

AGELESS LAW: THE CASE FOR (SOME) AGE DISCRIMINATION*

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*Chronological age is currently used to determine everything from eligibility for public benefits and tax breaks to the allocation of health care resources and employment opportunities to discounts at public parks. But this central feature of American social welfare law is poised for change. As States respond to the overturning of *Roe v. Wade* and concerns about retrenchment of federal civil rights protections, they are considering expanding state constitutional protections against discrimination—including age discrimination. Indeed, in November 2022 and 2024 respectively, Nevada and New York voters overwhelmingly voted to amend their state constitutions to add age as a protected class. It is in this political environment that this Article asks a simple question that is, remarkably, largely unexplored in the legal literature: Should law be “ageless”? That is, should rights and responsibilities be distributed among adults in a way that is age-blind? After providing a comprehensive typology of how age-based classifications are used in the American legal system, the Article outlines the theoretical justifications for the use of age-based classifications to distinguish among adults and explores whether the objectives currently served by age-based policy could be met through alternative approaches. It then evaluates the potential impact of state constitutional amendments that make age a protected class and the jurisprudential factors that would mediate that impact. After showing how wholesale rejection of age-based distinctions among adults would impede efficient and effective policy, it urges states to enhance protection against age discrimination not by adding constitutional language that would require “age-blindness” but rather by embracing language that would permit age-based distinctions that are substantially related to important objectives.*

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INTRODUCTION

Age-based policies are a ubiquitous feature of American social welfare and fiscal policy. The federal government and the States use age-based criteria to determine eligibility for a broad array of public benefits, as well as to target interventions designed to address abuse and exploitation. Likewise, private entities routinely try to attract consumers by offering discounts and other incentives to those of advanced age.

This central feature of the American legal landscape may be poised for change. New attention to state constitutionalism raises the specter of adding age as a protected class.¹ In November 2022, voters in Nevada overwhelmingly voted to amend their state's constitution to add "age" as a protected class,² making it the second state to provide such protection.³ In November 2024, New York voters followed Nevada's lead, approving a constitutional amendment that bars government discrimination on the basis of age.⁴ With the U.S. Supreme Court shifting to the political right, other states are also considering expanding

1. State constitutions are rich sources of diverse rights but have been largely ignored by civil rights theorists and attorneys, who tend to narrowly focus on federal civil rights. *See generally* EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013) (arguing that a full account of American constitutional rights is incomplete without addressing the extent of positive rights recognized in state constitutions).

2. The measure received overwhelming support, passing by more than a 17-point margin. *Nevada Question 1, Equality of Rights Amendment (2022)*, BALLOTPEdia, [https://ballotpedia.org/Nevada_Question_1_Equality_of_Rights_Amendment_\(2022\)#Text_of_measure](https://ballotpedia.org/Nevada_Question_1_Equality_of_Rights_Amendment_(2022)#Text_of_measure) [<https://perma.cc/B3BH-Y77H>].

3. The first state was Louisiana. *See infra* notes 86–89 and accompanying text.

4. The amendment reads:

a. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, *age*, disability, creed [or], religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in [his or her] their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law.

b. Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section, nor shall any characteristic listed in this section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other characteristic identified in this section.

2024 Statewide Ballot Proposal, N.Y. STATE BD. OF ELECTIONS, <https://elections.ny.gov/2024-statewide-ballot-proposal> [<https://perma.cc/3T3K-2N7F>] (emphasis added); *see also* Press Release, ACLU of N.Y., *Equal Rights Amendment Advances to New York Voters In November 2024* (Jan. 24, 2023), <https://www.nyclu.org/en/press-releases/equal-rights-amendment-advances-new-york-voters-november-2024> [<https://perma.cc/J6MV-PC73>] (discussing the ACLU's support for the proposal, without discussion of its impact on age-based classification).

state-based constitutional protections as a way of bolstering civil rights.⁵ If and when such measures are approved, a wide variety of commonplace age-based policies and practices may become impermissible.

Age-based policies are also facing criticism at the federal level. Federal policymakers on both sides of the aisle increasingly attack age-based entitlement programs. On the right, key entitlement programs for older adults once thought of as politically untouchable are being put on the chopping block to reduce expenditures as the U.S. population becomes increasingly elderly. Republican Congressional leaders have proposed cutting Social Security by a third,⁶ and some prominent Republicans have called for simply eliminating Social Security and Medicare as entitlement programs.⁷ On the left, liberals have suggested that furthering racial and socioeconomic equity also requires ending age-based preferences in favor of entitlement programs that benefit people of all ages, such as universal income⁸ and Medicare for All.⁹ Developments in international law may further challenge existing norms around age-based policy. The United Nations is currently developing a proposal for a Convention on the Rights of

5. See Helen Hershkoff, Introductory Remarks, *The Promise and Limits of State Constitutions*, 99 N.Y.U. L. REV. 1895, 1904–05 (2024) (describing the growing interest in state constitutional law as a response to, among other things, the U.S. Supreme Court’s reduced reliance on *stare decisis* and its 2022 decision in *Dobbs v. Jackson Women’s Health Organization* that upended reproductive rights jurisprudence); Michael Milov-Cordoba & Alica L. Bannon, Foreword, *The Promise and Limits of State Constitutions*, 99 N.Y.U. L. REV. 1915, 1915 (2024) (describing the growing interest in using state constitutional law to protect individual rights as a response to the U.S. Supreme Court being “an increasingly hostile venue for many forms of civil rights litigation”).

6. Alicia H. Munnell, *Congressional Republicans Want Big Cuts to Social Security*, MARKETWATCH BLOG (July 11, 2023), <https://crr.bc.edu/wp-content/uploads/2023/07/Congressional-Republicans-Want-Big-Cuts-to-Social-Security-%E2%80%93-Center-for-Retirement-Research.pdf> [<https://perma.cc/W2X7-UYTV>].

7. See, e.g., Amy Wang, *Sen. Johnson Suggests Ending Medicare, Social Security as Mandatory Spending Programs*, WASH. POST (Aug. 3, 2022), <https://www.washingtonpost.com/national-security/2022/08/03/ron-johnson-medicare-social-security/> [<https://perma.cc/T8YE-ZBX6>].

8. Liberal cities around the country are experimenting with universal basic income and guaranteed basic income programs that disconnect income support from age-based criteria. Elizabeth Meisenzahl, *Guaranteed Income Gets a New Life*, AM. PROSPECT (Aug. 8, 2023), <https://prospect.org/economy/2023-08-07-guaranteed-income-gets-new-life/> [<https://perma.cc/9XVV-PPV5>].

9. For example, Minnesota Democratic Representative Ilhan Omar has called Medicare for All a “racial equity policy.” James Smathers, *Medicare for All Is a ‘Racial Equity Policy,’* PUB. CITIZEN, <https://www.citizen.org/article/medicare-for-all-is-a-racial-equity-policy/> [<https://perma.cc/G8NQ-UEWS>]. Similarly, Washington Democratic Representative Pramila Jayapal has suggested that Medicare for All is a solution for removing structural barriers to healthcare and advancing racial justice. *ICYMI: House Democrats Lift Medicare for All as Racial Justice Issue*, CONGRESSWOMAN PRAMILA JAYAPAL (July 10, 2019), <https://jayapal.house.gov/2019/07/10/icymi-house-democrats-lift-medicare-for-all-as-racial-justice-issue/> [<https://perma.cc/2KWK-EWHC>].

Older People.¹⁰ If adopted, the Convention could spur new calls for legal reform¹¹ even if the United States does not become a signatory.¹²

Yet while age-based classifications are coming under intense attack in many arenas, they are being embraced in others. For example, recent concerns about age-related cognitive decline of world leaders, including Presidents Biden and Trump, have led some to propose new age limits for politicians.¹³

In this environment, we must ask: Should age-based policy continue to be the norm?¹⁴ If not, should it be prohibited outright? And if it is, what will be the implications? Who will be helped? Who will be hurt? In short, should the law ban age discrimination or embrace it?

This Article seeks to answer these timely questions. It makes three major contributions. First, it is the first article to comprehensively describe age-based law in the United States, including its current manifestations, functional objectives, and legal status. Second, it is the first article to analyze the implications of states' emerging efforts to constitutionalize protections against age discrimination. Third, it makes the case for a new type of state constitutional protection against age discrimination—one that explicitly subjects age-based classifications to intermediate scrutiny, thereby protecting against invidious age discrimination while preserving the ability to use age-based classifications to advance important policy objectives.

10. Issa Idowu Olanrewaju (Rapporteur), Open-Ended Working Group on Ageing, Rep. of the Open-Ended Working Group on Ageing on Its Fourteenth Session, U.N. Doc. A/AC.278/2024/2 (2024), <https://docs.un.org/en/A/AC.278/2024/2> [<https://perma.cc/MK93-TUAM>].

11. It is yet unclear what types of reform calls might result. Given that the motivation behind the proposed Convention is to protect older adults, one could imagine calls for reforms to prohibit certain forms of age-based discrimination (e.g., age-based health care rationing), calls to embrace pro-elderly forms of discrimination (e.g., age-based income security), or even a combination of the two.

12. Indeed, the UN's Convention on the Rights of Persons with Disabilities ("CRPD"), even though never ratified by the United States, has galvanized advocacy around disability rights in the United States. See generally Benjamin A. Barsky, *Dual Federalism, Constitutional Openings, and the Convention on the Rights of Persons with Disabilities*, 24 U. PA. J. CONST. L. 345 (2022) (discussing the impact of the CRPD on policy in the United States, including supported decision-making legislation).

13. See, e.g., Joseph Stepansky, *Thorny Question of Presidential 'Age Limit' Grows in U.S. Political Discourse*, AL JAZEERA (Feb. 16, 2024), <https://www.aljazeera.com/news/2024/2/16/thorny-question-of-presidential-age-limit-grows-in-us-political-discourse> [<https://perma.cc/5EHC-WK64>] (noting then-Congresswoman Katie Porter's public support of potential age-based eligibility criteria for elected officials); Tori Powell, *Most Older Americans Favor Age Limits for Elected Officials*, CBS MORNINGS (Sep. 8, 2022, at 17:05 ET), <https://www.cbsnews.com/news/most-older-americans-favor-age-limits-for-elected-officials/> [<https://perma.cc/DMV5-QGLX>] (sharing a CBS News poll finding that 71% of Americans support a maximum age for elected officials; notably, older adults were more supportive of such limits than younger people).

14. This Article, consistent with current legal approaches, uses the term "age" to refer to chronological age. For a compelling discussion of alternative approaches to defining legal age, and their relative strengths and limitations, see Alexander A. Boni-Saenz, *Legal Age*, 63 B.C. L. REV. 521 (2022) [hereinafter Boni-Saenz, *Legal Age*].

The Article fills an increasingly problematic gap in the literature on the legal treatment of age. In recent years, a variety of scholars have considered the ethics or morality of discriminating against adults based on their chronological age.¹⁵ Particular attention has been paid to the rectitude of discriminating against older people in the allocation of public resources and medical care,¹⁶ and whether protection against age discrimination should be enshrined in human rights law (and, if so, the contours of that protection).¹⁷ These are important conversations, but the narrow focus on delineating *wrongful* uses of chronological age has obscured a larger conversation about *desirable* ones. Moreover, perhaps because the focus has been on addressing bad uses, prior literature has not fully considered the potential impact of prohibiting *all* uses of age-based classifications.¹⁸ Yet states are adopting constitutional provisions making age a protected class—a move that could create broad prohibitions against age-based classifications, irrespective of their ethical or moral correctness. By providing a comprehensive analysis of the utility of age-based classifications in U.S. law and policy, this Article may inform this emerging state constitutionalism.

In doing so, this Article revives and expands a conversation about the utility of age-based classifications that has largely lain dormant since the early 1980s. As entitlement programs expanded in the years leading up to the Reagan administration, there was thoughtful scholarly discussion of the value of age-

15. Attention has also been paid to the legal status of minors, a topic that falls outside the scope of this Article. *See generally, e.g.,* Benyam Dawit Mezmur, *Based Solely on their Date of Birth? Rethinking Age Discrimination against Children under the Convention on the Rights of the Child*, 36 HARV. HUM. RTS. J. 261 (2023) (considering how human rights law should treat discrimination against children).

16. *See generally, e.g.,* Alexander Boni-Saenz, *Age, Time, and Discrimination*, 53 GA. L. REV. 845 (2019) [hereinafter Boni-Saenz, *Age, Time*] (considering a complete lives approach in evaluating the wrongfulness of age discrimination); Govind Persad, *Evaluating the Legality of Age-Based Criteria in Health Care: From Nondiscrimination and Discretion to Distributive Justice*, 60 B.C. L. REV. 889 (2019) [hereinafter Persad, *Evaluating*] (arguing that age-based discrimination in the healthcare context advances justice); Hengameh Hosseini, *Aging and the Rising Costs of Healthcare in the United States: Can There Be a Solution?*, 40 AGEING INT'L 229–47 (2015) (considering the ethics of age-based rationing of healthcare resources); Pnina Alon-Shenker, *The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination*, 25 CAN. J.L. & JURIS. 243 (2012) (describing and critiquing the “complete lives” vision of egalitarianism); DENNIS MCKERLIE, JUSTICE BETWEEN THE YOUNG AND OLD (2013) (considering when age-based distribution of resources is consistent with intergenerational justice); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG (2008) (finding discrimination based on age less problematic than discrimination on the basis of a variety of other characteristics).

17. *See, e.g.,* Gerald L. Neuman & Abadir M. Ibrahim, *When Is Age Discrimination a Human Rights Violation?*, 36 HARV. HUM. RTS. J. 223, 234–44 (2023) (considering whether international human rights law should tolerate age discrimination).

18. Alexander A. Boni-Saenz’s 2022 article considering construct of “legal age” comes closest. *See* Boni-Saenz, *Legal Age*, *supra* note 14. In it, Boni-Saenz suggested that one way to avoid the problems of chronological age-based criteria would be to abolish legal age as a construct in adulthood, an approach that “would entail either the rejection of age-based distinctions in law once one reaches the age of adulthood, or the adoption of a subjective model of age, which would demand a similar outcome” and provided a broad overview of some of the types of impacts that might result. *Id.* at 562–65.

based criteria.¹⁹ As fiscal austerity came into vogue and the liberal position became defensive, critiques of age-based policies largely fell silent. This appears to have reflected, at least in part, concern that any effort to address age discrimination could be a “Trojan Horse” that undermines age-based entitlements and benefits.²⁰

The Article begins with Part I, which provides a typology of how age-based policy currently works in the United States. It shows how age-based classifications are increasingly used not only to establish entitlements but also to create obligations and limit civil liberties.²¹ Part II explores and critiques the theoretical justifications for age-based classifications and the practical impact of abandoning age-based classifications, including whether the policy objectives of age-based policies could be met without such classifications. Part III then explores likely impacts of prohibitions on age discrimination to state constitutions and variables that would mediate those impacts. It then shows how states might constitutionalize protections against age discrimination in a way that would protect against discrimination that subordinates or marginalizes people on the basis of age, while preserving the ability of state and private actors to use age-based classifications to further important objectives. Finally, this Article concludes by urging states wishing to constitutionalize protections against age discrimination to avoid language that could require “age blind” policies and practices and instead embrace language that would permit age-based distinctions that substantially further legitimate and important objectives.

19. The seminal work on this topic was an edited volume by psychologist Bernice L. Neugarten published in 1982. See BERNICE L. NEUGARTEN, *AGE OR NEED?: PUBLIC POLICIES FOR OLDER PEOPLE* (1982).

20. JOHN MACNICOL, *AGE DISCRIMINATION: AN HISTORICAL AND CONTEMPORARY ANALYSIS* 267 (2006) (“Combating age discrimination in employment may lead on to a wider, and much-needed, onslaught upon ageism in social relations and attitudes. On the other hand, it may be the Trojan horse of an attack upon the welfare rights of older people.”). This impression is not limited to public perception but also appears to have affected constitutional analysis of age-based classifications. An earlier draft of the *Murgia* decision, which held age not to be a suspect classification, suggested that the Court assumed that age-based classifications are generally used in ways that are well-intentioned with regard to older adults, stating that “[t]here is no basis upon which to assume that state and federal legislatures will not deal fairly with persons as they age and be responsive to their needs.” See Justice Lewis Powell, Fourth Draft of Opinion 9, *Mass. Bd. of Ret. v. Murgia*, No. 74-1044 (June 7, 1976) (on file with Libr. of Cong., Thurgood Marshall Papers, Box 165, Folder 8).

21. Age-based classifications that distinguish minors from adults, or distinguish among minors, fall outside the scope of this Article. It is worth noting, however, that age-based classifications are often reasonable to differentiate minors. Minor age is a fairly robust proxy for stage of development, and hence needs and abilities.

I. THE CURRENT USE AND PERMISSIBILITY OF AGE-BASED CLASSIFICATIONS

Policies that differentiate based on older age are so common in modern America that they are often treated as unremarkable. Federal and state governments routinely use age to establish eligibility for public benefits. Private actors use age-based classifications by, for example, offering discounts to persons of a certain age. This Part catalogs the diverse uses of age-based classifications in modern American law. It then describes the current legal status of such classifications under state and federal law, revealing the law's overwhelmingly permissive approach to age-based distinctions.

A. *Uses of Age-Based Classifications*

Age-based policies are often assumed to benefit older adults.²² This is understandable given that the most significant social welfare programs in the United States give preference to older adults relative to younger ones. However, as this Section shows, the impact of age-based classifications in public policy is much more variable. Age-based classifications are not merely used to allocate government benefits to older adults, but also to selectively abridge their civil rights and liberties.

This Section outlines how age-based classifications are used in laws and policies in the United States. Specifically, it looks at how they are used in five spheres: public benefits eligibility, tax breaks and discounts, employment law, interventions to address abuse and exploitation, and allocation of healthcare resources.

1. Public Benefits

The nation's largest public benefit programs largely condition eligibility on advanced chronological age. Eligibility for the Old-Age, Survivors, and Disability Insurance System, commonly called "Social Security," is largely dependent upon age. Workers who have paid into the system (approximately 90% of the U.S. workforce)²³ become eligible for benefits only when they experience a qualifying disability or reach the age of 62.²⁴ Similarly, eligibility for Medicare is limited to people aged 65 and older, and those who meet

22. See Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 242–43 (2010).

23. SOCIAL SECURITY ADMINISTRATION, FACT SHEET: SOCIAL SECURITY, <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> [<https://perma.cc/N7T8-T283>].

24. Sixty-two is "early retirement age." A worker who elects to collect at this age, instead of waiting until full retirement age (currently 67), receives a reduced amount of benefits. See NINA A. KOHN, *ELDER LAW: PRACTICE, POLICY, & PROBLEMS* 258 (3d ed. 2024).

restrictive disability criteria.²⁵ Together, Social Security and Medicare account for nearly a third of the federal budget.²⁶

Other major public benefit programs provide favorable eligibility criteria for older adults. The federal Supplemental Security Income (“SSI”) Program allows older adults to establish eligibility based only on income and resources; by contrast, younger adults and children must also show a qualifying disability.²⁷ Similarly, the Medicaid program, which provides health insurance to low-income persons and can be used by older adults to cover expenses not covered by Medicare, also favors older adults. Although Medicaid eligibility pathways are diverse and vary by state, older adults generally have more avenues for establishing eligibility than younger adults.²⁸ One reason for this is that those eligible for SSI are deemed eligible for Medicaid.²⁹

These blockbuster programs are not alone in giving older adults preferential treatment. More tailored programs do too. The Supplemental Nutrition Assistance Program (“SNAP”), commonly referred to as “food stamps,” has more favorable eligibility criteria for those age 60 and older.³⁰ Those over 55 who lose their jobs may qualify for free job training through the federally funded Senior Community Service Employment Program (“SCSEP”).³¹ And those 60 and older have priority for federal assistance with weatherization,³² as well as for support from the federal Low Income Home Energy Assistance Program (“LIHEAP”), which helps pay utility and fuel costs

25. *See id.* at 309–10.

26. Social Security accounts for approximately 21% of the federal budget. CTR. ON BUDGET & POL’Y PRIORITIES, POLICY BASICS: WHERE DO OUR FEDERAL TAX DOLLARS GO? 1 (2024), https://www.cbpp.org/sites/default/files/4-14-08tax_rev7-18-24.pdf [<https://perma.cc/3GUB-DBJW>]. Medicare accounts for approximately 10% of the federal budget. Juliette Cubanski & Tricia Neuman, *What to Know About Medicare Spending and Financing*, KFF (Jan. 19, 2023), <https://www.kff.org/medicare/issue-brief/what-to-know-about-medicare-spending-and-financing/> [<https://perma.cc/9K4U-4DDE>].

27. CTR. ON BUDGET & POL’Y PRIORITIES, *supra* note 26, at 2.

28. *See generally* KIRSTEN J. COLELLO & WILLAM R. MORTON, CONG. RSCH. SERV., R46111, MEDICAID ELIGIBILITY: OLDER ADULTS & INDIVIDUALS WITH DISABILITIES (2019) (providing an overview of categorical and financial criteria for Medicaid eligibility pathways).

29. *Id.*

30. USDA FOOD AND NUTRITION SERV., *SNAP Special Rules for the Elderly or Disabled*, <https://www.fns.usda.gov/snap/eligibility/elderly-disabled-special-rules> [<https://perma.cc/6UCS-2G7T>] (last updated Sep. 30, 2025) (detailing the higher income thresholds used to establish eligibility for persons over 60 and those with disabilities, as well as provisions allowing such persons to be treated as their own household in certain circumstances where others would not have such favorable treatment).

31. *See Senior Community Service Employment Program*, DEP’T OF LABOR: EMP. & TRAINING ADMIN., <https://www.dol.gov/agencies/eta/seniors> [<https://perma.cc/57JC-P9P9>].

32. *See* U.S. DEP’T OF ENERGY, *How To Apply for Weatherization Assistance*, <https://www.energy.gov/scep/wap/how-apply-weatherization-assistance> [<https://perma.cc/9D6T-SUDM>].

for low income persons.³³ While eligibility criteria vary somewhat by state, federal law requires states to give priority to persons over age 60 in allocating LIHEAP's limited resources.³⁴

In addition, those seeking help identifying community-specific resources or understanding potential benefits may obtain assistance through their local federally funded office of the aging. These agencies provide diverse and valuable social services such as Meals on Wheels, adult daycare, and exercise classes.³⁵

2. Discounts and Tax Breaks

Older individuals receive preferable tax treatment. Individuals aged 65 and older are automatically entitled to an additional deduction if they file as single or as head of household.³⁶ In addition, lower-income taxpayers aged 65 and older are eligible for a credit that is otherwise only available to those who have a permanent and total disability.³⁷ States also provide favorable tax treatment to certain older adults based, at least in part, on their advanced age. At the state level, common forms of favorable tax treatment include property tax exemptions³⁸ and income tax exemptions for older adults.³⁹

In addition to tax benefits, older adults qualify for a plethora of discounts offered by public entities. Many of these are associated with leisure and

33. See 42 U.S.C. § 6864(b)(2) (requiring the program to establish methods to prioritize the "elderly"; the statute defines "elderly" as any individual who is 60 years of age or older).

34. See *id.* § 8624(b)(2) (setting forth the eligibility criteria for LIHEAP; those criteria deem people eligible for receiving LIHEAP if they meet certain income tests or if they receive certain other benefits, some of which are easier to establish eligibility for if you are above a certain chronological age).

35. The name of this office can vary from state to state. See *Area Agencies on Aging*, ADMIN. FOR CMTY. LIVING, <https://acl.gov/programs/aging-and-disability-networks/area-agencies-aging> [<https://perma.cc/L8VB-3DHK>] (last modified Aug. 12, 2024).

36. This deduction benefits taxpayers who do not itemize. See *Topic No. 551, Standard Deduction*, INTERNAL REVENUE SERV. (Dec. 4, 2025), <https://www.irs.gov/taxtopics/tc551> [<https://perma.cc/J5Z4-UQGP>].

37. See *Publication 524 (2023), Credit for the Elderly or the Disabled*, INTERNAL REVENUE SERV., <https://www.irs.gov/publications/p524> [<https://perma.cc/7CMU-KGYY>] (last updated Sep. 9, 2024).

38. New York State, for example, permits local governments and school districts to reduce property taxes levied against lower income older adults. See *Senior Citizens Exemption*, N.Y. STATE DEP'T TAX'N & FIN., <https://www.tax.ny.gov/pit/property/exemption/seniorexempt.htm> [<https://perma.cc/5B2Y-RVWV>] (last updated July 31, 2025).

39. See Ben Brewer, Karen Smith Conway & Jonathan C. Rork, *Protecting the Vulnerable or Ripe for Reform? State Income Tax Breaks for the Elderly—Then and Now*, 45 PUB. FIN. REV. 564, 565 (2017) (reporting that 35 states offered seniors an extra exemption, deduction, or credit based on age as of 2013); Elizabeth C. McNichol, *States Should Target Senior Tax Breaks Only to Those Who Need Them, Free Up Funds for Investments*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (June 19, 2019), <https://www.cbpp.org/research/states-should-target-senior-tax-breaks-only-to-those-who-need-them-free-up-funds-for> [<https://perma.cc/CJ6M-UD7R> (staff-uploaded archive)] (reporting all but six states with personal income tax provide "personal income tax exemptions, standard deductions, or credits based on age").

recreational activities. For example, the National Park Service offers those 62 and over their choice of either a “Senior Pass” that allows lifetime admission to the National Parks for the same price as an annual pass offered to others, or an annual pass that costs a quarter of the price charged to others.⁴⁰ Many states offer parallel benefits. For example, New York State’s “Golden Pass Program” allows residents aged 62 and older to access most of its state parks without charge on weekdays.⁴¹ In this way, these public entities mimic the types of discounts offered by private actors. Those discounts are numerous and variable. For example, resorts and entertainment venues frequently offer senior discounts, and retailers also seek to attract older adults with age-specific discounts. Mega-retailer Amazon, for example, offers a discount on its Prime service, while other retailers such as Walgreens offer discounts on some or all purchases.⁴²

3. Mandatory Retirement and Maximum Hiring Age Requirements

Age-based classifications are used to regulate the labor market. While state and federal statutes protect some workers from age-based employment discrimination,⁴³ many state statutes still require the retirement of others. Most notably, the majority of U.S. states require state court judges to retire around age 70.⁴⁴ In some states, mandatory retirement for judges is even required by state constitution. For example, Pennsylvania’s constitution requires judges to retire at the age of 75 or before, and New York’s constitution requires retirement at the age of 70.⁴⁵

Other public employees are also subject to mandatory retirement. Federal firefighters and law enforcement officers employed by the U.S. Department of the Interior, for example, are required to retire either at age 57 or upon reaching 20 years of service, whichever is later.⁴⁶ Similarly, Capitol police officers are required to retire at age 57 if they have already served for 20 years.⁴⁷

40. *Entrance Passes*, NAT’L PARK SERV., <https://www.nps.gov/planyourvisit/passes.htm> [<https://perma.cc/Z6CU-T2S2>] (last updated Jan. 5, 2026).

41. *Golden Pass Program*, N.Y. STATE: PARKS, RECREATION & HIST. PRES., <https://parks.ny.gov/admission/golden-park-program.aspx> [<https://perma.cc/383S-SB8C>].

42. For further discussion of such age-based discounts, see Taylor Shuman, *Senior Discounts in 2026*, SENIORLIVING.ORG (Nov. 20, 2025), <https://www.seniorliving.org/finance/senior-discounts/> [<https://perma.cc/JG78-GNAP>].

43. See *infra* notes 71–76 and 93–98 and accompanying text.

44. Francis X. Shen, *Aging Judges*, 81 OHIO STATE L.J. 235, 245 (2020) (reporting that 32 states had mandatory retirement ages for state court judges and referencing an appendix with those states’ mandatory retirement ages).

45. PA. CONST. art. V, § 16(b) (2025); N.Y. CONST. art. VI § 25(b) (2025).

46. 5 U.S.C. § 8335 (b)(1).

47. *Id.* § 8425 (2)(c); see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-137R, CAPITOL POLICE: POTENTIAL EFFECTS OF RAISING THE MANDATORY RETIREMENT AGE 1 (2019), <https://www.gao.gov/products/gao-20-137r> [<https://perma.cc/FW72-AZ8X>] (discussing the potential financial impact of raising the retirement age from 57 to 60).

Individuals may also be ineligible to be hired if they are above a certain age. For example, the U.S. Department of the Interior has adopted regulations that preclude most individuals from being hired into firefighting or law enforcement positions after the age of 37, and all individuals from being hired into such positions after the age of 40.⁴⁸ And the U.S. Constitution has its own age-based hiring qualifications: a person must be 25 years old to be a member of the U.S. House of Representatives,⁴⁹ 30 to be a U.S. senator,⁵⁰ and 35 to be the president.⁵¹

4. Interventions to Address Abuse and Exploitation

Age-based classifications have long been employed to protect the public from risks posed, or thought to be posed, by older adults. For example, some states require testing for older drivers that they do not require for younger ones,⁵² consistent with a common concern that predictable declines in functioning may impair driving abilities—endangering pedestrians and others on the road.⁵³

Increasingly, however, states are employing age-based criteria to protect older adults themselves. For example, in response to growing concerns about elder abuse in the late 1990s and first decade of the twenty-first century, most states adopted mandatory elder abuse reporting laws. These laws typically require at least certain members of the public to report information about suspected exploitation or abuse of older adults to state agency personnel.⁵⁴ Similarly, many states have created new statutes that aim to address sexual abuse of older adults by criminalizing engaging in certain behavior with an older adult, even though that behavior would be lawful with a younger one. For example, Washington criminalizes otherwise consensual sexual activity between disabled persons aged 60 or older and persons who provide them with paid

48. U.S. DEP'T OF THE INTERIOR, OFF. OF THE SEC'Y, PERS. BULL. NO. 12-16, MAXIMUM ENTRY AGE REQUIREMENTS AND MANDATORY RETIREMENT FOR LAW ENFORCEMENT OFFICERS AND FIREFIGHTERS (2013), [https://www.doi.gov/sites/doi.gov/files/elips/documents/\[https://perma.cc/2SPQ-6QT5\]](https://www.doi.gov/sites/doi.gov/files/elips/documents/[https://perma.cc/2SPQ-6QT5]).

49. See U.S. CONST. art. I, § 2.

50. See *id.* art. I, § 3.

51. See *id.* art. II, § 1.

52. See, e.g., FLA. STAT. § 322.18(5) (requiring a vision test for drivers aged 80 and older seeking a license); *License Renewal Procedures*, INS. INST. FOR HIGHWAY SAFETY (Jan. 2026), <https://www.iihs.org/topics/older-drivers/license-renewal-laws-table> [https://perma.cc/EAF4-ALNH] (comparing licensure renewal requirements for younger versus older drivers).

53. By contrast, physician screening requirements are left to employers and health care institutions. See Gayatri Devi, Darren R. Gitelman, Daniel Press & Kirk R. Daffner, *Cognitive Impairment in Aging Physicians*, 11 NEUROL. CLIN. PRAC. 167, 170 (2021).

54. See Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053, 1058–90 (2009) [hereinafter Kohn, *Outliving*] (providing an overview of elder abuse reporting statutes and discussing their implications on older adults' civil rights and civil liberties).

transportation.⁵⁵ Similarly, to address financial exploitation, some states have adopted laws that have the effect of criminalizing certain financial transactions with older adults even though the older adult consented to it.⁵⁶

Such age-based intrusions on liberty are not limited to situations where there is reason to believe the older adult is a victim of abuse or exploitation. In 2021, Florida adopted legislation that permits its courts to require individuals aged 60 or over who are alleged to be suffering from “infirmities of aging”⁵⁷ to both participate in and pay for eldercaring coordination” services. Termed a “dispute resolution process” by Florida statute,⁵⁸ eldercaring coordination involves a court appointing a professional “elder caring coordinator” who is empowered to, among other things, educate or negotiate the creation of a care plan for the older adult.⁵⁹ The court can make the appointment without any finding that the individual needs the services or is incapacitated.⁶⁰

As the above discussion might suggest, while designed to be protective, these age-based laws can substantially undermine older adults’ civil rights and civil liberties. For example, mandatory reporting laws that require doctors, lawyers, and clergy to share otherwise confidential information about older adults with state entities compromise older adults’ privacy interests and First Amendment rights.⁶¹ Similarly, laws that criminalize older adults’ financial transactions burden their freedom of contract, and laws that criminalize otherwise consensual sexual conduct burden sexual expression and freedom of association.⁶²

5. Health Care Rationing

Age is also used as a factor in various public and quasi-public systems for allocating scarce resources. Sometimes, this works to the advantage of older adults. For example, amid the COVID-19 pandemic, older adults were

55. *Id.* at 1092.

56. *Id.* at 1093–94.

57. *Id.* at 1085–86; FLA. STAT. § 44.407 (granting the court broad discretion to order any person 60 years of age or older into “eldercaring coordination” as part of certain proceedings involving the care and safety of an elder (including but not limited to a guardianship proceeding) if the individual is alleged to suffer from “infirmities of aging as manifested by a physical, a mental, or an emotional dysfunction to the extent that the elder’s ability to provide adequately for the protection or care of his or her own person or property is impaired”).

58. FLA. STAT. § 44.407(2)(d).

59. *Id.*

60. *Id.* § (3)–(4).

61. See generally Kohn, *Outliving*, *supra* note 54 (discussing the civil rights implications of mandating elder abuse reports).

62. See generally Nina A. Kohn, *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1 (2012) (discussing the civil rights implications of laws criminalizing elder abuse).

prioritized for key preventative care; most significantly, they were given high-priority for vaccination against COVID-19 when vaccine doses were scarce.⁶³

But other times, it works to the disadvantage of older adults. While older adults were prioritized for COVID-19 vaccination, during the height of the COVID-19 pandemic some states and health-care systems used triage standards that deprioritized older patients for curative care such as respirators and hospital beds. For example, Pennsylvania directed its hospitals to prioritize resources to adults based on “life stage,” with those aged 75 and older given lowest priority.⁶⁴ Likewise, Louisiana advised its hospitals to give lower priority to those aged 65 and older.⁶⁵

There is a strong argument to be made that policies like those in Louisiana and Pennsylvania are a violation of the Age Discrimination Act of 1975 (the “Age Act”)⁶⁶ and Section 1557 of the Affordable Care Act (the “ACA”),⁶⁷ to the extent that each uses age as a definitive criteria for eligibility and not as merely one factor in a multifactor triage decision.⁶⁸ However, both statutes permit policies that have a disparate impact on older adults, so long as the policies are based on “reasonable factors other than age” and are necessary to achieve a

63. Kathleen Dooling, Mona Marin, Megan Wallace, Nancy McClung, Mary Chamberland, Grace M. Lee, H. Keipp Talbot, José R. Romero, Beth P. Bell & Sara E. Oliver, *The Advisory Committee on Immunization Practices' Updated Interim Recommendation for Allocation of COVID-19 Vaccine – United States, December 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1657, 1657 (2021), <https://www.cdc.gov/mmwr/volumes/69/wr/mm695152e2.htm> [<https://perma.cc/8T76-FGZ2>] (summarizing CDC recommendations for prioritizing COVID-19 vaccinations during first months of availability); Vageesh Jain, Lara Schwarz & Paula Lorgelly, *A Rapid Review of COVID-19 Vaccine Prioritization in the U.S.: Alignment Between Federal Guidance and State Practice*, at 2, in 18 INT'L J. ENV'T RES. & PUB. HEALTH 3483 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8036633/> [<https://perma.cc/4BZK-KH3F>] (discussing how states prioritized initial COVID-19 vaccine doses).

64. See PA. DEP'T OF HEALTH & HOSP. & HEALTHSYSTEM ASS'N OF PA., INTERIM PENNSYLVANIA CRISIS STANDARDS OF CARE FOR PANDEMIC GUIDELINES 33 (2020), <https://www.pa.gov/content/dam/copapwp-pagov/en/health/documents/topics/documents/diseases-and-conditions/COVID-19%20Interim%20Crisis%20Standards%20of%20Care.pdf> [<https://perma.cc/SM6K-MH4V>].

65. See Nina A. Kohn, *The Pandemic Exposed a Painful Truth: America Doesn't Care About Old People*, WASH. POST (May 8, 2020), https://www.washingtonpost.com/outlook/nursing-home-coronavirus-discrimination-elderly-deaths/2020/05/07/751fc464-8fb7-11ea-9e23-6914ee410a5f_story.html [<https://perma.cc/UM3N-4AKD> (dark archive)].

66. Pub. L. 94-135, 89 Stat. 713, 728 (codified as amended at 42 U.S.C. §§ 6101–07); see also *Combating Discriminatory Crisis Standards of Care*, JUST. IN AGING (Sep. 2020), <https://justiceinaging.org/wp-content/uploads/2020/09/Combating-Discriminatory-Crisis-Standards-of-Care.pdf> [<https://perma.cc/6XU5-C8TL>].

67. Patient Protection and Affordable Care Act, Pub. L. 111-148, sec. 1557, 124 Stat. 119, 260 (codified as amended at 42 U.S.C. § 18116).

68. The applicability of both of these Acts is discussed further in Part II, *infra*. See also Susannah J. Gleason & William J. Keegan, *Ethical Considerations of Ventilator Triage During a Pandemic: Formulation and Implementation of Ventilator Triage and Other Scarce Resource Allocation Guidelines for Use During COVID-19*, 37 GA. STATE U. L. REV. 173, 194–95 (2020) (suggesting that a cut-off would violate the Age Act but using age as one factor would not).

stated policy goal.⁶⁹ And, perhaps reflecting the ambiguity, the federal government has largely turned a blind eye. Although the federal Department of Health and Human Services (“HHS”) issued guidance stating that “persons with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person’s relative ‘worth’ based on . . . age,” it stopped well short of suggesting that age could not be used to allocate healthcare resources.⁷⁰

This approach was consistent with the de-prioritization of older patients for curative care in other contexts. For example, the United Network for Organ Sharing, a nonprofit organization that contracts with HHS to administer a national organ procurement and transplantation network, considers potential recipient age when assigning priority scores. Thus, adult kidney transplant candidates receive a priority score that reflects their estimated length of post-transplant survival, and that calculation is based in large part on candidate age.⁷¹

B. *Legal Status of Age-Based Law and Policy*

To understand how age-based classifications have been able to proliferate, it is helpful to understand how the law currently treats age-based classification. Accordingly, this Section describes the current legal status of age-based classifications under federal and state law.

1. Permissibility Under Federal Law

The United States does not provide any generally applicable constitutional protection from age discrimination. The U.S. Supreme Court has consistently refused to treat age as a classification that warrants special consideration. Unlike classifications based on other questionable factors such as race, nationality, or gender, the Supreme Court has held that classifications based on age warrant no special scrutiny. Since the landmark case *Massachusetts Board of Retirement v.*

69. See Teneille R. Brown, Leslie P. Francis & James Tabery, *Should We Discriminate Among Discriminations?*, 14 ST. LOUIS U. J. HEALTH L. & POL’Y 359, 379–80 (2021) (considering what the Age Act does and does not permit in the healthcare context). *But see* Govind Persad, *Equal Protection and Scarce Therapies: The Role of Race, Sex, and Other Protected Classifications*, 75 SMU L. REV. F. 226, 237–38 (2022) (taking the position that age-based allocation of limited therapies is likely to be permissible under Section 1557—both when they favor or disfavor older adults).

70. U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. FOR C.R. IN ACTION, BULLETIN: CIVIL RIGHTS, HIPAA, AND THE CORONAVIRUS DISEASE 2019 (COVID-19) (Mar. 28, 2020), <https://us.pagefreezer.com/en-US/wa/browse/0a7f82bb-be6e-448a-ae11-373d22c37842?find-by-timestamp=2020-12-31T08:51:59Z&url=https:%2F%2Fwww.hhs.gov%2Fabout%2Fnews%2F2020%2F03%2F28%2Focr-issues-bulletin-on-civil-rights-laws-and-hipaa-flexibilities-that-apply-during-the-covid-19-emergency.html×tamp=2020-12-31T03:43:02Z> [https://perma.cc/Q5T3-L4Z9 (staff-uploaded archive)].

71. See *EPTS Calculator*, HEALTH RES. & SERVS. ADMIN. <https://optn.transplant.hrsa.gov/data/allocation-calculators/epts-calculator> [https://perma.cc/3UKL-VZMS] (last updated Dec. 2025) (providing a calculator to generate a score for a real or hypothetical transplant candidate).

Murgia,⁷² in 1976, the Supreme Court has consistently rejected arguments that age should be treated as a suspect classification, finding instead that policies that differentiate among people based on age are legally permissible provided they are rationally related to a legitimate state interest.⁷³ Thus, chronological age criteria may be readily used to establish benefits, duties, or rights.

Similarly, federal statutory and regulatory law provide only limited protection from age-based discrimination. There are three primary federal protections. First, and most significant, the Age Discrimination in Employment Act of 1967 (“ADEA”)⁷⁴ protects certain workers aged 40 and older from age discrimination.⁷⁵ The ADEA, however, does not protect all older workers. For example, it does not cover those employed by entities with fewer than 20 employees. This is a big gap in coverage, given that 89% of U.S. firms have fewer than 20 employees and that approximately 21.3 million workers (just over 16% of employees) work in firms with less than 20 employees.⁷⁶ In addition, the ADEA permits mandatory retirement of employees who are “bona fide executives”⁷⁷ (a term broadly defined to include a wide range of employees with managerial responsibilities),⁷⁸ employees in “high policymaking position[s],”⁷⁹ or firefighters or law enforcement officers.⁸⁰

72. 427 U.S. 307 (1976).

73. *Id.* at 312–17; *see also* Gregory v. Ashcroft, 501 U.S. 452, 452–54 (1991) (holding that a mandatory retirement age for state judges was constitutional); Vance v. Bradley, 440 U.S. 93, 93–94 (1979) (holding that a mandatory retirement age for certain federal workers was constitutional because plaintiffs had failed to show it created an irrational distinction); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (“States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision.”); Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 227–31 (2010) (discussing how the lower federal courts have accepted and applied *Murgia* and its progeny).

74. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–34).

75. 29 U.S.C. §§ 621–34.

76. *See Facts & Data on Small Business and Entrepreneurship*, SMALL BUS. & ENTREPRENEURSHIP COUNCIL, <https://sbecouncil.org/about-us/facts-and-data/> [<https://perma.cc/6RRP-5E8L>].

77. *See* 29 U.S.C. § 631(c); 29 C.F.R. § 1625.12(a).

78. *See* 29 C.F.R. § 1625.12(d)(1) (referring the reader to 29 C.F.R. § 541 for the definition of “bona fide executive,” now codified at 29 C.F.R. § 541.100); *id.* § 541.100 (effectively allowing the term to apply to those in management positions who supervise two or more employees and have some say in the employment status of others). *But see id.* § 1625.12(d)(2) (restricting the range of employees exempted from the ADEA’s prohibition on mandatory retirement by requiring those who are “bona fide executives” to meet additional criteria beyond 29 C.F.R. § 541.100 in order to receive such protection).

79. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189, 189 (codified as amended at 29 U.S.C. § 631(c)).

80. Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342, 3342 (codified as amended at 29 U.S.C. § 623(j)).

Second, the Age Act prohibits federally funded programs and activities from excluding, denying benefits to, or “discriminating” against individuals on the basis of age.⁸¹ However, the Age Act allows federally funded activities and programs to target services or benefits based on age if age is “a factor necessary to the normal operation” to achieve a statutory objective.⁸² Thus, because the Age Act permits the use of age-based classifications where they are authorized by federal or state law,⁸³ it is ill-equipped to address age discrimination that is at the core of the design of an activity or program.

Third, Section 1557 of the ACA prohibits individuals from being discriminated against on the basis of age in health programs and activities that receive federal assistance.⁸⁴ Section 1557 thus has the effect of extending the Age Act’s protections to all of the entities covered by the ACA, including healthcare marketplaces.⁸⁵

2. Permissibility Under State Law

Three states’ constitutions make age a protected class. First, Louisiana’s constitution states, “No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.”⁸⁶ This provision has been interpreted narrowly by the state’s courts as not precluding the state from distinguishing between adults and minors.⁸⁷ It also does not provide a remedy

81. See Age Discrimination Act of 1975, Pub. L. 94-135, 89 Stat. 713, 728 (codified as amended at 42 U.S.C. §§ 6101–07). The Age Act also provides a private right of action to enjoin violations. Amendments to Age Discrimination Act of 1975, Pub. L. 95-478, 92 Stat. 1513, 1555 (1978) (codified as amended at 42 U.S.C. § 6104(e)) (allowing “any interested person” to “bring[] an action . . . to enjoin a violation of this Act”).

82. Age Discrimination Act of 1975, Pub. L. No. 95-135, 89 Stat. 713, 729 § 1557 (codified as amended at 42 U.S.C. § 6103(b)(1)(a)).

83. Accord David Wasserman, Govind Persad & Joseph Millum, *Setting Priorities Fairly in Response to Covid-19: Identifying Overlapping Consensus and Reasonable Disagreement*, 7 J.L. & BIOSCIENCES 1, 6 (2020) (“The Age Discrimination Act of 1975 and regulations interpreting it permit the use of age as an effective proxy for another characteristic—like medical benefit—that is legitimate to consider. And they exempt from review age-based criteria that are authorized by federal, state, or local statutes or ordinances.”).

84. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, 260 (codified as amended at 42 U.S.C. § 18116(a)) (providing that “an individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance” on the basis of age).

85. Arguably consistent with both the Age Act and Section 1557, the U.S. Department of Health and Human Services took the position—without directly citing any underlying authority—that treatment decisions may not be based on “stereotypes and biases based on . . . age.” See U.S. DEPT. OF HEALTH & HUM. SERVS., CRISIS STANDARDS OF CARE AND CIVIL RIGHTS LAWS (2020), <https://files.asprtracie.hhs.gov/documents/crisis-standards-of-care-and-civil-rights-laws-covid-19.pdf> [<https://perma.cc/G3AK-GGJC> (staff-uploaded archive)].

86. LA. CONST. art. 1, § 3 (enumerating Louisiana’s “Right to Individual Dignity”).

87. Louisiana courts consistently reject challenges brought on behalf of younger adults, objecting to laws that treat them differently from older adults. See, e.g., *Latour v. State*, 778 So. 2d 557, 566 (La.

against private entities discriminating based on age.⁸⁸ Indeed, as discussed further in Subsection IV.A.4, Louisiana courts appear to have used the constitutional protection only three times to strike down instances of age discrimination—and all were in the context of employment discrimination.⁸⁹

Second, since November 2022, Nevada’s constitution has included age as a protected class.⁹⁰ Specifically, the state’s constitutional provision provides that “[e]quality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin.”⁹¹

Third, since November 2024, New York’s constitution prohibits denial of equal protection of the laws by the state “or any subdivision thereof . . . because of . . . age” but stipulates that this prohibition shall not “invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of” age.⁹²

Outside of these three states, state constitutions provide only very limited protection from age discrimination, if any. State constitutional guarantees of “equal protection” or equal “privileges and immunities” have occasionally been used to successfully challenge discrimination based on age. For example, the Montana Supreme Court held that a state law that increased pension benefits for retired beneficiaries aged 55 and older, but not younger retirees, amounted to irrational discrimination in violation of that state’s constitutional equal protection guarantee.⁹³ That court reached the same conclusion about a

2001) (upholding state law barring sale or purchase of lottery tickets to or by adults under age 21); *Manuel v. State*, 692 So. 2d 320, 338 (La. 1996) (holding on rehearing that a minimum drinking age of 21 was constitutional because it substantially furthered the governmental purpose of improving highway safety).

88. See LA. CONST. art. 1, § 3 (“No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . age.” (emphasis added)); see also *State v. Eames*, 365 So. 2d 1361, 1368–69 (La. 1978) (Dennis, J., concurring) (explaining that LA. CONST. art. 1, § 3 prohibits “state action”).

89. The three cases discussed herein were identified through a thorough and comprehensive review of published cases using the Westlaw database. That review and additional searches verified that they were the only three such cases on Westlaw. See, e.g., WESTLAW, + “age discrimination” + “art. I, § 3”, 9 results (Jan. 9, 2026) (on file with the North Carolina Law Review) (returning only three cases that use Louisiana’s Right to Individual Dignity to prohibit instances of age discrimination).

90. NEV. CONST. art. I, § 24.

91. *Id.*

92. N.Y. CONST. art. I, § 11 (West, through Nov. 2024 amendments). Notably, the age-based protection in the amendment was not given much attention by either proponents or opponents. See, e.g., Press Release, ACLU of N.Y., *supra* note 4 (discussing the ACLU of New York’s support for the proposal, without discussion of its impact on age-based classification).

93. See *Arneson v. State*, 864 P.2d 1245, 1248–49 (Mont. 1993); see also Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS U. L.J. 1013, 1079–80, 1104–05 (2003) (discussing *Arneson* and other state age-discrimination cases).

statutory provision that prohibited those aged 34 and older from being hired as firefighters.⁹⁴

However, states have typically rejected claims that age discrimination runs afoul of state constitutional protections.⁹⁵ This is true even in states that closely scrutinize legal classifications. For example, the Vermont Supreme Court has held that allegedly unconstitutional classifications must “bear[] a reasonable and just relation to the governmental purpose” for which they are used.⁹⁶ To determine whether this standard is met, Vermont considers “(1) the significance of the benefits to the excluded group; (2) whether the omission of a part of the community promotes the government’s stated goals; and (3) whether the classification is overinclusive or underinclusive.”⁹⁷ Yet the Vermont Supreme Court found constitutional a state policy that mandated police officers retire at age 55, finding it “reasonable and just in light of its purpose.”⁹⁸

State statutory protections are also limited. The one area in which there are substantial state protections is employment.⁹⁹ As noted previously, one of the key limitations of the ADEA is that it does not provide protection to those employed by businesses with fewer than 20 employees.¹⁰⁰ Many states, however, have adopted statutes that apply to smaller employers.¹⁰¹ Similarly, the ADEA

94. *Jaksha v. Butte-Silver Bow County*, 214 P. 3d 1248, 1248 (Mont. 2009). Similarly, in *Nelson v. Miwa*, 546 P.2d 1005 (Haw. 1976), the Hawaii Supreme Court held that a state policy that led to a professor’s job being terminated because he turned 65 was unconstitutional because it was “totally arbitrary” and “not reasonably related to a state interest.” *Id.* at 1013. The court, however, did not explain whether it was interpreting the state’s constitution or the federal one. *See id.* As the case was decided prior to the U.S. Supreme Court’s *Murgia* decision, whether it is still good law is an open question.

95. *See, e.g., Landers v. Stone*, 496 S.W.3d 370, 377–81 (Ark. 2016) (applying the rational basis review approach articulated by *Murgia* and its progeny to reject a claim that a judicial retirement system, which penalized judges over 70 who run for or are elected to a new term, violated the state’s constitutional equal protection provisions); *Nagle v. Bd. of Educ.*, 629 P.2d 109, 119 (Haw. 1981) (finding statute that mandated that public school teachers retire at age 65 did not violate the Hawaii constitution’s equal protection or due process provisions).

96. *See, e.g., Badgley v. Walton*, 10 A.3d 469, 478 (Vt. 2010) (citing *Baker v. State*, 744 A.2d 864, 879 (Vt. 1999)).

97. *Id.*

98. *Id.* at 470–71, 477.

99. *See* Cara Yates, Annotation, *Application of State Law to Age Discrimination in Employment*, 51 A.L.R. 5th 1 (2025) (exploring state age discrimination in employment laws).

100. *See supra* note 72 and accompanying text.

101. *See* ALASKA STAT. § 18.80.220(1); ARK. CODE ANN. § 16-123-107; CAL. GOV’T CODE § 12940(a); COLO. REV. STAT. § 24-34-402(1)(a)(I); CONN. GEN. STAT. § 46a-60(b)(1); DEL. CODE ANN. tit. 19, § 711(b); D.C. CODE § 2-1402.11; HAW. REV. STAT. § 378-2(a)(1); IDAHO CODE § 67-5909; IND. CODE § 22-9-2; IOWA CODE § 216.6; KAN. STAT. ANN. § 44-1113; KY. REV. STAT. ANN. § 344.040(1); ME. STAT. tit. 5, § 4572(1); MASS. GEN. LAWS ch. 151B, § 4; MICH. COMP. LAWS § 37.2202; MINN. STAT. § 363A.08; MISS. CODE ANN. § 25-9-149 (limited to state employees); MO. REV. STAT. § 213.055; MONT. CODE ANN. § 49-2-303 (limited to when the reasonable demands of the position do not require distinction based on age); N.H. REV. STAT. ANN. § 354-A:7; N.J. STAT. ANN. § 10:5-12; N.M. STAT. ANN. § 28-1-7; N.Y. EXEC. LAW § 296(1); N.D. CENT. CODE § 14-02.4-01; OHIO REV. CODE ANN. § 4112.02; OKLA. STAT. tit. 25, § 1302; OR. REV. STAT. § 659A.030; 43

permits mandatory retirement of “bona fide executives,”¹⁰² a term that can wrap in a wide range of employees with managerial responsibilities or authorities.¹⁰³ On this issue, too, many states have substantially expanded protection for workers by adopting statutes that lack the exception.¹⁰⁴

Outside of the employment context, by contrast, state statutory protections are more of a rarity, but are not unheard of. For example, some states have statutes that protect against age discrimination in healthcare.¹⁰⁵ Such statutes typically apply to certain types of health care providers or health care settings.¹⁰⁶ For example, Oregon prohibits health plans from excluding individuals on the basis of age,¹⁰⁷ and South Carolina prohibits home health plans from discriminating on the basis of age when determining whether to recruit or serve particular patients.¹⁰⁸

II. IMAGINING A WORLD WITHOUT AGE-BASED POLICY

As Part I explored, age-based classifications are used in a myriad of ways, some well-recognized, others underappreciated. This Part describes the theoretical justifications that underpin these diverse uses. Specifically, it describes five purposes that age-based classifications are employed to serve: (1) allocating resources to those who need them, (2) promoting egalitarianism, (3) allocating resources to those who deserve them, (4) improving the human experience by helping mitigate against the “terror” of aging, and (5) excluding

PA. STAT. AND CONS. STAT. ANN. § 955; 28 R.I. GEN. LAWS § 28-5-7; TENN. CODE ANN. § 4-21-401; VT. STAT. ANN. tit. 21, § 495; WASH. REV. CODE § 49.60.180; W. VA. CODE § 16B-17-9; WIS. STAT. § 111.321; WYO. STAT. ANN. § 27-9-105.

102. 29 U.S.C. § 631.

103. See 29 C.F.R. § 541.100(a) (defining “bona fide executive” as including an employee who: “(1) is compensated on a salary basis at not less than \$844 per week (rising to \$1,128 per week on July 2, 2025); (2) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) who customarily and regularly directs the work of two or more other employees; and (4) has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.”). However, even if the employee meets the definition of “bona fide executive” pursuant to § 541.1, the exemption will generally not apply unless the employee is also a “top level employee who exercises a substantial executive authority over a significant number of employees and a large volume of business.” *Id.* § 1625.12 (d)(11)(2).

104. See, e.g., CAL. GOV'T CODE § 12940; ME. STAT. tit. 5, § 4572; MINN. STAT. § 363A.08; OR. REV. STAT. § 659A.030; VT. STAT. ANN. tit. 21, § 495.

105. See Persad, *Evaluating*, *supra* note 16, at 901–02 (citing a handful of state statutes that protect against discrimination on the basis of age in particular medical contexts, such as home health care or mental health treatment).

106. See *id.* at 902 n.56.

107. OR. REV. STAT. § 659.875(1) (2023).

108. S.C. CODE ANN. § 44-69-80 (2025).

those with limited abilities.¹⁰⁹ It then considers whether these objectives could be met without the use of age-based classifications.

A. *Functions of Age-Based Classifications*

1. Allocate Resources

Age-based classifications are primarily used in policy to allocate resources that are scarce or seen as too costly to provide to all who need them. Age is an appealing proxy for need, in part because it is easier to administer than more direct indicators, such as those that might require an individualized assessment.¹¹⁰ Because chronological age can be readily determined, age classifications allow the targeting of resources without the need for a more complex inquiry into subjective qualities such as maturity, frailty, or vulnerability.

When age is used as a proxy for need in public policies that differentiate among adults, it is typically to provide older adults with benefits that are not granted to younger adults. Indeed, that is the design of the United States' most expensive entitlement programs: Social Security and Medicare. Most people only become eligible for these programs once they reach a certain age. Similarly, other major entitlement programs, including SSI and Medicaid, have more favorable eligibility criteria for older adults.

Targeting income support, health coverage, and tax breaks at older adults is a way of allocating resources to a group seen as disproportionately vulnerable to economic insecurity (e.g., because of decreased ability to hold paid employment) and medical costs (e.g., because of greater health needs). Similarly, one justification for targeting protection from financial mistreatment at older adults is that older adults are seen as more susceptible to that mistreatment and less resilient to negative financial shocks. For example, an older adult who is scammed out of life savings is typically in a worse position to recoup those savings than a younger adult who can more readily find employment. Indeed, age-based policy is commonly justified by reference to stereotypes of older adults as frail and needy.¹¹¹ Thus, age-based classification is

109. This typology is imperfect as the categories sometimes overlap but disentangling them in this way is instructive and helps illuminate the multiple (and sometimes competing) purposes age-based policy can aim to accomplish.

110. Cf. Neuman & Ibrahim, *supra* note 17, at 235 (observing that the usefulness of proxies such as chronological age “depends on a comparison with alternative options, including the cost, accuracy, and intrusiveness of more individualized assessments”).

111. See generally Douglas W. Nelson, *Alternative Images of Old Age as Bases for Policy*, in *AGE OR NEED?* (Bernice Neugarten ed. 1982) (discussing justifications for age-based policy); Reuben Ng, Ting Yu Joanne Chow & Wenshu Yang, *The Impact of Aging Policy on Societal Age Stereotypes and Ageism*, 62 *GERONTOLOGIST* 598 (2022) (exploring the relationship between age-based policy and ageism).

central to redistribution of resources in modern America and may be seen as furthering distributive justice goals.

2. Promote Egalitarianism

Age-based classifications have also been advocated on the grounds of egalitarianism. At its core, egalitarianism is a philosophy that all human beings have equal “moral worth” and that a just society is therefore one in which people are treated as equals.¹¹² Depending on the theory of egalitarianism employed, egalitarianism can be invoked to argue that the old should be favored or quite the opposite: that the young should be favored.

A lifetime egalitarianism theory of justice, which posits that individuals are treated equally if they have equal opportunities during their lives, can be used as a basis to justify prioritizing younger adults over older ones.¹¹³ Most prominently, the “fair innings” theory, originally coined by John Harris,¹¹⁴ favors prioritizing younger adults over older adults when allocating scarce resources. The theory posits that, relative to younger persons, older adults have already had their “fair innings,” or fair share of opportunities, and thus it may be justifiable to prioritize younger individuals for certain resources or opportunities.

As concerns about racial and socioeconomic equity gain prominence, this theory has gained greater scholarly support. Influential scholars and thought-leaders routinely condone age-based rationing of scarce medical resources on the grounds that older adults have already had their “fair innings.”¹¹⁵ For example, health law scholar Jessica Mantel has warned against allocating health care resources based on quality-adjusted life expectancy because it disadvantages persons with disabilities.¹¹⁶ She advocates instead for rationing scarce resources based on age alone, declaring it ethical to favor younger people because such rationing is based on lifespan and not negative stereotypes about older adults.¹¹⁷ Notably, the fair innings rationale seems to align with commonly held views in the United States.¹¹⁸

112. See Juliana Bidadure & David Axelsen, *Egalitarianism*, STAN. ENCYC. OF PHIL. (Mar 12, 2025), <https://plato.stanford.edu/entries/egalitarianism/> [<https://perma.cc/G43M-T6PQ>].

113. See generally Pnina Alon-Shenker, *The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination*, 25 CAN. J.L. & JURIS. 243 (2012) (describing and critiquing the “complete lives” vision of egalitarianism).

114. See JOHN HARRIS, *THE VALUE OF LIFE* 91–94 (1985).

115. See, e.g., Wasserman, Persad & Millum, *supra* note 83, at 12 (arguing that “any reasonable” triage protocol “should favor younger over older patients, at least when other things are equal”); Persad, *Evaluating*, *supra* note 16, at 925–29 (urging age-based discrimination in the healthcare context).

116. Jessica Mantel, *Age Is More than Just a Number: A Legal and Ethical Defense of Age-Based Triage Protocols*, 111 KY. L.J. 387, 408–09 (2023).

117. *Id.* at 420–22.

118. See Ryan M. Antiel, Farr A. Curlin, Govind Persad, Douglas B. White, Cathy Zhang, Aaron Glickman, Ezekiel J Emanuel & John D. Lantos, *Should Pediatric Patients Be Prioritized When Rationing*

By comparison, a temporal approach to egalitarianism would treat people with equal respect and dignity regardless of their phase of life.¹¹⁹ Under this approach, shifting resources to those who are older may be appropriate to compensate for the challenges and vulnerabilities associated with older age. As many a birthday card has joked, in one way or another, being old is not easy. It typically comes with decreased earning potential, increased health concerns, and dwindling life savings.

3. Reward the Deserving

Age-based classifications are also justified on the grounds that they can allocate resources to people who are the most deserving of those resources.

Targeting resources to older adults has, for example, been justified on the principle of desert; that is, that it allocates resources to those who have earned them and are therefore deserving of them. In a classic work published in 1982, for example, Douglas W. Nelson posited that favorable legal treatment for older adults can serve to recognize the value that older adults have contributed to society, and thus pro-elderly policy may be justified by seeing old age as an “earned status.” If adulthood is seen as a time during which one contributes to society, including by engaging in self-sacrifice, old-age benefits can be justified as “repayment by the larger community.”¹²⁰

The principle of desert, however, is also sometimes used to argue for allocating resources to younger adults. For example, the “fair innings” approach is sometimes advocated not merely on egalitarian grounds, but also by reference to the principle of desert: that is, younger adults deserve the opportunities that older ones have had.

4. Exclude

At times, public policies use age-based criteria to exclude older adults due to concerns about their physical or mental abilities. For example, as noted in Part II, most states do not allow state court judges to remain on the bench after a certain age (most commonly, 70),¹²¹ and firefighters and law enforcement officers are also commonly subject to a mandatory retirement age.¹²² These criteria reflect concerns about age-related disability—physical, cognitive, or

Life-Saving Treatments During COVID-19 Pandemic, at 4, in 146 PEDIATRICS art. 3 (2020), http://publications.aap.org/pediatrics/article-pdf/146/3/e2020012542/1081393/peds_2020012542.pdf [<https://perma.cc/3758-UGRY>] (discussing research showing public attitudes favoring the young when allocating scarce medical resources).

119. See Alon-Shenker, *supra* note 113, at 252 (advocating for a “dignified lives approach” to age discrimination, described as “treating individuals with equal concern and respect *at any given time* and not just when considering their lives as a whole”).

120. Nelson, *supra* note 111, at 157.

121. See *supra* note 43 and accompanying text.

122. See *supra* note 45 and accompanying text.

both—interfering with job performance.¹²³ In this way, age-based classifications are a pretense for disability discrimination. They allow actors to exclude persons believed to be at high risk for disability, without admitting to discrimination on the basis of disability, which is increasingly seen as both morally and legally impermissible.

In recent years, there has been a growing sentiment in favor of age-based limitations for other public servants—namely, elected officials—reflected in part by concerns about the cognitive well-being of candidates in the 2024 U.S. Presidential election.¹²⁴ This reflects a mismatch between voters' stated preferences and who they actually elect. Voters tend to prefer younger and middle-aged candidates relative to elderly ones,¹²⁵ but elected officials tend to be substantially older than the voting-age population.¹²⁶ A 2023 Pew Research Center poll found that 79% of Americans favor age limits for elected officials.¹²⁷ Consistent with these preferences, efforts to raise mandatory retirement ages for state court judges have typically been met with disapproval by voters.¹²⁸

5. Manage Terror

Although most people hope to grow old and will put themselves through great pain and expense to increase life expectancy, the thought of aging often evokes feelings of fear among individuals and societies alike. This fear of aging reflects unease about increased vulnerability, as well as specific concerns such

123. As Francis Shen has noted, there are other theoretical justifications one might offer for mandatory judicial retirement including that

older judges grew up in a different culture, and may judge with different cultural sensitivities than younger judges; older judges are more distant in age from more youthful parties appearing in court; and older judges, as a cohort, are less diverse along a variety of dimensions than cohorts of younger judges.

Shen, *supra* note 44, at 275. However, these justifications do not appear to be what has motivated states to adopt mandatory retirement ages, or courts to uphold them. Rather, the animating concern appears to be concerns about age-associated cognitive decline.

124. See *supra* note 12 and accompanying text.

125. Charles T. McClean & Yoshikuni Ono, *Too Young To Run? Voter Evaluations of the Age of Candidates*, 46 POL. BEHAV. 2333, 2335–36 (2024) (finding that surveyed Japanese voters preferred young and middle-aged candidates for elected office over elderly ones and that older ones were perceived as less competent).

126. See Daniel Stockemer & Aksel Sundström, *Age Inequalities in Political Representation: A Review Article*, 60 GOV'T & OPPOSITION 271, 272 (2025) (discussing under-representation of younger adults in elected office worldwide).

127. John Gramlich, *Most Americans Favor Maximum Age Limits for Federal Elected Officials, Supreme Court Justices*, PEW RSCH. CTR. (Oct. 4, 2023), <https://www.pewresearch.org/short-reads/2023/10/04/most-americans-favor-maximum-age-limits-for-federal-elected-officials-supreme-court-justices/> [https://perma.cc/54U2-M5L7]. Notably, preferences varied slightly by political affiliation: 82% of Republicans and 76% of Democrats supported a maximum age limit for elected officials serving in Washington, D.C. *Id.*

128. Shen, *supra* note 44, at 246–48 (describing efforts to raise the mandatory retirement age for judges and their fate at the ballot box).

as health problems, financial insecurity, social isolation, and the loss of independence.¹²⁹ As individuals grow older, they often face declining health, reduced mobility, and increased reliance on others for care. The fear of burdening family members or society amplifies these concerns, leading to anxiety and distress. Furthermore, ageism—the stereotyping and discrimination against individuals based on their age—exacerbates feelings of vulnerability and marginalization among older adults.

Public policies that respond to the vulnerability of aging individuals can shape how individuals and societies perceive the challenges associated with aging, alleviating fears while enhancing quality of life for older adults. Old-age entitlements respond to the societal terror of aging. In a world in which youthfulness is prized and aging dreaded,¹³⁰ favorable treatment for older adults is a tool for combating the fear of aging, thus reducing terror associated with growing older, not only for the old but also for the young anticipating older age. For example, a chief concern people face when contemplating their future, older self is financial insecurity. Social Security benefits targeted at older adults can help address this concern. Likewise, programs such as Medicare and Medicaid, which make quality healthcare affordable for most older adults, can mitigate against fear of aging, since a chief concern associated with aging is access to good healthcare. Similarly, policies that provide long-term care to older adults may mitigate concerns about becoming a burden to family.

In so doing, such policies may also decrease ageism. Terror management theorists have explained that human beings respond to the instinctive anxiety over their own mortality by creating psychological mechanisms to combat that anxiety. Gerontologists have explained that one such response is to “avoid” and disassociate from older people. For example, Andy Martens, Jamie Goldenberg, and Jeff Greenberg have argued that fear of one’s own death helps explain negative attitudes towards older adults in general.¹³¹ Specifically, they explain that older people, and their aging bodies, serve as an unwelcome reminder of

129. Cf. Fiona S. Rupprecht, Kristina Martin & Frieder R. Lang, *Aging-Related Fears and Their Association with Ideal Life Expectancy*, 19 EUR. J. AGEING 587, 588 (2022) (describing fears underlying the fear of aging, and studying the relationship between three of those fears—fear of loneliness, fear of illness, and fear of death—on people’s preferred life expectancy and finding that fears are sufficiently strong that they reduce people’s desire for longer life).

130. The country’s \$22 billion anti-aging industry is a testament to the intense fear of aging, and the negative qualities associated with growing older. See Deepa Pandley, *Anti-aging Market Size, Share and Trends 2026 to 2035*, PRECEDENCE RSCH., <https://www.precedenceresearch.com/anti-aging-market> [<https://perma.cc/YMR3-838X>] (reporting on the size of the U.S. market) (last updated Dec. 2025). Globally, the anti-aging market has an estimated value of approximately \$80 billion, and is expected to grow to exceed over \$162 billion by 2034. See *Global Anti-Aging Market 2025–2034*, CUSTOM MKT. INSIGHTS, <https://www.custommarketinsights.com/report/anti-aging-market/> [<https://perma.cc/B5RE-Y9RF>] (last updated Dec. 2025).

131. See Andy Martens, Jamie L. Goldenberg & Jeff Greenberg, *A Terror Management Perspective on Ageism*, 61 J. SOC. ISSUES 223, 223–24 (2005).

people's own mortality.¹³² Programs that help address key concerns associated with aging—such as illness, frailty, and loneliness—may thus serve not only to mitigate the “terror” of aging, but also to reduce ageism.

B. *Impact of Abandoning Age-Based Classifications on Policy Objectives*

Having laid out the purposes that age-based classifications theoretically serve, this Section now considers whether, and how, the objectives underlying modern age-based policy could be met without the use of age-based classifications. To do so, it revisits the theoretical justifications for age-based policy outlined in Section II.A and considers whether they could be achieved in alternative ways. This analysis suggests that some of the key objectives of age-based laws could not feasibly be met without such classifications.

1. Impact on Resource Allocation

The first objective of age-based policy—to provide for those who are most in need—could be met through alternative means. One approach would target resources based solely on the financial means of resource recipients. Targeting public benefits at those who meet certain financial criteria (based on income, assets, or both) directs public resources to individuals or families who are genuinely in need. Focusing assistance on those with lesser means avoids devoting resources to individuals who, although age qualified, do not require additional support to meet their needs.

Means-testing as an alternative to age-based eligibility is not without costs, however. Conditioning benefits on financial means involves a greater administrative burden than conditioning benefits on chronological age, as verifying eligibility is more complex. It also creates, at least on the margins, a risk of disincentivizing economically productive behavior. Income tests, for example, may create disincentives for individuals to improve their economic well-being for fear that benefits will be reduced or eliminated as their income rises. Likewise, asset tests can discourage savings as additional resources threaten to push individuals over eligibility limits and thus risk loss of benefits. The resulting “poverty trap” can perpetuate cycles of dependency and hinder efforts to improve individuals' economic situations. These problems, however, can be mitigated by careful design of means-tested programs, like gradual phase-outs that prevent the abrupt withdrawal of support as income or assets rise.

Moreover, there is the risk that eligibility criteria based solely on income thresholds may overlook other factors that shape need, such as regional cost of living disparities, disability, or caregiving responsibilities. A narrow focus on

132. *Id.* at 227–28.

income and assets may result in exclusion of vulnerable populations who may require support despite not meeting strict income or asset criteria.

A second alternative to age classifications would be to tie interventions to vulnerability itself. Recognizing that vulnerability is inherent to the human condition, Martha Fineman has posited that governments should allocate resources in a way that ensures everyone has equal access to the societal institutions that distribute resources.¹³³

By targeting resources based on vulnerability and not age, governments could more carefully tailor social welfare interventions and do so in a way that does not perpetuate ageism. Accordingly, critics of age-based policies sometimes point to Martha Fineman's "vulnerability theory" as a framework for an alternative approach. For example, Titti Mattsson and Lottie Giertz have argued that, rather than allocating social services based on group-based identities like age or diagnosis, the State should allocate resources based on more individualistic assessments of vulnerability.¹³⁴ Alex Boni-Saenz also takes a favorable view of targeting interventions based on vulnerability rather than old age, observing that age-based classifications have historically served as a proxy for vulnerability in the first place.¹³⁵

However, as vulnerability is a universal condition, it is impossible to target interventions based merely on vulnerability.¹³⁶ Rather, operationalizing vulnerability as a targeting mechanism requires it to be defined in relation to the threat being addressed. As I have explained elsewhere:

[I]magine a state wished to address the problem of financial exploitation. Adopting a vulnerability approach would suggest that states should resist the urge to create age-specific crimes (like "elder abuse" or "exploitation of an elderly adult"). Instead, the state should identify factors that make people susceptible to such exploitation or its impacts and allocate resources with a view to supporting conditions that increase resilience to financial exploitation. Thus, states might support interventions that target conditions associated with the risk of exploitation, such as social isolation, lack of long-term care supports, limited financial literacy, and

133. Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9–15 (2008) (introducing the theory).

134. Titti Mattsson & Lottie Giertz, *Vulnerability, Law, and Dementia: An Interdisciplinary Discussion of Legislation and Practice*, 21 THEORETICAL INQUIRES L. 139, 143–44 (2020).

135. See Alexander A. Boni-Saenz, *Age, Equality, and Vulnerability*, 21 THEORETICAL INQUIRES L. 161, 162–63 (2019) (embracing Fineman's focus on vulnerability but urging an end-goal of "sufficiency," not equality).

136. Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 21–23 (2014).

lack of access to civil legal services for those who experience exploitation.¹³⁷

That is, resources must be based on individuals' vulnerability to the specific problem being addressed. Notably, this is consistent with recognizing—as Fineman has explained¹³⁸—that vulnerability stems from an individual's relationship with their environment.

In short, vulnerability might be a reasonable alternative targeting mechanism in some contexts. That said, it is likely less efficient than an age-based system considering both the administrative costs as well as the greater risk that potential beneficiaries will game the system to obtain benefits by presenting indicators of vulnerability that administrators do not have the time or resources to assess objectively. Indeed, in many contexts, a vulnerability-based approach may be practically impossible to operationalize without reference to group identity characteristics such as age or gender. The result is that a vulnerability approach could collapse into one that targets people based on identity characteristics such as “old age” or “disability” or poverty status, while stigmatizing those populations with the label of “vulnerable”—thus potentially feeding into existing forms of prejudice such as ageism and ableism.

Nevertheless, in many cases these alternative targeting mechanisms might be superior to the age-based classifications they would replace. While age is an appealing proxy for need, it has several major weaknesses. First, it is not a very accurate predictor of need. For example, old age is not—contrary to public perceptions—a particularly good indicator of an individual's underlying health care status or needs. As individuals within a cohort age up together, they become more heterogeneous. This heterogeneity reflects not only differences in experiences and genetics, but also the snowballing effect of cumulative advantages and disadvantages over the life course. Cohort members with higher socioeconomic status and greater levels of education tend to experience superior health and fewer functional limitations relative to members with lower socioeconomic status and fewer years of education.¹³⁹ Indeed, research suggests functional performance heterogeneity is highest for the very old (i.e., those 85 and older).¹⁴⁰ Only at very old ages does chronological age correlate well with disability. For example, most people in the United States over the age of 65 (the age at which people are frequently classified as “older adults”) do not have any substantial cognitive impairment, but as individuals enter their 90s it becomes

137. Nina A. Kohn, *Age-Based Classifications in an Age of Centenarians*, in *LAW AND THE 100-YEAR LIFE* 119 (Anne L. Alstott, Abbe R. Gluck & Eugene Rusyn, eds., 2025) [hereinafter Kohn, *Centenarians*].

138. Fineman, *supra* note 133, at 9–10.

139. David J. Lowsky, S. Jay Olshansky, Jay Bhattacharya & Dana P. Goldman, *Heterogeneity in Healthy Aging*, 69 *J. GERONTOLOG. SERIES A. BIO. SCI. MED. SCI.* 640, 647 (2013).

140. *See id.* at 643 fig. 2.

prevalent. Indeed, less than 5% of Americans in their 70s have dementia, although more than a third of those age 90 and over have dementia.¹⁴¹

Second, and relatedly, since not all older adults are needy, using age as a proxy for need when determining eligibility for benefits comes at substantial fiscal cost. Indeed, as the proportion of the population made up of older adults increases,¹⁴² programs such as Social Security and Medicare, which base eligibility primarily on older age, have become ever more costly. When Medicare began, people over the age of 65 constituted only 10% of the population,¹⁴³ by the 2020 Census, that had increased to 16.8%.¹⁴⁴ Thus, Social Security¹⁴⁵ and Medicare¹⁴⁶ will need to collect substantially more funds or will have to limit benefits or change eligibility requirements.

Third, using chronological age as a proxy perpetuates stereotypes of older adults as frail and dependent. For example, laws that limit older adults' civil rights in the name of protecting them (such as some of the laws aimed at remedying elder mistreatment discussed in Subsection II.A.4) reflect and amplify stereotypes that older adults are dependent, incapable, and frail. This fans the flames of ageism. Individuals who perceive older adults as frail are more likely to support social exclusion of older adults. One study of New York City residents' attitude toward older adults found that nearly 40% of younger adults thought that "older adults need to be protected from the harsh realities of society" and more than a quarter thought that older adults "shouldn't be allowed to work" because "they are fragile and may get sick."¹⁴⁷

141. B.L. Plassman, K.M. Langa, G.G. Fisher, S.G. Heeringa, D.R. Weir, M.B. Ofstedal, J.R. Burke, M.D. Hurd, G.G. Potter, W.L. Rodgers, D.C. Steffens, R.J. Willis & R.B. Wallace, *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 *NEUROEPIDEMIOLOGY* 125, 128 (2007).

142. Life expectancy has increased substantially in the past century and continues to climb. Average life expectancy is anticipated to increase by approximately six years between 2017 and 2060. Lauren Medina, Shannon Sabo & Jonathan Vespa, *Living Longer: Historical and Projected Life Expectancy in the United States, 1960 to 2060*, U.S. CENSUS BUREAU (Feb. 2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1145.pdf> [<https://perma.cc/8DH6-RJVT>].

143. Marian E. Gornick, Joan L. Warren, Paul W. Eggers, James D. Lubitz, Nancy De Lew, Margaret H. Davis & Barbara S. Cooper, *Thirty Years of Medicare: Impact on the Covered Population*, 18 *HEALTH CARE FIN. REV.* 179, 188 (1996).

144. Zoe Caplan, *U.S. Older Population Grew from 2010 to 2020 at Fastest Rate Since 1880 to 1890*, U.S. CENSUS BUREAU (May 25, 2023), <https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html> [<https://perma.cc/2XND-ZFNT>].

145. Cf. Anne L. Alstott, *A New Deal for Old Age*, 97 *B.U. L. REV.* 1933, 1939–40 (2017) (arguing that raising the retirement age for higher-income workers is appropriate in light of concerns about Social Security solvency and justice across the lifespan).

146. TRICIA NEUMAN & JULIETTE CUBANSKI, KAISER FAM. FOUND., *RAISING THE AGE OF MEDICARE ELIGIBILITY: A FRESH LOOK FOLLOWING IMPLEMENTATION OF HEALTH REFORM 1* (2011), <https://www.kff.org/wp-content/uploads/2013/01/8169.pdf> [<https://perma.cc/8JCH-VTKL>] (examining the effects of raising the Medicare eligibility age to 67).

147. N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, *EPI DATA BRIEF NO. 136, HOW AGEIST ARE WE, NEW YORK CITY?* (2023),

By perpetuating such stereotypes, these laws may be counterproductive. Evidence suggests that people with ageist attitudes are more likely to perpetuate mistreatment.¹⁴⁸ Gerontologist Erdman Palmore explained that “stereotypes of the old as helpless, worthless, and repulsive” may encourage “people to vent their frustrations on elders or to see them as vulnerable targets for exploitation.”¹⁴⁹

The risk of perpetuating ageism is significant because ageism in the United States is already entrenched and substantially harms human well-being. Ageism in the employment sector causes businesses to lose valuable employees.¹⁵⁰ Ageism in social settings reduces community cohesion and social capital.¹⁵¹ Perhaps most consequential, internalized ageism is associated with decreased physical and mental well-being.¹⁵² Becca Levy’s work to quantify this impact suggests it is very substantial. Levy finds that individuals who view aging positively live, on average, seven and a half years longer than those who have a negative outlook on aging.¹⁵³ In addition, Levy estimates that ageism results in \$63 billion in increased healthcare costs in the United States annually.¹⁵⁴

In short, to the extent that the purpose of age-based classifications is to target resources to the needy, that objective could be met in alternative ways. But doing so would likely involve substantially greater administrative costs. In some cases, actors might accept these higher costs. However, in others, they might forego redistribution altogether, opting instead not to distribute resources to the needy. This risk is heightened by the fact that, were key benefits currently distributed on the basis of age instead distributed based solely on financial need or some metric of “vulnerability,” the political constituency

<https://www.nyc.gov/assets/doh/downloads/pdf/epi/databrief136.pdf> [https://perma.cc/4PT4-5CU8] (reporting results of a 2019 poll).

148. Karl Pillemer, David Burnes & Andie MacNeil, *Investigating the Connection Between Ageism and Elder Mistreatment*, at 163, in 1 NAT. AGING 159 (2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10687725/pdf/nihms-1930087.pdf> [https://perma.cc/GA75-TY9F].

149. See ERDMAN B. PALMORE, AGEISM: NEGATIVE & POSITIVE 138 (2d ed. 1999).

150. See TRACEY GENDRON, AGEISM UNMASKED: EXPLORING AGE BIAS AND HOW TO END IT 14–15 (2022) (summarizing the research on ageism’s impact on business).

151. See *id.* at 15.

152. See *id.* at 14 (summarizing the research on the impact of ageism on well-being); see, e.g., Rylee A. Dionigi, *Stereotypes of Aging: Their Effects on the Health of Older Adults*, at 1, 2–5, in J. GERIATR. (2015), <https://onlinelibrary.wiley.com/doi/epdf/10.1155/2015/954027> [https://perma.cc/7RN3-277S (staff-uploaded, dark archive)]; *Discrimination and Negative Attitudes About Ageing Are Bad for Your Health*, WORLD HEALTH ORG. (Sep. 29, 2016), <https://www.who.int/news/item/29-09-2016-discrimination-and-negative-attitudes-about-ageing-are-bad-for-your-health> [https://perma.cc/PH9E-LM87].

153. See Becca R. Levy, Martin D. Slade, Suzanne R. Kunkel & Stanislav V. Kasl, *Longevity Increased by Positive Self-Perceptions of Aging*, 83 J. PERSONALITY & SOC. PSYCH. 261, 265 (2002); see also BECCA LEVY, *BREAKING THE AGE CODE* 92–94 (2022) (discussing the study and its significance).

154. Becca R. Levy, Martin D. Slade, E-Shien Chang, Sneha Kannoth & Shi-Yi Wang, *Ageism Amplifies Cost and Prevalence of Health Conditions*, 60 GERONTOLOGIST 174, 178 (2020) (estimating the cost of ageism on U.S. healthcare expenditures).

for such benefits would be undermined. For example, Americans overwhelmingly oppose changes that would reduce Social Security and Medicare benefits,¹⁵⁵ at least in part because these are viewed as “earned” benefits and not “welfare.”¹⁵⁶

2. Impact on Egalitarianism

Abandoning age-based classifications for adults might well promote egalitarianism. Although age-based classification is often justified on egalitarianism grounds, this justification is highly problematic because individuals in any given age cohort are diverse in their needs, experiences, opportunities, and contributions. And indeed, this diversity increases with age.

The notion that favoring the young promotes egalitarianism is rooted in the assumption that the old have had a greater opportunity to “live” and have taken more. In a narrow sense, this is true. By definition, the old have experienced more time on earth and have consumed more of certain resources (fossil fuels, for example). And yet, whether a person has had more opportunity to “live” in the sense of being able to enjoy the world and make choices in it, and whether the old have actually used more total resources or limited resources, is highly variable—reflecting, among other things, socio-economic status, social capital, and time and place.

Moreover, focusing on what people have “taken” paints an incomplete picture of an individual’s net contribution to society. For example, while the fair innings argument may initially seem rational and fair, it ultimately rests on a particular, stereotypically Western and individualist view of humans’ role in the world.¹⁵⁷ In the fair innings view, the human being is depicted as taking from society, instead of giving to society. In a fair innings world, the old have “taken” their fair share and should step aside so the younger can take. Imagine

155. For example, a 2023 poll found that 79% of Americans oppose reducing the size of Social Security benefits. *Poll: Most Oppose Social Security, Medicare Cuts* (Apr. 10, 2023), AARP, <https://www.aarp.org/advocacy/poll-social-security-medicare-cuts-2023/> [<https://perma.cc/7KJN-6NGR>]; see also DEAN BAKER & HYE JIN RHO, CTR. FOR ECON. & POL’Y RSCH., *THE POTENTIAL SAVINGS TO SOCIAL SECURITY FROM MEANS TESTING 3* (2011), <https://cepr.net/documents/publications/ss-2011-03.pdf> [<https://perma.cc/78BU-5UUS> (staff-uploaded archive)]; Julie Carter, *Means Testing and Income Relating Undermines Medicare*, MEDICARE RTS. CTR. (Oct. 7, 2021), <https://www.medicarerights.org/medicare-watch/2021/10/07/means-testing-and-income-relating-undermines-medicare> [<https://perma.cc/QYN5-QQNT>].

156. See *Means-Testing Social Security: Breaking Faith with American Workers*, NAT’L COMM. TO PRESERVE SOC. SEC. & MEDICARE (June 1, 2024), <https://www.ncpssm.org/documents/social-security-policy-papers/means-testing-social-security-breaking-faith-with-american-workers/> [<https://perma.cc/8BG7-UPDT>].

157. For a classic discussion of cross-cultural psychology and the Eastern communitarian world view versus the Western individualist worldview, see GEERT HOFSTEDE, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* 89–134 (3d ed. 2010). For a discussion of the limitations of this generalization, see, for example, Jihyun Kim, Taw-Seop Lim, Kathryn Dindia & Nancy Burrell, *Reframing the Cultural Differences Between the East and the West*, 61 *COMMUN. STUD.* 543 (2010).

instead a more Eastern, communitarian world view, where human beings are seen as giving to society. Under that world view, the opposite result would seem fair: as older adults have given more, they should be prioritized over younger individuals for resources and opportunities.

That said, taking a temporal approach to egalitarianism is a recipe for fostering lifetime inequity. Old age is not an equitably allocated resource. Many people will never reach old age. Whether because of illness, accident, or violence, some will die in childhood or earlier adulthood. Those of higher socioeconomic status and greater educational attainment can expect to live more years than their less privileged peers. Life expectancy also varies by race. For example, in 2021, life expectancy at birth for non-Hispanic Black Americans was six years less than life expectancy for non-Hispanic White Americans and more than seven years less than that for Hispanic Americans.¹⁵⁸ Extreme old age is even less equitably distributed—less than 10% of people live to be 90 and less than 1% live to be 100.¹⁵⁹ Race¹⁶⁰ and socioeconomic status¹⁶¹ are both strong predictors of extreme longevity.

Because enhanced longevity is more likely among those with higher socioeconomic status, policies that favor older adults tend to compound existing advantage. And the inequity created by age-based policy is likely to expand as gaps in life expectancy grow. The unequal distribution of old age thus is a reason to be concerned about selectively allocating benefits based on age. Targeting

158. Elizabeth Arias, Betzaida Tejada-Vera & Farida Ahmad, *Provisional Life Expectancy Estimates for January Through June, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 2021), <https://stacks.cdc.gov/view/cdc/100392> [<https://perma.cc/4UMX-JFHG>].

159. *What Percent of the U.S. Is Over 90 Years Old?*, HEALTHY AGING HUB (Oct. 19, 2025), <https://wis.it.com/what-percent-us-over-90-years-old> [<https://perma.cc/A2R8-GTSS> (staff-uploaded archive)]; Katherine Schaeffer, *U.S. Centenarian Population Is Projected to Quadruple Over the Next 30 Years*, PEW RSCH. CTR. (Jan. 9, 2024), <https://www.pewresearch.org/short-reads/2024/01/09/us-centenarian-population-is-projected-to-quadruple-over-the-next-30-years> [<https://perma.cc/69CY-CKV8>]; see also *What Are the Odds of Living to 100?*, DISCOVERTHEODDS (Apr. 28, 2025), <https://discovertheodds.com/what-are-the-odds-of-living-to-100> [<https://perma.cc/XJ82-QBEH>].

160. Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2018*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 17, 2020), <https://www.cdc.gov/nchs/data/nvsr/nvsr69/nvsr69-12-508.pdf> [<https://perma.cc/TLL5-KXQP>].

161. See Linda Enroth, Jani Raitanen, Antti Hervonen, Lily Nosraty & Marja Jylhä, *Is Socioeconomic Status a Predictor of Mortality in Nonagenarians? The Vitality 90+ Study*, 44 *AGE & AGING* 123, 125–26 (2014) (discussing impact of socio-economic factors such as occupation, class, and education level on mortality after age 90, and finding statistically significant differences in mortality among those in different occupation classes). Over the past several decades, the life expectancy gap by socio-economic status has increased in many states (especially those in the Midwest and South). Jennifer Karas Montez, Anna Zajacova, Mark D. Hayward, Steven H. Woolf, Derek Chapman & Jason Beckfield, *Educational Disparities in Adult Mortality Across U.S. States: How Do They Differ, and Have They Changed Since the Mid-1980s?*, 56 *DEMOGRAPHY* 621, 633 (2019); see also Raj Chetty, Michael Stepner, Sarah Abraham, Shelby Lin, Benjamin Scuderi, Nicholas Turner, Augustin Bergeron & David Cutler, *The Association Between Income and Life Expectancy in the United States, 2001-2014*, 315 *JAMA* 1750, 1750 (2016).

resources at older adults entrench inequality by reducing the share of total resources invested in demographic groups that have lower life expectancy (e.g., the poor, the less educated, persons with disabilities, and Black Americans), especially because the benefits are cumulative. Older adults are not only the primary beneficiaries of the nation's largest social welfare programs, they are also the recipients of substantial tax breaks and discounts that elevate their financial well-being relative to younger adults.

In short, while egalitarianism can be used to argue in support of either pro- or anti-elderly discrimination, a strong argument can be made that neither type of discrimination is consistent with egalitarianism. Rather, the use of broad-brush chronological categories inhibits the law's ability to provide more targeted interventions that more accurately equalize individuals' opportunities.

3. Impact on Just Deserts

Preferable treatment for older adults has been justified on the grounds that it rewards older adults for the contributions they have made over their lifetime to their communities and to society more broadly.

Ultimately, one's assessment of whether age-based criteria should be abandoned therefore depends, at least in part, on whether one sees age as a proxy for being deserving. This, in turn, may depend on whether one sees the role of younger adults as primarily one that involves *giving to* society or primarily one that involves *taking from* society. If one sees it as the former, the more rational conclusion is that older adults have paid into the system, supported others, and are finally owed their due. If one sees it as the latter, then one might reasonably use a fair innings argument to argue that older people have already gotten their share of what they deserve. They have already had their fair earnings.

The first view—that older adults should be rewarded for their contributions—has intuitive appeal. It both recognizes the very real contributions that the average older adult has made to their community across their lifetime and embraces a positive vision of humankind and society in which lives are spent giving and enriching society.

Nevertheless, age-based policy ultimately fails to provide just deserts. Favoring older adults on the grounds that they have earned favorable treatment is rooted in the incorrect assumption that the number of years that one spends on earth is a good measure of one's contributions. In addition, rewarding longevity can be seen as akin to rewarding people for winning the lottery.¹⁶² Individuals who have had the good fortune to survive to old age are in many

162. Like the lottery, one's choices can create the opportunity to become lucky. Just as one can increase one's odds of winning the lottery by buying tickets, one can increase one's odds of survival by engaging in healthy life choices (e.g., exercising, wearing a seatbelt).

ways the winners in the game of life. Further reward based exclusively on the number of years lived could thus be criticized as merely adding to existing winnings.

Similarly, rewarding younger adults on the basis that they are more deserving because they have not had the opportunities older adults have is based on the false assumption that the number and quality of one's opportunities are correlated with chronological age. This assumption ignores the vastly unequal distribution of financial and social resources in the United States and how the family and community into which one is born profoundly shape one's opportunities across the lifespan.¹⁶³

4. Impact on Exclusion

To the extent that age-based classifications are used to disqualify persons thought to be at increased risk of mental or physical incapacity, prohibiting them will likely lead to more effective policy interventions. This is because chronological age is a very poor proxy for ability. For example, mandatory retirement ages for judges have allowed states to weed out older judges who may have cognitive decline, but at the expense of losing judges with accumulated experience and wisdom whose judgment is not impaired by age-associated disability. As Francis Shen has observed, "Mandatory retirement regimes conflate age with diminished judicial capacity, overlooking the wisdom that comes with experience and the scientific reality that age is a risk factor for, but *not* dispositive of, cognitive decline."¹⁶⁴

Actors who wish to exclude persons due to their physical or cognitive limitations will likely have to make more individualized determinations about those persons' abilities and limitations. Otherwise, such actors may run afoul of protections against disability discrimination, including the Americans with Disabilities Act.

5. Impact on Terror Management

Many social safety net programs that use age-based criteria seek to address conditions that people fear they themselves will experience as they grow older. For example, the nation's primary major social welfare programs that rely on age-based eligibility criteria—Social Security, Medicare, and Medicaid—may mitigate against the terror of aging. This is because chief concerns associated with growing older include outliving one's savings, paying for care, and suffering with illness and frailty.

163. Cf. Lina Hedman, David Manley, Maarten van Ham & John Östh, *Cumulative Exposure to Disadvantage and the Intergenerational Transmission of Neighbourhood Effects*, 15 J. ECON. GEOGRAPHY 195, 195 (2015) (investigating the effects of exposure to different Stockholm neighborhoods on personal income later in life).

164. Shen, *supra* note 46, at 238.

Whether such programs would be able to continue to ease this terror after a prohibition on age-based classification would depend on the political response to eliminating age-based preferences. For example, if the response to ending Medicare's preferential treatment for older adults were to instead adopt "Medicare for All" (a version of universal healthcare coverage), the program could continue to serve as a way of mitigating against the terror of aging by addressing key concerns related to aging: illness and frailty. Realistically, however, efforts to replace age-based eligibility criteria in Medicare and other social safety net programs run the risk of unleashing political forces that could dismantle these critical programs.

III. THE CASE FOR AGE-FRIENDLY, NOT AGE-BLIND, CONSTITUTIONALISM

The preceding section considered the impact of shifting away from age-based classifications on the ability to realize various policy objectives.¹⁶⁵ Informed by that analysis, this Part considers how states might draft constitutional protections against invidious forms of age discrimination while preserving the ability of public and private actors to meet the objectives served by age-based classifications. It begins by looking at the impact that making "age" a constitutionally protected classification under state constitutional law would have on existing laws and policies and the legal variables that will shape that impact. It then explains why states should avoid adding constitutional protections that demand, or would be interpreted as demanding, age-blind policy. Finally, it suggests how states might craft constitutional protections that would be responsive to concerns about subordinating or marginalizing adults based on age but still permit age-based classification that further important objectives.

A. *Potential Impact of State Constitutionalism*

This Section explores the impact of adding age as a protected class in state constitutions on existing law, policies, and practices. Ultimately, the extent of the impact will vary based on four variables: (1) how the protected class is defined, (2) whether the protection applies to private conduct as well as governmental conduct, (3) whether a legal remedy is available for unintentional discrimination based on the protected classification, and (4) the level of scrutiny a state's courts apply when reviewing potential violations.

165. The impact of state prohibitions is mitigated by the fact that most consequential age-based policies in the United States—those that provide health and income benefits—are primarily federal programs. Amending the U.S. Constitution to prohibit age discrimination could be catastrophic from the perspective of older adults, but such prohibitions in state constitutions do not pose the same risk to older adults' entitlement programs.

1. Impact by Definition of Protected Class

The impact of adding constitutional language to protect against age-based discrimination will depend on the class of persons protected. Specifically, it will depend on whether the provision limits all age-based classifications, only those that distinguish between different age adults, or only those that protect individuals over a certain adult age (much as the ADEA protects those 40 and over). The three states that have constitutionalized such prohibitions take the broadest approach: adding “age” as a protected class without qualification. However, Louisiana’s prohibition has been interpreted as only prohibiting distinctions between adults.¹⁶⁶

Theoretically, however, a state could provide protection only to “old age.” Such an approach could be justified on the grounds that the state’s greatest interest is protecting against irrational discrimination that is rooted in stereotypes and overgeneralizations about age, and that older adults have historically faced more significant and consequential negative impacts of irrational age discrimination.¹⁶⁷ The protected class could be defined based on chronological age, for example, age 40 as in the ADEA, 65 as in Medicare, or some higher number. Alternatively, states might not tie the protection to a particular chronological age, instead limiting the ability to discriminate against anyone on the basis that they are older than others.

By taking this narrower approach, states could mitigate against negative impacts of constitutional protection that older adults might otherwise face. This approach would permit discrimination that favors older adults, thereby protecting current practices that selectively grant benefits to older adults, including tax breaks and discounted “senior” prices.

2. Impact by Type of Actors Covered

The impact of state constitutional limitations on age discrimination will also vary based on the scope of protection offered. This will turn in part on the explicit language of the constitutional provision and, most significantly, whether it prohibits *all* age-based discrimination or only discriminatory *government* action. The three states that currently have prohibitions have taken the latter approach, but a state could choose to prohibit private actors from discriminating based on age.¹⁶⁸

166. See *supra* note 85 and accompanying text.

167. Cf. U.S. DEP’T OF LAB., 89TH CONG., THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 5–9 (1965) (in the seminal report which led to the adoption of the Age Discrimination in Employment Act of 1967, finding that older adults faced rampant and irrational discrimination on the basis of age).

168. If a state did not specify whether the prohibition applied to private actors, it is unclear whether state courts would interpret it to do so. Where state constitutions are silent in this way, some courts have interpreted the anti-discriminatory provisions as applying to nongovernment actors, but others

If states take a more expansive approach and extend their protections to cover private behavior, they could fill gaps in existing legislation that protect against discrimination against older adults. Most significantly, in many states, such an expansion could substantially increase protection from age discrimination in employment. The ADEA falls short of providing comprehensive protection from age discrimination in employment, in large part because it does not cover all workers. Some workers are excluded because their employer has fewer than 20 employees. Others are excluded because they work in an occupation that is exempt from the ADEA's prohibition (such as a firefighter, a police officer, or someone in a disqualifying policymaking or executive role). In addition, winning an ADEA case is an uphill battle for most plaintiffs. The Supreme Court has interpreted the ADEA such that plaintiffs face a stiff evidentiary burden,¹⁶⁹ and there are a growing number of federal court decisions holding that only existing employees—not job applicants—can bring disparate impact claims under the ADEA.¹⁷⁰

This protection could have real value for many. Despite the ADEA and state statutory protections, older adults face substantial age-based employment discrimination. Older workers are less likely to be hired than younger workers.¹⁷¹ The extent of the discrimination, however, varies by race, gender, and other identities.¹⁷² For example, research indicates that older women face greater difficulty securing new employment than do older men,¹⁷³ and that older Black applicants face greater age discrimination than older White applicants.¹⁷⁴

have not. See JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* § 3.01(2) (2015).

169. See, e.g., *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009) (requiring plaintiffs to show that age was a “but for” cause of a materially adverse employment action to prevail on a disparate treatment claim under the ADEA).

170. See, e.g., *Kleber v. Carefusion Corp.*, 914 F.3d 480, 488 (7th Cir. 2019) (finding that plaintiff, who alleged that a job description that required applicants to have “no more than 7 years” of relevant experience did not have a claim for age discrimination because the ADEA’s protections against policies that have a disparate negative impact against older workers do not apply to “outside job applicants”).

171. See David Neumark, Ian Burn & Patrick Button, *Age Discrimination and Hiring of Older Workers*, FED. RSRV. BANK OF S.F. ECON. LETTER, Feb. 27, 2017, at 1, 4–5, <https://www.frbsf.org/wp-content/uploads/el2017-06.pdf> [<https://perma.cc/HJ22-H722>].

172. See NAOMI CAHN & NINA A. KOHN, *AGING WHILE FEMALE* (Oxford Press forthcoming 2027) (discussing the intersectional nature of age-based employment discrimination). Notably, for women, age discrimination is deeply tied to physical appearance. As one female observed at a recent conference of women journalists when a colleague asked how many people in the room over the age 65 feel discriminated against: “I felt it as soon as I stopped coloring my hair.” *Id.*

173. See Neumark et al., *supra* note 171, at 4; Patricia Cohen, *Over 50, Female and Jobless Even as Others Return to Work*, N.Y. TIMES (Jan. 1, 2016), <https://www.nytimes.com/2016/01/02/business/economy/over-50-female-and-jobless-even-as-others-return-to-work.html> [<https://perma.cc/R6TY-Y8YL> (dark archive)].

174. See, e.g., Joanna N. Lahey & Douglas R. Oxley, *Discrimination at the Intersection of Age, Race, and Gender: Evidence from an Eye-Tracking Experiment*, 40 J. POL'Y ANALYSIS & MGMT. 1083 (2021) (in a controlled experiment, examining the amount of time screeners viewed resumes of Black and White job applicants of different ages).

Likewise, older Black women face more acute age discrimination than either older Black men or older White women.¹⁷⁵

The extent of this benefit for older adults will, of course, turn on the extent to which state law already goes above and beyond federal law. As noted previously, almost all states have some state-specific statutory protections against age discrimination.¹⁷⁶ However, many of these state statutes have substantial gaps in protection; for example, like the ADEA, many have exceptions for certain professions and for employees of small firms.¹⁷⁷

Moreover, the benefit may come with real costs. While some research has shown that laws prohibiting age discrimination in employment reduce such discrimination,¹⁷⁸ other research has suggested that stronger legal protections against age discrimination may be counterproductive because they discourage employers from hiring older workers,¹⁷⁹ perhaps due to concerns that these workers will be harder to terminate.¹⁸⁰

3. Impact by Conduct Prohibited

Prohibitions on discrimination are sometimes interpreted to only preclude “disparate treatment”: deliberate discrimination on the basis of the protected characteristic. Other times, such prohibitions are interpreted as also precluding “disparate impact,” or conduct that has an unreasonable, adverse consequence on those in the protected class, even if not intentionally discriminatory.

175. See, e.g., Nick Drydak, Anna Paraskevopoulou & Vasiliki Bozani, *A Field Study of Age Discrimination in the Workplace: The Importance of Gender and Race. Pay the Gap*, IZA INST. LAB. ECON. 1, 17–18 (2022) (in a study of age discrimination in employment in Britain, finding that Black British women experienced the highest level of age discrimination).

176. See *supra* note 97 and accompanying text.

177. See generally Cara Yates, *Application of State Law to Age Discrimination in Employment*, 51 A.L.R. 5th 1 (2025) (examining state-specific protections against age discrimination in employment).

178. David Neumark, Ian Burn, Patrick Button & Nanneh Chehras, *Do State Laws Protecting Older Workers from Discrimination Reduce Age Discrimination in Hiring? Evidence from a Field Experiment*, 62 J.L. & ECON. 373, 398 (2019) (reporting, based on an empirical study, “some evidence that stronger laws protecting older workers from discrimination, providing for larger damages, boost callback rates for older relative to younger job applicants”).

179. Joanna Lahey, *State Age Protection Laws and the Age Discrimination in Employment Act*, 51 J.L. & ECON. 433, 447–52 (2008) (explaining that in a study examining the impact of state anti-discrimination laws on White men, the laws were associated with reduced employment of White men over forty); Joanna Lahey, *How Do Age Discrimination Laws Affect Older Workers?*, CTR. FOR RET. RSCH. AT B.C., Oct. 2006, at 4–5 [hereinafter Lahey, *Discrimination Laws*], https://crr.bc.edu/wp-content/uploads/2007/01/wob_5.pdf [<https://perma.cc/C6Y3-28GT>] (sharing circumstantial evidence that stronger state protections against age discrimination may negatively impact employment of older White men).

180. Lahey, *Discrimination Laws*, *supra* note 179, at 3. For an insightful discussion of the state of the research, which concludes that there is a need to strengthen legal protections against age discrimination, see DAVID NEUMARK, *STRENGTHEN AGE DISCRIMINATION PROTECTIONS TO HELP CONFRONT THE CHALLENGE OF POPULATION AGING* (Brookings Institution ed. 2020), <https://www.brookings.edu/wp-content/uploads/2020/11/ES-11.19.20-Neumark.pdf> [<https://perma.cc/4P8E-GMB7>].

The practical impact of adding a constitutional protection against age-based discrimination can be expected to vary based on the state's underlying equal protection jurisprudence and the types of claims that state courts recognize. If a state only recognizes disparate treatment, a broader range of conduct will remain permissible. Moreover, it may be harder to hold accountable those who deliberately discriminate based on age; one of the key benefits that recognizing disparate impact claims offers plaintiffs alleging discrimination is that they do not have to prove intent on the part of the defendant.

Even if states adopt identical constitutional language, they may differ in how they interpret the language. When interpreting state constitutional bans on gender discrimination, states differ on whether they recognize disparate impact claims.¹⁸¹ Some state courts have found that their state's constitution merely protects against disparate treatment: discrimination that occurs when someone is intentionally treated differently because of the individual's gender.¹⁸² However, other states have found disparate impact claims cognizable as well.¹⁸³ In these states, a plaintiff may bring a suit alleging that a policy or practice—regardless of intent—is unlawful because it disproportionately and negatively impacts persons of a certain gender. This gender-based jurisprudence thus suggests that the impact of state constitutional bans on age discrimination will depend on whether the State will find that it gives rise to protection from policies that create a disparate impact or only those that intentionally discriminate on the basis of age.

4. Impact by Level of Scrutiny Applied

Finally, and perhaps most profoundly, the impact of a state's protection against age discrimination will depend on the jurisprudential approach of the state when determining whether the use of age-based policies or practices runs afoul of its constitutional provision.

A constitutional protection against age-based discrimination is not necessarily a ban on all uses of age in law. Consider the three states that have adopted protections to date. While all three have constitutional limitations on

181. See FRIESEN, *supra* note 168, § 3.02[5][b].

182. See, e.g., *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686 (Tenn. 2020) (rejecting a claim that a state law capping noneconomic damages in civil cases discriminated against women in violation of state's constitution because the plaintiff had failed to allege that the state legislature had "a discriminatory intent or purpose" in enacting the provision).

183. See, e.g., *Hardy v. Stumpf*, 37 Cal. App. 3d 958, 963–64 (1974) (considering a claim that a height and weight requirement for patrolman violated the state's constitutional protection against sex discrimination, stating "It is not necessary to conclude that these standards were adopted with intent to discriminate; it is enough if statistics show that the standards imposed in fact exclude virtually all women.").

age discrimination, they create different standards for determining whether distinctions based on age amount to impermissible discrimination.

Nevada's provision, as noted previously, reads: "Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin."¹⁸⁴ The use of the absolutist term "shall not" in reference to laws that deny or abridge rights parallels the absolutist "no state shall" language of the Fourteenth Amendment of the U.S. Constitution, and thus suggests that classifications based on age would be subject to strict scrutiny—that is, only permitted if narrowly tailored to a compelling state interest.

Similarly, New York's provision, as noted previously, reads: "No person shall, because of . . . age . . . be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law."¹⁸⁵ But it also provides that this provision shall not "invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of [age] . . . nor shall . . . [it] be interpreted to interfere with, limit, or deny the civil rights of any person based upon [age]."¹⁸⁶ This language maps less directly onto the Fourteenth Amendment of the U.S. Constitution, in part because it appears to permit discrimination to the extent that it is designed to remedy past discrimination. While the New York prohibition is recent, it has already been used to strike down a state statutory provision requiring city court judges outside of New York City to retire at age 70.¹⁸⁷

Louisiana's provision is a bit different. It reads: "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."¹⁸⁸ This provision, on its face, provides little more protection than that provided under the federal constitution. The U.S. Constitution already requires that (consistent with the rational basis scrutiny afforded to nonsuspect distinctions between citizens) age-based classifications be rationally related to a legitimate government purpose. Thus, they must already be nonarbitrary and noncapricious. And it is unclear whether "reasonable" is a higher bar than "rationally related" to a "legitimate government interest." The handful of cases interpreting the provision suggest it may not be. Louisiana courts have used the

184. NEV. CONST. art. I, § 24.

185. N.Y. CONST. art. I, § 11.

186. *Id.*

187. *Saltarelli v. New York*, No. EF2025-1969, 2026 WL 100302, at *2-5 (N.Y. Sup. Ct. Jan. 2, 2026).

188. LA. CONST. art. I, § 3 (setting forth Louisiana's "Right to Individual Dignity").

constitutional protection only three times to strike down instances of age discrimination—and all were in the context of employment discrimination. Two involved situations in which workers' compensation benefits were restricted for workers who also received old-age Social Security benefits.¹⁸⁹ The third considered a municipal rule that permitted terminated civil servants to appeal terminations allegedly based on discrimination for political or religious beliefs, sex, or race, but denied appeals to those who alleged age discrimination. In all three cases, reasonable minds might well not see the connection between the classification and a legitimate policy goal.¹⁹⁰

Where, as is commonly the case, state constitutional protections do not explicitly provide the level of scrutiny to be applied, the effect of adding a state constitutional prohibition on age will likely reflect the approach of the state's underlying equal protection jurisprudence. Specifically, it can be expected to depend on the difference between the level of scrutiny the state applies to classifications made based on a protected characteristic, and the baseline level of scrutiny applied to distinctions made based on characteristics that lack special protection. The impact of a prohibition can be expected to be more consequential where there is a greater difference between the treatment of protected classes and nonprotected classes.

States differ in the level of scrutiny they apply to distinctions made based on a protected characteristic. Many have adopted the approach the U.S. Supreme Court uses for equal protection challenges based on the federal Constitution. The U.S. Supreme Court has interpreted the Fourteenth Amendment as requiring distinctions made on the basis of suspect classifications (e.g., race, national origin) to withstand strict scrutiny.¹⁹¹ Under strict scrutiny analysis, a classification will be found constitutionally impermissible unless its use is narrowly tailored to a compelling state interest.¹⁹²

If a state were to adopt the U.S. Supreme Court's analytical framework, adding age as a protected class would likely result in age being treated as a suspect classification. Thus, public policies that use age-based classifications to allocate resources would be impermissible unless narrowly tailored to a

189. See *Wal-Mart Stores, Inc. v. Keel*, 2001-3013, p. 1–15 (La. 05/31/02), 817 So. 2d 1, 2–10. (finding that a statute that offset workers' compensation benefits by Social Security benefits unreasonably discriminated against persons age 65 and older, in violation of the state's equal protection guarantee); *Pierce v. Lafourche Par. Council*, 99-2854, p. 1–10 (La. 04/15/00), 762 So. 3d 608, 610–15 (finding that a statute limiting workers' compensation benefits paid to employees who received Social Security benefits violated the state's equal protection guarantee).

190. *Mixon v. New Orleans Police Dep't*, 407 So. 2d 793 (La. Ct. App. 1981).

191. See *Plyer v. Doe*, 457 U.S. 202, 216–17 (1982) (summarizing strict scrutiny: “[W]e have treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’ With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.” (citations omitted)).

192. *Id.*

compelling state interest. This could be highly problematic because, as explored in Part III, many of the policy objectives currently served by age-based classifications would be impossible or politically infeasible to meet without such classifications. However, state courts are free to craft their own approaches to equal protection when interpreting state constitutional law, and many have adopted approaches that differ from that adopted by the U.S. Supreme Court.¹⁹³

Experience with prohibitions on sex discrimination indicates that the impact of future prohibitions will depend on states' underlying equal protection jurisprudence. State courts interpreting prohibitions against sex discrimination have applied a range of levels of scrutiny to sex-based classifications. Many apply strict scrutiny much as the U.S. Supreme Court applies strict scrutiny when considering distinctions made on the basis of federally suspect classifications. Others are even more demanding. For example, Colorado and Pennsylvania have both interpreted their constitutional provisions as prohibiting sex-based classifications that are not "required by physical differences."¹⁹⁴ Other courts have been willing to uphold distinctions, especially in the context of gender-based affirmative action. For example, Washington state's supreme court held that statutory provisions requiring that both men and women hold certain positions in state political parties did not violate its constitution, reasoning that because they promoted "equality" the provisions were not "discriminatory."¹⁹⁵

Regardless of the particular jurisprudential preferences of the state, at least some policies that use age-based classifications as a proxy for need will likely survive scrutiny. Those where the age classification has a strong correlation with the need that the policy seeks to address are most likely to survive—whereas those with only a weak relationship will likely fail. For example, it might be highly reasonable for insurers, whether public or private, to refuse to cover a particular treatment on the basis that its efficacy is nonexistent or limited for persons of a certain age.

Thus, the extent to which age-based policies will survive will likely vary based on whether the needs addressed correlate with chronological age and the extent to which they correlate with the particular age classification employed. For example, a statute that creates a presumption of cognitive incapacity of

193. See FRIESEN, *supra* note 168, § 3.01(3); see also Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1586 (2017) (in the context of discussing using state equal protection clauses to challenge discrimination on the basis of sexual orientation, observing that "because state courts are often more protective in their applications of equal protection doctrine, state courts may invalidate under the state constitution's equal protection clause—or its equivalent—state laws that would survive scrutiny under federal law").

194. FRIESEN, *supra* note 168, § 3.02(5).

195. *Marchioro v. Chane*, 90 Wash. 2d 298 (1978), *aff'd* by *Marchioro v. Chaney*, 442 U.S. 191 (1979).

people aged 90 and over might fare better than one which creates a presumption at age 50 and over.

Supporting this hypothesis is a wealth of cases in which state courts have interpreted constitutional bans on gender or sex discrimination. State constitutional prohibitions on sex discrimination are relatively common,¹⁹⁶ resulting in a sizable collection of cases to examine. Moreover, looking to sex discrimination prohibitions is informative because sex, like age, is closely correlated with biological characteristics.¹⁹⁷ When considering the permissibility of policies that differentiate based on gender, courts in states with constitutional protections against gender discrimination tend to reject policies that are rooted in stereotypes about gender roles.¹⁹⁸ Accordingly, such courts have rejected policies that impose financial burdens on men but not women.¹⁹⁹ By contrast, policies that provide differential treatment to different sexes due to biological differences have generally been found permissible.²⁰⁰ Thus, such courts have generally upheld policies that provide maternity leave but not paternity leave.²⁰¹ In the gender context, the “tricky” cases have been ones where distinctions are made based on differences that are the combined result of biological and historical attitudes toward gender (e.g., those that limit participation in team sports to persons of a particular biological gender).²⁰²

Therefore, some age-based classifications would likely remain permissible even in states that adopted a constitutional ban on age discrimination. For

196. Approximately one-third of states have such bans. *See id.* § 3.01(1).

197. *Cf.* Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination*, 44 U.C. DAVIS. L. REV. 213, 248 (210) (“Like gender, age has long been used as a proxy for other more germane characteristics that are perhaps more difficult to quantify (e.g., maturity, frailty, vulnerability, or need). As with gender, all too frequently these uses reflect overbroad generalizations based on outdated misconceptions about the class at issue.”).

198. FRIESEN, *supra* note 168, § 3.02(3).

199. *Id.* § 3.03. *Compare* *People v. Salinas*, 551 P.2d 703 (Colo. 1976) (finding that a statutory rape statute that only punished male perpetrators was constitutionally permissible because the differential treatment was “reasonably and genuinely based on physical characteristics unique to just one sex” but not explicitly stating what that difference was), *with* *Henderson v. Henderson*, 327 A.2d 60 (Pa. 1974) (finding a state statute that allowed the wife in a divorce action to have certain expenses paid by the husband, but did not allow the husband such expenses, violated Pennsylvania’s Equal Rights Amendment).

200. FRIESEN, *supra* note 168, § 3.02(5)(a).

201. *Id.* § 3.02(4).

202. *Id.* § 3.02(3)–(5). In recent years, courts have grappled with these distinctions in the context of state laws restricting trans individuals access to spaces and participation in activities. *See, e.g.*, *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2023) (upholding the district court’s decision to enjoin a state law which barred individuals who are not biologically female from participating in women’s and girls’ teams in public schools, and created a sex verification process which contemplated invasive testing for women who do not appear sufficiently “feminine”); *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2025) (finding that the district court erred in granting summary judgment to defendants on an equal protection claim brought by a transgender girl who was barred from joining her middle school cross-country team due to a state statute that prohibited transgender girls from participating on girl’s teams).

example, imagine that—much like during the first wave of the COVID-19 pandemic—people above a certain age were prioritized for vaccination for a novel virus because they were at heightened risk for death from infection from that virus. Such a classification should readily withstand strict scrutiny because the eligibility criteria would be narrowly tailored to a compelling interest (preventing avoidable death). Likewise, imagine that there is another pandemic and a limited supply of vaccinations; anyone who is not vaccinated (regardless of age) faces a very high risk of severe harm or death. Could a policy prioritize vaccinations for younger people to maximize the number of life years saved? While this approach might be politically unpopular, it would likely survive scrutiny as saving the greatest number of years of life could readily be argued to be a compelling government interest.

By contrast, states and local governments would likely be found to have engaged in impermissible discrimination if they use status as a senior citizen (e.g., 60 or 65) as a crude proxy for cognitive or physical incapacity. Broad mandatory elder abuse reporting statutes, like that in Rhode Island, might not survive. Rhode Island requires “any person who has reasonable cause to believe that any person aged sixty (60) years of age or older has been abused, neglected, or exploited, or is self-neglecting” to make an immediate report of the abuse to the State.²⁰³ The report is required even if the information is confidential, and regardless of whether the older adult is at any risk for future or ongoing harm.²⁰⁴ Although a state can be said to have a compelling interest in preventing abuse and perhaps even in obtaining reports of past abuse, the classification utilized by Rhode Island (anyone age 60 and older) cannot reasonably be said to be narrowly tailored to that interest. There is a lack of evidence that being 60 years of age or older meaningfully increases the risk of abuse or the risk of being unable to report abuse or otherwise seek help, as well as little evidence that requiring such reports either reduces abuse or improves outcomes for victims.²⁰⁵

Adding age as a protected class would not only likely preclude policies that use age-based classifications in ways that further stereotypes without linking to biological difference. They would also likely preclude policies that differentiate among age groups for the sake of doing just that. That is, what a policy can currently do, but would no longer be able to do, is determine that age is an appropriate and ethical basis for allocating resources (e.g., health care, basic income) or assigning duties (e.g., participation in compulsory education). As suggested in Section II.A, one reason why governments might employ age-based criteria is to express appreciation for older adults or to reward older adults

203. See R.I. GEN. LAWS § 42-66-8.

204. See *id.*

205. Research on the efficacy of such schemes has shown that they increase reporting but has not yet shown improvement in well-being of or satisfaction of elder abuse victims. The author is currently exploring this issue in other research.

for contributions they are presumed to have made to the community over their lives. In such contexts, age may not be utilized simply as a proxy for other characteristics but also because policymakers think chronological age itself matters. Indeed, one justification for programs such as Social Security is that they express appreciation for older adults and their lifetime of contributions.²⁰⁶

This is problematic not only because it limits the ability of policymakers to show such appreciation for elders, but also because favoring older adults for public benefits may compensate for disadvantages associated with older age. Likewise, the prospect of future benefits may help all people by reducing the fear of aging, while easing the financial, physical, and emotional burdens that younger generations face in caring for the old.

But it is hard to see how prioritizing older adults for public benefits and discounts would not squarely be impermissible age-based discrimination if age becomes a constitutionally protected class. Consider a common way that governments and other actors help make the aging experience easier for older adults, and the prospect of aging more palatable to younger ones: tax breaks and other discounts for people of advanced age. It seems unlikely that policies that make eligibility for financial perks depend on age would survive any level of scrutiny above rational basis. To find such classifications permissible, courts generally would need to find honoring older adults to be an important or compelling state interest. And doing so would seem to run contrary to what presumably would be a key intent behind making age a protected class in the first place: limiting favoritism based exclusively on age. That said, this is untrodden ground and perhaps a sympathetic court would find such programs permissible if age was one of several factors determining eligibility for favorable treatment (for example, tax breaks were provided to older adults if they were within a certain percentage of the poverty level).

Thus, policies that use age-based classifications to further egalitarianism, to advance the interests of those seen as worthy, or to mitigate the terror of aging, would stand on shaky ground.

B. *The Case Against Age-Blindness*

As the preceding subsection suggests, by making age a constitutionally protected class, states would be able to protect adults against discrimination based on age-based animus or stereotype. At the same time, especially if states apply strict scrutiny to age-based classifications—as existing precedent suggests they are likely to do—such constitutional protections could undermine key policy objectives currently served by age-based law.

In short, to the extent that constitutional protections are interpreted to require laws and policies to be “age-blind”—or to only consider chronological

206. See Kohn, *Centenarians*, *supra* note 137, at 120 (suggesting this role for age-based law).

age when it is a very robust proxy for biological differences—they will likely limit States' ability to craft efficient and effective policy interventions. Most significantly, it will likely undermine efforts to distribute resources to those most in need of them, and, in so doing, increase—not mitigate—the terror of aging.

Perhaps those utilitarian costs could be justified if age blindness was morally necessary. Yet the problem with age-based classification is not the act of classifying based on age, but rather how such classifications may be used.²⁰⁷ There is nothing inherently wrong about acknowledging a person's chronological age, nor about grouping people based on age. That is because age is a meaningful and objective characteristic. A person's chronological age reveals an objective truth about their experience: their number of years on earth. It tells us what world or personal events may have shaped their experience. And it is a meaningful predictor of physical and social experiences they may have had, or that they are likely to experience within a particular time period. Indeed, while legal theorists debate the principles that govern determinations of which age-based classifications are wrongful and which are morally defensible, there is very broad agreement that at least some forms of age discrimination are morally defensible.²⁰⁸

To the extent there is something wrongful about age-based classification, the wrong is in the way that classification is used.²⁰⁹ In particular, the likely wrong is that age-based classification may be based on, or perpetuate, stereotypes and entrenched biases that unfairly disadvantage certain age groups, especially when it does so in a way that demeans one group.²¹⁰ For example, older individuals may face assumptions of diminished capability, while younger individuals are often perceived as inexperienced or irresponsible. Such stereotypes can lead to exclusion from the workforce, unequal access to education, or diminished political representation. Thus, to the extent that states try to reduce the use of age-based classifications, the goal should not be "anti-classification" but rather "anti-subordination."

207. For another scholar's discussion of this point, see HELLMAN, *supra* note 16, at 2 (recognizing that not all distinctions that discriminate between people are wrongful).

208. See Boni-Saenz, *Age, Time*, *supra* note 16, at 896–97 (discussing the application of discrimination theory to age-based discrimination).

209. A full analysis of the moral status of age discrimination is outside the scope of this Article. The scholarly debate over what makes certain distinctions wrongful discrimination and other distinctions morally acceptable is robust. Suffice to say that the author is sympathetic to arguments that the moral correctness of distinctions should be evaluated based on multiple factors, but that the impact on human dignity should be a central concern.

210. This view is largely consistent with Deborah Hellman's argument that discrimination is wrong when it demeans, but the author takes a broader view than Hellman, who suggests that age discrimination is *not* wrong when it does not demean. HELLMAN, *supra* note 16, at 57.

Moreover, ignoring a person's age is inconsistent with recognizing and respecting a person as an individual. If we ignore a person's age, we ignore a meaningful characteristic of that person. Chronological age describes and shapes a person's lived experience and needs. And, as this Article has shown, allocating resources and responsibilities based on chronological age can result in efficient and equitable public and private choices.

Accordingly, it is neither useful nor morally necessary for the law to be—or even encourage others to be—“age blind.” In this regard, experience with bans on race-based discrimination is instructive. As Randall Kennedy and others have persuasively argued, “adherence to . . . procedural colorblindness” has undermined efforts to achieve substantive racial justice.²¹¹ As Kennedy explained, in a world in which racial minorities continue to experience subordination or marginalization due to either ongoing or past racism, insistence on colorblind policy stymies the ability of actors to undue that disadvantage.²¹² Consistent with Kennedy's concerns, the U.S. Supreme Court has relied on a vision of the U.S. Constitution as requiring colorblindness when striking down affirmative action policies designed to address the subordination and marginalization of racial minorities.²¹³

C. *Drafting the Age-Friendly Constitution*

If states wish to avoid parallel problems with “age blindness” they should avoid adopting constitutional protections that mirror the Fourteenth Amendment's prohibition on race-based discrimination. That language has largely been interpreted, and increasingly is being interpreted, as requiring strict scrutiny and therefore embracing an anti-classification principle. And while generations of legal scholars have railed against an anti-classification principle and made cogent and compelling arguments in favor of an anti-

211. Randall Kennedy, *Colorblind Constitutionalism*, 82 *FORDHAM L. REV.* 1, 15 (2013).

212. *Id.* (“A policy that eschews—indeed, prohibits—routine, official racial distinctions would be very attractive if the antidiscrimination rule reflected appropriately the will of those affected, including racial minorities, and arose in a context in which there exists no current or vestigial subordination or marginalization of racial outsiders.”); accord Ralph Richard Banks, *Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 *HARV. BLACKLETTER L.J.* 41, 51–52 (2009) (noting that the irony of colorblindness is that although it prohibits overt racial discrimination, “it permits covert discrimination, even if it subordinates already disadvantaged groups”).

213. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166 (2023) (finding the consideration of race in college admissions programs unconstitutional). Notably, in his concurrence, Justice Thomas described himself as “writ[ing] separately to offer an originalist defense of the colorblind Constitution.” *Id.* at 2177 (Thomas, J., concurring).

subordination principle,²¹⁴ the anti-classification approach has (largely) prevailed.²¹⁵

How, then, are we to foster an “age-conscious” approach while avoiding classifications that result in unjustified age-based subordination? The answer could be found in drafting a constitutional amendment that explicitly addresses the circumstances under which age discrimination is unlawful and distinguishes them from those under which age discrimination would be sufficiently justified as to be permissible.

One possibility would be to draft language that would subject age-based classifications to proportionality review. Many foreign jurisdictions have adopted a proportionality approach to assessing potential constitutional rights violations.²¹⁶ Such an approach explicitly requires a balancing of any burden created by the classification against the benefits.²¹⁷ Applying a proportional approach to evaluating age-based discrimination would thus require considering the nature and extent of the burden imposed by the age-based classification; greater burdens would require greater justification.

The proportionality approach, which has been fervently advocated by progressive academics such as Vicki Jackson and Jamal Greene,²¹⁸ certainly has intrinsic appeal. Unlike the tiered scrutiny model that the U.S. Supreme Court has long relied on to evaluate the permissibility of classifications under the Fourteenth Amendment’s Equal Protection Clause, the proportionality approach is not reliant on “rigid ex ante” categories.²¹⁹ As such, it may allow for more flexible and transparent assessments of the permissibility of particular policies. Such flexibility has value in the context of age discrimination given that the utility of age-based classifications, as explored earlier, varies by context.²²⁰

Yet the proportionality approach, as many others have recognized,²²¹ is potentially difficult to operationalize and prone to unpredictability. Justin

214. See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1477–78 (2004).

215. See Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 651 (2024) (describing the ways that antisubordination principles have been invoked in equal protection jurisprudence to uphold discrimination and how recent challenges to affirmative action could be viewed as consistent with one variety of antisubordination argument).

216. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015).

217. *Id.* at 3099–100.

218. See *id.* at 3094; Jamal Greene, *The Supreme Court 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 65 (2018) (advocating for U.S. courts to embrace a proportionality approach).

219. Jackson, *supra* note 216, at 3152.

220. See discussion in *supra* Sections I.A, II.A.

221. See, e.g., FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 198–99 (Cambridge Univ. Press 2017) (discussing how a lack of legal direction in proportionality results in unpredictable adjudication).

Collings and Stephanie Barclay describe foreign courts using proportionality review as adopting a four-step approach when determining if a burden is justified.²²² That approach considers “whether the legal provision restricting the interest (1) pursues a legitimate aim; (2) actually advances that purpose; (3) restricts the interest no more than is necessary to achieve the purpose; and (4) restricts the interest in a proportionate way.”²²³ Each step leaves tremendous room for judicial discretion, which risks not only judicial overreach²²⁴ but also a great deal of unpredictability. The result is that a proportionality requirement may offer little help to policymakers seeking to determine with a reasonable degree of confidence which policies will be deemed permissible.

Another more easily operationalized approach would be to incorporate an approach that is already entrenched in federal equal protection jurisprudence but has never been applied to age. In the context of gender, the U.S. Supreme Court has held that classifications based on gender are permissible when the classification serves an important governmental objective and is substantially related to achieving that objective.

This approach, called “intermediate scrutiny,” is generally described as prohibiting discrimination on a quasi-suspect classification unless that discrimination is substantially related to an important government interest. It was first overtly applied by the U.S. Supreme Court in the landmark case of *Craig v. Boren*,²²⁵ which invoked intermediate scrutiny to invalidate an Oklahoma law that discriminated against young men.²²⁶ Justice Brennan, writing for the majority, explained that the problem with the Oklahoma statute was that it relied on only a “weak congruence between gender and the characteristic or trait that gender purported to represent.”²²⁷ Brennan explained that to comply with Equal Protection requirements, a state legislature must

222. See Justin Collings & Stephanie Hall Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. REV. 453, 471 (2022).

223. *Id.*

224. See Samuel Moyn, *Why Do Americans Have So Few Rights?*, NEW REPUBLIC (Mar. 9, 2021), <https://newrepublic.com/article/161561/americans-rights-jamal-greenebook-review> [<https://perma.cc/4CHS-BVCX>] (critiquing the proportionality approach as one that “tends to be a smoke screen for transferring lots of policy choice to unelected judges, who are less accountable than legislators.”); see also Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1335 (2022) (raising concerns about operationalizing proportionality review when courts are politically polarized).

225. 429 U.S. 190 (1976).

226. See *id.* at 203–04 (first recognizing intermediate scrutiny as a category and holding that state law limiting sale of “nonintoxicating” beer beverages to males under the age of 21 and females under the age of 18 violated constitutional equal protection guarantees). Informally, the Court had begun applying this approach earlier. See, e.g., *Reed v. Reed*, 404 U.S. 71, 77 (1971) (finding unconstitutional an Idaho statute that required the state’s probate court to give males preference over females when appointing estate administrators, purporting to apply rational basis scrutiny but using language that parallels intermediate scrutiny).

227. *Craig*, 429 U.S. at 199.

“choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.”²²⁸

As Brennan’s discussion suggests, intermediate scrutiny has enabled the court to strike down gender-based distinctions based on overbroad generalization and historical assumptions about gender roles while permitting distinctions more firmly rooted in biological differences between the sexes. As such, it can be used to smoke out archaic and invidious uses of gender-based classifications, while not ignoring the reality of gender. Intermediate scrutiny acknowledges that there may be legitimate reasons for gender-based distinctions in certain contexts that are grounded in evidence and serve important objectives. In this way, it strikes a (perhaps imperfect) balance between protecting individuals from discrimination based on stereotype and allowing systems to respond to biological differences.

The rationale for heightened scrutiny to gender also applies to age. Like gender, chronological age has a biological basis and there are objective human characteristics that can be fairly well predicted by chronological age. Yet at the same time, age-based classification historically has been applied based on generalizations about physical or mental capabilities of “old people” or “young people” that, while not entirely untethered from reality, are overbroad to the point of inaccuracy.

While the U.S. Supreme Court has repeatedly rejected invitations to apply intermediate scrutiny to age-based classifications²²⁹ (reflecting its general aversion to expanding quasi-suspect classifications beyond gender),²³⁰ states could draft an intermediate scrutiny requirement into their own constitutions. Vagueness may be seen as helpful politically when seeking support for an amendment,²³¹ but constitutional language can be explicit and clear—and in this case, clear and explicit language is advisable.

There are many ways such language could be drafted. Some states could invoke formal language familiar to constitutional law scholars. Others might embrace plain language. For example, the provision might read: “No adult may be discriminated against on the basis of age unless the discrimination is substantially related to an important objective.” Or they might offer some

228. *Id.*

229. See Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 224–27 (2010) (outlining the series of relevant Supreme Court decisions and the Court’s reasoning for this rejection).

230. Most recently, for example, the U.S. Supreme Court explicitly rejected an invitation to find transgender individuals to be a quasi-suspect class. See *United States v. Skrmetti*, 145 S. Ct. 1816, 1832–34 (2025).

231. Whether it is actually helpful is another matter. Vagueness helps proponents argue that the language can be interpreted however voters prefer; yet at the same time, it allows opponents to suggest the language will be interpreted in a way voters disfavor.

variation on intermediate scrutiny, depending in part on whether the protection would apply to private discrimination as well as to government-based discrimination: “This state may treat adults differently from one another because of their age if doing so furthers an important government interest.” Or: “All adults shall be entitled to equal protection of the law regardless of age except when differentiation based on age would further an important government interest.”

Importing intermediate scrutiny directly into the blackletter of state constitutions would enable states to create a balanced, nuanced, age-conscious approach to addressing age discrimination. By subjecting age-based classifications to intermediate scrutiny, states could still permit age-based classifications that substantially further important interests, while prohibiting uses that primarily reflect stereotype, animus, or political favoritism. This framing could not only combat ageism but also further intergenerational justice. It would allow, for example, states to invalidate property tax breaks based exclusively on old age (a regressive approach that undermines intergenerational equity) while upholding prohibitions on age discrimination in employment or essential services.

Perhaps the most appealing aspect of intermediate scrutiny is its ability to reduce reliance on stereotypes without imposing undue rigidity on legislative and administrative processes. It curtails use of distinctions that are arbitrary or rooted in stereotypes while permitting those that reflect actual differences and responds to those differences in evidence-based ways. And by requiring actors to articulate and defend their objectives, intermediate scrutiny fosters transparency and accountability. Over time, this may help not only filter out policies based on outdated or ageist assumptions but also slowly dismantle patterns of practice that foster ageism and age-based inequality.

CONCLUSION

Policies and practices that differentiate among adults based on their chronological age are ubiquitous. But political upheaval, as well as demographic shifts that are fostering tension between generations, are increasingly leading some to question the way age-based classifications are used currently, and others to propose new age-based classifications.²³² And new attention on state constitutional reform may lead to age being added as a protected class to state constitutions, greatly limiting the ability to use age-based classifications. In this

232. While generational tension is hardly a new phenomenon, the aging of the baby boomers and concerns by younger generations that they will not achieve the material success of earlier generations is raising the tension to a fever pitch. At a recent conference of women journalists attended by the author, a reporter working in the aging space expressed concern that “we are running into an era of generational warfare.”

environment, it is critical to consider whether age-based classifications should continue to play a role in American law and policy and, if so, what role.

As this Article has shown, age-based classifications are rarely technically necessary to policy goals but are often politically necessary. Many of the objectives of age-based classifications could, in large part, be met through alternative means. However, doing so would typically involve greater administrative costs and be politically infeasible in many cases. As a result, without age-based classifications, social safety net programs, especially those on which older adults rely such as Medicare and Social Security, might contract, jeopardizing the financial security and health of those who rely on them.

Thus, the way that states to date have amended their constitutions to make age a protected class—although perhaps intended to protect older adults—may well be detrimental to older adults' welfare. Although these protections could limit the ability of state and private actors to discriminate against older adults in the allocation of healthcare resources and in the workforce, they could open the door to dismantling state-level social safety net programs on which older adults rely and tax breaks and discounts, which play an important role in financial security in later life.

This does not mean that states must avoid constitutionalizing protections against age discrimination. Rather, it suggests that states should provide protections against discrimination that are less absolute. States could capture the benefits of age-based law while addressing concerns about invidious discrimination and classifications that reflect stereotypes and not meaningful distinctions by drafting constitutional protections that explicitly subject age-based classifications to intermediate scrutiny.

In short, states should not embrace “ageless” law and ban age discrimination, especially if they want to help those who face the greatest age discrimination: older adults. Making the law age-blind could undermine efforts to achieve intergenerational justice, much as adherence to colorblindness can jeopardize efforts to achieve racial justice. Accordingly, states should learn from how the federal courts have interpreted the U.S. Constitution's Equal Protection Clause and consider adoption of constitutional amendments that subject age-based classifications to heightened scrutiny. This balanced approach would enable states to weed out invidious age-based discrimination while allowing them to continue to capture the substantial functional benefits of age-based classifications.