Determination of the role that older citizens should play is a perplexing problem for contemporary society. In pre-industrial cultures, those advanced in age have retained an active societal role and have been looked to for guidance and wisdom; but it has become commonplace in modern industrial societies for older workers to retire and live on the income from social security and pension plans. It is paradoxical that "early" retirement is encouraged and mandatory retirement plans are tolerated in a country such as the United States that espouses the work ethic.

Over the years, courts have almost uniformly rejected challenges to mandatory retirement plans and have generally accepted

* After this Comment was put into galley form, the Supreme Court decided Vance v. Bradley, 47 U.S.L.W. 4176 (Feb. 22, 1979), in which it upheld different retirement ages for the federal Foreign Service and Civil Service. Invoking minimal equal protection scrutiny, the Court reversed a three-judge district court, Bradley v. Vance, 436 F. Supp. 134 (D.D.C. 1977), and held that Congress could rationally have concluded that the retirement ages of 60 for Foreign Service employees and 70 for Civil Service employees were justified by differing job requirements. Justice Marshall would have applied the middle-level test that he advocated in Murgia. Vance v. Bradley, 47 U.S.L.W. at 4182 (Marshall, J., dissenting). Although the appellees asserted that the relevant statute discriminated between those over 60 and those younger, the Court dismissed this issue, holding that because the appellees had abandoned the claim in the district court the Supreme Court need not decide the issue. Id. 4177 n.10, 4181 n.27. But see id. 4182 (Marshall, J., dissenting). By thus sidestepping the underlying (and more difficult) question whether a mandatory retirement age of 60 is itself constitutionally permissible for these kinds of occupations, and focusing instead on the difference between the two services, the Court failed to address squarely the issue discussed in this Comment. Nevertheless, the Court noted that it found no merit in such a claim. Id. 4181 n.27. Insofar as it relied on either the holding or the reasoning of Murgia for this conclusion, Bradley is subject to the criticisms of that case made in this Comment.

1 “Early” retirement means voluntary retirement according to an established pension plan before the customary retirement age. A social policy that encourages “early” retirement is not without its costs:

The individual who loses his job due to the operation of a mandatory retirement provision experiences loss of income, status, and social orientation. There exist taxing psychological costs as well, since found leisure is, in many instances, an unsatisfactory alternative to the retention of meaningful employment. Finally, apart from the cost to the individual victimized by mandatory retirement, society suffers as well since it must forego the benefits of currently wasted productive capacity and must instead bear the burden of the increased cost of supporting retired and unemployed individuals who in many instances, are both physically and mentally prepared to continue as productive members of labor’s work force.

such plans as a reasonable way to accomplish the legitimate goals of
promoting competence and efficiency and providing a path of ad-
vancement for younger
workers.\(^2\)

Prior to 1976, the Supreme Court had held that mandatory
retirement plans did not present a substantial federal constitutional
question.\(^3\) Then, in *Massachusetts Board of Retirement v. Murgia*,\(^4\) the Court implicitly rejected this position. Invoking minimal equal
protection scrutiny, it upheld a Massachusetts law that required
state police officers to retire at age fifty. Because the lowest level
of scrutiny was used, the Court did not examine the merits of the
arguments of those opposed to mandatory retirement; rather, it
found the state's purposes legitimate and its means a rational, if
imprecise, way of achieving the specified legislative goals.\(^5\)

*O'Neil v. Baine*\(^6\) provides an opportunity to evaluate the sound-
ness of the *Murgia* decision when extended to non-physical occupa-
tions. In *O'Neil*, the Missouri Supreme Court upheld a state law
requiring magistrates to retire at age seventy.\(^7\) Reversing the judg-

\(^2\) Occupations in which mandatory retirement plans have been upheld include:
F.2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129 (1973); schoolteachers, *Cook-
son v. Lewistown School Dist. #1*, 351 F. Supp. 983 (D. Mont. 1973); park
workers, *Talbot v. Pyke*, 533 F.2d 331 (6th Cir. 1976); hospital workers, *Armstrong
512 F.2d 431 (2d Cir. 1975); *Boughton v. Price*, 70 Idaho 243, 215 P.2d 286
(1950); *Nelson v. Miller*, 25 Utah 2d 277, 480 P.2d 467 (1971); *Aronstam v.

Typical of the above opinions is *Weiss v. Walsh* in which the court noted:
Notwithstanding great advances in gerontology, the era when advanced
age ceases to bear some reasonable statistical relationship to diminished
capacity or longevity is still future. It cannot be said, therefore, that age
ceilings upon eligibility for employment are inherently suspect, although
their application will inevitably fall unjustly in the individual case. If the
precision of the law is impugnable by the stricture of general applicability,
vindication of the exceptional individual may have to attend the wise dis-
cretion of the administrator.

324 F. Supp. at 77. This Comment will argue that such a low-level rationality test
may no longer be appropriately applied to old-age classifications such as mandatory
retirement. See text accompanying notes 36-61 infra.

\(^3\) See, e.g., *Cannon v. Guste*, No. 74-3211 (E.D. La. May 5, 1975), aff'd, 423
appeal dismissed, 415 U.S. 986 (1974); *Campbell v. Aldrich*, 159 Ore. 208, 79 P.2d
257, appeal dismissed, 305 U.S. 559 (1938). The Court in these cases either sum-
marily affirmed or dismissed for want of a substantial federal question lower court
decisions on mandatory retirement plans.


\(^5\) Id. 316.

\(^6\) 568 S.W.2d 761 (Mo. 1978).

\(^7\) The statute states, in relevant part: "Except as otherwise provided in this
section, . . . magistrate judges, probate judges, and probate ex-officio magistrate
judges shall retire at the age of seventy years . . . ." Mo. ANN. STAT. § 476.458
ment of the trial court, the state supreme court held that the statute violated neither the equal protection nor the due process clauses,\(^8\) even though it recognized that Judge O’Neil’s age “has not lessened his legal abilities” and that he “is competent both physically and mentally, that his health is generally good, that he is very competent and that he desires to continue to serve the public.”\(^9\) In so doing, the court relied heavily on the framework established by the Supreme Court in *Murgia* and followed by other courts in subsequent cases.\(^10\)

This Comment will examine *Murgia* and its legacy and suggest that the constitutional principles of that case, if sound at all, should not be extended beyond its special facts. Because maximum age classifications are analogous to others in which the Supreme Court has invoked a middle-level equal protection scrutiny, this level of scrutiny and not the minimal scrutiny of *Murgia* should be used in this area generally. Applying the middle-level test, the Comment argues that the mandatory retirement scheme upheld in *O’Neil* violates the equal protection clause.\(^11\)

I. *Murgia* and Its Legacy

In *Massachusetts Board of Retirement v. Murgia*,\(^12\) the Supreme Court reversed a district court\(^13\) and upheld a state requirement that state police retire at age fifty.\(^14\) Declining to find age-based

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\(^8\) 568 S.W.2d at 768.

\(^9\) Id. 763.

\(^10\) See text accompanying notes 21-32 infra.

\(^11\) Judge O’Neil (and others who have challenged mandatory retirement) set forth two contentions in addition to his equal protection argument: he argued that the requirement denied him due process and also that it created an irrebuttable presumption. This Comment is limited to a discussion of the equal protection argument. It should be noted, however, that the *O’Neil* court said of the due process approach: “The due process argument is similar to the equal protection one; the two are closely intertwined. If mandatory retirement is constitutionally permissible and is not a violation of equal protection then respondent is not deprived of any due process rights.” *Id.* 767-68.

\(^12\) 427 U.S. 307 (1976) (per curiam).


\(^14\) In addition to being required to retire at age 50, uniformed state officers were required to pass a comprehensive physical examination until age 40. “After that, until mandatory retirement at age 50, uniformed officers . . . [were required] to pass annually a more rigorous examination, including an electrocardiogram and test for gastro-intestinal bleeding.” *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 311 (1976) (per curiam).
classifications suspect\textsuperscript{15} or the right to work fundamental,\textsuperscript{16} the Court instead applied a low-level rationality test.\textsuperscript{17} In reaching its decision, the Court noted the existence of a legitimate state purpose, that of assuring the physical preparedness of the police force. Observing that "physical ability generally declines with age," it concluded that the mandatory retirement plan was rationally related to that goal.\textsuperscript{18}

\textsuperscript{15} See notes 38 & 39 infra & accompanying text.

\textsuperscript{16} According to the Supreme Court, its prior decisions "give no support to the proposition that a right of governmental employment \textit{per se} is fundamental." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56, 73 (1972); Dandridge v. Williams, 397 U.S. 471, 485 (1970)). At least one commentator disagrees with the Court. Noting that the Court has repeatedly recognized the right to engage in a lawful occupation as among the liberties guaranteed by the fourteenth amendment, Professor Abramson claims that despite repeated opportunities to do so, the right to earn a living has never explicitly been relegated to mere minimum scrutiny by the Supreme Court. . . . While the elderly are not in the same class as those individuals classified on the basis of race, they are arguably subject to discrimination when they are denied an important benefit such as employment. The Court's decision . . . [that the right to work is not fundamental] disregards the significant nature of the benefits denied and the hardships which may result.

Abramson, \textit{Compulsory Retirement, The Constitution and the Murgia Case}, 42 Mo. L. Rev. 25, 49-50 (1977) (citations omitted). To the extent that Professor Abramson's argument is valid, it provides additional support for the application of middle-level scrutiny to mandatory retirement plans.

\textsuperscript{17} For an example of the application of a similar low-level rationality test, see Dandridge v. Williams, 397 U.S. 471 (1970). \textit{See also} note 36 infra & accompanying text.

\textsuperscript{18} Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 315-16 (1976) (per curiam). The Supreme Court clearly was more deferential to the state legislature than was the district court, which also claimed to have invoked the minimum rationality test. Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753, 754 (D. Mass. 1974), \textit{rev'd per curiam} 427 U.S. 307 (1976). Indeed, the court noted that "[the rationality test] employs a relatively related standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. . . . Such action by a legislature is presumed to be valid." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam). The district court, on the other hand, stated that "to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning point, does not mean that the line can be drawn anywhere at all." Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. at 755. In reaching its decision the district court relied on the following statistics, compiled from Novmeber, 1967 to December, 1973, showing discharges for non-injury disability:

<table>
<thead>
<tr>
<th>Age</th>
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<th>Age</th>
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<tr>
<td>40</td>
<td>3</td>
<td>45</td>
<td>1</td>
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<tr>
<td>41</td>
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<td>46</td>
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<td>43</td>
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<td>48</td>
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<tr>
<td>Total 8</td>
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\textit{Id.} 756. In the opinion of the district court these figures "furnish no reason to suppose that age 50 is within, or even significantly approaching, a range where
The extent to which *Murgia* is dispositive of the constitutionality of other mandatory retirement laws is, however, open to question. The nature of the occupation there under consideration involved peculiar characteristics of both physical fitness and protection of public safety. The Court noted that the job of police officer

"requires comparatively young men of vigorous physique. The nature of the duties to be performed in all weathers is arduous in the extreme." . . . [T]he purpose of the [age] limitation was to protect the public by assuring the ability of state police to respond to the demands of their jobs.

These distinguishing characteristics have contributed to the confusion evident in lower court construction of *Murgia*.

In *Vance v. United States*, an Air Force regulation providing for dismissal or demotion of overweight enlisted men was at issue. The regulation operated without regard to the actual effect of obesity upon job performance. The federal district court viewed *Murgia* as limited to specialized professions like the police or armed forces, and held that, in such instances, "the physical criteria may be broad and relatively unparticularized." 20

The Court of Appeals for the Seventh Circuit has similarly concluded that *Murgia* is thus limited. In *Gault v. Garrison*, involving mandatory retirement for teachers at age sixty-five, the court of appeals distinguished between the teaching and law enforcement professions in two ways. First, the court recognized that teaching is a profession in which mental skills are vastly more important than physical ability. We cannot assume that a teacher's mental faculties diminish at age 65. On the contrary, . . . much in the way of knowledge and experi-

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19 Indeed, one commentator has noted that *Murgia* may not have been the best case to test the constitutionality of mandatory retirement laws because of the age involved. Cain, *Mandatory Retirement: The Murgia Decision and Its Likely Consequences*, 3 INDUS. GERONTOLOGY 233, 240 (1976).


21 434 F. Supp. 826 (N.D. Tex.), aff'd, 565 F.2d 1214 (5th Cir. 1977).

22 Id. 837.

23 569 F.2d 993 (7th Cir. 1977), cert. denied, 47 U.S.L.W. 3586 (U.S. March 6, 1979). The court remanded the case for evidentiary hearings on the state's purpose and the relationship of the means to that purpose. 569 F.2d at 996-97.
ence, so helpful to the educational profession, is often gained through years of practice.24

Second, the court noted that, because of the peculiar nature of the policeman's job in Murgia,

failure to perform properly in any given instance could become a matter of life or death. In contrast, if a teacher becomes unfit, whether because of age or other factors, it does not become a matter of such immediacy that there is no time or opportunity to take appropriate procedural steps for his or her removal.25

Unlike the Vance and Gault courts,28 however, most courts have viewed Murgia as uniformly applicable to all mandatory retirement provisions. The reasoning of Murgia has been transplanted virtually intact to other cases involving the police.27 A challenge by an attorney to the New York State civil service retirement age of seventy was rejected on the strength of Murgia.28 Several retirement laws for teachers and other educational employees have passed the minimum rationality test.29 These courts have upheld the legitimacy of state purposes such as efficiency, economy,30 administrative planning, creating job opportunities for younger workers, aid in planning for retirement, and avoiding individual decisions.31

24 Id. 996. The same argument applies with even more force in regard to judges.

25 Id. The court continued: "If the procedures normally taken for removal of an allegedly unfit teacher are used, there is greater assurance that unfit teachers will be removed while the rest will be able to continue performing their jobs, putting to use the experience and knowledge gained over the years." Id. If applied to judges, this reasoning would indicate a greater reliance on impeachment, or other proceedings designed by law to remove incompetent judges, rather than on mandatory retirement. See text accompanying notes 97 & 98 infra.

26 In Bradley v. Vance, 436 F. Supp. 134, 136 (D.D.C. 1977), rev'd, 47 U.S.L.W. 4176 (Feb. 22, 1979), a three-judge district court, dealing with a similar issue, cited Murgia as having applied a minimum rationality test. The Bradley court, however, seems to have applied a more expansive test similar to the one actually used by the district court in Murgia. See note 18 supra. At least one commentator agrees that Murgia applies to only a limited number of cases. See Abramson, supra note 16, at 51.


The decision of the Missouri Supreme Court in *O'Neil v. Baine* adopted a similarly broad view of *Murgia* and thus represents an excellent opportunity for the Court to resolve the ambiguities of its holding in *Murgia*. Although the Court is usually reluctant to re-examine its recent decisions out of respect for the principle of stare decisis, this policy should not be dispositive here. First, the Court has long recognized that adherence to precedent is less appropriate in cases in which constitutional issues are at stake than it is in non-constitutional cases. Second, the Court has decided only one mandatory retirement age case, *Murgia*. As pointed out above, however, the scope of that case remains undecided and the Court may appropriately limit it to its special facts. Finally, the Court was not called upon to consider squarely the applicability of middle-level scrutiny in the *Murgia* case. In a case such as *O'Neil*, therefore, which is distinguishable and in which the new middle-level approach is expressly argued for, the Court need not feel bound by *Murgia*.

II. Equal Protection: A Middle-Level Test

The level of equal protection scrutiny applied to a mandatory retirement plan or other maximum age classifications can itself determine the ultimate fate of the scheme. Traditionally, the Supreme Court has exercised minimal scrutiny when evaluating social and economic legislation: its inquiry is limited to whether the statutory scheme is rationally related to a legitimate state purpose.  

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32 565 S.W.2d 761 (Mo. 1978).
34 See text accompanying notes 18-25 supra.
35 Even though Justice Marshall complained of the Court's mechanical reliance upon the traditional two-tier approach to equal protection analysis, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317-18 (1976) (Marshall, J., dissenting), and even though strict scrutiny was urged upon the Court by amici, e.g., Brief of Lawrence Carter for Appellee as Amicus Curiae at 4-5, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), Murgia, himself, argued only for minimal scrutiny before the high Court. Brief for Appellee at 18-20, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). Because the court below had granted him relief on the basis of the weaker test, Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753, 755-56 (D. Mass. 1974), he had no reason to ask for more from the Supreme Court.
In Vance v. Bradley, 47 U.S.L.W. 4176 (Feb. 22, 1979), the parties also agreed that the minimum rationality standard was applicable. Id. 4178. Thus, as in *Murgia*, the Court was able to avoid deciding the applicability of the middle-level test advocated here.
36 See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955). The great discretion given to legislatures was best described by Chief Justice Warren:

The constitutional safeguard is offended only if the classification rests on grounds *wholly irrelevant* to the achievement of the State's objective. State
In its most relaxed form, this test even allows the Court to hypothesize unstated purposes. On the other hand, the Court has exercised strict scrutiny when classifications are inherently suspect (especially racial classifications) or when certain fundamental rights are involved. Under the strict scrutiny test, the Court inquires whether the legislature has adopted a necessary method to serve a compelling state interest.

There has been widespread dissatisfaction with this rigid, two-tier approach. Justice Marshall, in particular, has complained that this pigeonholing fails to consider openly "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification." New equal protection models have thus been suggested that give some added scrutiny to classifications based on immutable individual characteristics.

Although it has never explicitly adopted a new standard, the Burger Court has invoked a middle-level scrutiny in certain cases.
in which classifications are based on human characteristics and capabilities analogous to those that have been held to be suspect.\footnote{E.g., Mathews v. Lucas, 427 U.S. 495, 505-06 (1976) (illegitimacy).} Although the Court has applied this new standard primarily to classifications based on gender\footnote{See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).} and illegitimacy,\footnote{See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).} it has not confined its application to these two areas.\footnote{See, e.g., United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (unrelated individuals in same household).} Because the Court has never admitted using this new approach, however, its precise meaning is unclear. The Court, for example, has indicated that classifications based on illegitimacy, a non-suspect criterion, should be judged by the rationality test.\footnote{Mathews v. Lucas, 427 U.S. 495 (1976).} In a cryptic afterthought, however, the Court added that this test is not "toothless."\footnote{Id. 510.} The precise constitutional standard intended by the Court thus remains uncertain.

The Court first invoked this middle-level scrutiny in Reed v. Reed,\footnote{404 U.S. 71 (1971).} in which a statute providing for a mandatory preference for males as administrators of estates was challenged. Chief Justice Burger wrote that the classification must bear a fair and substantial relationship to the ends desired.\footnote{Id. 76.} Although the Court recognized as legitimate the goal of reducing a probate court's workload by eliminating a class of applicants for administrator, the Chief Justice criticized giving "a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, [as] the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."\footnote{Id. 76-77.} In this middle area, therefore, classifications designed for administrative convenience and intended to avoid individual inquiries are to be treated skeptically.\footnote{Indeed, a major reason for the different results reached in two recent illegitimacy cases, Trimble v. Gordon, 430 U.S. 762 (1977), and Mathews v. Lucas, 427 U.S. 495 (1976), was the provision in the latter for a hearing on the merits for those illegitimates excluded by the statutory presumptions. Id. 512.}

Later, the Court gave increased scrutiny to a classification preventing dependent, unacknowledged illegitimate children from re-
the Court accepted some state purposes as legitimate but, without acknowledging it, clearly inquired into
the means adopted to accomplish those purposes. No longer willing to accept unquestioningly legislative judgment on the rationality of
the means, the Court weighed the professed state interests against
the nature of the personal rights endangered.

The Court has extended its middle-level scrutiny to classifications other than gender and illegitimacy. In *United States Department of Agriculture v. Moreno*, a statute was challenged that barred the distribution of food stamps to unrelated individuals liv-
ing in the same household. While allowing for some imprecision, the Court closely examined the means adopted and found that the classification did not accomplish the acceptable purpose of eliminating fraud; consequently, the classification was declared invalid.

The middle-level scrutiny remains a vital if unexplained part
of equal protection analysis. In *Craig v. Boren*, the Court noted
that gender-based classifications must serve important objectives and be substantially related to the achievement of those objectives. It sharply criticized what it called outdated misconceptions and over-
broad generalizations about the role of females as “loose-fitting” characterizations that could not support statutes based on their
accuracy. In *Mathews v. Lucas* and *Trimble v. Gordon*, the
Court noted that, though the characteristics of illegitimates are
analogous in many respects to personal characteristics previously
held to be suspect, the analogy is not sufficient to require the most
exacting scrutiny; thus, although strict scrutiny was inappropriate,
the Court noted that the scrutiny clearly should not be “tooth-
less.” Thus, when classifications are based upon immutable per-
sonal characteristics, the latitude granted the legislature in defining
the scope of the classification is reduced.


Id. 172-76.

413 U.S. 528 (1973).

Id. 535-38. Because this degree of scrutiny has normally been invoked sub silentio, one can only guess at the Court’s motives for choosing it over a more relaxed scrutiny. Here, it is likely that the Court believed that classifications affecting access to a basic instrumentality which was inextricably related to enjoyment of guaranteed liberties, *i.e.*, food, deserved closer scrutiny. The right to work, involved in retirement cases, would also fit into this category. *See* note 16 *supra.*


The classification of individuals using old age as the criterion is analogous to the others in which middle-level scrutiny has been invoked. Like women and illegitimates, the elderly are without power to change the classifying characteristic; old age is an inevitable and unalterable fact of the human condition. Furthermore, as will be demonstrated below, old age is a characteristic that "frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions [on this basis] . . . often have the effect of invidiously relegating the entire class . . . to inferior legal status without regard to the actual capabilities of its individual members." For these reasons, old age classifications should be examined under the more demanding middle-level test.

III. O'Neil v. Baine: MIDDLE-LEVEL SCRUTINY APPLIED

The middle-level test requires that the means chosen bear a fair and substantial relationship to a legitimate state purpose. After identifying the state purposes articulated in O'Neil, the means will be examined to determine whether they bear the required relationship to those purposes.

In O'Neil v. Baine, the Missouri Supreme Court noted the existence of several purposes underlying the mandatory retirement age for state judges. First, the policy is designed to assure the highest caliber of judiciary. Mandatory retirement should "insure the fitness of the judiciary as a whole and . . . insure the continued competency of the system . . . [by] . . . attempt[ing] to insure that, on the whole, only those judges who have the vigor, health and vitality will carry out the public's work in administering justice." Second, the state wishes to avoid having to make perplexing individual determinations of competence and to hold the traumatic hearings necessary for such determinations. Third, mandatory retirement will increase opportunities for other qualified persons to serve

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62 See text accompanying notes 72-94 infra.
63 Frontiero v. Richardson, 411 U.S. 677 (1973). The language quoted was applied to gender classifications; although it was used in Frontiero to support the inclusion of gender among suspect classifications, and thus to trigger strict scrutiny, it seems equally applicable to classifications demanding only middle-level scrutiny. This is especially true because the attempt made in Frontiero to include gender among the suspect classifications seems to have failed, and gender classifications have been largely examined with only middle-level scrutiny. See Craig v. Boren, 429 U.S. 190 (1976).
64 568 S.W.2d 761 (Mo. 1978).
65 Id. 766-67.
66 Id. 767.
Fourth, the scheme assures predictability and ease in administration of the judges' pension plans.

"There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." As a method for attaining this end, however, the imposition of a mandatory retirement age cannot withstand the scrutiny of the middle-level test. Although the O'Neil court defended the age limit of seventy as "about" the time mental processes weaken among many men and women, this is not supported by the increasingly large body of medical research on the aging process. Undeniably, the mental processes of many older people have declined. Nevertheless, early gerontological research indicates that any deterioration in cognitive and psychomotor functions is highly variable across individuals and is often retardable or reversible. One prominent gerontologist has suggested that society is at least as important as biology in the aging process; thus, stereotypical behavior by older people may be a result of societal discrimination, deprivation of basic satisfactions, and reduction to an inferior status. Reduced intellectual performance may simply result from an environment that becomes in-

67 Id.

68 Id. Previous cases concerning mandatory retirement laws for judges, see note 2 supra, have not recognized any purposes that are appreciably different from those outlined above.


70 Interestingly, Missouri, like most employers with mandatory retirement policies, believes that high standards can be maintained simply by eliminating older judges. One observer calls this a policy of removing the "deadwood," which is defined to consist only of old people: "The 25-year-old incompetent is not so classified; he is simply a lousy employee. A 45-year-old schoolteacher is not 'deadwood'; rather, she is an employee with whom the school board is just going to have to live." Eglit, Another Name for Discrimination, in Debate, Is Compulsory Retirement Constitutional?, CIV. LIB. REV., Fall 1974, at 87, 91.

71 568 S.W.2d at 767.

72 For general discussions of this research as it relates to mandatory retirement, see Note, The Constitutional Challenge to Mandatory Retirement Statutes, 49 ST. JOHN'S L. REV. 748, 755-59 (1975); Note, Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment, 47 ST. CAL. L. REV. 1311, 1315-18 (1974). Medical evidence demonstrates that chronological age is not a good predictor of physiological age. See text accompanying note 81 infra. See also Kovarsky & Kovarsky, Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment, 27 VAND. L. REV. 839, 849 (1974). This article, a comprehensive treatment in its area, outlines many clinical concomitants of increasing age, including senile dementia, coronary heart disease, diabetes, neuromuscular diseases, and arthritic disorders. A comprehensive discussion of all the gerontological research is obviously beyond the scope of this Comment. For a helpful anthology of research articles, see HANDBOOK OF THE PSYCHOLOGY OF AGING (J. Birren & K.W. Schaie eds. 1977) [hereinafter cited as HANDBOOK].

creasingly inhibiting. It has been suggested that intellectual decline is reversible through training and preventable by continued exposure to a challenging environment. This implies that removal of older individuals from their work roles may be an important factor in any subsequent decline. Furthermore, several studies suggest that those with a greater intellectual ability earlier in life are more resistant to decline. Assuming that judges generally possess better than average intellectual ability, there is even less foundation for mandatory retirement in their case.

What sometimes appears to be intellectual decline may, in reality, represent new ways of thinking. Older people may often simply process information differently from younger ones and may, thus, compensate for any losses with new strategies. One study, noting that there is little evidence to support the notion that older decisionmakers are less facile information processors, found that they sought and apparently digested large quantities of information. This practice, the result of years of experience, perhaps accounts for some slowness at arriving at decisions. Indeed, considering the complexities of the law, it would seem that a judge would grow more competent over the years as he gains experience. Two gerontologists have noted: "It is important to remember that the performance of some 70-year-olds [with respect to learning and information retention] is indistinguishable from that of younger individuals." Many gerontologists conclude that the aged can maintain both their psychological and their physical health by remaining active and involved with society. Sparks, for example, has argued that society should emphasize experiential aging, which is determined

74 Labouvie-Vief, Hoyer, Baltes, & Baltes, Operant Analysis of Intellectual Behavior in Old Age, 17 HUMAN DEV. 259, 266 (1974).
76 Botwinick, Intellectual Abilities, in HANDBOOK, supra note 72, at 599-601.
77 Taylor, Age and Experience as Determinants of Managerial Information Processing and Decision Making Performance, 18 ACAD. MANAGEMENT J. 74, 180 (1975). See also Rabbitt, Changes in Problem Solving Ability in Old Age, in HANDBOOK, supra note 72, at 623, in which other characteristics of compensation are noted, including: recognizing the need to take advice, conserving resources, and distinguishing between critical and extraneous demands and tasks.
78 This cautiousness may be an example of what is often thought of as the "wisdom of age," a not undesirable trait for judges.
79 Compare this notion with that raised for teachers in Gault v. Garrison, 569 F.2d 993, 996 (7th Cir. 1977), cert. denied, 437 U.S.L.W. 3586 (U.S. March 6, 1979). See note 26 supra.
80 Arenberg & Robertson-Tchabo, Learning and Aging, in HANDBOOK, supra note 72, at 445. See also text accompanying note 89 infra.
by the quality of interaction with the environment, rather than chronological aging. Because experiential aging is reversible and controllable, adherence to this concept would reveal that many who are old chronologically are able to free themselves from constraints imposed by the arbitrary dictates of society and thus able to remain vital and productive.

Researchers have found a positive correlation between high activity and satisfaction in old age and have uncovered four highly significant predictors of longevity: mobility, education, occupation, and employment. Furthermore, older workers in physical occupations can compensate for any small capacity deficit with experience, responsibility, capacity for precision work, low labor turnover, and low short-term absence.

Congressional determinations underlying the recent amendments to the Age Discrimination in Employment Act ("ADEA") of 1967 also indicate the unsatisfactory nature of old-age classifications. Perhaps the most important factor underlying the 1978 amendments was the congressional feeling that age-based distinctions like mandatory retirement are unrelated to actual capabilities and cause great financial and psychological hardship. These concerns are apparent in testimony offered in Congressional hearings on the subject:

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81 Sparks, Behavioral Versus Experiential Aging: Implications for Aging, 13 Gerontologist 15 (1973). But see E. CUMMINGS & W. HENRY, GROWING OLD: THE PROCESS OF DISENGAGEMENT (1961), setting out the rival theory of disengagement. Disengagement theory holds that aging causes an inevitable withdrawal of the individual and society from each other. The result is decreased interaction between the person and others in his social system.

82 Palmore, The Effects of Aging on Activities and Attitudes, 8 Gerontologist 259 (1968).


86 Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those older persons who wish to be re-employed have a much more difficult time finding a new job than younger persons.

In the past aging was thought to be invariably accompanied by diminution in mental and other capacities. A person's abilities were thought to deteriorate in direct proportion to their age. Almost every investigation that has been undertaken on the topic has shown definitively that chronological age and functional ability are not related. Aging as a process of wearing out is related to the concept of biological age, but biological age and chronological age are not correlative. . . . The concept that a person at age sixty-five, or for that matter seventy or seventy-two inexorably has suffered a loss of ability and functional capacity is completely at variance with known facts. . . . There is no rational basis for taking age sixty-five as a milestone as either physical or mental capacity.87

Representative Cohen noted research showing that learning ability and intelligence do not necessarily decrease with age but may remain steady or even increase depending on one's profession, interests, and health.88 Such research supports the observations of one gerontologist that intelligence declines much later than commonly thought. The brain can deteriorate substantially before the ability to learn is affected; the age associated with loss due to brain deterioration varies widely, from age sixty-five to over ninety.89 Representative Findley observed that defenders of mandatory retirement, rather than offering a principled basis for its support, often resort instead to stereotypical disparagement of older people, terming them "slow," "prone to sickness," and "unable to be retrained."90 These are the same sort of stereotypes that for years were offered as justifications for restraints on blacks and women.91

With this background, Congress voted to amend ADEA, raising the earliest allowable mandatory retirement age to seventy for all covered non-federal employees and prohibiting mandatory retirement of most federal employees on the basis of age.92 The latter prohibition was intended to serve as an example for the rest of the


89 Green, Age, Intelligence, and Learning, INDUS. GERONTOLOGY, Winter 1972, at 39-40.


91 Id.

country, while the former represents a compromise designed to allow the Department of Labor to assess the economic impact of raising the age limit. Thus, congressional action reflects a growing realization that the impact of many mandatory retirement laws is arbitrary and devastating, both personally and socially. The conclusion to be drawn from the available evidence on aging is thus clear: a significant segment of society is being victimized by rules that perpetuate the very stereotypes used to justify the rules in the first place. Certainly, the Court's holding in Craig v. Boren, rejecting legislation based upon outdated misconceptions and overbroad generalizations, is relevant. Similarly, its disapproval in Reed v. Reed of a mandatory gender preference without individual inquiry into ability is also pertinent. Just as it is wrong to assume a man is more qualified than a woman to administer an estate, it is wrong to assume that those who have reached a certain age have decreased mental or other professional capacity. As pointed out above, this is particularly true in the case of judges who are presumed to be of above average intellectual capability. In short, the connection asserted by Missouri to exist between a mandatory retirement age and the maintenance of a qualified judiciary does not exist.

This leads to the second justification that is given for the state law involved in O'Neil. The evidence reviewed above implies that individual determinations of competence rather than mandatory retirement rules should be used to guard against older judges who have become incompetent. This conclusion, however, may conflict with Missouri's desire "to avoid the tedious and often perplexing decisions" inherent in individualized determinations. For a serious conflict to exist, of course, it must be assumed that the competence of a sufficient number of judges over seventy would be questioned and that enough of these would demand a formal determination of competence to burden the state. This assumption is doubtful, especially when the burden of such determinations is weighed against the benefit resulting from the continued productivity of the most experienced members of the judiciary. Even assuming that such individual determinations would be administra-

\[94\] House Report, supra note 86, at 7. Most of the economic considerations that led to this compromise are not applicable to state judges.
\[95\] 429 U.S. 190 (1976).
\[96\] 404 U.S. 71 (1971).
tively inconvenient, however, mere convenience is not sufficient to justify classifications subject to middle-level scrutiny.\(^9\)

The third of the state's asserted purposes is also based partially on administrative convenience. The mandatory retirement age is said to assure predictability and ease in the administration of pension plans. Although this is undoubtedly true, the cost must again be weighed against the savings from those who would continue on the bench and thus not collect pensions. Nor is this administrative convenience any more satisfactory as a justification for otherwise arbitrary classifications under the middle-level test than the previous one.\(^9\) Moreover, there are alternative methods for achieving the desired administrative convenience. For example, the state might stop accrual of pension benefits at age seventy. Although the middle-level test does not require the use of the least restrictive alternative necessary to further state purposes,\(^10\) the existence of significantly less restrictive alternatives does cast doubt on the substantiality of the relationship between the chosen means and the desired ends.

Finally, the state's purpose in encouraging younger men and women to become judges,\(^10\) although certainly legitimate, can more reasonably be served in a way that would be harmonious both with the goal of a highly competent judiciary and with that of allowing competent older judges to remain on the bench.\(^10\) First, the idea that young attorneys will be unwilling to become judges simply because they may have to wait longer for the opportunity is flawed. Becoming a judge is a great honor and challenge; indeed, a prospective judge who is forced to wait may, perhaps, be better qualified because of the added professional experience. Second, as an alternative to mandatory retirement at some upper age limit, the

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\(^9\) Id.

\(^10\) See Newer Equal Protection, supra note 40, at 21.

\(^10\) See generally this purpose was also advanced by the State of New York in Rubino v. Ghezzi, 512 F.2d 431-33 (2d Cir.), cert. denied, 423 U.S. 891 (1975). Congress, on the other hand, has disavowed the use of mandatory retirement to provide job opportunities for minorities and women. House Report, supra note 86, at 3.

\(^10\) Economists are not at all certain that mandatory retirement in general creates many job opportunities for younger workers, for only a small percentage of workers continue working to the retirement age. See generally Schultz, The Economics of Mandatory Retirement, 1 Indus. Gerontology 1 (1974). The experience of one company with no retirement rule suggests that older workers do not continue to "hang on." See Howard, Mandatory Retirement: Traumatic Evidence of Age Discrimination, Trial, Nov. 1977, at 46, 48. Older workers may, in fact, create jobs for others rather than take them away. House Hearings, supra note 86, at 26 (statement of Rep. Roybal).
state could provide either for terms of service or limited length of tenure. Under the latter plan, judges of any age would be able to serve a limited amount of time; this would provide continual vacancies and assure, if the state so desires, an ongoing influx of new judges and ideas to the bench. The former scheme would permit periodic review of judges and allow for termination of those no longer competent. Where judges are elected, the voters should have the opportunity to return to office or reject any judge; if one is no longer competent, the voters may refuse to re-elect him. If a competent judge over seventy seeks election, the voters should not be arbitrarily denied the chance to elect him. Although the state's desire to afford judicial opportunities to more attorneys is legitimate, the existence of these less restrictive alternatives indicates that mandatory retirement lacks a "fair and substantial" relationship to this goal.

CONCLUSION

The foregoing discussion demonstrates that the Missouri court erred in its treatment of O'Neil v. Baine. Under the appropriate level of scrutiny, the Missouri mandatory retirement law for state judges does not bear a "fair and substantial relationship" to the achievement of its purposes.

More generally, mandatory retirement laws for judges based on old age should be reviewed under the evolving middle-level equal protection test. For such laws properly to survive, the state would have to show that there is some generalizable and discernible drop in performance somewhere "about" the mandatory retirement age. If this were so, then the lack of absolute precision in the

103 The procedure by which this review would be carried out would be for the state to determine. If judges beyond a certain age were, in fact, not being retained simply because of their age, then equal protection principles would clearly be violated.

104 568 S.W.2d 761 (Mo. 1978).

105 Not all age-based classifications are necessarily improper. If there is a readily identifiable change in some relevant capability around some age, then it is acceptable to draw an arbitrary line at that age. This is especially true if the number of people affected is so great that individual evaluations would be impossible. Because of their belief that young people mature and take on more responsibilities in late adolescence, for example, the courts have approved minimum age limits for service on a grand jury in United States v. Duncan, 456 F.2d 1401 (9th Cir.), vacated on other grounds, 409 U.S. 814 (1972), and for voting in Oregon v. Mitchell, 400 U.S. 112 (1970). Similarly, courts have upheld tax exemption classifications for parents of children under 19 (or full-time students), Scarangella v. Commissioner, 418 F.2d 228 (3d Cir. 1969) (dictum), and age limits for eligibility for induction into the army, Smith v. United States, 424 F.2d 267 (9th Cir. 1970). The fatal flaw in mandatory retirement laws for judges is that there
designated age as the cutoff might be justifiable. Given the scientific evidence, however, that tends to show that older people, like those of any other age group, have a great variety of abilities, the state's ability to meet this burden is doubtful.

Although this Comment has focused on judges and the recent Missouri Supreme Court action in *O'Neil v. Baine*, it is quite probable that mandatory retirement is equally unsupportable in other occupations involving primarily mental skills. Furthermore, courts might want to re-examine jobs with physical demands, at least those that do not have the peculiar, life or death, public safety characteristics of state police, to determine if age-based mandatory retirement rules are proper there.

In an era that has witnessed the beginnings of a new judicial attitude to groups such as blacks, women, and illegitimates that have historically been accorded inferior status in varying degrees because of false generalizations and prejudice, the continued acceptance of a comparable attitude toward older people is curious. Like members of those other groups, the elderly should receive the benefits of a skeptical judicial eye when their right to live useful and fulfilling lives is jeopardized by government. Disapproval of mandatory retirement laws for judges, such as that involved in *O'Neil v. Baine*, would be an appropriate place to begin this new approach. The Justices of the Supreme Court, after all, need not look far to discover that age is not a reliable criterion of mental decline.

is no such distinct change in relevant capabilities around 65 or 70. Furthermore, individualized determinations of capability are not nearly so cumbersome as in the above cases.

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106 568 S.W.2d 761 (Mo. 1978).
107 See text accompanying notes 19 & 20 supra.
109 E.g., Reed v. Reed, 404 U.S. 71 (1971).
111 568 S.W.2d 761 (Mo. 1978).