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COMPULSORY RETIREMENT, THE CONSTITUTION AND THE MURGIA CASE

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Although the United States Supreme Court has occasionally concerned itself with classifications by age, *Massachusetts Board of Retirement v. Murgia*[1] appears to be the first case which deals with the constitutionality of a maximum age for purposes of retirement. The increasing life expectancy of Americans may prove of little use if, at an arbitrarily early age, *e.g.*, age 50, retirement is required and dependency on society begins. On the other hand, for younger workers, mandatory retirement statutes assure increased employment and promotion opportunities, thereby advancing incentive and morale.

Government studies indicate the dramatic shift in work participation since the passage, in recent years, of compulsory retirement laws. In 1890, 68.2% of men 65 and older were active members of the work force.[2] By 1920, a majority of men over 65 remained in the work force.[3] During the early part of the twentieth century, the proportion of people over age 65 was only 4%.[4] In the 1970's, the percentage of people 65 and older has grown to about 10%, or more than 20 million, and by the year 2000 the number will probably be 29 million.[5] Medical progress has accounted for this increase, and the implication is to expect a more active and productive older population. Instead, only 25% of males 65 and older were active in the 1970 work force,[6] and a small 3.4% of all persons over 65 were working.[7] A recent survey reports that "61 percent of all working people can expect that at a fixed age they will be told to retire from their jobs."[8] Yet 86% of the

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1. 96 S. Ct. 2562 (1976), *reversing* 376 F. Supp. 753 (D. Mass. 1974) (three-judge court).

2. CRITERIA FOR RETIREMENT 13 (G. Mathiasen ed. 1953).

3. *Id.*

4. U.S. BUREAU OF THE CENSUS, ABSTRACT OF THE 12TH CENSUS 11 (1904).

5. U.S. DEPT. OF COMMERCE, U.S. STATISTICAL ABSTRACT 6 (1974).

6. B. SMITH, AGING IN AMERICA 19 (1973).

7. U.S. DEPT. OF LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 43, Table I (1974).

8. LOUIS HARRIS AND ASSOCIATES, INC., THE MYTH AND REALITY OF AGING IN AMERICA 211 (1975).

population believes that "nobody should be forced to retire because of age, if he wants to continue working and is still able to do a good job."[9]

This article explores the constitutional issues implicated by mandatory retirement schemes, examines some lower court decisions, and analyzes the recent *Murgia* opinion.

I. Due Process and Irrebuttable Presumption

The legislative branches of the federal and state governments constantly are involved in "line-drawing," whereby some people are classified and accorded certain rights while others who are not so classified are denied those same rights. Mandatory retirement statutes are one example of such legislation. By enacting this type of legislation, the state creates a conclusive statutory presumption that all individuals above a certain age are unfit, and those below that age are fit, to continue as public employees. This presumption is one procedural method by which a government decides whether public employees may continue in their jobs. Constitutionally, public employees' rights to continued employment in the face of a conclusive presumption may involve a property right under the due process clause of the fourteenth amendment. If a property right is involved, then the employee cannot be deprived of this right without due process of law.[10] At issue, then, is whether a conclusive statutory presumption concerning the mandatory retirement of individuals over a particular age adequately safeguards an individual's procedural due process rights as guaranteed by the fourteenth amendment. This issue is at the heart of the Supreme Court's decisions which have dealt with the concept of the "irrebuttable presumption."[11] As is evident from the language used by the Court, these decisions considered whether a procedural due process violation had occurred.[12]

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9. *Id.*

10. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Connell v. Higginbotham, 403 U.S. 207 (1970); Slochower v. Bd. of Educ., 350 U.S. 551 (1956); Wiemann v. Updegraff, 344 U.S. 183 (1952). The Court in *Roth* discussed the attributes of a "property" interest stating:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Roth, supra at 577.

11. Weinberger v. Salfi, 422 U.S. 749 (1975); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).

12. In Vlandis v. Kline, 412 U.S. 441 (1973), and United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973), the Court simply referred to "due process" and did not use the terms "procedural" or "substantive." However, the Court employed at least in certain aspects what was a procedural analysis. The cases of Bell v. Burson, 402 U.S. 535 (1971), and Stanley v. Illinois, 405 U.S. 645 (1972), are primarily procedural and are so referred to by the Court elsewhere. *See also* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972). The language used in the

In *Carrington v. Rash*[13] the Court stated the issue in terms of an equal protection problem. However, the Court used what was essentially a procedural due process analysis to decide that a Texas voting residency statute went beyond what was necessary or reasonable to protect an admittedly valid state interest. The Court stated that:

> Texas is free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirement of bona fide residence. *But this constitutional provision goes beyond such rules.* "[T]he presumption here created is . . . definitely conclusive—incapable of being overcome by proof of the most positive character." *Heiner v. Donnan,* 285 U.S. 312, 324.[14]

In going "beyond the rules" the state denied one class of persons a fundamental right—the right to vote—without due process of law, while other classes of adult residents were afforded that right. This, of course, is an equal protection problem. However, the heart of the matter is the nature of the equal protection denial—the denial of procedural due process by the use of an irrebuttable presumption.

The procedural due process approach is more clearly illustrated by the analysis in *Bell v. Burson*[15] which held that an individual's driver's license could not be revoked without adherence to procedural due process standards. Under the Georgia statutory system involved, Georgians' driver's licenses normally were not summarily revoked because of involvement in automobile accidents. However, *uninsured* motorists' licenses were suspended following an accident, regardless of fault, unless a bond was posted. This presented an equal protection question, because uninsured motorists were denied procedural due process (notice and a hearing prior to license suspension) while insured motorists faced no suspension in the same situation. However, as in *Carrington,* there was an additional and distinct issue concerning the procedure used to terminate the entitlement of a driver's license. The procedure employed by the state in *Bell* presumed that an

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Vlandis opinion further supports this, the Court stating that: "[S]tandards of due process require that the State allow such an individual the *opportunity to present evidence* showing that he is a bona fide resident entitled to the in-state rates." 412 U.S. at 452 (emphasis added). Further, Justice Marshall in his *Vlandis* concurrence states that the case dealt with "nothing more than the *procedures* by which the State determines whether or not a person is a resident for tuition purposes." 412 U.S. at 455 (emphasis added). Procedural due process deals with the enforcement of public policy as determined by the legislature. It is precisely this method of enforcement that is the concern of the Court in irrebuttable presumption cases. While there may in these cases be an *additional* equal protection problem creating a violation of substantive due process, the two issues are distinguishable and do not merge into one as suggested by some commentaries. *See* Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?* 72 MICH. L. REV. 800, 821 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court,* 87 HARV. L. REV. 1534 (1974); Note, *Irrebuttable Presumption: An Illusory Analysis,* 27 STAN. L. REV. 449 (1975).

13. 380 U.S. 89 (1965).
14. *Id.* at 96 (emphasis added).
15. 402 U.S. 535 (1971).

uninsured motorist involved in an accident was likely to be liable and to be judgment proof. No hearing was held even on the *possibility* of liability and as a result, the Georgia procedure was held violative of procedural due process. *Bell* found that the state must provide a forum to determine the reasonable possibility of a civil judgment being rendered against an individual in order to provide a more precise relationship between the legislation's purpose and the uninsured motorist.

Bell and *Carrington* illustrate the two part analysis followed by the Supreme Court in approaching cases involving irrebutable presumptions. This analysis, which identified (1) the equal protection issue of whether the classification serves a legitimate state interest; and (2) the procedural due process issue of whether an entitlement may be terminated without adherence to minimal notice and hearing standards, was also followed in *Vlandis v. Kline*.[16] In *Vlandis* the Court held that:

> [A] permanent irrebuttable presumption of nonresidence—the means adopted by Connecticut to preserve that legitimate interest—is violative of the Due Process clause, because it provides no opportunity for students who applied from out of state to demonstrate that they have become bona fide Connecticut residents.[17]

In *Cleveland Board of Education v. La Fleur*[18] the procedural due process argument again was articulated. The Court stated that: "The question before us is . . . whether the interests advanced in support of the rules of the . . . School Boards can justify the *particular procedures* they have adopted."[19] *La Fleur*, however, treated the equal protection problem and the procedural due process argument as two distinct issues. Thus, the court also applied an equal protection test and considered whether mandatory maternity leave rules were "rationally related" to admittedly justifiable state interests in having only physically fit teachers in the classroom. This results in the "grafting" of the equal protection clause onto the due process clause; a result which the dissenting minority in *Vlandis* feared.[20] The *La Fleur* equal protection discussion concerned the validity of the basic class distinction between individuals less than five months pregnant and those more than five months pregnant in relation to articulated state objectives. Its due process

16. 412 U.S. 441 (1973).
17. *Id.* at 453.
18. 414 U.S. 632 (1974).
19. *Id.* at 640 (emphasis added).
20. Chief Justice Burger, with whom Justice Rehnquist joined dissenting in *Vlandis*, stated that the Court's use of an irrebuttable presumption analysis:

> [A]ccomplish[ed] a transference of the elusive and arbitrary "compelling state interest" concept into the orbit of the Due Process Clause, [and that in the future] [t]here will be . . . some ground for a belief that the Court now engrafts the "close judicial scrutiny" test onto the Due Process Clause whenever we deal with something like "permanent irrebuttable presumptions."

Vlandis v. Kline, 412 U.S. 441, 460, 462 (1973).

discussion concerned the use of a five month cut-off as a procedural device to determine which individuals fit within each classification.[21] The Court found the presumptive procedure in *La Fleur* to be a violation of procedural due process, because its classification was overinclusive and therefore *procedurally* defective because of *substantive* defects.

> [T]he question is whether the rules sweep too broadly . . . for the provisions amount to a conclusive presumption that *every* pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing.[22]

The fact that the existence of an equal protection problem is evidence that the requirements of procedural due process are not being met illustrates the manner in which the procedural due process requirements and the equal protection clause overlap.

In *Stanley v. Illinois*[23] the basic validity of the classification involved was considered.[24] *Stanley* dealt with both a conclusive statutory presumption that all unmarried fathers, upon the mother's death, were "unfit" parents and an equal protection problem involving the fact that, with no rational basis for the distinction, all mothers and married fathers were awarded a hearing on parental fitness while unmarried fathers were not. The Supreme Court stated:

> We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.[25]

The Court also considered the notion of procedure by presumption and its validity under the due process clause. It stated that it granted certiorari:

> to determine whether this method of procedure by presumption could be allowed to stand in light of the fact that Illinois allows married fathers—whether divorced, widowed or separated—and mothers—even if unwed—the benefit of the presumption that they are fit to raise their children.[26]

The first part of the passage articulates the due process problems involved in the case; the second examines the equal protection issue and its bearing on

21. The difficulty with *La Fleur* is that despite the consideration of due process by the Court, no due process claim was made by the respondents. This causes a lack of clarity and demarcation of the issues presented in the Court's opinion.

22. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 644 (1974) (emphasis added).

23. 405 U.S. 645 (1972).

24. In Carrington v. Rash, 380 U.S. 89 (1965) and Vlandis v. Kline, 412 U.S. 441 (1973), the valid interests of the state in creating a distinction between certain groups of individuals were not disputed. Rather, it was the *method* employed in determining the members of the classes which was found impermissible.

25. Stanley v. Illinois, 405 U.S. 645, 658 (1972).

26. *Id.* at 647.

determining the validity of the "presumption procedure" in light of due process requirements. These appear to be distinct issues, not due process masquerading as a convoluted equal protection analysis.[27]

The equal protection problem in mandatory retirement schemes is similar to that presented in *Stanley*. All public employees could take a physical examination to determine fitness. Instead, in mandatory retirement schemes, those over the mandatory retirement age are legislatively determined to be unfit regardless of the physical examination results. Thus, while those under the mandatory retirement age are afforded an opportunity for a meaningful due process proceeding, *e.g.*, an annual physical examination to determine continued fitness, those over the age do not receive the same treatment. The due process issue in mandatory retirement schemes involves the "procedure by presumption" that all public employees older than the legislatively-designated age are conclusively unfit for continued employment. The question presented, then, is can this "procedure by presumption" withstand a due process analysis?

In *United States Department of Agriculture v. Murry*,[28] the Court held that ease of administration cannot justify the use of procedures which are a denial of due process. In a concurring opinion Justice Marshall expressed his view that if the private interest involved is a primary interest, then a hearing is necessary to satisfy due process requirements and procedure by presumption is inadequate.[29] A significant property interest is involved in mandatory retirement statutory schemes—the interest in continued employment.[30] Therefore, *Murry* and the procedural due process requirements of the fourteenth amendment appear applicable to mandatory retirement cases.

However, in *Weinberger v. Salfi*,[31] the Court appeared to restrict the applicability of the irrebuttable presumption approach to procedural due process problems. In rejecting a challenge to the Social Security Act's

27. Justice Powell in his concurrence in the result in *La Fleur* expressed the view that:

> If the Court nevertheless uses "irrebuttable presumption" reasoning selectively, the concept at root often will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause.

Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 652 (1974).

28. 413 U.S. 508 (1973).

29. Justice Marshall, in positing what he believes to be the "analytic underpinnings" of the majority opinion, states that:

> In short, where the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices.

United States Dep't of Agriculture v. Murry, 413 U.S. 508, 518 (1973).

30. *See*: note 10 *supra*.

31. 422 U.S. 749 (1975).

duration-of-relationship requirements, Justice Rehnquist reiterated[32] his view that the wholesale extension of the irrebuttable presumption holdings of *Stanley, Vlandis* and *La Fleur* classifications which concern the distribution of government funds

> would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.[33]

Notwithstanding Justice Rehnquist's recent pronouncement, it is submitted that mandatory retirement schemes involve the same types of "fact" determinations—the physical "fitness" or "unfitness" of a public employee—as did the factual inquiries in *Stanley, Vlandis* and *La Fleur.* Thus, even under the restricted construction of the irrebuttable presumption doctrine's applicability, it is arguable that a hearing is necessary prior to the mandatory retirement of public employees. The statistics involved in age-job capacity are no more weighty than those used in correlating unwed fathers with fitness or unfitness in caring for children.[34]

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32. In his *Murry* dissent, he said:

> There is a qualitative difference between, on the one hand, holding unconstitutional on procedural due process grounds presumptions which conclude factual inquiries without a hearing on such questions as fault, *Bell v. Burson,* 402 U.S. 535 (1971), the fitness of an unwed father to be a parent, *Stanley v. Illinois,* 405 U.S. 645 (1972), or, accepting the majority's characterization in *Vlandis v. Kline,* 412 U.S. 441 (1973), residency, and, on the other hand, holding unconstitutional a duly enacted prophylatic limitation on the dispensation of funds which is designed to cure systemic abuses. United States Dep't of Agriculture v. Murry, 413 U.S. 508, 524 (1973).

More important, his *La Fleur* dissent spoke of:

> . . . the jeopardy in which the Court's opinion places longstanding statutes providing for mandatory retirement of government employees . . . Since [the] right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life. . ., the Court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 659 (1974).

33. Weinberger v. Salfi, 422 U.S. 749, 772 (1975). In *Salfi, Murry* was distinguished as a case involving an irrational classification.

34. In *Stanley* the State spoke of "general disinterest of putative fathers in their illegitimate children" and that "in most instances, the natural father is a stranger to the child." Stanley v. Illinois, 405 U.S. 645, 654, n.6. The Court in *Stanley,* noted however, that there was no sociological data by which lower courts were justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his natural mother. *Id.* at 654, n.7.

The statistical data concerning age-job capacity is equally inconclusive. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1223, *Comparative Job Performance by Age: Large Plants in the Men's Footwear and Household Furniture Industries* (1957) (slight decrease in productivity among older workers); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1273, *Comparative Job Performance by Age:*

II. EQUAL PROTECTION

A. *Strict Scrutiny*

In most situations, a statutory classification is considered valid[35] if it includes all, but only those, persons who are similarly situated with respect to the purpose of the law. In decisions dealing with economic regulations,[36] the Court has used concepts like "purpose"[37] and "similar situations"[38] which give considerable latitude to state legislatures in determining the permissible scope of classifications. However, when either "suspect classifications"[39] or "fundamental rights"[40] are involved, legislative discretion is narrowed con-

Office Workers (1960) (greater productivity by older workers); CANADIAN DEP'T OF LABOUR, ECONOMICS AND RESEARCH BRANCH, *Age Performance in Retail Trade* (1959) (older department store workers were equal to or better than those younger, with peak performance at ages 51-55); Clay, *A Study of Performance in Relation to Age at Two Printing Works*, 11 JOURNAL OF GERONTOLOGY 417 (1956) (machine compositors and hand compositors showed a slight decline in productivity after age fifty, while older readers maintained a higher level of performance than younger ones until retirement); HAKKINEN, TRAFFIC ACCIDENTS AND DRIVER CHARACTERISTICS (1958) (this study of Helsinki bus and tram drivers found no correlation between age and accidents); NORMAN, PROCEEDINGS OF THE SECOND CONGRESS OF THE INTERNATIONAL ASSOCIATION FOR ACCIDENTS AND TRAFFIC MEDICINE, *Professional Drivers and Road Safety* (1966) (this study on London bus drivers found the safest age range to be 60-64, with no significant decline for those older); Palmer and Brownell, *Influence of Age on Employment Opportunities*, 48 MONTHLY LABOR REV. 765 (1939) (these researchers found no correlation between age and output in surveying six New England companies); Walker, *The Job Performance of Federal Mail Sorters by Age*, 87 MONTHLY LABOR REV. 296 (1964) (this study of postal workers found a slight decrease, less than 10%, in performance after age 60).

35. The exception is where the statute involves a "fundamental right" or "suspect category." In those cases a statute is not automatically presumed constitutional. Shapiro v. Thompson, 394 U.S. 618 (1969).

36. Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Ry. Express Agency v. New York, 336 U.S. 106 (1949); Nebbia v. New York, 291 U.S. 502 (1934).

37. In Nebbia v. New York, 291 U.S. 502, 537 (1934), the Court stated that:

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.*

38. In Goesaert v. Cleary, 335 U.S. 464 (1948), the Court stated:

> The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations "which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas, 310 U.S. 141, 147 (1940).

Id. at 466.

39. Korematsu v. United States, 323 U.S. 214 (1944).

40. Shapiro v. Thompson, 394 U.S. 618 (1969).

siderably. In dealing with the constitutionality of mandatory retirement laws, therefore, it is important to determine whether age is a "suspect category" or whether employment is a "fundamental right." If neither of the aforementioned is found to be true, then the state's burden of justification for the classification is substantially reduced.[41] On the other hand, if a "suspect classification" or "fundamental right" is involved, a "very heavy burden of justification"[42] is placed upon the state, and the classification is subject "to the most rigid scrutiny."[43]

In determining the applicability of a "strict scrutiny" standard of review to mandatory retirement legislation, the first question presented is whether age should be treated as a suspect classification. The Court has long recognized a "strict" standard of review in examining classifications based on race[44] and has extended this approach to cases involving discrimination because of national origin.[45] More recently, the Court held that classifications based on alienage are "inherently suspect" and, therefore, are subject to strict judicial scrutiny.[46] Aliens, as a class, were held to be a prime example of a "discrete and insular"[47] minority for whom such heightened judicial solicitude is appropriate. The Court has also subjected classifications based on illegitimacy[48] and sex[49] to strict scrutiny in determining their validity, but neither has yet been held a suspect category.

Although no decision has held that discrimination against poor people is "inherently suspect," the Court has stated that "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored"[50] and "render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[51] Hence, by the late 1960's it appeared that the Court was adopting an attitude that would permit the addition of wealth (or lack of wealth) to the existing list of suspect categories. However, despite this

41. McGowan v. Maryland, 366 U.S. 420 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

42. Loving v. Virginia, 388 U.S. 1, 9 (1967).

43. Korematsu v. United States, 323 U.S. 214, 216 (1944).

44. Brown v. Bd. of Education, 347 U.S. 483 (1954); Strauder v. West Virginia, 100 U.S. 303 (1880).

45. Early decisions on racial classifications which discriminated against Blacks were later extended to include discrimination dealing with any racial classifications. While upholding the imposition of a curfew on Japanese individuals during World War II, the Court stated that, "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and that, "courts must subject them to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944). This approach has been extended to cases involving discrimination because of national origin. Hernandez v. Texas, 347 U.S. 475 (1954).

46. Graham v. Richardson, 403 U.S. 365 (1971).

47. *Id.* at 372.

48. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

49. Frontiero v. Richardson, 411 U.S. 677 (1973).

50. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

51. McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969).

trend, in recent decisions the Court has indicated an increasing reluctance to identify wealth as a suspect classification. In *San Antonio Independent School District v. Rodriguez*,[52] appellee's claim for relief alleged discrimination based upon wealth in state funding of education. The Court stated that:

> [I]t is clear that appellees' suit asks that Court to review a system that allegedly discriminates against *a large, diverse, and amorphous class*, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. *The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.*[53]

Even under the "liberal" view adopted by *Frontiero v. Richardson*,[54] the labeling of age as a suspect category is questionable. In applying "strict scrutiny" criteria to sex-based classifications. *Frontiero*[55] found that sex was similar to race and national origin in that it was an "immutable characteristic" determined "solely by accident of birth." Moreover, what distinguished suspect sex-based classifications from nonsuspect classifications dealing with intelligence or physical disability was that the sex characteristic *frequently* bore no relation to the ability to perform or contribute to society. This language arguably might apply to age classification, for age *at times* may not bear a relation to functioning ability.[56] However, the other factors present in the sex discrimination cases arguably are not found in age discrimination[57] situations, and the reference of these factors may weigh heavily against applying a *Frontiero* strict scrutiny analysis to age discrimination-mandatory retirement cases.[58]

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52. 411 U.S. 1 (1973).

53. *Id.* at 28 (emphasis added).

54. 411 U.S. 677 (1973).

55. *Id.* In *Frontiero*, only Justices Brennan, Douglas, White and Marshall concluded that sex was an inherently suspect category.

56. The appellant in Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976), did not cite any conclusive empirical data in this regard, *but see* note 34 *supra.*

57. It is questionable if there has been any "purposeful unequal treatment" or relegation to a position of "political powerlessness" as discussed by the Court in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). However, it is also arguable that once a particular age is reached, people are saddled with the disability of mandatory retirement which could be viewed as equivalent to a history of purposeful unequal treatment. Yet the current expansion of political power of the elderly is evidenced by the advances of political lobbies for the elderly. Further, the elderly have never been denied the right to vote, as were women, and increasing age has a tendency, at least at times, to bring increasing respect for the experience of life that accompanies it. In contrast, one's status as a woman has traditionally caused a diminution in the amount of respect and significance attached to one's beliefs and opinions.

58. The courts have in fact upheld mandatory retirement statutes in other situations. *See, e.g.*, Airlines Pilots Ass'n Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960); McCarthy v. Sheriff of Suffolk County, 322 N.E.2d 758 (Mass. 1975); McIlvaine v.

The second question presented in determining the applicability of a "strict scrutiny" standard of analysis to mandatory retirement legislation is whether employment is a "fundamental right." The Court had ruled that any classification which penalizes the exercise of a fundamental constitutional right is subject to close review. Thus, classifications which inhibit the right to travel among the states,[59] the right to vote,[60] the right to procreate,[61] and the right to an appeal from a criminal conviction[62] have been subjected to strict scrutiny as potentially violative of the equal protection clause of the fourteenth amendment.[63] On the other hand, the Court has rejected the argument that the need for shelter is a fundamental right, stating that "the Constitution does not provide judicial remedies for every social and economic ill."[64] This position was also taken in *San Antonio Independent School District* where the Court stated that "social importance is not the critical determinant for subjecting state legislation to strict scrutiny."[65] In the present situation, it appears that the right to work must logically fall into this area of "social and economic ills" and is not a situation calling for "strict scrutiny" on the part of the judiciary.

In *San Antonio Independent School District* the Court did not consider education to be a fundamental right and, in speaking of past fundamental rights cases, stated:

> [T]he lesson of these cases [concerning fundamental rights] . . . is plain. *It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.* Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing [or] by weighing whether education is as important as the right to travel. *Rather the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.*[66]

Because the Constitution does not explicitly guarantee a fundamental right to employment,[67] one must argue its existence by implication.

Pennsylvania, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974). *See* text accompanying notes 115-41 *infra*.

59. Shapiro v. Thompson, 394 U.S. 618 (1969).
60. Reynolds v. Sims, 377 U.S. 533 (1964).
61. Skinner v. Oklahoma, 316 U.S. 535 (1942).
62. Griffin v. Illinois, 351 U.S. 12 (1956).
63. *See*: text accompanying note 35 *supra*.
64. Lindsey v. Normet, 405 U.S. 56, 74 (1972). For the view that employment is within the concept of fourteenth amendment "liberty" and is a fundamental right, *see* notes 160-63 and accompanying text *infra*.
65. San Antonio Independent School Dist. v. Rodriguiz, 411 U.S. 1, 32 (1973).
66. *Id.* at 33 (emphasis added).
67. While there are early decisions which emphasize the importance of employment, Meyer v. Nebraska, 262 U.S. 390 (1928); Traux v. Raich, 239 U.S. 33 (1915); Butchers' Union Slaughter-house & Livestock Trading Co. v. Crescent City Live-Stock Landing & Slaughter-house Co., 111 U.S. 746 (1884), this has never been expanded to the holding that employment *is* a fundamental right. Rather, later

The Court in *Griswold v. Connecticut*[68] recognized the ninth amendment[69] as a means for arguing the existence of a fundamental right when the right was not explicitly enunciated in the first eight amendments to the Constitution. The specific guarantees in the Bill of Rights were viewed to be surrounded by certain "penumbras"[70] which made the specific guarantees "meaningful" and gave them "life" and "substance." However, while *Griswold* seems to invite an expansion of the concept of fundamental rights, it is important to note that *Griswold* concerned rights emanating from the first amendment. Alleged violations of first amendment rights traditionally have been viewed as requiring extremely careful analysis in their own right in comparison to alleged violations of other constitutional rights.[71] Therefore, because first amendment rights are not involved, applying the *Griswold* language to an argument that employment is a fundamental right is less than dispositive of the issue.

Since the *Griswold* decisions, the Court has expressed the much narrower fundamental rights standard enunciated in *San Antonio Independent School District.*[72] In addition, in *Belle Terre v. Boraas,*[73] the Court stated explicitly that "fundamental right" included "voting," "the right of association," "access to the courts," or "any right of privacy."[74] Thus employment, while considered a "property right" in certain situations,[75] is not yet considered a "fundamental right." Because it is likely that neither age will be

opinions are expressed in terms of procedural due process based on the consideration that a right to continued employment is a property interest which cannot be taken without the requirement of due process. Perry v. Sinderman, 408 U.S. 593 (1973); Bd. of Regents v. Roth, 408 U.S. 564 (1972); Wieman v. Updegraff, 344 U.S. 183 (1952). This is very different from a holding that employment itself is a fundamental right, for the Court has explicitly rejected the notion that a unliateral expectation of continued employment demands even the procedural due process discussed above. *See* text accompanying notes 10-34 *supra.*

68. 381 U.S. 479 (1965).

69. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

70. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

71. See DeJonge v. Oregon, 299 U.S. 353, 364 (1937), where the Court states, "[t]he right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions . . . ."; Kovacs v. Cooper, 336 U.S. 77 (1949), where the majority opinion of Justice Reed speaks of the "preferred position of freedom of speech"; Thomas v. Collins, 323 U.S. 516 (1945); Bridges v. California, 314 U.S. 252 (1941); Schneider v. Irvington, 308 U.S. 147 (1939).

72. It is arguable that the Court's statement concerning "explicit" and "implicit" guarantees in *San Antonio* is equivalent to the *Griswold* discussion of "penumbras." However, in general it would seem that "penumbra" would allow for greater flexibility than "implicit" since "implicit" entails at least some basis in the actual statutory language while "penumbra" does not.

73. 416 U.S. 1 (1974).

74. *Id.* at 7.

75. See text accompanying note 10 *supra.*

labeled as a suspect classification nor employment labeled a fundamental right, the proper standard of review for mandatory retirement statutes under the two-tier analysis[76] promulgated by the Warren Court appears to be minimal scrutiny—a showing merely of a rational basis for the classification.

B. *Rational Relation Test*

Even though a classification may not involve a suspect category or a fundamental right, it may still be found to be a denial of fourteenth amendment equal protection under the rational relation test. Equal protection decisions recognize that a state cannot function both without classifying its citizens for various purposes and without treating some citizens differently than others. In ordinary cases of statutory interpretation, a reviewing court usually follows the policy set by the legislature and avoids the imposition of its own policy views. However, if the court finds that the statute either furthers an impermissible "purpose" or state interest or serves no "rational relation" to a permissible purpose, the statute may be subject to attack as a denial of equal protection of the law.

In determining the "purpose" of a statute, the court attributes a purpose to the statute that will uphold its constitutionality, even though this may not be the most likely purpose.[77] However, if the purpose of the statute is clearly discriminatory, the statute will be held to deny equal protection. Such a classification results in a denial of equal protection not because it is arbitrary, but because its *purpose* is impermissible.[78] If the purpose of the statute is found to be permissible, then it must be determined whether the statutory classification is "rationally related" to achieving the permissible purpose. If the statute is not so related, it may be held unconstitutional as violative of equal protection.

Analysis of whether a statutory classification is rationally related to a permissible purpose may produce a judicial finding that the statute is "underinclusive" or "overinclusive." A statute is underinclusive when it benefits or burdens persons in a manner that furthers a legitimate purpose

76. 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, 24 (1972). Under the "two-tiered system" the choice of tier, whether it be that of "strict scrutiny" or "minimum rationality," tends to determine the results. In the vast majority of cases, if strict scrutiny is applied, the legislation is invalidated; and if the minimum rationality standard is applied, the legislation is upheld. The observation has been made by Professor Gunther that there is a trend in recent Supreme Court decisions toward the use of a middle ground of "intensified scrutiny" or "sliding scale" approach. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). However, the Court has not yet articulated its adoption of this new approach.

77. Goesaert v. Cleary, 335 U.S. 464 (1948).

78. Yick Wo v. Hopkins, 118 U.S. 356 (1886). For factors involved in the decision as to whether there is an impermissible purpose, *see* text accompanying notes 93-97 *infra*.

but does not confer the same benefit or place the same burden on others similarly situated. Underinclusion may be found to be so arbitrary that it constitutes a denial of equal protection.[79] At times, however, the courts have held that such underinclusion does not constitute a denial of equal protection. These holdings were prompted by judicial deference to a legislature's discretion in dealing with particular harms that are considered acute.[80]

In many factual contexts, the courts' toleration of underinclusion may be simply a recognition that persons similarly situated with respect to a statute for one purpose may be differently situated in other respects.[81] In contrast, if a statute is found to be overinclusive, it includes not only those similarly situated with respect to the purpose of the statute, but also those who are not so situated.[82] Overinclusion would appear to be more onerous than underinclusion because overinclusion imposes a burden on persons who do not belong in a designated class, while underinclusion merely fails to impose the burden on all persons who are similarly situated.

Mandatory retirement statutes are most subject to attack on the grounds that the statute is not rationally related to a permissible purpose.[83] However there are some problems with such an attack. While involving important individual interests, state mandatory retirement statutes also involve state economic and social regulations, and these regulations normally receive a high degree of respect from the Court.[84] Moreover, the Court has deferred to a state's selection of its own officers and agents,[85] and a state has been held to have an undeniable right to require high standards of qualification for its personnel.[86] Undoubtedly, statutes which regulate a state's police could fit into this framework.

In *Murgia v. Commonwealth of Massachusetts Board of Retirement*[87] the district court limited its inquiry to the single issue of whether a classification based solely on attaining age fifty for mandatory retirement of state police officers lacks a rational basis in furthering any permissible state interest. The "rational basis" test used by the district court had been articulated earlier by the Supreme Court:

> It is necessary to say that the "equal protection of the laws" required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that

79. Rinaldi v. Yeager, 384 U.S. 305 (1966).

80. Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

81. Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1084 (1969).

82. Korematsu v. United States, 323 U.S. 214 (1944).

83. *See* text accompanying notes 77-82 *supra.*

84. Dandridge v. Williams, 397 U.S. 471, 485-86 (1970).

85. Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 557 (1946).

86. Schware v. Bd. of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957).

87. 376 F. Supp. 753, 755 (D. Mass. 1974).

> they have a wide range of discretion in that regard. *But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation,* so that all persons similarly circumstanced shall be treated alike.[88]

This test affords the state broad discretion. In addition, since under this test a statute is presumed valid,[89] the burden is on the party challenging the statute to overcome this presumption,[90] a principle which the district court in *Murgia* recognized.[91]

As previously discussed,[92] in applying the rational basis test, a two-step process is required. First, a court determines whether the object or purpose of the legislation is permissible, and then it decides whether the statutory classification is rationally related to the legislative purpose. In the first step of determining purpose, a court may look to the language of the statute,[93] the overall statutory scheme,[94] relevant legislative history,[95] other legislative interpretation by the state courts,[96] and facts properly the subject of judicial notice.[97] The district court in *Murgia* found that a valid state purpose did exist—securing a fit police force.[98] It then turned to the second step and considered whether the classification used by the state—mandatory retirement at age fifty—was "rationally related" to achieving the valid state purpose. The district court in *Murgia* acknowledged that "there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job."[99] Yet the court found a lack of rationality, apparently basing its opinion on its interpretation of statistical data and evidence introduced by Murgia of his own healthy physical condition. It is questionable whether this was an adequate basis to support Murgia's burden of demonstrating a lack of rationality, since under the "rational relation" test it is the plaintiff and not the defendant who has the burden of demonstrating a lack of rationality.[100]

88. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (emphasis added).

89. McGowan v. Maryland, 366 U.S. 420, 425 (1961).

90. San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 55 (1973).

91. Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753, 754, 756 (D. Mass. 1974).

92. *See* notes 77-78 and the accompanying text *supra.*

93. Marshall v. United States, 414 U.S. 417, 422-23 (1973).

94. Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 557 (1946).

95. Two Guys from Harrison—Allentown, Inc., v. McGinley, 366 U.S. 582, 584-85 (1961).

96. Eisenstadt v. Baird, 405 U.S. 438, 451 (1972).

97. Kahn v. Shevin, 416 U.S. 351, 353 (1974).

98. Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753, 755 (D. Mass. 1974). The court dismissed the state's arguments that enhancing the morale of younger force members or providing for rapid promotion were valid interests. *Id.* at 754.

99. *Id.* at 755. *But see* note 34 *supra.*

100. *See* text accompanying notes 86-88 *supra.*

The Supreme Court has recognized that "every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."[101] Determinations concerning age involve complex judgments about relationships between age and physical and psychological capabilities. Recently, the Supreme Court observed in another area involving conflicting medical opinion that:

> When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming arguendo, that judges with more direct exposure to the problem might make wise choices.[102]

The legislation under examination in *Murgia* is not unique, although Massachusetts does use a lower age than most state statutes as a basis for classification.[103] Every state, as well as the federal government, has estab-

101. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (footnotes omitted).

102. Marshall v. United States, 414 U.S. 417, 427 (1974) (concerning Title II of Narcotics Rehabilitation Act of 1966).

103. MASS. GEN. LAWS ANN: ch. 32, § 26(3)(a) (1976). A recent survey indicates that of the 23 states with separate State Police Departments, 17 have prescribed mandatory retirement at age 60 or lower and five have provided for retirement at age 65 or above. DIVISION OF STATE AND PROVINCIAL POLICE, INTERNATIONAL ASS'N OF CHIEFS AND POLICE: COMPARATIVE DATA REPORT, 1974 at 109 (1975). Other state statutes prescribing mandatory retirement for state police: ALA. CODE tit. 55, § 460(1)(e) (1973) (60 years or with evidence of fitness); ALASKA STAT. § 39.35.680(11) (1975) (55 years); ARIZ. REV. STAT. ANN. § 38-781.01(23) (1974) (65 years); ARK. STAT. ANN. § 42-455C (1975) (65 years); CAL. GOV'T CODE § 20980 (West Supp. 1976) (60 years); COLO. REV. STAT. ANN. § 24-50-204(3) (1974) (65 years); CONN. GEN. STAT. ANN. § 5-162(c)(2) (1976) (70 years); DEL. CODE ANN. tit. 11, § 8323(a) (1974) (55 years or 20 years service); FLA. STAT. ANN. § 321.18(1) (1975) (65 years); GA. CODE ANN. §§ 92A-217-218 *repealed by* Acts of 1949, p. 70 (1972) (no age); HAWAII REV. STAT. §§ 88-73(2) (1975) (70 years); IDAHO CODE § 59-1310(1) (1976) (60 years); ILL. REV. STAT. ch. 121, § 307.12-1 (1976) (60 years); IND. CODE § 10-1-1(h)(1) (1973) (70 years); IOWA CODE ANN. § 97A.6(1)(b) (1972) (65 years); KAN. STAT. ANN. § 74-4975 (1972) (60 years); KY. REV. STAT. ANN. § 16.505(15) (1975) (55 years); LA. REV. STAT. ANN. § 40.1426.1 (1976) (65 years); ME. REV. STAT. ANN. tit. 5, § 1121(c) (1976) (65 years or 20 years service); MD. ANN. CODE art. 88B, § 53(1)(c) (1975) (60 years); MICH. COMP. LAWS ANN. § 28.105 (1967) (56 years); MINN. STAT. § 352B.20 *repealed by* Laws 1973), c. 178, § 22 (1976) (no age); MISS. CODE ANN. § 21-29-245 (1975) (60 years); RSMO § 104.080 (1971) (65 years); MONT. REV. CODES ANN. § 31-216 (1961) (60 years); NEB. REV. STAT. § 60-452(2) (1974) (60 years); NEV. REV. STAT. § 286.510(2) (1973) (55 years and 30 years service); N.H. REV. STAT. ANN. § 103:12 (1975) (65 years); N.J. STAT. ANN. § 53:5A-8(b) (1976) (65 years); N.M. STAT. ANN. § 39-2-6(B) (1972) (61 years); N.Y. EXEC. § 228(1) (McKenney 1972) (62 years); N.C. GEN. STAT. § 135-14 (1974) (65 years); N.D. CENT. CODE § 39-03A-18 (1972) (60 years); OHIO REV. CODE ANN. § 5505.16 (1971) (55 years); OKLA. STAT. tit. 47, § 2-305(a) (1975) (55 years); ORE. REV. STAT. § 237.129(1) (1975) (60 years); PA. STAT. ANN. tit. 71, § 5102 (1976) (50 years); R.I. GEN. LAWS ANN. § 45-21-16(a) (1975) (70 years); S.C. CODE ANN. § 61-103(2) (1976) (72 years); S.D. COMPILED LAWS ANN. § 3-12-47(35) (1974) (55 years); TENN. CODE ANN. § 8-3905(b) (1975) (60 years); TEX. REV. CIV. STAT. ANN. art. 6228a, § 5.(A)(1) (1975) (60 years);

lished general mandatory retirement ages for its employees.[104] Most states and the federal government, though, have prescribed lower mandatory retirement ages for police officers and other occupations demanding a special need for alertness, strength, and stamina than for those performing in less strenuous capacities.[105] The reasonableness of such provisions has been upheld generally in several cases.[106] On the other hand, federal legislation such as the Age Discrimination in Employment Act of 1967 expresses the view that classifications based on age in an employment context are subject to certain restrictions.[107] Therefore, the state is not given unbridled discretion in setting its employment policies.

UTAH REV. ANN. § 49-11-8(39) (1970) (55 years); VT. STAT. ANN. tit. 3, § 455(13)(B) (1972) (55 years); VA. CODE ANN. § 51-150(a) (1974) (65 years); WASH. REV. CODE § 43.43.250(1) (1970) (60 years); W. VA. CODE ANN. § 15-2-28 (1972) (55 years); WIS. STAT. § 41.02(23) (1975) (55 years); WYO. STAT. ANN. § 31-11.7(d) (1975) (65 years); Federal Law Enforcement and Firefighter Personnel, 5 U.S.C. § 8335(g), (55 years or 20 years service, whichever comes later).

104. In 1972 it was estimated that 84 percent of all state and local public employees were covered under government retirement plans. BUREAU OF THE CENSUS, SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION, U.S. DEPT. OF COMMERCE CENSUS OF GOVERNMENT 1972, 6 TOPICAL STUDIES NO. 1, *Employee Retirement Systems of States and Local Governments*, 11-23 (1973).

105. In *McCarthy v. Sheriff of Suffolk County*, 322 N.E.2d 758, 763-64 (Mass. 1975), the court stated in support of this practice, that:

> Examination of the various groups established by the statute discloses a legislative intent to provide for earlier retirement of those government officers concerned with the safety of the public. Thus, the statute provides for the early retirement of State Police officers, and other law enforcement personnel and those employed in positions involving potential danger to the safety of the public are also classified in groups having an earlier retirement age than that of general officials and employees. We find this classification to be clearly rational. . . . The sudden incapacitation of a government employee who is directly responsible for the safety of others presents a far greater danger to the public than that of an employee sitting behind a desk or doing general labor.

106. McCarthy v. Sheriff of Suffolk County, 322 N.E.2d 758 (Mass. 1975); McIlvaine v. Pennsylvania State Police, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974); Airlines Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1962).

107. 29 U.S.C. §§ 621-634 (1967). The declared purpose of the ADEA is that:

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

Age classifications have been upheld in various situations, including voting,[108] jury service,[109] selective service,[110] and classification of tax exemptions.[111] However, it may be argued that the factor which distinguishes the classification in *Murgia* from these other situations is that in *Murgia* the group that is subject to age classification has *already* been screened and classified for the same purpose as that motivating the statutory classification. This screening occurs through the periodic physical examination which is mandatory after a state police officer reaches age forty. This fact arguably makes the statutory classification "irrational", since the mandatory retirement statute in actuality serves to eliminate, by its overbreadth, those very officers which the mandatory physical examination statute seeks to retain—those "physically fit."[112] An elaborate medical screening system is uniformly applied in the Massachusetts system to every police officer throughout his career.[113] The purpose of this scheme is to eliminate from the police force

> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. 29 U.S.C. § 621. However, despite these principles, there is a defect in the ADEA in that only those persons between forty and sixty-five are protected. 29 U.S.C. § 631. Further limitations on the effectiveness of the act include the definition of an "employer" as an individual "engaged in an industry affecting commerce who has twenty-five or more employees," 29 U.S.C. § 630(b), and the exception from ADEA protection "[w]here age is a bona fide occupational qualification that is reasonably necessary in the normal operations of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1967).

State statutes forbidding age discrimination in employment are: ALASKA STAT. §§ 18.80.200 to 18.80.300 (1975); CAL. LABOR CODE §§ 1410 to 1433 (1976); CONN. GEN. STAT. ANN. §§ 31-122 to 31-128 (1976); DEL. CODE ANN. tit. 19, §§ 710 to 718 (1975); GA. CODE § 54-1102 (1974); HAWAII REV. STAT. § 378-1 to 378-10 (1975); IOWA CODE ANN. §§ 601A.1 to 601A.15 (1975); KY. REV. STAT. ANN. §§ 344.010 to 344.515 (1969); LA. REV. STAT. ANN. §§ 23:892-893 (1964); ME. REV. STAT. ANN. tit. 5, part 12, ch. 337, sub I-VI (1976); MD. ANN. CODE art. 49B, §§ 1-30 (1975); MASS. GEN. LAWS ANN. ch. 149, § 24A-K (1976); MICH. COMP. LAWS ANN. §§ 423.301 to 423.311 (1976); MONT. REV. CODES ANN. §§ 64-301 to 64-320 (1976); NEB. REV. STAT. §§ 48-1001 to 48-1009 (1974); NEV. REV. STAT. §§ 613.310-430 (1973); N.H. REV. STAT. ANN. §§ 354A-1 to 354A-14 (1975); N.J. STAT. ANN. §§ 10:5-1 to 10:5-38 (1976); N.M. STAT. ANN. §§ 4-33-1 to 4-33-13 (1975); N.Y. EXEC. §§ 290-301 (1975); N.D. CENT. CODE § 34-01-17 (1975); ORE. REV. STAT. §§ 659.010 to 659.115, 659.990 (1975); PA. STAT. ANN. tit. 43, § 951-963 (1976); TEX. REV. CIV. STAT. art. 6252-14 (1970); WASH. REV. CODE §Pa 49.60.010-49.60.320 (1976); W. VA. CODE ANN. §§ 5-11-1 to 5-11-19 (1975); WIS. STAT. §§ 111.31 to 111.37 (1974).

108. Oregon v. Mitchell, 400 U.S. 112 (1970).

109. United States v. Duncan, 456 F.2d 1401 (9th Cir. 1972), *vacated on other grounds*, 409 U.S. 814 (1972).

110. Smith v. United States, 424 F.2d 267 (9th Cir. 1970).

111. Scarangella v. Comm'r of Internal Revenue, 418 F.2d 228 (3rd Cir. 1969).

112. *See* text accompanying notes 10-34 *supra.*

113. Pursuant to the granting of authority contained in MASS. GEN. LAWS ANN. ch. 22, § 9A (1976), the Commissioner of Public Safety had established comprehen-

those officers who have become unfit to perform their duties. Thus, it is reasonable to assume that an officer who has passed this physical examination has been determined by the Massachusetts State Police to possess all the physical requirements necessary to meet the physical demands of his job. The physical examination, therefore, provides the criteria for continued service on the force. There was no argument raised in *Murgia* that the physical examination screening process was ineffective or that an officer who is 50 is unfit even though he has passed his physical examination. The mandatory retirement statute operates to retire an officer who has been previously declared fit for duty. The result of the application of the statute, therefore, is in direct contradiction to its purpose, maintaining a fit police force, because it actually eliminates fit members of the force.

Because a state has no interest in the operation of a legislative classification which achieves results it does not desire,[114] Massachusetts arguably had no interest in the operation of this statute. The classification may be termed "overbroad" and irrational since it employs a means which does not secure the statute's purpose but which in fact causes an opposite result. Hence, the statute would appear to fail under the "rational relation" test of equal protection.

III. LOWER COURT DECISIONS

When faced with challenges to the provisions of compulsory retirement systems, the vast majority of lower federal and state courts have held that such systems are a valid exercise of the state's regulatory power. Plaintiffs

sive fitness standards entitled *Medical Fitness Standards for Initial Appointment to the Massachusetts State Police.* The police were required to maintain these standards throughout their career in order to continue to serve as state police officers. The member's fitness was measured by individual medical examination against the established standards at the time of initial enlistment and every two years thereafter upon the member's biannual application for reenlistment. The examination includes the taking of a thorough medical history, a urine examination, a blood serology, chest x-ray, audiometric examination, and tests to determine color vision, near vision or distant vision, blood pressure, pulse, height and weight, color hair, color eyes and body build. The physician then examines the following areas for defects: head, face, neck and scalp, nose, sinuses, mouth and throat, ears, eardrums, eyes, opthalmoscopic, pupils ocular mobility, lungs and chest, heart, vascular system, abdomen, viscera, anus and rectum, endocrine system, G-U system, upper extremities, feet, lower extremities, spine, identifying body marks, skin-lymphatics, neurologic and psychiatric systems. In some instances an EKG is performed. Beginning at age 40 and continuing on an annual basis until retirement, the officer is examined using the identical standards as applied to the initial recruit. In addition, the over-40 officer is annually given an electrocardiogram and is tested for gastro-intestinal bleeding. If a member is found to have a physical defect which would impair his duties and functions as a state police officer, he is declared unfit and retired from service unless he obtains a waiver from the Commissioner of Public Safety to continue. After the member's sixth year in service, passage of the physical examination becomes the sole criterion for continued service.

114. Bell v. Burson, 402 U.S. 535, 540 (1970).

have had little success arguing that mandatory retirement statutes are unconstitutional under either strict scrutiny or minimum scrutiny standards.[115] The courts have rejected both the argument that age is a "suspect" classification and that the right to employment is "fundamental." Further, in applying the minimum scrutiny equal protection test, both federal and state courts have held that classifications based on age are sufficiently "reasonable" and accordingly are constitutionally permissible.

The justification most commonly offered by governmental units for mandatory retirement schemes is that there is a reasonable connection between increased age and declining job capabilities and that mandatory retirement is an administratively convenient way to insure an effective and productive work force.[116] Aside from admininstrative convenience, the argument is also made that compulsory retirement schemes increase the opportunity for all qualified persons to share in public employment.[117] Neither the mass employment nor the administrative convenience argument can withstand the strict scrutiny analysis under the equal protection clause, since administrative convenience alone is not a compelling state interest,[118] and increasing work opportunities for qualified persons could be achieved by a narrower means. However, under minimum scrutiny, such arguments have been held to support a mandatory retirement plan. Because courts have been unanimous in holding that age is not a suspect classification,[119] it is the minimum scrutiny standard that is used by most courts, and under minimum scrutiny the compulsory retirement statute normally is held constitutional.[120]

115. *See* Goult v. Garrison, Civil No. 74C-931 (N.D. Ill., May 22, 1974), *appeal docketed*, No. 74-1579, 7th Cir., July 16, 1974 (minimum scrutiny); Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 940 (1975) (strict scrutiny); Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753 (D. Mass. 1974) (newer equal protection).

116. Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974); Cookson v. Lewiston School Dist. No. 1, 351 F. Supp. 983 (D. Mont. 1972). *See* note 34 *supra.*

117. Townsend v. County of Los Angeles, 49 C.A.3d 263, 122 Cal. Rptr. 500, 503 (2d District 1975).

118. Reed v. Reed, 404 U.S. 71 (1971).

119. *See, e.g.*, Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974).

120. Lewis v. Tucson School Dist. No. 1, 531 P.2d 199 (Ariz. 1975) (upholding a system which retained one mandatory retirement age for elementary and secondary teachers and another for all other government employees); McCarthy v. Sheriff of Suffolk County, 322 N.E.2d 758 (Mass. 1975) (upholding mandatory retirement at ages 65 to 70 of court officers as a rational classification since court officers were in employment positions involving potential dangers to public safety); Choura v. City of Cleveland, 73 Ohio Op. 2d 107, 336 N.E.2d 467 (Ohio 1975) (upholding mandatory retirement of city firemen and policemen; Delvitto v. Shope, 17 Pa. C. 436, 333 A.2d 204 (1975) (holding that the establishment of a mandatory retirement age for county employees did not violate the civil rights of deputy sheriffs); Aronstam v. Cashman, 132 Vt. 538, 325 A.2d 361 (1974) (holding that constitutionally mandated retirement at age 70 of assistant judges promotes a legitimate state concern and does not violate equal protection); Nelson v. Miller, 25 Utah 2d 277, 480 P.2d 467 (1971) (upholding a statute providing for mandatory retirement of district court judges at age 70 and

In *Armstrong v. Howell*,[121] the court applied the minimum scrutiny standard to a suit brought under the Federal Civil Rights Act by an involuntarily retired county hospital employee. The court found that no deprivation of any constitutional right existed, stating that:

> [T]here appears to be no question but what age is a classification which bears a reasonable relation to the law in question and . . . age has an inevitable and definite relationship with the ability to perform work.[122]

Similar sentiments were expressed in *Weiss v. Walsh*[123] where, despite the fact that the plaintiff, a university professor, was eminently qualified for his position and the prognosis for his lengthy productivity was excellent, the court held that the use of an arbitrary mandatory retirement age limit to deny the plaintiff his employment was permissible. The *Weiss* court stated that:

> Notwithstanding great advances in gerontology, the era when advanced age ceases to be of some reasonable statistical relationship to diminished capacity or longevity is still future. It cannot be said, therefore, that age ceilings . . . are inherently suspect, although their application will inevitably fall unjustly in the individual case.[124]

Further, in *Norman v. United States*[125] the court held that mandatory retirement of senior grade military officers under a system designed to insure retention of only superior officers was not a constitutional deprivation of due process.

Plaintiffs have used a variety of arguments in attacking mandatory retirement statutes. They have argued that a strict standard of review should be adopted,[126] basing this argument on two theories: that age is a suspect category,[127] and that employment is a fundamental right.[128] In rejecting the

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Supreme Court Justices at age 72); American Airlines, Inc. v. State Comm'n for Human Rights, 29 A.D.2d 178, 286 N.Y.S.2d 493 (1968); Fabio v. St. Paul, 267 Minn. 273, 126 N.W.2d 259 (1964).

121. 371 F. Supp. 48 (D. Nev. 1974).

122. *Id.* at 51.

123. 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd.*, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973).

124. *Id.* at 77. *Accord*, Retail Clerks, Local 770 v. Retail Clerks Int'l Ass'n, 359 F. Supp. 1285 (C.D. Cal. 1973) (holding that age classifications of persons of advanced years are neither constitutionally nor statutorily infirm).

125. 392 F.2d 255 (Ct. Cl. 1968).

126. Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 940 (1975); Retail Clerks Local 770 v. Retail Clerks Int'l Ass'n, 359 F. Supp. 1285 (C.D. Cal. 1973).

127. Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 940 (1975).

128. Townsend v. County of Los Angeles, 49 Cal. App. 3d 263, 122 Cal. Rptr. 500 (2d Dist. 1975).

argument that employment is a fundamental right, however, the court in *Gossman v. State Employees Retirement System*[129] stated that:

> It is clear that State employment is not a vested right, but it is extended at the will of the State, and the State may reasonably make a mandatory retirement system as a condition of such employment, and if this be so, it falls that the State has a right to impose such conditions as are economically and practically sound.[130]

On the issue of age as a suspect category,[131] unlike the lower court in *Murgia*, the *Gossman* court held that:

> The maintenance of morale, inducement to younger employees to remain, inducement for older ones to quit when their skills have diminished, special inducements for different high-quality types of employment, and a regard for the necessity to meet competitive provisions in other retirement acts, all are proper objectives.[132]

A procedural due process argument was made by the plaintiff in *Rosen v. Carey*.[133] The plaintiff argued that as a tenured public employee, he had a property interest in continued public employment which was protected by procedural due process against interference by the mandatory retirement scheme in question. He further argued that his tenured status entitled him to an individualized hearing on his competence to continue in his present job. It is questionable whether this argument was correct, because the statute which determined that the employee had a property right in his employment also contained the mandatory retirement provision, and the statute terminated the property right that is needed for a procedural due process claim.

Several plaintiffs[134] have unsuccessfully attacked mandatory retirement laws on the grounds that the laws contained a constitutionally infirm irrebuttable presumption that all workers over a certain age were incompetent. The Supreme Court's recent decision in *Weinberger v. Salfi*[135] has narrowed considerably the potential applicability of the irrebuttable presumption doctrine to mandatory retirement laws. In *Salfi*, the Court refused to hold unconstitutional a provision of the Social Security Act[136] which denied benefits to any woman who had been married to a wage earner for less than nine months prior to his death. The Court held that the irrebuttable presumption analysis would be inapplicable to classifications involving

129. 177 Neb. 326, 129 N.W.2d 97 (1964).

130. *Id.* at 103. This statement was cited with approval in Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974).

131. *See* text accompanying notes 59-76 *supra.*

132. Gossman v. State Employees Retirement System, 177 Neb. 325, 129 N.W.2d 97 (1964).

133. Civil No. 74C-1006 (N.D. Ill., January 17, 1975) (dismissed as moot).

134. *Id.*, Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 940 (1975); Townsend v. County of Los Angeles, 49 Cal. App. 3d 263, 22 Cal. Rptr. 500 (2d Dist. 1975).

135. 422 U.S. 749 (1975).

136. Social Security Act §§ 216(c)(5), (3)(2), 42 U.S.C. §§ 416(c)(5), (e)(2) (1970).

eligibility for social welfare programs.[137] The reasoning in *Salfi* appears to indicate that if a statute is otherwise constitutional under due process or equal protection grounds, it will not be struck down merely because it contains an irrebuttable presumption.[138]

The most successful means of attack on mandatory retirement schemes has been that of the "newer" equal protection doctrine, which appears to have been employed to strike down mandatory retirement provisions by the lower court in *Murgia*[139] and by the Hawaii Supreme Court in *Nelson v. Miwa.*[140] In addition, in *McIlvaine v. Pennsylvania State Police,* dissenting Justice Roberts of the Pennsylvania Supreme Court suggested that a mandatory retirement statute might be unconstitutional under the newer equal protection standard where no interest other than administrative convenience had been advanced by the state as justification for the statute.[141] However, the failure of the United States Supreme Court in *Murgia* to adopt this newer approach probably renders this argument extremely weak. Hence, in all probability state and lower federal courts will continue their present course and uphold mandatory retirement statutes as legitimate exercises of the states' police power.

IV. THE MURGIA DECISION

Despite the presence of numerous arguments to the contrary, in June, 1976, the Supreme Court reversed a district court's ruling and held a mandatory retirement statute constitutional. The *per curiam* opinion in *Massachusetts Board of Retirement v. Murgia*[142] addressed only the equal protection issue, and in so doing, the Court rejected the proposition that a "strict scrutiny" analysis was applicable to a statutory scheme involving compulsory retirement laws. While there is arguably a reference to an irrebuttable presumption argument present in Justice Marshall's *Murgia* dissent,[143] the equal protection issue was properly the only issue before the Court, for the district court had dealt solely with the equal protection argument and had not considered the alternative irrebuttable presumption issue. The Supreme Court found that the legislative classification at issue neither "interferes with the exercise of a fundamental right" nor "operates to the peculiar disadvantage of a suspect class."[144] Moreover, the Court

137. Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975).

138. *Id.* at 768-74. *See also* text accompanying notes 31-34 *supra.*

139. Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753 (D. Mass. 1974).

140. 546 P.2d 1005 (Hawaii 1976).

141. 454 Pa. 129, 145-47, 309 A.2d 801, 809-11 (1973), *appeal dismissed for want of substantive federal questions,* 415 U.S. 986 (1974).

142. 96 S. Ct. 2562 (1976), *rev'g,* 376 F. Supp. 753 (D. Mass. 1974) (three-judge court).

143. *Id.* at 2573. Justice Marshall's dissent speaks of "irrationality" in "automatically terminating" individuals previously judged to be physically fit merely because they have reached age 50.

144. *Id.* at 2566.

specifically endorsed its earlier holdings[145] which stated that a standard less than that of "strict scrutiny" should be applied to state legislation restricting the availability of employment opportunities,[146] and it further rejected the argument that old age defines a "discrete and insular" group in need of greater protection of the laws.[147]

In rejecting the notion that age is a suspect category, the Court noted that while age shares several characteristics of classifications already deemed suspect, such as being an "immutable characteristic determined solely by accident of birth"[148] and "relegating the entire class . . . to inferior . . . status without regard to the actual capabilities of its members,"[149] this is an insufficient basis upon which to create a "suspect" category. The characteristics of immutability and lack of individual assessment are common to many classifications which have never been considered suspect. On the other hand, classifications based upon alienage, for example, are created by statute and are therefore alterable and not immutable; yet these classifications are still considered "suspect." For the Court, then, immutability is not a touchstone of strict scrutiny equal protection analysis.

The inquiry conducted by the Court instead focused on the "relatively relaxed standard" or a "rational basis" analysis,[150] which presumes the legislation in question to be valid.[151] This was the same standard of analysis used by the district court but with a different result.[152] Using this approach, the Supreme Court quickly came to the conclusion that a permissible state purpose was involved and that the means used by the state were rationally related to that purpose.[153] Although admitting that the state scheme was perhaps "not the best" means to accomplish its purpose and that "the problems of retirement have been well documented and are beyond serious dispute,"[154] the Court upheld the classification on the basis of the rationality

145. Dandridge v. Williams, 396 U.S. 471, 485 (1970).

146. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2566 (1976).

147. The Court states:

> Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny.

Id. at 2567.

148. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion).

149. *Id.* at 687.

150. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2567 (1976).

151. *Id.*

152. Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753 (D. Mass. 1974).

153. The Court states:

> There is no indication that [the statute] 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.

Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2568 (1976).

154. *Id.*

standard. The Court stated that "where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. . . .' "[155]

With this decision, the Court seems to have retreated from its earlier modification of the rigid two-tiered method of analysis into a more flexible "sliding scale" or "newer equal protection" approach.[156] As indicated by Justice Marshall in his dissent in *Murgia*, recent inquiries into the equal protection area had involved a more sophisticated analysis than that used by the Court in *Murgia*.[157] This newer approach had considered (1) the character of the classifications in question, (2) the relative importance of the governmental benefits to the individuals in the discriminated class, and (3) the state interests asserted in support of the classifications.[158] It was this newer "sliding scale" approach which Marshall argued more properly should have been applied in *Murgia*.

The Court in *Murgia* also seems to have stumbled on the question of employment as a fundamental right. The right of the individual to engage in any lawful occupation has been repeatedly recognized by the Supreme Court as falling within the concept of "liberty" articulated in the fourteenth amendment.[159] Moreover, despite repeated opportunities to do so, the right to earn a living has never explicitly been relegated to mere minimum scrutiny by the Supreme Court.[160] Prior to *Murgia* several lower federal courts[161] and an increasing number of state courts[162] had recognized the

155. *Id.*

156. Several recent Supreme Court equal protection decisions had indicated the formation of an analytic standard lying somewhere between the rigorous strict scrutiny approach and lax minimum scrutiny analysis. In this newer approach, the classification is no longer assumed to be rationally related to the legislative purpose. Instead, the burden is placed on the party defending the classification to demonstrate its rationality. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

157. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2569 (1976).

158. *Id. See also* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); United States Dep't of Agriculture v. Moreno, 413 U.S. 523 (1973).

159. *See* Bd. of Regents v. Roth, 408 U.S. 564 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923); Slaughterhouse Cases, 111 U.S. 746 (1884). The Court in Smith v. Texas, 233 U.S. 630 (1914) stated that:

> In so far as a man is deprived of the right to labor his liberty is restricted . . . and is denied the protection which the law afford those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

Id. at 636.

160. Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961); Green v. McElroy, 360 U.S. 474, 496 (1958); Harrisiades v. Shaughnessy, 342 U.S. 580, 599 (1952) (Douglas, J., dissenting); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 415-16 (1948).

161. Colorado Springs Amusements, Ltd., v. Rizzo, 387 F. Supp. 690, 696 (E.D. Pa. 1974); Cianciolo v. Members of City Council, 376 F. Supp. 719 (E.D. Tenn. 1974);

right to work as a fundamental right requiring a strict scrutiny analysis. While the elderly are not in the same class as those individuals classified on the basis of race, they are arguably subject to discrimination when they are denied an important benefit such as employment. The Court's decision, based on the fact that it has not specifically declared the right to work to be "fundamental" and that the elderly are not as discriminated against as individuals in classifications based on race, disregards the significant nature of the benefits denied and the hardships which may result.

Under the "newer equal protection" standard previously used by the Court, those factors would have received some consideration. For this reason, the "newer equal protection" analysis appeared to hold the most promise for a successful challenge to mandatory retirement schemes. Under this analysis, once the plaintiff has demonstrated a prima facie interest in retaining his or her employment, the burden would shift to the state to prove that there existed substantial reasons which justified the mandatory retirement regulation. If the state could not prove that age represented a rational basis for separating those individuals who were able to work from those who were not, the mandatory retirement provision would not be upheld. Under the "newer equal protection" approach, a classification is not judged *per se* unreasonable. Rather, it is judged in the context of a particular set of facts and circumstances. The unique facts surrounding the elderly in the context of employment makes the "newer equal protection" analysis particularly appropriate. The fact that the Court itself recognizes the negative sociological results of mandatory retirement[163] demonstrates the desirability of using the "sliding scale" or "newer equal protection" approach. This approach would allow a more realistic assessment of the particular issues and consequences involved.

While some lower courts have failed to utilize the newer equal protection standard in economic and social areas,[164] and others have apparently restricted its application to sex-based classifications,[165] at least one federal appellate court has employed the newer equal protection standard in the

Corey v. City of Dallas, 352 F. Supp. 977 (N.D. Tex. 1972), *rev'd on other grounds*, 492 F.2d 496 (5th Cir. 1974).

162. *See* Town of Milton v. Civil Service Comm'n, 312 N.E.2d 188 (Mass. 1974); York v. State, 498 P.2d 644 (Hawaii 1972); Sailer Inn, Inc. v. Kirby, 485 P.2d 529 (Cal. 1971).

163. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2568 (1976).

164. Hooban v. Boling, 503 F.2d 648, 650-51 (6th Cir. 1974), *cert. denied*, 421 U.S. 920 (1975); Rasulis v. Weinberger, 502 F.2d 1006, 1009 (7th Cir. 1974); Kersh v. Bounds, 501 F.2d 585, 589 (4th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); Rivera v. Chapel, 493 F.2d 1302, 1304 (1st Cir. 1974); New Rider v. Bd. of Education of Independent School Dist. No. 1, 480 F.2d 693, 699 (10th Cir. 1973).

165. Prostrollo v. University of South Dakota, 507 F.2d 775, 781 n.8 (8th Cir. 1974) (dictum), *cert. denied*, 421 U.S. 952 (1975); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973); Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973).

socio-economic areas.[166] In addition, several lower federal courts have employed a similar analysis.[167] The rejection of the newer analysis by the Supreme Court, therefore, represents a step backwards in judicial thinking, a point which is recognized by Justice Marshall's *Murgia* dissent.[168] Beyond any consideration of the serious negative sociological effects arising from mandatory retirement is the basic fact that while older workers may not constitute a traditionally "suspect" class, they do constitute a class subject to recurring arbitrary discrimination in employment.[169] Yet, under the rationale of the *Murgia* majority, there has been no denial of any right which is sufficient to require a remedy.

The *Murgia* opinion, however, is not necessarily applicable to all mandatory retirement situations. The state's interest in *Murgia* concerned the maintenance of a physically fit police force, where physical well being and strength are quite important. The Court based its opinion on the assumption that physical well being and strength necessarily decrease with age. A different result might well occur where the characteristics relevant to employment were those other than physical strength. Arguably in employment situations involving mental ability or non-manual labor,[170] no legitimate basis for mandatory retirement would exist, even under the *Murgia* holding. Hence, the decision in *Murgia* does not necessarily imply that all mandatory retirement laws are valid.[171] It does, however, create a troubling precedent for the validation of such laws by lower federal and state courts.

V. CONCLUSION

Persons nearing retirement age will await future descriptions, if any, by the Supreme Court or lower federal and state courts of jobs for which there

166. City of New York v. Richardson, 473 F.2d 923, 931-32 (2d Cir. 1973), *cert. denied*, 412 U.S. 950 (1973).

167. *See* American Trust Co. v. South Carolina State Board of Bank Control, 381 F. Supp. 313 (D.S.C. 1974); Pavone v. Louisiana State Bd. of Barber Examiners, 364 F. Supp. 961 (E.D. La. 1973), *aff'd*, 505 F.2d 1022 (5th Cir. 1974); Chatman v. Barnes, 357 F. Supp. 9 (N.D. Okla. 1973); Delorme v. Pierce Freightlines Co., 353 F. Supp. 258 (D. Ore. 1973).

168. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2570 (1976).

169. This fact was recognized by Congress in passing the Age Discrimination in Employment Act in 1967 which states:

> [I]n the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment . . . [and]
>
> [T]he setting of arbitrary age limits regardless of potential . . . had become a common practice. . . .

29 U.S.C. § 621 (1967).

170. Lower court decisions, however, had upheld mandatory retirement in non-physically demanding jobs. *See* Weiss v. Walsh, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd*, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973) (university professor); Lewis v. Tucson School Dist. No. 1, 23 A. App. 154, 531 P.2d 199 (Ariz. 1975) (teachers); Aronstam v. Cashman, 132 Vt. 538, 325 A.2d 361 (1974) (assistant judges); Nelson v. Miller, 480 P.2d 467 (Utah 1971) (district court judges).

171. In Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2573, n.8 (1976), this point is made by Justice Marshall in his dissent.

is no rational reason for mandatory retirement. An indiscriminate rule, which disregards individual ability or job demands and is held to constitutionally require retirement upon reaching the statutory age, is without merit.

Analysis of the issues involved in mandatory retirement statutes also raises concern for the physchological and political problems of the aged and the aging. Being old is regarded by the young as a moral attribute rather than a time on the calendar. Society packages people by their age, like skin, color or religion. Old is a certain age of a person who may be more alive than many who are chronologically younger. However, compulsory retirement forces people to try to prevent their new-found leisure time from becoming loneliness and inhibits creative and constructive accomplishments by older citizens.[172] Recurring issues of the Social Security system—bankruptcy, higher withholding taxes, voluntary participation—may assume greater importance as more mandatorily retired citizens grow dependent upon it for economic survival.

172. In the appendix to the *amicus curiae* brief for Legal Services for the Elderly Poor, Accomplishments Past the Age of 69 (1975), the American Civil Liberties Union, the National Council of Senior Citizens and the Massachusetts Civil Liberties Union, chronicle 175 persons who have made noteworthy contributions after attaining 69 years of age in architecture, art, business and labor, cinema, education, fiction and poetry, government, the American presidency, historical and political theory, journalism, law, music and dance, philosophy, psychology, religion and sports.