NOTES

THE CONSTITUTIONALITY OF MANDATORY RETIREMENT FOR NONPHYSICAL GOVERNMENT EMPLOYMENT

I
INTRODUCTION

The Supreme Court remains unresponsive to claims of discrimination based on age, despite its rejection of classifications based on race[1] or gender.[2] The Court's reluctance to grapple with age discrimination is apparent in its treatment of cases brought under the Age Discrimination in Employment Act (ADEA),[3] as well as in the analytical framework it has used to judge age discrimination suits brought under the equal protection clause of the fourteenth amendment.[4] Recently, the Court denied petitions for certiorari for three equal protection cases from two different Circuit Courts of Appeal: *Gault v. Garrison,*[5] *Johnson v. Lefkowitz,*[6] and *Palmer v. Ticcione.*[7] These cases offered an excellent opportunity for the Supreme Court to limit the effects of its much-criticized[8] 1976 decision in *Massachusetts Board of Retirement v. Murgia,*[9] and to recognize that age discrimination, particularly in the form of mandatory retirement laws, is no more constitutionally valid than is racial or sexual discrimination. Granting certiorari also would have allowed the Court to clarify its decision in *Vance v. Bradley*[10] and its summary affirmance of *Slate v. Noll.*[11] Though neither *Bradley* nor *Slate* considered the validity of mandatory retirement statutes generally, the decisions indicate that the Court is even less sympathetic towards those forced to retire than the *Murgia* opinion indicated.

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1. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954).
2. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).
3. 29 U.S.C. §§ 621-34 (1976 & Supp. III 1979).
4. U.S. CONST. amend. XIV § 1.
5. 569 F.2d 993 (7th Cir. 1977), *cert. denied,* 440 U.S. 945 (1979).
6. 566 F.2d 866 (2d Cir. 1977), *cert. denied,* 440 U.S. 945 (1979).
7. 576 F.2d 459 (2d Cir. 1978), *cert. denied,* 440 U.S. 945 (1979).
8. *See* Abramson, *Compulsory Retirement, the Constitution and the Murgia Case,* 42 Mo. L. REV. 25 (1977); Note, *Defeat of the Constitutional Challenge to Mandatory Retirement,* 8 U. TOL. L. REV. 764 (1977); *Forced Retirement Affirmed: Is the Supreme Court Sanctioning Age Discrimination?* 23 LOY. L. Rev. 251 (1977).
9. 427 U.S. 307 (1976) (per curiam).
10. 440 U.S. 93 (1979). The Court decided the case approximately two weeks before denying certiorari in *Johnson, Gault,* and *Palmer.*
11. 444 U.S. 1007 (1980).

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In discussing the recent decisions, Section II of this Note briefly explores equal protection doctrine and its application to age discrimination. The section examines *Gault, Johnson,* and *Palmer* and their underlying reasoning, placing the decisions within an analytical framework that highlights the inconsistencies in judicial treatment of mandatory retirement legislation. Finally, the section suggests a more suitable equal protection standard for age discrimination cases than the one the courts now employ. Adoption of such a standard would be consistent with the trend toward eliminating mandatory retirement and developing flexible working schemes for the aged. This trend, in both the private and public sectors, is the subject of the following three sections.

Section III examines such alternatives to mandatory retirement as competency testing, increased retirement benefits, and more flexible working arrangements for older workers. Section IV discusses policy concerns in the age discrimination area, including the tensions among the elimination of mandatory retirement laws, the reduction of unemployment among the young, and the retention of affirmative action programs for women and minorities. The advantages of eliminating mandatory retirement for the Social Security system and its long-range effects are also examined.

Section V deals with the most important federal legislation in the area of age discrimination: ADEA and its 1978 amendments. ADEA's shortcomings are also explored. These shortcomings often compel those seeking to challenge mandatory retirement schemes to rely on the equal protection clause, rather than on the Act itself. Section VI draws some conclusions from the recent Congressional amendments to ADEA and suggests means to avoid the age discrimination created by mandatory retirement programs.

II

Three Recent Cases

A. Background

The passage of the Social Security Act of 1935[12] began the trend toward mandatory retirement at age sixty-five. The Act prohibited the Social Security Board from approving old-age assistance plans with an age requirement of more than sixty-five years.[13] The designation of age sixty-five was not the result of any carefully conceived plan.[14] Economic pressures, ignorance

12. Ch. 531, 49 Stat. 620 (1935) (codified at 42 U.S.C. § 301-1397 (1976 & Supp. III 1979)).

13. *Id.* § 2(b)(1) (codified at 42 U.S.C. § 302(b)(1) (1976)).

14. Congress' choice of age sixty-five is traced by some writers to Otto von Bismarck's use of that age when he pioneered old age insurance legislation in the German Empire in 1889. At that time the average life expectancy was only thirty-five years. Bismarck's plan served as a model for many later plans. *See* Comment, *Age Discrimination and the Over-Sixty-Five Worker,* 3 Cum. Sam. L. Rev. 333, 335 (1972). Others suggest that age sixty-five was chosen by Congress because it was both acceptable to the public and not overly

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about older workers' ability to do their jobs, and the later development of private insurance and pension plans[15] have made sixty-five almost synonymous with retirement age in the United States. Eventually, mandatory retirement statutes were passed, making retirement at age sixty-five the law for public employees.[16]

Mandatory retirement statutes were widely challenged as violating the fourteenth amendment's equal protection clause.[17] Rarely were any of these challenges successful.[18] Those challenges which were successful were generally decided on other grounds.[19] Though courts have often refused to sustain equal protection challenges to age discrimination,[20] the equal protection clause was the focus of the challenges in *Johnson, Gault,* and *Palmer.*

The general lack of success of equal protection challenges in this area can be traced to the manner in which such challenges are handled by the courts. Traditionally, the courts have divided equal protection cases into two categories: those which require only a "rational relationship" between a legislative objective and the challenged classification, and those which require "strict scrutiny," a more rigorous examination of certain categories of legislative classification.[21]

While the requirements of the "rational relationship" or "minimum rationality" standard have been stated in a number of ways, the standard essentially requires the challenged legislation to meet two rather lenient tests. First, the legislation must have a permissible nondiscriminatory pur-

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expensive. *See* Note, *Age Discrimination in Employment,* 50 N.Y.U. L. REV. 924, 936-37 n.65 (1975). *See also* W. COHEN, RETIREMENT POLICIES UNDER SOCIAL SECURITY 18 (1957).

15. Comment, *Age Discrimination and the Over-Sixty-Five Worker, supra* note 14, at 335-36. The connection between private pension plans and mandatory retirement can be seen in 1974 statistics which showed that approximately 45% of employees covered by benefit plans had mandatory retirement provisions in their contracts. *See* D. Kittner, *Forced Retirement: How Common Is It?* MONTHLY LAB. REV., Dec. 1977, at 60.

16. Despite some reform in recent years, sixty-five is still a common age for mandatory retirement of public employees. For example, a majority of states require either mandatory retirement or retirement at the option of the employer at age sixty-five. Most of the remaining states use seventy as the mandatory retirement age. *See* 123 CONG. REC. 34301 (1977) (remarks of Sen. Cranston).

17. Challenges were also based on due process grounds or on grounds of improper delegation of legislative power to local administrative boards. For a history of these generally unsuccessful challenges, *see* Abramson, *supra* note 8; *Age Discrimination in Employment, supra* note 14, at 927-45; Annot., 81 A.L.R.3d 811 (1977).

18. Annot., 81 A.L.R.3d 828 (1977).

19. *See, e.g.,* Bole v. Civil City of Ligonier, 130 Ind. App. 362, 161 N.E.2d 189 (1959) (dismissal at age 70 contrary to a state statute which allowed termination only for valid cause); Messano v. Board of Educ., 32 N.J. 561, 161 A.2d 475 (1960) (Board acted without the necessary clear statutory authority). In Nelson v. Miwa, 56 Hawaii 601, 546 P.2d 1005 (1976), the state university's mandatory retirement policy was overturned on an equal protection challenge. The court, however, did not state that all mandatory retirement statutes were unconstitutional, but depended to a large extent upon the unusual characteristics of that particular mandatory retirement policy.

20. *See, e.g.,* cases cited in notes 31-32 *infra.*

21. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

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pose.[22] This test is easily met since courts applying the rational relationship standard interpret statutes so as to find a constitutionally permissible purpose.[23] Second, the classification must not be one which "rests on grounds wholly irrelevant to the achievement of the State's objective."[24] Because of the ease with which both of these tests may be satisfied, the rational relationship standard has been described as giving state legislation a presumption of constitutionality.[25]

The use of a standard requiring "strict scrutiny" in certain situations reflects the absence of the presumption of constitutionality "when legislation appears on its face to be within a specific prohibition of the Constitution. . . ."[26] Courts have applied the strict scrutiny standard whenever "fundamental rights"[27] are at issue or when "suspect classifications"[28] are involved. In such circumstances, the challenged statute will be upheld only if it serves a compelling state interest which cannot be achieved by less restrictive means.[29] Generally, use of the strict scrutiny standard is a signal that legislation will be struck down.[30]

Prior to *Murgia,* state and federal courts used a minimum rationality standard to uphold mandatory retirement statutes for many occupations.[31] In *Murgia,* the Supreme Court for the first time accorded full review to a mandatory retirement case,[32] and decided the constitutionality of the state's mandatory retirement laws. Using the minimum rationality standard, the Court reversed the district court's holding and upheld the constitutionality of a mandatory retirement statute applicable to fifty-year-old policemen.[33]

The *Murgia* Court went to great lengths to justify its use of minimum rationality rather than strict scrutiny. It disposed of the claim that employ-

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22. *See* Dandridge v. Williams, 397 U.S. 471 (1970).
23. *See, e.g.,* McGowan v. Maryland, 366 U.S. 420, 426 (1961).
24. *Id.* at 425.
25. *Id.*
26. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
27. Legislation which impairs rights deemed to be fundamental will be strictly scrutinized by the courts. *E.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (voting); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (privacy).
28. When legislation differentiates between persons on the basis of race or alienage, the classification scheme is suspect and subject to strict scrutiny. *See, e.g.,* Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Hunter v. Erickson, 393 U.S. 385, 392 (1969) (race).
29. *See* Korematsu v. United States, 323 U.S. 214, 216, 218 (1944).
30. *See Age Discrimination in Employment, supra* note 14, at 928-30.
31. *See, e.g.,* Armstrong v. Howell, 371 F. Supp. 48 (D. Neb. 1974) (hospital employee); 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) (college professor); Aronstan v. Cushman, 132 Vt. 538, 325 A.2d 361 (1974) (judge).
32. *Cf.* Rubino v. Ghezzi, 512 F.2d 431 (2d Cir.), *cert. denied,* 423 U.S. 891 (1975); Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C., 1974), *aff'd mem.,* 420 U.S. 940 (1975); McIlvaine v. Pennsylvania, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed,* 415 U.S. 986 (1974).
33. 427 U.S. 307 (1976) *rev'g per curiam* 376 F. Supp. 753 (D. Mass. 1974) and 386 F. Supp. 179 (D. Mass. 1974) (granting relief to discharged policeman).

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ment is a fundamental right by stating that its past "decisions [gave] no support to the proposition that a right of governmental employment *per se* is fundamental."[34] The Court then rejected the claim that age is a suspect classification.[35] Applying the test set forth in *San Antonio Independent School District v. Rodriguez*,[36] the Court noted that to be considered suspect for equal protection purposes a class must be "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."[37]

The *Murgia* Court also pointed out that the statutory mandatory retirement age of fifty does not discriminate solely against the aged, since it "draws the line at a certain age in middle life."[38] Since a majority of the population will eventually become part of the "aged" class, the class could not be considered a "discrete and insular" group in need of "extraordinary protection."[39] The Court therefore found strict scrutiny to be unnecessary.[40]

The Court emphasized that medical evidence indicated a correlation between increased difficulty in performing stress functions and increased age.[41] Accordingly, the Court held the statute constitutional. The arduous nature of the state policeman's work, and the state's asserted need to assure the "physical preparedness of its uniformed police," satisfied the minimum rationality standard.[42]

Justice Marshall, dissenting, criticized the majority for its continued articulation of a rigid two-tiered "minimum rationality *v.* strict scrutiny" test.[43] Marshall instead urged the Court to adopt a more demanding standard which he believed the Court had in fact employed in several decisions.[44] This standard requires assessing the character of the class discriminated against and the importance of the benefits denied members of that class. The interests of the class are then weighed against the state interests served by the classification.[45] Essentially, Marshall's proposal roughly parallels

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34. 427 U.S. 307, 313 (1976). *But see Compulsory Retirement, the Constitution and the Murgia Case*, *supra* note 8, at 49-50. Abramson contends that because of the importance of employment, mandatory retirement statutes should be subject to the newer equal protection analysis. *See* text accompanying notes 43-48 *infra* for a discussion of the analysis suggested by Justice Marshall's dissent.

35. Murgia, 427 U.S. 307, 313 (1976).

36. 411 U.S. 1, 28 (1973).

37. Murgia, 427 U.S. 307, 313 (1976).

38. *Id.*

39. *Id.* (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938)).

40. Murgia, 427 U.S. 307, 313-14 (1976).

41. *Id.* at 310-11.

42. *Id.* at 314-17.

43. *Id.* at 318 (Marshall, J., dissenting).

44. *Id.* at 320.

45. *Id.* at 318.

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the strict scrutiny standard, unconstrained by its formalities and inflexibility.[46] Marshall felt that the right to work approached the status of a fundamental right and that the aged as a group met some of the criteria of a suspect class.[47] He concluded that the benefits denied the group far outweighed the state's dubious claims that mandatory retirement promoted the state's interest in strong and healthy policemen.[48]

Justice Marshall has not been alone in his criticism. Commentators have joined in attacking *Murgia,* arguing that the importance of the right to employment and the history of discrimination against the aged demand closer scrutiny of mandatory retirement legislation than that offered by the rationality standard which the Court applied.[49] Despite its claims to the contrary, the Court has occasionally employed a middle-tier approach, especially in sex discrimination cases.[50] The Court, however, has shown no inclination to adopt either an intermediate standard of scrutiny[51] or Marshall's balancing approach in the age discrimination area. At least in this area, the Court seems unwilling to undertake the investigatory obligations which a heightened level of scrutiny would impose and which might appear to be both a burden on the Court and an improper encroachment upon state sovereignty.[52] In addition, it may be argued that imposition of a test considering a multiplicity of competing factors would make it difficult to predict the constitutionality of new state legislation before a final determination by the Supreme Court.

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46. *Id.* For a discussion of the strict scrutiny standard, *see* notes 26-30 *supra* and accompanying text.

47. Murgia, 427 U.S. 307, 322 (1976) (Marshall, J., dissenting).

48. *Id.* at 322-27.

49. *See, e.g.,* articles cited note 8 *supra.*

50. *See, e.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

51. *See, e.g.,* Vance v. Bradley, 440 U.S. 93, 96-97 (1979); Frontiero v. Richardson, 411 U.S. 677 (1973). The intermediate standard, which Professor Gunther terms the "newer equal protection," would focus on the means employed by the state to attain its objectives rather than on the state's purposes themselves. It would require that "legislative means . . . *substantially* further legislative ends." Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 20 (1972) (emphasis added).

52. The traditional view of the limited power of the federal courts to review state legislation was articulated by the Supreme Court in Barbier v. Connolly, 113 U.S. 27, 31-32 (1885):

> [N]either the [fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people . . . . From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts . . . . Special burdens are often necessary for general benefits . . . . Regulation for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good.

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In fact, however, the minimum rationality standard used by the *Murgia* majority offers little assistance to courts deciding age discrimination cases. A major problem with the *Murgia* opinion is the language stating that the legislation must serve a legitimate purpose "identified by the State."[53] The meaning of that phrase must be clarified if lower courts are to gauge their authority to question stated legislative purposes where the interests of the aged are impaired.

The *Murgia* Court readily accepted the state's articulated purpose as the actual objective of the legislation: maintaining a uniformed police force in satisfactory physical condition.[54] The actual purpose, however, may have been to reduce unemployment among youthful workers, thereby benefiting one group at the expense of another. The Court's ready acceptance of the purpose identified by the state may indicate that any purpose, including those far more questionable than the one put forward here, would be accepted by the judiciary at face value. While this interpretation is not mandated by *Murgia*, such a reading is plausible. Because the Court simply accepted the state's identified purpose without requiring the state to demonstrate the relationship between the purpose and the means selected for achieving that purpose, it appears that any nondiscriminatory purpose articulated by the state will meet the Court's standard.

The *Murgia* Court also failed to discuss the lower court's assertion that the state's intent to open senior positions to younger employees constituted age discrimination per se.[55] As a result, the lower courts have no guidelines for assessing the validity of mandatory retirement statutes intended to serve purposes unrelated to job performance. After *Murgia*, some lower courts have found acceptable such state purposes as improving employee motivation[56] or increasing promotion opportunities for younger employees.[57] This tendency illustrates the need for a stronger evidentiary requirement than that used by the *Murgia* Court, particularly in cases where purposes unrelated to job performance are involved in mandatory retirement.

The Court's ambiguous reference to the "purpose identified by the State" poses a somewhat different problem for courts dealing with statutes without an articulated purpose. The Court's directive to look to the state's

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The Court eventually did adopt a policy of "strict scrutiny" of state legislation, but only in a limited number of cases where suspect classes or fundamental rights were involved. *See* notes 27-28 and accompanying text *supra*. For a description of the early developments concerning the application of the equal protection clause, *see* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CAL. L. REV. 341 (1949).

53. Murgia, 427 U.S. 307, 314 (1976).

54. *Id.* at 314-15.

55. Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753, 754-55 (D. Mass. 1974), *rev'd,* 427 U.S. 307 (1976).

56. *See, e.g.,* Johnson v. Lefkowitz, 566 F.2d 866, 869 (2d Cir. 1977).

57. *See, e.g.,* Palmer v. Ticcione, 576 F.2d 459, 462 (2d Cir. 1978), *cert. denied,* 440 U.S. 945 (1979).

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identified purpose may indicate that courts are not to supply a more acceptable purpose when applying the rationality standard. Such a directive would constitute a departure from the Court's declared position on the rationality standard: "A statutory discrimination will not be set aside if *any* state of facts reasonably *may be* conceived to justify it."[58] The *Murgia* standard may thus be more stringent in one respect than the minimum rationality standard: the state bears the burden of articulating a specific legislative purpose. Yet, once the state has identified the purpose, the court apparently is to apply the same level of scrutiny as that required by the minimum rationality standard, effectively "rubber-stamping" the purpose as acceptable.

The *Murgia* Court, furthermore, gave no clear indication of how much, if any, evidence is necessary to show that a statute is in fact related to the stated purpose.[59] If the courts follow the *Murgia* example, they will undertake only a minimal analysis of state legislation once a legitimate state purpose is articulated.[60] The *Murgia* Court relied upon the same medical testimony, correlating aging with physical deterioration, both to find the statute rational[61] and to approve its purpose.[62] Because the Court was applying a minimum rationality standard, it did not inquire into the availability of less onerous and overbroad alternatives to satisfy the state's purpose.[63] The ambiguous combination of the stringent evidentiary standard as stated in *Murgia* and its weakness as applied may be responsible for the contradictory approaches and results in the lower federal courts.[64]

The Supreme Court subsequently dealt with the standard of review for mandatory retirement statutes in *Vance v. Bradley*.[65] The Court, however, expressly limited the *Bradley* decision to the question of the rationality of a statute which required Foreign Service employees to retire at sixty, as compared to general Civil Service provisions which required employees to retire at seventy.[66] Because of the opinion's narrow scope, it is unclear whether the Court in *Bradley* intended to modify the *Murgia* standard.

The district court in *Bradley*[67] applied the minimum rationality standard to the case, stating that although "application of the 'rational basis

58. McGowan v. Maryland, 366 U.S. 420, 426 (1961) (emphasis added). *But see* note 51 and accompanying text *supra*.

59. *See* notes 80-133 and accompanying text *infra*.

60. *See* discussion of Johnson v. Lefkowitz, 566 F.2d 866 (2d Cir. 1977), and Palmer v. Ticcione, 576 F.2d 459 (2d Cir. 1978), in text accompanying notes 80-91 and 116-25 *infra*.

61. 427 U.S. 307, 315-16 (1976).

62. *Id.* at 311.

63. *See id.* at 325-27 (Marshall, J., dissenting). Since full physical examinations were required yearly for each policeman over forty, there already existed a method for eliminating those who could no longer handle the physical demands of the job.

64. *See* text accompanying notes 80-133 *infra*.

65. 440 U.S. 93 (1979) (rejecting a constitutional challenge to the Foreign Services Act of 1946, 22 U.S.C. § 1002).

66. *Id.* at 95-97.

67. Vance v. Bradley, 436 F. Supp. 134 (D.D.C. 1977), *rev'd*, 440 U.S. 93 (1979).

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standard' does not require . . . judicial abdication," it does place on the plaintiff "a heavy burden in proving its invalidity."[68] The court refused to accept enhanced advancement opportunities for younger people as a legitimate purpose.[69] The court also rejected the government's concern about physical and psychological difficulties of employees overseas, citing statistics which showed that more than 90% of government employees overseas were not subject to the early retirement statute.[70] The lower court thus held the statute to be an unconstitutional violation of the fifth amendment's equal protection guarantees.[71]

In an extremely narrow opinion, the Supreme Court reversed.[72] The Court did not directly address the rationality of mandatory retirement for nonphysical employment. It also sidestepped the issue of the legitimacy of recruitment, promotion, and retirement policies designed solely to encourage younger employees at the expense of older ones.[73]

The Court did offer a single evidentiary standard to be applied in mandatory retirement cases, a standard which is even lower than that established by the ambiguous language of *Murgia*.[74] In *Bradley*, the Court placed a heavy burden of proof upon "those challenging the legislative judgment."[75] The challengers had to show "that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[76] The Court also accepted the government's argument that mandatory retirement improved the Foreign Service system because it made promotions more predictable, boosted employees' morale, and removed older employees from rigorous, albeit nonphysical, Foreign Service employment.[77]

The impact of *Bradley*, however, remains uncertain. The Supreme Court was considering certiorari petitions in three mandatory retirement cases at roughly the same time as it was formulating the *Bradley* decision.[78] It denied certiorari in all three cases, despite the fact that the two circuit courts involved used different rationality standards, neither of which approximated the *Bradley* approach.[79] As discussed below, the Court's continuing failure to end the confusion regarding the rationality standard has impeded uniform and reasoned treatment of the claims of those persons

68. *Id.* at 136.
69. *Id.*
70. *Id.*
71. *Id.* at 135, 138.
72. Vance v. Bradley, 440 U.S. 93, 95 (1979).
73. *Id.* at 100-01.
74. *Id.* at 111.
75. *Id.*
76. *Id.*
77. *Id.* at 98.
78. *See* note 10 *supra.*
79. *See* text accompanying notes 80-125 *infra.*

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forced into retirement. The present array of standards and case dispositions in the mandatory retirement area, when viewed together, demonstrates the need for the Court to articulate the proper mode of equal protection analysis.

1. *Post-*Murgia *Cases*

a. Johnson v. Lefkowitz

The plaintiff in *Johnson v. Lefkowitz*[80] appealed a lower court dismissal of his challenge to section 70 of the New York State Retirement and Social Security Law.[81] Johnson, an attorney, had worked for the New York State Department of Law until he was forced to retire in 1974 at age seventy.[82] While Johnson attacked the mandatory retirement provision on several grounds,[83] the Second Circuit gave its most detailed consideration to his equal protection argument.[84]

Citing *Murgia* and several other cases,[85] the court found that the legislation had the necessary "rational basis" to satisfy the equal protection clause because it furthered "legitimate state interests in efficiency and economy."[86] The *Johnson* court appeared to draw its own conclusions regarding the statutory purpose, never indicating whether the state itself had articulated the statute's purpose.[87] The court stated that the mandatory retirement policy allowed department heads to plan the training and advancement of their employees and to motivate younger workers to excel in order to progress through the ranks.[88] Unlike the *Murgia* Court,[89] the *Johnson* court did not discuss the ability of the plaintiff or others in his age

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80. 566 F.2d 866 (2d Cir. 1977).
81. N.Y. RETIRE. & SOC. SEC. LAW § 70 (McKinney 1971).
82. 566 F.2d 866, 867-68 (2d Cir. 1977).
83. Johnson claimed that the statutory provision amounted to an irrebuttable presumption because it made assumptions about a class, in this case employees over sixty-five years old, and did not allow individual members of the class to challenge that presumption. The court found Johnson's irrebuttable presumption argument to be substantially the same as his equal protection argument, noting further that "the applicability of the so-called irrebuttable presumption doctrine is limited to those cases including suspect classifications." *Id.* at 868-69. For a detailed discussion of irrebuttable presumption challenges, *see* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court,* 87 HARV. L. REV. 1534 (1974). Plaintiff also claimed that the refusal to grant him a hearing violated his right to due process. The court replied that, even assuming that a protected property or a liberty interest was at stake, the interests of the individual would be outweighed by the administrative costs to the state of providing each retiree with a hearing. 566 F.2d 866, 869 (2d Cir. 1977).
84. *Id.* at 868-69.
85. McIlvaine v. Pennsylvania, 415 U.S. 986 (1974); Rubino v. Ghezzi, 512 F.2d 431 (2d Cir.), *cert. denied,* 423 U.S. 891 (1975); Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd,* 420 U.S. 940 (1975).
86. 566 F.2d 866, 869 (2d Cir. 1977).
87. *Id.*
88. *Id.*
89. 427 U.S. 307, 314-16 (1976).

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perform capably in the position in question.[90] The court, furthermore, did not require the state to present any evidence of a rational relationship between the provision's purposes and the means used to accomplish them.[91]

b. Gault v. Garrison

In *Gault v. Garrison,*[92] as in *Johnson*, the plaintiff appealed the dismissal of his suit by the district court. Here, the Seventh Circuit said it was applying the *Murgia* minimum rationality standard,[93] and concluded that the challenged mandatory retirement statute could not stand.[94]

The plaintiff in *Gault* was a high school teacher forced to retire at age sixty-five by operation of the Illinois School Code and local school board policy.[95] Judge Swygert, applying the rationality standard, first addressed the issue of the state's purpose.[96] Relying on the "purpose identified by the State" language in *Murgia*, he made clear that the state must identify its aim in requiring mandatory retirement.[97] Because the lower court had dismissed the case without taking any evidence, the state had not had an opportunity to articulate its purpose; the Seventh Circuit therefore relied, *arguendo*, on a "hint" in defendant's briefs, and assumed a possible purpose to be the removal of unfit teachers.[98] The court then found that even this hypothetical state purpose was not rationally furthered by the age classification.[99]

In reversing and remanding the case for further proceedings,[100] the *Gault* court distinguished *Murgia* in several respects. First, in *Gault* there was no evidence linking the attainment of the mandatory retirement age

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90. The court, however, did mention in passing that the performance of the plaintiff was "satisfactory" throughout the time he worked for the state, noting his perfect score on a civil service examination in 1968. 566 F.2d 866, 867 (2d Cir. 1977).

91. *Id.* at 869.

92. 569 F.2d 993 (7th Cir. 1977), *cert. denied,* 440 U.S. 945 (1979).

93. *See* Murgia, 427 U.S. 307, 314-16 (1976). The Seventh Circuit had stayed the appeal in anticipation of the Supreme Court's decision in *Murgia.* Gault v. Garrison, 523 F.2d 205 (7th Cir. 1975) (staying appeal), *decided,* 569 F.2d 993 (7th Cir. 1977).

94. 569 F.2d 993, 995-97 (7th Cir. 1977). Each member of the three-judge panel wrote a separate opinion: Circuit Judge Swygert wrote the majority opinion, Senior Circuit Judge Barnes concurred, and Circuit Judge Pell dissented. *Id.*

95. Although the relevant statute, Illinois School Code of 1961 § 24, ILL. REV. STAT. ch. 122, §§ 24-11, 24-12 (1973), removed tenure of public school teachers at age sixty-five and placed their subsequent employment on an annual basis, the local school board had decided that all teachers must retire at sixty-five. 569 F.2d 993, 994 (7th Cir. 1977).

96. 569 F.2d 993, 995 (7th Cir. 1977).

97. *Id.* at 996 (citing Murgia, 427 U.S. 307, 314 (1976)).

98. Gault v. Garrison, 569 F.2d 993, 996 (7th Cir. 1977).

99. *Id.*

100. The court concluded by finding that there was an additional violation of the equal protection clause stemming from procedural inequities. Teachers over sixty-five who were terminated did not receive a hearing, while teachers under sixty-five received a mandatory hearing. *Id.* at 996-97.

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with an inability to perform the job. The *Gault* court found that the physical demands on teachers were not comparable to the physical demands on policemen.[101] Second, the court would not presume that mental faculties diminish at age sixty-five, noting that evidence has demonstrated that teachers gain knowledge and experience over time, leading to the opposite conclusion.[102] Third, the court reasoned that the consequences of an unfit teacher were less drastic than the consequences of an unfit policeman. Although a potentially unfit policeman should be relieved of duty before it becomes "a matter of life and death," an unfit teacher can be removed by less arbitrary procedures, since no emergency is involved.[103]

Judge Barnes, concurring, emphasized that no evidence was presented by the state in support of mandatory retirement.[104] Barnes was willing to assume that the state's purpose was similar to the performance-related purpose in *Murgia*,[105] and to accept any evidence which might establish a rational relationship between that purpose and the mandatory retirement statute.[106] Thus, he noted that a court applying a rationality standard is not to be concerned with "whether 65 or 60 or 70 is a proper age for teacher retirement."[107] Nevertheless, because no evidence had been presented it was "impossible" to judge the issues or to apply the law.[108]

In his dissent, Judge Pell noted two reasons for upholding the earlier dismissal. He pointed out that sixty-five was the well-established retirement age endorsed by Congress in the original Age Discrimination in Employment Act.[109] Sixty-five was thus part of a greater social scheme, unlike the mandatory retirement age of fifty in *Murgia*. Therefore, any changes in the general age of retirement should be made by the legislative branch, as part of the ongoing process of amending ADEA.[110] Judge Pell also noted the growing surplus of teachers which had prevented many newly-graduated teachers from finding jobs.[111] He was concerned that ending the mandatory retirement of teachers would discourage students from majoring in education, and would eventually result in a shortage of teachers.[112] Judge Pell found that factor provided a second rationale for the mandatory retire-

101. *Id.* at 996.
102. *Id.*
103. *Id.*
104. *Id.* at 997 (Barnes, J., concurring).
105. *Id.*
106. *Id.*
107. *Id.* (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970), as support for the proposition that "[i]mperfect classifications made by legislative bodies are not rendered unlawful by their imperfections").
108. Gault v. Garrison, 569 F.2d 993, 997 (7th Cir. 1977) (Barnes, J., concurring).
109. ADEA of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 607 (1967) (current version at 29 U.S.C. § 631(a) (Supp. III 1979)). Gault v. Garrison, 569 F.2d 993, 998-99 (7th Cir. 1977) (Pell, J., dissenting).
110. Gault v. Garrison, 569 F.2d 993, 998-99 (7th Cir. 1977) (Pell, J., dissenting).
111. *Id.* at 999-1000.
112. *Id.*

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ment statute.[113] Judge Pell thus was willing to posit legitimate state purposes, disregarding the implications of the "purpose identified by the State" language of *Murgia*.[114]

c. Palmer v. Ticcione

Several months after the Seventh Circuit decided *Gault*, the Second Circuit again examined the mandatory retirement issue. *Palmer v. Ticcione*,[115] like *Gault*, concerned a teacher's mandatory retirement. As in *Johnson* and *Gault*, the case came to the circuit court as an appeal from an order of dismissal in the district court.[116]

The Second Circuit observed one difference between *Gault* and *Palmer:* plaintiff in *Palmer* was seventy, while the plaintiff in *Gault* was sixty-five.[117] The court did not distinguish *Gault* on that basis; it did, however, advance two reasons for declining to follow *Gault*. First, the court noted several similar pre-*Murgia* cases which upheld mandatory retirement statutes against a variety of constitutional challenges.[118] Although these cases involved occupations demanding only nonphysical skills, the courts had generally assumed that mandatory retirement improved the efficiency of the work force.[119] Second, the court attacked the underlying assumption in *Gault* that the possibility of teachers becoming unfit as they grow older was the preeminent justification for mandatory retirement.[120] The Second Circuit found that employment opportunities for young teachers and minorities and greater predictability in establishing and in administering pension plans, were equally valid purposes for a mandatory retirement statute.[121] The court acknowledged that *Gault* had distinguished *Murgia* because removing an unfit teacher is not as urgent as removing an unfit policeman. The Second Circuit, however, did not find this distinction persuasive because of the precedents and the variety of rationales for mandatory retirement.[122]

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113. *Id.*

114. 427 U.S. 307, 314 (1976). *See* text accompanying notes 53-58 *supra.*

115. 433 F. Supp. 653 (E.D.N.Y. 1977), *aff'd,* 576 F.2d 459 (2d Cir. 1978), *cert. denied,* 440 U.S. 945 (1979).

116. *Id.* at 655.

117. Palmer v. Ticcione, 576 F.2d 459, 461 (2d Cir. 1978).

118. *Id.* at 462. The court cited Rubino v. Ghezzi, 512 F.2d 431 (2d Cir.), *cert. denied,* 423 U.S. 891 (1975) (mandatory retirement of state judges at 70); Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd mem.,* 420 U.S. 940 (1975) (mandatory retirement of federal civil servants at 70); 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) (college professor denied a state-endowed chair because he was over 65).

119. *See, e.g.,* Rubino v. Ghezzi, 512 F.2d 431, 433 (2d Cir. 1975); Weiss v. Walsh, 324 F. Supp. 75, 77 (S.D.N.Y. 1971).

120. Palmer v. Ticcione, 576 F.2d 459, 462 (2d Cir. 1978).

121. *Id.*

122. *Id.* at 462 n.1. The court also disposed of the plaintiff's attempts to distinguish earlier cases and his due process challenge to the use of an irrebuttable presumption. *Id.* at 462-64.

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The Second Circuit, although speculating about the state's acceptable purposes, did pay lip service to the requirement of a "purpose *identified* by the State,"[123] which it had not done in *Johnson*. Nevertheless, the court accepted purposes such as predictability in administering pension plans, without requiring evidence demonstrating the nexus between the means and the end.[124]

2. *Unresolved Questions*

After *Murgia* it is clear that courts will use a minimum rationality standard for judging age discrimination questions, but thus far they differ in their views of what such a standard entails.[125] One area of conflict between the Second and Seventh Circuits is the interpretation of the phrase "purpose identified by the State."[126] The Seventh Circuit, construing this phrase literally, did not discuss any purpose other than the one implied in defendants' briefs.[127] The Second Circuit, on the other hand, interpreted the phrase as requiring no articulation of purpose by the state.[128] Since the statute at issue left the decision concerning compulsory retirement to local school boards, the court believed that the purpose for which the statute was used would vary from board to board. Although the school board in ques-

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123. *Id.* at 462-63.

124. *Id.* at 463.

125. Other courts have applied the rationality standard. In Fazekas v. University of Houston, 565 S.W.2d 299 (Tex. Civ. App. 1978), the court used the rationality standard to uphold the mandatory retirement of a college professor for the purpose of hiring "young, more vigorous faculty." *Id.* at 308. In O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978) (en banc) the court upheld mandatory retirement for judges at seventy. Using the rationality standard and referring to *Johnson, Gault,* and *Palmer,* the Missouri Supreme Court followed the Second Circuit in *Johnson* and *Palmer.* Acceptable rationales identified by the court included opening judicial positions to qualified persons and easing the difficulties involved in establishing and administering judges' pension plans. *Id.* at 767. Hawkins v. Preisser, 264 N.W.2d 726 (Iowa 1978) upheld mandatory retirement for members of the State Transportation Department by reading the state statute broadly in order to find a rational purpose. Judge Harris filed a strong dissent, interpreting the statute much more narrowly. *Id.* at 730-31.

Issarescu v. Cleland, 465 F. Supp. 657 (D.R.I. 1979) concerned a government pathologist's challenge to a mandatory retirement statute. The court joined the Second Circuit and the majority of other courts, declaring that there were valid purposes for mandatory retirement laws other than the elimination of older employees unable to perform their jobs adequately. *Id.* at 661-62.

In Bradley v. Vance, 436 F. Supp. 134 (D.D.C. 1977), *rev'd,* 440 U.S. 93 (1974), the district court took a broader view of the courts' powers in applying the rationality standard. *See* note 7 *supra.* The reversal of *Bradley* by the Supreme Court, and the Court's summary affirmance of Slate v. Noll, 444 U.S. 1007 (1980), indicate, however, that the Court approves of the Second Circuit's view in *Johnson* and *Palmer.*

126. Murgia, 427 U.S. 307, 314 (1976). *See* notes 53-58 and accompanying text *supra* for discussion of the phrase as used in *Murgia.*

127. Gault v. Garrison, 569 F.2d 993, 995-96 (7th Cir. 1977).

128. Palmer v. Ticcione, 576 F.2d 459, 463 (2d Cir. 1978).

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tion stated no purpose, the court upheld the statute based on its own belief that the statute had a number of acceptable purposes.[129]

The second principal area of disagreement focuses on the evidentiary demands a court can place on the party asserting a rational relationship between the statute's purpose and the age classification used to achieve it. The Second Circuit in *Palmer* and *Johnson* simply presumed the legitimacy of certain purposes, and decided that the mandatory retirement statutes served those purposes without any evidentiary showing.[130] In *Gault*, the Seventh Circuit demanded evidence of the incapacity of the elderly to perform, and questioned whether so gross and inflexible a measure as mandatory retirement of elderly teachers was necessary to promote efficiency in education.[131]

Finally, underlying the divergent interpretations of the rationality standard taken by the circuits is a difference of opinion as to the proper relationship between the legislature and the judiciary. The disparity between the Second and Seventh Circuit Courts' decisions is merely one example of this larger controversy. The courts are uncertain as to whether they are to grant total deference to any conceivable legislative purpose, or to require the statute's proponent to demonstrate some degree of congruence between the purpose and the means used.[132] The Supreme Court must clarify precisely what the rationality standard entails if these controversies are to be resolved.

III

A Framework for Analysis of the Rationality Standards

One commentator has suggested that recent Supreme Court decisions indicate that the courts have some discretion in applying the "rationality standard."[133] He has offered a three-pronged system for classifying cases which demonstrates how the Supreme Court has applied the standard. The Court has apparently used not one rationality standard but three, providing courts with the flexibility to deal with varying types of equal protection challenges.[134]

The Court has applied the first standard to legislation for which the Court has found a subjectively valid purpose; in these cases the Court does

129. *Id.* at 462-63.

130. *Id.* at 463; Johnson v. Lefkowitz, 566 F.2d 866, 869 (2d Cir. 1977).

131. 569 F.2d 993, 996 (7th Cir. 1977).

132. *See* Dandridge v. Williams, 397 U.S. 471 (1970), and text accompanying notes 53-63 *supra*.

133. Note, Massachusetts Board of Retirement v. Murgia: *A Fifty Year Old Policeman and Traditional Equal Protection Analysis: Are They Both Past Their Prime?*, 4 Pepperdine L. Rev. 369, 382-87 (1977) [hereinafter cited as *Fifty Year Old Policeman*].

134. *Id.*

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not even seek evidence of a rational connection between the statute's means and purpose.[135] *Dandridge v. Williams*[136] provides an example of this extremely deferential standard: the Court upheld a state welfare program's statutory maximum grant per family, finding that the state's "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor" freed the Court from any further need to examine the state's purpose.[137] The *Dandridge* analysis offers little practical assistance, however, to judges seeking Suprme Court guidance concerning the proper test of constitutionality. Subjective opinions about what constitutes a valid purpose, without further scrutiny, vary from one judge to another in all but the clearest cases.[138]

The second rationality standard applied by the Court is exemplified by *Murgia*.[139] The Court refused to hypothesize legitimate purposes, but nevertheless "rubber stamped"[140] the alleged purpose of the statute despite facts which cast doubt on the purpose's legitimacy. Citing slender evidence,[141] the Court was satisfied that the classification scheme was rational, despite its overinclusiveness. This second rationality standard thus permits a court to use minimal evidence in the legislative history to demonstrate rationality, but prohibits a court from hypothesizing unarticulated state purposes.[142] The outcome of the *Murgia* case indicates the weakness of this second standard of rationality because there is no requirement that the statute's proponents demonstrate a connection between the means selected and the articulated ends.

Finally, a third rationality standard may be seen from a line of cases in which the Court has not only refused to hypothesize a legislative purpose, but has carefully examined the reasonableness of the purported legislative aim and at times has refused to accept its legitimacy.[143] This examination of the statutory purpose includes reviewing the legislative history and any classifications which are excluded from the statutory benefits. An example of this standard is found in *United States Department of Agriculture v. Moreno*.[144] The Court in *Moreno* held unconstitutional a provision of the food stamp program which defined "households" as consisting only of "related persons." The legislative history had indicated that this definition was designed to disqualify politically unpopular "hippie communes."[145]

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135. *Id.* at 382.
136. 397 U.S. 471 (1970).
137. *Id.* at 486.
138. *See, e.g., id.* at 523-30 (Marshall, J., dissenting).
139. 427 U.S. 307 (1976).
140. *See Fifty Year Old Policeman, supra* note 133, at 383.
141. Murgia, 427 U.S. 307, 311 (1976).
142. *Fifty Year Old Policeman, supra* note 133, at 383, 385.
143. *Id.* at 384.
144. 413 U.S. 528, 533-35 (1973).
145. *Id.* at 534-35.

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The Court was unwilling to accept this "patently offensive" anti-hippie purpose.[146]

The foregoing analysis presents an overview of how the Court has applied the rationality standard in the past. There is one major weakness in the rationality standard as presently employed, which is particularly relevant to mandatory retirement cases and other situations where a discrete but not suspect class is burdened by a grossly overinclusive categorization. In applying the "rubber stamp" *Murgia* standard, the Court has been too willing to allow the smallest amount of evidence to demonstrate rationality.[147] The courts should instead demand that states show an unequivocal connection between state purpose and legislation enacted to fulfull that purpose. This nexus should certainly be required in cases such as *Murgia*, where there is evidence contradicting the assumptions upon which the legislation is based. This standard, incorporating the requirement that legislative means bear a "fair and substantial relationship" to legislative ends[148] without examining the legitimacy of those ends, would be more appropriate under these circumstances.

The Supreme Court's use of the three approaches to minimum rationality analysis has resulted in considerable confusion in the lower courts. The confusion following *Murgia* is evident in several recent lower court cases. In both *Johnson*[149] and *Palmer*[150] the Second Circuit applied not the *Murgia* standard, but the less rigorous *Dandridge* standard. The court accepted such purposes as opening employment opportunities for the young and minorities and motivating younger workers, without requiring any evidence showing that mandatory retirement achieved these aims. The Seventh Circuit in *Gault*[151] professed to be applying the *Murgia* standard. The court never actually reached the question of whether the state's purpose was valid, because no evidence about the state's purpose had been presented before the district court dismissed the case. However, the Seventh Circuit indicated that had a state interest been articulated, the court would have invalidated the statute absent evidence that the means selected rationally furthered that interest,[152] thus effectively requiring that the statute meet the *Moreno* standard.

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146. *See 50 Year Old Policeman, supra* note 133, at 386. There is some similarity between the *Moreno* standard and that suggested by Justice Marshall in his dissent in *Murgia. See* notes 44-52 *supra.* The Marshall test would require a court to weigh the character of the class and the benefits it is being deprived of against interests of the state in all equal protection cases. The *Moreno* standard, on the other hand, requires the court to concentrate solely on the relationship between the state's purpose and the means selected to achieve it in determining whether the classification scheme is legitimate.

147. *E.g.,* 427 U.S. 307, 314-17 (1976).

148. *See* Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 425 (1920)).

149. 566 F.2d 866 (2d Cir. 1977); *see* text accompanying notes 80-91 *supra.*

150. 576 F.2d 459 (2d Cir. 1978); *see* text accompanying notes 115-24 *supra.*

151. 569 F.2d 993 (7th Cir. 1977).

152. *Id.* at 996.

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The Supreme Court in *Bradley*[153] employed a weaker evidentiary standard than it did in *Murgia*, but did not entirely abandon the evidentiary requirement as it did in *Dandridge*. The Court accepted questionable state purposes similar to those in *Johnson* and *Palmer*.[154] In *Bradley*, however, the Court found these purposes in the statute's legislative history,[155] and did not need to hypothesize state purposes as the Second Circuit had done. Thus, the Court seems to be applying elements seen in both the Second Circuit's and the Seventh Circuit's approaches, in effect establishing a new evidentiary standard and creating further confusion in an already chaotic area of the law.

The Court confused matters further with its summary affirmance of a district court decision in *Slate v. Noll*.[156] In *Slate*, the lower court upheld a statute which required Wisconsin civil servants to retire at age sixty-five.[157] As in *Bradley*, the court placed the burden of proof on the plaintiff.[158] While admitting that the burden was "perhaps impossible,"[159] the court insisted that the challenger show that no legitimate state interest was at stake, or that there was no rational relationship between the means and the legitimate state interest.[160] Furthermore, the court asserted that it only need consider "whether *any* state of facts may reasonably be conceived to justify the classification."[161] The court thus ignored *Murgia's* requirement that the challenged classification further a "purpose identified by the State."[162] The court instead relied on the state's interest in "achieving and maintaining a certain level of physical, mental and emotional competence among governmental employees."[163]

Bradley and *Slate* imply that courts may accept any plausible state justification for mandatory retirement legislation, despite the legislation's impact on those subject to its action.[164] A goal such as stimulating "the highest performance"[165] may be invoked to protect questionable purposes such as boosting young employees' morale by increasing the frequency of

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153. 440 U.S. 93, 111 (1979).

154. *See* discussion of *Bradley*, notes 65-78 and accompanying text *supra*.

155. 440 U.S. 93, 98-102 (1979). The lengthy Supreme Court discussion cites Congress' concern with the risks of overseas duty and its intent to encourage promotion of younger foreign service officers.

156. 444 U.S. 1007 (1980). Justice Marshall would have heard oral argument. *Id.*

157. 474 F. Supp. 882 (W.D. Wis. 1979). Circuit Judge Swygert, the author of the *Gault* opinion, dissented. *Id.* at 888.

158. *Id.* at 887.

159. *Id.*

160. *Id.* at 885.

161. *Id.* at 886 (citing Tralefet v. Thompson, 594 F.2d 623, 626 (7th Cir. 1979)) (emphasis added).

162. *See* notes 52-58 and accompanying text *supra*.

163. 474 F. Supp. 882, 887 (W.D. Wis. 1979).

164. Slate v. Noll, 444 U.S. 1007 (1980); Vance v. Bradley, 440 U.S. 93, 97-98 (1979).

165. Vance v. Bradley, 440 U.S. 93, 101 (1979).

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their promotions. The Court seems ready to accept such rationales so that it need not examine the central issue, which is the older employee's ability to do his job.

Rather than skirting this issue, the Court should apply the more rigorous *Moreno* rationality standard,[166] particularly to mandatory retirement cases involving state purposes not related to performance. The courts must refuse to accept a clearly offensive state purpose, whether it is the openly anti-hippie purpose of *Moreno* or the more subtle attempt to raise younger employees' morale at the expense of older workers, as in *Bradley*. The *Moreno* standard, requiring a determination that a *legitimate* "purpose [have been] identified by the state,"[167] prevents courts from merely rubber-stamping offensive state purposes.[168] Even the United States Department of Labor has rejected mandatory retirement for non-performance-related purposes, deeming it "robbing one generation to pay another."[169]

Recent developments in the public and private sectors add weight to the argument that the courts should adopt a *Moreno* standard where non-performance-related state purposes are concerned. Precedent for applying a standard stonger than mere rationality can be found in analogous sex discrimination cases.[170] While the Court has never recognized gender as a suspect classification nor explicitly invoked strict scrutiny, challenges to gender-based classifications have been sustained based on a standard of review stricter than minimum rationality.[171] The intermediate level of review permits the courts to prohibit denial of jobs or benefits to a class of people because of personal characteristics or societal stereotyping. Thus, the growing recognition of changes in the nation's social structure may be partly responsible for the increased level of review of gender-based classifications.[172]

The impetus behind the adoption of stricter standards in sex discrimination cases applies with equal force in the age discrimination area. This Note will now explore alternative retirement schemes and ADEA, the domi-

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166. The *Moreno* standard is rigorous because it requires courts to investigate and judge the legitimacy of the legislative purpose. *See* notes 45, 152-56 and accompanying text *supra.*

167. Murgia, 427 U.S. 307, 314 (1976).

168. *See* text accompanying note 140 *supra.*

169. *Developments in Industrial Relations,* MONTHLY LAB. REV., June 1978, at 56.

170. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

171. In *Reed,* the Court struck down a state statute according males priority for appointments as estate administrators. The Court applied a stricter standard than minimum rationality, but did not invoke strict scrutiny. 404 U.S. 71, 75-77 (1971). In *Frontiero,* the Court invalidated a federal statute applying different criteria to male and female members of the uniformed services when determining whether their spouses qualified as "dependents" for entitlement to certain benefits. Four members of the Court applied a strict scrutiny analysis, while three others believed that the *Reed* standard sufficed to invalidate the statute. 411 U.S. 677, 687-92 (1977).

172. *See generally* J.A. BAER, THE CHAINS OF PROTECTION (1978); W.L. HEPPERLE & L. CRITES, WOMEN IN THE COURTS (1978).

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nant legislative enactment in the retirement area. These alternatives suggest that a stricter level of review is justified in age discrimination cases, and that recent Supreme Court decisions are not in accord with prevailing legislative and societal views of the aged.

IV

ALTERNATIVES TO MANDATORY RETIREMENT

The courts, in determining whether a mandatory retirement statute is reasonable, should consider whether alternatives exist which would enable local governments to deal with the problem of aging employees who can no longer capably perform all functions of their jobs. Considered in conjunction with the many studies indicating that older employees can continue to function successfully in occupations which are not physically demanding,[173] the alternatives are strong evidence of the irrationality of mandatory retirement statutes. Two possible alternatives are competency testing, to gauge whether employees are performing adequately, and increased retirement benefits, to make retirement a more appealing alternative.[174] Private industry is also experimenting with other possibilities, such as retaining older workers on a part-time basis or in different, less demanding capacities.[175]

Competency testing, though likely to be fair and efficient, has serious drawbacks. Testers, and ultimately courts, must first determine the job skills to be tested, the frequency with which the test is to be administered,[176] and the party which shall bear the burden of proof for demonstrating the relationship between the test and its purpose.[177] Nevertheless, at least in regard to "physical" employment where objective testing is possible, many problems will be solved with the experience gained by using these tests over a period of years.[178] More troublesome, however, is the attempt to use such tests for occupations in which the job requirements, and correspondingly the indications of incapacity, are less tangible and therefore more difficult to measure. The private sector, which has the greatest experience in using competency testing, has experienced many problems in developing compe-

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173. *See* Note, *Mandatory Retirement: Discrimination Against the Aged Minority,* 23 S.D.L. REV. 358, 361-62 (1978); *Age Discrimination in Employment, supra* note 14, at 935-36 n.64.

174. *See, e.g.,* BUS. WEEK, Sept. 19, 1977, at 39; Ross, *Retirement at Seventy: A New Trauma for Management,* FORTUNE, May 8, 1978, at 106, 110.

175. *See, e.g.,* BUS. WEEK, Sept. 19, 1977, at 39.

176. *See* Comment, *Mandatory Retirement: The Law Past and Future,* 30 BAYLOR L. REV. 333, 341 (1978).

177. *See Age Discrimination in Employment, supra* note 14, at 940, for one suggestion on allocating the burden of proof.

178. *See* BUS. WEEK, Sept. 19, 1977, at 39. Such competency testing, at least to the extent of giving regular physical examinations, has been used among blue-collar workers in the steel industry for many years in place of mandatory retirement rules.

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tency tests for executives;[179] this is one important reason for exemption of high-level private-sector executives in the 1978 ADEA Amendments.[180] In addition, unique difficulties in applying competency testing arise in the public sector. One problem involves civil service tenure. Although some discharges are open to challenge in the private sector, it is not nearly as difficult to discharge an employee in the private sector as in the public sector where tenure exists.[181] Another distinguishing factor in public employment is the general absence of professional personnel managers and systems for judging employee capability.[182] At present, therefore, these factors make competency testing an unlikely solution to the problem of aging government employees who may have become incompetent.

Another possibility is the use of increased pensions and other benefits to encourage employees to retire at an earlier age. One commentator has suggested that courts consider the level of benefits received by retiring employees as a primary factor in age discrimination cases because of its effect on their continued welfare.[183] Two of the country's largest corporations, General Motors and IBM, have offered employees lucrative bonuses of as much as two years' salary in order to induce early retirement.[184] IBM's experience has indicated, however, that the success of an increased benefits plan will depend largely upon the rate of inflation and its effect upon the value of the fixed benefits or pensions the employees receive.[185] Although increased benefits are the most appealing alternative to mandatory retirement, they do not appear to be a likely solution for public employers. Given the current financial demands on local and state governments and the trend toward lowering state and local taxes, it is unlikely that local governments would be either willing or able to provide the benefits necessary to have any substantial impact upon employees who continue working for financial reasons.

A final option, which presents significant administrative problems, may nevertheless provide the most benefits to all parties. A program which would encourage employees who reach a specified age, such as sixty, to volunteer to work either at a less demanding job at lower pay, or in a part-time capacity while being given the opportunity to collect a portion of their retirement benefits, could eliminate the need to force people to retire. Such a system would also prevent an elderly employee from facing the

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179. *See* U.S. NEWS & WORLD REP'T, Nov. 7, 1977, at 73.

180. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3, 92 Stat. 189 (1978) (amending 29 U.S.C. § 631 (1976)).

181. *See* Schier, *Raising the Mandatory Retirement Age: Examining the Consequences*, INTELLECT, Dec. 1977, at 215.

182. *Id.*

183. Comment, *The Problem of Involuntary Retirement Before Age 65*, 60 MARQ. L. REV. 1053, 1080 (1977).

184. FORTUNE, May 8, 1978, at 107, 110.

185. *Id.* at 110.

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dilemma of having to choose between retirement, with its attendant economic, medical, and psychological problems,[186] and the frustration of continuing in a job the employee is increasingly unable to perform.

A growing number of private employers are experimenting with more flexible employment policies. One employer has eliminated mandatory retirement, but requires that high-level executives choose between leaving and taking a subordinate position.[187] Another employer has entered into agreements with older employees which allow them to switch to less taxing work if they have difficulty with their present jobs.[188] Some employers use elderly employees as temporary workers, especially for special projects and during rush periods.[189] In other cases, employers use their own "retired" employees on a part-time basis, paying them through temporary agencies. This allows the company to save on payroll costs while the employee continues to collect retirement benefits.[190] Under the federal judiciary's retirement system, federal judges are allowed to retire from "regular active service" and continue to perform tasks that they are "willing and able to undertake, when designated and assigned."[191]

These alternative "retirement" plans suggest that if employers cooperate with workers, alternatives to mandatory retirement can be successful. Apart from the bureaucratic problems presented by the size of some government employers, there is little reason why such programs in the public sector could not succeed there, as well. Ideally, a retirement plan should use whatever skills and experience the older employee has gained over the years,[192] while providing the employee with continuing vocational and remunerative satisfaction.

In sum, given the existence of these alternatives, traditional mandatory retirement statutes should not survive the *Moreno* rationality test, because there is no nexus between the state's legitimate interests and the mandatory retirement schemes used to implement those interests. The underlying irrationality of mandatory retirement schemes, particularly in nonphysical employment, is further demonstrated by the lack of objective evidence showing that older employees are unable to perform their jobs.[193] Had the courts

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186. *See* Howard, *Mandatory Retirement: Traumatic Evidence of Age Discrimination,* TRIAL 46, Nov. 1977, at 47. *Age Discrimination in Employment, supra* note 14, at 924-25.

187. *See* BUS. WEEK, Sept. 19, 1977, at 39.

188. *Id.*

189. *See* Ross, *One Way to Get Good Workers,* NATION'S BUSINESS, Sept. 1977, at 39-40.

190. *Id.*

191. *Age Discrimination in Employment, supra* note 14, at 940 n.79 (citing 28 U.S.C. § 294(b) (1970)).

192. For example, mandatory retirement for elementary and secondary school teachers is often jusitifed because of their increasing inability to communicate with their young students. *See* Schier, *supra* note 181, at 216. In such situations the teacher could be assigned to an adult education program or an administrative post.

193. *See* Gault v. Garrison, 569 F.2d 993, 996 (7th Cir. 1977).

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properly applied the *Moreno* standard,[194] the courts would have overturned the mandatory retirement statutes in *Johnson* and *Palmer*. Had this standard been applied, the only remaining argument which could justify the challenged statutes would have been that they were designed to serve purposes other than the removal of incapable employees. As the following section makes clear, however, mandatory retirement should not be used to serve non-performance-related ends, such as motivating younger workers[195] or opening employment opportunities for young workers and minorities.[196]

V

Policy Considerations

The legislative debates preceding passage of the 1978 ADEA amendments revealed a number of policy considerations which support the use of mandatory retirement statutes. Two major topics of debate were the amendments' effects on unemployment and their impact upon conditions for the elderly.[197] The greatest barrier faced by proponents of employment for the elderly was the argument that many older employees, given the opportunity, would continue to work, thereby raising the already high unemployment rate, especially among the young.[198] The detrimental effects upon female and minority workers were also discussed.[199] These discussions implied that alleviating the well-documented problems of the elderly[200] would result in injury to other groups seeking to overcome long histories of discrimination. However, opponents of mandatory retirement provisions have emphasized that age discrimination has a particularly harmful effect on elderly blacks and women.[201]

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194. *See* note 148 and accompanying text *supra.*

195. *But see* Johnson v. Lefkowitz, 566 F.2d 866, 869 (2d Cir. 1977).

196. *But see* Palmer v. Ticcione, 576 F.2d 459, 462 (2d Cir. 1978). The same court addressed this question several years earlier. *See, e.g.,* Rubino v. Ghezzi, 512 F.2d 431, 433 (2d Cir. 1975), in which the court, upholding the mandatory retirement of state judges at seventy, considered the state's interest in encouraging attorneys with judicial aspirations. *But see* Murgia, 376 F. Supp. 753, 754-55 (D. Mass. 1974), *rev'd on other grounds,* 427 U.S. 307 (1976) (per curiam) and Nelson v. Miwa, 56 Hawaii 601, 609, 546 P.2d 1005, 1011 (1976), in which the courts refuse to accept encouragement of younger workers as a valid purpose for mandatory retirement. *See also* text accompanying notes 144-61 *supra* for a discussion of *Bradley* and *Slate.*

197. *See* 123 Cong. Rec. 34294-326, 30554-74 (1977).

198. 124 Cong. Rec. 8219 (1978) (remarks of Sen. Stevenson).

199. *See, e.g.,* 123 Cong. Rec. 34308 (1977) (remarks of Sen. Chafee).

200. Many studies have indicated that mandatory retirement produces serious medical and psychological consequences in addition to the economic problems faced by the elderly who are forced to retire. *See* Howard, *supra* note 186, at 46-47; *Mandatory Retirement: Discrimination Against the Aged Minority, supra* note 173, at 362-63; *Age Discrimination in Employment, supra* note 14, at 925-26.

201. *See* 123 Cong. Rec. 34303-04 (1977) (statements by the National Organization for Women and the National Caucus on the Black Aged in support of the 1978 amendments,

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In fact, the effects of eliminating mandatory retirement are not so easily predictable nor is the tradeoff between various groups so clearcut. Some argue that the trend toward voluntary retirement at an earlier age will result in relatively few elderly workers choosing to continue to work.[202] Others believe that growing numbers of workers, if given the choice, would choose to continue working.[203] Regardless of the general statistics concerning retirement age, employees who work in less physically demanding occupations would be much more likely to continue working than those whose jobs are physically demanding.[204] Perhaps the most significant and least predictable factor of all, however, is inflation. The extent to which elderly workers will choose to continue working may well depend on whether the inflation rate allows them to retire comfortably on fixed incomes.[205]

One benefit of eliminating mandatory retirement is that an increase in the elderly work force would also increase the funding available to the Social Security program. The Social Security system faces tremendous problems as life expectancy in the United States increases.[206] The ratio of those contributing to Social Security to those receiving benefits has dropped considerably over the past twenty years.[207] The likelihood that the average age of the population will increase over the next several decades[208] necessitates changes in order to maintain the solvency of the Social Security system.

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placed in the record by Sen. Cranston). The statement by the National Organization for Women emphasized the late start many women had in reaching the job market and the limited time available to them to accumulate pension benefits when mandatory retirement occurs at 65. *Id.* at 34303. The National Caucus on the Black Aged pointed out that elderly blacks have held a disproportionate number of the lowest paying jobs throughout their years of employment, therefore making them least able to handle mandatory retirement's economic consequences. *Id.* at 34304.

202. The Department of Labor has estimated that approximately 175,000 to 200,000 workers out of more than 90 million in the total labor force would continue to work as a result of increasing the mandatory retirement age to 70. 123 CONG. REC. 34296 (1977) (remarks of Sen. Javits).

203. *See* CHANGING TIMES, OCT. 1978, at 15-16. One projection estimates that by 1985, 375,000 employees will continue working as a result of the increase of the mandatory retirement age to 70. This is only one-third of 1% of the estimated total labor force. *See also* 123 CONG. REC. 30550 (1977) (remarks of Rep. Michel). Rep. Michel compared a 1974 Harris Poll in which 31% of those who retired in that year indicated they did so only because they were forced to retire, to a 1976 poll in which 50% said they retired involuntarily.

204. *See* 123 CONG. REC. 34309 (statement of William Bowen of Princeton University, placed in the record by Sen. Williams). Mr. Bowen cited statistics which indicated that only 9% of the professors at Princeton had chosen early retirement during the preceding ten years.

205. *See generally* J. SCHULTZ, THE ECONOMICS OF AGING 30-33 (1976).

206. In 1935, when the Social Security system was established, the average life expectancy in the United States was 61.7 years. In 1976 it was 72.5 years. *See* 123 CONG. REC. 30558 (remarks of Rep. Michel). For a general discussion on the financing of Social Security, *see* FINANCING SOCIAL SECURITY (C. Campbell ed. 1979).

207. *See* 123 CONG. REC. 30568 (1977) (remarks of Rep. Roybal). In 1955, the ratio of those paying Social Security (F.I.C.A.) taxes to those collecting benefits was 7 to 1; in 1960 it was 4 to 1, and in 1975 it was less than 3 to 1. *Id.*

208. *See, e.g.,* R. CAMPBELL, SOCIAL SECURITY: PROMISE AND REALITY 6-12 (1977).

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If it is difficult to predict the effect that phasing out mandatory retirement will have on unemployment, it is impossible to make definitive predictions of the long-range economic effects. Some members of the business community argue that measures such as the 1978 ADEA amendments will eventually result in a less productive and less competitive American economy.[209] Those who disagree point to government studies which show that, at least with regard to nonphysical employment, there is no decrease in productivity for workers over sixty-five.[210] In the final analysis, it appears that neither Congress nor anyone else can predict with substantial accuracy the effects of reducing mandatory retirement, much less the effects of completely eliminating it. More important for purposes of this Note is the recognition that in passing the 1978 ADEA amendments, Congress acknowledged its inability to make accurate long-range predictions, yet overwhelmingly approved legislation which would reduce the effects of arbitrary age discrimination.[211]

VI

ADEA—A Congressional Attempt to Curtail Age Discrimination in Employment

In 1978 Congress extended the coverage of ADEA[212] to prohibit age discrimination against private sector employees between the ages of forty and seventy,[213] and to provide similar protection for most state and local government employees.[214] The 1978 amendments also eliminated the mandatory retirement provisions for federal employees who had previously faced mandatory retirement at seventy.[215] ADEA permits several signifi-

209. *New Retirement Rules: Their Impact on Business, Workers,* U.S. News & World Rep't, Nov. 7, 1977, at 71.

210. *See* Howard, *supra* note 186, at 48; *Mandatory Retirement: Discrimination Against the Aged Minority, supra* note 173, at 361; Note, *Mandatory Retirement: Vehicle for Age Discrimination,* 51 Chi.-Kent L. Rev. 116, 118-19 (1974); *Age Discrimination in Employment, supra* note 14, at 935 n.64. It has been estimated that the mandatory retirement of willing and able employees reduced the gross national product (GNP) by approximately 4.5 billion dollars in 1976. S. Rep. No. 493, 95th Cong., 2d Sess. 4 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 504, 507.

211. *See* 123 Cong. Rec. 34325 (1977) (remarks of Sen. Percy). Senator Percy spoke of his doubts about the wisdom of voting for a bill for which there existed little hard evidence relating to its economic impact. He declared, nevertheless, that he would vote for the 1978 ADEA amendments because he considered mandatory retirement primarily a "people issue" as opposed to an economic issue.

212. 29 U.S.C. §§ 621-34 (1976 & Supp. II 1979).

213. ADEA Amendments of 1978, Pub. L. No. 95-256, § 3, 92 Stat. 189 (1978) (codified at 29 U.S.C. § 321(a) (Supp. III 1979)). The ADEA originally protected private sector employees between the ages of 40 and 65. ADEA of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602 (1967).

214. Coverage for government employees was initially provided in the 1974 amendments to the Act. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1), (4), 88 Stat. 55 (1974) (codified at 29 U.S.C. § 630(b), (f) (1976)).

215. ADEA Amendments of 1978, § 5(c) (amending 5 U.S.C. § 8335 (1976)).

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cant exemptions, including circumstances in which age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."[216] Discharges for "good cause" are also exempted from ADEA.[217]

Judicial construction of the bona fide occupational qualification (BFOQ) exemption[218] has important implications for applying the rationality standard to mandatory retirement statutes. Basically, a BFOQ exempts from ADEA certain occupations, such as long-distance bus driving,[219] when it can be shown that the arduous nature of the job makes it impossible to employ older workers. Although courts have refused to apply the BFOQ exemption where employers have used it to discharge aging employees,[220] other courts have allowed the exemption to justify an employer's refusal to hire older employees.[221] The courts' underlying rationale is that the knowledge and experience gained by an employee who has worked for many years at a particular job can, to a large extent, compensate for any debility resulting from advancing age.[222] Courts have also shown a greater tendency to allow the BFOQ exemption where public safety may be endangered.[223]

The standards used by the courts in applying the BFOQ exemption under ADEA differ from those used in an equal protection challenge.[224]

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216. *Id.* § 623(f)(1).

217. *Id.* § 623(f)(3).

218. *See generally* James & Alaimo, *BFOQ: An Exception Becoming the Rule*, 26 CLEV. ST. L. REV. 1 (1977); Reed, *The First 10 Years of the Age Discrimination in Employment Act*, 4 OHIO N.U.L. REV. 748, 767-72 (1977); *Age Discrimination in Employment*, *supra* note 14, at 946-49.

219. *See* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

220. *See, e.g.*, Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977) (attempt to discharge 52 year-old test pilot); Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976) (attempt to discharge a 62 year-old fireman).

221. *See, e.g.*, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) and Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974) (initial employment of long-distance bus drivers over 40 and 35, respectively).

222. *See, e.g.*, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974) (defendant successfully distinguished over-age drivers employed by Greyhound, who were not discharged, from plaintiff, who sought and was denied employment after he had reached 40 years of age). *See also* Aaron v. Davis, 414 F. Supp. 453, 459 (E.D. Ark. 1976) (older, more experienced firemen are less likely to be injured); Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 563-64 (8th Cir. 1977) (experience alone can remedy poor pilot judgment, the major cause of accidents).

223. In both Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 231-33 (5th Cir. 1976), and Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974), the courts were concerned about the effect on public safety of hiring drivers over 40. The courts in Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir. 1977) and Aaron v. Davis, 414 F. Supp. 453, 459 (E.D. Ark. 1976) did not see a great risk to public safety in the plaintiffs' continued employment. It appears that courts applying the BFOQ exemption have depended on both experience and public safety in their decisions.

224. *See* Aaron v. Davis, 424 F. Supp. 1238, 1242 (E.D. Ark. 1976) (on motion for reconsideration).

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Unlike the presumption of constitutionality which the courts give the state's purpose under the rationality standard,[225] courts interpret the BFOQ exemption more narrowly, because it is an exception to ADEA's general policy.[226] Both employee experience and any potential threat to public safety are factors which the courts should consider when evaluating the nexus between the state's purpose and a BFOQ exception used to serve that purpose.

Even more significant than the BFOQ exemption is Congress' response to judicial interpretations of ADEA. The recent amendment of the employee benefit plans exemption amounted to a repudiation of a controversial Supreme Court decision,[227] *United Air Lines, Inc. v. McMann.*[228] In *McMann,* the Court held that an employee benefit plan adopted in good faith before passage of the Act was not "a subterfuge to evade the purposes of [the Act]."[229] Under the Court's decision, the employer could force the retirement of an employee before age sixty-five if a bona fide employee benefit plan existed, without having to show a business or economic purpose.[230] Congress reacted by amending the employee benefit plan exemption to say that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of an individual . . . because of the age of such individual."[231] Congress' quick reaction to *McMann* demonstrated that it will not tolerate judicial undercutting of its attempt to end age discrimination in employment.

The 1978 amendments clearly demonstrate Congress' conviction that age discrimination in employment deserves continuing attention. Congress' overwhelming support for the amendments,[232] and the promise of further legislation to eliminate the maximum age limit of ADEA protection,[233] suggest that age discrimination in employment will soon be overcome. Such speculation, however, would be premature, because any further age discrimination legislation is several years away from passage.[234] Until Congress

225. Murgia, 427 U.S. 307, 314 (1976).

226. *See* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 230 (5th Cir. 1976) (quoting the Labor Department Bulletin, 29 C.F.R. § 860.102 (1978), concerning BFOQ: "[A]s this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer . . . which relies upon it").

227. *See* Reed, *supra* note 218, at 772-74; *The Problem of Involuntary Retirement Before Age 65, supra* note 183, at 1060-78.

228. 434 U.S. 192 (1977).

229. *Id.* at 203. *See* ADEA of 1967, § 4(f)(2), 29 U.S.C. § 623(f)(2) (1976) (amended 1978).

230. United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977).

231. ADEA Amendments of 1978, § 2(a) (codified at 29 U.S.C. § 623(f)(2) (Supp. III 1979)).

232. The House passed the final version of the amendments by a vote of 391 to 6. 124 CONG. REC. 7889 (1978). The margin in the Senate was 62 to 10. 124 CONG. REC. 8220 (1978).

233. *See* 124 CONG. REC. 7886 (1978) (remarks of Rep. Pepper).

234. The amendments require the Department of Labor to submit a full report on the effects of the 1978 amendments by the beginning of 1982. *See* ADEA Amendments of 1978, §

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passes such legislation, the courts must continue to apply the equal protection clause in cases brought by older workers not protected under ADEA. If the behavior of the judiciary in *Johnson, Palmer, Bradley,* and *Slate* is any indication, the intervening period will be a difficult one for elderly employees.

VII

CONCLUSION

There has been slow progress toward the elimination of age discrimination in employment. Congressional amendments to ADEA in 1978, particularly the removal of maximum age limits for the protection of most federal government employees, constituted a major step in that direction. If the amendments prove to have only a minor effect on the federal civil service, Congress may again amend ADEA. Meanwhile, as experimentation with alternatives to mandatory retirement continues, the arguments for complete, mandatory retirement become increasingly less persuasive.

Several conclusions can be drawn from examining ADEA and the possible alternatives to mandatory retirement. Congress recently reproved the Supreme Court for its narrow interpretation of ADEA's scope in *United Air Lines, Inc. v. McMann.*[235] This reproof reflects Congress' growing impatience with the Court's tolerance of age discrimination in employment. Recent judicial application of the BFOQ exemption indicates the importance of experience in determining the ability of an older employee to perform a job, especially when there is no threat to public safety.[236] Finally, the elimination of mandatory retirement could create opportunities to overhaul the Social Security system and to promote the efficient use of the skills of elderly employees.

Evidence shows that older employees perform physically undemanding jobs as well as or better than younger employees. This evidence, together with the existence of many alternatives to mandatory retirement suggest that where the state's goal is to eliminate incapable employees, the *Murgia* standard should require the state to articulate that goal.[237] Further, the

6(b) (codified at 29 U.S.C. § 624 (Supp. III 1979)). These duties were later shifted to the Equal Employment Opportunity Commission. Reorg. Plan No. 3 of 1978, § 2, 43 Fed. Reg. 19807 (1978), *reprinted in* 92 Stat. 3781. However, it should be noted that despite the fact that ADEA originally required the Department of Labor to research the problems of the aged, little actual research was done because of a shortage of money and manpower. *See* Reed, *supra* note 218, at 751. This report would mark the beginning of a long process which might eventually lead to legislation to fulfill the purposes of ADEA by eliminating the maximum age limit for ADEA protection.

235. 434 U.S. 192 (1977). *See* notes 201-05 and accompanying text *supra;* 124 CONG. REC. 7881 (1978) (remarks of Rep. Hawkins); 124 CONG. REC. 8218 (1978) (remarks of Sen. Javits); ADEA Amendments of 1978, 29 U.S.C. § 623(f)(2) (Supp. III 1979).

236. *See* notes 218-26 and accompanying text *supra.*

237. *See* text accompanying note 54 *supra.*

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more rigorous *Moreno* rationality standard should apply where mandatory retirement statutes are used to provide opportunities for promotions or to improve the morale of younger employees at the direct expense of elderly employees.[238] Recent Congressional enactments, the availability of alternatives to mandatory retirement, and public policy reasons would support such a shift in the courts' stance.

Despite indications that greater judicial activism would be welcome and proper, the courts continue to approve mandatory retirement statutes. In upholding the dismissal of the plaintiffs' constitutional challenges, the Second Circuit in *Johnson* and *Palmer* failed to apply even the *Murgia* rationality standard. Had the Supreme Court reversed *Johnson* and *Palmer* and upheld *Gault,* it could have clarified *Murgia* and brought the law into conformity with the policies of the 1978 Amendments. The courts' recent decisions[239] mean that the elimination of age discrimination in employment will have to be pursued through the legislative process.

HOWARD J. STIEFEL

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238. It is possible, however, that even applying the *Moreno* rationality standard, a court could find a valid purpose and uphold a mandatory retirement statute if the purpose, upon closer examination, is not "patently offensive" as it first appears. *See Fifty Year Old Policeman, supra* note 133, at 384.

239. *See* discussion of *Bradley* and *Slate,* notes 65-78, 157-64, and accompanying text *supra.*

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