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Constitutional Limitations on Mandatory Teacher Retirement

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CONSTITUTIONAL LIMITATIONS ON MANDATORY TEACHER RETIREMENT

INTRODUCTION

The passage of the Age Discrimination in Employment Act of 1967[1] focused much attention on the employment problems of the aged in America.[2] Congress indicated its awareness of the special employment problems encountered by Americans in the 40-65 year age group[3] by forbidding any employment practice that discriminates against this group on the basis of age.[4]

Such discrimination has usually been in the form of reluctance to hire persons over 40 years old. However, a recent amendment to the Act suggests that the aged suffer from an additional disadvantage—mandatory retirement policies. Mandatory retirement constitutes common personnel practice in both the public and private sectors and operates to force the aged from their employment. Although the exact origin of mandatory retirement at 65 is uncertain, the concept seems to be an outgrowth of social legislation for the aged and a product of managerial convenience.[5] In an attempt to mitigate the effect of mandatory retirement policies, Congress adopted the Age Discrimination in Employment Amendments of 1978, which completely eliminate mandatory retirement in federal employment and raise to 70 the age at which private employers can force employees to retire.[6]

During the Congressional debate over the proposed amendments, particular attention was given to the area of mandatory teacher retirement. The amendment, as initially proposed, would have permitted mandatory retirement at 65 for teachers to continue.[7] However, the amendment as finally

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[1] 29 U.S.C. §§ 621-634 (1971) [hereinafter cited as the *Act*].

[2] *See generally* Colamosca, *"Gray Rights" Retirement Fight,* DUNS REV., Oct. 1977, at 82; Vish, *Age Discrimination Act: An Overview,* 41 KY. BENCH & BAR 13 (1977); Note, *Age Discrimination in Employment,* 50 N.Y.U.L. REV. 924 (1975).

[3] 29 U.S.C. § 621(a) (1971).

[4] *Id.* § 623.

[5] *Retiring at 65: An Arbitrary Cut-Off That Started With Three Men,* DUNS REV., Oct. 1977 at 31.

[6] Pub. L. No. 95-256, § 3(a) (amending 29 U.S.C. § 631), § 5 (amending 29 U.S.C. § 633(a) and 5 U.S.C. § 8335 (1976)).

[7] H.R. 5383, 95th Cong., 1st. Sess. (1977).

adopted protects teachers from mandatory retirement until they are 70.[8] Tenured college and university professors will be subject to mandatory retirement at age 65 until 1982, at which time their mandatory retirement age will be a minimum of 70.[9]

This recent legislative action, although indicative of public attitudes on mandatory retirement, does not reach the question of whether forced retirement at any age is permissible under the Constitution. Kentucky, along with 32 other states, provides a maximum age (70) for teacher retirement.[10] This Comment will review the only Supreme Court decision on mandatory retirement, two conflicting federal appellate decisions on mandatory retirement for teachers, and Kentucky's statutory scheme[11] in light of these cases.

I. MASSACHUSETTS BOARD OF RETIREMENT V. MURGIA

The Supreme Court's only detailed treatment[12] of the constitutionality of mandatory retirement occurred in *Massachusetts Board of Retirement v. Murgia.*[13] Murgia, a state police officer, challenged a Massachusetts statute that forced him to retire at age 50.[14] He alleged that the statute infringed his fourteenth amendment rights under the equal protection clause.[15] The trial court[16] applied the "rational basis" test[17] and determined that the statute was unconstitu-

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[8] *Id.* This provision goes into effect January 1, 1979. *Id.*

[9] College and university administrators successfully lobbied for an extension of the effective date for application of the amendment to professors. They claimed that immediate application of the amendment to higher education would have had devastating effects on personnel planning and affirmative action programs geared toward hiring increased numbers of women and minorities. *See generally* 123 CONG. REC. 17,284 (daily ed. Oct. 19, 1977).

[10] 123 CONG. REC. 17,280 (daily ed. Oct. 19, 1977).

[11] *See* notes 59-62 and accompanying text *infra* for a discussion of Kentucky's system of mandatory teacher retirement.

[12] Prior to *Murgia,* the Court afforded summary treatment to challenges of mandatory retirement. *See* Cannon v. Guste, 423 U.S. 918 (1975); Weisbrod v. Lynn, 420 U.S. 940 (1975), *aff'g* 383 F. Supp. 933 (D.D.C. 1974); McIlvane v. Pa., 415 U.S. 986, *dismissing appeal from* 309 A.2d 801 (Pa. 1973).

[13] 427 U.S. 307 (1976).

[14] *Id.*

[15] *Id.* at 309.

[16] Murgia v. Mass. Bd. of Retirement, 376 F. Supp. 753 (D. Mass. 1974).

[17] In recent years the Court has developed and applied a multilevel test to determine whether a legislative classification violates the equal protection clause. For an

tional because unequal treatment of policemen based on age did not have a reasonable relation to the state interest.[18] The Supreme Court reversed the lower court judgment, holding that the rational basis standard was the correct test of the statute's validity, but that the district court had incorrectly applied the test.[19]

The Court rejected the appellee's contention that the legislation should be reviewed with strict scrutiny. The Court did not find that a fundamental right was involved and declined to declare that the aged were a suspect class; none of the requisite elements existed for either classification.[20] The Court found the existence of a legitimate state purpose—protection of the public with physically prepared uniformed police—and determined that a reasonable relationship existed between that purpose and the means used to achieve it. In finding this reasonable relationship, the Court relied on testimony at trial which linked advanced age to decreased physical ability to perform as a policeman.[21] There were some officers whose physical capabilities had not declined by age 50; however, the majority found that the equal protection clause did not require that each officer be found physically unfit before he could be retired at age 50.[22] Thus, the statute was upheld despite overinclusiveness in the class disadvantaged by the statute.[23]

Justice Marshall, dissenting, warned against interpreting the majority opinion as blanket approval for all mandatory retirement schemes. He argued that *Murgia* was applicable only when the state's purpose was related to physical fitness to

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extensive discussion and analysis of the Supreme Court's treatment of equal protection cases, see Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). *See also* Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection,* 1976 B.Y.U.L. REV. 89.

[18] 376 F. Supp. at 756.

[19] 427 U.S. 307 (1976).

[20] *Id.* at 313. *See* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (ancestry). In declining to declare that age constitutes a suspect method of classification, the court reasoned that old age "marks a stage that each of us will reach if we live out our normal span." 427 U.S. at 313.

[21] *Id.* at 311.

[22] *Id.* at 316.

[23] *Id.* at 314.

perform in a particular occupation and that a different result would have been reached in the case if the classification were based on mental ability or manual dexterity.[24]

II. MURGIA'S UNCERTAIN IMPACT ON TEACHER RETIREMENT

Despite Justice Marshall's caveat, courts have relied on *Murgia* to uphold mandatory retirement schemes; these opinions have displayed only a superficial analysis of the relationship of the statutes to the skills required by the job.[25] However, a conflict has developed regarding the application of *Murgia* to mandatory teacher retirement schemes. The Seventh Circuit[26] and the Second Circuit[27] have applied the *Murgia* rational basis test to similar fact patterns and have reached opposite results. These decisions are analyzed below in an effort to determine which approach to the rational basis test should be applied to Kentucky's statutory mandatory retirement plan for public school teachers.

A. *Gault v. Garrison*

In *Gault v. Garrison* an Illinois teacher who was forced to retire at age 65 contended that the state's retirement scheme violated her right to equal protection under the fourteenth amendment. The district court granted the defendant school board's motion to dismiss the action for failure to state a claim upon which relief could be granted.[28] The Seventh Circuit reversed and remanded for trial on the merits,[29] accepting Gault's contention that the combination of an Illinois statute which ended tenure protection at age 65 and a local school board policy which required automatic retirement at 65 deprived her

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[24] *Id.* at 317-27. Justice Marshall's dissent in *Murgia* seems to be an extension of his argument in *San Antonio School Dist. v. Rodriguez*, in which he maintained that the degree of judicial scrutiny used to examine legislation challenged on equal protection grounds should vary according to the importance of the state interest involved. 411 U.S. 1, 124-25 (1973) (Marshall, J., dissenting).

[25] *See* Johnson v. Lefkowitz, 566 F.2d 866 (2d Cir. 1977) (state civil servants forced to retire at age 70); Klain v. Pennsylvania State Univ., 434 F. Supp. 571 (M.D. Pa. 1977) (state university professors forced to retire at age 65).

[26] Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977).

[27] Palmer v. Ticcione 576 F.2d 459 (2d Cir. 1978).

[28] 569 F.2d at 993.

[29] *Id.*

of equal protection.[30] Gault argued that the discrimination was not only substantive, because of the school board's mandatory retirement policy,[31] but also procedural, due to the removal of tenure protection (pre-termination hearings, etc.) from teachers over 65.[32]

The Seventh Circuit, using *Murgia* as authority, applied the rational basis test to determine the validity of the retirement plan. The court's examination of the state purpose involved was complicated by the fact that the district court had decided *Gault* on a motion to dismiss; no evidence had been presented in the case and no affidavits filed. As a result, the

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[30] Illinois public school teachers are covered by a statewide tenure law, ILL. REV. STAT. ch. 122 §§ 24-1 to 24-16 (1977), which protects teachers from termination except for cause once they have successfully completed a probationary period (two years) of employment. During the probationary period, separate contracts are issued for each school year, and a decision about whether or not the probationary contract will be renewed for the succeeding year must be made by the local school board no later than 60 days before the close of the school year. *Id.* § 24-11. A probationary teacher is entitled only to written notice of the specific reasons for nonrenewal, which must be received before a date specified by the statute. *Id.* However, once the teacher has successfully completed the probationary period, he or she acquires "contractual continued service" status and is afforded the protections of the tenure system. *Id.* A school board which intends to dismiss a tenured teacher must not only give the teacher written notice of specific charges, but must also provide a hearing for the teacher if one is requested. At the hearing, the teacher is entitled to rebut any charges made by the board. *Id.* § 24-12. The statute provides that contractual continued service status "[s]hall cease at the end of the school term following the 65th birthday of any teacher, and any subsequent employment of such a teacher shall be on an annual basis." *Id.* § 24-11. Although Illinois sets no uniform mandatory retirement age for teachers, local school boards have interpreted this statutory termination of the contractual continued service status as authority for the adoption of policies requiring teachers to retire at the end of the school year in which they reach 65. Gault v. Garrison, 569 F.2d at 994.

[31] The local board policy provided: "[A] teacher who reaches the age of sixty-five before the end of a school year shall retire on that date following his 65th birthday." 569 F.2d at 994.

[32] *Id.* at 997. Tenured teachers in Illinois could be terminated only after certain procedures such as hearings. Non-tenured teachers could be terminated without such procedures; their contracts were simply not renewed. Gault claimed that the denial of pretermination procedures to teachers over 65 violated procedural equal protection by discriminating among those similarly situated. She argued that this lack of procedure resulted in treatment unequal to that afforded tenured teachers under 65. *Id.* at 996-97. This procedural equal protection appears to differ from a due process claim in that a due process analysis focuses on the type of procedure required before the state can deprive an individual of a property right. Procedural equal protection appears to focus on the legitimacy of affording procedural due process to some (tenured teachers under 65), while denying it to others (tenured teachers over 65).

defendant school board had not identified, at least in the record on appeal, a purpose by which its mandatory retirement policy could be evaluated under the rational basis standard.[33] However, the court of appeals assumed that the purpose of the system was to prevent the retention of mentally and psychologically unfit teachers. The court held that such a purpose did not satisfy the rational basis requirement[34] and further stated that the plan could not be upheld even if its purpose were to assure that teachers were physically, as well as mentally and psychologically, fit.[35]

The court explained that its result differed from that reached in *Murgia* for several reasons. First, the court drew a distinction between the strenuous physical nature of a policeman's duties and the lesser physical demands made on a teacher.[36] Secondly, the court stated that, in contrast to the decline in a police officer's physical ability which accompanies advancing age, a teacher's knowledge and skill increase with age and experience.[37] Finally, the court emphasized the disparity in consequences of age-related failure to perform each job, noting that a teacher who becomes physically incapacitated while employed could easily be replaced before posing any critical threat to himself or to his students, while a police officer who becomes incapacitated on the job could create a life-threatening situation.[38]

The court recognized that a classification may be upheld under a rational basis standard even if some members of the class do not possess the characteristic sought to be eliminated by the state: the statute in *Murgia* was upheld even though some of the policemen were fit. However, the issue of overinclusiveness became irrelevant in light of the court's implicit finding that the board's classification in *Gault* was wholly unrelated to any legitimate state purpose: "Unlike the Court in *Murgia,* we cannot say that the provisions in the instant case

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[33] *Id.* at 995-96.

[34] *Id.* at 997.

[35] *Id.* at 996.

[36] *Id.*

[37] *Id.* This conclusion of the court resulted at least in part from the fact that no evidence to the contrary had been presented at trial.

[38] *Id.* at 997.

would eliminate any more unfit teachers (assuming again that such is the purpose) than a provision to fire all teachers whose hair turns gray."[39]

The court also found that the statute removing tenure at age 65 denied Gault procedural equal protection rights, since the statute discriminated among those similarly situated, i.e., tenured public school teachers of all ages. The court found that such discrimination could not stand without "a justifiable and rational state purpose."[40] Because the court again could find no legitimate state purpose for denial of tenure safeguards to teachers past 65, the scheme was invalidated and the case remanded for trial.[41]

B. *Palmer v. Ticcione*

In *Palmer v. Ticcione*[42] a New York teacher who was forced to retire at age 70 challenged the New York statute[43] and local board action[44] which had forced her to retire and had denied her a pre-termination hearing.[45] As in *Gault,* the appeal was from an order of the federal district court dismissing the teacher's complaint. However, the Second Circuit affirmed the district court's decision, holding that there had been no violation of Palmer's fourteenth amendment rights.[46]

The *Palmer* court, just as the Seventh Circuit in *Gault,* recognized that *Murgia* required the application of a rational basis test to the retirement plan.[47] However, the court declined to follow *Gault,* stating that decision "too narrowly conceives the possible rational bases for a compulsory retirement stat-

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[39] *Id.* at 996.

[40] *Id.* at 997.

[41] *Id.*

[42] 576 F.2d 459 (2d Cir. 1978).

[43] "Any member who has attained age seventy may be retired at his own request or at the request of his employer . . . if throughout the year immediately preceeding . . . he shall have been in service as a teacher in the state." N.Y. EDUC. LAW § 510(1)(b) (McKinney 1969).

[44] Palmer was informed by the superintendent of the school district in which she taught that she would be forced to retire. Later this decision was ratified by the school board. 576 F.2d at 461.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 462.

ute."[48] Palmer listed several possible legitimate state objectives: "to open up employment for young teachers . . ., to open up more places for minorities, or to bring young people with fresh ideas and techniques in contact with school children, or to assure predictability and ease in establishing and administering pension plans."[49] The court found that "[a] compulsory retirement system [would be] rationally related to any or all of these objectives."[50] The court also denied Palmer's procedural due process claim that the retirement statute created an irrebuttable presumption by regarding people over 70 unfit to be teachers.[51] This claim was denied because both the equal protection and procedural due process claims arose from the same system of classification and the court felt that since the statute had been upheld on equal protection grounds, "it should not fall because it might also be labeled a presumption."[52] In addition, the court interpreted several cases to be binding precedent in which mandatory retirement systems had been approved for occupations which involved primarily mental skills.[53]

The court also denied Palmer's claim to a pre-termination hearing; no equal protection violation existed so long as the mandatory retirement scheme was an across-the-board system.[54] Also, procedural due process did not require a hearing since "the benefits of holding such a hearing are outweighed by

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[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

[52] 576 F.2d at 463.

[53] *Id.* at 462. *See* Johnson v. Lefkowitz, 566 F.2d 866 (2d Cir. 1977) (involving retirement of civil servants at 70); Rubino v. Ghezzi, 512 F.2d 431 (2d Cir. 1977), *cert. denied*, 423 U.S. 891 (1975) (mandatory retirement of state judge at age 70); Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd*, 420 U.S. 940 (1975) (mandatory retirement of civil servants at age 70).

[54] *Id.* at 464. Although Palmer categorized her lack of a hearing as a violation of due process, her claim appears to be identical to the procedural equal protection argument sustained by the court in *Gault*. *See* note 32 *supra*. Although the *Palmer* court also categorizes the claim as one involving due process, an equal protection analysis is used to deny the claim, *i.e.*, that if the goal of the retirement scheme is legitimate and the discrimination based on age is rationally related to the goal, the scheme will be upheld so long as all members of the class (teachers over 70) are treated alike.

the burdens imposed upon the state by requiring a hearing in every case."[55]

The court concluded its opinion by stating that the issue of mandatory retirement was better left to Congressional action, as it presents "precisely the type of clash of competing social goals that is best resolved by the legislative process."[56] The court relied on Congress' "superior ability" to collect data and to resolve competing social goals, and cited the 1978 amendments to the Age Discrimination in Employment Act[57] as support for its deference to the legislative branch.[58]

III. FORCED RETIREMENT OF KENTUCKY TEACHERS

Kentucky's scheme of mandatory teacher retirement is similar to those challenged in *Gault* and *Palmer*. Tenure[59] is terminated by statute at the end of the school year in which the teacher reaches 65,[60] and all teachers covered by the statute must retire at age 70.[61] Since the teacher's status reverts from tenured to probationary at age 65, some local school boards

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[55] *Id.*

[56] *Id.* at 465.

[57] Pub. L. No. 95-256, § 3(a) (amending 29 U.S.C. § 631), § 5 (amending 29 U.S.C. § 633(a) and 5 U.S.C. § 8335 (1976)).

[58] 576 F.2d at 465.

[59] Under Kentucky's statewide tenure law, KY. REV. STAT. §§ 161.720-.990 (Supp. 1978) [hereinafter cited as KRS], a teacher remains in a probationary status for four school years. Upon successful completion of the fourth year, the teacher is eligible for "continuing service contract" status, which continues until the close of the school year in which the teacher reaches age 65. A teacher employed under a continuing service contract can only be dismissed for cause, *i.e.*, immorality, insubordination, or mental or physical disability. *Id.* § 161.790(1). A school board seeking to remove a tenured teacher must give the teacher written notice of the charges, and an opportunity to answer charges at a hearing. *Id.* § 161.790(3). The teacher may appeal an adverse decision from the hearing to the state district court. *Id.* § 161.790(6).

Statutory requirements for removal of a teacher on probationary status are less stringent. The school board need only inform the teacher of its decision not to rehire by the date specified in the statute. The board need not show cause for the nonrenewal but must provide a written statement of the reason(s) for the decision if the teacher so requests. *Id.* § 161.750(1). Compare the Illinois scheme of tenure and mandatory retirement discussed at note 30 *supra.*

[60] KRS § 161.720(4) (Supp. 1978).

[61] KRS § 161.600(2) (Supp. 1978). The statute does not cover teachers in private schools or at state universities. The Board of Trustees is empowered to set retirement age at the University of Kentucky, KRS § 164.220(3) (Supp. 1978), and retirement age is set by the Board of Regents of the other state universities, KRS § 164.360 (Supp. 1978).

have adopted policies of not renewing the contract of teachers who have reached age 65, thus lowering the actual age of mandatory retirement from 70 to 65.[62]

One such local policy was challenged in *Belcher v. Gish*,[63] in which the forced retirement of three teachers over 65 was approved by the Supreme Court of Kentucky. The teachers in *Belcher* made three claims: that the local board regulation violated KRS § 161.600[64] by lowering the retirement age from 70 to 65, that this age discrimination was "arbitrary and capricious and bears no relation to the purpose of education," and that the regulation violated the due process clause of the fourteenth amendment.[65] The Kentucky Supreme Court affirmed a circuit court decision which had granted summary judgment to the defendant school board.[66]

The Court acknowledged that the teachers' claims may have implicated constitutional considerations,[67] but the majority opinion failed to confront the constitutional issues. Instead, the Court approved the school board's action as a proper exercise of legislatively delegated authority.[68] Once tenure is revoked by statute at 65, the Court found, the board's action regarding continued employment of a teacher is purely a matter of contract. At 65, "[t]he cloak of tenure falls from his shoulders, and his reemployment on a yearly basis is dependent on the grace of the board of education."[69] Since the Court further found that the school board had complied with statutory requirements for notice of nonrenewal of probationary teachers, it decided that the teachers had been retired in a manner permissible under existing Kentucky law.[70]

Presumably the Court found it unnecessary to deal with

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[62] The policy of automatic termination at age 65 adopted by the Central City Board of Education is an example. This policy is explained in detail in Belcher v. Gish, 555 S.W.2d 264, 265 (Ky. 1977), discussed at notes 63-71 *infra* and accompanying text.

[63] 555 S.W.2d 264 (Ky. 1977).

[64] The teachers claimed that the state statute requiring mandatory retirement at age 70 precludes a school district from lowering that age. *Id.* at 265.

[65] *Id.* at 267.

[66] *Id.* at 265-66.

[67] "They (the teachers) assert that it (local board policy) violates the Kentucky Constitution as well as the United States Constitution." *Id.* at 266.

[68] *Id.* (citing KRS § 160.290).

[69] *Id.*

[70] *Id.*

the constitutionality of the retirement system in order to decide the case; an examination of the superficial discussion of the constitutional issues in the majority opinion leaves considerable doubt about the scope and rationale of the Court's decision. The majority opinion makes no clear statement as to whether the Kentucky retirement scheme denies the fourteenth amendment rights of teachers.[71] The Court simply found that the board policy did not conflict with state law; the Court did not specifically consider the underlying question of whether the board's policy when coupled with state law operates to deprive teachers over 65 of constitutional rights. The Supreme Court of Kentucky should face the constitutional implications of mandatory retirement schemes when the issue is next presented to the Court.

To determine whether Kentucky's system of mandatory retirement violates the equal protection clause, the rational basis test must be used to examine the classification made by the statute. The outcome of this analysis hinges on which interpretation of *Murgia* is applied by the Court: *Palmer* or *Gault.*

The *Palmer* court reached a result different from that in *Gault* for two reasons: *Gault* had too narrowly construed the possible legitimate state objectives to be furthered by mandatory retirement; and the *Palmer* court was bound by precedents which had upheld mandatory retirements for occupations emphasizing mental skills.[72]

Since both *Palmer* and *Gault* were decided at the district court level on motions to dismiss, neither record on appeal contained any evidence of the state objective. In *Gault,* the court assumed that the purpose of the plan was to eliminate unfit teachers. In *Palmer,* the court assumed that the objectives were predictability and the use of a younger teaching force with more members of minority groups. The major distinction between these two cases is based on these different viewpoints toward statutory purpose. The *Gault* objective focuses attention on the connection between the objectives and the group among which the distinction is to be made. The *Gault* court

[71] The outcome in *Belcher* obviously indicates that the Court found no interference with constitutional rights, since the opinion makes clear that at least some constitutional issues were raised by the teachers. *Id.*

[72] Palmer v. Ticcione, 576 F.2d 459, 462 (2d Cir. 1978).

assumed that any state objective must relate to the group among which it seeks to discriminate. The court found no evidence to support the state's contention that older teachers are less able to teach than younger teachers. Thus even though the state's goal was legitimate, the means employed by the state were not reasonably related to achieving that goal.

The broad objectives articulated in *Palmer* did not lend themselves to such a focus. Rather, they focused attention on the ultimate effect of discrimination. The *Gault* court's emphasis on the group discriminated against indicates more attention to the means by which a statute achieves its ends than does the *Palmer* attitude toward legislative ends. By focusing on effect, *Palmer* wrongly applied *Murgia,* since the *Murgia* Court looked first to the basis of the classification (means), not to the state objectives (ends) involved. By choosing such broad purposes, the *Palmer* court incorrectly shifted attention away from the connection between the statute and the group discriminated against. In *Palmer,* the court upheld an age-based classification without showing that the advanced age had a rational relationship to inability to perform the job in question. This is a far cry from *Murgia,* in which the Supreme Court considered medical and psychological evidence before concluding that there was a relationship between increased age and declining physical fitness which justified the state's discrimination between younger officers and those above the age of 50.[73] *Gault* confronted this threshold issue of the relationship between advancing age and ability to perform the job.

In addition, the *Palmer* court found itself bound to approve mandatory retirement for teachers by a line of cases which had approved forced retirement in occupations which demand primarily mental (as opposed to physical) skills.[74] The threshold issue of whether advancing age could affect job performance was not raised or considered in any of the cases. One of the cases, *Weisbrod v. Lynn,*[75] had been affirmed without opinion by the Surpreme Court two years before *Murgia.*[76]

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[73] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 316 (1976).

[74] Palmer v. Ticcione, 576 F.2d at 462.

[75] 420 U.S. 940 (1975).

[76] The *Murgia* court referred to its earlier cursory treatment of mandatory retirement, but stated that such treatment did not preclude a fuller re-examination of the issue. 427 U.S. 308 n.1.

Palmer's superficial analysis of the problem, patterned after pre-*Murgia* cases, does not compare favorably with *Gault's* full examination of the rationality of age-based classifications. Despite reaching a result inconsistent with *Murgia,* the *Gault* analysis is the one best applied in court challenges to mandatory teacher retirement systems, since *Gault* more accurately reflects the *Murgia* approach by carefully examining both the state's objective and the means employed to achieve that objective.

In applying the *Gault* analysis to a constitutional attack on teacher retirement, a Kentucky court must examine carefully the state's purpose to determine whether it is legitimate. It is difficult to enumerate all possible purposes that the state might claim to be furthered by its scheme, but some general observations are possible. Clearly a purpose of eliminating unfit teachers would be legitimate; such a purpose is similar to the one upheld by the Supreme Court in *Murgia.* A goal of maintaining a youthful teaching staff would be illegitimate, as it expresses an irrational preference for youth over age and ignores any special characteristics that might make older teachers more valuable than young ones. Other goals, such as promoting administrative convenience and predictability, may seem legitimate, but must be evaluated in terms of the manner in which the state seeks to achieve them.

If the state's purpose is found to be legitimate, the court must continue its analysis and determine whether the discrimination made is rationally related to the purpose. If the goal is to eliminate unfit teachers, the court must ask itself whether forced retirement at a fixed age will eliminate unfit teachers. The evidence must be weighed to determine whether there is a significant relationship between advancing age and fitness to teach. Obviously such a decision should be made only after a thorough presentation of medical and psychological evidence, and the court should consider the value derived from older teachers' experience and maturity. It would seem that the value derived from such experience would prevent a finding that all or even a majority of older teachers are unfit to teach.

If the purpose before the court is administrative convenience and predictability, the court must change its focus. The court is no longer focusing directly on the class being discrimi-

nated against, but is balancing the class's interest in continued employment (and the difficulties of unemployment) against the state's interest in an organized, predictable personnel system. The court should question whether the mandatory retirement system actually does promote predictability and convenience. Arguably, the uncertainty attendant to voluntary retirement would be no greater than that inherent in the resignations of younger teachers.

Even if mandatory retirement promotes administrative convenience and predictability, it is possible that the state could achieve its goal through less onerous means. Voluntary retirement or fitness hearings may be as predictable, in the long run, as a mandatory retirement system. If no other means are available the statute could still fall unless the convenience achieved justifies the abridgment of older teachers' constitutional rights.

A more difficult question is presented when the state's purpose is to create opportunities for minorities. Obviously, this is a legitimate goal, and forcing older teachers to retire will create vacancies that can be filled by minorities. However, the court should weigh the competing social policies before it. Although the state's goal is laudable, its effects on the aged can be extreme. Older persons who are forced to retire may find it difficult or impossible to obtain other employment. Also, students are deprived of the experience and maturity of older teachers. The benefits of an increased number of minority teachers may not outweigh the contributions of the older teacher, especially considering the harsh effects of mandatory retirement on the older teachers. Since mandatory retirement schemes have been in existence for some time, an additional factor to consider is whether these schemes have actually been used to facilitate minority hiring. The importance of the conflicting interests involved requires an in-depth consideration of all of these relevant factors.

CONCLUSION

The issue of mandatory retirement is one which will not disappear with the implementation of the 1978 amendments to the Age Discrimination in Employment Act. Although the exact number of Americans who would prefer to work beyond

age 70 is impossible to determine, recent court challenges to forced retirement and the total elimination of mandatory retirement in the federal sector indicate that automatic retirement is no longer appealing to many Americans.

Because the *Belcher* Court declined to deal specifically with the constitutional issues presented by Kentucky's mandatory teacher retirement scheme, it is likely that these claims will be presented to the court in a more direct fashion in future cases. If and when Kentucky's appellate courts are faced with such a challenge, they should apply an analysis similar to that employed by the Seventh Circuit in *Gault v. Garrison.* The mandatory retirement system should be examined to determine whether it is rationally related to the interest the state seeks to further. To apply this rational basis test properly, the court must determine the existence and significance of any relationship between advancing age and job performance. Such an examination of the mandatory retirement system would give proper consideration to the standards promulgated by the U.S. Supreme Court in *Murgia* and would assure teachers that their constitutional right to equal protection of the laws has been properly protected in the making of the legislative decision.

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