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# Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus

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*The consensus in the legal academy and in the courts is that the window of opportunity for bringing a successful equal protection challenge to age discrimination closed decades ago. This Article challenges that conclusion by showing how current Supreme Court precedent creates an opportunity for certain forms of age discrimination to be found to violate the Fourteenth Amendment's equal protection guarantees. In doing so, this Article calls into serious question legislation that uses age classifications in ways that undermine older adults' important rights. For example, it challenges the permissibility of elder abuse legislation that limits the informational and substantive privacy rights of persons once they reach an advanced age. By demonstrating the new viability of a form of legal challenge long presumed to be unproductive, this Article outlines potential legal strategies for those who would challenge age discrimination in the courts. It also warns policymakers that the courts may refuse to tolerate the cavalier use of age-based classifications.*

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*When I was young I was called a rugged individualist. When I was in my fifties I was considered eccentric. Here I am doing and saying the same things I did then and I'm labeled senile.*

— George Burns<sup>1</sup>

#### INTRODUCTION

For decades, both the legal academy and the courts have assumed that — unlike classifications based on race or gender — classifications based on age do not offend constitutional equal protection guarantees. Consistent with this assumption, chronological age is seen as an expedient and acceptable proxy for a variety of underlying human characteristics that policymakers wish to target for public policy interventions, and age-based criteria continue to be entrenched in U.S. public policy.<sup>2</sup> For example, one must be twenty-one to consume alcohol legally and sixty-five to become eligible for general Medicare.<sup>3</sup> Chronological age criteria employed in statutes can also dictate the ability of an individual to invoke statutory protection from employment discrimination, the criteria for retaining a driver's license, or even the extent to which patients may communicate privately with physicians.<sup>4</sup>

The understanding that age-based classifications are constitutionally permissible stems in large part from the U.S. Supreme Court's 1976 decision in *Massachusetts Board of Retirement v. Murgia*.<sup>5</sup> In *Murgia* the Court rejected the claim that Massachusetts' mandatory retirement age for state police officers violated the officers' right to equal protection. The Court reasoned that “uniformed state police officers over 50” did not constitute a suspect class for purposes of equal protection analysis.<sup>6</sup> By the early 1980s, after the Supreme Court affirmed

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<sup>1</sup> JUST YOU AND ME KID (Columbia Pictures 1979) (featuring George Burns).

<sup>2</sup> Robert Hudson has described the prevalence of age-based criteria as a “distinctive” characteristic of U.S. public policy. See Robert B. Hudson, *Contemporary Challenges to Aging Policy*, in THE NEW POLITICS OF OLD AGE POLICY 3, 3 (Robert B. Hudson ed., 2d ed. 2010) [hereinafter Hudson, *Contemporary Challenges*].

<sup>3</sup> See 42 U.S.C.A. § 1395c (2010) (Medicare Part A), 42 U.S.C.A. § 1395o (2010) (Medicare Part B), 42 U.S.C.A. § 1395w-21 (2010) (Medicare Part C), 42 U.S.C.A. § 1395w-101 (2010) (Medicare Part D).

<sup>4</sup> See discussion *infra* notes 272-73 and accompanying text (discussing how mandatory elder abuse reporting laws can undermine doctor-patient confidentiality on account of patients' older age).

<sup>5</sup> 427 U.S. 307 (1976).

<sup>6</sup> *Id.* at 313-14.

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*Murgia's* central holding in considering another form of age-based employment discrimination,<sup>7</sup> a consensus had developed in the legal academy and in the courts: litigants could not successfully employ the Fourteenth Amendment's Equal Protection Clause to attack age discrimination.<sup>8</sup>

This Article argues that this consensus view is wrong: the potentially successful equal protection challenge to age discrimination is merely dormant, not dead. It shows that current Supreme Court precedent actually paves the way for finding that certain forms of age discrimination violate equal protection guarantees. By doing so, it calls into question legislation that uses age classifications in ways that undermine older adults' important rights.

Now is a critically important time to reconsider the permissibility and appropriateness of age-based classifications. Current political conditions are ripe for an expansion of rights-limiting uses of chronological age in public policy. Confronted with significant financial limitations and a burgeoning elderly population, both American policymakers and the American public can be expected to show greater interest in limiting resources available to older adults.<sup>9</sup> Moreover, new and highly problematic uses of such classifications have begun emerging in several important policy areas. For example, as discussed in this Article, growing interest in protecting older adults from abuse and neglect has led to a rapid expansion in age-specific legislation designed to provide special "protections" to older adults that, although well-intentioned, can severely undermine their civil rights.<sup>10</sup>

By resurrecting the possibility of an equal protection-based attack on age discrimination, this Article outlines a viable strategy for litigants to challenge such forms of discrimination in court, but also warns policymakers that the Constitution requires caution when using chronological age criteria in public policy. To this end, the Article

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<sup>7</sup> See *Vance v. Bradley*, 440 U.S. 93, 112 (1979). As noted *infra* in the text accompanying notes 97-99, the modicum of optimism to the contrary that remained after *Vance* was quashed by the Supreme Court's subsequent decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>8</sup> See generally *infra* notes 79-92, 98-99 and accompanying text (discussing development of this consensus).

<sup>9</sup> Cf. Hudson, *Contemporary Challenges*, *supra* note 2, at 17 (remarking on potential for spending on old-age entitlement programs to be reined in under Obama administration).

<sup>10</sup> See Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053, 1058-59, 1067-90 (2009) [hereinafter Kohn, *Outliving*] (discussing legislative approach, and exploring its implications for civil rights, especially those related to privacy).

proceeds in four primary parts. Part I analyzes the *Murgia* decision and how it has been interpreted.<sup>11</sup> Part II shows how *Murgia*'s reasoning is consistent with finding that at least certain age-based classifications warrant intermediate scrutiny.<sup>12</sup> Part III demonstrates that, as the traditional three-tiered approach to judicial scrutiny collapses, a new approach to equal protection jurisprudence is emerging that is consistent with de facto heightened scrutiny for certain age-based classifications. It then shows how using this approach could lead courts to apply heightened scrutiny to statutes limiting the rights of older adults in several key policy areas.<sup>13</sup> Finally, Part IV explores the justifications for age-based public policy, the problems created by using chronological age in public policy schemes, and the social benefits of subjecting age-based classifications to heightened scrutiny.<sup>14</sup>

### I. THE DEVELOPMENT AND IMPACT OF MURGIA

Understanding the *Murgia* decision and how the courts have interpreted its holding is essential to understanding current and future prospects for successful constitutional challenges to age discrimination.<sup>15</sup> Although the Supreme Court had ruled on age-based classifications in earlier cases,<sup>16</sup> in *Murgia* the Court set forth its first, and most significant, discussion of the constitutionality of such classifications. This Part therefore provides a historical overview of the *Murgia* decision and its progeny. Specifically, it shows how a vigorous debate among the Justices as to the nature of rational basis scrutiny shaped the decision's language. It then explores the nature and scope

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<sup>11</sup> See *infra* pp. 217-31.

<sup>12</sup> See *infra* pp. 231-55.

<sup>13</sup> See *infra* pp. 256-78.

<sup>14</sup> See *infra* pp. 278-81.

<sup>15</sup> This Article uses the term "age discrimination" in a value-neutral sense to refer to distinctions based on chronological age. It is recognized that not all situations in which such distinctions occur will warrant the negative connotations normally associated with the term "discrimination." Cf. DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 2 (2008) (using "discrimination" in parallel manner and explaining why).

<sup>16</sup> See *Cannon v. Guste*, 423 U.S. 918 (1975) (mem.) (affirming federal district court decision that had dismissed state employee's challenge to mandatory retirement system on grounds that system clearly satisfied rational basis scrutiny); *Weisbrod v. Lynn*, 420 U.S. 940, 940 (1975) (affirming dismissal of parallel claim); *McIlvaine v. Pennsylvania*, 415 U.S. 986, 986 (1974) (dismissing, for want of substantial federal question, case in which former state policeman sought declaratory judgment stating statute that required he retire at age sixty was, among other things, unconstitutional).

of the three Supreme Court cases that subsequently considered the constitutionality of age classification. Finally, it discusses how the lower courts have applied and interpreted the Supreme Court's age discrimination jurisprudence.

#### A. *The Murgia Decision*

Robert Murgia joined the Uniformed Branch of the Massachusetts State Police at age twenty-five and was eventually promoted to its highest rank.<sup>17</sup> Although otherwise qualified to continue in his job, Murgia was forced to retire upon reaching age fifty because Massachusetts state law required that, with one minor exception, uniformed state police officers retire at that age.<sup>18</sup> By contrast, officers under fifty years of age were subject to job termination only if, after a medical comprehensive examination, they were determined to have a physical or mental incapacity likely to be permanent.<sup>19</sup> Murgia had passed the comprehensive examination four months prior to his mandatory retirement, and it was undisputed that he was physically and mentally able to perform the duties of a uniformed officer.<sup>20</sup>

Murgia challenged the mandatory retirement provision on equal protection grounds and a three-judge panel of the district court found in his favor, striking down the provision as unconstitutional.<sup>21</sup> Murgia had argued that the district court should find that the mandatory retirement provision was based on a suspect classification.<sup>22</sup> The strategy behind this argument was elementary: the Supreme Court had already made it clear that suspect classifications would be strictly scrutinized and would only be permitted in compelling circumstances.<sup>23</sup> Accordingly, had the district court determined that

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<sup>17</sup> Brief for Appellee at 11, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (No. 74-1044), 1974 WL 175951 at \*11 [hereinafter Brief for Appellee].

<sup>18</sup> An officer was allowed not to retire at age fifty in the event that he had performed less than twenty years of service. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 308 n.1 (1976). However, given the age limits for enlisting, such a case would have been most unusual.

<sup>19</sup> *Id.* Such examinations were given biannually until officers reached the age of forty; after forty, a more rigorous examination was required annually. *Id.* at 311.

<sup>20</sup> *Id.*

<sup>21</sup> *Murgia v. Commonwealth Bd. of Ret.*, 376 F. Supp. 753, 754 (D. Mass. 1974).

<sup>22</sup> Brief for Appellee, *supra* note 17, at 17.

<sup>23</sup> See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (holding that classifications based on alienage are "inherently suspect" and, therefore, "subject to close judicial scrutiny"); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (finding race to be suspect class and, therefore, that classifications based on race should be subject to "most rigid scrutiny" and "if they are ever to be upheld, they must be shown to be

the disputed age classification was suspect, this would almost certainly have necessitated a conclusion that the statute was unconstitutional. The district court, however, concluded that it did not need to reach the question of whether the classification was suspect because the statute failed to satisfy even the low standard of review it would apply to a nonsuspect classification — a standard it described as a basic rationality test.<sup>24</sup> Specifically, the district court held that “a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest.”<sup>25</sup>

The case was appealed directly to the United States Supreme Court, which reversed the district court.<sup>26</sup> Among the Supreme Court Justices, the decision to reverse the lower court and uphold the Massachusetts statute was readily reached and largely uncontroversial; all but Justice Marshall voted to reverse.<sup>27</sup> Moreover, all were in agreement that the rational basis test should be applied in reaching this conclusion.<sup>28</sup> There appears to have been no serious interest in applying the intermediate level of scrutiny that the court officially recognized only five months later in *Craig v. Boren*,<sup>29</sup> and that it had already begun applying selectively and informally.<sup>30</sup>

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necessary to the accomplishment of some permissible state objective”). The Supreme Court, however, had not yet articulated strict scrutiny in precisely the way it is defined today. See *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (stating that suspect classifications are only permissible where “precisely tailored to serve a compelling governmental interest”).

<sup>24</sup> See *Murgia*, 376 F. Supp. at 754.

<sup>25</sup> *Id.*

<sup>26</sup> Cf. Howard Eglit, *Mandatory Retirement, Murgia, and Ageism*, in *EMPLOYMENT DISCRIMINATION STORIES* 259, 273-74 (Joel Wm. Friedman ed., 2006) [hereinafter Eglit, *Mandatory Retirement*] (discussing procedure underlying three-judge panel and subsequent direct appeal).

<sup>27</sup> See generally Correspondence from Court regarding *Murgia* decision, in MARSHALL PAPERS, box 165, folder 8 (on file with U.S. Library of Congress) (containing Justices’ extensive communications regarding *Murgia*).

<sup>28</sup> See generally *id.* (showing that despite significant dispute over rational basis scrutiny’s contours, all but one Justice supported its application in *Murgia*).

<sup>29</sup> See generally *Craig v. Boren*, 429 U.S. 190 (1976) (holding that state law limiting sale of “nonintoxicating” beer beverages to males under age twenty-one and females under age eighteen violated constitutional equal protection guarantees).

<sup>30</sup> Most notably, in the 1971 case of *Reed v. Reed*, 404 U.S. 71 (1971), the Court had found unconstitutional an Idaho statute that required the state’s probate court to give males preference over females when appointing estate administrators. While the Court purportedly applied rational basis scrutiny in *Reed*, its language paralleled a modern description of intermediate scrutiny. The Court stated that to survive constitutional scrutiny the Idaho classification must be “reasonable” and must have “. . . a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” *Reed*, 404 U.S. at 76. Consistent with

Despite the general agreement as to the proper disposition of the case, the process of formulating the opinion occasioned tremendous disagreement among the Justices. At the heart of the dispute was the question of how to formulate the rational basis test that the Court applied to nonsuspect classifications.<sup>31</sup> Justice Brennan, who authored the first draft circulated to the conference,<sup>32</sup> favored a robust formulation that would require a classification to have a “fair and substantial relation” — which he treated as synonymous with a “reasonable relation” — to a “legitimate state objective.”<sup>33</sup> On the other side of the debate, Justice Rehnquist fought for a highly permissive standard that would invalidate a classification only if it “‘rests on grounds wholly irrelevant to the achievement of the State’s objectives.’”<sup>34</sup> Rehnquist opposed the “legitimate state objective” language on the grounds that it would encourage the courts to reject statutes with seemingly dubious legislative purposes without adequate judicial consideration.<sup>35</sup> Likewise, Rehnquist objected to characterizing the required relationship as “substantial” or “reasonable,” and argued that the only requirement should be a

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a heightened level of scrutiny, the Court struck down the Idaho statute as unconstitutional despite finding that it could reduce the workload of the probate courts. *Id.* Similarly, in the 1972 case of *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the Court had applied a heightened form of scrutiny to a classification based on illegitimacy of birth.

Of course, whether it had really done so, or whether these cases were evidence of the evolution of the rational basis standard, was part of what the Justices debated in considering *Murgia*.

<sup>31</sup> In his book, *Making Constitutional Law*, Mark Tushnet provides an account of the Court’s decision-making process in *Murgia* that also draws on the Marshall Papers. He describes the court as “hopelessly divided on equal protection theory or at least on the verbal formulations the justices used to describe standards of review.” See MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW* 110 (1997).

<sup>32</sup> In the Marshall Papers, this draft is labeled as the second draft. There is, however, no evidence to suggest that an earlier version was ever circulated and the correspondence amongst the Justices suggests that none was.

<sup>33</sup> See Draft Opinion of Brennan at 8, *Mass. Bd. of Ret. v. Murgia*, (Jan. 27, 1976), in MARSHALL PAPERS, box 165, folder 8, file p. 21 (1976) (on file with U.S. Library of Congress) [hereinafter Brennan Draft].

<sup>34</sup> See Memorandum from J. Rehnquist to Conference at 3-4 (Feb. 11, 1976), in MARSHALL PAPERS, box 165, folder 8, at file pp. 40-41 (1976) (on file with U.S. Library of Congress) [hereinafter Rehnquist, February 11] (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) in support of his position).

<sup>35</sup> See Rehnquist, February 11, *supra* note 34, at 7-12, file pp. 44-49 (suggesting that under Brennan’s formulation of rational basis scrutiny, whether statute would withstand such scrutiny might depend on ability of attorney defending statute to properly frame its purpose).



“rational relation” between the challenged classification and a state objective.<sup>36</sup>

In addition to disagreeing as to the nature of the rational basis test, the Justices disagreed as to the significance that should be placed on what was perceived to be older adults’ “political clout.” In Brennan’s circulated draft, the conclusion that age was not a suspect classification turned, at least in large part, on what it described as the political power of the elderly.<sup>37</sup> However, Brennan garnered little support from his fellow Justices for placing such emphasis on political power. Particular opposition was voiced by Rehnquist and Blackmun in memoranda shared with the conference<sup>38</sup> and by Marshall at length in a first draft of his dissent.<sup>39</sup>

In an attempt to fashion a compromise, Justice Powell assumed responsibility for writing the opinion. Initially, he tackled the disagreement directly with a detailed discussion of the contours of rational basis scrutiny.<sup>40</sup> In the end, however, the Justices reached an agreement not by elucidating the standard to be applied, but by obfuscating it. Powell slashed his lengthy discussion of both rational

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<sup>36</sup> See *id.* at 1-8, file pp. 38-45.

<sup>37</sup> Brennan Draft, *supra* note 33, at 10, file p. 23.

<sup>38</sup> See Correspondence from J. Blackmun to J. Brennan (Mar. 11, 1976), in MARSHALL PAPERS, box 165, folder 8, file p. 56 (1976) (on file with U.S. Library of Congress) (“I share Bill Rehnquist’s concern about the suggestion that political clout is to serve as a test of a suspect classification. It may be a factor to consider in a negative way, but I am hesitant to go beyond that.”); Correspondence from J. Rehnquist to J. Powell at 3 (May 25, 1976), in MARSHALL PAPERS, box 165, folder 8, file p. 104 (1976) (on file with U.S. Library of Congress) (“I would be somewhat concerned if all of your discussion of the relative success of the aged in obtaining their wishes legislatively remained in your opinion the way it is now written.”).

<sup>39</sup> Marshall explained: “While the ability of the burdened class to obtain relief through the legislative process may ultimately eliminate these discriminatory classifications, so long as discrimination is still wide-spread that ability should not reduce to the lowest level the standards by which we judge those classifications that remain.” See Draft Dissent of Justice Marshall at 9, *Mass. Bd. of Ret. v. Murgia*, (Apr. 1, 1976), in MARSHALL PAPERS, box 165, folder 8, file p. 66 (1976) (on file with U.S. Library of Congress) [hereinafter Marshall Draft Dissent]. He also emphasized the slow speed at which the political process works, critiqued the argument that the prevalence of older legislators was relevant to determining the level of scrutiny afforded to age classifications, challenged the notion that passage of the Age Discrimination in Employment Act proved that older workers do not constitute a suspect class, and referred to social science literature questioning the actual political power of older adults. See *id.* at 8-9, file pp. 65-66.

<sup>40</sup> See, e.g., Third Draft of Opinion of J. Powell at 10-15, *Mass. Bd. of Ret. v. Murgia*, (May 19, 1976), in MARSHALL PAPERS, box 165, folder 8, file pp. 88-93 (1976) (on file with U.S. Library of Congress) [hereinafter Powell Third Draft] (providing such discussion).

basis scrutiny and the political power of older adults in favor of a brief opinion that — in Powell’s words — left the Justices “free to ‘fight again another day.’”<sup>41</sup> The result was a muddled and somewhat opaque opinion that finally received the support of seven Justices who, after five months of back-and-forth debate, were apparently eager to dispose of the case. With the exception of Justice Marshall (who dissented) and Justice Stevens (who did not take part in the case’s consideration), the Justices joined Powell’s *per curiam* opinion.

In the final version of the opinion, the Court stated that “rationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection.”<sup>42</sup> The Court explained that strict scrutiny was not warranted because “the class of uniformed state police officers over 50” did not constitute a suspect class.<sup>43</sup> According to the Court, “a suspect class is one ‘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.’”<sup>44</sup> The Court then stated:

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin have not experienced a “history of purposeful unequal treatment” or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.<sup>45</sup>

Applying the rationality approach, the Court upheld the challenged statute. In doing so, the Court appeared to accept the state’s argument that the mandatory retirement age would remove significant numbers of unqualified officers.<sup>46</sup> By contrast, Justice Marshall dissented on the

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<sup>41</sup> See Memorandum from J. Powell to Conference (June 15, 1976), in MARSHALL PAPERS, box 165, folder 8, file p. 141 (1976) (on file with U.S. Library of Congress).

<sup>42</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

<sup>43</sup> *Id.* at 313.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* at 315-16 (“There is no indication that [the challenged provision] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.”); see also *id.* at 316 n.9 (stating that state legislative commission which reported on mandatory retirement provisions prior to their enactment “proceeded on the principle” that maximum retirement age for employees should be that “at which the efficiency of a large majority of the employees in the group is such that it is in the public interest

grounds that the means chosen to obtain the government's objective were too over-inclusive to be constitutionally permissible.<sup>47</sup>

Underscoring the per curiam opinion was a high level of comfort among the Justices with age classifications. The Court seemed lulled into the assumption that age-based classifications are generally well intentioned. Indeed, an earlier draft of the opinion went so far as to state that “[t]here is no basis upon which to assume that state and federal legislatures will not deal fairly with persons as they age and be responsive to their needs.”<sup>48</sup> Nevertheless, the Court explicitly limited its holding to “the class of uniformed state police officers over 50”<sup>49</sup> and did not reach the broader question of whether other age-based classifications might warrant heightened scrutiny.

Although little of the internal debate within the Court is visible in the *Murgia* opinion, the battle helps explain its often unclear and imprecise reasoning. For example, the opinion never clarified whether the state's *actual* purpose in enacting the mandatory retirement policy had to be legitimate, or whether (as Rehnquist had advocated) it would be sufficient for there to be a *hypothetical* legitimate purpose for the policy.<sup>50</sup> More significantly, the Court's description of the class at issue contained verbal inconsistencies.<sup>51</sup> While the Court limited its ruling to the class of “uniformed state police officers over the age of 50,” the Court spoke about the nature of “old age” and not specifically about the nature of being fifty or older in discussing its reasons for applying rational basis scrutiny.<sup>52</sup>

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that they retire”); *id.* at 314 n.7 (repeating state special legislative commission's conclusion that “[n]o argument is needed to demonstrate that men above middle life are not usually physically able to perform such duties”).

<sup>47</sup> *Id.* at 325 (Marshall, J., dissenting).

<sup>48</sup> Fourth Draft of Opinion of J. Powell at 9, *Mass. Bd. of Ret. v. Murgia*, (June 7, 1976), in MARSHALL PAPERS, box 165, folder 8, file p. 129 (1976) (on file with U.S. Library of Congress) [hereinafter Powell Fourth Draft].

<sup>49</sup> See *Murgia*, 427 U.S. at 313.

<sup>50</sup> The opinion states that the rationality test requires that the challenged classification be “rationally related to furthering a legitimate state interest,” but goes on to determine that the statute at issue “furthers the purpose identified by the State.” See *id.* at 312, 314.

<sup>51</sup> Howard Eglit has characterized this portion of the opinion as suffering from “an annoying degree of inexactitude” and containing “confusing phraseology.” See Eglit, *Mandatory Retirement*, *supra* note 26, at 284-85 (noting that, for example, Court erred in describing class as consisting over those over fifty as it also included fifty-year-olds).

<sup>52</sup> See *Murgia*, 427 U.S. at 313-15.

In short, by making no mention of the debate over the nature of rational basis scrutiny,<sup>53</sup> the per curiam opinion was able to reach a relatively uncontroversial disposition despite an unresolved debate over its underlying rationale.

#### B. Murgia's Progeny in the Supreme Court

In three subsequent cases, the Court had the opportunity to clarify and test the limits of its decision in *Murgia*. Three years after *Murgia*, in *Vance v. Bradley*,<sup>54</sup> the Court considered the constitutionality of a provision in the Foreign Service Act of 1946 mandating retirement at age sixty for all employees participating in the Foreign Service retirement system.<sup>55</sup> Although the Court's decision in *Vance* was commonly characterized as slamming the door on future equal protection challenges to age discrimination,<sup>56</sup> *Vance* was not argued to the Court as an age discrimination challenge. Rather, the petitioners argued that the challenged statute impermissibly discriminated on the basis of job classification because Civil Service personnel were not subject to the mandatory retirement requirements to which Foreign Service personnel were subject.<sup>57</sup> It was in this posture that the Court found that the provision furthered a legitimate governmental interest in providing promotion opportunities to newer employees<sup>58</sup> and furthered the "secondary objective of legislative convenience."<sup>59</sup>

Thus, while *Vance* discussed *Murgia*, it did not seize the opportunity to test *Murgia*'s reach. However, *Vance* indicated that the Court remained comfortable with the notion that age-based distinctions are rational. In finding that the policy was rationally related to a legitimate state interest, the Court noted that "age does in fact take its toll" and remarked upon "the common-sense proposition that aging — almost by definition — inevitably wears us all down."<sup>60</sup> The Court did not appear to be bothered by what Justice Marshall, in his dissent, aptly characterized as a "record devoid of evidence that persons of [age

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<sup>53</sup> The Court treated rational basis scrutiny and strict scrutiny as the only available options and treated rational basis scrutiny as a unitary concept despite the Justices' active debate on the matter.

<sup>54</sup> *Vance v. Bradley*, 440 U.S. 93 (1979).

<sup>55</sup> *Id.* at 95-96.

<sup>56</sup> See, e.g., Howard Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, 882-83 (1981) [hereinafter Eglit, *Of Age*].

<sup>57</sup> See *Vance*, 440 U.S. at 97 n.10.

<sup>58</sup> *Id.* at 101.

<sup>59</sup> *Id.* at 109.

<sup>60</sup> *Id.* at 111-12.

sixty] or older are less capable of performing their jobs than younger employees.”<sup>61</sup>

The Court next considered the constitutionality of age discrimination in 1991 in *Gregory v. Ashcroft*.<sup>62</sup> The case challenged a provision in the Missouri state constitution requiring judges to retire at age seventy.<sup>63</sup> At issue was whether the provision satisfied a rational basis test, not whether that was the proper test to apply.<sup>64</sup> Writing for the majority, Justice O’Connor found the provision rationally related to the “legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform.”<sup>65</sup> She explained that “[i]t is an unfortunate fact of life that physical and mental capacity sometimes diminish with age,” and therefore it was rational for Missouri to wish to replace older judges.<sup>66</sup> Most notably, she suggested that a rational basis might exist even if no judges affected by the requirement were incompetent when removed as a result of the provision: “The Missouri mandatory retirement provision, like all legal classifications, is founded on a generalization. It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all.”<sup>67</sup> Although such dicta would suggest that O’Connor believed that very little scrutiny was necessary when assessing the classification, her language was actually consistent with intermediate scrutiny — she identified the government’s interest as “compelling” and declared the provision not merely rational, but “reasonable.”<sup>68</sup>

The most recent Supreme Court decision to interpret *Murgia* and address the constitutional status of age discrimination is *Kimel v. Florida Board of Regents*,<sup>69</sup> which was decided in 2000. At issue in *Kimel* was whether the Age Discrimination in Employment Act (ADEA) abrogated state sovereign immunity and, thus, whether the

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<sup>61</sup> See *id.* at 112 (Marshall, J., dissenting).

<sup>62</sup> *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>63</sup> The Court reached the constitutionality question after concluding that the Age Discrimination in Employment Act (ADEA) did not prohibit such a provision. See *id.* at 470.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 472.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 473.

<sup>68</sup> O’Connor explained that voluntary retirement, impeachment, and the election process might be inadequate mechanisms for removing judges, and concluded that “[m]andatory retirement is a reasonable response to this dilemma.” *Id.* at 472.

<sup>69</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

plaintiffs, employees of state-owned institutions,<sup>70</sup> had standing to sue their former employers under the ADEA. Writing for the Court, Justice O'Connor asserted that the ADEA did not abrogate State sovereign immunity.<sup>71</sup> O'Connor reasoned that although the ADEA contained a clear statement of intent to abrogate, abrogation exceeded Congress's authority under Section 5 of the Fourteenth Amendment because it imposed liability for constitutionally permissible acts.<sup>72</sup>

In concluding that the adverse employment actions complained of by the petitioners were not unconstitutional, O'Connor looked to the earlier Supreme Court cases that had found age discrimination in employment to be constitutional.<sup>73</sup> While purporting merely to summarize past decisions, O'Connor — joined in this portion of the opinion by a majority of the justices<sup>74</sup> — instead made sweeping pronouncements about the permissibility of age discrimination that extended well beyond what the Court had previously endorsed. O'Connor not only endorsed the rational basis test for all age-based classifications,<sup>75</sup> but declared that “age classification is presumptively rational.”<sup>76</sup> O'Connor further asserted that “a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. . . . That age proves to be an inaccurate proxy in any individual case is irrelevant.”<sup>77</sup> Thus, although the narrow holding of the *Murgia* opinion created an opportunity for the Court to refine its treatment of age-based classifications in a

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<sup>70</sup> In *Kimel*, the Court reviewed an appeal of the Eleventh Circuit decision that considered three separate age discrimination appeals. *See id.* at 71.

<sup>71</sup> *See id.* at 67.

<sup>72</sup> *Id.* Justice Thomas, joined by Justice Kennedy, dissented as to whether there was a clear intent to abrogate, but joined the section of the O'Connor opinion addressing the constitutional status of age discrimination. *See id.* at 99-109 (Thomas, J., dissenting). Thus, a majority joined the portions of the opinion addressing the constitutional status of age discrimination.

<sup>73</sup> *See id.* at 83-86.

<sup>74</sup> Justices Stevens, Souter, Ginsburg, and Breyer dissented on the grounds that neither the Eleventh Amendment nor the doctrine of sovereign immunity limit Congress's ability to authorize “federal remedies against state agencies that violate federal statutory obligations.” *Id.* at 93. Their separate opinion, concurring in part and dissenting in part, did not comment on O'Connor's discussion of the constitutionality of age discrimination.

<sup>75</sup> *Id.* at 83-84 (stating that “as we recognized in *Murgia*, *Bradley*, and *Gregory*, age is not a suspect classification under the Equal Protection Clause” and that “[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest”).

<sup>76</sup> *Id.* at 84.

<sup>77</sup> *Id.*

careful, incremental manner,<sup>78</sup> the Court failed to capitalize on this opportunity in its subsequent age discrimination opinions. Rather, *Vance*, *Gregory*, and *Kimel* reveal a Court willing to embrace *Murgia*'s language in a sweeping manner without significant further reasoning.

### C. *Murgia's Progeny in the Lower Courts*

Similar to Justice O'Connor's opinion in *Kimel*, the lower courts have broadly embraced the notion that *Murgia* and its Supreme Court progeny foreclose the possibility of applying heightened scrutiny to age-based classifications.<sup>79</sup> Despite the fact that the *Murgia* Court was

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<sup>78</sup> Cf. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (praising judicial minimalism as creating the opportunity for deliberate, incremental judicial decisions that leave space for democratic deliberation).

<sup>79</sup> Since *Murgia*, all of the circuit courts have decided age discrimination cases that turned on *Murgia*. All have, at least in name, applied rational basis scrutiny. See *Gary v. City of Warner Robins*, 311 F.3d 1334, 1337, 1339 (11th Cir. 2002) (applying rational basis scrutiny to uphold law barring persons under age of twenty-one from entering establishments that sell alcohol but not food); *Breck v. Michigan*, 203 F.3d 392, 397 (6th Cir. 2000) (holding that Michigan legislation rendering persons seventy years of age and older ineligible for judicial office did not violate equal protection because it was rationally related to "judicial efficiency and reducing partisan appointments of judges"); *Weber v. Strippit, Inc.*, 186 F.3d 907, 911 (8th Cir. 1999) (holding that party's right to equal protection was not violated when opposing party used its peremptory challenges to strike older jurors based on their ages because age classifications do not warrant heightened scrutiny); *Riggin v. Office of Senate Fair Emp't Practices*, 61 F.3d 1563, 1571 (9th Cir. 1995) (indicating that statute requiring police officers to retire at fifty-five did not violate equal protection guarantees because "[t]here is no plausible basis for distinguishing this case from *Murgia*, or from the Supreme Court's subsequent decision in [*Vance*]"); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 472-73 (1st Cir. 1990) (finding that demotion of older newscast reporter to allow hiring of younger woman did not amount to equal protection violation based on age since rational basis test was satisfied); *Thomas v. U.S. Postal Inspection Serv.*, 647 F.2d 1035, 1037 (10th Cir. 1981) (holding that postal service policy limiting age of new postal inspectors to thirty-four was rationally related to need for comparatively young, strong, and vigorous personnel in law enforcement departments); *Alford v. City of Lubbock*, 664 F.2d 1263, 1266-67 (5th Cir. 1980) (upholding Texas's municipal retirement system policy of withholding membership from employees hired after age fifty because of its rational effort to promote State's objective of encouraging and rewarding long service among municipal employees); *Kuhar v. Greensburg-Salem Sch. Dist.*, 616 F.2d 676, 679 n.6 (3d Cir. 1980) (upholding school district's forced mandatory retirement policy at sixty-five because it satisfied rational basis test); *Palmer v. Ticcione*, 576 F.2d 459, 462-63 (2d Cir. 1978) (holding that state compulsory retirement system that required teachers to retire at age seventy satisfied rational basis test and was "immune from constitutional attack"); *Arritt v. Grisell*, 567 F.2d 1267, 1272 (4th Cir. 1977) (upholding eighteen- to thirty-five-year-old age limitation for police officer applicants since restriction was rationally related to legitimate purpose); *Gault v. Garrison*, 569 F.2d 993, 995 n.4 (7th Cir.

explicit in only ruling on the permissibility of using a class consisting of officers over fifty,<sup>80</sup> the lower courts have routinely cited *Murgia*'s age-related language for the proposition that all age-based classifications warrant only rational basis scrutiny. In language characteristic of this approach, for example, the First Circuit described *Murgia* as holding that the "aged do not constitute a suspect class"<sup>81</sup> and that all "constitutional age discrimination claims are subject to the rational basis test, rather than strict or even intermediate-level scrutiny."<sup>82</sup> Similarly, the Third Circuit has cited *Murgia* for the proposition that the "Supreme Court has determined that classifications based on age do not burden a suspect class."<sup>83</sup>

Consistent with such broad interpretations of *Murgia*, the federal appellate courts have easily upheld a range of age-based distinctions in the employment context.<sup>84</sup> The notable exception is the Seventh Circuit's 1977 decision in *Gault v. Garrison*.<sup>85</sup> In *Gault*, the Seventh Circuit considered an equal protection challenge to a statute that terminated tenure of public school teachers at age sixty-five.<sup>86</sup> While the court concluded that *Murgia* required the application of rational basis scrutiny,<sup>87</sup> it nevertheless found that the plaintiff had stated a claim under the Fourteenth Amendment.<sup>88</sup> The court's decision turned on its determination that the state had failed to show that the policy rationally furthered "some identifiable and articulable state purpose."<sup>89</sup>

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1977) (refusing to apply heightened scrutiny to equal protection challenge of statute that terminated tenure of public school teachers at age sixty-five, and stating that "[w]e are compelled to decline plaintiff's invitation [to apply heightened scrutiny] as *Murgia* is clearly dispositive in this regard").

<sup>80</sup> Accord Martin Lyon Levine, *Comments on the Constitutional Law of Age Discrimination*, 57 CHI.-KENT L. REV. 1081, 1100 (1981) (describing *Murgia* opinion as largely dicta).

<sup>81</sup> *Izquierdo Prieto*, 894 F.2d at 471.

<sup>82</sup> *Id.*

<sup>83</sup> See *Dungan v. Slater*, 252 F.3d 670, 675 (3d Cir. 2001). Notably, *Gregory* has also been subject to such broadly sweeping characterization. See *Breck*, 203 F.3d at 395 (citing *Gregory* for proposition that "age is not a suspect classification under the Equal Protection Clause . . .").

<sup>84</sup> See *supra* note 79 and accompanying text.

<sup>85</sup> 569 F.2d 993 (7th Cir. 1977).

<sup>86</sup> The Seventh Circuit described two ways in which equal protection was denied on the basis of age: first, tenure was denied on the basis of age; second, procedural safeguards were denied on the basis of age. See *Gault*, 569 F.2d at 995.

<sup>87</sup> *Id.* at 995 n.4 (stating that "[w]e are compelled to decline plaintiff's invitation [to apply heightened scrutiny] as *Murgia* is clearly dispositive in this regard").

<sup>88</sup> See *id.* at 997 (reversing and remanding lower court's decision dismissing case).

<sup>89</sup> See *id.* at 996-97; see also *id.* at 997 (Barnes, J., concurring).



The court explained that in *Murgia* the state clearly stated the purpose of its mandatory retirement provision, whereas in *Gault* the state failed to identify the purpose of its requirement.<sup>90</sup> The court further noted that even if it could assume that the state's purpose was to prevent retention of unfit teachers, it would still deem the statute unconstitutional because there was no evidence to indicate "any relationship between the attainment of the age of 65 and a schoolteacher's fitness to teach" and "[w]e cannot assume that a teacher's mental faculties diminish at age 65."<sup>91</sup>

Despite the potential persuasiveness of its reasoning, *Gault* remains a rare exception to an otherwise well-established approach to Fourteenth Amendment age discrimination challenges.<sup>92</sup> Similarly,

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<sup>90</sup> *Id.* at 996 (majority opinion).

<sup>91</sup> *Id.* at 996. The Court distinguished *Murgia* on the grounds that the risk of unfitness was more significant in that case:

Because of the nature of the duties required of the policemen in [*Murgia*] and the imminent possibility of unfitness shown to be related to advancing age, failure to perform properly in any given instance could become a matter of life or death. In contrast, if a teacher becomes unfit, whether because of age or other factors, it does not become a matter of such immediacy that there is no time or opportunity to take appropriate procedural steps for his or her removal. If the procedures normally taken for the removal of an allegedly unfit teacher are used, there is greater assurance that unfit teachers will be removed while the rest will be able to continue performing their jobs, putting to use the experience and knowledge gained over the years.

*Id.*

<sup>92</sup> Only a handful of other cases at any level have deemed age-based classifications to be irrational, and even then, they have characterized the classification as one other than age. In *Industrial Claim Appeals Office of Colorado v. Romero*, 912 P.2d 62 (Colo. App. 1996), the court held that a statute which reduced worker's compensation benefits for claimants age sixty-five or older with permanent total disabilities failed to withstand rational basis scrutiny. However, the decision turned more on the distinction the statute made between types of claimants than the distinction it made based on age. Specifically, the Court stated that: "[the challenged law] is not rationally related to achieving those purposes because it eliminates benefits for totally disabled claimants who are age sixty-five or older, but provides such benefits for partially disabled claimants of the same age." See *Romero*, 912 P.2d at 69. In a parallel case, *State ex rel. Boan v. Richardson*, 482 S.E.2d 162 (W. Va. 1996), the West Virginia Supreme Court of Appeals held that a statute that required reduction of permanent total disability benefits if a claimant also received old-age Social Security benefits created an irrational classification because: (1) the classification bore no reasonable relationship to the government's purpose of avoiding duplication of benefits; and (2) it failed to treat equally all persons within the class of old age social security recipients. *Id.* at 171.

attempts to use state constitutions to challenge age discrimination also have been generally unsuccessful.<sup>93</sup>

The fact that equal protection challenges have been widely unsuccessful, however, does not necessarily indicate that all future constitutional challenges to age discrimination claims will fail. Despite the broad pronouncements about *Murgia's* reach, almost all cases in which courts have considered the constitutional permissibility of age discrimination after *Murgia* have been employment discrimination cases.<sup>94</sup> In those rare cases considering the constitutionality of age discrimination outside of the employment context, the challenged classifications have almost always been based on young age, not old age.<sup>95</sup> The result is that the courts have yet to really grapple with applying rational basis scrutiny in cases alleging that age discrimination involving older adults in non-employment contexts — for example, health care — violates constitutional equal protection guarantees. As will be discussed in Parts II and III, this has significant implications and leaves the door open — or at least ajar — to age discrimination claims outside of the employment context.

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<sup>93</sup> See Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1077-82 (2003) (reporting that age-based classifications are generally considered to be “perfectly constitutional” by state courts considering such challenges). *But see, e.g., Arneson v. State*, 864 P.2d 1245, 1249 (Mont. 1993) (invalidating state statute that differentially allocated pension benefits based on chronological age).

<sup>94</sup> See cases cited *supra* note 92.

<sup>95</sup> See, e.g., *Gary v. City of Warner Robins*, 311 F.3d 1334, 1337-39 (11th Cir. 2002) (employing rational basis scrutiny in holding that ordinance barring persons under age of twenty-one from entering “non-eating establishments” did not violate young nude dancer’s right to equal protection); *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242 (7th Cir. 1989) (holding that neither minors nor mentally incapacitated are either suspect or quasi-suspect classes; that rational basis scrutiny applies when considering constitutionality of tolling provision that allegedly discriminated against them; and that challenged statute did not violate mentally incapacitated minor’s right to equal protection); *Gabree v. King*, 614 F.2d 1 (1st Cir. 1980) (upholding state law raising drinking age to twenty against equal protection challenge and, in so doing, applying rational basis scrutiny); *Felix v. Milliken*, 463 F. Supp. 1360, 1363, 1389 (E.D. Mich. 1978) (upholding state constitutional amendment that raised legal age for buying and drinking alcohol against equal protection challenge); see also *Weber v. Strippit, Inc.*, 186 F.3d 907, 911 (8th Cir. 1999) (reaching substantially same conclusion as *Lawler*); *Lawler v. MacDuff*, 779 N.E.2d 311, 319 (Ill. App. Ct. 2002) (holding that it is permissible for party to engage in age discrimination in striking juror of advanced age during voir dire because “under neither state nor federal law are the aged a class to which heightened scrutiny applies”).

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D. *Part I Summary*

*Murgia* has been interpreted more broadly than its narrow holding would require. Nevertheless, *Murgia* and its Supreme Court progeny should not be read as precluding the lower courts from entertaining the possibility that certain forms of age classification warrant some degree of heightened scrutiny or the possibility that some such classifications may not be rational. This is particularly true outside of the employment discrimination context because the Supreme Court has yet to consider an age discrimination challenge outside that context. As a result, the Court has not had the opportunity to show how it would apply its equal protection jurisprudence to age discrimination cases in which older adults are disadvantaged with regard to other, potentially more compelling, interests. Moreover, since age discrimination claims in the federal courts — particularly those brought by older adults — have likewise focused almost entirely on age discrimination in employment, most circuits' own precedent does not preclude entertaining such arguments.

II. THE CASE FOR INTERMEDIATE SCRUTINY

In the years immediately following *Murgia*, many scholars and advocates remained hopeful that the decision might be confined to certain types of mandatory retirement situations.<sup>96</sup> Even after *Vance*, there was some lingering optimism. For example, writing in 1981, Martin Lyon Levine explained that while *Murgia* and *Vance* “reveal judicial unreceptivity to the constitutional claims they discuss, as a matter of precedent the issues of age discrimination remain open for another day even for the elderly.”<sup>97</sup> It has been many years, however, since there has been any significant attempt to treat the issue as an open one.<sup>98</sup> Although criticisms of *Murgia* remain, the conventional

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<sup>96</sup> See, e.g., Leslie W. Abramson, *Compulsory Retirement, The Constitution and the Murgia Case*, 42 MO. L. REV. 25, 51 (1977) (arguing that “[a] different result might well occur where the characteristics relevant to employment were those other than physical strength”); John David Price, Comment, *Constitutional Law — Equal Protection — State Mandatory Retirement Law Not Violative of the Equal Protection Clause*, 48 MISS. L.J. 135, 142 (1977) (suggesting that *Murgia* might not preclude findings that all mandatory retirement laws were unconstitutional because majority considered need for physical strength by policemen in *Murgia*).

<sup>97</sup> Levine, *supra* note 80, at 1103.

<sup>98</sup> The closest is a student comment from 1995 in which the author attempted to make the case for heightened scrutiny on the grounds that *Murgia* is unsound because it was decided six months prior to the Court “officially” creating intermediate scrutiny. See Julie R. Steiner, Comment, *Age Classifications and the Fourteenth*

wisdom among both scholars and courts is that the Supreme Court has closed the door on future challenges to the constitutionality of age-based classifications. Howard Eglit's writing exemplifies this approach. While he recognizes that the Court's precedent on age discrimination has been limited to the employment context, Eglit has characterized *Murgia* and *Vance* as "leav[ing] virtually no room for successful future challenges to mandatory retirement; indeed the breadth of the decisions makes successful equal protection or due process challenges to age distinctions in any context extremely dubious."<sup>99</sup>

Although the Supreme Court is extremely reluctant to recognize new quasi-suspect classifications,<sup>100</sup> there are excellent reasons for the Court to reject its earlier dicta that all age-based classifications warrant only rational basis scrutiny and to hold that at least some laws and policies that engage in age discrimination warrant an intermediate level of scrutiny. This Part therefore makes the case for applying intermediate scrutiny to age-based classifications. It shows how doing so would not require courts to reject *Murgia's* reasoning or to reject the outcomes of prior Supreme Court cases. It then argues that the Court should, consistent with its prior precedent, be more willing to use intermediate scrutiny with classifications that disadvantage persons based on old age status than with other age-based classifications.

#### A. *The Rationale for Applying Intermediate Scrutiny*

The case for applying intermediate scrutiny to age-based classifications begins with recognizing that the Court's reasoning in *Murgia* was profoundly faulty.<sup>101</sup> At least in academic circles, such

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*Amendment: Is the Murgia Standard Too Old to Stand?*, 6 SETON HALL CONST. L.J. 263, 293 (1995) (contending that "[t]he Court's holding in *Murgia* is quite unsound considering that it was decided six months before the Court officially created a middle tier for equal protection analysis"). For a critique of this argument, see *infra* note 101 and accompanying text.

<sup>99</sup> Eglit, *Of Age*, *supra* note 56, at 880; see also Howard Eglit, *Health Care Allocation for the Elderly: Age Discrimination by Another Name?*, 26 HOUS. L. REV. 813, 842 (1989) [hereinafter Eglit, *Health Care*] ("*Murgia* and *Vance* . . . demonstrate that in the employment setting, at least, the Supreme Court has had no problem with the notion that those who have accumulated too many years legitimately can be required to sacrifice a desirable government-created and -funded commodity . . . in order to make that commodity available for younger successors.").

<sup>100</sup> See *infra* note 211 and accompanying text.

<sup>101</sup> By contrast, it is incorrect to suggest that intermediate scrutiny should be considered for age-based classifications now because the Court did not previously have the opportunity to consider that argument. Not only had the Court previously

recognition is hardly new. In the years closely following *Murgia*, the decision was roundly criticized in the legal literature.<sup>102</sup> The negative response reflected both disappointment in the case's outcome and recognition that the Court's reasoning was both inexact and inconsistent with the weight of the evidence before it as to the nature and affect of mandatory retirement provisions.

### 1. *Murgia's* Faulty Reasoning

As previously discussed, in determining that "state police officers over 50" do not constitute a suspect class, the Court reasoned that the "aged" had not experienced "a history of purposeful unequal

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applied intermediate scrutiny as discussed *supra* note 30, but an amicus brief before the Court had explicitly argued that the Court could apply an intermediate level of scrutiny. See Brief for Legal Services for the Elderly Poor et al. as Amici Curiae Supporting Respondents, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (No. 74-1044), 1975 WL 173591 at \*13-14 (arguing that Court should adopt approach used in *Reed*). In addition, the *Murgia* Court was well aware of — and in active debate over — Gerald Gunther's *Harvard Law Review* article — Gerald Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (suggesting employment of intermediate level of scrutiny, which he described as "modestly interventionist model" that would ask if there was substantially reasonable fit between classification and legislative branch's stated purpose). Rough drafts of the opinion cited Gunther's article. See, e.g., Powell Fourth Draft, *supra* note 48, at 11, file p. 131 (citing article for proposition that it is desirable for policies and objectives of legislation to be identified at time legislation is enacted as this indicates that legislative branch has focused on underlying problem); Powell Third Draft, *supra* note 40, at 12, file p. 90 (same). But see Steiner, *supra* note 98, at 293 (suggesting that *Murgia* Court's failure to discuss intermediate scrutiny reflects lack of awareness of this possibility, and contending that "[t]he Court's holding in *Murgia* is quite unsound considering that it was decided six months before the Court officially created a middle tier for equal protection analysis").

<sup>102</sup> See, e.g., Abramson, *supra* note 96, at 50 (criticizing Court for not adopting Marshall's "sliding scale" approach); Price, *supra* note 96, at 141 (describing Court as abdicating "its vital function of ensuring that similarly situated are treated similarly by the separate legislative branches" by "retreat[ing] to the . . . 'traditionally toothless' rational connection standard") (quoting Gunther, *supra* note 101 at 25); William David Evans, Comment, *Massachusetts Board of Retirement v. Murgia: A Fifty Year Old Policeman and Traditional Equal Protection Analysis: Are They Both Past Their Prime?*, 4 PEPP. L. REV. 369, 380-81 (1977) (criticizing Court for not subjecting statute to "minimal scrutiny with bite" because right to work is "quasi-fundamental one" and age is "similar" to suspect classification); Stuart M. Kirshenbaum, Note, *Age Discrimination — Defeat of the Constitutional Challenge to Mandatory Retirement, Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 8 U. TOL. L. REV. 764, 782-83 (1977) (arguing that more scrutiny was warranted in part because *Murgia* involved interest in pursuing chosen livelihood); Lynne Wasserman, Note, *Forced Retirement Affirmed: Is the Supreme Court Sanctioning Age Discrimination*, 23 LOY. L. REV. 251, 256-57 (1977) (criticizing result in *Murgia*).

treatment’ ” nor been “subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”<sup>103</sup> This was flatly untrue. As Eglit has pointed out, the very existence of the law being challenged in *Murgia* “would seem to belie” the Court’s unsupported statement.<sup>104</sup> Moreover, at the time of the decision, there was extensive documentation of the plight of older workers, the disadvantages they faced based on age, and the unique effect such disadvantages had on older workers as a result of their ages. For example, a decade earlier, the U.S. Secretary of Labor W. Willard Wirtz had released a report (commonly called the “Wirtz Report”) that found rampant age discrimination in employment based on unfounded stereotypes about older age.<sup>105</sup>

The Court’s second line of reasoning for refusing to apply heightened scrutiny was also based on a fallacy. The Court stated that “old age does not define a ‘discrete and insular’ group in need of ‘extraordinary protection from the majoritarian political process.’ ”<sup>106</sup> It was true that historically the majoritarian process had led to the passage of laws providing older adults with special benefits.<sup>107</sup> However, the majority’s conclusion that “old age” does not define a discrete and insular group was based on two fundamental mistakes: (1) the decision to treat “old age” as a broad class, and (2) the decision to treat chronological age as something other than an immutable characteristic.<sup>108</sup>

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<sup>103</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

<sup>104</sup> See Eglit, *Of Age*, *supra* note 56, at 886.

<sup>105</sup> See W. WILLARD WIRTZ, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REP. OF THE SECRETARY OF LABOR TO CONGRESS 5-9 (June 1965). The Wirtz Report further found that age discrimination in employment was qualitatively different from discrimination on the basis of race because it did not appear to result from dislike of or intolerance toward the aged. *Id.* at 2-3, 5. This suggested different approaches to addressing age discrimination and other forms of discrimination, but did not undermine the report’s significant findings as to the prevalence of age discrimination in employment. See also *Smith v. City of Jackson*, 544 U.S. 228, 253-56 (2005) (O’Connor, J., concurring) (discussing Wirtz Report’s findings and their relevance to interpreting ADEA).

<sup>106</sup> *Murgia*, 427 U.S. at 313 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153, n.4 (1938)).

<sup>107</sup> See generally ROBERT A. HAROOTYAN, ANNOTATED INDEX OF FEDERAL LEGISLATION IMPACTING THE ELDERLY (1977) (identifying over sixty federal laws providing such targeted benefits).

<sup>108</sup> See *Murgia*, 427 U.S. at 313-14 (stating, “even old age does not define a ‘discrete and insular’ group . . . in need of ‘extraordinary protection from the majoritarian political process.’ Instead it marks a stage that each of us will reach if we live out our normal span.”).

Treating older adults as part of a single, homogenous group was relatively common at the time the Court decided *Murgia*. Until the late 1970s, older Americans were effectively “lumped together” into a single homogenous grouping for the purpose of policy-making.<sup>109</sup> Since then, gerontologists have pushed for a more complex, layered understanding of old age. Under the modern understanding, old age is broken into subcategories: the “young-old” (typically ages sixty-five to seventy-four), the “middle old” or “old” (typically ages seventy-five to eighty-four), and the “old-old” or “oldest of the old” (typically age eighty-five and older).<sup>110</sup> These categories better reflect the very real social and physical differences between these age cohorts. In addition, there is growing recognition that significant socio-economic and cultural diversity exists even within such refined age groups.<sup>111</sup>

The Court’s failure to recognize the diversity within the older population likely contributed to at least some of the Justices perceiving the elderly to be a politically powerful group. Breaking away from a monolithic category of old age is necessary to understand the variability in the political power and political vulnerability of the aged.<sup>112</sup> Historically the “young old” and healthy elderly have been relatively influential.<sup>113</sup> By contrast, the “old-old” and the frail elderly are less likely to be able to participate directly in the political

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<sup>109</sup> Judith B. Gonyea, *The Emergence of the Oldest Old: Challenges for Public Policy*, in *THE FUTURE OF AGE-BASED PUBLIC POLICY* 77, 77 (Robert B. Hudson ed., 1997).

<sup>110</sup> See, e.g., Carol D. Austin & Marin B. Loeb, *Why Age Is Relevant*, in *AGE OR NEED* 263, 267 (Bernice Neugarten ed., 1982) (parsing old age into such categories).

<sup>111</sup> Cf. Kenneth F. Ferraro, *The Evolution of Gerontology as a Scientific Field of Inquiry*, in *GERONTOLOGY: PERSPECTIVES AND ISSUES* 13, 13-33 (Janet M. Wilmoth & Kenneth F. Ferraro eds., 3d ed. 2007) (discussing evolution of field of gerontology and field’s move away from equating chronological age with disease and decrepitude, and explaining gerontologists now understand that age is positively associated with heterogeneity in population).

<sup>112</sup> In Marshall’s first draft of his *Murgia* dissent, he cited Robert Binstock’s scholarship for the point that the political power of the aged was disputed by scholars, who noted that a lack of “cohesive identity” as an impediment to elder’s achieving political power as a class. See Marshall Draft Dissent, *supra* note 39, at 8, file p. 65.

<sup>113</sup> There is much debate over the extent to which this is true. See, e.g., ANDREW E. SCHARLACH & LENARD W. KAYE, *CONTROVERSIAL ISSUES IN AGING* 81-91 (1997) (containing essays debating whether elderly have political clout). However, it is true that the young-old and the healthy old vote at disproportionately high rates compared to younger voters. In the 2008 Presidential election, an estimated 72.4% of citizens age sixty-five to seventy-four voted as did an estimated 68.7% of those age forty-five to sixty-four. This is significantly higher than the percentage of those age eighteen to twenty-four or twenty-five to forty-four who voted. See U.S. CENSUS BUREAU, *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008 - Detailed Tables*, Table 2, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html>.

process,<sup>114</sup> and their interests are increasingly given short shrift by old-age interest groups.<sup>115</sup>

Although disaggregating the broad classification of officers over the age of fifty would not have helped Robert Murgia to establish membership in a group deserving special protection (at the relatively young age of fifty, he would most likely have been found to be in a cohort with limited vulnerabilities), it could have significantly impacted the language and outcome of the *Murgia* decision. Specifically, such disaggregation could have helped reveal the unreasonableness of the classification to which he was subjected, thereby justifying a finding that the classification failed to withstand rational basis scrutiny. Additionally, had the Court examined a more narrow cohort (e.g., uniformed officers who were fifty, or uniformed officers in late middle age), the resulting language would have prompted lower courts to examine narrowly defined age cohorts when considering the permissibility of other age classifications. This might have encouraged lower courts considering subsequent age discrimination claims to find, for example, that the “old-old” are a discrete and insular group in need of protection from majoritarian processes.

The Court’s determination that the class at issue in *Murgia* did not require protection also reflects its misguided decision to treat old age as a stage of being rather than an immutable trait.<sup>116</sup> Chronological age is mutable in the sense that it changes over time. Yet it is simultaneously immutable in that an individual has no ability to control it. It is this latter characteristic of immutability — the inability to control an immutable trait — that is generally used to justify greater scrutiny for immutable characteristics.<sup>117</sup> This is, in part, because

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<sup>114</sup> Older adults can face formidable barriers to voting. Some of these are the result of physical disabilities, reduced access to transportation, or housing setting (e.g., placement in a long-term care institution). See Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 MCGEORGE L. REV. 1065, 1073-75 (2007). Others result, directly or indirectly, from some degree of cognitive impairment. See Nina A. Kohn, *Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections*, 1 CANADIAN ELDER L.J. 28, 30-44 (2008). This helps explain why the old-age and frail elderly tend to vote at lower rates than the young-old and healthy elderly. See U.S. CENSUS BUREAU, *supra* note 113 (finding that those age seventy-five and over were significantly less likely to vote than either those age forty-five to sixty-four or sixty-five to seventy-four in 2008 Presidential election).

<sup>115</sup> See *infra* notes 151-52 and accompanying text.

<sup>116</sup> See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976).

<sup>117</sup> See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask Don’t Tell,”* 108 YALE L.J. 485, 494-95 (1998)



groups disadvantaged on the basis of immutable traits have historically been seen as more vulnerable than those disadvantaged based on traits they have the capacity to control.<sup>118</sup>

Examined from a control-based definition of immutability, it readily becomes apparent that chronological age is a human's most immutable characteristic. In an era when both race and gender are increasingly understood to be socially constructed and fluid classifications, and gender can be altered through medical means, time travel remains a figment of the imagination, and it is thus utterly impossible to change one's chronological age.<sup>119</sup> Indeed, in conflict with the *per curiam's* reasoning, Brennan's original circulated draft recognized the immutability of chronological age and noted that age, like gender, was "an immutable characteristic determined solely by accident of birth."<sup>120</sup> By treating age as something other than immutable, however, the Court was able to avoid having to reconcile its decision in *Murgia* with its earlier treatment of gender in *Reed* or in *Frontiero v. Richardson*.<sup>121</sup> In *Frontiero*, the plurality reasoned that strict scrutiny should apply to gender classifications because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."<sup>122</sup> While immutability is only one factor in the determination of whether a class deserves heightened scrutiny and it is a factor that has increasingly been de-emphasized by the courts and criticized by scholars,<sup>123</sup> the Court's failure to recognize and address the immutability of age nevertheless undermines its decision to employ rational basis scrutiny instead of the heightened scrutiny employed in *Frontiero*.<sup>124</sup>

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(explaining that "the Supreme Court's jurisprudence emphasizes the descriptive issue of whether a person can control a characteristic" and is more likely to consider trait immutable where it is "defined by nature rather than by culture").

<sup>118</sup> *Id.* at 509 (explaining and critiquing this presumption).

<sup>119</sup> Functional age, by contrast, is certainly mutable.

<sup>120</sup> Brennan Draft, *supra* note 33, at 9, file p. 22.

<sup>121</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>122</sup> *Id.* at 686 (Brennan, J., plurality opinion).

<sup>123</sup> See generally Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (explaining that immutability is conceptually problematic and only one factor in Court's equal protection analysis); Cass Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 9 (1994) (arguing on both descriptive and normative grounds that "[i]mmutability is neither a necessary nor a sufficient basis for treatment as a 'suspect class'"); Yoshino, *supra* note 117, at 518 (discussing how "courts have begun to withdraw the immutability factor . . . and recent academic commentary seems univocal in calling for its retirement as a factor").

<sup>124</sup> The Court limited its treatment of immutability to a statement that age is a "stage

In short, neither the Court's statement that older adults had not experienced a history of purposeful mistreatment nor its assumption that older adults were politically powerful was fully accurate at the time it decided *Murgia*. Accordingly, holding that age-based classifications warrant intermediate scrutiny would not require rejecting the use of these indicators for determining what level of scrutiny to apply to such classifications. Rather, using that same approach — i.e., asking whether the age group has experienced a history of purposeful unequal treatment or been subjected to unique disabilities based on inaccurate stereotypes, and asking whether protection from majoritarian processes is needed — could reasonably have led the Court to reach the opposite conclusion: that the mandatory retirement policy at issue in *Murgia* was unconstitutional.

## 2. Social Changes Since *Murgia*

Even if one were to concede that the Court's analysis was correct when it decided *Murgia*, subsequent changes in the aging experience and in the perception and status of old age indicate that its analysis is increasingly incorrect today.

The first important change to occur since *Murgia* is that the elderly population has experienced a significant decrease in the rates of disability and health-related problems. Of course, chronological age continues to impact significantly both physical and mental well-being, often in highly predictable ways. As individuals age, the likelihood that they will be afflicted by cognitive impairments increases, as does the likelihood that they will experience limitations on their ability independently to provide for their own personal care (i.e., to perform "activities of daily living" or "ADLs") or independently to manage basic household tasks (i.e., to perform "instrumental activities of daily living" or "IADLs").<sup>125</sup> However, over the past three decades, elderly status has become an increasingly poor predictor of physical well-being. For many decades, the Centers for Disease Control and Prevention ("CDC") has estimated the percentage of persons suffering from chronic conditions that cause limitations in activity and limitations in a major life activity. In 1967, forty-six percent of those sixty-five and older had an activity limitation and forty percent had a

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of being," suggesting that it is not immutable because it changes over time. This miscomprehends the immutability approach. *Cf. supra* note 117 and accompanying text.

<sup>125</sup> See CENTERS FOR DISEASE CONTROL & PREVENTION, QUICKSTATS: ESTIMATED PERCENTAGE OF ADULTS WITH DAILY ACTIVITY LIMITATIONS, BY AGE GROUP AND TYPE OF LIMITATION — NATIONAL HEALTH INTERVIEW SURVEY, UNITED STATES, 2006, available at <http://www.cdc.gov/MMWR/preview/mmwrhtml/mm5640a7.htm>.

limitation on a major life activity.<sup>126</sup> In 1977, the figures were forty-three percent and thirty-seven percent respectively;<sup>127</sup> in 1987, thirty-eight percent and twenty-three percent;<sup>128</sup> in 1996, thirty-six percent and twenty-two percent.<sup>129</sup> The evidence suggests that since 1996, the health status of sixty-five year-olds has continued to improve.<sup>130</sup> Today, only a small minority of sixty-five-year-olds experience either ADL or IADL limitations.<sup>131</sup>

The effect of these changes in health status is that: (1) chronological age has become less predictive of one's abilities than it was at the time the Court decided *Murgia*, and (2) entry into "old age" status — commonly treated as sixty-five — has also become less indicative of

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<sup>126</sup> CHARLES S. WILDER & CAROLYN W. RIVERS, NAT'L CTR. FOR HEALTH STATS., CURRENT ESTIMATES FROM THE HEALTH INTERVIEW SURVEY: UNITED STATES – 1967, VITAL HEALTH STAT SERIES 10, No. 52, Table 9, at 15 (1969), available at [http://www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_052acc.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_052acc.pdf).

<sup>127</sup> LONNIE J. HOWIE & THOMAS F. DRURY, NAT'L CTR. FOR HEALTH STATS., CURRENT ESTIMATES FROM THE HEALTH INTERVIEW SURVEY: UNITED STATES 1977, VITAL HEALTH STAT SERIES 10, No. 126, Table 14, at 24 (1978), available at [http://www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_126.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_126.pdf).

<sup>128</sup> CHARLOTTE A. SCHOENBOM & MARIE MARANO, NAT'L CTR. FOR HEALTH STATS., CURRENT ESTIMATES FROM THE NAT'L HEALTH INTERVIEW SURVEY U.S., 1987, VITAL AND HEALTH STAT SERIES 10, No. 166 (1988), available at [http://www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_166.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_166.pdf).

<sup>129</sup> PATRICIA F. ADAMS ET AL., NAT'L CTR. FOR HEALTH STATS. CURRENT ESTIMATES FROM THE NAT'L HEALTH INTERVIEW SURVEY, 1996, VITAL HEALTH STAT SERIES 10, No. 200, Table 67, at 105 (1999), available at [http://www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_200.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_200.pdf).

<sup>130</sup> Data from the National Health Information Survey indicates that the percentage of persons over sixty-five reporting excellent or very good health increased between 1994-1996 and 2005-2006, while the percentage reporting fair or poor health decreased during that period. See CENTERS FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATS. HEALTH DATA INTERACTIVE, [www.cdc.gov/nchs/hdi.htm](http://www.cdc.gov/nchs/hdi.htm) (last visited Aug. 11, 2009). Data from the Medicare Current Beneficiaries Survey (MCBS) indicates that between 1996 and 2006, those over sixty-five became increasingly likely to be capable to perform most types of ADLs and IADLs. See *id.* (showing that total percentage of those over sixty-five experiencing each of five types of ADLs decreased, and that percentage experiencing four out of six IADLs also decreased). In addition, the MCBS data indicates that the percentage of those over sixty-five experiencing the most severe limitations (i.e., limitations in three or more ADLs) dropped significantly between 1996 and 2006. However, changes were not uniformly positive as the percentage of those over sixty-five experiencing some level of functional limitation appears to have increased between 1996 and 2006. See *id.*

<sup>131</sup> See PATRICIA F. ADAMS ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, SUMMARY HEALTH STATISTICS FOR THE U.S. POPULATION: NATIONAL HEALTH INTERVIEW SURVEY, 2007, VITAL HEALTH STAT SERIES 10, No. 238, Table 5, at 18 (2008), available at [http://www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_238.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_238.pdf) (indicating that as of 2007, only 6.8% of those over sixty-five had ADL limitation and only 12.7% had IADL limitation).

one's abilities. As a result, some age-based classifications that may have previously appeared rational in 1976 can no longer be said to be rational. Moreover, to the extent that society holds outdated beliefs about the relationship between chronological age and well-being, older adults are increasingly at risk of being subjected to disadvantages based on stereotypes not truly indicative of their abilities.<sup>132</sup>

The second important change that has occurred since *Murgia* is that attitudes towards older adults — and especially beliefs about age-based entitlements — have changed dramatically. The Court decided *Murgia* less than a decade after the passage of the historic Age Discrimination in Employment Act<sup>133</sup> and on the heels of tremendous, unprecedented growth in governmental programs specifically designed to benefit older adults.<sup>134</sup> As Robert Binstock writes:

[D]uring the 1960s and 1970s, just about every issue or problem that was identified as affecting just some older persons became a governmental responsibility: nutritional, legal, supportive, and leisure services; housing; home repair; energy assistance; transportation; employment assistance; job protection; public insurance for private pensions; special mental health programs; a separate National Institute on Aging; and on and on. By the late 1970s, the proportion of the annual federal budget spent on benefits to older persons had grown to 25 percent . . . .<sup>135</sup>

In such an environment, it is not surprising that the Justices were dismissive of the notion that older adults might need “extraordinary protection from the majoritarian political process.”<sup>136</sup> Indeed, in Brennan’s circulated draft, the conclusion that age was not a suspect classification turned, at least in large part, on the political clout of the

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<sup>132</sup> Gerontologists began remarking on the increasing disconnect between chronological age and physical, psychological, and social well-being over thirty years ago. See Bernice Neugarten, *Older People: A Profile*, in AGE OR NEED 19, 20-21 (Bernice Neugarten ed., 1982) (explaining in piece originally published in 1979 that chronological age is increasingly poor predictor of physical, social, and intellectual performance).

<sup>133</sup> 29 U.S.C. §§ 621-634 (1967).

<sup>134</sup> See Robert H. Binstock, *The Contemporary Politics of Age Policies*, in THE NEW POLITICS OF OLD AGE POLICY 265, 266 (Robert B. Hudson ed., 2005) [hereinafter Binstock, *Contemporary Politics*]; Hudson, *Contemporary Challenges*, *supra* note 2, at 4 (describing decade between mid-1960s and -1970s as “high-water mark of aging-based public policy”).

<sup>135</sup> See Binstock, *Contemporary Politics*, *supra* note 134, at 266.

<sup>136</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

elderly.<sup>137</sup> Similarly, Powell's early drafts included substantial discussions of elders' political clout as evidenced by then new anti-age discrimination and pro-elderly legislation.<sup>138</sup>

In the years since *Murgia*, however, there has been a significant shift in both the extent and design of governmental programs that specifically benefit the elderly. In 1976, older Americans were at the height of their political success as an age group.<sup>139</sup> By comparison, the government has scaled back or subjected to means testing many of the old-age entitlement programs in existence in 1976, with the result that they no longer uniformly benefit older adults. Binstock describes the Social Security Reform Act of 1983 as beginning this trend by subjecting social security benefits to taxation.<sup>140</sup> Since then, Older Americans Act programs have been targeted at lower income and minority elders.<sup>141</sup> Recently, for example, the Medicare Modernization Act of 2003 raised Medicare Part B premiums (premiums that are required to establish eligibility for out-patient and doctor-related health care services) for higher income beneficiaries.<sup>142</sup>

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<sup>137</sup> Specifically, in distinguishing age-based classifications for gender-based classifications, Brennan focused on elders' role in politics. Brennan Draft, *supra* note 33, at 9, file p. 23.

<sup>138</sup> The fourth draft of the opinion, for example, included the following language, which was omitted in the final version:

The aged have had a high degree of success in making the political process responsive to their needs. *See, e.g.*, Pension Reform Act of 1970, 29 U.S.C. § 1001; Age Discrimination in Employment Act of . . . 1965, 42 U.S.C. § 3001. Several States have legislation forbidding age discrimination, including Massachusetts. The participation of the aged in the functions of decisionmaking institutions at all levels and the continuing legislative concern at all levels for the problems of the elderly, including age discrimination, demonstrate that the traditional political processes have not foundered where interests of the aged are at stake.

Powell Fourth Draft, *supra* note 48, at 7, file pp. 127-28 (footnotes omitted).

<sup>139</sup> Andrew W. Achenbaum, *From the Margins to Pacesetter: The Place of the Elderly in U.S. Legal History from a Historian's Perspective*, 7 MARQ. ELDER'S ADVISOR 93, 113 (2005) (arguing that "[o]lder Americans emerged as the true beneficiaries in the heyday of American liberalism[: the Johnson Administration]").

<sup>140</sup> Binstock, *Contemporary Politics*, *supra* note 134, at 270. The Act also, and perhaps more significantly, raised the retirement age from sixty-five to (over a long phase-in period) sixty-seven. *See* Social Security Amendments of 1983, Pub. L. No. 98-21, § 201(a)(1) (1983).

<sup>141</sup> Binstock, *Contemporary Politics*, *supra* note 134, at 270.

<sup>142</sup> For an explanation of this change, which went into effect in 2007, see Social Security Administration, Medicare Part B. Premiums: New Rules for Beneficiaries with Higher Incomes, available at <http://www.ssa.gov/pubs/10161.pdf>.

These policy changes partly reflect political shifts. The rise of the Reagan era in the early 1980s and the accompanying move to constrict social programming occasioned the introduction of taxation on social security benefits and new efforts to limit social programming for the elderly to those with limited income and resources.<sup>143</sup> Similarly, the 1994 midterm congressional election ended forty years of Democratic control in the U.S. House of Representatives and has been credited with bringing about a decrease in preferential treatment of aging-related programs in Congress.<sup>144</sup>

These policy changes also reflect a growing resentment of, and an attitudinal shift toward, older adults. As Binstock has explained, “[t]hroughout the 1980s, the 1990s, and into the twenty-first century, the new stereotypes, readily observed in popular culture, have depicted aged persons as a new elite — prosperous, hedonistic, politically powerful, and selfish.”<sup>145</sup> Older adults are seen as “greedy geezers” whose “selfishness is ruining the nation.”<sup>146</sup> They are also increasingly the scapegoats for those seeking to reduce government spending or explain budget shortfalls.<sup>147</sup> A key component of this attitudinal shift has been the questioning of the “legitimacy of elderly as beneficiaries.”<sup>148</sup> This shift, paradoxically, has been assisted by the work of gerontologists. By depicting the elderly as a heterogeneous class — not a monolithic entity — gerontologists have inadvertently

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<sup>143</sup> See Achenbaum, *supra* note 139, at 115; Binstock, *Contemporary Politics*, *supra* note 134, at 270.

<sup>144</sup> See Janie S. Steckenrider & Tonya M. Parrott, *Introduction: The Political Environment and the New Face of Aging Policy*, in *NEW DIRECTIONS IN OLD AGE POLICIES* 1, 3-4 (Janie S. Steckenrider & Tonya M. Parrott eds., 1998). Of course, the election’s effects should not be over-stated. The previous year’s federal budget act increased the taxability of social security benefits. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13215, 107 Stat. 312, 475-76 (1993). Moreover, some new benefits for older adults (such as Medicare coverage for prescription drugs) were adopted after the election.

<sup>145</sup> Binstock, *Contemporary Politics*, *supra* note 134, at 267.

<sup>146</sup> See *id.*; see also Achenbaum, *supra* note 139, at 116; M. Silverstein et al., *Solidarity and Tension Between Age-Groups in the United States: Challenge for an Aging America in the 21st Century*, 9 *INT’L J. SOC. WELFARE* 270, 272 (2000) (describing programs for elderly as coming under attack in early 1980s as elderly came to be labeled as “greedy geezers” and blamed for taking public resources at expense of young); Debra Street & Jeralynn Sittig Cossman, *Greatest Generation or Greedy Geezers? Social Spending Preferences and the Elderly*, 53 *SOC. PROBS.* 75, 77 (2006) (describing American press since early 1980s as portraying older Americans as selfish).

<sup>147</sup> See Binstock, *Contemporary Politics*, *supra* note 134, at 267; Hudson, *Contemporary Challenges*, *supra* note 2, at 5.

<sup>148</sup> See Steckenrider & Parrott, *supra* note 144, at 2.

fed criticism of the elderly as undeserving of special benefits<sup>149</sup> and encouraged policymakers to see them as part of a broader group of “needy people,”<sup>150</sup> rather than a distinct interest group with distinct needs.

Changes in the structure and focus of old age interest groups may also be fueling such policy shifts. Most notably, as part of its organization-building and maintenance strategy, AARP, the nation’s foremost old-age interest group, has shifted part of its focus away from its older members in favor of its baby boomer members.<sup>151</sup> This shift is facilitated by AARP’s powerful membership recruitment program that recruits members as early as age fifty with promises of appealing discounts on a range of products and services.<sup>152</sup>

The third, and perhaps most important, change since *Murgia* is that new forms of legislation have resulted in older adults increasingly being subjected to unique disabilities based on their chronological age. The past two decades have seen a proliferation of legislation aimed at protecting older adults from abuse and neglect.<sup>153</sup> Many of the resulting statutes have the practical effect of abrogating the civil liberties of older adults based primarily, or even exclusively, on their chronological age.<sup>154</sup> For example, Rhode Island law requires all persons with reasonable cause to believe that a person age sixty or older has been subject to abuse, neglect, exploitation, or who is self-neglecting to report it to the State.<sup>155</sup> Similarly, under Texas law, any person having reason to believe that a person age sixty-five or older is

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<sup>149</sup> See *id.* at 2 (describing this phenomenon).

<sup>150</sup> Achenbaum, *supra* note 139, at 117 (“Our early history offers a sobering lesson to those who would scrap age as a criterion entirely; older people often get lost in the crowd when they are mainstreamed with other needy people.”).

<sup>151</sup> See, e.g., Ken Bensinger, *AARP’s Generation Gap*, 15(3) SMART MONEY 68-75 (Mar. 2006) (discussing criticism that AARP has abandoned its older members); Jeffrey Birnbaum, *Washington’s Second Most Powerful Man*, 135(9) FORTUNE 122 (May 1997) (describing AARP as shifting its emphasis to its non retired members). Consistent with this shift, AARP has rejected its former name, “American Association of Retired Persons,” and today instead uses its former acronym.

<sup>152</sup> AARP’s 2007 Annual Report — which is peppered with images of parents and children and in which the AARP executives appear to be the oldest individuals pictured — vividly illustrates this younger focus. See AARP Annual Report (2007), available at [assets.aarp.org/www.aarp.org/\\_articles/aboutaarp/AnnualReports/hq\\_main.html](http://assets.aarp.org/www.aarp.org/_articles/aboutaarp/AnnualReports/hq_main.html).

<sup>153</sup> This new legislation has primarily been at the state level and has been characterized by three types of statutes: those governing Adult Protective Services, those governing elder abuse reporting schemes, and those increasing criminal liability for perpetrators of elder abuse.

<sup>154</sup> For additional discussion of how these laws undermine constitutional rights and interests, see generally Kohn, *Outliving*, *supra* note 10.

<sup>155</sup> See R.I. GEN. LAWS § 42-66-8 (Supp. 2009-10).

being abused, neglected, or exploited must notify a designated state agency.<sup>156</sup> As will be discussed further in Section III(B) of this Article, such statutes create unique disabilities on the basis of stereotyped characteristics by selectively limiting the freedom of older adults to engage in certain forms of confidential communications. They also can cause states to respond to reports of elder abuse in ways that target older adults for interventions such as institutionalization or guardianship that can further undermine their rights.<sup>157</sup>

Some states have also begun adopting a series of statutes that, in the name of protecting elders against sexual mistreatment, effectively criminalize certain consensual sexual activities when they involve older adults, typically singling out those older adults who also have some level of disability. For example, Washington state prohibits consensual sexual activity between a disabled person sixty years of age or older and anyone who provides him or her with paid transportation.<sup>158</sup> In addition, a paid transportation provider who

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<sup>156</sup> See TEX. HUM. RES. CODE ANN. §§ 48.002(a)(1), 48.051 (Vernon Supp. 2008).

<sup>157</sup> Institutionalization and the imposition of guardianship are common interventions in elder abuse cases. See Stephen Crystal, *Social Policy & Elder Abuse*, in ELDER ABUSE: CONFLICT IN THE FAMILY 331, 338 (Karl A. Pillemer & Rosalie S. Wolf eds., 1986) (stating that elder abuse victims may perceive “cure” they are offered to be “worse than the disease”); Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 84-88 (1982) (arguing that subjects of elder abuse reports have good reason to fear unwanted institutionalization or guardianship); Margaret F. Hudson, *Elder Mistreatment: Current Research*, in ELDER ABUSE: CONFLICT IN THE FAMILY, *supra*, at 125, 130 (reviewing research on treatment offered to victims of elder abuse and discussing study that found that institutionalization was treatment mechanism used for forty-six percent of identified elder abuse victims); Ailee Moon et al., *Elder Abuse and Neglect Among Veterans in Greater Los Angeles: Prevalence, Types, and Intervention Outcomes*, in ELDER MISTREATMENT: POLICY PRACTICE & RESEARCH 187, 191-99 (M. Joanna Mellor & Patricia Brownell eds., 2006) (finding that most common intervention for abused or neglected veterans in outpatient clinic was to move victim into long-term care facility and that second most common intervention was to place victim under conservatorship).

<sup>158</sup> Specifically, in Washington, having sexual intercourse with a disabled person age sixty or over to whom one has provided paid transportation is the Class A felony of rape in the second degree unless the parties are lawfully married. See WASH. REV. CODE ANN. § 9A.44.010(16) (West Supp. 2008) (defining term “[f]rail elder or vulnerable adult” as including “a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself”); *id.* § 9A.44.050(1)(f) (“A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [w]hen the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who: (i) Has a significant relationship with the victim; or (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense”);



“knowingly causes” a disabled person age sixty or older, other than his or her spouse, “to have sexual contact with him or her or another” commits a felony even if the contact is indisputably consensual.<sup>159</sup> Similarly, Vermont criminalizes sexual acts between anyone who works or volunteers at a caregiving facility or program and any person whose ability to care for him or herself is impaired due to “infirmities of aging.”<sup>160</sup> Consent is irrelevant unless the defendant was “hired, supervised, and directed” by the vulnerable adult.<sup>161</sup>

Likewise, Florida imposes civil liability for “acts of a sexual nature” done in the presence of any adult “whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to . . . the infirmities of aging,” unless the actor has first obtained informed consent.<sup>162</sup> Thus, civil liability can be imposed on anyone who engages in a sexually charged activity — whether he or she be an erotic dancer or life partner — in front of a person whose aging-related infirmities impair their ability to engage in activities of daily living who does not first stop to obtain the consent of such a person.<sup>163</sup> This is true even if the alleged victim is opposed to the suit.<sup>164</sup> Similarly, an individual is guilty of a felony if he or she either “entices” an elderly person to engage in an act that involves

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*id.* § 9A.44.050(2) (stating that second degree rape is class A felony).

<sup>159</sup> See WASH. REV. CODE ANN. § 9A.44.100 (setting forth elements for crime of “indecent liberties;” exception is made if disabled person is would-be perpetrator’s spouse).

<sup>160</sup> See VT. STAT. ANN. tit. 13, § 1379(a) (2008) (“A person who volunteers for or is paid by a caregiving facility or program shall not engage in any sexual activity with a vulnerable adult. . . . A person who violates this subsection shall be imprisoned for not more than two years or fined not more than \$10,000.00, or both.”); see also VT. STAT. ANN. tit. 13, § 1375(8) (2010) (defining category of “vulnerable adult” as including “any person 18 years of age or older who . . . is impaired due to . . . infirmities of aging, or a physical, mental, or developmental disability that results in some impairment of the individual’s ability to: (i) provide for his or her own care without assistance, including the provision of food, shelter, clothing, health care, supervision, or management of finances; or (ii) protect himself or herself from abuse, neglect, or exploitation”).

<sup>161</sup> See VT. STAT. ANN. tit. 13, § 1379(a) (2008) (“It shall be an affirmative defense to a prosecution under this subsection that the sexual activity was consensual between the vulnerable adult and a caregiver who was hired, supervised, and directed by the vulnerable adult.”). The statute could be interpreted as permitting other defenses to the crime of sexual abuse of a vulnerable adult, but no other provision in the Vermont code appears to offer an applicable consent-based defense.

<sup>162</sup> See FLA. STAT. ANN. §§ 415.102(25), 415.102(27), 415.1111 (West Supp. 2008).

<sup>163</sup> See *id.* § 415.102(25). Although an exception exists for “appropriate display of affection,” no definition of what constitutes such a display is provided. *Id.*

<sup>164</sup> See *id.* § 415.1111 (permitting alleged victim’s guardian or estate to independently bring suit).

sexual activity or acts in a lewd or lascivious manner in the presence of an elderly person without the elder's consent.<sup>165</sup> An "elderly person" includes any person age sixty or older who is "suffering from the infirmities of aging," which can, in turn, be shown merely by advanced age and a reduced ability to care for oneself.<sup>166</sup> Such prohibitions thus criminalize, and potentially chill, a broad range of sexual behaviors in the presence of persons with full cognitive capacity primarily as a result of their chronological age.

These types of rights-limiting "protections" for older adults reflect the type of inaccurate stereotypes about old age that the *Murgia* Court thought were generally not part of the aging experience.<sup>167</sup> Most notably, they are grounded in the inaccurate stereotype that older adults are commonly cognitively impaired and unable to make sensible decisions about their own lives and stereotypes that conflate physical impairments with cognitive impairments.<sup>168</sup> Contrary to these stereotypes, at the age of sixty the vast majority of individuals are cognitively intact and not limited in either ADLs or IADLs.<sup>169</sup> In addition, even though the likelihood of cognitive disability increases with age, the majority of non-institutionalized persons with such disabilities are not old.<sup>170</sup> Moreover, to the extent that emotional difficulties impede the ability to refuse consent, older individuals are less likely to be disadvantaged, as the vast majority of non-institutionalized persons with emotional difficulties are young or middle-aged.<sup>171</sup> In addition, laws limiting consensual sexual relations with older adults reflect ageist stereotypes of the elderly as nonsexual

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<sup>165</sup> See *id.* at § 825.1025.

<sup>166</sup> See *id.* at § 825.101(5).

<sup>167</sup> The fact that a subset of such new rights-limiting protections combine disability-based and age-based criteria does not change the fact that they reflect such stereotypes.

<sup>168</sup> Such stereotypes are similar to those about non-elderly persons with disabilities, stereotypes which likewise tend to treat physical impairments as indicative of cognitive and emotional ones. Cf. Jack A. Nelson, *Broken Images: Portrayals of Those with Disabilities in American Media*, in *THE DISABLED, THE MEDIA, AND THE INFORMATION AGE* 1, 5 (Jack A. Nelson ed., 1994) (describing seven major types of stereotypes about persons with disabilities).

<sup>169</sup> *Id.*

<sup>170</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., *DISABILITY AND HEALTH IN THE UNITED STATES, 2001-2005*, at 16 (2008), available at <http://www.cdc.gov/nchs/data/misc/disability2001-2005.pdf> (approximately fifty-six percent of those with cognitive disabilities are under age of sixty-five).

<sup>171</sup> *Id.* (indicating that only 12.6% of non-institutionalized persons with emotional difficulties are 65 years of age or older; 87.4% are under age of 65).

beings. Older persons are often stereotyped as sexless,<sup>172</sup> and their sexual activities are disproportionately perceived as abnormal or pathological.<sup>173</sup>

The combined effect of these three changes is that today older adults constitute the type of discrete and insular minority needing protection from the majoritarian process. Contrary to the observations of the *Murgia* Court, the majoritarian process has, especially in recent years, created new policies that subject older persons to unequal treatment based on outdated and inaccurate stereotypes about their well-being, vulnerability, and social role. Thus, classifications that burden older adults fail to satisfy the “standard” set forth by the Court in *Murgia* for applying mere rational basis scrutiny. Under such circumstances, it would be appropriate for the Court to revisit — and indeed even overturn — its decision in *Murgia*.<sup>174</sup>

At least in the modern era, therefore, classifications based on old age merit the type of intermediate scrutiny applied to gender classifications.<sup>175</sup> Ergo, they should be upheld only if they serve important governmental objectives and are substantially related to achieving those objectives.<sup>176</sup> Discrimination based on old age is akin to that based on gender.<sup>177</sup> Like gender, chronological age can meaningfully affect a person’s physical and psychological traits, but cannot be chosen, cannot be changed by one’s volition, has historically been the basis for significant forms of discrimination, and leads to unique disabilities based on inaccurate stereotypes. These stereotypes,

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<sup>172</sup> BARBARA SHERMAN, *SEX, INTIMACY AND AGED CARE* 3-4 (1999).

<sup>173</sup> *Id.*

<sup>174</sup> *Cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992) (discussing how changes in facts, or understanding of facts, can justify departing from precedent).

<sup>175</sup> This Article does not, by contrast, argue that all age-based classifications warrant intermediate scrutiny, nor does the author believe that the rationale advanced herein for applying intermediate scrutiny to old-age classifications indicates that other age-based classifications, such as those based on youth, also warrant intermediate scrutiny. While an argument for applying intermediate scrutiny to youth-based classifications could be advanced, the argument is far weaker than that for applying intermediate scrutiny to old-age classifications. One reason for this comparative weakness is that chronological age is a far cruder proxy for the traits of older adults than it is for children.

<sup>176</sup> *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (recognizing formally that gender is subject to intermediate scrutiny and defining what constitutes intermediate scrutiny).

<sup>177</sup> By contrast, it does not rise to the level of discrimination based on race or other suspect classifications. Classifications based on age are less invidious because they both have a less hateful history and are more likely to be used to capture meaningful differences between persons.

in turn, are similar not only in form but in content — both women and the aged have traditionally been stereotyped as mentally inadequate, frail, and in need of protection by outsiders.<sup>178</sup> Moreover, the equal protection concerns that arise from the use of gender classifications are parallel to those that arise from the use of age-based classifications. At the core of the Court's decision to subject gender to intermediate scrutiny was its concern that the legislative branch was "employing gender as an inaccurate proxy for other, more germane bases of classification" based on "'archaic and overbroad' generalizations" and "increasingly outdated misconceptions concerning the role of females in the home."<sup>179</sup> The Court viewed subjecting gender classifications to intermediate scrutiny as a way to incentivize states to either create gender-neutral laws or to limit the use of gender to situations "where the sex-centered generalization actually comported with fact."<sup>180</sup>

Like gender, age has long been used as a proxy for other more germane characteristics that are perhaps more difficult to quantify (e.g., maturity, frailty, vulnerability, or need). As with gender, all too frequently these uses reflect overbroad generalizations based on outdated misconceptions about the class at issue. Indeed, the Wirtz Report used the term "arbitrary" to refer to the type of rampant age discrimination it identified in employment settings.<sup>181</sup> The use of the term "arbitrary" reflected the fact that the discrimination generally occurred without the employer determining whether age was relevant to the job requirements and that employers generally defended such discrimination on grounds unrelated to job performance.<sup>182</sup> The elder

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<sup>178</sup> Cf. GEORGIA M. BARROW & PATRICIA A. SMITH, *AGING, THE INDIVIDUAL, AND SOCIETY* 28-29 (2d ed. 1983) (summarizing negative stereotypes of older adults); SUSAN A. BASOW, *GENDER STEREOTYPES AND ROLES* 5 (3d ed. 1992) (providing table of stereotypic sex role descriptors); Frank T. Y. Wang, *Resistance and Old Age: The Subject Behind the American Seniors' Movement*, in *READING FOUCAULT FOR SOCIAL WORK* 189, 198, 206 (Adrienne S. Chambon et al. eds., 1999) (describing negative view of elderly as dependent, frail, and in need of assistance was major impetus for seniors' movement gaining public support).

<sup>179</sup> See *Craig*, 429 U.S. at 198-99.

<sup>180</sup> *Id.* at 199. Thus, *Murgia* can be described as the age-discrimination equivalent of the Supreme Court's discredited decision in *Goesaert v. Cleary*, in which the Court cavalierly relied on unthinking stereotypes about gender to foreclose an equal protection challenge to a form of social legislation that the Court was not yet ready to question. See *Goesaert v. Cleary*, 335 U.S. 464, 465, 467 (1948) (holding that state might prohibit women from being employed as bartenders while noting that "[b]eguiling as the subject is, it need not detain us long").

<sup>181</sup> See WIRTZ, *supra* note 105, at 6-8.

<sup>182</sup> See *id.*

protection statutes just discussed provide a more recent example of this troubling tendency.

### 3. Consistency with Prior Precedent

Applying intermediate scrutiny to classifications that discriminate on the basis of old age would not necessitate rejecting the outcomes of the Supreme Court's prior cases that considered the constitutionality of age-based classifications. Examining *Murgia* and *Vance* in 1981, Martin Lyon Levine found that "[a] future Court ready to hold that those attributes of intermediate scrutiny were required in age discrimination cases would find *Murgia* and *Vance* congenial precedents."<sup>183</sup> According to Levine, in both cases the Court was able to "demonstrate" an important governmental interest, show a substantial relationship or close fit between the challenged policies' means and ends, and limit reliance on ex post facto justifications for the policies in favor of contemporaneous legislative expressions.<sup>184</sup> Although Levine's conclusion that the Court actually demonstrated such a close fit between means and end is questionable given the Court's reliance on largely inaccurate stereotypes about old age, the Court's discussions of the particular demands of the jobs at issue in the two cases suggest that it thought such fits existed.<sup>185</sup> Accordingly, a court or litigant eager not to be seen as rejecting prior precedent could interpret at least aspects of both cases as consistent with using intermediate scrutiny to review age-based classifications.

The Court's decision in *Gregory* is even more consistent with intermediate scrutiny. In *Gregory*, Justice O'Connor, writing for the majority, reasoned that Missouri had a "compelling interest" in "maintaining a judiciary fully capable of performing the demanding tasks that judges must perform."<sup>186</sup> Because the retirement provision at issue in *Gregory* applied only to judges and only to those judges who had attained the relatively advanced age of seventy, a reasonable

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<sup>183</sup> Levine, *supra* note 80, at 1104.

<sup>184</sup> *Id.*

<sup>185</sup> See *Vance v. Bradley*, 440 U.S. 93, 111-12 (1979) (describing work of Foreign Service employees as "demanding" and noting that plaintiffs in case conceded that it was arguable whether those over age sixty would be as reliable as younger employees); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 310-11 (1976) (explaining that officers' work could be "arduous" and that plaintiffs' experts conceded that there was "general relationship between advancing age" and ability to satisfy job's demands).

<sup>186</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991) ("The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform.").

person could conclude that the provision bore a substantial (and not merely rational) relationship to that compelling purpose. In addition, the Court's use of the term "reasonable" to describe the classification, as opposed to the word "rational," suggests that the Court may have considered the statute to be more tailored to its purpose than mere rational basis scrutiny would require. As discussed earlier, Supreme Court justices had historically differed on whether a "reasonable" relationship between a government's purpose and its classification is the same as a "rational" relationship between the two. For example, in the Court's debate over *Murgia*, Rehnquist was wary of using the term "reasonable" to describe the degree of fit required to satisfy rational basis scrutiny.<sup>187</sup> By contrast, Brennan equated a "substantial relationship" with a "reasonable relationship."<sup>188</sup>

By contrast, the *Kimel* opinion suggests that there is no need for such close congruence between means and end. For example, in *Kimel*, O'Connor indicated that it is permissible to use a chronological age classification as a proxy for other traits even in circumstances in which the majority of persons disadvantaged by that classification probably have none of the traits for which it is a proxy.<sup>189</sup> However, the *Kimel* opinion never stated what degree of fit the Court found between the challenged policy and the government's goal. Had it done so, it might well have recognized both the type of important government interest and the level of congruency generally required to satisfy intermediate scrutiny.

### B. Defining the Classification Subject to Intermediate Scrutiny

The proceeding Part showed why *Murgia's* approach to determining whether a class deserves heightened scrutiny could be used to conclude that classifications that discriminate against older adults warrant intermediate scrutiny, but a key issue remains: how should and how would a court applying heightened scrutiny in an age

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<sup>187</sup> See Brennan Draft, *supra* note 33, at 8, file p. 21 (stating that proper inquiry is whether classification is "reasonable, not arbitrary, and . . . rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation" and that "substance of such inquiry is essentially whether the classification is reasonably related to a legitimate state objective") (internal citations omitted); *cf.* Correspondence from J. Rehnquist to J. Brennan at 2-3 (Jan. 30, 1976), in MARSHALL PAPERS, box 165, folder 8, file pp. 29-30 (1976) (on file with U.S. Library of Congress) (voicing Rehnquist's concern regarding Brennan's description of rational basis scrutiny).

<sup>188</sup> See Brennan Draft, *supra* note 33, at 8, file p. 21.

<sup>189</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000).

discrimination claim define the class triggering that additional scrutiny? Specifically, would the courts need to treat all age-based classifications as warranting intermediate scrutiny? Or, would the courts instead treat only some age classes (e.g., “old age” or “very old age” classes) as “quasi-suspect” and thus deserving of additional scrutiny?

From a normative perspective, the argument in favor of applying intermediate scrutiny to age discrimination claims suggests that the courts should single out certain age classifications (e.g., “old age” or “very old age”) for quasi-suspect classification status, and not grant all age classifications such status. After all, that argument turns on the contention that *older* adults are increasingly subjected to unique disabilities on the basis of inaccurate stereotypes about *old* age.<sup>190</sup> This rationale does not indicate that other age-based classifications, such as those based on youth, also warrant intermediate scrutiny. While one could advance an argument for applying intermediate scrutiny to youth-based classifications, the argument is significantly weaker than that for applying intermediate scrutiny to old-age classifications. One reason for this comparative weakness is that chronological age is a far cruder proxy for the traits of older adults than it is for children.<sup>191</sup>

From a predictive perspective, the answer is less clear. However, the Supreme Court’s descriptions of the age classifications at issue in *Murgia*, *Vance*, *Gregory*, and *Kimel* provide insight as to how the Court might define the class at issue in a future age discrimination challenge. *Murgia*’s language is indicative of a Court inclined to examine the permissibility of using the particular age classification before it, as opposed to examining the permissibility of using chronological age classifications in general. In discussing Robert Murgia’s claim, the Court was clear that it was considering the class of “uniformed state police officers over 50” and that it was holding that “rationality is the

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<sup>190</sup> See *supra* Part II.A.2.

<sup>191</sup> Development psychologists have long recognized that children’s cognitive functioning develops in predictable ways corresponding to their chronological age. The highly influential Jean Piaget, for example, described four distinct stages of child development that occur at distinct chronological ages: (1) The stage of sensori-motor intelligence (zero to two years): the child does not have the ability to “think conceptually”; (2) The stage of preoperational thought (two to seven years): the child develops language and other forms of conceptual development; (3) The stage of concrete operations (seven to eleven years): the child learns to apply logical thought to concrete problems; and (4) The stage of formal operations (eleven to fifteen years): the child gains the ability to apply logical reasoning to all types of problems. See BARRY J. WADSWORTH, *PIAGET’S THEORY OF COGNITIVE AND AFFECTIVE DEVELOPMENT* 24-25 (4th ed. 1989). More recent work on the development of the adolescent brain is furthering the scientific community’s understanding of the stages of cognitive development of the child.

proper standard by which to test whether compulsory retirement at age 50 violates equal protection.”<sup>192</sup> Moreover, the Court’s analysis focused on the historical treatment of older adults, not on the historical treatment of chronological age.<sup>193</sup> Similarly, in *Vance*, the Court’s discussion focused on the Foreign Service Retirement System’s use of a particular age sixty categorization and not on the permissibility of age classifications in general.<sup>194</sup> Moreover, the Court’s decision that this cut-off was rational turned on the negative characterization of *old* age the Court earlier commented on in *Murgia*.<sup>195</sup> Likewise, the Court’s discussion in *Gregory* focused exclusively on the permissibility of an age-seventy classification and did not directly discuss age classifications more broadly.<sup>196</sup> By contrast, in *Kimel*, the Court expanded its earlier jurisprudence by discussing the permissibility of age discrimination in general and did not limit its discussion to whether particular age classifications were constitutional.<sup>197</sup>

Because the Supreme Court’s age discrimination cases do not provide a clear picture of how the Court would define the classification at issue in a future age discrimination case, it is important to look elsewhere to try to make a reasonable prediction. Perhaps the best place to look is in the Court’s opinions addressing equal protection challenges raising parallel concerns in the context of other types of classifications. Of these opinions, the Court’s decisions in reverse race discrimination cases — cases in which members of a traditionally privileged race allege that they have been the victims of constitutionally impermissible race discrimination — provide the most valuable insight. The Court has purported to treat these cases as they would any other racial discrimination case: recognize race as a “suspect classification” and declare that strict scrutiny applies. At the same time, however, the Court has sometimes effectively applied a lower degree of scrutiny.

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<sup>192</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-13 (1976) (emphasis added).

<sup>193</sup> *See id.* at 313-15.

<sup>194</sup> *See Vance v. Bradley*, 440 U.S. 93 *passim* (1979).

<sup>195</sup> *See id.* at 111.

<sup>196</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 472-73 (1991).

<sup>197</sup> However, since the issue in *Kimel* was whether the ADEA abrogates state sovereign immunity, and the ADEA provides no protection to those under the age of forty, the Court’s holding could be considered dicta with regards to the constitutional status of those under forty. Consistent with the question presented, all of the plaintiffs in *Kimel* were over the age of forty. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 70 (2000).



Most notably, in *Grutter v. Bollinger*,<sup>198</sup> the Supreme Court considered the constitutionality of the University of Michigan's law school admission policy that allowed admissions officers to consider applicants' race as one of a multitude of factors in an effort to foster diversity within the law school community.<sup>199</sup> The Court's language reaffirmed its commitment to using strict scrutiny to review the constitutionality of racial distinctions, but it nevertheless upheld the challenged policy.<sup>200</sup> As critics have pointed out, *Grutter* achieved this result by applying a level of deference that seemed more consistent with intermediate scrutiny than with strict scrutiny.<sup>201</sup> By doing so, it "implicitly recognized (but refused to expressly acknowledge) that some uses of race are considerably more invidious than others, and explicitly recognized that some uses of race are not wrongful at all."<sup>202</sup>

*Grutter* by inference suggests the possibility that, in the context of age discrimination, the Court might ask whether "age" is a quasi-suspect classification and not whether a specific age classification constitutes a quasi-suspect classification. In *Grutter*, the Court focused on "race" as a classification, never asking whether "white race" or "non-minority race" might not be a suspect classification. *Grutter*'s approach also suggests, however, that the Court might in practice more closely scrutinize some age classifications than others. For example, it might give greater deference to policies favoring older adults than policies disadvantaging older adults.

The conclusion that the Court might implicitly apply greater scrutiny to certain age-based classifications than to others is further supported by the Court's approach to equal protection in the context of gender discrimination. The Court has clearly stated that it applies the same level of scrutiny to classifications that discriminate against males and females,<sup>203</sup> but has also indicated by its actions that

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<sup>198</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>199</sup> *Id.* at 314-16.

<sup>200</sup> See, e.g., *id.* at 326, 334 (stating that all racial classifications that government imposes must be reviewed using strict scrutiny and contending that "[c]ontrary to Justice Kennedy's assertions, we do not 'abandon strict scrutiny'") (alteration in original).

<sup>201</sup> See, e.g., Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 976 (2004) (arguing that "the *Grutter* Court would have been more forthright had it revived Justice Brennan's view that 'benign' racial classifications trigger intermediate scrutiny, but malignant ones should trigger strict scrutiny").

<sup>202</sup> *Id.* at 975.

<sup>203</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (invalidating state law restricting admission to state college to females and stating that fact that statute "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review").

classifications perpetuating inaccurate stereotypes will be more closely scrutinized than those that aim to compensate for gender-based discrimination.<sup>204</sup> For example, in *Mississippi University for Women v. Hogan*, the Court invalidated a state law restricting admission to a state nursing school exclusively to women.<sup>205</sup> The Court held that the law was impermissible because “[r]ather than compensate for discriminatory barriers faced by women, [the policy] tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job.”<sup>206</sup> Similarly, in *United States v. Virginia*, the Court held that Virginia could not limit admission to the Virginia Military Institute (“VMI”) to men because — although gender classifications are permissible where used to “compensate women . . . for particular economic disabilities” — gender classifications may not be used to “create or perpetuate the legal, social, and economic inferiority of women.”<sup>207</sup> Thus, the gender discrimination cases suggest that the Court would likely apply the same level review to all age-based classifications but might be less willing to sustain classifications that disadvantage older adults because such classifications tend to both reflect and perpetuate ageist stereotypes.

That said, the Court’s more recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, may signal that the Court is moving away from the context-dependent approach implicitly employed in *Grutter*, *Hogan*, and the VMI case. In *Parents Involved*, the Court struck down two voluntary school desegregation plans that assigned students to public schools based on rigid racial classifications.<sup>208</sup> In doing so, the Court adamantly rejected the notion that the motive behind a classification should affect the level of scrutiny employed when reviewing it.<sup>209</sup>

Accordingly, a combined analysis of the Supreme Court’s age discrimination, reverse racial discrimination, and gender discrimination cases indicates that there is a possibility — but not a clear indication — that the Court would examine policies that disadvantage older adults more critically than policies that privilege

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<sup>204</sup> See *id.* at 728 (stating that in “limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened”).

<sup>205</sup> *Id.* at 731.

<sup>206</sup> *Id.* at 729.

<sup>207</sup> *United States v. Virginia*, 518 U.S. 515, 533-34 (1996).

<sup>208</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-11, 747-48 (2007).

<sup>209</sup> *Id.* at 741-42.

older adults. However, these cases also suggest that the Court would probably not be explicit about such differential treatment and might well purport to apply the same standard to any classification that discriminates among adults based on chronological age.<sup>210</sup>

### C. Part II Summary

Subjecting age-based classifications to heightened scrutiny does not require a rejection of the Court's approach in *Murgia*. To the contrary, the factors the Court treated as persuasive in *Murgia* suggest that: (1) the Court misapplied its own approach in the case such that, even in 1976, it could have reached a different result using the same reasoning, and (2) social changes since *Murgia* further undermine the conclusion that all age-based classifications only warrant rational basis scrutiny. These factors also suggest that the courts should be more willing to subject classifications based on old age to intermediate scrutiny than other age-based classifications.

Although a reasonable case for intermediate scrutiny can thus be made either for subjecting all classifications of adults based on chronological age to intermediate scrutiny or for subjecting classifications of adults based on "old age" to intermediate scrutiny, it is unlikely that the Supreme Court will do so. Although the Court is dynamic and its composition is in flux, for nearly three decades the Court has been loath to recognize new suspect or quasi-suspect classifications. As Julie Nice has aptly noted, judicial decisions have long "echoed" the familiar refrain "no new suspect classes and no new fundamental rights."<sup>211</sup> Moreover, it seems unlikely that the Court would be willing to disavow blatantly the path it started down in *Murgia* or even the broadly sweeping language of *Kimel*. Thus, it is simply unrealistic to expect the Court explicitly to adopt intermediate scrutiny for age-based classifications. The next Part therefore suggests a legal approach to challenging age discrimination that is more likely to be fruitful.

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<sup>210</sup> This in no way suggests, by contrast, that the Court would apply the same standard to classifications based on the chronological age of minors. Across contexts, the law recognizes that minors' rights are significantly diminished relative to those of adults.

<sup>211</sup> Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1211 (1999).

## III. A TRANSFORMATIVE STRATEGY

While it is unlikely that the Court will announce that age classifications merit intermediate scrutiny, this reality does not necessarily mean that the Court would not apply a degree of heightened scrutiny to certain age-based classifications. Specifically, as discussed in this Part, the collapse of the traditional tiers of judicial scrutiny, as well as the Court's willingness to take a "stereoscopic" approach to equal protection jurisprudence in certain situations, provide an opportunity to wage successfully an equal protection challenge to certain forms of age discrimination. This modern approach to equal protection could be applied to invalidate age discrimination in the context of discriminatory mandatory elder abuse reporting laws and in other key contexts.

A. *A Predictive Account of Judicial Scrutiny of Equal Protection Claims*

Since the Warren Court era, the Supreme Court has described its equal protection jurisprudence as divided into two branches of analysis, one for classifications and the other for rights, each of which can be analyzed using one of three levels of scrutiny: rational basis scrutiny, intermediate scrutiny, or strict scrutiny.<sup>212</sup>

This two-strand, three-level approach to equal protection jurisprudence evolved over the fervent objections of Justices Marshall and Stevens. Justice Marshall believed the Court's approach to be artificial and instead advocated a "sliding scale" approach to the issue. As he wrote in his dissent in *San Antonio Independent School District v. Rodriguez*:

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<sup>212</sup> This approach was perhaps best summarized by Justice Brennan in *Plyler v. Doe*:

[W]e have treated as presumptively invidious those classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right." With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.

457 U.S. 202, 216-18 (1982).

I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. . . . The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review — strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued — that is, an approach in which 'concentration (is) placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.'<sup>213</sup>

Justice Stevens, by comparison, also disapproved of the three-tiered approach, but favored a more unitary approach to considering the constitutionality of classifications.<sup>214</sup> As he famously noted in *Craig v. Boren*, he found the majority's jurisprudential approach inconsistent with the fact that "[t]here is only one Equal Protection Clause."<sup>215</sup> More broadly, Stevens's criticism of the tiers reflected his "hostility at the rigidity of the categories and impatience with the hollowness of the analysis they provoke."<sup>216</sup>

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<sup>213</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); *accord City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 437, 460 (1985) (Marshall, J., concurring in part and dissenting in part) ("I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'").

<sup>214</sup> See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 519-21 (2004) (discussing Stevens's and Marshall's approaches).

<sup>215</sup> *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

<sup>216</sup> Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 *FORDHAM L. REV.* 2339, 2349

Over the continuing objections of Stevens as well as generations of legal academics, the Court continues to use the language of the three tiers to describe its decision-making process.<sup>217</sup> Scholars have explained the appeal of the formalistic tiered system by describing the multiple functions the system has served. First and foremost, it has been described as a mechanism for imposing self-discipline on the courts.<sup>218</sup> This self-disciplinary function was perhaps most important and effective during the system's early years, when it served as a "training tool" for a judiciary eager to avoid returning to the heavy-handed approach of the *Lochner* era and the Court's discredited activism in protecting economic freedoms against government regulation.<sup>219</sup> For the more conservative wing of the Court, the tiered system has also had the appeal of functioning as a tool to help the Court avoid alternative, more liberal approaches to equal protection jurisprudence. Kathleen Sullivan has argued that the "Court ties itself to the twin masts of 'strict scrutiny' and 'rationality review' precisely in order to resist the siren song of the sliding scale" traditionally favored by the liberal wing of the Court.<sup>220</sup> In addition, the tiers helped create a public impression of legitimacy. Kenneth Karst argues that this impression is the primary purpose of the tiered system: "The identification of categories of judicial scrutiny, from its beginnings in the days of the Warren Court, has never controlled the Supreme Court's decisions. Mainly, it has served to offer assurance — to the public, and even to wavering Justices — that the Court was not 'legislating,' but merely following rules."<sup>221</sup>

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(2006).

<sup>217</sup> Cf. Goldberg, *supra* note 214, at 525 (remarking on "Court's reluctance to revisit the multi-tiered framework").

<sup>218</sup> Accord Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1272 (2007); Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 78 (1996) [hereinafter Sunstein, *1995 Term*] ("The use of 'tiers' has two important goals. The first is to ensure that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work. . . . The second goal of a tiered system is to discipline judicial discretion while promoting planning and predictability for future cases. Without tiers, it would be difficult to predict judicial judgments under the Equal Protection Clause, and judges would make decisions based on ad hoc assessments of the equities.").

<sup>219</sup> Goldberg, *supra* note 214, at 582. Brennan was explicit in his circulated draft of the *Murgia* opinion that a goal of the "rationality test" is to avoid the errors of the *Lochner* era. See Brennan Draft, *supra* note 33, at 11-12, file pp. 24-25.

<sup>220</sup> Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) [hereinafter Sullivan, *Post-Liberal Judging*].

<sup>221</sup> Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 138 (2007). Sullivan also recognizes the public value of

The Court's use of the formulaic and largely static language of the tiers, however, belies the reality that in practice equal protection jurisprudence is neither formalistic nor static. Rather, equal protection jurisprudence is in flux.<sup>222</sup> An accurate description of the Court's decision-making must acknowledge that the tiers of judicial scrutiny are in a state of disarray, if not outright collapse.<sup>223</sup> Rather than three distinct tiers of scrutiny, the scrutiny employed by the Court consists of a "spectrum of standards."<sup>224</sup> "Strict scrutiny," for example, is hardly the unitary, fatal mechanism it was once thought to be. Instead, it is better described as a category containing multiple approaches of review. Richard Fallon has explained, for example, that the single tier of "strict scrutiny" can be well-parsed into three distinct types of strict scrutiny.<sup>225</sup> Which type the Court applies appears to reflect the context in which strict scrutiny is being used.<sup>226</sup> Like strict scrutiny, rational basis scrutiny has also devolved into a multitude of approaches, with the result that there is significant variance in the extent to which the

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the tiers. See Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992) (using "siren song" description, but instead stating that "the Court ties itself to the twin masts of strict scrutiny and rationality review in order to resist (or appear to resist) the siren song of the sliding scale") (emphasis added).

<sup>222</sup> This is not the first time that American equal protection jurisprudence has changed. See generally Fallon, *supra* note 218, at 1285 (describing evolution of strict scrutiny review and stating that modern strict scrutiny formula "is not a timeless feature of constitutional law, but rather a judicially developed device of relatively recent origin that even now could be abandoned by the Supreme Court at any time"); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1 (2005) (describing history of judicial scrutiny and showing that no regime of constitutional interpretation is static).

<sup>223</sup> This is not a sudden event — scholars have commented on the deterioration of tiers for decades. See, e.g., Sullivan, *Post-Liberal Judging*, *supra* note 220, at 299 ("the Court has both escalated what is purportedly rationality review and watered down scrutiny that is nominally strict.").

<sup>224</sup> James E. Fleming, "There is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence, 74 FORDHAM L. REV. 2301, 2301-02 (2006); Sunstein, *1995 Term*, *supra* note 218, at 77-78 ("The hard edges of the tripartite division have thus softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests. This development is reminiscent of Justice Marshall's famous argument in favor of a 'sliding scale' rather than a tiered approach to equal protection issues, and of Justice Stevens's reminder that there is 'only one Equal Protection Clause.'").

<sup>225</sup> Fallon, *supra* note 218 *passim*.

<sup>226</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 869-70 (2006) (finding, in empirical study of federal courts' applications of strict scrutiny, that rate at which laws survive strict scrutiny depends on both subject matter of law and on its institutional origin).

Court actually defers to legislative decisions when reviewing statutes using rational basis scrutiny.<sup>227</sup>

The tiers, however, are not the only part of equal protection jurisprudence in flux. So too is the formalistic divide between the two branches (or “strands”)<sup>228</sup> of analysis. In 2002, Pamela Karlan called on courts and scholars to use a “stereoscopic” approach to equal protection jurisprudence and, thereby, interpret the Equal Protection Clause and the (substantive) Due Process Clause in light of one another.<sup>229</sup> Julie Nice makes a persuasive case that the Supreme Court has, in fact, taken such an approach. Nice explains that certain cases commonly treated as “outliers” in the Court’s equal protection jurisprudence can better be described as part of a third strand of equal protection jurisprudence.<sup>230</sup> This Third Strand approach imposes heightened scrutiny in circumstances where the interaction of due process rights and class-based distinctions makes the Court uncomfortable.<sup>231</sup> Specifically, Nice shows how the Court has employed this approach in situations in which “fairly important rights” were denied to “relatively vulnerable groups.”<sup>232</sup> Thus, out of the disarray of the tiers has emerged a new, less rigid framework that includes a Third Strand of analysis.

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<sup>227</sup> *Accord* Goldberg, *supra* note 214, at 515-17 (discussing “unevenness” of rational basis scrutiny and dividing cases that utilize rational basis review into those that use weak version and those that use strong version); Massey, *supra* note 201, at 951-57 (discussing, as part of broader discussion of break-down of tiers, diversity of approaches to rational basis scrutiny).

<sup>228</sup> Julie Nice uses the term “strands” in referring to these branches. *See* Nice, *supra* note 211 *passim*.

<sup>229</sup> *See* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 *passim* (2002). Karlan also argued that certain Supreme Court equal protection decisions can only be understood by “importing some due process-based notion of fundamental liberty interests into the Court’s equal protection analysis.” *Id.* at 485.

<sup>230</sup> *See* Nice, *supra* note 211, at 1211-14, 1227-48 (providing Third Strand analysis of *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); and *Plyler v. Doe*, 457 U.S. 202 (1982)).

<sup>231</sup> *Cf. id.* at 1212 (describing Third Strand as imposing heightened scrutiny “in situations where the rights and classes interact in such a way as to raise the Court’s suspicions”).

<sup>232</sup> *Id.*; *accord* Nan Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1135 (2004) (citing Nice and stating that “where the Court has confronted claims of not-quite-deprivation of liberty, as experienced by persons in not-quite-suspect classes, it has in practice displayed a willingness to take into account a kind of cross-doctrinal cumulative weighting of the interests involved and the consequences of adverse legal treatment”).



It is not surprising that a Court moving away from the rigidity of the tiers would be drawn to a Third Strand approach. Not only are balancing tests intrinsically tempting, but there is a basic human tendency to see “near misses” as something fundamentally different than misses that were far from the mark, even when the rules of a given game specify that the two are to be treated as one and the same.<sup>233</sup>

The Third Strand approach can be seen as a variation of — or, alternatively one effect of using — the sliding scale approach to equal protection jurisprudence that Justice Marshall originally advocated. Marshall maintained that in equal protection cases the Court should use a spectrum of scrutiny such that the level of scrutiny would vary

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<sup>233</sup> In a delightful and mouth-watering analogy, Jeremy Paul characterizes the appeal of such an approach as follows:

Suppose you were on a diet and had two rules for yourself. One rule was that you would allow yourself a small dessert after dinner if you had skipped lunch on the same day. The other was that you would allow yourself dessert if you had run your typical four miles that day. It is 8 p.m. and that small bowl of frozen yogurt is quite tempting. You reflect back on your day and recall that you had a dry bagel, nothing on it, and black coffee at noontime. You also cut your run short after 3 1/2 miles when it started to rain. May you indulge? At first blush, of course not. You have not met either standard and thus no yogurt for you.

If you can stick to this regime, more power to you. Here’s why I’d be likely to partake. In the end, the reason behind both the no-lunch rule and the four mile requirement is the same. Lunch puts in calories. Exercise takes them off. Thus the combination of a light lunch and an almost full workout is quite likely to be a greater net contribution to weight loss than either one alone. Even though the rules crafted for the diet are separate, it would be rather stubborn to insist on keeping them that way. And since the diet rules are those that I have probably imposed on myself, I would have little trouble concluding that coming close twice was good enough. . . .

Do the two judicially-created strands of equal protection analysis fit together in the same way as diet and exercise? Not exactly. . . . Certainly, however, we can see why a court will struggle when facing a case with a claimant who belongs to a group that is almost a suspect class and who has lost something almost as important as a fundamental right. On one hand, there’s a strong formalist tendency to tell the claimant no. . . . On the other hand, from a purely conceptual standpoint a court might be very tempted to look at the case more broadly. If the government is to be watched more closely when there is a suspect class and when it takes away something fundamental, shouldn’t it also be watched more closely when the claimant gets close on each?

See Jeremy Paul, *Changing the Subject: Cognitive Theory and the Teaching of Law*, 67 *BROOK. L. REV.* 987, 1013-14 (2002).

“depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.”<sup>234</sup> Consistent with Marshall’s approach, Third Strand scrutiny takes into account both the importance of the interest affected and the invidiousness of the classification. Indeed, if courts were to use Marshall’s approach, one would expect enhanced scrutiny where vulnerable populations are denied important rights. Accepting the existence of the Third Strand, therefore, does not require rejecting the arguments of scholars who contend that the Court is heading in the direction of Marshall’s sliding scale approach.<sup>235</sup> Rather, the Third Strand phenomenon may come to be recognized as one step on the evolving road to the Marshall approach.

A Third Strand approach is also consistent with the values system that Karst describes as underpinning the Court’s equal protection jurisprudence. Karst writes that “egalitarian values” provide the background for the Court’s due process decisions, noting that “concerns about respect and stigma . . . repeatedly have provided the background for” substantive due process decisions and “sometimes have taken center stage.”<sup>236</sup> The existence of the Third Strand approach suggests that the reverse is also true: concerns about due process influence the Court’s decisions regarding the permissibility of classifications.

If there were previously any doubts as to whether the distinction between the Court’s analysis of classifications and fundamental rights has blurred, the Supreme Court’s seminal 2003 decision in *Lawrence v.*

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<sup>234</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting and Douglas, J., concurring in dissent).

<sup>235</sup> See TUSHNET, *supra* note 31, at 112-15 (arguing that Marshall’s “sliding scale” approach provides better description of Court’s actual decision than tiers because “the Court has informally moved away from giving such critical importance to the level of scrutiny and has moved toward a sliding scale approach”); Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and Bush v. Gore*, 4 U. PA. J. CONST. L. 372, 382 (2002) (“What appears to prevail most of the time instead is a sub silentio embrace of the sliding scale approach.”); Karst, *supra* note 221, at 138 (arguing that Justice Marshall was correct in describing Court’s equal protection jurisprudence as amounting to “a ‘spectrum’ of standards of review with the intensity of judicial scrutiny depending on the importance of the constitutional interests adversely affected and the invidiousness of the classification. He was right . . . but the categories survived, ornamenting opinions even though decisions were reached in the manner that Marshall had described”); cf. Fleming, *supra* note 224 (describing Court’s behavior as consistent with both Justice Stevens’s unitary approach and Justice Marshall’s sliding scale approach).

<sup>236</sup> Karst, *supra* note 221, at 101-02.

*Texas*<sup>237</sup> should erase them. In *Lawrence*, the Court held a Texas anti-sodomy statute unconstitutional.<sup>238</sup> Writing for the majority, Justice Kennedy determined that no legitimate state interest justified a Texas statute prohibiting certain homosexual sexual activity.<sup>239</sup> Kennedy's reasoning was deliberately opaque, and the Court refused to announce the level of scrutiny it was applying.<sup>240</sup>

Scholars have aptly characterized *Lawrence* as calling the future of tiered scrutiny into serious question.<sup>241</sup> More importantly for the purposes of this discussion, *Lawrence* exemplifies the stereoscopic approach that Karlan advocated on normative grounds and that Nice shows occurs empirically via the Third Strand approach. Indeed, in describing *Lawrence*, Karst described Justice Kennedy's opinion in *Lawrence* as a "textbook" example of the stereoscopic approach that Karlan urged.<sup>242</sup> By interweaving discussions of liberty interests and classifications, the Court suggested that it was the combined result of the classification at issue and the liberty interest implicated that made

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<sup>237</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>238</sup> *Id.* at 578-79 (providing Justice Kennedy's opinion with Justice O'Connor concurring with result).

<sup>239</sup> In her concurrence, Justice O'Connor chose to decide the case on equal protection grounds and, therefore, did not need to determine whether the statute at issue violated substantive due process rights. *See id.* at 584-85 (O'Connor, J., concurring).

<sup>240</sup> What level of scrutiny the Court actually employed is the subject of extensive scholarly debate. *See* Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1279 (2007) (describing standard of review in *Lawrence* as "more searching form of rational basis"); Hunter, *supra* note 232, at 1129 (describing standard of review in *Lawrence* as "rational basis on steroids"); Michael A. Scaperlanda, *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 CATH. U. L. REV. 5, 49 (2005) (describing Court as employing "heightened form of rational basis review").

<sup>241</sup> *See. e.g.,* Massey, *supra* note 201, at 946 (arguing that *Lawrence* has "done serious damage to the health of tiered scrutiny" such that "the neat compartments of tiered scrutiny are beginning to collapse"). Others view *Lawrence* as signaling even more dire consequences for the tiers. *See* Jeremy M. Miller, *The Potential for an Equal Protection Revolution*, 25 QUINNIPIAC L. REV. 287, 304 (2006) (describing O'Connor's dissent in *Lawrence* as one that "opened the door . . . to abandoning the flawed tiered analysis").

<sup>242</sup> Karst, *supra* note 221, at 100. In Karst's view, *Lawrence* is the culmination of a century of jurisprudence in which "concerns about group subordination have profoundly influenced the doctrinal growth of substantive due process" and illustrates how egalitarian values impact substantive due process decisions. *Id.* at 102. In his view, the case shows how "today's substantive due process does require the government to offer persuasive justification for an invasion of liberty that stigmatizes an identifiable social group, denying its members the status of respected equal citizens." *Id.* at 141.

the statute impermissible. Additionally, by failing to identify a level of scrutiny, the case undermined the notion that equal protection analysis is driven by the tiers and signaled that the Court was willing to move away from earlier, formulaic approaches to equal protection analysis.

By signaling the Court's willingness to depart from its three-tier, two-branch approach to equal protection jurisprudence, *Lawrence* loudly (although, of course, only implicitly) proclaims the existence of the Third Strand approach, and paves the way for this approach to be explicitly adopted in subsequent cases. Since *Lawrence*, the Court has given further signs that it may soon be willing to abandon the tiers. During oral argument in *District of Columbia v. Heller*,<sup>243</sup> a Second Amendment challenge to a gun control statute, Chief Justice Roberts publicly questioned whether it was even necessary to prescribe a standard of review, and the *Heller* opinion never explicitly stated one.<sup>244</sup> Similarly, Justice Ginsberg, speaking publically in 2004, described the tiers as creating "a false sense of security" about judicial decision-making.<sup>245</sup> Ginsberg explained that as a practical matter such equal protection decisions "generally turn[] on the character of the right involved, the individual interest at stake, and the strength of the government interest tugging the other way."<sup>246</sup> In addition, Ginsberg indicated a willingness to abandon the facade of the tiers, stating that equal protection decisions are "often reached without resorting to preconceived labels, and [which are] then fitted into the tiers."<sup>247</sup>

As *Lawrence* demonstrates, embracing a Third Strand approach allows the Court to examine the relationship between the classification and the state's interest more critically, where important (but not fundamental) rights are denied to vulnerable (but not suspect or quasi-suspect) populations. However, neither the level of skepticism that can be expected in future such cases, nor the focus of that

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<sup>243</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

<sup>244</sup> Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller*, 75 TENN. L. REV. 789, 798 (2008) (citing Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290)); see also *Heller*, 128 S. Ct. at 2787 (stating that "[u]nder any of the standards of scrutiny the Court has applied to enumerated constitutional rights" . . . the challenged statute would "fail constitutional muster").

<sup>245</sup> Ruth Bader Ginsberg, *An Open Discussion with Justice Ruth Bader Ginsberg*, 36 CONN. L. REV. 1033, 1045-46 (2004) (commenting as part of question-and-answer session with Justice Ginsberg at Connecticut University School of Law in spring 2004; comments are as set forth in edited transcript).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

skepticism, is entirely clear. In prior Third Strand cases, the Court has typically been said to have applied “rational basis with bite.”<sup>248</sup> Yet the Court itself neither uses the term nor has defined it, and there is no scholarly consensus as to what, practically speaking, “rational basis with bite” involves. Some have differentiated “rational basis with bite” from traditional rational basis review on the grounds that the Court insists on an actual (possibly on-record) legitimate state interest, not merely a hypothetical legitimate state interest, to uphold a challenged classification.<sup>249</sup> Others have described “rational basis with bite” as also requiring a more meaningful connection between a chosen classification and the state’s interest.<sup>250</sup> Under this latter interpretation, courts would more closely scrutinize both a law’s means (i.e., the classification) and its ends (i.e., the government’s interest).

The latter approach, which would require a greater degree of tailoring than traditional rational basis review, is normatively preferable because it would provide individuals with greater

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<sup>248</sup> This understanding is so common that a footnote may seem unnecessary. *But see, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-3 (2d ed. 1988) (describing *Cleburne* and *Plyler* as cases in which Court covertly employed heightened form of scrutiny); Nan D. Hunter, Essay, *Proportional Equality: Readings of Romer*, 89 KY. L.J. 885, 891 (2001) (characterizing *Moreno*, *Cleburne*, and *Romer* as “with bite” cases); Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1264-65 (2008) (characterizing *Cleburne*, *Plyler*, and *Romer* as cases in which Court applied rational basis with bite); Paul M. Secunda, *Lawrence’s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117, 133-36 (2005) (arguing that *Lawrence* Court applied “rational basis with bite”); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (characterizing *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), *Cleburne*, and *Romer* as “with bite” cases).

<sup>249</sup> Some have described this as requiring more of connection than rational basis scrutiny but less than intermediate scrutiny. *See, e.g.*, Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 461 (2009) (proposing that courts use rational basis with bite when reviewing agency rulemaking); *cf.* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (suggesting that rational basis with bite should mean that Court requires actual, not hypothetical, legitimate state interest).

<sup>250</sup> *See, e.g.*, Mathew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL’Y REV. 23, 30 (2005) (describing issue, when “rational basis with bite” might be employed, as whether “the law has some real connection to the state’s interest”). Those who have argued that rational basis is simply intermediate scrutiny in disguise effectively take a similar position. *See, e.g.*, Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987) (arguing “that rational basis with bite is simply intermediate scrutiny without an articulation of the factors that triggered it”).

protection from unreasonable government discrimination.<sup>251</sup> If applying heightened scrutiny simply requires greater scrutiny of a law's underlying purpose, courts could use this approach to invalidate statutes and regulations motivated by prejudice, bias, or fear of old age. However, it would likely leave standing laws that are not motivated by such factors, but that nevertheless contain age-based classifications that are only very marginally related to the government's interest. By contrast, if heightened scrutiny means that the Court also looks more skeptically at the relationship between the classification and the government's interest, it could be a more powerful tool for fighting age discrimination. Under this formulation, applying heightened scrutiny could cause courts to invalidate a broader range of policies — policies that while rational could not be said to be reasonable.<sup>252</sup> In addition to being preferable, the latter approach, with which courts would be open to questioning both tailoring and the legitimacy of the government's interest, seems more likely. The Third Strand approach, itself triggered by the confluence of multiple factors, is inherently holistic in nature and therefore ill-suited to a rigidly circumscribed inquiry. Moreover, the Supreme Court's prior Third Strand cases suggest that the heightened scrutiny in such cases involves an examination of both tailoring and the government's actual interest. For example, writing for the Court in *City of Cleburne v. Cleburne Living Center, Inc.*, Justice White questioned the legitimacy of the government's interest, noting that "mere negative attitudes, or fear" were not permissible rationales for treating a home for mentally retarded persons differently from other forms of housing.<sup>253</sup> However, White stated that the determination that the challenged zoning ordinance was unconstitutional turned on a lack of evidence that the ordinance would achieve its stated goal.<sup>254</sup> Similarly, in *Plyler v. Doe*, the Court asked whether the classification at issue was "reasonably

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<sup>251</sup> That said, the fact that a policy is designed to help older adults, does not necessarily mean it is not also motivated by prejudice or bias towards older adults. Indeed, policies aimed at helping older adults may do so because they perceive older adults to be diminished in their abilities or social value.

<sup>252</sup> While the two words are often used interchangeably, they are often not, as demonstrated by the disagreement between the Justices in *Murgia* as to how to define the rational basis standard. See *supra* notes 33-36 and accompanying text.

<sup>253</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

<sup>254</sup> *Id.* ("Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.").

adapted to the purposes for which the state desires to use it”<sup>255</sup> and labeled the challenged law irrational in part because “its efficacy was dubious.”<sup>256</sup>

### B. *Applying Third Strand Scrutiny to Age Discrimination Claims*

The manner in which equal protection jurisprudence is evolving suggests that certain constitutionally grounded age discrimination claims could succeed despite *Murgia* and its progeny. Specifically, the emergence of the Third Strand approach provides a real, pragmatic opportunity to challenge successfully laws that selectively burden the civil rights of older adults. This next sub-section shows why this is the case by exploring how this approach could and should be employed to challenge mandatory elder abuse reporting statutes. It then identifies other contexts in which, consistent with this approach, courts should apply heightened scrutiny to age-based classifications.

#### 1. Mandatory Reporting Example

Mandatory reporting statutes create a prime example of the conditions Nice describes as the prerequisite for Third Strand scrutiny: they target a relatively vulnerable group (older adults suspected of being abused or exploited) and then deny that group important rights (including those to privacy of medical records, clergy-communicant confidentiality, doctor-patient confidentiality, and attorney-client confidentiality) that fall just shy of fundamental. To understand how this happens, it is first necessary to understand how these statutes function.

In every state, elder abuse that occurs in certain residential facilities, including nursing homes, must be reported to the government.<sup>257</sup> Most states also require at least some categories of people to report elder abuse regardless of where it occurs.<sup>258</sup> Statutes that require reports of

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<sup>255</sup> *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (emphasis and internal quotation marks omitted).

<sup>256</sup> See *TRIBE*, *supra* note 248, at 1444-45 (describing *Plyler* as employing “balancing test of sorts” that weighed costs and benefits of “compelling Texas to educate the children of illegal aliens”); see also *Plyler*, 457 U.S. at 227-30 (comparing costs and benefits of challenged classification and concluding that “[i]t is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation”).

<sup>257</sup> Federal law requires abuse that occurs in nursing homes be reported to a designated state agency. See 42 C.F.R. § 483.13(c)(2) (2010).

<sup>258</sup> All but five states have adopted mandatory elder abuse reporting schemes. See Lori

abuse of non-institutionalized elderly are commonly called “mandatory elder abuse reporting statutes.”<sup>259</sup> The broadest such statutes require all persons who suspect mistreatment to report it.<sup>260</sup> Others target certain groups such as health care professionals, bank employees, social workers, or even attorneys for this reporting duty.<sup>261</sup>

Elder abuse reporting statutes tend to make chronological age a key factor in triggering the duty to report. Some states require reports about all suspected victims of a statutorily specified age, regardless of whether they have diminished mental capacity or any other characteristics indicating unusual vulnerability. For example, as previously explained, Rhode Island’s mandatory reporting statute requires “all persons with reasonable cause to believe that a person age 60 or older has been subject to abuse, neglect, exploitation, or is self-neglecting” to report it to the state.<sup>262</sup> Similarly, Texas requires anyone with reason to believe that a person age sixty-five or older is experiencing abuse, neglect, or exploitation to report that mistreatment to the state.<sup>263</sup> To facilitate this, Texas law explicitly states mandated reporters include individuals whose “professional communications are generally confidential, including an attorney,

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Stiegel & Ellen Klem, *Reporting Requirements: Provisions and Citations*, in ADULT PROTECTIVE SERVICES LAWS, BY STATE, <http://www.abanet.org/aging/about/elderabuse.shtml>. States that do not mandate reporting instead encourage voluntary reporting. See, e.g., COLO. REV. STAT. § 26-3.1-102(1)-(3) (2009) (encouraging certain groups of people to report elder abuse); N.J. STAT. ANN. § 52:27D-409(a) (West 2010) (stating that any person may report abuse, neglect, or exploitation of vulnerable adult); N.D. CENT. CODE § 50-25.2-03 (2010) (inviting reports of mistreatment).

<sup>259</sup> These statutes vary in a number of important ways, ranging from upon whom they impose a reporting duty, to whom reports must be made about, to the consequences of failing to report.

<sup>260</sup> See DEL. CODE ANN. tit. 31, § 3910(a) (Supp. 2008); FLA. STAT. ANN. § 415.1034 (West Supp. 2008); IND. CODE ANN. § 12-10-3-9(a) (West 2007); KY. REV. STAT. ANN. § 209.030(2)-(6)(a) (LexisNexis 2007); LA. REV. STAT. ANN. § 15:1504(A) (2010); MO. REV. STAT. § 660.255(1) (2000); N.H. REV. STAT. ANN. § 161-F:46 (Supp. 2008); N.M. STAT. ANN. §§ 27-7-30(A), -30(B) (2007); N.C. GEN. STAT. §§ 108A-102(a), -102(b) (2008); OKLA. STAT. ANN. tit. 43A, § 10-104(A) (West Supp. 2008); R.I. GEN. LAWS § 42-66-8 (Supp. 2009); TENN. CODE ANN. § 71-6-103(b) (2010); TEX. HUM. RES. CODE ANN. § 48.051 (West Supp. 2008); UTAH CODE ANN. § 62A-3-305(1) (West Supp. 2008); WYO. STAT. ANN. § 35-20-103(a) (2007).

<sup>261</sup> Cf. Stiegel & Klem, *supra* note 258 (providing state-by-state information on elder protection laws); Pamela B. Teaster, *A Response to Abuse of Vulnerable Adults: The 2000 Survey of State Adult Protective Services* 5, 20 (2003), available at [http://www.ncea.aoa.gov/NCEAroot/main\\_site/pdf/research/apsreport030703.pdf](http://www.ncea.aoa.gov/NCEAroot/main_site/pdf/research/apsreport030703.pdf) (reporting findings of national survey regarding state Adult Protective Services’ responses to abuse of vulnerable adults).

<sup>262</sup> See R.I. GEN. LAWS § 42-66-8.

<sup>263</sup> See TEX. HUM. RES. CODE ANN. §§ 48.002(a)(1), 48.051.



clergy member, medical practitioner, social worker, and mental health professional.”<sup>264</sup> Other states use chronological age as one of two or more factors that trigger the duty to report.<sup>265</sup> Even in some states where age is not directly a factor, “infirmities” or “impairments” associated with “age” or “aging” can trigger reporting duties.<sup>266</sup>

For a court to be willing to apply *de facto* heightened scrutiny to mandatory elder abuse reporting laws consistent with earlier Third Strand precedents, those challenging such laws would need to show both that the laws target a vulnerable population and that the laws deny important rights to that population. Those challenging the broadest mandatory elder abuse reporting statutes — *i.e.*, those statutes that require a broad range of persons to report abuse or neglect of anyone over a certain chronological age — could make a strong showing of both.

First, mandatory elder abuse reporting statutes certainly target a vulnerable population. Not only do they focus on older adults, but they target older adults suspected of being abused. Abuse victims are a highly vulnerable population. In addition to being abused or neglected, they are also disproportionately socially isolated,<sup>267</sup> female,<sup>268</sup> and cognitively impaired.<sup>269</sup> Moreover, there is evidence to suggest that racial minorities are more likely to be the subjects of mandated reports, even though it appears they are not more likely to be abuse victims.<sup>270</sup>

Second, such statutes significantly burden very important civil rights.<sup>271</sup> Medical professionals are frequently mandated reporters, and

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<sup>264</sup> *Id.* § 48.051(c).

<sup>265</sup> See, *e.g.*, MO. REV. STAT. §§ 660.250, 660.255 (requiring reports of abuse be made about any “person sixty years of age or older . . . who is unable to protect his own interests or adequately perform or obtain services which are necessary to meet his essential human needs”).

<sup>266</sup> See, *e.g.*, FLA. STAT. ANN. § 415.102(26) (West Supp. 2008) (defining “vulnerable adult” category of persons about whom reports are mandated as including any adult “whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to . . . the infirmities of aging”).

<sup>267</sup> Richard J. Bonnie, *Risk Factors for Elder Mistreatment*, in *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 88, 93 (Richard J. Bonnie & Robert B. Wallace eds., 2003).

<sup>268</sup> See BONNIE BRANDL ET AL., *ELDER ABUSE DETECTION AND INTERVENTION: A COLLABORATIVE APPROACH* 21 (2007); see also Bonnie, *supra* note 267, at 93 (noting, however, possible confounding variables).

<sup>269</sup> Bonnie, *supra* note 267, at 93.

<sup>270</sup> *Id.*

<sup>271</sup> For further discussion of these burdens, see Kohn, *Outliving*, *supra* note 10, at 1114-15.

disclosure of the alleged victim's physical or mental condition may be required to satisfy reporting duties.<sup>272</sup> Accordingly, disclosures required by mandatory reporting laws frequently involve disclosures of medical records or of equivalent materials. Such disclosures, if done without the alleged victim's consent, undermine the right to informational privacy — that is, the right to control information about oneself.<sup>273</sup> In addition, to the extent that mandatory reporting laws include provisions allowing the state to gain access to an alleged victim's home or property, they can infringe on physical privacy rights.<sup>274</sup>

Moreover, mandatory elder abuse reporting statutes implicate both common law and constitutional rights specific to the contexts in which would-be reporters learn of mistreatment. For example, some mandatory reporting laws require attorneys to report suspected elder abuse and neglect even when the basis for their suspicions comes from confidential client communications.<sup>275</sup> Yet the common law protects attorney-client confidentiality, and the Constitution may even require it in certain situations. State interference with the confidentiality of attorney-client communications may undermine clients' constitutionally protected First Amendment interest in confidential communications with their attorneys.<sup>276</sup> In addition, such interference

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<sup>272</sup> See *id.* at 1071, 1076-77.

<sup>273</sup> See *id.* at 1071-73 (discussing how several federal courts have come to broadly recognize right to informational privacy vis-à-vis medical records and explaining legal basis for concluding that fact that subject of report may be victim of abuse does not diminish privacy interest at stake).

<sup>274</sup> See, e.g., HAW. REV. STAT. § 346-229 (2008) (giving those investigating reports of abuse right to “visit” with alleged victim and right to enter into alleged victim's home without warrant under certain situations); IOWA CODE ANN. § 235B.3(7) (West 2008) (“Upon a showing of probable cause that a dependent adult has been abused, a court may authorize a person, also authorized by the department, to make an evaluation, to enter the residence of, and to examine the dependent adult. Upon a showing of probable cause that a dependent adult has been financially exploited, a court may authorize a person, also authorized by the department, to make an evaluation, and to gain access to the financial records of the dependent adult.”).

<sup>275</sup> Not only are attorneys required to report in states that require all persons to report suspected abuse, but there are also states in which attorneys are singled out for reporting duties. See, e.g., TEX. CODE ANN. § 48.051(c) (West 2008) (stating that mandatory reporters include those whose “professional communications are generally confidential, including an attorney . . .”).

<sup>276</sup> See *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000) (stating that interference with attorney-client confidentiality “impedes the client's First Amendment right to obtain legal advice”); *Martin v. Lauer*, 686 F.2d 24, 34-35 (D.C. Cir. 1982) (holding that public agency's requirement that employees disclose certain communications made to their attorneys violated employees' First Amendment

may undermine criminal defendants' Sixth Amendment right to effective assistance of counsel<sup>277</sup> and their Fifth Amendment right against self incrimination.<sup>278</sup> Similarly, many mandatory reporting laws include clergy as mandated reporters.<sup>279</sup> However, the clergy-communicant privilege is recognized in all fifty states,<sup>280</sup> and requiring clergy members to divulge parishioner confidence undermines both the right to free exercise of religion and informational privacy rights.<sup>281</sup> In addition, while the Supreme Court has yet to consider the question, it is possible that the clergy-communicant privilege itself is constitutionally protected.<sup>282</sup>

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rights). Such holdings are the logical extension of the Supreme Court's more general finding that freedom of speech, among other First Amendment rights, protects the right to obtain and consult with an attorney. *Accord* DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990) (stating that "[t]he right to retain and consult with an attorney . . . implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech"); see *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) ("We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.").

<sup>277</sup> See generally *Weatherford v. Bursey*, 429 U.S. 545, 556-57 (1977) (indicating that state interference with attorney-client relationship would violate Sixth Amendment where it occasioned disclosure of otherwise confidential communication).

<sup>278</sup> The right against self-incrimination guaranteed by the Fifth Amendment is fundamentally undermined if attorneys are required to disclose otherwise confidential information provided by a client for the purpose of receiving legal representation. Similar arguments have been raised in the context of mandatory reporting of child abuse. See Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 N.M. L. REV. 125, 158 n.204 (2006) (noting that, at time of publication, this type of Fifth Amendment challenge had not occurred, but arguing that it has merit); Brooke Albrant, Note, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 TEX. L. REV. 655, 667 (2002) (expressing concern that attorneys' disclosures regarding child abuse will undermine Fifth Amendment rights of battered women).

<sup>279</sup> See Kohn, *Outliving*, *supra* note 10, at 1073.

<sup>280</sup> See generally *In re Grand Jury Investigation*, 918 F.2d 374, 382-83 (3d Cir. 1990).

<sup>281</sup> See Kohn, *Outliving*, *supra* note 10, at 1073. *But see* Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 769-76 (1987) (arguing that some child abuse reporting laws may violate clergy members' rights to free exercise of religion, but that they do not violate informational privacy rights).

<sup>282</sup> See R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1703-04 (2003) (discussing whether privilege is constitutionally required and noting Supreme Court has not directly considered question).

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Given that mandatory elder abuse reporting statutes single out a vulnerable population and impose significant burdens on that population's important rights, courts should (assuming they are unwilling to apply intermediate scrutiny), apply heightened scrutiny when considering whether the classifications used in those statutes violate equal protection guarantees. Applying heightened scrutiny would most likely cause courts to inquire as to whether there is a reasonable relationship between the classification and the state's underlying policy interest.<sup>283</sup>

Accordingly, the Third Strand approach would likely result in courts finding at least a subset of such statutes unconstitutional, because the distinctions they draw are not sufficiently related to their underlying purpose. Although protecting vulnerable persons from abuse and neglect is an important and laudable government interest, broad-sweeping mandatory reporting statutes are a very poor fit for achieving that goal. One reason they are a poor fit is that statutes may require reporting abuse and neglect even in situations in which the state has limited ability or authority to remedy the situation.<sup>284</sup> Another reason is that such laws may be counterproductive. For example, there is reason to believe that mandatory reporting laws do not meaningfully increase the number of elder abuse cases reported, but nevertheless discourage caregivers and victims from seeking medical attention or assistance.<sup>285</sup> Mandatory reporting statutes may also undermine the ability of service providers to meet victims' needs by increasing providers' investigatory obligations.<sup>286</sup> Moreover, if policymakers insist on using mandatory reporting to address elder mistreatment (either in lieu of or in addition to other strategies such as permissive reporting and risk minimization), they could create less burdensome and more narrowly tailored reporting requirements. Reporting can be limited to

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<sup>283</sup> See *supra* Part III.A.

<sup>284</sup> For example, Rhode Island's statute requires "[a]ny person who has reasonable cause to believe that any person sixty (60) years of age or older has been abused, neglected, or exploited, or is self-neglecting" to report it to the State. See R.I. GEN. LAWS § 42-66-8 (2009). However, the state has no authority to provide services to the subject of abuse if the subject withdraws and refuses consent. See R.I. GEN. LAWS § 42-66-8.2(e) (2009).

<sup>285</sup> Cf. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect — The Legal Framework*, 31 CONN. L. REV. 77 (1998) (discussing critique that mandatory reporting is counter-productive because it will discourage victims from seeking help).

<sup>286</sup> See ROSALIE S. WOLF & KARL A. PILLEMER, *HELPING ELDERLY VICTIMS: THE REALITY OF ELDER ABUSE* 149-50 (1989).

situations in which the suspected victim is vulnerable<sup>287</sup> or, more narrowly, to situations in which the suspected victim likely cannot independently address the problem. For example, unless a third party is currently at risk, Wisconsin only mandates reporting of elder abuse when there is “imminent risk of serious bodily harm, death, sexual assault, or significant property loss” and the alleged victim “is unable to make an informed judgment about whether to report the risk.”<sup>288</sup>

The lack of fit between ends and means displayed by statutes such as Rhode Island’s reflects the inaccurate notion that older adults are commonly cognitively impaired and unable to make good decisions about their own lives. As previously discussed in Part II(A)(2), cognitive impairment is by no means the norm among older adults.<sup>289</sup> Nevertheless, such stereotypes persist and though far more tailored laws could be developed, states likewise persist in using broad-sweeping interventions.

In short, the Court’s prior willingness to apply *de facto* heightened scrutiny in situations where a vulnerable population was denied an important — but not fundamental — right suggests that courts could invalidate at least the broadest mandatory elder abuse reporting statutes on the grounds that they unconstitutionally deny older adults equal protection of the law.

## 2. Other Applications

Mandatory elder abuse reporting statutes are only one example of a type of statute that uses age-based classifications in a way that warrants heightened scrutiny under a Third Strand approach. Health care rationing is another context in which advocates might be able to employ a Third Strand approach successfully to mount an equal protection challenge to age discrimination.<sup>290</sup> The Supreme Court has never recognized access to health care as a fundamental right. However, the Court has recognized that the Constitution protects certain decisions related to medical care,<sup>291</sup> and it is beyond dispute

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<sup>287</sup> See, e.g., FLA. STAT. ANN. § 415.1034(1)(a) (West Supp. 2008) (mandating reporting of abuse of “vulnerable adults”).

<sup>288</sup> See WIS. STAT. ANN. § 46.90(4) (West Supp. 2008).

<sup>289</sup> See *supra* notes 168-71 and accompanying text.

<sup>290</sup> While there is certainly a significant body of literature rejecting equal protection challenges to health care rationing, a full discussion of that literature is beyond the scope of this article, especially given that it does not discuss the potential of a Third Strand approach. See, e.g., Eglit, *Health Care*, *supra* note 99 (arguing against viability to equal protection challenge to age-based health care rationing).

<sup>291</sup> See *Cruzan v. Dir. Mo. Dep’t Health*, 497 U.S. 261, 281 (1990) (finding that

that individuals have a very significant interest in being able to access health care — indeed, the ability to do so can mean the difference between life and death.

The case for heightened scrutiny in the health care context would be most compelling where the government uses age-based classifications to deny older adults the right to obtain a certain procedure regardless of need or ability to pay. For example, if the United States implemented a policy that stated that no person over a certain age could receive a certain type of organ transplant regardless of his or her need or ability to pay, Third Strand analysis would be appropriate. In this scenario, the government would be denying a very important interest (that in a vital organ) to a very vulnerable population (older people in need of such an organ). Although this is not currently U.S. policy, a current proposal for changing how kidneys are allocated suggests that the United States may be moving in this direction.<sup>292</sup>

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Fourteenth Amendment protects patient's liberty interest in refusing life-sustaining treatment); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992) (reaffirming *Roe v. Wade's* "essential holding"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding that Constitution contains right of privacy that is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

<sup>292</sup> UNOS, the non-profit that — through a contract with the U.S. Department of Health and Human Services — administers the national organ procurement and transplantation network, assigns priority scores to persons awaiting organ transplantation based on multiple factors. Under a new proposal, UNOS would use chronological age as a key variable in determining which patients receive needed kidney transplants. Specifically, under the proposed Life Years from Transplant (LYFT) approach, kidneys would be allocated based on "estimated survival that a recipient of a specific donor kidney may expect to receive versus remaining on dialysis." *See* UNOS, KIDNEY ALLOCATION POLICY DEVELOPMENT, *available at* <http://optn.transplant.hrsa.gov/kars.asp> (last visited July 27, 2009). The effect of such a system could be to reduce significantly access to organ transplants by older adults based, in large part, on their chronological age. *See* UNOS, CALCULATING LIFE YEARS FROM TRANSPLANT (LYFT) 23, 32, *available at* <http://www.ustransplant.org/kars.aspx> (last visited July 7, 2009) (showing that LYFT approach would cause likelihood of receiving transplant to decrease linearly, significantly, and dramatically based on increased chronological age). This has, naturally, raised some concerns. *See* REPORT OF THE OPTN/UNOS PATIENT AFFAIRS COMMITTEE TO THE BOARD OF DIRECTORS 5 (Feb. 21, 2008), *available at* [http://optn.transplant.hrsa.gov/CommitteeReports/board\\_main\\_PatientAffairsCommittee\\_2\\_26\\_2008\\_12\\_21.pdf](http://optn.transplant.hrsa.gov/CommitteeReports/board_main_PatientAffairsCommittee_2_26_2008_12_21.pdf) (noting that, in decision of recommended kidney allocation changes, "Members discussed the even more pronounced negative impact upon those recipients who are older than 50 years of age. Some Members described the allocation system as being discriminatory against the aging and the dialysis population. There was discussion about older individuals on dialysis being at a distinct disadvantage. Though the concept of LYFT was supported, concern was expressed by some that it shouldn't be at the expense of older individuals, especially since many are maintaining their health longer").

A less compelling, but nonetheless plausible, case for heightened scrutiny could be made where the government restricts insurance coverage for a procedure to those below a certain age, while not directly restricting the procedure itself. Although such a restriction undermines a less critical right than that in the organ transplant scenario, it is nevertheless important because many individuals may find it impossible to obtain care if they lack insurance coverage for it. A good example of the type of funding restriction that might warrant heightened scrutiny is the Medicare program's decision to limit coverage of a certain form of lumbar disc replacement to beneficiaries under the age of sixty despite receiving a number of comments — both from medical professionals and interested device makers — indicating that the procedure could be an appropriate treatment for certain Medicare beneficiaries over the age of sixty.<sup>293</sup>

Other laws that might be successfully challenged under a Third Strand approach include statutes that criminalize certain forms of consensual sexual behavior with older adults. As previously discussed, certain new state statutes aimed at addressing sexual abuse of older adults have the effect of criminalizing consensual sexual behavior with certain older adults based, in part, on their advanced chronological age.<sup>294</sup> These laws burden the very same right that was burdened in *Lawrence* — the right to engage in consensual sexual activity with a consenting adult partner.<sup>295</sup> As in *Lawrence*, these statutes target a

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<sup>293</sup> CMS denied coverage for the procedure on the grounds that there was insufficient evidence as to its benefit to those over age sixty. Although CMS concluded that the evidence in favor of the procedure was more robust with regards to those under the age of sixty (persons over the age of sixty were excluded from key FDA clinical trials), the cut-off age of sixty was inconsistent with the age sixty-five criterion suggested by a CMS commissioned technology assessment. See CENTERS FOR MEDICAID AND MEDICARE SERVICES, DECISION MEMO FOR LUMBAR ARTIFICIAL DISC REPLACEMENT (LADR) (CAG-00292R) 13, available at <http://www.cms.hhs.gov/mcd/viewdecisionmemo.asp?from2=viewdecisionmemo.asp&id=197&> (last visited Sept. 21, 2010) (“The [Technology Assessment] commissioned by CMS for the [Medicare Coverage Advisory Committee] concluded, ‘The evidence . . . did not conclusively demonstrate short-term or long-term benefits compared with non-surgical treatment, especially when considering patients over 65 years of age.’”). The determination appears to have been colored by an underlying assumption about the physical condition of persons over the age of sixty, an assumption for which CMS provided virtually no support. It simply stated that “CMS is convinced that the indications for [lumbar artificial disc replacement] will exclude the over age 60 population.” See *id.* at 18.

<sup>294</sup> See *supra* notes 158-66 and accompanying text.

<sup>295</sup> See Kohn, *Outliving*, *supra* note 10, at 1095-99 (explaining why potential dependency of older adults does not change nature of right implicated and explaining that “[o]lder adults and disabled adults who have the capacity to consent to sexual activity have no less of a liberty interest in private, consensual relations than did the

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vulnerable population: older adults who have some level of disability or enhanced dependency. Accordingly, it would be doctrinally appropriate for courts to scrutinize these laws using the same heightened scrutiny used in *Lawrence*.

By contrast, the courts would be far less likely to grant heightened scrutiny to laws that use chronological age-based classifications to allocate purely economic goods and rights.<sup>296</sup> For example, if the government reversed current policy and provided social security payments to the middle-aged instead of the old, the courts would be unlikely to apply anything more than the traditionally deferential formulation of rational basis scrutiny. Historically, courts have employed Third Strand scrutiny to invalidate classifications that restrict civil rights, rights which modern courts generally view as more compelling than economic rights.<sup>297</sup>

Similarly, laws that use chronological age criteria that discriminate on the basis of younger age are also less likely to be granted heightened scrutiny than those that discriminate on the basis of old age. This is in part because compared to older adults, youth are not as close to being a quasi-suspect class.<sup>298</sup> That said, the case for applying Third Strand scrutiny to all age-based classifications is significantly stronger than that for applying intermediate scrutiny to all age-based classifications. For example, a more persuasive argument can be made for subjecting youth-based classifications to Third Strand scrutiny than to intermediate scrutiny. Because children have yet to fully develop their physical and mental capacities and because they have not yet reached an age when they have full legal rights, they are arguably “vulnerable” for purposes of Third Strand scrutiny. However, because chronological age is a far more accurate predictor of underlying traits for children than for older adults,<sup>299</sup> children lack the same compelling history of being subjected to unique disadvantage as

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*Lawrence* defendants. To the contrary, adults of all ages and abilities can have the desire and capacity to engage in sexual activity. Despite stereotypes of older or disabled persons as de-sexualized, sexual expression is an important part of the life and dignity of many such persons”).

<sup>296</sup> Cf. Julie Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629 (2008) (criticizing deconstitutionalization of poverty law and second-class citizenship afforded to economic rights).

<sup>297</sup> See *id.* at 649.

<sup>298</sup> A full discussion of this point falls outside the scope of this Article. As noted *supra* note 191 and accompanying text, however, chronological age classifications are less crude proxies for youth than for older adults. As such, they are less likely to be subjected to unique disabilities based on inaccurate stereotypes.

<sup>299</sup> See *supra* note 191 and accompanying text.



the result of inaccurate stereotypes that would justify application of intermediate scrutiny.

C. *Part III Summary*

Equal protection jurisprudence has evolved such that certain forms of age discrimination may be found unconstitutional even if the Supreme Court refuses to recognize age or “old age” as a quasi-suspect classification. Specifically, in situations where important rights are denied to older adults, the Court might use enhanced scrutiny and find an age classification impermissible. Mandatory elder abuse reporting laws that require reporting abuse of all persons above a given chronological age, laws that ration health care based exclusively on chronological age, and laws criminalizing consensual sexual behavior by certain older adults are just three examples of types of laws that might be found impermissible as a result. Of course, some statutes that would qualify for a heightened form of scrutiny would nevertheless pass constitutional muster. For example, where there is empirical evidence that the efficacy of a certain treatment is very limited above a certain age, courts should be expected to uphold a government’s decision to restrict publically funded insurance coverage of that treatment to those above that age regardless of whether or not that court uses a Third Strand approach.

In considering how Third Strand scrutiny would be applied to different types of age discrimination claims, it should not be assumed that because the oldest of the old tend to be the most vulnerable older adults, the more advanced the age classification used in a public policy, the more likely that classification will be found impermissible. Applying Third Strand scrutiny to age discrimination claims requires a complex balancing act. The older the age classification used, the more likely that the affected individuals will be vulnerable; at the same time, the more likely chronological age may be a reasonable proxy for certain traits. Chronological age, for example, is a more accurate predictor of physical and cognitive disabilities for the oldest of the old than it is for the young-old or old.<sup>300</sup> Yet it is the oldest of the old who tend to have the least political clout and greatest vulnerability.<sup>301</sup> Thus

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<sup>300</sup> See Judith G. Gonyea, *The Oldest Old and a Long-Lived Society: Challenges for Public Policy*, in *THE NEW POLITICS OF OLD AGE POLICY*, *supra* note 2, at 183, 193-94 (discussing health status of oldest of old).

<sup>301</sup> See *id.* at 3 (explaining that while oldest old are diverse group, they are less politically powerful and more vulnerable than young old and old; for example, they are more likely to live below poverty line, are generally in poorer health, and are significantly more impaired in their ADLs IADLs); see also *supra* notes 113-15 and

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in some contexts, age classifications that target the most vulnerable older adults may be the most likely to be found constitutional.

Of course, arguing that certain age classifications should be subjected to heightened scrutiny, and that certain classifications would not be able to withstand that scrutiny, is a far cry from suggesting that the Constitution condemns all forms of age discrimination.<sup>302</sup> Given the relatively benign nature of many chronological age-based criteria used in U.S. public policy and the rationales for those uses, the majority of forms of age discrimination currently in existence would likely survive the type of heightened scrutiny used in Third Strand cases.

#### IV. THE DESIRABILITY OF APPLYING HEIGHTENED SCRUTINY TO AGE DISCRIMINATION

The preceding Parts have explored constitutional arguments in favor of applying heightened scrutiny to old-age classifications. There are also compelling policy arguments in favor of limiting the use of such classifications.

Of course, not all forms of age discrimination are bad. Although the term “discrimination” is generally treated as pejorative, discrimination is a fundamental and necessary legal tool. There are often good reasons for discriminating on the basis of age. Common sense would tell us that while it may be reasonable to compel children to be educated, far greater justification would be required to mandate education of adults. Similarly, while there is debate as to what the voting age should be, virtually no one would advocate extending the right to vote to prepubescent children.

Even age discrimination based on old age status can be reasonable. Sometimes there are good reasons to advantage younger persons to the disadvantage of older ones. For example, a society might reasonably choose to provide free education to younger persons but not to older ones. In the face of limited resources, the utilitarian would propose giving those resources to those individuals who can make the best use of them. In a society that believes all persons should be treated as possessing equal moral worth — the traditional liberal ideal — “best use” can reasonably be equated with “longest use” and thus it may be

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accompanying text.

<sup>302</sup> In fact, some age discrimination is written into the Constitution — the President and Vice President must be at least thirty-five; Senators, thirty; Members of Congress, twenty-five. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. II, § 1, cl. 4. For more discussion of U.S. Constitutional provisions affecting age discrimination, see Elgit, *Of Age*, *supra* note 56, at 864-66.

appropriate to allocate resources in a way that favors those with the longest expected life-spans. Similarly, there are many justifications for discriminating in favor of older adults. Pro-elderly discrimination may compensate for disadvantages the elderly experience in society or for other indignities associated with aging. Such preferential treatment may also serve as a form of just reward and as a way for society to express appreciation for its elders. Moreover, programs providing special benefits to older adults such as Medicare and Social Security may make the prospect of aging less daunting for the young and old alike.<sup>303</sup>

However, many forms of age discrimination are concerning. Discriminating in favor of older adults can undermine efforts to allocate resources efficiently, while discriminating against older adults can burden already marginalized persons, promote ageist stereotyping, increase the indignity associated with aging, and make the prospect of aging more dismal for young and old alike. Moreover, these negative effects are increasingly unlikely to be outweighed by positive ones.<sup>304</sup> This is because policies that use chronological age criteria frequently do so not because their goal is to give differential treatment to people of different ages, but rather because policymakers consider chronological age to be an expedient proxy for some underlying characteristic that policymakers believe warrants differing treatment. For example, chronological age may be considered a valid proxy for individual characteristics such as maturity, frailty, vulnerability, or worthiness.<sup>305</sup> This perception, combined with the administrative appeal of chronological age as a proxy (chronological age criteria are easy to implement because chronological age can be readily determined without the need for discretion<sup>306</sup>), encourages over-reliance on such criteria.

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<sup>303</sup> While many have discussed the rationales for policies preferencing older adults, Bernice Neugarten's classic volume *Age or Need?* provides perhaps the best compilation of such arguments. See generally *AGE OR NEED?* (Bernice L. Neugarten, ed., 1982) (exploring tensions between age-based and need-based approaches to policy making).

<sup>304</sup> Cf. Bernice L. Neugarten, *Age Distinctions and Their Social Functions*, 57 CHI.-KENT L. REV. 809, 822-23 (1981) (describing age proxies as requiring trade-offs between accuracy and efficiency).

<sup>305</sup> Cf. Hudson, *Contemporary Challenges*, *supra* note 2, at 4 (noting that, "[h]istorically, chronological age has served as a central proxy for need, as an important marker of an inability to work, and as an essentially inevitable predictor of illness and disability").

<sup>306</sup> See Neugarten, *supra* note 304, at 822-23.

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Thus, as chronological age becomes an increasingly poor predictor of functional abilities, using it as a proxy will increasingly result in policies poorly tailored to the objectives that they seek to achieve. Nevertheless, it has been more than fifteen years since there was significant academic discussion of either the desirability or legality of the use of chronological age as an eligibility criterion in public policy. This absence of discussion to some extent reflects the fears of advocates for the elderly. There is a common impression that age-based classifications are generally benign with respect to the elderly and past discussions of their wisdom created fierce debates in which ethicists and others urged severely restricting health care to older adults. Because of these two factors, elder law specialists and elder advocates have been hesitant to question the use of age in public policy. Indeed, some have warned that attacks on ageism and age discrimination are a type of “Trojan Horse” that could open the door to undermining age-based entitlements and benefits.<sup>307</sup> Consistent with such fears, in recent years, litigants raising equal protection challenges to age-based classification have tended to do so in the context of suits aimed at protecting the rights of youth.<sup>308</sup>

The result is that at a time when the use of chronological age is increasingly problematic, this lack of attention has created an environment in which problematic policies that classify persons based on old age — and, indeed, selectively limit rights based on old age — have been able to proliferate with relatively little criticism. For example, as discussed earlier, new statutory schemes designed to protect older adults from abuse and neglect have the effect of undermining older adults’ civil rights based, at least in part, on their chronological age.

It is in this environment that this Article calls for the courts to more closely scrutinize age-based classifications. Closer judicial scrutiny is important both because it could lead to invalidation of some highly problematic laws and because, by more closely scrutinizing age-based classifications, the courts may nudge policymakers to reduce their reliance on such classifications. Specifically, courts applying Third Strand scrutiny to old-age classifications could encourage policymakers to restrict the use of such classifications to situations

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<sup>307</sup> JOHN MACNICOL, *AGE DISCRIMINATION: AN HISTORICAL AND CONTEMPORARY ANALYSIS* 267 (2006) (“Combating age discrimination in employment may lead on to a wider, and much-needed, onslaught upon ageism in social relations and attitudes. On the other hand, it may be the Trojan horse of an attack upon the welfare rights of older people.”).

<sup>308</sup> See *supra* note 95 and accompanying text.

where the classifications are substantially related to an important governmental goal, thereby simultaneously avoiding unreasonably disadvantaging certain age groups. Arguments that certain forms of age discrimination are unconstitutional have the potential not only to affect judicial decision-making, but also legislative decision-making. This is not simply because policymakers would prefer not to have their policies invalidated in a court of law, but also because such arguments can carry sufficient rhetorical and persuasive force to alter policymakers' determinations as to the desirability of discriminatory policies. Historically, constitutional arguments — especially those focused on individual rights and liberties — have had such power even in situations where they did not or could not prevail in a court of law.<sup>309</sup>

In short, the constitutional and policy arguments for curtailing the use of age-based classifications are not only compatible, they are mutually supporting. Thus, just as challenging age discrimination on equal protection grounds is not a substitute for challenging age discrimination on other legal grounds, court-based challenges to age discrimination are not a substitute for legislative advocacy strategies. To the contrary, challenging age discrimination on equal protection grounds may complement and support legislative avenues of attack.

#### CONCLUSION

Both scholars and the judiciary have accepted the conventional wisdom that the constitutional status of age-based classification is a settled issue. This Article shows why it is nevertheless too early to surrender to the consensus view that all forms of age discrimination merit only rational basis scrutiny.

A strong case can be made that the Court should explicitly apply intermediate scrutiny to old-age classifications, and that doing so would be consistent with prior decisions. However, given the Court's extreme reluctance to expand the ranks of quasi-suspect classifications and its repeated rejection of the invitation to do so in the age discrimination context, it is unlikely the Court will embrace intermediate scrutiny for age-based classifications. That said, it is

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<sup>309</sup> See Kohn, *Outliving*, *supra* note 10, at 1106; Larry Kramer, *Generating Constitutional Meaning*, 94 CAL. L. REV. 1439, 1444-45 (2006) (describing political value of tying policy arguments to constitutional ones); *cf.* Daveed Gartenstein-Ross, *An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation*, 14 DUKE ENVTL. L. & POL'Y F. 185, 191-98 (2003) (explaining that arguments in favor of constitutional right to clean environment have political sway despite their rejection in courts).

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possible that certain state courts could be persuaded by this Article's arguments in favor of intermediate scrutiny and embrace them when interpreting state constitutional provisions.

At the federal level, however, the real opportunity for waging a successful equal protection challenge to age discrimination lies almost exclusively in the potential to exploit the variability in the degree of scrutiny actually afforded to classifications that are neither suspect nor quasi-suspect. Specifically, the emerging Third Strand of equal protection jurisprudence holds promise as a jurisprudential approach that courts could use to invalidate age classifications that deny older adults important rights. The Court has previously employed the Third Strand approach in parallel contexts, striking down classifications in situations where the Court recognized neither a fundamental right nor a suspect class, but decided that the interaction between the right and the class merited heightened scrutiny because of the importance of the right to the targeted class.

Recognizing the Third Strand's potential as a tool for attacking age discrimination is not only valuable to litigants seeking to challenge particularly ill-conceived and pernicious age classifications in the courts. It is also significant to policymakers as it warns them that the government cannot cavalierly undermine older adults' important rights without showing both a relatively important justification for doing so and a reasonable relationship between its chosen classification and its underlying goal.

This is a critically important time to reconsider the permissibility of age discrimination. The first members of the baby boom generation will reach traditional retirement age in 2011. As the nation struggles with this demographic change, increased political support for economizing by limiting the resources that society allocates to older adults is to be expected. In such a political climate, advocates and judges must not overlook the potential of the Equal Protection Clause. Instead, we must recognize that the Equal Protection Clause retains the power to provide an important check on the majoritarian process — a check that can help ensure that older adults' important rights are respected even in difficult times.