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John B. McHugh

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THE CONSTITUTIONAL CHALLENGE TO MANDATORY RETIREMENT STATUTES

"How dull it is to pause, to make an end,
To rust unburnished, not to shine in use!"
—TENNYSON, Ulysses

INTRODUCTION

In December of 1972, after having worked for nearly four years as medical-records transcriber for Douglas County, Nebraska, Loretta Armstrong was informed that her employment was being discontinued. Her ability was unquestioned. Unfortunately, a recently enacted mandatory retirement policy with an upper limit of age 65 required her termination. Ms. Armstrong was then one month short of her seventieth birthday. Defending the validity of the regulation in the federal district court, the Douglas County attorney argued:

Age is a condition which goes to the ability of a person to perform work or services. Loretta Armstrong was not retired because of her assertion of any First Amendment right, or because she was the member of a minority group. She belongs to a class of persons reasonably labeled as generally unsuitable to employers.1

The court, in Armstrong v. Howell,2 sustained the retirement provision holding that it was reasonably related to the permissible governmental goals of achieving equal employment opportunities for all citizens and promoting economy and efficiency in such employment. Under the rationale of Armstrong, a governmental employer can safely promote youth at the expense of the aged regardless of individual capacity since advanced age (65 and over) brings with it an apparently unquestionable decrement in work efficiency.8

Until recently, those who disagreed with mandatory retirement suffered silently. The few challenges that were brought produced dis-

3 The Armstrong court cited with approval the statement of Judge Tyler in Weiss v. Walsh, 324 F. Supp. 75, 77 (S.D.N.Y. 1971), aff'd mem., 461 F.2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129 (1973): "Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still future." 371 F. Supp. at 52. See note 85 infra. Nevertheless, neither the court in Weiss nor that in Armstrong cited any evidence supporting the existence of this age-related decrement. In both cases the courts conceded that the complainants were fully qualified.
couraging results. These decisions often emphasized that it was the legislative prerogative to determine at which point the ravages of time render the skills of a class of employees obsolete or inefficient. Nevertheless, the state has seldom come forward with evidence more concrete than the generally accepted notion that personnel over a certain age detract from the vigor of the work force.

Although several suits filed in the federal courts have attempted to force states to empirically demonstrate the assumed deficiencies of older workers, the Supreme Court recently dismissed the appeal of one such case, McIlvaine v. Pennsylvania, for want of a substantial

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In Boyle v. Philadelphia, 338 Pa. 129, 12 A.2d 43 (1940), the hosemen and laddermen of the Fire Bureau and the patrolmen of the Police Department questioned the city council's right to classify them as second-class at age 60 and to compulsory retire them at age 65. The Supreme Court of Pennsylvania responded:

To ask the question is to answer it. . . . While there are some individual exceptions, it is undoubted that the man of sixty is not as physically able to perform exhausting duties as is a younger man. Certainly, it is also true that he has developed a mental attitude of caution to danger that would be disregarded by one more youthful. Acts of strength, endurance, and bravery are not usually performed by men of three score years. They are generally physically incapable of such action.

Id. at 131, 12 A.2d at 44.


6 See, e.g., Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753 (D. Mass. 1974), prob. juris. noted, 95 S. Ct. 1973 (1975). In Murgia, a three-judge federal court ruled that the Massachusetts statute which compelled the retirement of state police at age 50 was unconstitutional. The court refused to assume that "early retirement enhances the morale of younger members"; rather, it found that it "merely advances the time of ultimate unhappiness." Id. at 754 (footnote omitted). More importantly, the Murgia court would not accept the bald assertion that retirement at age 50 is rationally related to maintaining a vigorous police force, but required the state to document the presumed debilities of the 50 and over age group. The state was unable to produce a study of any kind. The little data it had revealed—statistics on discharges which were unrelated to injury—showed more losses in the 40-44 age group than in the older 45-49 category. 376 F. Supp. at 756. Absent a demonstrable rational basis for its classification, the court had no reasonable alternative but to find the policy in conflict with the equal protection requirements of the fourteenth amendment. See generally note 69 and accompanying text infra.

Age 50 is a far cry from the traditional retirement age of 65 or 70. In fact, the court in Murgia stated that the outcome might well have been different had a more usual age limit been involved. Id. n.9. The import of Murgia for present consideration, however, is that the state was required to produce evidence supportive of its mandatory retirement age.


federal question. This dismissal has been interpreted by the Court of Appeals for the Second Circuit as a decision by the Supreme Court on the merits upholding the mandatory retirement of governmental employees and thereby foreclosing further constitutional challenges. Moreover, a three-judge court in the District of Columbia similarly interpreted the Supreme Court's disposition of McIlvaine, and on appeal, this decision was itself summarily affirmed by the Supreme Court. Despite the fact that such dismissals, along with summary affirmances, are frequently referred to as decisions on their merits, their precedential value is limited, especially where the decision in the lower court either omitted or inadequately treated important constitutional issues.

9 Rubino v. Ghezzi, 512 F.2d 431 (2d Cir. 1975) (per curiam), petition for cert. filed, 44 U.S.L.W. 3012 (U.S. May 22, 1975) (No. 74-1468). In Rubino, the court affirmed the district court's refusal to convene a three-judge court to hear a challenge to the state's mandatory retirement of elected inferior court judges at age 70. The Second Circuit panel reasoned that the state's interest in judicial efficiency and in encouraging younger attorneys with judicial aspirations provided a rational basis for the requirement and that arguments that it contravened equal protection and due process of law were clearly insubstantial in view of McIlvaine. Id. at 433-34. See also Aronstam v. Cashman, 132 Vt. 538, 325 A.2d 361 (1974) (mandatory retirement of elected state judges upheld).

10 Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974) (mem.) (three-judge court), aff'd mem., 420 U.S. 940 (1975). In this case a federal civil servant sought a declaratory judgment that the Federal Employee Mandatory Retirement Law, 5 U.S.C. § 8335 (1970), was unconstitutional. In the initial unreported decision, the district court dismissed plaintiff's request to convene a three-judge court as well as the action itself on the ground that the complaint failed to state a claim upon which relief could be granted. The court of appeals reversed, finding ample indication that the case warranted consideration by a three-judge court. Weisbrod v. Lynn, 494 F.2d 1101 (D.C. Cir. 1974) (per curiam). Shortly thereafter, however, the McIlvaine appeal was dismissed. In light thereof, the District of Columbia three-judge court — convened pursuant to the appellate court's decision — dismissed Weisbrod's complaint, holding that the Supreme Court's dismissal of McIlvaine was dispositive of the issues raised therein. The court rejected plaintiff's attempts to distinguish McIlvaine on the ground that higher physical stamina was required of police than of legal services employees. It found such reasoning to be pure speculation and concluded that the McIlvaine court was fully aware of the controlling constitutional issues in the mandatory retirement controversy so as to render the case at bar substantially similar, if not identical, to it. 383 F. Supp. at 936-37.


12 See Edelman v. Jordan, 415 U.S. 607, 670-71 (1974), discussed in notes 25-30 and accompanying text infra. In Dillenburg v. Kramer, 469 F.2d 1222 (9th Cir. 1972), a paroled convicted felon challenged a Washington statute disenfranchising persons convicted of crimes punishable by imprisonment in the State penitentiary. In requesting the convening of a three-judge court the plaintiff argued that the statute violated the equal protection clause insofar as the offenses which might subject one to imprisonment in the State penitentiary bore no rational relation to the need for disenfranchisement. For example, offenses such as dueling, adultery, and bigamy carried a prison sentence, yet a wide variety of offenses directly related to the electoral process did not result in disenfranchisement since no prison sentence attended them. Rather than counter the plaintiff's arguments, the State relied on the Supreme Court's summary affirmance of a three-judge
In *McIlvaine*, a state police captain of conceded ability was, pursuant to the state administrative code, forced into retirement the day following his 60th birthday. He subsequently brought a mandamus action in the Pennsylvania courts asking for reinstatement. The captain alleged that: (1) the administrative code provision violated the state constitution's prohibition of discrimination against the exercise of civil rights;\(^\text{13}\) (2) the Pennsylvania Human Relations Act specifically stated that the opportunity to obtain employment for which one is qualified constitutes a civil right which may not be infringed upon by age discrimination;\(^\text{14}\) and, (3) the statute mandating his retirement was violative of his rights under the fourteenth amendment of the Federal Constitution.

The commonwealth court, in a decision affirmed by a divided Pennsylvania Supreme Court,\(^\text{15}\) held that termination of employment by reason of age when applied uniformly to the selected class was not discrimination within the meaning of the Human Relations Act.\(^\text{16}\) In addition, the court noted that the Act excepts from its coverage bona fide occupational qualifications and the plaintiff presented no proof, beyond his own continued ability, that mandatory retirement at age 60 was not a bona fide exception.\(^\text{17}\) Turning to the fourteenth amendment issues, the court completely omitted discussion of the equal protection and due process clauses because the plaintiff's sole support under this heading was the Federal Age Discrimination in Employment Act.\(^\text{18}\)

decision upholding a Florida statute similar to the one sub judice.

The Court of Appeals for the Ninth Circuit held that termination of employment by reason of age when applied uniformly to the selected class was not discrimination within the meaning of the Human Relations Act.\(^\text{19}\) In addition, the court noted that the Act excepts from its coverage bona fide occupational qualifications and the plaintiff presented no proof, beyond his own continued ability, that mandatory retirement at age 60 was not a bona fide exception.\(^\text{20}\) Turning to the fourteenth amendment issues, the court completely omitted discussion of the equal protection and due process clauses because the plaintiff's sole support under this heading was the Federal Age Discrimination in Employment Act.\(^\text{21}\)

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\(^{13}\) See Pa. Const. art. 1, § 26, wherein it is provided that "neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."


> The opportunity for an individual to obtain employment for which he is qualified, and to obtain all the accommodations, advantages, facilities and privileges of any place of public accommodation and of commercial housing without discrimination because of race, color, religious creed, ancestry, handicap or disability, age, sex or national origin are hereby recognized as and declared to be civil rights which shall be enforceable as set forth in this act.

\(^{15}\) 454 Pa. 129, 309 A.2d 801 (1973). After discussing the applicability of the mandamus statute to the instant case, four of the six justices summarily affirmed the decision of the court below upholding the challenged provision of the administrative code. Justice Roberts, joined by Justice Nix, dissented.

\(^{16}\) 6 Pa. Commw. at 511, 296 A.2d at 633.

\(^{17}\) Id. at 512, 296 A.2d at 633.

\(^{18}\) See notes 55-63 and accompanying text infra.
Since this statute, like the Pennsylvania Human Relations Act, recognizes bona fide occupational qualifications, the court found the plaintiff's lack of proof to be as fatal under the federal statute as it had been under that of the state.\textsuperscript{19}

\textit{McIlvaine} need not prevent further consideration of the merits of mandatory retirement legislation since the case fails to consider the abilities and circumstances of the aged as a class; overlooks the equal protection and due process clauses of the fourteenth amendment; and finally, appears to invite further challenges by parties who can present data more persuasive than his or her own continued work capacity. Yet, even if \textit{McIlvaine} is construed as having considered all pertinent issues,\textsuperscript{20} a controversy still exists over the weight attributable to an appeal dismissed by the Supreme Court. The Court of Appeals for the Ninth Circuit, for example, gives such summary decisions little prece-

\begin{footnotes}
\footnote{\textsuperscript{19} 6 Pa. Commw. at 511-12, 296 A.2d at 633-34. Justice Roberts, in his dissenting opinion in the Pennsylvania Supreme Court argued that the lower court had erroneously put the burden of establishing the lack of a bona fide occupational exception on the plaintiff. He noted that under § 954(b) of the Human Relations Act the Commonwealth is to be treated as any other "employer" and under controlling Pennsylvania law the employer, not the complaining employee, must prove the facts establishing the exception. 454 Pa. at 138, 309 A.2d at 806. In addition, Justice Roberts found the mandatory retirement statute violative of the equal protection clause. He adopted the equal protection test propounded by Justice Powell in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). This test, interpreted by Justice Roberts as a step toward the "sliding scale" approach, 454 Pa. at 146, 309 A.2d at 810, requires a dual inquiry: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" 406 U.S. at 173. Applying this standard to the case at bar, Justice Roberts found the state's only proffered interest — administrative convenience — could not justify age-based termination where there was no showing whatsoever that age significantly related to McIlvaine's performance. He argued that: "This record demonstrates that appellant has, through the mechanistic application of this discriminatory statute, been denied an equal opportunity to continue in his chosen profession — one for which he is admittedly eminently qualified." 454 Pa. at 148, 309 A.2d at 811.}
\footnote{\textsuperscript{20} The three-judge court in Weisbrod v. Lynn, 383 F. Supp. 932 (D.D.C. 1974) (mem.), aff'd mem., 420 U.S. 940 (1975), felt that the "aged as a suspect class" argument, see text accompanying notes 79-110 infra, was before the Court in \textit{McIlvaine} because it was treated in Justice Roberts' dissent in the Pennsylvania Supreme Court. 383 F. Supp. at 936 n.6. Actually, Justice Roberts never mentioned this theory, rather he pointed out that `[i]t has been further suggested that classifications having a differential impact on particular income groups should be added to the circle of cases in which the reviewing court will require a "compelling state interest" in order to justify the classification. 454 Pa. at 141-42, 309 A.2d at 808 (footnote omitted). Yet, since \textit{Weisbrod} squarely raised the issue, and on appeal the decision was summarily affirmed, 420 U.S. 940 (1975), an argument can be made that any points missed in \textit{McIlvaine} were disposed of on the merits by the \textit{Weisbrod} affirnance. Inasmuch as neither the district court nor the Supreme Court in \textit{Weisbrod} delved further than the pleadings, however, it is submitted that the precedential value of \textit{Weisbrod} is minimal. This view is confirmed by the Supreme Court's holding in Edelman v. Jordan, 415 U.S. 651 (1974), wherein the Court noted that both summary affirmances and full opinions which do not substantively treat an issue passed on below are of some precedential value despite the Court's lack of discussion, but that such affirmances are not of the same value as opinions passing on the merits. \textit{Id.} at 670-71.}
\end{footnotes}
dential value, whereas that of the Second Circuit views them as binding on the merits. In addition, a recent Supreme Court holding reveals the potential error in a lower court's allowing either a summary affirmance or a dismissal of an appeal to take the place of an independent determination of the constitutional issues presented.

In Edelman v. Jordan, the Court faced the question of whether the eleventh amendment, regarding federal jurisdiction over actions commenced against the states, prohibited federal courts from ordering state governments to make retroactive welfare payments to recipients whose benefits had been wrongfully withheld. Several three-judge court decisions, summarily affirmed by the Supreme Court as recently as 1972, had issued such orders despite the eleventh amendment arguments of the affected states. The Court of Appeals for the Seventh Circuit, whose decision was before the Court in Edelman, relying on these precedents and on the maxim that a summary affirmance is a

21 Dillenburg v. Kramer, 469 F.2d 1222, 1225 (9th Cir. 1972).
24 In Rubino v. Ghezzi, 512 F.2d 431 (2d Cir. 1975) (per curiam), petition for cert. filed, 44 U.S.L.W. 3012 (U.S. May 22, 1975) (No. 74-1468), see note 9 supra, the court refused to convene a three-judge district court to test the constitutionality of the state's mandatory retirement of elected civil court judges at age 70. In so holding, the Second Circuit panel stated, "[t]he claim that the mandatory retirement age violates the due process and equal protection clauses is, we believe, clearly insubstantial in view of the holding of the Supreme Court in McLlvaine .... " Id. at 433. It is submitted that in so ruling the court erred. In Goosby v. Osser, 409 U.S. 512 (1973), the Court, after stating that a three-judge court need not be convened when the constitutional attack upon the state statute is essentially frivolous or obviously without merit, proceeded to define these terms.

The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of ... [convening a three-judge court to challenge a state statute].

Id. at 518. The language in Goosby would appear to indicate that there is little justification for the Second Circuit's view that McLlvaine is dispositive of an issue of first impression in the Supreme Court. This is so since in Edelman v. Jordan, 415 U.S. 651 (1974), the Court found that summary affirmances are not equivalent to opinions treating the issues on the merits.

decision on the merits, concluded that "the aforementioned Supreme Court affirmances foreclose the sovereign immunity or Eleventh Amendment argument defendants press here."  

The Supreme Court reversed. Writing for the Court, Justice Rehnquist explained that summary affirmances, although of precedential value, are not equivalent to an opinion treating the issue on its merits. Furthermore, the Court noted that when constitutional questions are involved, the doctrine of stare decisis is less constraining. In light of this reasoning, it is submitted that the issue of mandatory retirement be resolved, not by rigid adherence to a precedent of doubtful validity, but rather, by the thorough consideration recommended by Justice Field over 80 years ago:

It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience.

In accordance with the observation of Justice Field, this Note will examine many studies conducted during the last thirty years which have

28 472 F.2d at 989-90.
29 This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion. Shapiro v. Thompson and these three summary affirmances [see note 26 supra] obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits.
415 U.S. at 670-71.
30 "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."
Id. at 671 n.14, quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting).
31 In addition to Edelman's indication that summary decisions do not settle constitutional issues with the requisite finality so as to render their further adjudication "frivolous," the Second Circuit itself in Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973), found not controlling two summary affirmances by the Supreme Court of lower court decisions upholding the constitutionality of federal court orders directing states to make retroactive welfare payments to wrongfully deprived recipients.

For the most part, appellees have been content to defend the District Court's award of retroactive payments by the assertion that other federal courts have done so and that their judgments on appeal to the Supreme Court have been affirmed. It certainly is true that relief of this kind has been given in other cases. We do not find, however, that the Supreme Court has as yet addressed itself specifically and authoritatively to this issue.
467 F.2d at 239. See also Hagans v. Lavine, 415 U.S. 528 (1974).
addressed the question of whether older workers exhibit a measurable deterioration in employment capacity. The results of these studies will be further scrutinized against the backdrop of the psychological effects of mandatory retirement and present federal age discrimination laws. Ultimately, this Note will attempt to demonstrate that compulsory retirement, where state action can be shown, violates both the equal protection and due process rights of the aged. It is hoped that the arguments presented herein will be given careful consideration by courts and legislatures in their respective determinations as to whether existing age-based retirement statutes should be perpetuated.

The Psychological Impact of Retirement

Low retirement benefits, illness, death of a spouse, and inflation—both individually and in combination—burden the lives of senior citizens. Nevertheless, the descent into the abyss of “old age” is for many, if not most, people associated with work status and chronological age. Mandatory retirement of the older worker not only deprives him

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34 The Senate Special Committee on Aging reported in 1973 that “[p]ersons involuntarily retired frequently experienced a sharp reduction in income. Annuities for those involuntarily retired typically replaced less than one-half of their prior Government salary.” SPECIAL COMM. ON AGING, DEVELOPMENTS IN AGING: 1972 AND JANUARY-MARCH 1973, S. REP. NO. 147, 93d Cong., 1st Sess. 71 (1973) [hereinafter cited as SPECIAL COMM. REPORT]. The Senate Committee noted that the Bureau of Labor Statistics Intermediate Budget, “estimated at $5,200 for elderly couples and $2,860 for single persons,” was “beyond the means of most older Americans.” Id. at 15. Even this modest Intermediate Budget appears affluent when compared to the plight of 300,000 elderly New York City residents, 30% of the City’s aged population, who must exist on incomes of $2,800 for couples and $2,100 or less for a single person. See Carmody, Lunch Programs Feed Mind and Body of Elderly, N.Y. Times, Nov. 25, 1974, at 33, col. 1. The high incidence of poverty among the aged is not caused by the already poor growing older. Rather, as Dr. Robert N. Butler writes, “[m]ost poor elderly grew poor after growing old. The American median income of some $10,000 per year is halved by the ‘blessings’ of retirement for which the elderly are ill prepared.” Butler, How to Grow Old and Poor in an Affluent Society, 4 INT’L J. AGING AND HUMAN DEV. 277 (1973). Under the new Supplemental Security Income, 42 U.S.C. §§ 1381-85 (Supp. III 1973), the maximum entitlement available to a single elderly person is $1,752. Id. § 1382(b)(1). For an eligible couple the maximum entitlement is $2,628. Id. § 1382(b)(2).

35 See Atchley & George, Symptomatic Measurement of Age, 13 GERONTOLOGIST 332, 334 (1973) [hereinafter cited as Atchley & George]. But see Peters, Self-Conceptions of the Aged, Age Identification, and Aging, 11 GERONTOLOGIST 69 (1971) [hereinafter cited as Peters]. Peters suggests that chronological age bears only a slight relationship to age-identification. Id. at 72.

Research has indicated that a significant number of the elderly identify themselves as members of the “working” class. Imbued with the work ethic, many find little satisfaction in devoting themselves to hobbies or other forms of leisure activity. In a study of 483 retired male company workers, only 36% of those who had made no retirement plans were found well adjusted to their status. Among those who had made such plans, only
of income but also, within the passage of a day, transports him to what
has been described as a "class of persons reasonably labeled as generally
unsuitable to employers." The psychological impact of compulsory
retirement, although difficult to quantify, cannot, it is suggested, be
overlooked.

A number of studies agree that a person's self-conception is
diminished, not because of any actual physiological changes occurring
with advanced chronological age, but rather, because of the roles, refer-
ences, norms, and stereotypes imposed on the aged by society. Research
a slightly higher percentage was well adjusted. The data revealed that keeping busy and
involvement in hobbies were minor factors in gaining satisfaction. In fact, of those
most pleased with retirement, only 5% spent a significant amount of time on a hobby.
See M. BARRON, THE AGING AMERICAN 73 (1961) [hereinafter cited as BARRON].

But reluctance to join the leisure class is not restricted to the traditional working
class employee. The House of Delegates of the American Bar Association, meeting in
August, 1974, by voice vote decided "not to amend its by-laws to limit the age of its
members to 70 years and, by a nearly 2 to 1 vote, . . . determined not to deprive certain
past officers of the association from lifetime membership in the House." 3 ABA GENERAL
PRACTICE SECTION 1 (1974). Likewise, psychiatrists have expressed little desire to enter
retirement. See CYRUS-LUTZ & GAITZ, PSYCHIATRISTS' ATTITUDES TOWARD THE AGED AND AGING,
12 GERONTOLOGIST 163 (1972) [hereinafter cited as CYRUS-LUTZ & GAITZ].

(mem.). See text accompanying note 1 supra.

37 Many people have such great difficulty psychologically in dealing with their
retirement. Many never seem to work their problems out; they fall into deeper
and deeper stages of depression; family relationships become more complicated;
and frustration leads to loneliness and withdrawal. When this happens, society is
left with a mental cripple . . . .

Statement of William I. Mitchell, retirement consultant to the American Association of
Retired Persons, HEARINGS ON RETIREMENT AND THE INDIVIDUAL BEFORE THE SUBCOMM. ON
RETIREMENT AND THE INDIVIDUAL OF THE SENATE SPECIAL COMM. ON AGING, 90th CONG., 1st
SESS., pt. 1, at 166 (1967). This observation confirms the theoretical speculation that:

The abrupt termination of one's active interests and occupation, unless carefully
handled, can have disastrous personal effects. Unemployment aggravates existing
neuroses and tends to reactivate dormant ones . . . . The retired worker, business-
man, professional man, or homemaker misses the externally imposed routine. He
loses his familiar landmarks, his points of reference, and with them his sense of
personal identity . . . . The experience of being all at once unnecessary and
wanted, with the deprivation of incentive and of an opportunity to continue
one's accustomed work, may precipitate restlessness, weariness, and dejection that
lead over into hypochondria, chronic fatigue states, or neurotic depression with
resentment and self-depreciation.

Cameron, NEUROSES OF LATER MATURITY, in MENTAL DISORDERS IN LATER LIFE 201, 219 (2d ed.

38 See, e.g., Peters, supra note 35, at 70-72. Barron has analyzed eight of the most
common reasons given by employers for retiring or refusing to hire older workers:

1. Older workers are less productive. But such facts as are available do not bear
this out. Surveys generally show that the quantity and quality of work by older
workers are equal to or superior to those of younger employees.

2. They are frequently absent. Yet a 1956 survey by the United States Labor
Department showed that older workers had an attendance record 20 percent
better than that of younger workers.

3. They are involved in more accidents. Yet the same survey by the Labor De-
partment showed that workers forty-five years of age and over had 2.5 per cent
fewer disabling injuries and 25 per cent fewer non-disabling injuries than those
under forty-five.

4. They do not stay on the payroll long enough to justify hiring expenses. Yet
conducted by Atchley and George, based on questionnaires returned by 3,510 older adults, indicates that age identification is not so much correlated with the physical and psychological decrements assumed to accompany old age as it is with changes in work status and other roles which vary according to age.\textsuperscript{39} For the men studied, retirement seemed to be the central factor in age identification. The inference to be drawn from this study is that the older person develops his age identification not from an awareness of his own decreasing mental and physical abilities, but rather from social assignments determined by chronological age.\textsuperscript{40}

Sociologist Dr. George R. Peters of Kansas State University has noted that in recognizing changes in themselves and in perceiving that the attitudes of others towards them have been altered, older people are less influenced by chronological age than they are by age identification.\textsuperscript{41} He finds that society's views on aging and the elderly are paralleled by the self-images possessed by the aged.\textsuperscript{42} Notably, other studies show that society stereotypes old age as a period of decreasing activity, loneliness, economic insecurity, and diminished physical and mental ability.\textsuperscript{43} Studies dating back to 1953 have compared the status

\textsuperscript{39}Atchley & George, supra note 85, at 834.
\textsuperscript{40}See Peters, supra note 35, at 72.
\textsuperscript{41}Id. at 72.
\textsuperscript{42}See Kuypers & Bengston, Social Breakdown and Competence, 16 Hum. Dev. 181, 189-90 (1973) [hereinafter cited as Kuypers & Bengston]; notes 46-47 and accompanying text infra. Barron views society's attitudes toward aging as a significant catalyst in what he describes as the "potentially morbid consequences of retirement."

The theoretical ideas of Mead, Waller, Cottrell, and other leading social psy-
of the elderly to that of minority groups.  A 1968 study dealing with the attitudes of medical students found prejudice against the aged even stronger than that against blacks.

Kuypers and Bengston argue that the elderly in our society are dependent on external labeling due to both role loss which occurs as a result of leaving the work force and other consequences of social reorganization in later life. The result of this dependence is, in their opinion, internalization of the typically negative characteristics attributed to age. If one accepts the premise that society has a negative attitude toward the aged, it is then possible to establish a causal relation between this social stigmatization and mandatory retirement. This might be done by focusing on the involuntary nature of the retirement, viewing it as the first stage in a cycle whereby society increasingly deprives the older person of his decision making autonomy. Dr. Frederick C. Swartz, Chairman of the American Medical Association's Committee on Aging, however, finds more subtle objections to mandatory retirement:

At first, this problem may not seem to have any medical aspects, but it does when you realize that retired men live an average of only two and one-half years after separation from their jobs and

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chologists jointly stress that the individual personality may fruitfully be viewed as a "social self"; it internalizes in the course of its development not only society's or the group's normal attitudes but also the group's confusions and frustrations. Society's tensions and cultural inconsistencies contribute to the conditioning of the self. When the self is mentally and emotionally disordered as well as physically ill, the family, the neighborhood, or society itself may be the cause.

BARRON, supra note 35, at 82 (footnote omitted).

44 Barron, Minority Group Characteristics of the Aged in American Society, 8 J. Gerontology 477 (1953) [hereinafter cited as Minority Group Characteristics]. The author found that the existence of erroneous stereotypes concerning the aged worker; the bitterness, resentment, and self-hatred of older workers experiencing age discrimination; and the then incipient movement to legislate against age discrimination created enough parallels with ethnic minorities to justify dealing with the aged as a "quasi-minority."

45 Spence & Feigenbaum, Medical Student Attitudes Toward the Geriatric Patient, 16 J. Gerontology 976 (1968). The test involved the hypothetical situation of having to save one of two patients. When race was a factor, 50% of the students refused to choose whom to save; but when age was a factor, only 5% refused to choose.

46 See Kuypers & Bengston, supra note 43.

47 Comparing social labeling of the elderly with that of the mentally ill, Kuypers and Bengston write:

While the specific quality of social labeling of a mentally ill person and an elderly person are different, for both there is an emphasis on the negative quality of the cues. The elderly have the additional disadvantage of having vague or ill-defined labels. That is, negatively-toned stereotypes associated with loss of 'productive' roles may become accepted by the individual in describing himself. From the dominant functionalistic perspective of Western society, the elderly person is informed — directly and indirectly — of his uselessness, obsolescence, low value, inadequacy, and incompetence.

Id. at 189.
that the suicide rate in men past 65 is higher than in any other age group. In addition to these stark facts, the nonworker soon becomes a medical problem with most of the real or imaginary symptoms the flesh is heir to.\textsuperscript{48}

In contrast, one of the nation's leading authorities on aging, Dr. Jack Botwinick, has recently questioned the wisdom of opposing mandatory retirement.\textsuperscript{49} He claims that favoring a policy of voluntary retirement assumes that people will be happier, that the economy will support both young and old workers, and that it is possible to assess work ability with a minimum of difficulty. He continues:

\begin{quote}
[A] point must come in the lives of most people, if not all, when ability will decline to a point where it is difficult to carry out job responsibilities. Would it not be more painful, more damaging to self-concept, to be retired on this basis rather than on the arbitrary one of age?\textsuperscript{50}
\end{quote}

As an alternative, he recommends increased preparation for retirement. Unfortunately, there are now very few high quality programs of this type available.\textsuperscript{51} Studies have shown that younger members of the work force never expect to lose their productivity. Such evasion of the subject of aging has even been observed in psychiatrists. When asked about personal feelings regarding their own aging, a significant number responded that they hoped to work up to the moment of death or to die quickly.\textsuperscript{52} Thus, even if there were adequate compensation and preparation available to the prospective retiree, it is doubtful, given the present attitude toward aging, that today's older worker would enthusiastically embrace the type of program envisioned by Dr. Botwinick.

\textsuperscript{48} Swartz, Aging Redefined, or the Ravages of Time Debunked, 27 Geriatrics, Dec., 1972, at 26, 30.

\textsuperscript{49} J. Botwinick, Aging and Behavior 64 (1973) [hereinafter cited as Botwinick].

\textsuperscript{50} Id. Instead of struggling to keep people in the work force, Dr. Botwinick feels it is preferable to train them for leisure pursuits and to readjust personal and societal values with respect to work and leisure. \textit{See} id.

\textsuperscript{51} \textit{See} Schwartz, Retirement: Termination or Transition, 29 Geriatrics, May, 1974, at 190, 192. The author notes that in the past, the family and church prepared the worker for his later years. Today, however, such preparation is an individual concern. Industry has failed to promote retirement preparation programs since it views workers as a commodity and retirement as a control, \textit{i.e.}, a method of eliminating "deadwood." Government likewise has not made a significant effort to ready its older workers for retirement.

\textsuperscript{52} Cyrus-Lutz & Gaitz, supra note 35, at 166. In fact, gerontologists have found that denial is one of the most effective methods of countering the "age syndrome." A significant number of the elderly disassociate themselves from the aged and maintain that they are younger than their actual chronological age. A "positive" aspect of this denial is found in the observation that self-identification as "old" usually brings with it negative connotations. \textit{See} Peters, supra note 35, at 70.
AGE DISCRIMINATION LEGISLATION

The Civil Rights Act of 1964\(^5\) prohibits an employer from discharging or refusing to hire a person because of race, color, religion, sex, or national origin.\(^6\) In 1967, Congress passed the Age Discrimination in Employment Act (ADEA).\(^5\) The Act provides that absent a bona fide occupational qualification, reasonably necessary to operate the business,\(^6\) it shall be unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age . . . ."\(^5\)

There are a number of significant exceptions to the seemingly broad coverage of the above-quoted passage. First, the Act applies only to workers between the ages of 40 and 64.\(^8\) Second, it excludes employees of the federal government\(^9\) and private employers with fewer than 20 regular employees.\(^6\) In addition, the Senate Special Committee on Aging reports that there is a clear-cut need for vigorous enforcement of the Act since, from the time of the ADEA's enactment through the

\(\text{\footnotesize \textsuperscript{54}}\) 42 id. § 2000e-2(a)(1).
\(\text{\footnotesize \textsuperscript{55}}\) 29 id. §§ 621 et seq. The congressional findings which led to the enactment of this legislation are summarized in § 621:

621. Congressional statement of findings and purpose
(a) The Congress hereby finds and declares that—
(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

\(\text{\footnotesize \textsuperscript{56}}\) See id. § 622(f)(1).
\(\text{\footnotesize \textsuperscript{57}}\) Id. § 623(a)(1).
\(\text{\footnotesize \textsuperscript{58}}\) Id. § 631 (Supp. III, 1973).

\(\text{\footnotesize \textsuperscript{60}}\) 29 U.S.C.A. § 630(b) (Supp. 1975). Prior to the 1974 amendments, the number of workers needed to invoke the Act's protection was 25.
1972 fiscal year, only 136 actions had been filed by the Department of Labor, approximately 36 per year.61

Thus, despite recognition of the existence and detrimental effects of age discrimination, Congress has limited the protection of the Act to those between ages 40 and 64, i.e., to the middle aged. Why did Congress not go beyond age 64? The Committee reports provide no answer. The House Committee on Education and Labor reported that it lowered the age limit of 45 by 5 years on the ground that age discrimination became evident at age 40. It rejected further lowerings of the age limit reasoning that such action would lessen the bill's primary objective — promotion of employment opportunities for older workers.62 This silence on the part of the legislature has permitted some parties to infer that Congress thereby approved discrimination against the employment of workers over age 65.63 On the other hand, one can argue that Congress enacted the ADEA to protect that age group most susceptible to age discrimination, yet lacking the benefits of social security and other age-related forms of compensation. According to this view, Congress recognized the evil inherent in age discrimination, but made only an initial effort to combat its most flagrant abuses.

Age discrimination legislation at the state level is of recent vintage, the great majority of such statutes having been passed in the 1960's.64 These, like the ADEA, usually are restricted to ages 40-65 and contain a significant number of exceptions to the scope of their cover-

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61 See Special Comm. Report, supra note 34, at 66. Enforcement of the Act is entrusted to the Wage and Hour Division of the Employment Standards Administration of the Department of Labor. Age bias is only one of the Division's many responsibilities. As a result, only limited resources can be allocated thereto. Even where an action is brought, the courts could find the age limitation to be "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" and thus permissible under the Act. See 29 U.S.C. § 623(f)(1) (1970); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975) (company's refusal to consider applicants over the age of 35 for the position of bus driver upheld). See also Kovarsky & Kovarsky, Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment, 27 Vand. L. Rev. 839, 875-912 (1974) [hereinafter cited as Kovarsky & Kovarsky].


Absent statutory protection, what options are open to the governmental worker who believes himself capable of continuing his work but for a compulsory retirement regulation? First, he can hope to be rehired on a yearly or perhaps part-time basis if his employer sees fit to offer further employment. Second, he can seek a similar position in the private sector. Third, he can, as did Ms. Armstrong, bring suit. Although the weight of authority undeniably is in accord with Armstrong, an argument can be made that mandatory retirement contravenes the concepts of equal protection and due process of law.

**The Equal Protection Arguments**

Justice Stewart has written that the function of the equal protection clause "is simply to measure the validity of classifications created by state laws." Since the fourteenth amendment applies only to the states, the federal government has been subjected to the concept of equal protection by a more circuitous route emanating from the due process clause of the fifth amendment. In dealing with federal classifications, the Court justifies its equal protection analysis with the terse observation: "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" For the federal civil servant opposing compulsory retirement, this signifies that the equal protection standards applied to state actions will likewise gauge the classifications created by the federal government.

Under traditional equal protection analysis, legislative acts are presumed constitutional, and governmental bodies are given wide latitude in enacting laws that treat some classes of individuals differently from others. In such circumstances, the act will be upheld if facts exist, or are presumed to exist, which show the statute to be a reasonable means of achieving a legitimate governmental goal. By characterizing a case as

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65 Special Comm. Report, supra note 34, at 67. The committee found that legislation differs greatly from state to state with regard to age limitations, exemptions, types of prohibited activity and enforcement sanctions. See Kovarsky & Kovarsky, supra note 61.

66 In Armstrong, the county attorney suggested the possibility of temporary employment as an answer to plaintiff's grievance. See Brief for Defendant at 18, Armstrong v. Howell, 571 F. Supp. 48 (D. Neb. 1974) (mem.).


69 In McGowan v. Maryland, 366 U.S. 420 (1961), a case upholding a statute requiring all businesses to close on Sunday except those deemed necessary for recreational purposes,
one to which the presumption of constitutionality applies, the party opposing the statute faces the often overwhelming burden of proving that the legislature had no factual basis for its classification or that it treated a given set of facts in a wholly irrational manner.\textsuperscript{70}

Nevertheless, if the statutory classification is based on the criteria of race,\textsuperscript{71} national origin,\textsuperscript{72} alienage,\textsuperscript{73} or in certain circumstances indigency,\textsuperscript{74} illegitimacy,\textsuperscript{76} or sex,\textsuperscript{76} or if it infringes on a constitutionally protected right,\textsuperscript{77} then the presumption of constitutionality vanishes.

Chief Justice Warren gave what is perhaps the classic explanation of what has become known as the "rational basis" test:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

\textit{Id.} at 425-26.

\textsuperscript{70} For example, Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949), involved a challenge to a South Carolina statute prohibiting life insurance companies and their agents from acting as undertakers and barring undertakers from selling life insurance. The respondent insurance company was the only life insurance company in the state established in selling funeral insurance. The company and its agents, most of whom were undertakers, claimed the act was arbitrary, irrational, and a patent display of the power of the insurance lobby. In rejecting respondent's plea, the Court ruled that "[t]he forum for the correction of ill-considered legislation is a responsive legislature," stating tersely:

\textit{We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop.}\textit{Id.} at 224 (footnote omitted).

\textsuperscript{71} See Korematsu v. United States, 323 U.S. 214, 216 (1944).

\textsuperscript{72} See Graham v. Richardson, 403 U.S. 365, 371-72 (1971).


\textsuperscript{74} See Griffin v. Illinois, 351 U.S. 12 (1956).


The Court has historically been wary of legislative acts which single out "discrete and insular minorities" or diminish rights secured by the Constitution. Thus subjected to a court's strict scrutiny, the discriminatory enactment can be saved only if it is supported by a compelling governmental reason. The court, not the state, is the arbiter of whether the reasons proffered by the state for maintaining the restriction are compelling, and few if any justifications can satisfy the demands of this more rigorous scrutiny.

The Elderly as a Suspect Class — A Basis for Strict Scrutiny

It is crucial at the outset to determine which standard of equal protection review applies in the case of the employee who, solely because of a classification based on advanced age, is compelled to retire from governmental service. Since most mandatory retirement regulations affect workers over age 65, the initial inquiry is whether the persons in this age bracket share with racial minorities, women, aliens, and illegitimates an affinity of traits so as to justify their inclusion within the small circle of classes protected by strict judicial scrutiny.

In *Frontiero v. Richardson*, the Supreme Court outlined the characteristics of the inherently suspect classification. *Frontiero* involved the validity of a federal regulation which allowed a male in the armed services to claim his wife as a dependent without regard to whether she was in fact dependent on him, but required a servicewoman to prove that her husband was dependent on her for over one-half of his support. The plaintiff, a female Air Force lieutenant, claimed that this sex-based classification was as inherently suspect as those based upon race or national origin. Four members of the Court found that it was, and Justice Stewart, concurring, found that the statute "worked an invidious discrimination in violation of the Constitution."

Writing for the four-Justice plurality, Justice Brennan cited the nation's "long and unfortunate history of sex discrimination." The romantic stereotype of women, so firmly rooted in the national con-
sciousness, created the incapacitating “cage” of married women’s codes
and decisions such as Muller v. Oregon where, in language reminiscent of recent cases dealing with the aged, a unanimous Court stated:

Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself . . . .

Furthermore, the Frontiero plurality found “sex, like race and national origin, [to be] an immutable characteristic determined solely by the accident of birth” frequently bearing “no relation to [the] ability to perform . . . .” These factors distinguished it from nonsuspect criteria such as physical disability or intelligence.

83 In Sail’er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), the Supreme Court of California held:
Laws which disable women from full participation in the political, business and economic arenas are often characterized as “protective” and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment.

Id. at 20, 485 P.2d at 541, 95 Cal. Rptr. at 341.

84 208 U.S. 412 (1908) (statute limiting employment of women in factories or laundries to 10 hours per day permissible).

85 Id. at 422. In Weiss v. Walsh, 324 F. Supp. 75 (S.D.N.Y. 1971), aff’d mem., 461 F.2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129 (1973), Fordham University was allowed to revoke its offer of the state-sponsored Albert Schweitzer Chair in Humanities from the eminent philosopher Professor Paul Weiss because state law prohibited the employment of a candidate over age 65. Notwithstanding documented evidence that chronological age frequently bears less than a convincing relation to intellectual achievement, see, e.g., Birren, supra note 40, at 207-12, Judge Tyler held that age ceilings did not violate equal protection. Reasoning that age “generally bears some relation to mental and physical capacity,” he continued:
Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still future. It cannot be said, therefore, that age ceilings upon eligibility for employment are inherently suspect, although their application will inevitably fall unjustly [sic] in the individual case.

324 F. Supp. at 77. The opinion does not reveal the sources of the court’s statistical correlation between age and diminished capacity. Dr. A. T. Welford, director of the 10-year Cambridge study of aging and its effects on human skill, could find no such correlation. See text accompanying notes 122-23 infra. There is reason to believe, moreover, that the diminished capacity cited by the court as the raison d’être for age ceilings arises from policies, such as age ceilings, which tend to isolate the aged. “[M]any, or most, people who undergo degradation of behavior with advancing age do so because of disease and social deprivation rather than because such behavior is a pattern of normal senescence.” Birren, supra note 40, at 218.

86 411 U.S. at 686.

87 The plurality in Frontiero found implicit support for its conclusion that sex-based classifications should be subjected to the strict scrutiny standard of review in Reed v.
Another recent Supreme Court decision provides additional insight into what will be considered a suspect class. In *San Antonio Independent School District v. Rodriguez*, plaintiffs instituted a class action challenging the Texas system of financing public education largely through the local property taxes collected in each particular district. The complaint alleged that this system discriminated against the poor and interfered with the "fundamental right" of education. Writing for a majority of the Court, Justice Powell was unable to find a definable category of "poor" people created by the taxing system. Nor could the plaintiffs show an absolute deprivation of the desired educational benefit. The language of the Court in refusing to apply strict scrutiny to the Texas system, however, is relevant to the potential suspect nature of the aged as a class:

[I]t is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

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Reed, 404 U.S. 71 (1971), an earlier sex discrimination case which struck down a statutory preference for males in the granting of letters of administration. Although the Court in *Reed* recognized that the statutory preference involved a rational underpinning, it held it to be constitutionally infirm.

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests [intrafamily] is not without some legitimacy. ... [But] [t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment ...

Id. at 76. *See also* Jimenez v. Weinberger, 417 U.S. 628 (1974). In this case the Social Security Act's absolute denial of disability insurance benefits to illegitimate children born after the onset of the parent's disability was struck down on equal protection grounds despite the Government's claim that such a statute was necessary to avoid spurious claims.

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89 Id. at 22-23. The Court found no basis for assuming that the poorest families were clustered in the poorest property districts. A study in Connecticut had shown that poor families were often found in commercial and industrial areas which provide an attractive source of property taxes.
90 Id. at 25-26. In a survey of 10% of Texas school districts, 90% of the sample revealed a pattern contradicting plaintiff's assumptions. In these districts, those with the lowest median family incomes were spending more on education than were the wealthier.
91 Id. at 28 (footnotes omitted).
Do the aged have the traditional indicia of suspectness set forth in *Frontiero* and *San Antonio*?

The first obstacle encountered is defining the class affected by the statute. Unlike *San Antonio*, where the allegedly victimized persons constituted a class whose membership could not be precisely defined, the typical mandatory retirement statute covers all those over a certain age. Second, compulsory retirement effects a total deprivation. The aged person is abruptly severed from government employment, while his younger colleague is not only still employed, but, under most civil service statutes, can only be removed for cause. The third consideration is whether the aged are saddled with a history of purposeful mistreatment and political powerlessness so as to command what Justice Powell, in *San Antonio*, called the "Court's most exacting scrutiny." Mandatory retirement statutes lack the antiquity of the black codes of the *ante bellum* South or the married women's codes discussed in *Frontiero*, but the increased utilization of such statutes during this century has been evidenced by the marked disappearance of the older worker from the labor force to a "retirement" of usually marginal income. Another trait which the aged share with racial minorities, aliens, and until very recently, women, is the inability to change their

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82 The prospect of returning on an annual or part-time basis or finding a similar position in the private sector does not reduce the degree of deprivation. As of the moment of retirement, the employee's tenure, salary, and position as a civil servant cease. Cafeteria & Rest. Workers Local 473 v. McElroy, 367 U.S. 886 (1961), does not hold to the contrary. There the Court upheld the summary revocation of a cook's security clearance which had the effect of depriving her of access to her place of employment. Holding that she had not been arbitrarily deprived of a constitutionally protected right, the Court focused on the fact that she had been offered a similar position at a nonclassified location. "All that was denied her was the opportunity to work at one isolated and specific military installation." *Id.* at 896. The same cannot be said for the federal civil service employee retired under 5 U.S.C. § 8335(a) (1970) which provides in pertinent part: "Except as otherwise provided by this section, an employee who becomes 70 years of age and completes 15 years of service shall be automatically separated from the service." In addition, the possibility of continuing in a similar position is reduced to a fiction when one considers the incidence of age discrimination and the virtual monopoly exercised by government over many employment fields such as law enforcement, social services, and education.


84 See notes 82-84 and accompanying text *supra*. The significance of age 65 as the standard age for the commencement of retirement benefits as well as compulsory retirement can be traced to Chancellor Otto Von Bismarck's social security program of 1887. It was here that age 65 was first designated as the time at which retirement benefits would begin. See 113 Cong. Rec. 31,256 (1967) (remarks of Senator Young).

85 Justice Brennan in *Frontiero* noted that 43% of women over the age of 16 were in the labor force. 411 U.S. at 689 n.23. It is projected that in 1975, the number of men aged 65 and over in the labor force will have dwindled to approximately 23%, down from over 68% in 1900. Schwartz, *Retirement: Termination or Transition*, 29 Geriatrics, May, 1974, at 190, 191.
inferior status through the political process. Professor Robert Binstock of Brandeis University's Department of Politics and Social Welfare has analyzed the potential of the aged to use politics as a mechanism of improving their economic position. He finds that the aged lack the cohesive group identity necessary for decisive political action. Those better off neither identify themselves as aged nor identify with the problems confronting the aged. But even if the aged poor could unite, constituting a group numerically far from insignificant, Binstock concludes their influence would be de minimis:

Their capacity for militant, direct action is virtually nonexistent. Retired persons, especially those with little income, have no leverage for disrupting American society through economic action. They cannot slow down production or strike. And those most likely to identify as the disadvantaged aged — the 25% below the poverty line — are hardly in a position to undertake effective consumer boycotts.

As noted above, psychological studies indicate that workers associate the onset of old age with the time of their mandatory retirement. The evidence is abundant that the aged are as subject to debilitating stereotypes as have been racial minorities, women, and foreigners. In Brown v. Board of Education, the Court found that the forced separation of black children from their white counterparts under sanction of law created a sense of inferiority in the black children and retarded their educational development. In ringing down the curtain on an odious chapter of American history, Chief Justice Warren declared that "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Much of the available research indicates that the legally sanctioned separation of older workers from their younger associates without regard to diminished capacity is as invidious in its effects as was the vestige of Jim Crow condemned in Brown. The courts that have thus far

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96 See Binstock, Interest-Group Liberalism and the Politics of Aging, 12 Gerontologist 265 (1972).
97 Id. at 279.
98 See notes 39-43 and accompanying text supra.
100 Id. at 494.
101 Numerous studies suggest that society in general stereotypes aging and the aged with negative evaluations. The stereotype reflects the expectation that old age is a time characterized by a decreasingly active role in life, economic insecurity, loneliness, resistance to change, poor health, and failing mental and physical powers. In short, old age is not seen as conducive to feelings of adequacy, adjustment, usefulness, and security.

Peters, supra note 35, at 72-73. See also note 47 supra.
upheld the constitutionality of mandatory retirement statutes have done so without requiring the government to supply even a modicum of data to demonstrate the rationality of singling out the aged for "special treatment." In the only case to so require, *Murgia v. Massachusetts Board of Retirement*, the information supplied by the State undermined any claim to rationality that the classification may have had since losses in personnel for medical reasons other than injury actually decreased with age.

One will search the decisions in vain for any mention of the psychological damage inflicted by forced retirement. When dealing with the aged, courts have chosen to rely on the types of presumptions and clichés prevalent at the turn of the century. For example, in *Gault v. Garrison*, a teacher challenged a statute requiring her retirement at age 65. A comprehensive brief was filed in the federal district court hearing the case, bringing to the court's attention serious questions concerning the supposed decrement in work capacity accompanying old age. In sustaining the statute the court wrote:

The age of sixty-five for retirement is a classification which must be accorded a presumption of constitutionality, and an ascertainable rational basis will serve to uphold it. It has long been accepted in our society as an age when most people, because of diminishing mental and physical stamina, are no longer able to endure the rigors of full-time employment. This *chronological demarcation has generally proved to be reasonable and fair.*

In *Plessy v. Ferguson*, the Supreme Court faced the issue of

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103 Id. at 756. *See note 6 supra.*
104 Civil No. 74-C-931 (N.D. Ill., May 22, 1974) (mem.), *appeal docketed*, No. 74-1579, 7th Cir., June 20, 1974.
105 Id. at 3 (emphasis added). *These broad presumptions of lack of stamina and strength were until recently assumed validly applicable to women. In Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), the employer maintained women could be reasonably excluded from the position of switchman since it required the lifting of weights which averaged 30 pounds. In holding for the female plaintiff, the court reasoned: Southern Bell has ... introduced no evidence concerning the lifting abilities of women. Rather, they would have us "assume," on the basis of a "stereotyped characterization" that few or no women can safely lift 30 pounds, while all men are treated as if they can. While one might accept, *arguendo*, that men are stronger on the average than women, it is not clear that any conclusions about relative lifting ability would follow. ... [I]t can be argued tenably that technique is as important as strength in determining lifting ability. Technique is hardly a function of sex. What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved.

106 163 U.S. 537 (1896).
whether the State of Louisiana could legally provide separate railway cars for the white and "colored" races. Here, the demarcation was based on the well-known and long-accepted physiological distinction of color. Over the scathing dissent of Justice Harlan, the Court perceived no actual damage arising from the forced separation of one race from the other.\footnote{We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. \textit{Id.} at 551.} In a similar manner, the courts have perceived no damage in the forced separation of the aged from their employment and from the social interaction that is an integral part thereof. Yet, as previously discussed, the effects of such age-based sanctions can be devastating.\footnote{\textit{See} note 37 \textit{supra}.} It is submitted, given the economic plight of the aged in America\footnote{\textit{See} note 34 \textit{supra}. Graphic documentation of the mistreatment of the aged both in the United States and abroad is found in S. \textsc{De Beauvoir}, \textsc{The Coming of Age} (1972) and in C. \textsc{Townsend}, \textsc{Old Age: The Last Segregation} (1970).} and their scientifically supported claims of continued work capacity, that mandatory retirement regulations share with the statute Justice Brennan found constitutionally offensive in \textit{Frontiero} an affinity of traits sufficient to invoke the Court's strictest scrutiny:

\begin{quote}
[T]hese statutes seize upon a group . . . who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages.\footnote{\textit{Frontiero v. Richardson}, 411 U.S. 677, 689 n.22 (1973).}
\end{quote}

\textit{The Right to Work as Constitutionally Secured — An Alternative Basis for Strict Scrutiny}

The second basis for invoking the strict scrutiny test is in the case of a legislative classification which infringes on a fundamental right. For example, in \textit{Shapiro v. Thompson},\footnote{394 U.S. 618 (1969).} state welfare eligibility statutes imposed a one year durational residency requirement as a condition to the receipt of benefits. The statutes were held unconstitutional by the Court on the ground that they interfered with the constitutional right of interstate travel since they deterred welfare recipients from exercising this right.

The Court, however, has never held that the right to work is constitutionally secured. Admittedly, in \textit{Truax v. Raich},\footnote{239 U.S. 33 (1915).} where the Court
struck down an Arizona law which required anyone employing more than five persons to employ not less than 80 percent native born citizens or eligible voters of the United States, there is dictum which indicates that the right to earn a living "is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Nevertheless, the Court based its decision on the impermissibility of state legislation which denies employment on the grounds of race or nationality.

Thus, although it has been suggested that mandatory retirement infringes upon the "fundamental" right to pursue a lawful calling, no such right has been recognized by the Court. Nor is one likely to be. As Justice Harlan, dissenting in Shapiro, explains:

Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation, the right to receive greater or smaller wages or to work more or less hours, and the right to inherit property. ... To extend the "compelling interest" rule to all cases in which such rights are affected would go far toward making this Court a "super-legislature." The Disputed Rationality of Discrimination Against the Elderly

Despite the conviction of many that the aged constitute a suspect class, it can be argued that the distribution of the aged throughout all economic strata of society, coupled with their presence in the legislatures as well as on the highest judicial tribunals, is fatal to satisfaction of

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113 Id. at 41.
114 An alternative rationale for this holding was that the state's restriction on the employment of aliens interfered with the primacy of Congress in the area of immigration and that to deny these aliens the right to earn a living would be tantamount to the state's denying them access to the country. Id. at 42-43.

The Court has afforded stringent equal protection scrutiny to state classifications which resulted in the exclusion of many persons who, except for statutory restrictions, were fully competent to work. In Smith v. Texas, 233 U.S. 630 (1914), the plaintiff, a man with extensive experience as a train engineer, was convicted for having acted as a conductor on a freight train without having served for two years as a conductor or brakeman as required by Texas law. The evidence at trial revealed that engineers must be able to act as conductors under the rules of all railroads in case the regular conductor should become disabled en route. The Court held the statute unconstitutional on the grounds that it arbitrarily prohibited competent men from entering private employment and established the order by which men could be promoted in the private sector. While it is possible to argue that this case turned on the state's interference in the private sector, such a rationale appears weak in view of the extensive governmental regulation of the railroad industry. It appears more likely that the Court could not accept the state's absolute refusal to employ men of demonstrable skill. See id. at 641.

115 Infirm Legislative Judgment, supra note 88, at 1338-40.
116 394 U.S. at 661 (footnotes omitted).
the criteria for suspectness found in the heretofore recognized suspect classes. If a court accepts this reasoning, as all thus far considering it have, and the right to work is not established as fundamental, the opponent of mandatory retirement must assume the burden of proving that no rational basis for such regulations exists. In this situation, the attitude of the court towards the legislation at hand is crucial. If, as in Gault, the court assumes that facts exist so as to justify the legislation, plaintiff's obstacles approach the insurmountable. On the other hand, if the court requires that the government make a prima facie showing of rationality, in view of the results of research in the field, the outcome could parallel that of Murgia.

It is submitted that the approach taken by the three-judge court in Murgia is the more sound. Where the legislative purpose is to combat a recognized evil and the only dispute centers around the precision of the classification, perhaps the court would be justified in assuming facts exist to justify the type of legislation involved. But where the entire type of legislation is alleged to be without factual justification and supported by deep-seated prejudice, it is suggested that the court would be in error if it labeled such a statute rational without some initial factual inquiry. It is necessary at this point to examine some of the many investigations into the relationship between chronological age and work capacity.

A generation ago, the realm of test validity and psycho-social study was deemed beyond the province of the court. Accordingly, Justice Frankfurter, in an opinion sustaining a statute denying females bartending licenses unless they were the daughters or wives of male owners, could declare: "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."118

117 These distinctions convinced Dr. Milton Barron that the aged, like women, were not a true minority but rather a quasi-minority, i.e., a group subject to the traditional minorities' experience of frustration and subordination, but lacking the heretofore recognized characteristics of minority groups.

Unlike the traditional minorities, neither women nor the aged are socially organized as independently functioning subgroups in American society. On the contrary, they are found within the same families as the alleged majorities so that intergroup relations cannot possibly be involved in the full sense of the term. Hence the avoidance of the minority concept and the utilization of "quasi-minority" seem justified in the case of the aged as well as women.

Minority Group Characteristics, supra note 44, at 477.

118 Gossert v. Cleary, 335 U.S. 464, 466 (1948). In dissenting, Justice Rutledge, joined by Justices Douglas and Murphy, stated:

While the equal protection clause does not require a legislature to achieve "abstract symmetry" or to classify with "mathematical nicety," that clause does require lawmakers to refrain from invidious distinctions of the sort drawn by the statute challenged in this case.

Id. at 467-68 (footnotes omitted).
Today, however, no court can close its eyes to the importance of job-related tests and the insidious effect of test bias. The Equal Employment Opportunity Commission has issued guidelines calling for a significant correlation between test results and important elements of the job for which the candidates are being tested. The fact that the test was prepared by professionals in the testing field affords no insulation from scrutiny. The Supreme Court in *Griggs v. Duke Power Co.* stated: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability." Thus, tests which purportedly verify the inability of millions of people to perform as competently as individuals on the other side of a chronological meridian must be gauged with critical detachment and an eye for "built in headwinds." Although some of the studies conducted during the last few decades appear to have contained headwinds of gale force, the overall results are germane to the question of whether mandatory retirement enjoys a rational basis.

One of the earliest comprehensive studies of the effects of aging on physical and mental capacity was the Cambridge project conducted in England from 1946-1956 under the direction of Dr. A. T. Welford. Although many of his test models appear to favor younger subjects by utilizing tasks that reward such factors as the amount of schooling, ability to test in a laboratory environment, or capacity to perform meaningless tasks, Welford's conclusions negate the validity of any age-based generalizations. He first found that with age there was a slowing in sensorimotor tasks, perception, problem solving, and other situations stressing mental rather than motor activity. As age increased, however, he found increasing variation between individuals. In fact, a substantial number of old people performed as well or better than the average of the younger subjects. As to whether these results provide the basis for an inference that the aged as a group are less capable, Welford wrote: "None of these tendencies is, however, regular enough from one situation to another for us to be able to regard it as implying any universal rule or law."

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119 See 29 C.F.R. §§ 1607 et seq. (1972). These guidelines require the employer relying on tests to have available data demonstrating that the tests relied upon significantly correlate with important elements of the work behavior comprising the job or jobs for which the candidate is being tested. *Id.* § 1607.4.
120 401 U.S. 424 (1971). In this case, the use of intelligence tests and high school diploma requirements for promotion in defendant's plant was challenged because such use rendered a disproportionate percentage of blacks ineligible for promotion. Since not correlated with job performance, the practice was struck down.
121 *Id.* at 452.
122 See WELFORD, supra note 105.
123 *Id.* at 283.
Birren's study of actual work output and its relation to age resulted in the observation that productivity remains constant through the mid-fifties, with a slight falling off thereafter. This decrement, however, is not manifested in all trades. For example, no decline was noted in the productivity of women officeworkers over age 65. Even in those industries that do demonstrate the "post 55" decline, the older worker's output usually remains above the required level and individual variations are large. Many older employees even outperform their more youthful counterparts.\footnote{Biren, supra note 40, at 200-04. At the conclusion of his study, Dr. Welford suggested that slight variations in work environment, geared to the work pattern of older workers, could help overcome many of the problems presumed inherent in age. Welford, supra note 105, at 287. Although Dr. Welford does not elaborate on how industry might capitalize on the observed patterns of the older worker, other studies dealing with the retraining of older workers have addressed this issue. Dr. Ross A. McFarland has summarized how training methods might be adapted to the learning capacities of the older person. Older persons learn more readily if material is presented in ways allowing them to understand the task essentials, such as a selective presentation of essential areas. Pace of instruction should be slowed to enable full comprehension or the pace should be under the trainee's control. Learning by activity methods yields better results than memorizing instructions for translation into action. It seems essential to relate instructions and task as directly as possible, with opportunities for ambiguity kept at a minimum, and to avoid the learning of errors which may be unlearned only with difficulty. McFarland, The Need for Functional Age Measurements in Industrial Gerontology, INDUS. GERONTOLOGY, Fall, 1973, at 1, 15 [hereinafter cited as McFarland].} Dr. Botwinick's recent treatise on the aging process,\footnote{See Botwinick, supra note 49.} although not dealing extensively with the employment capacity of the aged, supports the view that any broad generalizations concerning the abilities of the aged are presently impossible. One of the most common assumptions is that responses to environmental stimulation slow with age. Botwinick's research reveals, however, that the evidence supporting this assumption is open to serious question. One study compares the reaction times of older and younger subjects. When the young athletes were removed from the sample, there was no difference between the 18-to-22-year-old subjects and those between the ages of 68 to 86.\footnote{Id. at 173-74.} He also found such substantial individual differences in a number of studies comparing reaction time — with many older subjects outperforming younger ones — that an inference of slowing of responses in later life could not be drawn. In light of the fact that motivation and practice tend to reduce age-related slowing, Botwinick concludes that the evidence pointing to a slowing of higher level functioning with age is, at best, equivocal.\footnote{Id. at 177. A study conducted by K. Warner Schaie of West Virginia University...}
At first glance, the outcome of studies on learning ability reported by Botwinick admittedly seem to establish an age-related decrement. Studies from Welford to Botwinick showed that the elderly do most poorly in tests under time pressure. But when allowed to pace themselves, the elderly improve significantly. Although Botwinick finds that even with self-pacing the elderly score below younger subjects, it is doubtful that such tests indicate an actual decrease in cognitive ability since the poorer performance of older subjects can be traced to such noncognitive elements as test anxiety and unfamiliarity with testing procedures.128

and Charles R. Strother of the University of Washington points to a contrary conclusion. A group of retired professors approached Dr. Schaie desiring to demonstrate by intensive studies that their members retained a high level of functioning. After devising a comprehensive survey of psychological, social, and physical functioning, the author selected a group of 50 elderly men and women, all college educated professionals with a mean age of 76.5, who possessed good health, economic independence, and a satisfactory degree of social activity. In other words, in this optimal elderly group the factors of economic, physical, and social deprivation had been minimized.

In testing the group's intellectual ability, memory, and visual-motor functions, the author found the members' performance to be well below what would have been expected of them in their prime. The authors' evaluation of their findings concludes:

[Schaie & Strother, Cognitive and Personality Variables in College Graduates of Advanced Age, in HUMAN AGING AND BEHAVIOR 281, 307 (G. Talland ed. 1968)](https://example.com) [hereinafter cited as Schaie & Strother]. The significance of these results, however, can be questioned. See note 128 and accompanying text infra.

Perhaps the strongest indication that the Schaie and Strother data focus on nothing more than test-taking ability is the performance of another optimal group under actual working conditions. Since 1948, Hastings College of Law has selected its faculty from distinguished professors and deans retired (often mandatorily) from other institutions. A handbook prepared and published by the Association of American Law Schools and the Law School Admission Test Council noted that Hastings' "65 Club" had brought to that law school "a wealth of teaching experience unmatched anywhere." [The Prelaw Handbook 64 (1971-1972 ed.).]

128 See Botwinick, *supra* note 49, at 218-22. Botwinick cautions:

It is commonly thought that learning ability declines in later life. This may not be true. It is true, however, that learning performances tend to be poorer in later life than during young adulthood. To understand this it must be recognized that a necessary distinction is made between learning as an internal process and performance as an external act. We see only the act and not the process; we infer that learning ability is poor when we observe only a little or no improvement in some performance. It is possible to be wrong about this inference because what may have made for the poor performance was not learning ability as such but the non-cognitive elements surrounding the act.

*Id.* at 218.

Haberlandt, in examining many of the same studies considered by Botwinick, also points to the laboratory environment as the root of many of the "observed" differences. Furthermore, he finds that initial differences in task performance are often overcome when the younger and older groups are compared over a longer period of time than the one or two hours usually allotted in the laboratory. [Haberlandt, *Learning, Memory and Age,*]
Two common justifications for compulsory retirement are that older workers present higher accident risks and they are difficult, if not impossible, to retrain. Serious doubts exist as to the validity of either assumption. Studies of a large number of formerly retired workers utilized in industry during World War II revealed not only competent performance, but greater job stability and fewer accidents than experienced with younger employees. Similar results are obtained from the accident records of older automobile and bus drivers. The widespread fear that the older worker will be suddenly incapacitated by a heart attack or other ailment, thereby causing serious injury to himself and others, has simply not materialized. Over a six-month period in the airline industry, the mean age of pilots who lost their license for medical reasons was 40. In Murgia, the court found that for state police, INDUS. GERONTOLOGY, Fall, 1973, at 20, 29-30 [hereinafter cited as Haberlandt]. But see Schaei & Strother, supra note 127, at 307 (findings of a decrease in higher level functioning “cannot be ... refuted simply by referring to ... artifacts of sampling”).

An unusual rationale for justifying mandatory retirement was relied upon in Aronstam v. Cashman, 132 Vt. 538, 325 A.2d 361 (1974) (per curiam). Here, in upholding a provision in the state constitution requiring elected judges to retire at age 70, the Supreme Court of Vermont held the state legislature could reasonably assume that a judge over the age of 70, if subjected to an incapacitating ailment, would be less likely to step down than a younger judge similarly incapacitated, thereby disgracing the state judiciary with his unseemly intransigence.

We recognize the legitimate state interest in requiring for members of the judiciary the highest possible standards obtainable by minimizing as far back as possible the threat of an obviously disabled judge continuing to preside in full view of the eyes of the public. Id. at 543, 325 A.2d at 366.

See McFarland, The Older Worker in Industry, 21 HARV. BUS. REV. 505, 519 (1943).

A comparison of the driving records of persons aged 65 and over with those of younger drivers showed that the elderly had safety records superior to the records of the group of drivers aged 35 and under. The percentage of personal and property damage caused by aged drivers was proportionately below the percentage of licenses held by them. Freeman, Elderly Drivers: Growing Numbers and Growing Problems, 27 GERIATRICS, July, 1972, at 46, 47-50 [hereinafter cited as Freeman].

McFarland refers to studies conducted on London bus drivers. These studies revealed that had drivers over 60 been replaced by men aged 30 or under, the number of accidents sustained per year would have risen appreciably. The results of studying the accident records of different age groups, both in the United States and abroad, led McFarland to conclude:

The deterioration with age in sensory, mental and physiological capacities is not apparent in the form of increasing accidents until the later decades. It shows how experience, judgment and compensation for declining abilities can be maintained at a higher level of performance than might be expected.


See Freeman, supra note 131, at 52 (research into relationship between automobile accidents and vascular disease). In O'Donnell v. Shaffer, 491 F.2d 55 (D.C. Cir. 1974), the Air Line Pilots Association (ALPA) brought suit to force the Federal Aviation Administration (FAA) to conduct a trial-type evidentiary hearing concerning the validity of its rule requiring commercial airline pilots to retire at age 60. The FAA had held hearings in which groups for and against the rule submitted testimony
noninjury, medical discharges decreased with age.\textsuperscript{133}

Retraining older workers for new tasks can be accomplished successfully if the learning needs of the older worker are kept in mind. Recent studies have shown that the format should concentrate on job essentials, the instruction should be paced to enable full comprehension, and learning should be by doing rather than by memorizing principles.\textsuperscript{134} The major obstacle confronting the older worker in obtaining such training is not his inability to learn a new skill, but rather the fact that industry can employ a younger man with less seniority for less money and recoup more of its training costs due to a longer work expectancy.

To sustain mandatory retirement statutes under the rational basis test, the government is not required to show that the policy is the wisest, most economical, or most congruent with the latest gerontological theories. All that must be shown is that it is pursuing a legitimate gov-

\textsuperscript{133} 376 F. Supp. at 756.

\textsuperscript{134} See McFarland, supra note 124, at 15; Haberlandt, supra note 128, at 30-31.
ernmental goal by means of a vehicle not patently irrelevant to that goal or otherwise capricious. The typical mandatory retirement statute is enacted to afford fair and equal opportunity of employment and promote economy and efficiency. These are undoubtedly legitimate governmental interests.

The remaining question, therefore, is whether fair and equal opportunity, admittedly a legitimate goal, is legitimately promoted by sweeping out all those reaching the age of 65 or 70. No study has been able to establish the existence of a generally applicable classwide decrement of statistical significance. The reason appears to lie in the individualistic nature of the aging process. As Ross A. McFarland, Professor Emeritus of the Harvard School of Public Health, writes:

[C]hronological age, as measured in years and months, is not the same as physiological age. There are great individual differences in the physical stamina of older persons, and chronological age is hardly ever a reliable index of that condition. Some boys reach puberty at 11 and others not until 16. Some men are old at 50, others at 75. Mental senescence may come prematurely in some; in others, continued brilliance of intellect defies corporal senility.

The most thorough judicial examination of the relationship between chronological age and employment capacity took place in Hodgson v. Greyhound Lines, Inc. The company was accused by the Secretary of Labor of violating the ADEA by its policy of refusing to consider applicants over the age of 35 for the position of intercity bus driver. The company contended that the age limitation was a "bona fide occupational qualification" since hiring applicants between the ages of 40 and 65 would increase the likelihood of accidents. The district court held that the defendant had failed to demonstrate how ap-

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135 Even the study of Schaie and Strother, supra note 127, at 307, revealed significant individual differences.

136 McFarland, supra note 124, at 1. Welford reports a study of the performance of younger and older workers in three skilled operations at two printing firms. Productivity continued to rise generally to the forties and fifties, and then it declined somewhat, but less than would have been predicted from the results of many experiments. The figures suggest that in most cases the skills concerned take many years to attain full maturity, but that once mastered they show little deterioration with age, or at any rate that compensation can be made fairly well for any deficiencies. The fall of productivity in the older age groups may admittedly have been somewhat greater than the figures indicate because some of the older men contracted out of the incentive scheme and thus furnished no productivity data. These men, many of whom had remained after normal retiring age, tended to be less productive than the rest, but were still regarded as worth employing from an economic point of view.

WELFORD, supra note 105, at 250-31.

137 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975).

Applicants over age 40 would be unable to perform the duties involved. The Court of Appeals for the Seventh Circuit reversed. Speaking through Chief Judge Swiggert, the court held that where the position in question involves responsibility for the lives of many, the company need not show that a substantial number of individuals over age 40 could not perform, but need only demonstrate “a rational basis” for believing that removal of the maximum hiring age would increase the risk of harm to its passengers.

The court then found that defendant satisfied the rational basis test by showing that statistically its safest driver is between 50 and 55 years of age with between 16 and 20 years of experience with Greyhound; that medical examinations could not detect potentially incapacitating diseases; that new drivers are put on the extra-board, less desirable and more demanding routes, i.e., routes which would unduly tax the older novice; and finally, that a Department of Transportation study had revealed that the negative effects of continual driving were more apparent in older drivers.

It is submitted that the court’s application of this standard of minimal rationality to a private company’s concededly discriminatory

140 Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice.

499 F.2d at 863.
141 Id. The court concluded that it would be impossible to achieve this blend of age and experience by hiring an applicant over age 40.
142 Id. at 863-64. The court rejected the Government’s argument that older drivers can compensate for the physical deterioration attendant upon age. Furthermore, the court found that even were it possible to screen out degenerative disabilities, it would be difficult if not impossible for Greyhound to “scrutinize the continued fitness of such drivers on a frequent and regular basis.” Id. at 864. The district court reached the opposite conclusion on the basis of federal regulations which require each driver’s reaction time and driving ability under all weather conditions to be checked periodically. In addition, a physical examination is required every two years up to age 50 and annually thereafter.
354 F. Supp. at 238.
143 499 F.2d at 864. The court explained the rigors of the extra-board:
While on the extra-board the driver is on call twenty-four hours a day, seven days a week with as little as two hours’ notice, to take runs that the more senior regular run drivers do not operate. Often these operations involve odd and irregular hours and, frequently, long charter trips outside the territory served by the regular routes of Greyhound, that may last up to thirty days.

Id.
144 Id. at 865. The court also found that even with the benefit of youth, extra-board drivers had over twice as many accidents per million miles driven than regular run drivers. In light of other studies, however, the advantage of youth remains questionable. See note 131 supra.
hiring policy is unwarranted. A legislative act is normally vested with a presumption of constitutionality. Accordingly, only a rational basis is needed to overcome a challenge. No such presumption of validity should apply, however, to corporate acts, especially where the policy is, at least prima facie, in violation of federal law.

A more disturbing aspect of the Seventh Circuit opinion was its uncritical acceptance of the defendant's justifications. The court reasoned that the district court had imposed too strenuous a burden on Greyhound by requiring it to affirmatively demonstrate the diminished ability of applicants over age 40 and then subjecting the company's proffered excuses to close scrutiny. According to the court of appeals, the standards urged by the Government and adopted by the district court would require Greyhound to experiment with the lives of passengers to establish satisfactory statistical evidence. This view appears exaggerated in light of the evidence adduced at trial.

The district court had found that:

1. The company's statistics show that its drivers over the age of 40 have a better safety record than those under that age.\(^\text{145}\)

2. Many older drivers had served up to 20 years on the extra-board, such practices belying the claim that an age 40 ceiling is necessary. Furthermore, absent from the data submitted by the defendant was a comparison of the accident records of its older and younger extra-board drivers. From this omission the court assumed the better safety record of older drivers applied likewise to the extra-board.\(^\text{146}\)

3. The rejection of applicants over age 40 with interstate bus driving experience on the grounds that they could not be "untrained" and taught the Greyhound method was irrational since the defendant's own driver-witnesses had prior commercial driving experience with large vehicles and had been "untrained." No evidence was submitted showing why younger drivers could be "untrained" but those over 40 could not.\(^\text{147}\)

\(^{145}\) 354 F. Supp. at 236. The district court also noted that during 1968-1971, drivers in the 24 to 40 age group had a substantially higher accident rate than those aged 56 to 60. \(\text{Id.}\)

\(^{146}\) \(\text{Id.}\). The district court found duty on the extra-board less rigorous than did the court of appeals.

Neither regular run drivers nor extra board drivers are permitted to drive more than ten hours and cannot be on duty, including driving, for more than fifteen hours, without at least eight consecutive hours off.

\(\text{Id. at 235.}\)

\(^{147}\) \(\text{Id. at 237.}\)

I cannot accede to a contention which flatly states that all applicants over 40 are
4. During certain peak periods, Greyhound leased drivers from other companies, making such drivers part of its operations. Yet these drivers were not screened and were permitted to drive regardless of age.\textsuperscript{148}

5. The company's own expert testified that the undetectable, potentially incapacitating effects of aging could occur in its own drivers over age 40, yet they were not considered unsafe.\textsuperscript{149}

An alternate phrasing of the rational basis test, appropriate for gauging the constitutionality of legislative classifications of individuals, is that not only must the enactment have "a fair and substantial relation to the object of the legislation," but it must also treat all persons "similarly circumstanced . . . alike."\textsuperscript{150} In Reed v. Reed,\textsuperscript{151} the state statute's preference for males was aimed at reducing the caseload of the probate court. The statute was found objectionable because it sought to achieve this goal through the creation of a legislative preference for one of two classes of people even though both classes were equally entitled to the preference. What amounts to a statutory preference for those below age 65 seems similarly vulnerable since no proof has been presented establishing the existence of their diminished ability.\textsuperscript{152}

Another purported rational basis is purely economic. Retaining older workers until they leave voluntarily is allegedly expensive and unwise. Since it is assumed that most older workers do not wish to retire, fewer jobs would be available, advancements based on seniority would become less frequent, and a large body of workers with obsolescent skills would remain in the labor force. In addition, pension plans presumably would face radical, perhaps costly alteration. In short, inflexible, unadaptable and untrainable and, in effect, that is what I am called upon to do. The defendant has not tendered the necessary statistical evidence to allow for such a finding. The defendant's policy is not based on personal experience or observations of new applicants age 40 or over.

\textit{Id.} at 236.\textsuperscript{148} Id. at 237. The age policy at issue was formulated in 1928. The defendant's officers at trial did not know why that age was originally chosen, but they admitted it was not based on any "surveys, inquiries, research studies, statistical studies or any other study to our knowledge." \textit{Id.} at 238, quoting \textit{Trial transcript} at 564-65.\textsuperscript{149} Id. at 233, \textit{ citing} \textit{Trial transcript} at 384, 394. \textit{See also} Kovarsky & Kovarsky, \textit{supra} note 61, at 894-901.

\textsuperscript{150} F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).\textsuperscript{151} 404 U.S. 71 (1971).\textsuperscript{152} \textit{See In re} Wright's Estate, 177 Cal. 274, 170 P. 610 (1918). This case held that a man could not be denied letters of administration solely on the basis of being 92 years of age. The evidence presented showed the petitioner to be fully capable of administering the estate despite his advanced chronological age.
it is feared that the social ramifications of upsetting this established policy would be enormous.

This speculation regarding the disruption which could be caused by the end of mandatory retirement does not appear to be well-founded. First, it is clear that not all workers would stay on past the customary retirement age and that many would retire voluntarily at such time. Second, evidence suggests that not every position vacated by a retiree is retained for a younger worker. This would appear to undermine the oft-heard basis for eliminating the older worker, i.e., to make room for the young. Third, the supposed difficulty in retraining older workers and assessing their "functional age" is very often an excuse to dismiss the senior employee without further inquiry. A large body of literature on the feasibility of retraining and assessing the capacity of older workers is available. That this evidence has been consistently ignored affords some indication of society's unwillingness to change its perspective on aging. Even if the economic consequences of overturning compulsory retirement were shown to be serious, it is submitted that this should not permit a court to shirk its duty to prevent irrational or invidious classifications.

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153 See Infirm Legislative Judgment, supra note 38, at 1347-52. The author concludes that the anticipated adverse consequences which will attend the demise of mandatory retirement are either nonexistent or greatly exaggerated. His research indicates that:

1. The loss of income to the gross national product caused by the removal of older workers from the labor force has been estimated to be as high as $10 billion annually. Id. at 1347.
2. The effect on employee pension plans of hiring older workers is overstated. Approximately 81% of such plans exclude workers hired beyond a certain age. To handle those workers who remain after the former mandatory retirement age, a variety of arrangements are available to adjust any new age-cost differentials. Id. at 1349-50.
3. The retention of workers beyond age 65 will not stifle the promotion of younger employees since 43% of workers reaching mandatory retirement age would retire without compulsion. Furthermore, seniority does not correlate uniformly with age, many younger workers having more seniority than their older colleagues. Studies have also shown that retiring older workers is not necessary to maintain the younger employees' desire for promotion. Id. at 1350-52.

154 See generally Kossoris, Early Retirement: An Overview, 4 INDUS. REL., May, 1965, at 1, 10-12. Here, surveys of governmental and private employees who had retired early showed a generally favorable attitude toward the decision to retire voluntarily. Recent economic events, however, cast doubts on whether employees will continue to retire voluntarily before the compulsory date. This implies that given the opportunity, they would remain at work longer. A recent article in the Wall Street Journal reported that early retirements for teachers in Ohio dropped 8.8% and only 20% of eligible Chrysler workers were opting for early retirement. General Motors workers, however, were retiring early, as expected. Wall Street Journal, Nov. 11, 1974, at 1, col. 6. Thus, even in difficult economic times, many workers voluntarily retire before the mandatory age, although the numbers are somewhat less than in more prosperous years.


156 For an extensive annotated bibliography of the works in this area see Kelleher & Quirk, Age, Physical Capacity and Work, INDUS. GERONTOLOGY, Fall, 1973, at 80.

157 When the Court decided Brown, segregation was required by law in 21 states and
The medical and psychosocial evidence surveyed indicates that a strong majority of workers over ages 65 or 70 are capable of carrying out their responsibilities until some ill-defined future point. With the overwhelming majority of scientific research revealing no basis whatsoever to generally equate the attainment of age 65 or 70 with diminished employment capacity, it is difficult to see how a state's forcing its employees into retirement solely on the basis of chronological age can satisfy the rational basis standard of equal protection review.

**THE DUE PROCESS CHALLENGE**

Procedural Due Process — Government Employment as a Constitutionally Protected Property Interest

The principle of due process is derived from the laws of England where it was designed to stay the arbitrary hand of the Crown and place the subject under the protection of law. The fifth and fourteenth amendments prohibit the government from depriving a person of an interest in constitutionally protected liberty or property without some kind of hearing prior to the termination of that interest. Nevertheless, this safeguard, known as procedural due process, encompasses only a finite range of interests. The mere fact that one is employed by the government is no guaranty that discharge must conform to procedural due process.

In *Board of Regents v. Roth*, plaintiff was hired for a period of one year as an assistant professor of political science. Before the midway point of the academic year, he was informed without explanation that his contract would not be renewed. He then filed suit in

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164 *See generally* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 652, 651 (1974) (Powell, J., concurring). In this case the use of the rational basis test was advocated to show that mandatory pregnancy leaves after the fourth or fifth month of pregnancy violated equal protection.

[T]he objectionable portions of these regulations appear to be bottomed on factually unsupported assumptions about the ability of pregnant teachers to perform their jobs. The overwhelming weight of the medical testimony adduced in these cases is that most teachers undergoing normal pregnancies are quite capable of carrying out their responsibilities until some ill-defined point a short period prior to term . . . . Thus, it appears that by forcing all pregnant teachers undergoing a normal pregnancy from the classroom so far in advance of term, the regulations compel large numbers of able-bodied teachers to quit work.

*Id.* at 654-55 (footnote omitted).

165 *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 142-74 (1951) (Black & Frankfurter, JJ., concurring).

166 408 U.S. 564 (1972).
the federal district court claiming that he was entitled to a statement of the reasons for his discharge and a hearing on the merits. According to plaintiff, his nonrenewal was in retaliation for his criticism of the university administration.

The Supreme Court held that plaintiff, as a nontenured teacher hired on a year-to-year basis, did not have a constitutionally cognizable interest in reemployment. Writing for the Court, Justice Stewart declared:

It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.\footnote{162}{Id. at 575 (citation omitted).}

To invoke the safeguards of procedural due process, the person affected must have more than a need or desire for the property at issue. He must have a contract or implied promise\footnote{163}{See, e.g., Perry v. Sinderman, 408 U.S. 593 (1972).} entitling him to continued employment. In Roth, the plaintiff's contract provided that his employment terminated at the close of the academic year.

The plaintiff argued that his nonrenewal imposed a stigma upon him that would create substantial adverse effects on his teaching career. His intention was to come within the scope of a series of Supreme Court decisions which have held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."\footnote{164}{Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140-42 (1951).} Nevertheless, the Court held that the fact that nonretention might make him less attractive to prospective employers did not constitute such a stigma.\footnote{165}{408 U.S. at 574 n.13. See generally Schwartz v. Board of Bar Examiners, 358 U.S. 282 (1958) (state refused to allow petitioner to take bar examination because of his membership in the Communist Party 17 years earlier).}

The government employee faced with mandatory retirement is usually tenured, thereby coming within the ambit of the protection afforded by procedural due process. On the other hand, the statutes affecting his employment as a civil servant frequently provide for mandatory retirement at a certain age, thereby negating any expectancy of continued employment. For example, in Gaul,\footnote{166}{See notes 104-05 and accompanying text supra.} the Illinois School Code provided tenure for any teacher completing two consecutive probationary terms. A subsequent paragraph added that such tenure would cease on the teacher's sixty-fifth birthday and that any further employ-
ment must be on an annual basis, thereby making dismissal of the older teacher as easy as that of the plaintiff in Roth. The Court’s recent decision in Arnett v. Kennedy,\textsuperscript{167} however, indicates that the legislature may not readily dilute the strictures of procedural due process affecting tenured civil servants.

In Arnett, a nonprobationary employee of the Office of Economic Opportunity (OEO) was discharged for alleged defamatory statements about other OEO employees. Under the procedures adopted by the Civil Service Commission, the discharged employee had an immediate opportunity to appear before the official vested with power to remove in order to answer the charges made, but a full trial-type hearing was deferred until after the discontinuance of employment.\textsuperscript{168} In dictum, a three-judge plurality stated that the procedures adopted were valid on the ground that the governmental employer, as a condition of employment, could limit the procedural safeguards relating to removal.\textsuperscript{169} The remaining six Justices sharply rejected this view; to them the issue was whether the Commission’s procedures satisfied the requirements of procedural due process. Concurring in the result reached by the plurality, Justice Powell found their approach to procedural due process incompatible with the principles set forth in Roth in that it would permit the deprivation of a protected property interest without notice or an opportunity to be heard at any time. He continued:

This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace, but by constitutional guarantee. \ldots [The legislature] may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.\textsuperscript{170}

It should be obvious that this reasoning should apply not only to the termination of employment but also to the revocation of tenure. If this were not so, an employee, once tenure has been revoked, could be simply and expediently removed by the nonrenewal of his “annual” contract. Of course tenure and employment may be conditioned upon such factors as continued competent performance and avoidance of

\textsuperscript{167} 416 U.S. 134 (1974).
\textsuperscript{168} See id. at 142-44 & nn.8-13.
\textsuperscript{169} Id. at 170.
\textsuperscript{170} Id. at 167. Justice Powell went on to find that the 30-day notice of intent to discharge coupled with a right to answer the reviewing officer and obtain a trial-type hearing on appeal satisfied the dictates of procedural due process. Id. at 170-71. Justice White, in a separate opinion, agreed with this view. Id. at 185. Justices Marshall, Douglas, and Brennan rejected not only the plurality’s view that the legislature could fashion due process statutorily, but also the concept that the evidentiary hearing could be held after dismissal. Id. at 206-27.
criminal activity. It is the very purpose of a due process hearing to establish whether facts which merit termination exist. Yet, if age 65 or 70 is deemed a sufficient basis for termination regardless of the individual's capacity, the sole purpose of such a hearing would be to allow the worker to disprove his age.\textsuperscript{171}

\textbf{Substantive Due Process — Constitutionality of Conclusive Presumption of Incapacity}

It appears unjust to allow the employee charged with having a debilitating physical condition or being generally incompetent to rebut these charges by showing his actual ability and at the same time deny such opportunity to the unblemished worker who happens to reach 65 or 70. A series of recent Supreme Court decisions indicates that such an anomaly violates evolving concepts of \textit{substantive} due process. Under these holdings, even though the employee lacks a specifically protected interest under the first, fifth, or fourteenth amendments, the government may not ignore his individual ability and dismiss him on the basis of an irrebuttable presumption of incapacity when such presumption is shown to lack general validity.\textsuperscript{172}

In \textit{Cleveland Board of Education v. LaFleur},\textsuperscript{173} the Court held unconstitutional the unpaid mandatory pregnancy leave regulations of two school boards. These regulations had required the teacher to leave work after either the fourth or fifth month of pregnancy. Since some teachers become physically incapable during the latter stages of pregnancy, the school boards argued that the regulations were reasonable measures to insure the welfare of mother and child as well as the physical capabilities of teachers in the classroom.

The medical evidence presented by both sides undermined the school board's position. The ability of any particular pregnant woman to work past a fixed time in her pregnancy was very much an individual matter.\textsuperscript{174} Lacking proof to sustain the general validity of the regulations, the Court, using due process analysis, relied upon two grounds to nullify them.

First, they exacted a needless penalty from the teacher who chose

\textsuperscript{171} In \textit{In re Wallington's Appeal}, 390 Pa. 416, 135 A.2d 744 (1957), three city policemen requested a hearing to challenge their forced retirement at age 65. The Pennsylvania Supreme Court found little use for a hearing, observing:

This is not a dismissal, based upon misconduct, incompetence, or political affiliation, but retirement based upon age limitation. The only useful purpose a hearing could serve, would be a denial of their age.

\textit{Id.} at 418, 135 A.2d at 745.

\textsuperscript{172} See generally \textit{Substantive Due Process}, supra note 93, at 1647-53.

\textsuperscript{173} 414 U.S. 632 (1974).

\textsuperscript{174} \textit{Id.} at 645-46.
to bear a child. In so doing, the rules constituted a governmental in-
trusion into matters of marriage and family life which are afforded stringent protection under the due process clause.\textsuperscript{175} Second, and on the issue of mandatory retirement more significant, the rules amounted to a conclusive presumption of physical incapacity applicable in the face of medical evidence demonstrating the individual's continued capacity. In words that are strikingly applicable to the mandatory retirement situation, Justice Stewart wrote:

Even assuming, \textit{arguendo}, that there are some women who would be physically unable to work past the particular cut off dates embodied in the challenged rules, it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the Cleveland and Chesterfield County regulations will allow. Thus, the conclusive presumption embodied in these rules . . . is neither "necessarily [nor] universally true," and is violative of the Due Process Clause.\textsuperscript{176}

An argument might be made that the conclusive presumptions challenged in \textit{LaFleur} were constitutionally offensive only because they impinged on a fundamental right, namely, the right to bear children. The argument would continue, therefore, that conclusive presumptions impinging on tenured employment would not be constitutionally offensive since no fundamental right is involved. Such a restrictive interpretation draws apparent support from the Court's conclusion: "[W]e hold that the mandatory termination provisions . . . violate the Due Process Clause of the Fourteenth Amendment, because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty."\textsuperscript{177}

Closer analysis, however, reveals that this interpretation is without merit. The \textit{LaFleur} Court used the words "protected constitutional liberty." As was seen in \textit{Roth}, tenured employment, although admittedly not a recognized fundamental right, is nevertheless a constitutionally protected property interest under the due process clause.\textsuperscript{178}

\textsuperscript{176} \textit{Id.} at 644-46. Justice Rehnquist, dissenting in \textit{LaFleur}, recognized the potential impact of the Court's decision on the area of compulsory retirement regulations: "[T]he Court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees." \textit{Id.} at 659.
\textsuperscript{177} \textit{Id.} at 651.
\textsuperscript{178} In \textit{Hostrop v. Board of Junior College Dist. No. 515}, 471 F.2d 488 (7th Cir. 1972), \textit{cert. denied}, 411 U.S. 967 (1973), a college president, fired without a hearing on the basis of allegedly circulating a confidential memorandum proposing that the college's ethnic study program be changed, was held to have been deprived of a property interest without due process of law. The court noted that since his contractual term had not
An even more powerful rebuttal is the Court's holding in *Vlandis v. Kline.* In *Vlandis*, the petitioners challenged a state statute which regulated the tuition rates at the state university where nonresidents were required to pay higher tuition than state residents. The petitioners attacked as unconstitutional the provision that if the student was married and a nonresident at the time of his application, he was conclusively presumed to be a nonresident during his entire career at the university and thus denied the opportunity to demonstrate that he had become a bona fide resident. The Court agreed with the petitioners. Writing once again for the Court, Justice Stewart reasoned that:

"[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates."  

Neither the in-state tuition rates nor the obtaining of a higher education constituted a fundamental interest, nevertheless the Court held that the government could not withhold the lower rates on the basis of conclusive presumptions of inability to meet the required standards.

The Fifth Circuit, in *Thompson v. Gallagher,* anticipated the Court's reasoning in *LaFleur* when it struck down under the due process clause a city ordinance possessing many of the characteristics of a mandatory retirement statute. Plaintiff Thompson was the custodian at the city diesel plant. Five weeks after he had commenced work at the plant, the city council passed a resolution requiring that all city employees who were veterans possess an honorable discharge. 

It can be argued that older workers subject to mandatory retirement have no expectation of continued employment past the specified age. However, as *LaFleur* and *Arnett* indicate, the state can neither act arbitrarily by statute or contract nor circumvent constitutional mandates through artful draftsmanship. See also Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973), discussed in text accompanying notes 181-87 infra.


410 U.S. at 452. See also Stanley v. Illinois, 405 U.S. 645 (1972) (irrebuttable presumption that all unwed fathers were unfit to raise their children); Carrington v. Rash, 380 U.S. 89 (1965) (irrebuttable presumption that all servicemen stationed in Texas, not Texas residents prior to induction, were nonresidents for local voting purposes as long as they remained in the military).

489 F.2d 443 (5th Cir. 1973).
The day after the resolution was passed Thompson was fired. He had left the Army with an undesirable discharge. Although such a discharge is not honorable, it is not dishonorable and can be issued for security considerations and causes such as homosexuality, financial irresponsibility, and bed-wetting.\textsuperscript{182}

According to Thompson, many of the reasons for which a less than honorable discharge could be received bore no rational relation to the responsibilities of a plant custodian. Therefore, he argued that his summary termination was a taking in violation of his right to due process. The city countered that it had a strong interest in maintaining the quality of its work force and a less than honorable discharge signified, if not criminal behavior, at least antisocial characteristics.\textsuperscript{183} In an unreported decision, the district court "wholeheartedly" agreed with the defendant's contentions and entered judgment for the city.\textsuperscript{184} Thompson appealed to the Court of Appeals for the Fifth Circuit.

The court of appeals felt the issue before it to be whether, in the absence of a specifically defined constitutional right, due process of law protects the governmental employee from arbitrary dismissal.\textsuperscript{185} In holding that it did, the court, through Judge Morgan, stated:

Just as a public employee does not give up his First Amendment rights when he begins receiving a pay check from the government, neither does he give up his right to due process of law. The Fourteenth Amendment stands for the proposition that the government must act, when it acts, in a manner which is neither arbitrary nor unreasonable.\textsuperscript{186}

Having decided that the city's sweeping dismissal of all veterans with less than honorable discharges must be rationally justifiable, the court turned its attention to the justifications proffered by the city. Although maintaining the quality of the work force was a legitimate governmental interest, the court agreed with Thompson's contention that numerous factors leading to a less than honorable discharge bore no relationship to one's ability to function as a plant custodian. In a

\textsuperscript{182} Id. at 448-49.  
\textsuperscript{183} Id. at 448.  
\textsuperscript{184} See id.  
\textsuperscript{185} Id. at 447. The court politely distinguished, as not coming to grips with the issues in the instant case, Judge (later Justice) Holmes' rejection of a policeman's assertion that he had been dismissed for exercising his first amendment rights. Judge Holmes wrote: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Id. at 446, quoting McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).  
\textsuperscript{186} 439 F.2d at 447.
Due Process Infirmities

The due process implications of Roth, Arnett, LaFleur, Vlandis, and Thompson suggest that mandatory retirement statutes, as presently constituted, are constitutionally defective.\(^{188}\) Nothing in these cases, however, prevents a government from employing effective tests of job performance and expeditious termination hearings which meet the requirements of substantive and procedural due process. But since medical evidence establishes that decrements in work capacity are not in the exclusive domain of any particular age group, it should be recognized that setting up rigorous tests for only those over the former compulsory retirement age might violate equal protection.

\(^{187}\)Id. at 449. Accord, Beazer v. New York City Transit Auth., Civil No. 72-5307 (S.D.N.Y., Aug. 6, 1975) (blanket refusal to employ former heroin addicts enrolled in methadone maintenance programs violates equal protection and due process clauses).

The Thompson court also found the statute to discriminate irrationally against veterans since there was no city ordinance limiting employment to only those individuals who were, for example, good security risks or nonhomosexuals. 489 F.2d at 449. The court noted that not all the grounds for which one might receive a less than honorable discharge were necessarily impermissible as causes for dismissal. But to be constitutionally valid, the court cautioned that the ordinance should enumerate the characteristics deemed conducive to competent performance making them part of a comprehensive plan excluding all those lacking the specified characteristics. Id.

\(^{188}\)Although LaFleur did cause the Court of Appeals for the District of Columbia to reverse a dismissal of a challenge to the mandatory retirement of federal employees at age 70, Weisbrod v. Lynn, 494 F.2d 1101 (D.C. Cir. 1974) (per curiam), the Supreme Court’s dismissal of the appeal in McIvaine v. State Police, 454 Pa. 129, 309 A.2d 301 (1973), appeal dismissed, 415 U.S. 986 (1974), discussed in notes 8-19 and accompanying text supra, has led the district court in Weisbrod once again to dismiss the case. 383 F. Supp. 933 (D.D.C. 1974) (mem.) (three-judge court), aff’d mem., 420 U.S. 940 (1975). The district court reasoned that the Supreme Court could not have been unaware of the implications of LaFleur, and since the dismissal for want of a substantial federal question is binding on the merits, the district court was obligated to dismiss unless the two cases were not analogous. Since both cases involved mandatorily retired employees who claimed they were fully competent, the court held that the McIvaine precedent was binding. 383 F. Supp. at 937. See note 10 supra. The precedential value of such dismissals is discussed in the text accompanying notes 20-32 supra. Whether other courts will follow the example of the district court in Weisbrod remains to be seen. At the time of this writing, Gault v. Garrison, Civil No. 74-C-931 (N.D. Ill., May 22, 1974) (mem.) (statute requiring retirement of teacher at age 65 upheld), is on appeal to the Seventh Circuit. See id., appeal docketed, No. 74-1579, 7th Cir., June 20, 1974.
CONCLUSION

Since the early twentieth century, the older worker has been increasingly viewed as the least efficient member of the work force. Industry's attitude toward the aged employee finds its counterpart in society's generally negative stereotyping of the elderly. The courts too have succumbed to the popular perspective on aging. The defect in the perspective is that it views aging as a degenerative process, elevating the physical advantages of youth over the experiential advantages of age.

There will indeed be a social cost factor if mandatory retirement statutes are overturned. Yet, the dimensions of this cost defy quantification. The data examined in this Note indicate that a large-scale social disruption will not follow the replacement of mandatory retirement with another program. In actuality, there are strong reasons to encourage the older worker to remain in the work force. With the number of the aged increasing, a corresponding increase in the tax burden will be felt by younger workers as social security costs rise.

The materials discussed in this Note reveal that the overwhelming concern for the aged is focused upon their level of social security or retirement benefits. These older and often able employees have been denied by the courts an opportunity to demonstrate their individual abilities even though pregnant teachers, women, less than honorably discharged veterans, and former heroin addicts may not constitutionally be denied this opportunity. It would appear that the availability of certain retirement benefits to the older governmental employee no more justifies his mandatory expulsion from the labor force than did the availability of welfare, unemployment, or similar "benefits" to the above-mentioned classes of individuals. In sum, it is submitted that the obligatory retirement of older workers simply does not withstand rational analysis.

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189 See notes 153-55 and accompanying text supra. It may be argued, however, that the rationale which would bring about the fall of age-based retirement would likewise presage the end of age minimums on voting and obtaining drivers' licenses. See Oregon v. Mitchell, 400 U.S. 112 (1970) (Congress cannot reduce the voting age in local and state elections from 21 to 18). Yet such results are far from being automatic since the issues involved in other age-based statutes are inherently distinct from those involved in other mandatory retirement and hence must be decided on their individual merits.


191 Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), discussed in note 105 supra.

192 See Beazer v. New York City Transit Auth., Civil No. 72-5307 (S.D.N.Y., Aug. 6, 1975).