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The Principle of Equal Protection

By MICHAEL J. PERRY*

In this Article, I set forth a particular conception of the constitutional principle of equal protection. Then, in part to illustrate my analysis, I apply my conception of equal protection to the problem of age discrimination, which is the subject of this Symposium.

The Principle

What normative content ought the courts, in particular the Supreme Court, to give the principle of equal protection, beyond the normative content the framers of the fourteenth amendment intended it to have? One possible answer, of course, is: "None. The Court ought to give the principle only the content the framers meant it to have." But on the assumption, not defended here, that the Court can legitimately give the principle a normative content beyond that intended by the framers, what content ought the

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1. By its terms, the equal protection clause of the fourteenth amendment constrains only state action: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. But the Supreme Court has decided that the fifth amendment due process clause shall be understood to constrain federal action in the same way the equal protection clause constrains state action. See, e.g., Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Bolling v. Sharpe, 347 U.S. 497, 500 (1954). See also Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N.C.L. Rev. 541 (1977).
2. I have written this Article as a complement to an earlier essay in which I discussed a number of matters not addressed here, in particular the original understanding of equal protection (which was quite narrow) and the principal features of contemporary equal protection doctrine (some of which are flawed, in my view). See Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023 (1979) [hereinafter cited as Perry].
4. In defense of my claim that the Court can legitimately give constitutional principles
Court to give it? Indeed, even if one insists that the Court cannot legitimately give the principle any content beyond that disclosed by the original understanding, the question still arises, what normative content ought electorally accountable policymakers, especially legislators, to give the principle of equal protection, when the principle is understood as a constituent of public morality?5

The principle of equal protection is proscriptive, of course. Understood as constitutional in character, the principle forbids government to do something to persons. What, precisely, ought the principle be deemed to forbid government to do? Should government be forbidden to treat any person differently from any other person? Obviously not. Persons differ from one another in a variety—a seemingly infinite variety—of ways, and there is no merit in a principle that forbids legal recognition of every such difference. Such a principle would condemn, for example, laws providing aid to poor persons.

Should government be forbidden to treat any person differently from any other person who is similarly situated?6 Such a conception of equal protection—a variation on the “treat like cases alike” theme—is normatively empty, as commentators are fond of pointing out.7 Equal protection, thus conceived, forbids nothing. Or perhaps I should say that equal protection, thus conceived, permits every sort of hostile discrimination against one person, A, relative to another, B, because A and B are always dissimilarly situated (in a respect relevant to the aim of the differential treatment) if A, but not B, is the object of antipathy, and the differential treatment at issue is intended, in whole or in part, as an official (governmental) expression of that antipathy.

Should the principle of equal protection be deemed to forbid government to treat any person differently from any other person on the basis of any factor that it is unconstitutional (or, if you prefer, unjust) for government to take into account? Such a concep-

6. No two persons are ever similarly situated in all respects. The reference is to persons who are similarly situated in whatever respect is relevant to the aim of the differential treatment.
tion of equal protection collapses any distinction between the principle of equal protection, which is a source of governmental duty (and therefore of individual right), and any other constitutional principles that are also sources of various governmental duties (individual rights). For example, imagine a law that provides that no Buddhist may hold political office. That law offends the principle—or at least a principle—of religious freedom. To be sure, one can define equal protection so that the law offends the principle of equal protection as well: Because the law treats one person—actually, one group of persons—differently from other persons on the basis of a factor (religious affiliation) that it is unconstitutional for government to take into account, it offends equal protection. But note that the law offends equal protection, so defined, only because it offends a distinct principle, in this case, a principle of religious freedom. To define equal protection to forbid differential treatment of persons by government on the basis of any factor that it is unconstitutional for government to take into account is to render the principle superfluous or vacuous, for the principles that will then do the real service in condemning certain instances of differential treatment will be those that indicate which factors it is unconstitutional for government to take into account.

The challenge is to define equal protection without collapsing the distinction between that principle and any other constitutional principles that are also sources of governmental duties—duties that are as distinct from and independent of the duty to provide equal protection as they are distinct from and independent of one another. That is, the challenge is to give equal protection a normative content distinct from the normative content of other, discrete principles, such as the principle of religious freedom. The principle of equal protection would otherwise be superfluous.

I do not deny that “equality” is in some sense implicated whenever any group is discriminated against in favor of any other group, for in that case the former group, relative to the latter group, is not treated “equally.” But the “equality” that is implicated whenever any group is discriminated against in favor of another group is a vacuous notion, just as the “liberty” that is implicated whenever anyone is prevented from doing what he or she wants to do is a vacuous notion. Just as we must specify particular

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8. The duties in question are duties to refrain from taking certain factors into account—religious affiliation, for example.
principles defining particular legally protected liberties, so too must we define particular principles defining particular legally protected equalities. "We must now cease to speak of equality in the singular and proceed to deal with equalities in the plural. . . . Just as liberty actually comes down to the struggle to achieve particular liberties, so equality is defined, historically speaking, as the repudiation of certain differences instead of others." My effort here is to indicate the particular equality defined by the principle of equal protection.¹⁰


10. Professor Alexander has criticized my effort to "disentangle" equal protection from due process and other constitutional principles. Compare Alexander, Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique, 42 Omho St. L.J. 3, 51-57 (1981) [hereinafter cited as Alexander] with Perry, supra note 2, at 1074-83. For example, in discussing Shapiro v. Thompson, 394 U.S. 618 (1969), Professor Alexander writes that "[t]he true defect [of the durational residency requirement] was not a due process one stemming from the effect on interstate travel, but rather an equal protection one stemming from the new resident/old resident distinction in the award of welfare benefits." Alexander, supra, at 54. But I never suggested that the defect stemmed from the effect on interstate travel. I agree that the defect stemmed from the distinction between new residents and old residents. My point is that what makes that distinction problematic is not the principle of equal protection, but a distinct constitutional principle concerning the fundamental interest in interstate migration. Discussing Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), Professor Alexander writes that "the defect in the law was the unjustified discrimination between classes of demonstrators, an equal protection defect." Alexander, supra, at 55. I agree that the defect was the discrimination between those who were permitted to picket and those who were not. But I disagree with the view that this is an equal protection defect. It is a defect, rather, under the first amendment, just as a discrimination against Buddhists in favor of Christians would be a defect under the first amendment. Discussing Maher v. Roe, 432 U.S. 464 (1977), Professor Alexander writes that the crucial question was "whether the governmental distinction between those seeking abortions and those choosing childbirth, apparently to encourage the latter choice and discourage the former, was a valid discrimination . . . an equal protection question . . . ." Alexander, supra, at 55. I agree with Professor Alexander as to what was the crucial question, but I disagree that it is an equal protection question. What renders the distinction at issue in Maher problematic is not the principle of equal protection, but a distinct principle, if indeed it can be called a principle, or a distinct one—the "right of privacy."

Professor Alexander argues that "if the Constitution embodies one moral theory, then unless that theory has as many ultimate principles as there are constitutional provisions that reflect the theory, some of those provisions will merge with others at the most abstract level." Id. at 51. I am not sure what Professor Alexander means by "the Constitution." If he means the "written" Constitution (the Constitution as written and understood by the framers), why suppose that the framers all subscribed to the same moral theory? That supposition is implausible. If he means the "unwritten" Constitution (the Constitution as it has been elaborated over time by successive Courts), why suppose that the Court, which is to say the majorities of Justices who have comprised the Court, has subscribed to the same moral theory? That, too, is an implausible supposition.

It is not clear whether Professor Alexander means to claim that in fact the Constitution
I shall now indicate what normative content—distinctive normative content—I think the principle of equal protection ought to be given. Let me begin with this statement of the principle: Government may not treat any person differently from any other person—in particular it may not disadvantage any person relative to any other—on the basis of any factor that is not a determinant of a person's moral status. I want to emphasize that this is only an incomplete or provisional statement of the principle. I shall indicate

embodies one moral theory. But at least he comes close to claiming just that. For example, he claims to have dispelled the "myth . . . that the substantive values behind equal protection are independent of the substantive values behind other constitutional provisions. . . ." Although equal protection theories can be constructed around values that are unrelated to other constitutional values because they are not related to a set of ultimate values from which all constitutional values flow, such theories are normatively unsatisfactory. For that reason, they are less plausible in terms of proper standards of interpretation and judicial review." Id. at 67. See also id. at 51 n.148. I do not dispute what I take to be his underlying premise, which is that systems of political morality, like other systems, should aspire to coherence and fundamental simplicity. But constitutional doctrine, like the (written) Constitution itself, is not and does not purport to be a system of political morality. Constitutional doctrine, like the Constitution, is a potpourri of political morality, precisely because it reflects the fragmented character of the background culture (the culture of the Justices and of the polity from whose ranks the Justices come). I might be willing to agree that constitutional doctrine ought to be transformed into a system of political morality. But first I would like to hear, in convincing detail, about the particular system that Professor Alexander, or anyone else, means to nominate. In that regard, see B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

Professor Alexander also argues that "disentangling equal protection from due process will often be quite difficult" even if the Constitution does not embody one moral theory. "Disentangling will focus upon whether the defect in the rule is that the rule makes someone worse off than he would be under [any constitutionally permissible moral theory]." which Professor Alexander takes to be a due process defect, or whether the defect is that the rule is predicated, at least to some extent, on a constitutionally impermissible moral theory, which he takes to be an equal protection defect. Alexander, supra, at 54. I do not understand why substantive due process must be understood as concerned solely with defects in the form of impermissible effects, that is, effects making someone worse off than he or she would be under any constitutionally permissible moral theory. Due process is conventionally understood as concerned, in part, with defects in the form of impermissible predicates—predicates involving a constitutionally impermissible moral theory. For example, under the narrowest possible coherent reading of Roe v. Wade, 410 U.S. 113 (1973), the substantive due process "right of privacy" forbids government to take any action predicated on the view that abortion (before the stage at which a fetus is viable) is per se morally objectionable. See Perry, Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae, 32 STAN. L. REV. 1113, 1115-21 (1980). In any event, disentangling equal protection from due process, contrary to what Professor Alexander argues, is not all that difficult. It is simply a matter of specifying the predicate or predicates the principle of equal protection renders impermissible, as opposed to those different predicates that other, discrete constitutional principles—such as those subsumed by due process, the right of interstate migration, freedom of expression, or the right of privacy—render impermissible.
several refinements in due course. For now, let me clarify the notion of a person’s “moral status.” Moral status, like other kinds of status (economic status, for example), is relative. The status of $X$ cannot be measured except in relation to the status of non-$X$. From the point of view of the vast, impersonal cosmos, the status, or worth, of no person is greater or lesser than the worth of anything else, and because nothing has any worth, no person has any worth. As Art Leff would say, Mankind is no better—but no worse either—than a flatworm.\textsuperscript{1} By contrast, from the point of view of a God who regards all persons as ends in themselves, the worth of no person is greater or lesser than the worth of any other person, and because every person has “infinite” worth, each person has infinite worth.

From the point of view of a particular society of persons, struggling to improve its material and spiritual condition, the moral worth or status of a person is determined by the nature and extent of the person’s activities, native talents, acquired skills, and needs. Activities, talents, and skills are the resources upon which any society must principally rely in its effort to improve its condition. Needs—whether of an individual, a group, or of a whole society—constitute that which a society must identify, rank, and make some progress towards satisfying if the society is to improve its condition. Indeed, the state of a society’s present material and spiritual condition is in large part determined by the state of the needs of the members of the society.\textsuperscript{12}

The function of extending or withholding praise or blame, approval or disapproval, is to encourage or discourage activities deemed beneficial (or “right” or “good”) or harmful (or “wrong” or “evil”) in the effort to satisfy needs. However, if a factor is not a

\textsuperscript{11} See Leff, Book Review, 29 STAN. L. REV. 879, 888 (1977) reviewing R. UNGER, KNOWLEDGE AND POLITICS (1975). “[M]ankind is a species that doesn’t mean anything at all, except to itself. . . . If the species is or becomes one thing or another, or ceases to exist altogether, nothing else cares—except perhaps some other species which, mostly with joy, might register the ecological impact of man’s extinction. You are what you are, and will become what you will become, and the goodness or badness of that being and becoming is good for you, and you alone, to define and declare. No state of being is more authentic than any other or, just because it exists, any better.” See also Leff, Unspeakable Acts, Unnatural Law, 1979 DUKE L.J. 1229.

\textsuperscript{12} One might almost say that needs are primary here. Activities, talents, and skills are valuable mainly as resources on which society relies in its effort to meet the needs of individuals and of the community. I am grateful to Dory Rand for clarifying the relationship between activities, talents, and skills on the one hand, and needs on the other.

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determinant of a person's moral status—if the factor does not itself refer to or indicate anything about a person's activities, talents, skills, or needs—then that factor is morally irrelevant, that is, irrelevant to any sensible evaluation of that person's moral status. No person ought to be deemed, by virtue of a morally irrelevant factor, less deserving of respect, concern, and opportunity for self-fulfillment, or more deserving of subordination to or domination by others. Extending or withholding respect or concern on the basis of—adopting an attitude of approval or disapproval towards—a morally irrelevant factor makes no sense, because the factor neither refers to nor indicates anything about any particular activity, talent, skill, or need.

To elaborate and clarify my conception of equal protection, I want to respond to some problems this conception might be thought to raise. First, my conception of the principle of equal protection forbids government to treat any person differently from any other person on the basis of any factor that is not a determinant of a person's moral status. But is there any factor that is never a determinant of a person's moral status—a factor that is always morally irrelevant? Assuming, for the sake of argument, that there is no such factor, my conception of equal protection nonetheless is consequential, because if government may not treat any person differently from any other on the basis of any factor that is not a determinant of a person's moral status, neither may it treat any person differently on the basis of any factor that is not a determinant of any relevant aspect of a person's moral status. Relevancy is measured by reference to the particular governmental policy in question, of course. The fact that a woman can bear children indicates something about her moral status, in the sense in which I am using that term, but what it indicates, while relevant

13. This is not necessarily to say that no person ought to be deemed, by virtue of a morally irrelevant factor understood as a proxy for another, morally relevant factor, less deserving of respect. I shall address below the problem of governmental reliance on factors that, while not themselves determinants of a person's moral status, are nonetheless proxies for factors that are determinants. See text accompanying notes 53-55 infra.

14. See Railway Express v. New York, 336 U.S. 106, 115 (Jackson, J., concurring): "As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences in treatment under law should be approved on classification because of differences unrelated to legislative purposes. The equal protection clause ceases to assure either equality or protection if it can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance."
to some governmental policies (at least, to some imaginable government policies), is irrelevant to others.

What if the particular governmental policy in question is simply to express dislike for the group disadvantaged by the differential treatment? That is, what if the policy is predicated on the view that members of the disadvantaged class are intrinsically inferior—inferior without regard to their activities, talents, skills, or needs—to persons who are not members of the class? That predicate offends the principle of equal protection, because it presupposes that to some extent a person’s moral status is determined by something other than the person’s activities, talents, skills, or needs. The principle of equal protection, however, presupposes that no person is intrinsically inferior to any other person; it presupposes that all persons, considered without regard to their activities, talents, skills, or needs, have equal moral status or worth, whether that worth be zero or infinite.15 The principle also presupposes that while there are, from the point of view of society, deviations in moral status among persons, these are wholly a function of their activities, talents, skills, and needs.16

Why suppose that no person is intrinsically inferior to any other person and that deviations in moral status are wholly a function of persons’ activities, talents, skills, and needs? Why not suppose instead that deviations in moral status are due also to factors—skin complexion, for example, or eye color—that have nothing to do (or so I will assume) with a person’s activities, talents, skills, or needs? At least, why not suppose that it is morally permissible—which is not to say that it is morally obligatory—to deem moral status to be a function of such factors? I do not know whether it is ethically permissible for an individual, acting in a personal (nongovernmental) capacity, to attach significance to otherwise morally irrelevant factors, for example, to choose a spouse in part on the basis of eye color. Perhaps individuals—who are

15. Cf. Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 6 (1977) (“A society devoted to the idea of equal citizenship ... will repudiate those inequalities that impose the stigma of caste and thus ‘belie the principle that people are of equal ultimate worth.’”) (quoting R. Rods, The Legal Enterprise 163 (1976)) (emphasis added).

16. For a discussion of the notion of “intrinsic” worth and of the notion’s place in equal protection theory, see Baker, Three Models of Equal Protection (unpublished manuscript, a revised portion of which has been published under the title Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection, 58 Tex. L. Rev. 1029 (1980)).
nonrational creatures in so many respects—are fated to do so. But if a society of individuals qua government may attach significance to otherwise morally irrelevant factors, then government may discriminate against black persons, for example, or blue-eyed persons, simply because they are black or blue-eyed. A conception of equal protection that permits government to treat some persons as intrinsically inferior to other persons offers no meaningful protection against governmental discrimination. If the principle of equal protection is to have any consequential normative content at all, it cannot permit government to attach significance, in particular to attach negative significance, to otherwise morally irrelevant factors.

My principle of equal protection can now be restated: Government may not treat any person differently from any other person on the basis of any factor that is not a determinant of any relevant aspect of a person's moral status, when moral status is understood to be wholly a function of a person's activities, talents, skills, and needs. This statement of the principle, like the previous statement, is incomplete. I shall later indicate another important refinement.

Contemporary constitutional literature discloses several other conceptions of the principle of equal protection. I shall briefly mention what are perhaps the three most prominent other conceptions. First, there is the conception suggested by Ronald Dworkin and amplified by James O'Fallon, according to which every person has a right, against government, to “equal concern and respect.”

Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. Professors Dworkin and O'Fallon also claim that the right to equal concern and respect entails a duty on the part of government to refrain from counting “external,” as opposed to “personal,” preferences in allocating burdens and benefits; in their view, counting

external preferences constitutes a denial of the right to equal concern and respect.\(^{20}\) H.L.A. Hart has convincingly demonstrated that Professor Dworkin's conception of the principle of equal protection is fundamentally defective.\(^{21}\) In particular, he has demonstrated that counting external preferences, contrary to what Professor Dworkin has said, is \textit{not} a "form of double counting,"\(^{22}\) and that counting external preferences is not otherwise a denial of the right to equal concern and respect (on any plausible understanding of that right).\(^{23}\) But perhaps Professor Hart's most fundamental criticism is that "the ideas of 'equal concern and respect' and treatment 'as equals' are either too indeterminate to play the fundamental role which they do in Professor Dworkin's theory or ... a vacuous use is being made of the notion of equality."\(^{24}\) The interested reader should take time to read Professor Hart's compelling critique.\(^{25}\)

Next, there is the conception of equal protection—the "we-they" conception—developed by John Ely.\(^{26}\) Because I think Professor Ely's conception is ambiguous, I should in fairness let him speak for himself:

If the doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members—it would seem to follow that one set of classifications we should treat as suspicious are those that disadvantage groups we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure.

Note that the inquiry suggested is not whether there exists

\(^{20}\) The distinction between external and personal preferences, and the argument that the right to equal concern and respect entails a governmental duty to refrain from counting the former, are set forth in R. Dworkin, \textit{Taking Rights Seriously} 275-78 (1977) and O'Fallon, \textit{Adjudication and Contested Concepts: The Case of Equal Protection}, 54 N.Y.U. L. Rev. 19, 38-43 (1979).


\(^{22}\) \textit{Id.} at 841-42.

\(^{23}\) \textit{See id.} at 842-44.

\(^{24}\) \textit{Id.} at 844 & n.42.


unequal protection widespread hostility toward the group disadvantaged by the official act in issue—that would constitute a straightforward invitation to second-guess the legislative judgment—but simply whether there exists widespread hostility. . . .

. . .

The cases where we ought to be suspicious are not those involving a generalization whose incidence of counterexample is “too high,” but rather those involving a generalization whose incidence of counterexample is significantly higher than the legislative authority appears to have thought it was. . . .

. . .

By seizing upon the positive myths about the groups to which they belong and the negative myths about those to which they don’t, or for that matter the realities respecting some or most members of the two classes, legislators, like the rest of us, are likely to assume too readily [not that there are not counterexamples, but that the incidence of counterexample is significantly lower than it really is].

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Why is Professor Ely’s conception ambiguous? On the one hand, he seems to acknowledge that equal protection forbids “official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members.” That is, he seems to acknowledge that equal protection forbids government to treat any person as intrinsically inferior to any other person. But, on the other hand, Professor Ely insists that the question for a court “is not whether there exists unjustified widespread hostility toward the group disadvantaged by the official act in issue . . . but simply whether there exists widespread hostility.” This suggests that he means to say that equal protection forbids differential treatment of persons by government only if that treatment is based on “a generalization whose incidence of counterexample is significantly higher than the legislative authority appears to have thought it was.” But if that is his conception of equal protection, the conception is much too weak; it applies only to discriminatory classifications predicated on problematic factual generalizations—non-normative generalizations—about the group in question. Equal protection thus conceived does not proscribe any discriminatory classification predicated on a normative vision of the members of the group in question as intrinsically less worthy than

27. Id. at 153-54, 157, 159 (emphasis in original) (footnote omitted).
other persons. As I explained above, any conception of equal protection that permits that result offers no meaningful protection against governmental discrimination. As Professor Alexander has stated:

[I]f Ely wishes to treat mistakes as violations of equal protection without regard to ultimate moral principles, then his position is subject to the reductio ad absurdum of all pure mistake theories: so long as the government is pursuing evil ends through means that are well-suited to those ends, it does not violate equal protection.  

A conception of equal protection that forbids discrimination only when it is based on “a generalization whose incidence of counterexample is significantly higher than the legislative authority appears to have thought it was” is naive and largely worthless: “We can easily reduce our detractors to absurdity and show them their hostility is groundless. But what does this prove? That their hatred is real. When every slander has been rebutted, every misconception cleared up, every false opinion about us overcome, intolerance it-

28. Cf. Benn, Equality, Moral and Social, 3 Encyclopedia of Philosophy 38, 40 (P. Edwards ed. 1967): “[T]he principle of equal consideration does presuppose an initial commitment or decision, for it takes for granted whose interests are to count. No one claims equal consideration for all mammals—human beings count, mice do not, though it would not be easy to say why not. The Greeks made a similar distinction between themselves and barbarians, Aristotle between natural slaves and naturally free men, the slaves counting only as tools for the free men. It is not easy to see how anyone who seriously held that white men mattered but black did not could be reasoned out of this position, any more than one could argue for the equality of men and mice. Of course, many people who practice discrimination profess to believe that black men are in some way inferior to white, in intelligence, sensibility, responsibility, or some such quality, and on this account ought to be treated differently. But this is to admit the principle of equal consideration for all men, that all men count, and that an argument has to be made to justify discriminating against some among them. The man who denies that they count at all is not bound to show reasons, any more than we feel the need to show reasons for treating inanimate objects, plants, or primitive organisms, such as amoebae, according to our pleasure. Although we hesitate to inflict unnecessary pain on sentient creatures, such as mice or dogs, we are quite sure that we do not need to show good reasons for putting human interests before theirs. The boundaries of moral consideration are enlarged in practice by awakening sympathy and imagination; moral reasons presuppose an initial moral concern.

“The principle of equal consideration may be more, therefore, than what is necessarily implied by the concept of rational action. The notion of acting with good reason does not in itself rule out any inequality of treatment, for it may always be possible to argue that there is some relevant difference between members of a given class. But the principle that all men should be treated as members of the class whose equality is procedurally presupposed is not necessarily implied by the notion of rational action.”

self will remain finally irrefutable."\textsuperscript{30}

I doubt Professor Ely really means to say that equal protection forbids differential treatment of persons by government only when it is based on a problematic factual generalization about the group in question. I suspect he would agree that equal protection forbids differential treatment of persons by government also, even primarily, when that treatment presupposes that any person is intrinsically inferior to any other person. For example, Professor Ely writes that "[t]o disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect, specifically by valuing their welfare negatively."\textsuperscript{31} If I am correct, then Professor Ely's point about generalizations whose incidence of counterexample is higher than the legislative authority likely thought is best understood merely as a point about governmental reliance on proxy factors, an issue I address later in this Article.\textsuperscript{32}

The final conception of equal protection I want to mention here is that developed by Owen Fiss.\textsuperscript{33} In Professor Fiss' view, equal protection should be deemed to forbid any governmental action that "aggravates [perpetuates?] the subordinate position of a specially disadvantaged group."\textsuperscript{34} What is a "specially disadvantaged group"? Professor Fiss answers by referring to the prototypical such group—black persons:

[B]lacks should be viewed as having three characteristics that are relevant in the formulation of equal protection theory: (a) they are a social group; (b) the group has been in a position of perpetual subordination; and (c) the political power of the group is severely circumscribed. Blacks are . . . a specially disadvantaged group, and I would view the Equal Protection Clause as a protec-

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\textsuperscript{30} Goldstein, Deutsch-Judischer Parnass, quoted in J. Boswell, Christianity, Social Tolerance, and Homosexuality vii (1980).


\textsuperscript{32} For arguments, not relevant to the present discussion, that Professor Ely's concept of equal protection is not, as he seems to think, simply process-oriented and otherwise value-neutral, see Alexander, supra note 10, at 44-51; Baker, Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection, 58 Tex. L. Rev. 1029 (1980); Brest, The Substance of Process, 42 Ohio St. L. J. 131 (1981). Professor Alexander has argued, with particular reference to Professor Ely's "we-they" conception, that "to the extent that equal protection rules out or rules in any ultimate standard of moral worth, it is unquestionably substantive." Alexander, supra note 10, at 45. I agree.

\textsuperscript{33} See Fiss, Groups and the Equal Protection Clause, 5 J. PHILOSOPHY & PUB. AFF. 107 (1976) [hereinafter cited as Fiss].

\textsuperscript{34} Id. at 157.
tion for such groups.\footnote{Id. at 154-55.}

Any specially disadvantaged group, as Professor Fiss elaborates the term,\footnote{See id. at 148-49.} exists because society has attached negative significance to a morally irrelevant factor—a factor that is not a determinant of any relevant aspect of a person’s moral status. Certainly the prototypical specially disadvantaged group exists for just that reason. Indeed, one reason—a cardinal reason—why society ought not to attach negative significance to morally irrelevant factors is precisely because doing so helps create specially disadvantaged groups. But of course this is not to say that it is wrong for society to attach negative significance to a morally irrelevant factor only when doing so eventuates in a specially disadvantaged group. To the contrary, it is unjust for society to attach negative significance to a morally irrelevant factor even when doing so does not eventuate in a specially disadvantaged group, but only in harm to, and suffering on the part of, the particular individuals affected. At least, equal protection must be deemed to forbid society \textit{qua} government to attach negative significance to any morally irrelevant factor, because, as I have already explained, if equal protection were to permit government to do that, equal protection would offer no meaningful protection against discriminatory governmental action.\footnote{See text accompanying notes 17-18 supra.} Thus, I cannot accept the claim, which Professor Fiss is quite explicit in making, that equal protection should be viewed only “as a prohibition against group-disadvantaging practices,” not as a prohibition against governmental action that attaches negative significance to morally irrelevant factors.\footnote{See Fiss, supra note 33, at 159-60.} Are “illegitimates” a “specially disadvantaged group”? They are not if I understand Professor Fiss’ careful elaboration of the latter term.\footnote{For example, Professor Fiss seems to say that “the poor” are not a specially disadvantaged group: “[B]lacks have occupied the lowest socioeconomic rung in America for at least two centuries and will continue to do so unless redistributive measures are instituted. True, we may have always had and perhaps will always have people called ‘the poor,’ but that is to confuse a stratum with the occupant of a stratum. . . . [B]lacks face disabilities not encountered by the poor (even conceived of as a group). These disabilities manifest themselves in all spheres of life—economic, social, and political—and derive from the fact that the individuals are members of the racial group. These are disabilities that do not saddle persons who are poor. Indeed, in order to elevate themselves, the white poor have incentives to disassociate themselves from the blacks and to accentuate the racial distinction. They have incentives to make blackness the lowest status, for of necessity it is a status...
then really mean to suggest that discrimination against illegiti-
mates is not problematic under equal protection? If his conception
of equal protection entails such a claim, then it is a rather idiosyn-
cratic conception and, in my view, an unacceptably narrow one.

Why not view equal protection as disfavoring Professor Fiss’
“group-disadvantaging practices,” but also, and more fundamen-
tally, as prohibiting governmental action that attaches significance
to morally irrelevant factors? Anticipating some such question,
Professor Fiss has argued:

Admittedly, racially discriminatory conduct need not be viewed . . . as a species of the genus of group-disadvantaging con-
duct. It could be viewed as the member of another genus, that of
unfair treatment: what is wrong, it may be argued, with using race
as the criterion for admission to a swimming pool or a public
housing project is that it is a form of unfair treatment—an indi-
vidual is being judged (for the purpose of allocating the scarce
resource) on the basis of an irrelevant characteristic. The prob-
lem, however, is one of double membership: arbitrary discrimina-
tion is a member of the genus of unfair treatment as well as that
of group-disadvantaging conduct. Double membership is possible
because of an area of overlap of the two genuses (unfair treatment
and group-disadvantaging conduct), though to be sure, the
genuses are not coextensive, nor is one embraced by the other.40

This argument ignores the fact that “group-disadvantaging con-
duct,” as Professor Fiss elaborates the notion,41 is embraced by
“unfair treatment.” For example, what he rightly regards as a prin-
cipal group-disadvantaging practice—governmental action that has
a disproportionate racial impact42—is disfavored by equal protec-
tion understood as a prohibition on governmental action that at-
taches negative significance to morally irrelevant factors.43

Professor Fiss designed his conception of equal protection
mainly to validate the results he thinks courts should reach in
cases involving equal protection challenges to governmental action

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40. Fiss, supra note 33, at 159.
41. See id. at 157-64.
42. See id. at 157-60.
43. See Perry, supra note 2, at 1040-42. Under Professor Fiss’ concept of equal protec-
tion, governmental action having a disproportionate racial impact is not forbidden, but is
merely disfavored. See Fiss, supra note 23, at 157.
having a disproportionate racial impact and governmental programs of preferential treatment for blacks. Like Professor Fiss, I think that the former ought to be disfavored and the latter generally sustained. But to reach such results equal protection need not be conceived in the way Professor Fiss recommends. My conception of equal protection, for reasons I have set forth in detail in my earlier essay on equal protection, is adequate to the task. For that reason, I do not see any advantage in Professor Fiss’ conception. I do see significant disadvantage, however: first, the considerable difficulty of identifying “specially disadvantaged groups” under Professor Fiss’ conception; and second, the tension the group-centered conception creates with our individual-centered constitutional jurisprudence.

The Principle Applied: Age Discrimination

My conception of the principle of equal protection forbids government to treat any person differently from any other person on the basis of any factor that is not a determinant of any relevant aspect of a person’s moral status. I must now introduce a final refinement into that statement of the principle. Although a particular factor might not itself be a determinant of any relevant aspect of a person’s moral status, it might nonetheless correlate with another factor that is a determinant. Government, for the sake of administrative convenience, might want to rely on the former factor as a proxy for the latter factor. Equal protection has never been thought to prohibit government from ever relying on a proxy factor. Accordingly, I should say that the principle of equal protection forbids government to treat any person differently from any other person on the basis of any factor that is neither a determinant of, nor a proxy for a factor that is a determinant of, any relevant aspect of a person’s moral status.

Of course, equal protection, thus conceived, does not authorize

44. See Fiss, supra note 33, at 170-77.
45. See note 43 supra.
46. Compare Fiss, supra note 33, at 147-64, with Perry, supra note 2, at 1040-50.
47. See Perry, supra note 2, at 1040-50.
48. See note 39 supra.
49. A tension more with respect to rhetoric, I think, than results.
government to rely on a proxy factor anytime it so chooses. Sometimes there is reason to suspect that governmental reliance on a particular proxy factor conceals the view that members of the group defined in terms of the proxy factor have an intrinsically inferior moral status; at least, sometimes there is reason to suspect that government would not have relied on the proxy factor but for a (perhaps latent) cultural understanding to that effect.\(^5\) When there is good reason for such suspicion, it makes sense for the judiciary to disfavor governmental reliance on the proxy factor by subjecting that reliance to a standard of review stricter than the "rational basis" standard.\(^5\) The matter of classification-by-proxy, which I have addressed elsewhere,\(^6\) is relevant to the problem of age discrimination.

The problem of age discrimination—as indeed the Age Discrimination in Employment Act\(^5\) would suggest—is really the problem of discrimination against older persons, in particular persons beyond middle age. No one seriously claims that it is constitutionally problematic for government to treat fifteen-year olds, for example, differently from twenty-one-year olds with respect to a wide variety of matters. "Youth" is a proxy for "immaturity," whether physical, intellectual, or emotional, and unlike, for example, gender, it is not a proxy about which we need be suspicious. So, in discussing the problem of age discrimination, I shall confine myself to the problem of discrimination against older persons.

The particular age discrimination issue that arises in the constitutional context is almost invariably compulsory retirement.\(^5\)

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52. For example, the fact that a particular person is a woman does not necessarily mean that she is physically weaker than the "average" man. Nonetheless, few would deny that feminine gender is a proxy for physical capacity. Yet, there is excellent reason to suspect that a policy providing that no woman may assume a particular, physically demanding job—as opposed to a policy requiring every applicant for the job to meet a test of physical strength—would not exist but for the view that physically demanding jobs are "man's work."

53. On the rational basis standard, see Vance v. Bradley, 440 U.S. 93, 97 (1979). See also Perry, supra note 2, at 1067-74. See note 80 infra.

54. See Perry, supra note 2, at 1052-53.


Laws authorizing compulsory retirement are perhaps the paradigmatic example of age discrimination. How should such laws fare under the principle of equal protection? In the courts, compulsory retirement laws have fared very well, but that is not to say that they should fare well. Recall what sort of factor equal protection (as I conceive it) forbids government to rely on in treating some persons differently from other persons, in particular in disadvantaging some persons relative to others: any factor that is neither (1) a determinant of any relevant aspect of a person's moral status nor (2) a proxy for a factor that is a determinant of a person's moral status.

Is the fact that a person is seventy years of age rather than sixty-nine—or sixty rather than fifty-nine, or fifty rather than forty-nine—a proxy for a factor that is a determinant of a person's moral status? The answer must be yes, it seems to me. Age correlates with physical capacity, and so government might want to rely on age as a proxy for physical capacity. In Massachusetts Board of Retirement v. Murgia and in Vance v. Bradley the compulsory retirement provisions were sustained. In Murgia, which involved a requirement that uniformed state police officers retire at age fifty, the Supreme Court noted that "even [the challenging party's] experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." In Vance, the Court accepted the defending party's contention that the requirement that certain Foreign Service employees retire at age sixty served government's interest in removing "from the Service those who are sufficiently

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57. For several examples of such laws, see the cases cited in note 56 supra.


59. Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977), cert. denied, 440 U.S. 945 (1979), is the only case in which a federal court of appeals has ruled against a compulsory retirement provision. The other circuits have declined to follow Gault. See, e.g., Lamb v. Scripps College, 627 F.2d 1015, 1019-21 (9th Cir. 1980).

60. See Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 384 (1976): "[A]ge is at some point inherently related to ability, a fact which is implicitly recognized by both the legislative history and the provisions of the [Age Discrimination in Employment Act]." (emphasis in original).


old that they may be less equipped or less ready than younger persons to face the rigors of overseas duty in the Foreign Service.\footnote{440 U.S. at 98.}

As I indicated before, however, equal protection does not authorize government to rely on a proxy factor anytime it so chooses. Is there good reason to suspect that government would not rely on age as a proxy for physical capacity but for a cultural understanding to the effect that older persons have an intrinsically inferior moral status?\footnote{I am assuming for the moment that government may not deem age to be a determinant of moral status. I shall abandon that assumption below and defend a contrary position.} I do not know the answer, and I am reluctant to speculate. I am content, for the present, to identify it as a crucial question in deciding whether compulsory retirement provisions should be subject to a stricter than rational basis standard of review.\footnote{Another question in deciding whether to subject compulsory retirement provisions to a stricter standard of review concerns the constitutional weight to be accorded an individual's interest, in particular an older person's interest, in keeping his or her job. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 322-24 (Marshall, J., dissenting) (1976). But that is not an equal protection question, in my view. See Perry, supra note 2, at 1074-83. See also note 10 & accompanying text supra.} The principal function of a stricter standard is to reveal whatever illicit consideration is suspected to underlie classifications of the sort in question.\footnote{See Perry, supra note 2, at 1033-38.} The Supreme Court seems not to be particularly suspicious about age-based classifications. In concluding that compulsory retirement provisions shall be subject merely to the rational basis standard, the Court in \textit{Murgia} reasoned:

> While the treatment of the aged in this Nation has not been wholly free from discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.\footnote{See \textit{Perry}, supra note 2, at 1033. See also Note, \textit{The Age Discrimination in Employment Act of 1967}, 90 \textit{Harv. L. Rev.} 380, 383-88 (1976).}

Kenneth Karst, sounding a rather different note, has suggested that "[i]f any group in our society is systematically consigned to the status of 'nonpersons,' it is the aged."\footnote{Karst, \textit{Foreword: Equal Citizenship Under the Fourteenth Amendment}, 91 \textit{Harv. L. Rev.} 1, 23 n.122 (1977).} Let us assume, with Professor Karst's observation in mind, that there is a
reason to be suspicious about governmental reliance on age as a proxy factor. Ought we to conclude, on the basis of that assumption, that courts should disfavor governmental reliance on age as a proxy factor by subjecting such reliance to a stricter standard of review? The answer, I think, is probably no. To disfavor governmental reliance on age as a proxy factor is of course to favor reliance on individualized inquiry into the presence or absence of the factor for which age would have been the proxy. Yet, there are good reasons not to favor reliance on individualized determinations in this context.

Substituting individualized determinations of physical fitness for age-based classifications would pose two considerable problems. First, it is difficult for medical science to predict when an older person—one over sixty, say, or even one over fifty—will succumb to the rigors of a physically demanding, stressful job, like the jobs involved in Murgia and in Vance. Second, individualized determinations of a particular person's "absolute" fitness are in any event somewhat beside the point, because what is typically at issue is "relative" fitness. That is, what is at issue is less whether an older person meets specified fitness requirements than whether younger persons are generally more fit. If younger persons are generally more fit, why should the Massachusetts Legislature not be permitted to decide that it is preferable, as a matter of public policy, to have a larger proportion of younger persons in the uniformed state police? I suppose one might suggest that if relative physical fitness is the issue, or at least an important issue, individualized determinations can ascertain relative fitness too. But how might the inquiry be framed? Would the question be whether a particular fifty-year old is as physically fit as the considerably younger person who would likely be hired to fill the position that would open up were the fifty-year old to retire or be retired? It hardly seems necessary to have individualized determinations to ascertain such a thing.

Of course, there are many compulsory retirement provisions that do not rely on age as a proxy for physical fitness, or at least that are much better understood in other terms. An example is the provision sustained in Trafelet v. Thompson,70 under which state judges, with certain exceptions, were required to retire after the first general election following their seventieth birthday. It is not

70. 594 F.2d 623 (7th Cir. 1979). See also Malmed v. Thornburgh, 621 F.2d 565 (3d Cir. 1980); O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978).
implausible to understand such a provision as relying on age simply as a proxy for mental fitness, but I think that a provision like that sustained in *Trafelet* is better understood in other terms, that is, as relying on age, not simply as a proxy for a factor that is a determinant of moral status, but as itself a determinant of moral status. I shall have more to say about compulsory retirement, thus understood, in a moment. But for now assume that a provision like that sustained in *Trafelet* does in fact rely on age simply, or primarily, as a proxy for mental fitness. Age correlates with mental fitness only to a limited degree.\(^7\) Ought there then to be individualized determinations of mental fitness? What an unseemly mess that would be. The court in *Trafelet* properly reasoned:

Fitness to be a policeman is more susceptible of objective evaluation than fitness to be a judge, because decline in the intellectual ability and the personality factors essential for effective judicial performance are more difficult to measure than decline in physical condition. The Illinois evaluation means to which plaintiffs refer [by way of contending that an apparatus for individualized determinations of mental fitness already exists], involve an investigation, a complaint, and an adjudicative hearing. As a practical matter, this cumbersome individualized removal procedure, attended as it is with stigma to the judge, is unlikely to be used except in the most extreme cases. . . . It was entirely rational for the legislature to believe that the most satisfactory way to insure a vigorous judiciary was to impose a maximum age limitation.\(^7\)

In any event, there is a better way, as I said, to understand a provision like that sustained in *Trafelet*.

Compulsory retirement provisions do not always rely on age simply as a proxy for fitness, whether physical or mental. Often, perhaps invariably, compulsory retirement provisions, as I will explain, assume that (old) age is itself a determinant of a person’s moral status and not merely a proxy for some other factor that is a determinant. If age is a determinant of a person’s moral status—or may legitimately be viewed as such—and if government is relying on age not simply as a proxy but as itself a determinant of moral status, then of course there are excellent reasons not to require

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71. A greater proportion of older persons than younger persons suffer from senility, for example, but that proportion is small.

72. 594 F.2d at 628-29 (footnote omitted). See also Malmed v. Thornburgh, 621 F.2d 565, 572 (3d Cir. 1980). The same might be held true of fitness to be a teacher. See, e.g., Lamb v. Scripps College, 627 F.2d 1015 (9th Cir. 1980); Palmer v. Ticcione, 576 F.2d 459 (2d Cir. 1978) cert. denied, 440 U.S. 945 (1979).
government to resort to individualized determinations. Requiring individualized determinations makes sense only if government is relying on age simply as a proxy for another factor and the court concludes that government ought to bypass the proxy and concern itself directly with that other factor. The crucial question, therefore, is whether age is a determinant of moral status. I think it may legitimately be viewed as such. Recall one of the principal objectives of the compulsory-retirement provision sustained in Vance. The provision, the Court noted, was "an integral part of the personnel policies of the [Foreign] Service designed to create predictable promotion opportunities and thus spur morale and stimulate superior performance in the ranks. ..." Certainly that is a legitimate objective. Analogous objectives explain other familiar compulsory retirement provisions. Consider, for example, the court's statement in Palmer v. Ticcione that "[u]nrelated to any notion of physical or mental fitness, a state might prescribe mandatory retirement for teachers in order to open up employment opportunities for young teachers—particularly in the last decade when supply has outpaced demand, or to open up more places for minorities. ..." Another court used similar reasoning in Lamb v. Scripps College, saying that "[t]he California Legislature could have reasonably concluded that the challenged policy would ... stimulate performance among younger faculty members by assuring a predictable number of available positions. ..." Consider, finally, the Missouri Supreme Court's statement in O'Neil v. Baine, in which it sustained a provision requiring certain state judges to retire at age seventy:

[Mandatory retirement increases the opportunity for qualified persons—men and women alike—to share in the judiciary and permits an orderly attrition through retirement. ... Such a provision not only achieves the maximum in qualified judicial personnel, but equally important widens the opportunities for qualified younger members of the Bar to seek a judicial post.

73. 440 U.S. at 98. See also id. at 101: "Congress was intent ... on stimulating the highest performance in the ranks of the Foreign Service by assuring that opportunities for promotion would be available despite limits on the number of personnel classes and on the number of positions in the Service."
75. Id. at 462.
76. 627 F.2d 1015 (9th Cir. 1980).
77. Id. at 1021-22.
78. 568 S.W.2d 761 (Mo. 1978).
Rephrasing *Palmer v. Ticconn*, a state might prescribe a mandatory retirement for judges in order to “open up” judicial opportunities for younger lawyers. . . .

In what sense do compulsory retirement provisions, with the goal of “opening up” positions and thereby stimulating morale and performance and even career choice, assume that (old) age is itself a determinant of moral status? Obviously if positions are to be opened up, then, given the limited number of positions available, some persons will have to retire or be retired. One possibility (though certainly not a realistic one) is to retire persons by lottery. Another possibility is to retire persons by years of service. Still another possibility is to retire persons by age. What does the choice to retire persons by age imply? Most persons need to be engaged in “work,” in the sense of productive activity that contributes, in some fashion, to the material or spiritual well-being of the community. Certainly this is a need older persons have as well as younger persons. But older persons have had their chance—their turn—to satisfy that need (which ought not to be confused with financial need, which is a distinct matter). Surely it is not unreasonable, or morally improper, to think that younger persons ought to be given their chance, too.

The sense in which compulsory retirement provisions frequently, if implicitly, assume that age is itself a determinant of moral status thus is that older persons, simply by virtue of being older persons, have had a turn, and younger persons deserve a turn too. They too need a turn. Thus, age can be said to determine need. Consider this analogy: A Good Samaritan must decide whether to rescue from a fire either a young child or an aged person—he or she does not have time to rescue both—and, knowing nothing about either person, chooses to rescue the child. The issue is not whether he or she was morally obligated to make that choice, but whether the choice was a morally permissible one. Surely no one will deny that it was permissible. Similarly, I doubt anyone will insist that it is impermissible to suppose that age is a determinant of moral status in the way compulsory retirement provisions assume. Note that here “age” is not doing service for some other factor with which age is thought to correlate to some extent. Rather, it is (old) age itself, in the sense of a life lived for a certain period of time—a turn given—that is determinative. Or, put an-

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79. *Id.* at 767.
other way, it is (young) age that is determinative, in the sense of a life not yet lived—a turn not yet given, and therefore still needed.

Conclusion

For the various reasons I have set forth, the principle of equal protection, as I think it should be conceived, does not call for courts to disfavor age discrimination, at least age discrimination in its paradigmatic form—compulsory retirement laws. Such laws should be, and are, subject to a rational basis standard of review\textsuperscript{80} so far as \textit{equal protection} is concerned. This is not to deny that there may be one or more constitutional principles other than equal protection that call for courts to disfavor compulsory retirement laws.\textsuperscript{81} Nor is it to deny that Congress, or state legislatures, ought to impose constraints on age discrimination more severe than those the courts should enforce in the name of equal protection. After all, to say that a compulsory retirement provision comports with equal protection is not to say that it is morally desirable or politically provident.

\textsuperscript{80} Of course, there may be disagreement as to how a rational basis standard of review should operate. \textit{Compare} United States R.R. Retirement Bd. v. Fritz, 101 S.Ct. 453, 458-63 & n.10 (1980) (majority opinion), \textit{with id.} at 463-71 (Brennan, J., joined by Marshall, J., dissenting).

\textsuperscript{81} See note 66 \textit{supra}. 