender: The Development of Masculinity and Femininity} 225-61 (1974 ed.).
\textsuperscript{56} 411 U.S. 677 (1973) (plurality opinion).
\textsuperscript{57} \textit{Id.} at 686.
\textsuperscript{58} \textit{Id.}
\textsuperscript{60} Eglit, \textit{supra} note 3, at 864. One might just as well speak of skin color as a quality all of us, black and white, possess, the only difference among individuals being the amount of pigmenta-
saying that a "given age group is suspect." Eglit's central thesis of immutability refers to age as a classification; the qualifications in terms of the "special aspects" of stigmatization and "congruity" refer to the particular age groups so classified.

Major differences flow from the choice between the two approaches. To focus on age as a classification would commit one to Eglit's goal of a unified theory, while the contrasting focus on age groups would allow the development of separate theories as to discrimination against the elderly and against children, phenomena that perhaps have no more in common with each other than they have with gender discrimination. Furthermore, a law depriving those over any age of a benefit or opportunity implicates the immutability principle, but, contrary to Eglit's view, only certain maximum age lines define a stigmatized group and failure of "congruity."

Focus on the treatment of the class, rather than the characteristics of the classification, is manifested in some judicial opinions, such as the recent Supreme Court decision in *Jones v. Helms* which speaks of the equal protection clause as providing a basis for challenging laws that "treat one group of persons as inferior or superior to others,. . . ." Similarly, *Jones* quotes Senator Howard's statements in the fourteenth amendment debates for the purpose of showing that the objective of the amendment was to do away with the injustice of subjecting one "caste of persons" to laws not applicable to others. The language currently cited as the usual test for strict scrutiny speaks of the class, not the classification; it was used in *Murgia* itself to consider the situation of the aged as the class discriminated against. The Court said that "the aged . . . 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 'ex-

61. *Id.* at 899.
64. *Id.* at 2442.
65. *Id.* at 2442 n.23.
trouordinary protection from the majoritarian political process.'"66 The Court also considered whether a "caste of persons" was treated unjustly when it said, "Old age does not define a group but rather a stage in life."67 Charles Black would go even further in rejecting a "suspect classification" analysis, preferring an analysis concentrating on the group at hand.68

Focus on the characteristics of the classification, rather than on the treatment or identity of the target class, matches the usual vocabulary of constitutional discussion: we speak, for example, of race as a "suspect classification" rather than of blacks as a "suspect class." Justice Powell has denied that some groups or classes are "special wards entitled to a degree of protection greater than that accorded others."69 Such a focus provides a conceptual mechanism for using enhanced scrutiny for protecting those who are not a "discrete and insular group." Thus, as long as the doctrine is phrased in terms of gender classification, intermediate tier standards apply whether the law discriminates against males or females,70 even though men certainly meet none of the tests for a group in need of the protections of enhanced scrutiny. Focus on the classification would thus conceptually facilitate a doctrine of enhanced scrutiny for the elderly, who also may not be a "discrete and insular group."

67. Id.
68. For example, in his discussion of "the constitutional law of aliens," Black rejects the mechanistic "suspicion" and "overwhelming" state interest formula to suggest a different analysis with the characteristic that "fit is all about aliens." BLACK, supra note 12, at 61 (emphasis in original).

Attention to the class rather than the classification is manifested in several Supreme Court cases permitting the explicit use of racial classification. See, e.g., University of Cal. Bd. of Regents v. Bakke, 438 U.S. 265, 325 (1978) (Brennan, J., concurring) ("Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, . . ."); United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1976) (allowing voter reapportionment along racial lines to correct inequitable situation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (upholding assignment of school children on the basis of race to achieve balance).

Attention to the victim class is also emphasized in Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978). He advocates emphasis on the victim's perspective, i.e., a focus on the target group's objective conditions of life, such as lack of jobs, as well as the consciousness associated with those conditions, such as lack of choice and the condition of being perceived as a member of a group rather than as an individual. Id. at 1052-53.

69. University of Cal. Bd. of Regents v. Bakke, 438 U.S. 265, 296 (1978) (Powell, J., separate opinion). Focus on the racial classification rather than the class disadvantaged (to the exclusion of a theory based on United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938)) was required to justify applying more than minimal scrutiny to a rule disadvantaging whites.
Discrimination Against Children

An additional concern child advocates will have with Eglit's thesis is that he minimizes the need for scrutiny of deprivations imposed on the young. More detailed examination of the purposes and effects of age-based deprivations against the young may reach a conclusion opposite to Eglit's.\textsuperscript{71} Consider, for example, a law which sets age 21 as the minimum age to work, requiring compulsory school attendance until that age, where there is strong evidence that the purpose of the law is to restrict competition for jobs, and that its effect is to confine many youths in educational institutions from which they derive little or no benefit. Eglit's immutability test states that "at the core, perhaps, of accepting laws which limit and control children" is that the law can be outgrown.\textsuperscript{72} But that is an insufficient basis upon which to decide what degree of scrutiny such a law deserves.

In fact, the immutability test artificially considers all deprivations with maximum age limits (including those against young adults and the middle-aged) as it does deprivations on children. A maximum age of 30 is no more immutable than one of 21. Only his additional "special aspects" raise such questions as the degree to which deprivations on children and others are invidious, stereotyped or reality-based; immutability is irrelevant to those issues, and thus of no help in analyzing laws restricting the young.

Eglit's Proposed Guidelines

The five guidelines or "postulates" that embody the details of Eglit's proposal raise additional problems. An initial observation is that the guidelines do not seem to embody five different substantive proposals. Two of the principles seem to attach no effect to legislative use of age-based classifications. Thus, Eglit's first principle rejects "unadorned age distinctions" without subordinating justification as having "no redeeming merit."\textsuperscript{73} This point appears merely to apply the standard of minimal rationality to such legislation, which would be applicable whether an age-based classification were employed or not. Moreover, rulemakers and interpreters will always have a claim that age-based classifications are at least minimally rational, if only in that they serve administrative efficiency and convenience,\textsuperscript{74} so the point

\textsuperscript{71} See note 2 \textit{supra}.
\textsuperscript{72} Eglit, \textit{supra} note 3, at 889.
\textsuperscript{73} \textit{Id} at 904.
\textsuperscript{74} Eglit has recognized this point elsewhere: "Legislators and bureaucrats may act out of stupidity, error, or bias, but they hardly ever create a law or policy devoid of any justification."
seems to have little or no practical relevance. Similarly, Eglit’s fourth principle would apply to age-based classifications whatever standard of scrutiny the substantive right involved in the law “ordinarily evokes.”

Here, again, age falls out of the analysis: the substantive constitutional doctrine involved will be applied “without implicating the Equal Protection clause at all,” as Justice White recently said in a similar situation. These two guidelines seem to boil down to the observation that use of age classifications is not in itself an independent legitimate legislative goal.

Turning to the other Eglit guidelines, the remaining principles and qualifications seem to reduce to two points: that “age distinctions which penalize someone for being too old” should elicit a fairly strong

Eglit, Is Compulsory Retirement Constitutional?, 1 CIV. LIB. REV. 89, 95 (Fall 1974). Eglit believes, in fact, that administrative considerations may even satisfy enhanced scrutiny. He argues that age-based distinctions are needed in a variety of settings to avoid enormous social costs, staggering expense, onerous tasks of devising adequate tests and bureaucratic mistake and abuse. The examples he offers are Social Security, conceived as a system providing entitlements to those who need it, the driver licensing system and voting qualifications. Eglit, supra note 3. His examples, however, belie his argument. There already are in place systems to administer eligibility for Supplementary Security Income (the need-based complement to Social Security), to test applicants for driving licenses and, in many states, to test would-be voters. Thus the administrative need to use age-based automatic rules of eligibility seems minimal.

The Court itself, like Eglit, at times has accepted an administrative convenience rationale in such situations. In the employment settings considered in Murgia and Vance, systems were already in place to administer periodic physical examinations and determine the continued fitness of the employees. Thus, there was minimal administrative savings in using age-based mandatory retirement rather than individualized determination of capacity. The Court nevertheless accepted as constitutionally permissible the legislative choice of a generalized rule as the means to make retirement decisions. Elsewhere it has accepted a similar choice as to other decisions, reasoning that to “require individual determinations . . . would mandate costly factfinding procedures that would dissipate resources that could have been spent elsewhere.” Schweiker v. Gray Panthers, 101 S. Ct. 2633, 2642 (1981) (Medicaid “deeming” rule).

Whether or not administrative convenience is an acceptable rationale for using generalizations depends upon, and cannot justify, the choice of standard of scrutiny. Under the intermediate standard, the Court has repeatedly stated that the administrative convenience of employing a gender classification is not an adequate constitutional justification. See, e.g., Craig v. Boren, 429 U.S. 190, 198 (1976); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (plurality opinion).

75. Eglit, supra note 3, at 905.

76. Jones v. Helms, 101 S. Ct. 2434, 2443 (1981) (White, J., concurring). See also Ely, The Centrality and Limits of Motivation Analysis, 15 SAN DIEGO L. REV. 1155, 1161 (1978). A proposal similar to Eglit’s has been advanced previously that the combination of age-based lines and an unusually important interest should trigger a form of intermediate tier scrutiny. TRIBE, supra note 2, at 1077-82 (particularly as to youth). It is true that some cases using intermediate scrutiny do involve the combination of sensitive classifications and important interests. See cases cited id. at 1090-91 n.10. Nevertheless, in general it is thought that intermediate scrutiny can be triggered by the presence of an important interest alone, see cases cited id. at 1077 nn.1-4, so that the sensitivity of the classification drops out of the analysis.

One case where the guideline apparently would have made a difference was YMCA Vote at 18 Club v. Board of Elections, 319 F. Supp. 543 (S.D.N.Y. 1970). The court there failed to employ enhanced scrutiny to an age restriction on voting, notwithstanding voting’s status as a fundamental right under cases like Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969). The guideline may also have made a difference in the adolescent abortion cases. See note 4 supra.
version of intermediate judicial scrutiny ("semi-suspect"),\textsuperscript{77} and that all other uses of age lines (the only ones logically left are benefits for the elderly and penalties for the young) should receive a less enhanced, fourth level, scrutiny ("somewhat suspect").\textsuperscript{78}

As to deprivations imposed on the elderly, Eglit's version of intermediate scrutiny has two aspects: when an age line burdens those too old, an important governmental interest must be established, and the means used—\textit{i.e.}, the age distinction—must be substantially related to the end.\textsuperscript{79} Similar proposals for enhanced scrutiny have been made before\textsuperscript{80} and have of course been rejected by the Supreme Court in \textit{Murgia} and \textit{Vance}.

As to deprivations against the young and benefits for the elderly, Eglit's proposed test would shift to the government the burden of articulating the purpose of the age line. This doctrine can be analyzed as adding two "bites" to a minimum rationality test: to put a burden on the government seems to call for shifting the normal presumption of constitutionality, and requiring government articulation of purpose requires it to take political responsibility for doing so, ruling out judicial invention of a hypothetical purpose.

Eglit does not explain why his proposals do not include other possible intermediate tier requirements, \textit{i.e.}, that a statute's purpose be derived from the legislature's contemporaneous statements, rather than from the government lawyer's subsequent rationalizations,\textsuperscript{81} and that individuals disadvantaged by the classification be allowed to rebut application of its presumption to them.\textsuperscript{82} Arguably, the opinions in \textit{Vance} and \textit{Murgia} spoke in terms of all of these factors.\textsuperscript{83} Nor does Eglit justify his limitation of the "rationality with bite" analysis to age-based lines, while other commentators have suggested it be a generally

\textsuperscript{77} Eglit, supra note 3, at 906.
\textsuperscript{78} Id. at 904-05.
\textsuperscript{79} Id. at 906-07.
\textsuperscript{80} See works cited in note 2 supra.
\textsuperscript{81} Eglit criticizes the \textit{Murgia} and \textit{Vance} Courts as "simply too lax" in not even asking the defenders of the challenged law to articulate a justification for it. Eglit, supra note 3, at 904. Contrary to Eglit's point, rather than merely imagining the purpose of the law and a set of facts to justify that purpose, the Court cited in detail to legislative hearings and then reinforced the legislative findings by reference to testimony at trial and to factual concessions of those challenging the law. \textit{Vance} v. \textit{Bradley}, 440 U.S. at 99-105; \textit{Massachusetts Bd. of Retirement v. Murgia}, 427 U.S. at 314-15 nn.7-8. These justifications for the laws had indeed been articulated before the Court by the government attorneys. See \textit{Vance} v. \textit{Bradley}, Brief for Appellants, at 6-19; \textit{Massachusetts Bd. of Retirement v. Murgia}, Brief for Appellants, at 42-46.
\textsuperscript{82} See \textit{TRIIBE}, supra note 2, at 1082-89, and cases cited therein.
\textsuperscript{83} See text accompanying note 115 infra.
The general problem of Eglit's distinction between the two types of age-based laws—his immutability principle—has been discussed above.\textsuperscript{85}

The immutability thesis, as implemented by the guidelines, has an additional problem: disabilities imposed on the elderly would easily escape middle-tier scrutiny merely by setting a cap on the rule. Consider, for example, a hypothetical amendment to the Social Security Act that required all workers to retire temporarily between ages 65 and 72. Because the disability thus imposed is not permanent and is not based on an immutable characteristic, under Eglit's analysis the government would merely have to articulate a purpose such as administrative convenience and would not even have to justify its choice of the particular age lines. As illustrated in this example, the immutability thesis distracts from rather than clarifies consideration of whether a law discriminates.

\textbf{SUPREME COURT REJECTION OF THE AGE DISCRIMINATION CONCEPT}

The previous section has attempted to demonstrate that Eglit's thesis, while ambitious and important, has several problems. This section turns to a difficulty faced by any attempt to advance a constitutional law of age discrimination: after \textit{Murgia}\textsuperscript{86} and \textit{Vance}, do constitutional age discrimination issues remain open to litigation?

Mandatory retirement laws—overtly age-based classifications that impose a massive deprivation—are apparently the strongest case available for those seeking constitutional protection from age discrimination. In \textit{Cleveland Board of Education v. LaFleur},\textsuperscript{87} the dissent implied that the majority's irrebuttable presumption analysis would be interpreted to mean that legislatively imposed mandatory retirement was unconstitutional.\textsuperscript{88} Within only two years, however, in \textit{Murgia},\textsuperscript{89} the

\textsuperscript{84} See, e.g., Gunther, supra note 11; Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).

\textsuperscript{85} See notes 28-72 supra and accompanying text.

\textsuperscript{86} Eglit suggests that the per curiam signature on the Court's opinion in \textit{Murgia} means that the Court regarded the decision to be unimportant. Eglit, supra note 3, at 884 n.133. Given the length of the opinion, the detail of the factual and legal analysis, and its sweeping language coming after the Court had refused plenary hearing in a number of previous mandatory retirement cases, that conclusion seems unlikely. One surmises instead that original drafts by one or more Justices were thereafter revised extensively by others, and that because of the multiple participation in the writing, it was deemed inappropriate to name any single author. See McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962) (per curiam); Wright, A Colleague's Tribute to Judge David L. Bazelon, on the Twenty-Fifth Anniversary of his Appointment, 123 U. Pa. L. Rev. 250, 252 (1974).

\textsuperscript{87} 414 U.S. 632 (1974).

\textsuperscript{88} \textit{Id} at 659 (Rehnquist, J., dissenting).

\textsuperscript{89} Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).
Court upheld a government mandatory retirement law; the irrebuttable presumption analysis of cases like *LaFleur* was abandoned without citation and the door of suspect classification analysis slammed in the face of the elderly. Three years later, in *Vance*, the Court reaffirmed and extended *Murgia*. Indeed, *Murgia* and *Vance* have now become standard citations for the lowest tier—the minimal rationality test—of equal protection analysis. The Court's actions seemed to close off the possible development of a constitutional age discrimination doctrine. Eglit himself concludes that "the breadth of the[se] decisions makes successful equal protection or due process challenges to age distinctions in any context extremely dubious."\(^9\)

This section suggests that, while a broad interpretation of the opinions in *Murgia* and *Vance* is suggested by their tone, a close reading of those two cases demonstrates that their holdings are quite narrow. Most of the pertinent language is dicta, which can be easily distinguished in a future case if the Justices then sitting are convinced to do so. Of course, even when a constitutional question has been determined by holding, it may be reopened,\(^9\) but given the current state of the law, the constitutionality of age discrimination may properly be regarded as not yet settled by holding.\(^9\)


In addition to the *Murgia* and *Vance* cases, there is a series of Supreme Court actions without opinion which has left standing lower court rulings upholding mandatory retirement rules against age discrimination claims. *See*, e.g., Schmeir v. Trustees of California State Universities and Colleges, 74 Cal. App. 3d 314, 141 Cal. Rptr. 472 (1977), *appeal dismissed*, 440 U.S. 941 (1979); Fazekas v. University of Houston, 565 S.W.2d 299 (Tex. Civ. App. 1978), *appeal dismissed*, 440 U.S. 952 (1979); Slate v. Noll, 474 F. Supp. 882 (W.D. Wis. 1979), aff'd mem., 443 U.S. 1007 (1980). These actions are obviously not dicta, but their effect is problematic. Eglit states simply that "summary dispositions by the Supreme Court have precedent weight," Eglit, *supra* note 3, at 880 n.113, but the question is more complex. *See generally* Linzer, THE MEANING OF CERTIORARI DENIALS, 79 COLUM. L. REV. 1227, 1291-99 & n.457 (1979), and works cited therein. Appeals from state courts which are not regarded by the Supreme Court as substantial are "dismissed for want of a substantial federal question" while similar nonsubstantial appeals from federal courts are "affirmed" without opinion; the two are equivalent. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 378 (5th ed. 1978). These summary actions are said to bind the lower courts. Hicks v. Miranda, 422 U.S. 332, 344 (1975). But a summary affirmation has also been said to be an affirmation of the lower court's judgment only, and not its reasoning. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Mandel v. Bradley, 432 U.S. 173, 176 (1977). Moreover, "the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." Fusari v. Steinberg, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring). Over the years, some have indeed suggested that summary affirmances and dismissals for insubstantiality are entitled to little more precedential weight than denials of certiorari, or perhaps...
susceptible of a reading supporting intermediate tier scrutiny of age discrimination claims.

A Broad Reading

In one permissible interpretation of the cases, Murgia and Vance can be read broadly enough to foreclose the age discrimination issue even in its most blatant manifestation, mandatory retirement.

The Murgia Court said that the aged do not meet any of the criteria for a suspect class, and, in particular, that old age does not define a "'discrete and insular' group" but instead a "stage" in our lives. In Murgia, a program of individualized determination of fitness—annual physical examinations after age 40—was in operation; it was also conceded that the plaintiff had excellent health rendering him capable of performing his duties. The Court nevertheless concluded in a broad holding that, even on such strong facts, the state was permitted to use an adverse age-based generalization to make retirement decisions.

Vance can be given a similar broad reading. It extended Murgia from the situation of uniformed police officers—a job making unusual physical demands—to cover almost any type of work, i.e., lawyers, accountants, lecturers, clerical and custodial workers, etc. In Vance, there was a functioning program of individualized determination of fitness: Foreign Service employees received biennial medical examinations and special examinations when necessary and were subject to annual review of performance. The Court nevertheless found that the government was permitted to use an age-based rule for retirement.

The Court found the correlation of increasing age with decreasing capacity to perform adequately to be a logical assumption. It declared that "we have noted the common sense proposition that aging—almost by definition—inevitably wears us all down." It also suggested that the mere purpose of "providing promotion opportunities . . . through early retirement" was acceptable, apparently without re-

are even to be regarded as their functional equivalents. See A. Bickel, The Least Dangerous Branch 126 (1962); Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929, 44 HARV. L. REV. 1, 14 (1930). Thus, the Supreme Court summary cases on mandatory retirement do not completely foreclose the age discrimination issue.

94. 427 U.S. at 313.
95. Id.
96. 440 U.S. at 110 & n.28.
97. Id. at 112.
98. Id. at 101.
gard to the abilities of those retired. These statements have a wide reach.

Thus, on broad readings of these cases, enhanced scrutiny of mandatory retirement rules in particular and old age as a legislative classification appears to be foreclosed. Old age does not define a group but rather a stage in life, the Court said, rejecting the notion that the group needed any judicial protection. The Court's negative treatment of these issues suggests a general antipathy toward any age discrimination claims by any age group.

A Narrow Reading

Narrower readings of Murgia and Vance are also possible. Such readings leave open major constitutional age discrimination issues, even as to the elderly.

Murgia is explicit that its holding concerns only the "class of uniformed state police officers over fifty." That classification "draws the line at a certain age in middle life," and thus all statements in the opinion about the elderly are merely dicta. The private interest involved in Murgia was a limited one, as the disqualification was only from a specific employment; it is well known that retired police officers often have opportunities for private security work available to them. The government interest, on the other hand, was an especially important one: "to protect the public by assuring the ability of state police to respond to demands of their jobs." The job in question was found to be "arduous," where "physical ability" was of special importance, and there was said to be a relationship between aging and the ability to perform under stress. Moreover, it was not possible to evaluate the risk of health failure without "a number of detailed studies," and unusual administrative inconvenience.

This reasoning by the Court supports the state's decision in the concrete case involving Officer Murgia. Significantly, the steps in this reasoning were not invented by the Court, but were documented in the contemporaneous legislative history, supported by studies, and fur-

99. 427 U.S. at 313.
100. Id. at 317.
101. Id. at 313.
102. Id. at 314 n.7.
103. Id. at 310.
104. Id. at 311.
105. Id.
106. Id. at 314-15 n.7.
ther supported by testimony in the record, all cited by the Court. In addition, "even [appellee's] experts concede[d] that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." Thus the ratio decidendi or narrow holding of Murgia is limited to a situation where: the line drawn does not set off the class of the elderly; the conflict is between a limited private interest and an especially important public one; physical ability is involved and is especially required; it is conceded that age correlates with required ability and there is no administratively feasible way to individually determine requisite health; and there are contemporaneous statements of legislative purposes, based on data known to the legislature and confirmed in the trial record.

Vance is also susceptible to a narrow reading. The government interest, again, is an especially important one—promoting the conduct of foreign affairs and safeguarding national security—and the jobs in question were said to have special health requirements because they were under "difficult and often hazardous conditions." The legislative purposes considered by the Court were contemporaneously expressed by Congress. The correlation between age and capacities relevant to the job were conceded. Moreover, since the Court explicitly and repeatedly deemed the whole issue of age discrimination to be abandoned by the plaintiffs, any statements about the constitutional issues are manifestly dicta.

Vance does extend Murgia: it is not limited to jobs requiring physical abilities, it permits a greater impairment of the interest in employment, and it fails to invoke enhanced scrutiny even when older persons are involved rather than the middle-aged. Yet the ratio decidendi of Vance remains limited.

One may conclude therefore that, while Murgia and Vance reveal judicial unreceptivity to the constitutional claims they discuss, as a matter of precedent the issues of age discrimination remain open for another day even for the elderly, and a fortiori for other age groups. If

107. Id. at 311.
108. Id. at 310-11.
110. Id. at 103.
111. Id. at 98-100.
112. Id. at 111-12.
113. Id. at 96 n.10 & 110 n.27.
114. Eglit asserts, to the contrary, that the result in Vance "inevitably followed" from Murgia. Eglit, supra note 3, at 883.
only because *Murgia* involved the middle-aged and the constitutional issue was not before the Court in *Vance*, one would conclude that the constitutionality of age discrimination, even against the elderly, is still open for argument after those cases.

**Middle-Tier Reading**

One could argue that both *Murgia* and *Vance* provide support for the proposition that intermediate tier analysis is applicable to age discrimination. While the opinions disclaim the applicability of strict scrutiny and announce a minimum rationality standard, they also make a point of showing that the governmental actions had certain attributes which, in other contexts, have withstood intermediate tier scrutiny.

The opinions in both cases demonstrate that the governmental interest involved is important, show a substantial relationship or close fit between means and end, refer to current articulations of the justification for the rule, and limit use of rationalizations supplied as afterthoughts in favor of contemporaneous legislative expressions. Moreover, the opinions referred to empirical support for the legislature’s factual assumptions, appeared to balance the governmental and individual interest, and (at least in *Vance*\(^{115}\)) noted that the presumption was not irrebuttable and that individualized determination was possible through which exceptions could be made to the rule. The opinions did not specifically state that those attributes noted as present were required, but the Court’s discussion of them in detail demonstrates that they were thought relevant to the equal protection issue. A future Court ready to hold that those attributes of intermediate scrutiny were required in age discrimination cases would find *Murgia* and *Vance* congenial precedents.

**The Need for a Theory of the Court’s Role**

A proposal on how age distinctions should be treated under the equal protection clause requires more than that the issue should be deemed still open; it also requires a general principle of how that clause should be applied. At base, the principle must reflect some theory of the role of the Supreme Court in our system of government. Such a theory, overlapping law and political science, is required because a proposal that certain types of legislation, like age classifications, should be struck down under equal protection reasoning is simultaneously a pro-

\(^{115}\) 440 U.S. at 111-12 n.29.
posal on allocation of decisionmaking power.\textsuperscript{116} A proposal to recognize a constitutional law of age discrimination reserves ultimate authority over age classification statutes to the Supreme Court, rather than the democratically elected branches of the federal government or the states.

\textit{Alternative Theories}

A variety of competing theories have been prominent in recent debate over when the judiciary should play an activist constitutional role. This more general debate has relevance to the functions of the Court in equal protection cases, first, in deciding what type of legislation is deemed suspect or semi-suspect, and second, in scrutinizing laws under the appropriate standards. The traditional theory is that both the rationale and the content of judicial activism are founded upon the text of the Constitution.\textsuperscript{117} In a second approach, used by the Warren Court in equal protection analysis,\textsuperscript{118} the Court may look outside the constitutional text to various sources of basic values. Four noted authors have recently resurveyed the topic. John Ely has criticized both theories just stated,\textsuperscript{119} and suggested that the Court’s essential role in judicial review is a “representation-reinforcing” one of protecting the democratic process.\textsuperscript{120} Jesse Choper, on the other hand, has suggested that the protection of individual liberty is the fundamental constitutional mandate the courts are to enforce.\textsuperscript{121} Laurence Tribe has identi-


\textsuperscript{117} The theory of a text-based or “interpretivist” definition of the Court’s proper role in equal protection cases traces to Chief Justice Marshall’s opinion on its article III powers in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and to \textit{The Federalist} No. 78, at 228-30 (A. Hamilton) (Fairfield 2d ed. 1981). In the extreme version of the theory, it is claimed that in constitutional cases the Court “has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.” United States v. Butler, 297 U.S. 1, 62 (1936). For an example of the general scholarly ridicule of such a literalist version of the theory, see A. BICKEL, \textit{The Least Dangerous Branch} 89-91 (1962). But “[t]he pure interpretive model should not be confused with \textit{literalism} in constitutional interpretation, particularly with ‘narrow’ or ‘crabbed’ literalism.” Grey, \textit{Do We Have an Unwritten Constitution?}, 27 STAN. L. REV. 703, 706 n.9 (1975) (emphasis in original). See also Grey, \textit{Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought}, 30 STAN. L. REV. 843, 844-46 nn.8-10 (1978).


\textsuperscript{120} See J. ELY, DEMOCRACY AND DISTRUST (1980).

fied seven "models" that organize consideration of the Court's role.\textsuperscript{122} And Charles Black links the first two approaches by suggesting we treat the ninth amendment as part of the Constitution, directing us to recognize rights outside its explicit text.\textsuperscript{123}

The Court's application of enhanced scrutiny to gender-based classifications provides a testing case for such theories. There is still no consensus understanding of the justification for the role the Court plays in such cases. What it may be doing is scrutinizing laws which are based upon, and which reinforce, traditional negative stereotypes held by the powerful about the less powerful. The combination of the limited influence exercisable by the less powerful in the political process, the slur represented by the stereotypes, the inaccuracy of the stereotypes, and the effect of such law in reinforcing the stereotypes, may define a particular evil that must be corrected, if at all, by a Court relatively free of dominant political and social currents.

Eglit adopts none of these theories explicitly. The theory of the role of the Court implicit in his discussion, however, may be that of the Warren Court, as Eglit appears to believe that the Court has an appropriate function striking down a statutory classification that "flies in the face of fundamental societal values[,]"\textsuperscript{124} "basic social concepts"\textsuperscript{125} or "basic notions of equality and justice."\textsuperscript{126}

One's analysis of age discrimination claims is influenced by which underlying theory of the Court's role one adopts; claims that the Supreme Court should brand some age discrimination unconstitutional fare better under some theories than others.\textsuperscript{127} The Court in \textit{Murgia} seemed to rely in part on a theory akin to Ely's: as in the famous footnote of \textit{United States v. Carolene Products Co.},\textsuperscript{128} only groups which because of prejudice are substantially unrepresented in the electoral process have a claim for Court intervention to protect their interests. This approach is indicated by the \textit{Murgia} Court's comments that old

\begin{itemize}
\item \textsuperscript{122} See generally Tribe, supra note 2.
\item \textsuperscript{123} See generally Black, supra note 12. Earlier, Black had suggested that some constitutional questions can be decided by reasoning based on the structure of our governmental system. C. Black, Structure and Relationship in Constitutional Law (1969).
\item \textsuperscript{124} Eglit, supra note 3, at 862.
\item \textsuperscript{125} Id. at 861.
\item \textsuperscript{126} Id. at 901.
\item \textsuperscript{127} To apply individual liberty or fundamental values analyses, difficult questions must be solved. Without pursuing the discussion here, Myres McDougal and his associates, for example, believe that a basic nondiscrimination norm subsumes a prohibition of age discrimination. See McDougal, Lasswell & Chen, The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination, 28 U. Fla. L. REV. 639 (1976).
\item \textsuperscript{128} 304 U.S. 144, 152-53 n.4 (1938).
\end{itemize}
age does not define a "discrete and insular group" in need of "extraordinary protection from the majoritarian political process." Applying that approach could lead to conclusions the reverse of Eglit's: one might agree with the Court that the elderly are well represented in politics but, because minors are excluded from voting and holding office, extend enhanced scrutiny to laws burdening children. Tribe has concluded that children are a "semi-discrete minority." 

Stereotypes and Prejudice

Analogy to the gender cases is one starting point in considering if there are other groups which, under current case law, should receive the protection of intermediate scrutiny. Detailing that analogy is outside the scope of this article, but it may well lead to identifying a role for the Court in scrutinizing laws which both derive from and reinforce traditional negative stereotypes held by the more powerful about the less powerful. This hypothesis may be used to consider whether or not it is justifiable to extend an intermediate level of scrutiny to laws disadvantaging one or another age group.

Analysis will be facilitated if certain distinctions are introduced. First, there are age effects in society, i.e., age-based classifications or practices, such as the "age/work effect" (mandatory retirement and age-based hiring rules). While any age differentiation is "discrimination" in a loose sense, the term age discrimination seems most usefully limited to age effects that violate legal or constitutional norms. Second, there are widely held factual generalizations about the characteristics of age groups ("stereotypes" in a wider sense). The term stereotype (stereotype proper) is most usefully confined to negative and inaccurate generalizations. Third, there are adverse emotions or sentiments widely held toward members of an age group, which may be termed prejudice. These may range from a fear like gerontophobia, to the more common ambivalence, conscious or unconscious, felt toward the elderly or toward adolescents. Thus differentiated, a stereotype is a supposed factual statement; prejudice is an emotion; an age effect is a social practice.

Either stereotypes or prejudices may help produce the other. An age effect may be the product of either or both, or may be the product of neither (as when the old are pushed from jobs by the competition of

129. 427 U.S. at 313.
130. He further thinks that the elderly should be so classified. Tribe, supra note 2, at 1080 & 1081 n.14.
the middle-aged). A legal or constitutional doctrine of age discrimination may focus on the age effect, the stereotype or the prejudice, or on some combination.

The several age groups are widely perceived in our culture through the lens of various factual generalizations which are reinforced by government action. These generalizations are often stereotypes, that is, they are negative and substantially inaccurate. Such stereotypes particularly exist as to transitional age groups like adolescents and the "young-old" (under age 75). Age groups, on the other hand, are only rarely subject to widespread negative prejudice (generalized antipathy). The relative absence of overt emotional prejudice raises the question whether or not it is appropriate to extend the concept of discrimination to include age discrimination, and to expect the Court to function as to age classification like it functions as to race classifications.

The analogy to age is a closer one for gender than for race. Stereotypes as to women and their social role exist, though it is arguable whether prejudice exists. The stereotyping has been deemed sufficient to develop thereon a constitutional law of gender-based classifications. Cases involving gender classification have struck down laws on analyses emphasizing their use of "archaic and overbroad" generalizations, and "social stereotypes" which were not a "legitimate, accurate proxy" for a pertinent characteristic. That development may be instructive in formulating a theory of age discrimination.

Furthermore, there may be close connections between factual stereotype and emotional prejudice. Decisionmakers who impose hardships on those toward whom they supposedly feel no antipathy, based on erroneous factual presuppositions, may well be harboring ambivalence—perhaps unconsciously so. On this line of analysis, age effects

135. The relative significance of stereotypes and prejudice has been discussed, usually in the context of racial discrimination, as part of the debate on the significance of motivation in constitutional law. See Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legisla-
that are products of stereotypes may also reflect prejudice, and age-based classifications may deserve enhanced scrutiny of the kind already extended by the Court to other classes which are victims of discrimination based on prejudice.

If, however, an age effect reflects merely a stereotype and not a prejudice, it is questionable what warrant the Court has to correct the legislature’s error by substituting its own judgment. A recent case on gender discrimination suggests that the Court will then only require a recent and manifest decision by the legislature that the generalization it employs is actually intended.136

In applying an analysis emphasizing stereotypes and prejudice, the

Court would first have to determine their prevalence by considering the history of both private and public practices and attitudes as to a particular age group, in order to select the suitable standard of scrutiny. If sufficient stereotyping and prejudice existed generally to merit enhanced scrutiny, the Court would then determine the challenged statute's constitutionality by examining the extent to which it reflected and reinforced those attitudes and beliefs. This approach provides a method to analyze the three problems stated at the beginning of this article. The stereotypes and prejudice as to the elderly and children can be compared with those prevalent as to other social groups; those as to the elderly and children can be compared with each other; and those incorporated in age-based deprivations can be compared to those incorporated in age-based benefits.

In Murgia the Court said that the aged have not "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." It is unclear which element of that proposition the Court intended to deny. The exclusion of the aged from the workforce has been a unique disability. Mandatory retirement is apparently based at least in part on stereotypes as to their characteristics. So perhaps the Court believed that the negative "stereotypes" of the aged were actually accurate generalizations "truly indicative" of their abilities. A factual issue is thus framed; previous Courts, after all, regarded the treatment of women and of blacks to be based in the order of nature also. Application of a stereotype analysis may lead to the conclusion that the situation of the elderly and adolescents is analogous to that of women.

Textual Basis

The traditional approach requires the Court to base its activism on the text of the Constitution. Apparently self-evident to laymen and officially endorsed by Chief Justice John Marshall, this theory was ridiculed by the legal realists and recently savaged by Ely. There is an intriguing basis in such an approach, however, for claims by the aged to enhanced scrutiny like that afforded women or blacks. Certain discrimination on the basis of age, gender and race is prohibited by delib-
erately adopted, explicit bans in the Constitution: the fifteenth,\textsuperscript{142} nineteenth\textsuperscript{143} and twenty-sixth\textsuperscript{144} amendments prohibit the denial or abridgement of the right to vote on account of race, sex and age (for those above 18).\textsuperscript{145} These amendments can be read to mark out those distinctions for special constitutional treatment, manifesting "constitut

\textsuperscript{142} The fifteenth amendment provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

\textit{U.S. Const.} amend. XV, § 1.

\textsuperscript{143} The nineteenth amendment provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

\textit{U.S. Const.} amend. XIX, § 1.

\textsuperscript{144} The twenty-sixth amendment provides:

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.

\textit{U.S. Const.} amend. XXVI, § 1. If one regards the poll tax as essentially a wealth-based exclusion from voting, the twenty-fourth amendment can serve as the basis for a similar argument that a "constitutional choice" has been made in favor of equal citizenship without exclusion on the basis of poverty. \textit{See U.S. Const.} amend. XXIV, § 1.

\textsuperscript{145} Other references to age in the constitutional text are collected and discussed in \textit{Age Discrimination}, supra note 1, at 49.


\textsuperscript{147} The nineteenth amendment "seems very strongly to imply that in our political society discriminations against women are not only irrational but also unfair." \textit{Black}, supra note 12, at 73.

\textsuperscript{148} \textit{Cf.} Karst, \textit{Foreword: Equal Citizenship Under the Fourteenth Amendment}, 91 \textit{Harv. L. Rev.} 1, 5-11 (1976) (goal that blacks and other minorities be equal participants in society). Differing from the theory set out in the text, Karst's citizenship argument is based on the fourteenth amendment. A citizenship argument can also be based on the structure of our government. \textit{See C. Black, Structure and Relationship in Constitutional Law} (1969).
sifications of adults, without extending an open invitation to similarly apply enhanced scrutiny to a host of other legislative classifications.

The argument might at least provide a foot in the door by explaining to the Court one way to draw a line including age along with race and gender. As John Ely has stated,

before the Court can get to the "balancing" stage, before it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.149

This text-based argument of course is no substitute for analysis of the nature of age effects, to convince a court of the desirability for consequentialist, deontological, and institutional reasons of ruling that certain age-based classifications are unconstitutional.

TOWARD A SOCIAL AND PSYCHOLOGICAL THEORY OF AGE DISCRIMINATION

A legal theory of the constitutional law of age discrimination should have—in addition to a judicial theory—some social theory detailing what are the age effect phenomena to which it is proposed to apply the label "ageism"150 or the legal conclusion "age discrimina-


150. Eglit defines the term "ageism" to mean "the use of age-based distinctions and perceptions to impose negative consequences upon the target of such distinctions and perceptions." Eglit, supra note 3, at 861 n.4. The word was put into currency by Robert Butler. See Butler, The Effects of Medical and Health Progress on the Social and Economic Aspects of the Life Cycle, 2 INDUS. GERONTOLOGY 1 (1969) [hereinafter cited as Life Cycle]; Butler, Ageism: Another Form of Bigotry, 9 GERONTOLOGIST 243 (1969); R. BUTLER, WHY SURVIVE? BEING OLD IN AMERICA 11 (1975).

Eglit states that whereas Butler confined the term to anti-elderly references, he himself proposes to introduce a "broader perspective, deeming the term applicable in all contexts," including anti-youth references. Eglit, supra note 3, at 861 n.4. In fact, however, when Butler introduced the term, he defined it from the broad perspective to refer to "a deep-seated uneasiness on the part of one age group toward another" with anti-elderly references only one instance of a phenomenon applicable to all age groups. Life Cycle, supra, at 5. Accord, Butler, Ageism: A Foreword, 36 J. SOC. ISSUES 8 (1980). Butler's usage includes systematic age-based stereotyping as well as prejudice, R. BUTLER, WHY SURVIVE? BEING OLD IN AMERICA 11 (1975), but he accepts the differentiation of ageism from unreasonable fear or irrational hatred of an age group, such as gerontophobia. Id. See also Palmore, Gerontophobia Versus Ageism, 12 GERONTOLOGIST 213 (1972).

Eglit uses ageism to refer to age-based distinctions as well as perceptions and perhaps consequences. The broad reference may be an infelicitous usage, but it appears entrenched. For example, J. LEVIN & W. LEVIN, AGEISM: PREJUDICE AND DISCRIMINATION AGAINST THE ELDERLY 72-73 (1980), defines ageism to include what is here differentiated as prejudice (interpersonal hos-
tion." At several different places in his paper, Eglit suggests his understanding of age discrimination by giving explanations for or justifications of age effects (age-based differentiation in general), or of its particular manifestation in an age/work effect (mandatory retirement). It is desirable to attempt in a more systematic way to construct a theory of age effects claimed to constitute discrimination. A clearer understanding of age effect phenomena can serve as a partial basis for the judgment whether or not they should be deemed constitutionally suspect.

Four different sets of explanations for the phenomenon can be stated. Based on each explanation, one can construct or refute claimed justifications, which purport to distinguish age-based classifications from constitutionally suspect race or gender discrimination. These positions can be stated in a pure form as models or ideal types. Any actual societal example of age classification can be examined to determine the extent it approximates one or more of the models.

These models can be used in connection with three sorts of questions. First, how can the age-based practice be explained, whether on the level of macroeconomic forces, social structure and cultural norms, or on the level of individual purposes of relevant decisionmakers? (For example, if 18 to 20-year-olds are kept from jury service in a given district, is it because of a practice of replenishing the jury wheel from fresh voting lists every two years?) Second, are the factual assumptions made by the decisionmakers even arguably accurate? (For example, is it true that most 17-year-olds are too immature to vote, and that individualized screening is impractical?) Third, assuming the first two questions are answered, does the explanation of the practice supply a normative justification? (For example, if older workers are forced to retire because youths want their jobs and dominate the unions, does that explanation describe acceptable competition or condemnable discrimination?) The examples considered in the following discussion will emphasize mandatory retirement, the most litigated area of age discrimination claims.

The first model rests on the premise that age differentiation is rational. One sub-type concerns substantive rationality: that the aged

152. See Age Discrimination, supra note 1; Four Models, supra note 135.
153. See id.
(or children or other age group) are in fact different from the rest of us. For example, the aged are said to be inferior to the young in job relevant capacities or less cost-efficient workers,\textsuperscript{155} or children are considered particularly vulnerable.\textsuperscript{156} This substantively rational basis for age-based rules is thought to distinguish them from gender- or race-based classifications. Another sub-type concerns process rationality: there is said to be utility in using rules which presume the characteristics of an age-defined class in place of using individualized assessment. Third, even if one age group were not inferior in capacities to another, rotation of opportunities is sometimes thought to possess rational value for a system (systemic rationality). The old, for example, are thought to lack various novel viewpoints which the young have, so that rotation of jobs is justified. If the factual bases of rationality arguments are erroneous, they reflect stereotypes.

A second model rests on the commonplace observation that each person begins young and in time becomes older. It may be argued that age-based rules reflect the \textit{intertemporal choice} of decisionmakers as to how they wish to lead their own lives: today’s middle-aged decisionmakers deal with the current elderly as proxies for themselves. The (doubtful) conclusion is drawn that they therefore would not mistreat them; thus, whatever rules have been adopted for the elderly are presumed appropriate.

Another argument based on the same observation is that even if the rules for some age groups are unfair to them in some way, all persons will undergo them in turn; thus, there is no inequality. A variant concerns opportunities or benefits as to which the supply is limited, and argues that rotation is appropriate. Thus, even if only the middle-aged can have jobs, or only the aged can receive certain benefits, it is argued that there is no inequality as each person will receive his chance in turn. Others would argue that rotation of inequality does not satisfy the equal protection norm.

A third model accepts that there is \textit{intergroup competition} between different age cohorts for scarce jobs and other benefits; it sees no constitutional infirmity in whatever arrangements reflect the result of the

\textsuperscript{155} Employers have often been motivated by desire for increased efficiency. \textit{See generally} W. Graebner, \textit{A History of Retirement} (1980).

\textsuperscript{156} The courts have treated children differently, not because youth is a mutable quality, but rather because of a perception that children are indeed different. A recent decision noted three reasons for this perception: children are particularly vulnerable, they lack experience and maturity of judgment, and in our society the responsibility for the upbringing of children and the management of their affairs is properly vested in the parents. Bellotti v. Baird, 443 U.S. 622, 634-39 (1979).
struggle. If the legislature and other overt rule-making processes are
considered, rather than the invisible hand of competition, those
processes are still regarded as appropriate reconcilers of competing in-
terests. Democratic and societal decisionmaking are assumed ade-
quately to reflect the interests of any group which is not so hated as to
be outside the mainstream of society. The conclusion follows that age-
based classifications adopted by the legislature should not be subjected
to judicial strict scrutiny. The argument rests on an assumption that
neither the elderly, children, nor any other age group is excluded from
appropriate decisionmaking influence due to prejudice, stereotype or
other reasons.

A fourth model conceives of age-based decisions in an intergener-
ational framework. On the one hand, it is argued that decisionmakers
are likely to have children and old people in their families and, it is
thought, would not want to harm their own. On the other hand,
prejudice may exist in the form of intergenerational hostility. It is possi-
bile that decisionmakers express ambivalence to their own children and
parents in making age-based decisions, or express their own fear of
youthful characteristics or fear of aging and death. The conclusion
drawn may be that various age-based practices are not purely benevo-
157 lent in purpose, but rather ambivalent (perhaps unconsciously so). Age-based practices explained by ambivalence cannot automatically be
accepted as non-invidious.

A systematic consideration of age discrimination claims will be
clarified by use of these four models. They may be used in analysis at
each of the steps required under current equal protection theory: when
the Court considers the facts as to the treatment of that class in our
society as a general matter (for example, how is the history of
mandatory retirement to be understood?) in order to select the appro-
priate tier of analysis; and when it considers the facts as to the chal-
lenged governmental action (for example, the particular retirement
statute) in order to decide whether it survives the appropriate level of
scrutiny.

CONCLUSION

The symposium in which Eglit's paper and this article appear is

157. See note 135 supra. One of the ways (of at least half a dozen) in which psychology and
psychoanalysis can be of use to the law is to expose the implicit psychological functions of legal
and social institutions, such as age-based practices. The policy decision to either reaffirm or repu-
diate those functions can then be made on a more enlightened and conscious basis. See Levine,
part of an ongoing debate about age effects as social and psychological phenomena and age discrimination as a legal concept. Language employed by the Supreme Court in constitutional cases involving the elderly, the middle-aged and children reflects little appreciation of the phenomena nor willingness to employ the concept. Nevertheless, the holdings of these cases can be read so as to leave room for future evolution of doctrine. Moreover, Congress has adopted a series of laws— including the Age Discrimination Act\textsuperscript{158} which is the centerpiece of this symposium—that recognizes the applicability of the discrimination concept to existing age-based practices; four Justices in \textit{Frontiero}\textsuperscript{159} declared similar congressional recognition to be pertinent to the Court’s equal protection interpretation. Thus a constitutional law of age discrimination may yet be developed.

Proposals such as Eglit’s are welcome and important contributions to this development. His goal of a unified theory dealing with all age groups will challenge others considering the issue. The specifics of his immutability test and five guidelines, however, do not appear to adequately define an appropriate role for the Court and to frame consideration of the varieties of age-discriminatory practices.

A more useful line for exploration may begin with considering the extent to which age-based practices reflect (perhaps unconsciously) traditional negative and inaccurate age stereotypes and prejudices, and the extent to which such practices reinforce them. An appropriate role for the Court may be identified in scrutinizing the manifestations of such ageism in the products of the political process. The development of such a theory awaits exploration on another day.


\textsuperscript{159} \textit{Frontiero} v. Richardson, 411 U.S. 677 (1973) (plurality opinion).
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