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The Right to Grow Old

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Americans have no right to grow old. Or so we are told. In 1985, in a case holding that the rights of people with disabilities were to receive no special constitutional protection, Justice Byron White worried in his majority opinion that people with intellectual impairments constituted so broad a class that there would be no "principled" way to distinguish discrimination against them from burdens on "the aging, the (physically) disabled, the mentally ill, and the infirm."[1]

The clear implication was that these other burdens were self-evidently permitted. And so, for the Court, the idea that laws burdening the elderly might be worthy of special attention from judges was not just wrong but also so obviously wrong that it could serve as the lead float, as it were, in a parade of horribles. This chapter is about what US courts find so horrifying about a right to grow old, and whether they are right to be afraid.

It is important first to clear some definitional underbrush. There is, to be sure, a right to grow old in a sense. Deriving from the Fifth and Fourteenth Amendment rights not to be deprived of life without due process of law and the Eighth Amendment right against cruel and unusual punishments, Americans enjoy a right against arbitrary killing at the government's hands.[2] Should the state choose to end your life before you become elderly, it had better have a good reason for doing so. This is the right to grow old in its negative sense, as a right against certain kinds of state action. This negative form is the one US constitutional rights typically take.

Even this negative right has its limits. If the state is not ending life but is merely burdening the elderly in some other way, courts don't take much notice. Age discrimination is barely scrutinized under US constitutional law.[3] The traditional reasons for greater scrutiny, grounded in a group's relative lack of political power, its historical marginalization, or its vulnerability to overbroad and harmful stereotypes, can apply to the elderly with great force. US courts nonetheless tend to consider

[1] Cleburne v. Cleburne Living Center, 473 U.S. 432, 445–446 (1985).
[2] US Const. Amend. V, Amend. XIV, Amend. VIII.
[3] *See* Kimel v. Fla. Board of Regents, 528 U.S. 62 (2000); Gregory v. Ashcroft, 501 U.S. 452 (1991).

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discrimination against older people to be obviously rational even when it is sloppy and harmful.[4]

The positive version of the right to grow old, such as it is, is still more limited. In this form, it is not so much the right to life as the right to *live*. It is the right to the support needed to maintain an adequate quality of life up until death. The elderly face predictable challenges that arise less from choices they have made than simply because they are human, and therefore mortal. Our physical dexterity and mental acuity typically lessen as we age, sometimes to a point where they become debilitating in the way of severe physical or mental disabilities. Providing care for older Americans also imposes burdens on the professional lives of family members, and especially women. These challenges require our care, our attention, and our money. The costs of medical care and supervision needed for the elderly to retain their dignity are overwhelming. And even if the morbidity of old age is reduced in the future,[5] we can still expect that as Americans live longer on average, the wages they will have earned in their working lives will be insufficient to cover these costs. They – we, inescapably – will need help.

It might seem as though help is not forthcoming, at least not from constitutional law. Judges accustomed to the American way of thinking seem to resist positive rights. The US Supreme Court has been unusually clear that the Constitution protects individuals against certain state-inflicted harms but generally does not require the state to ensure a minimum quality of life or prevent or deflect the predations of private actors.[6] Of a piece with this narrow rendition of constitutional rights, the Court has also been clear that state actions that reliably burden even protected classes, such as those defined by race, sex, or religion, will be viewed as constitutionally uninteresting unless a victim can show that the state was trying specifically to harm the members of those classes.[7] The US Supreme Court's theory of the Constitution's protections appears to view rights as arising only in those cases in which the government is acting pathologically, not when ordinary governance happens (even knowingly) to spoil some lives along the way. This kind of constitutional austerity sweeps the legs from under any putative right to grow old.

An aging population calls for reconsideration of the constitutional status of the elderly. We can expect *rational* stereotypes about the capacities of older Americans, already troubling, to become ever more outdated and limiting. We can also expect inequality to rise as Americans get older; basic survival skills tend to atrophy with

[4] *See Gregory*, 501 U.S. at 470–471; Vance v. Bradley, 440 U.S. 93, 108–109 (1979).

[5] *See* Lynda Gratton & Andrew Scott, The 100-Year Life: Living and Working in an Age of Longevity 22–25 (2016).

[6] *See* Castle Rock v. Gonzales, 545 U.S. 748 (2005); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989); Harris v. McRae, 448 U.S. 297 (1980); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970).

[7] *See* Washington v. Davis, 426 U.S. 229 (1976); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1978); Employment Div. v. Smith, 494 U.S. 872 (1990).

age, and there is reason to be skeptical that future Americans will muster the political will to redistribute wealth to make up for it.

Constitutional law can only do so much for a miserly nation, but the prospects for some contribution are less bleak than they might appear. Positive rights are more prevalent in American constitutional law than US courts typically admit. Although courts are, for the foreseeable future, unlikely to create new substantive positive rights out of the cloth of the US Constitution, positive rights are best understood not as new rights but as the positive sides of older ones. And there are US constitutional rights whose protection requires the government to take on affirmative obligations. The Supreme Court's rejection of *overt* protection for positive rights has been deliberate, reflecting less an inherent feature of the US Constitution than a persistent divide in US politics, particularly around issues of race and class. Carving out some constitutional space for a right to grow old would require less a sledgehammer than a scalpel, less a constitutional invention than an exercise of judgment.

12.1 POSITIVE RIGHTS AT THE SUPREME COURT BAR

The Supreme Court has said repeatedly that the constitution protects negative rather than positive rights. Most bracingly, in the 1989 case of *DeShaney v. Winnebago County Department of Social Services*, the Court denied that a boy who had been beaten into a coma by his father had any constitutional rights against the county welfare workers who had negligently kept the boy in the father's care.[8] "Our cases have recognized," Chief Justice Rehnquist wrote, "that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[9]

The refusal to understand the Fourteenth Amendment's rights provisions as conferring a duty on the state to protect citizens from private injuries is consistent with a set of cases that arose in the 1970s, when the constitutional status of the welfare state remained very much in play. Thus, the Court held that a family had no right to have its state welfare benefits increase commensurate with family size,[10] that a woman had no right to a publicly funded abortion, even one that was medically necessary,[11] and that kids in poor neighborhoods had no right to have their public schools funded on par with those in rich neighborhoods.[12]

But as hostile as the Burger Court and its sequelae have been to positive rights, the constraint the Court's body of cases imposes on the recognition of such rights is best understood as one of degree rather than kind. Positive rights are not a question of

[8] *DeShaney*, 489 U.S. 189.
[9] *Id.* at 196.
[10] *See Dandridge*, 397 U.S. 471.
[11] Maher v. Roe, 432 U.S. 464 (1977); *Harris*, 448 U.S. 297.
[12] *Rodriguez*, 411 U.S. 1.

which rights the Constitution protects but rather about what the government is obligated to do in respect of those rights. Rights to food, shelter, education, health care, and other rights often associated with the positive dimension of rights do exist under US constitutional law. The Constitution does not permit the government to take food off American tables or prevent Americans from educating themselves.[13] When courts and commentators say that Americans lack positive rights, what they typically mean, rather, is that the federal Constitution does not obligate the government to provide these entitlements or facilitate access to them. In the language of international human rights law, the government has a duty to respect these rights, but it does not have a corresponding duty to protect or promote them.

This limitation is strict and marks the US as a global outlier, but it is not categorical. The Supreme Court has recognized some instances in which the respect the government must afford to rights extends to positive duties to facilitate their exercise. For example, the constitutional right to counsel is understood not simply as a "negative" right of criminal defendants to bring their own counsel to court but has been read to include a positive right to have the government provide counsel to indigent defendants.[14] The right to vote is not simply a right not to have one's vote unreasonably denied but also imposes obligations upon states to create an effective infrastructure for receiving and counting ballots. The right to marry is not just a right to hold oneself out as married but includes an obligation on the state to solemnify the marriage and, therefore, make married persons eligible for certain state benefits. Even in the US, then, the fact that a right is recognized does not, ipso facto, tell us the degree to which its positive dimensions are constitutionally resonant.

The text of the US Constitution is unhelpful here. Many courts around the world protect the positive dimensions of rights, but the different approach they take to these questions is not, as many believe, because their written constitutions provide for these rights explicitly. Although most of the world's constitutions are indeed longer and more explicit than that of the US, including when it comes to rights often characterized in positive terms, the text of the US Constitution determines neither the substance nor the degree of its rights commitments. As David Strauss has observed, the rights the Constitution protects are surprisingly disconnected from its specific language.[15] The Constitution contains no explicit rights against race or sex discrimination, no right to vote, and no free speech rights against states. The degree to which these or other rights are respected, protected, or fulfilled by US courts depends on acts of construction that could as easily apply to rights to food, health, education, and so forth.

[13] *See* Meyer v. Nebraska, 262 U.S. 390 (1923).
[14] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
[15] *See* David A. Strauss, *Foreword: Does the Constitution Mean What It Says?* 129 HARV. L. REV. 1, 3 (2015).

Indeed, US courts nearly accepted this invitation in the 1960s and 1970s. Positive rights relate closely to what American lawyers call the "state action doctrine" and what lawyers in many other parts of the world describe in the language of "horizontal effect:" To what extent does the Constitution require private actors to respect constitutional rights? A constitutional ban on private forms of discrimination is functionally related to a constitutional requirement that the government protect individuals against abuse by private actors. And by the late 1960s, six justices on the Supreme Court were willing to hold that, in at least some senses, the US Constitution could be read to reach such abuse.[16] This posture was manifest in a series of cases that prevented privatization as a means of evading desegregation measures, shielded "sit-in" protesters from state trespass laws, and affirmed Congress's power to guard against private discrimination.[17]

During the same period, in cases concerning the state's obligations toward those it seeks to prosecute criminally, the Court held that the state had to engage in prophylactic acts that lowered the risk of faulty convictions, most famously when it found that the government had to pay for a lawyer for indigent defendants.[18] In extending this last right to the appeal stage, the Court relied not on the Sixth Amendment right to counsel but on the Equal Protection Clause, reasoning that, in the government's refusal to fund appellate counsel for indigent defendants, "an unconstitutional line [had] been drawn between rich and poor."[19] Later, in striking down Virginia's $1.50 poll tax, the Court again relied on the presumptive impermissibility of government distinctions on the basis of wealth.[20] For courts to take seriously the right to be free of the disparate burdens of wealth might, in a practical sense, induce courts to require states to provide certain goods and services to the poor; the only alternative would be to take those goods and services away from the wealthy. An equal protection basis for such holdings could extend them beyond the criminal justice or voting contexts and into other important interests not held to have a specific constitutional basis, such as food, shelter, and health care.

The Court recognized this possibility in later cases placing limits on its incipient wealth discrimination doctrine. Pointedly, in a 1971 decision holding that indigent people can't be denied marital dissolution based on their inability to pay court fees, the Court relied solely on the Constitution's due-process provisions rather than equal protection.[21] Two years later, the Court decided that Texas could tie school funding to local property taxes, plainly disadvantaging students living in poor

[16] *See* United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring); *id.* at 774, 777 (Brennan, J., concurring in part and dissenting in part).
[17] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Peterson v. City of Greenville, 373 U.S. 244 (1963); Robinson v. Florida, 378 U.S. 153 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
[18] *See Gideon*, 372 U.S. 335.
[19] Douglas v. California, 372 U.S. 353, 357 (1963).
[20] *See* Harper v. Va. Board of Elec., 383 U.S. 663 (1966).
[21] *See* Boddie v. Connecticut, 401 U.S. 371, 380–381 (1971).

neighborhoods.[22] This arrangement did not count as unconstitutional wealth discrimination, Justice Lewis Powell wrote for the 5–4 majority, and the students in poor schools did not suffer so much as to implicate any fundamental right to education.[23]

The San Antonio case was, to be sure, bad news for supporters of positive constitutional rights. Wealth discrimination claims have gotten nowhere since then, and the Court appeared to deny that the Constitution mandated state support for important interests. It is important to linger here, however, because Justice Powell's rejection of a right to education was not total. Because the state did not absolutely deny poor children's right to a public education – they got to go to school, after all – the Court did not reach the question of whether a state had an affirmative obligation to provide a minimum level of public education.[24] And the most significant case to have addressed this question since the San Antonio case, *Plyler v. Doe*,[25] suggests that the state might indeed hold such an obligation.

Plyler arose out of a Texas policy that denied free public education to the children of undocumented immigrants. The Court struck it down. While paying lip service to the *Rodriguez* Court's suggestion that public education is not a constitutional right, "neither," wrote Justice Brennan for the majority, "is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[26] Justice Brennan singled out "the importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of the child."[27]

Taken in tandem, the *Rodriguez* and *Plyler* cases reinforce the idea that judicial recognition of the positive dimensions of rights may be denied at retail, but cannot be denied wholesale. In thinking through how much the crack in the door to positive rights could widen in the case of rights to various forms of support for older Americans, it is necessary to examine the political economy of the right to grow old, especially in relation to rights for which the door has remained closed.

12.2 THE POLITICAL ECONOMY OF POSITIVE RIGHTS

The cases in which US courts stifled the growth of positive rights were not random. They were tied quite directly to race and class and were the products of courts built to produce them. A potential right to grow old involves very different politics.

[22] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
[23] *See id.* at 36–37.
[24] *See id.*
[25] 457 U.S. 202 (1982).
[26] *Id.* at 221.
[27] *Id.*

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When Richard Nixon ran for president in 1968 and 1972, his two most significant domestic issue areas were criminal justice and busing.[28] He used these issues and the racialized frame around them as wedges to try to pry working-class whites away from the Democratic Party. Criticism of the Supreme Court's decisions on "law and order" and desegregation made regular appearances in Nixon's stump speeches (as they were, more pointedly, in George Wallace's).[29] At the time of the election, President Lyndon Johnson's nomination of Abe Fortas to replace the retiring Earl Warren was stalled in the Senate, and so the Warren Court was almost literally on the ballot.

The year before, Johnson had made Thurgood Marshall the Court's first African American justice. Marshall was also, of course, the face of desegregation, and the Nixon and Wallace campaigns and their supporters frequently conflated racial integration in schools with crime. "They are afraid of street disorders and crime," the *New York Times* wrote in an article on Wallace's supporters. "They also hate provocative political demonstrators and they resent incursions of Negroes into predominantly white neighborhoods and schools."[30] The militaristic language of *infiltration* was used to describe violent criminals and Black schoolchildren alike. Nixon was vice president when *Brown* was decided, and he publicly supported President Eisenhower's federal interventions in support of integration. Still, especially in light of Wallace's presence in the race, Nixon suggested that the Warren Court's desegregation rulings had been too broad and consistently emphasized themes of federalism and local political control.[31]

These law-and-order and desegregation themes permeated Nixon's judicial selection process. Warren Burger's selection as chief justice and the choice of Harry Blackmun as Nixon's second Supreme Court pick owed in part to the perception that they were "law-and-order" judges.[32] The racial undertones of Nixon's other two selections were undeniable. Lewis Powell had presided over the Richmond School Board during its resistance to desegregation efforts, vowing that he would never favor compulsory integration.[33] As a law clerk to Justice Robert Jackson, William Rehnquist had written a memo supporting *Plessy v. Ferguson*.[34] (Nixon's failed nominations of southerners Clement Haynesworth and Harrold Carswell were widely perceived as efforts to appeal to voters who disapproved of civil rights reforms.)

[28] *See* Kevin J. McMahon, Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences 7 (2011).
[29] *See id.* at 36.
[30] *Id.* at 43.
[31] *See id.* at 58, 74.
[32] *See id.* at 80, 87.
[33] *See* John C. Jeffries, Jr., Justice Lewis F. Powell, Jr.: A Biography 40–41 (2001).
[34] *See* Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. Rev. 631 (2012).

The racial themes of Nixon's campaign against the Warren Court engulfed his stance on government welfare as well. The common association of "welfare" with irresponsible behavior by racial minorities is well established. Nixon's 1968 convention speech played on these themes, accusing government welfare programs of "reap [ing] … an ugly harvest of frustration, violence, and failure."[35] The case rejecting any constitutional right to welfare, *Dandridge v. Williams*,[36] included Chief Justice Warren Burger in its five-justice majority opinion. The cases rejecting the right of Medicaid and state welfare recipients to abortion funding – *Maher v. Roe*[37] and *Harris v. McRae*[38] – both included Burger, Powell, and Rehnquist in their narrow majorities. Race was barely below the surface of the abortion issue. As Justice Marshall wrote in dissent in *Harris*, the abortion rate for nonwhites was about twice what it was for whites, and nonwhites were disproportionately likely to be indigent.[39]

The Court's opinion in the public school funding case, *Rodriguez*, decided two months after *Roe*, had all four of Nixon's appointees in the 5–4 majority, which Powell authored.[40] *Rodriguez* was on its face a case about wealth discrimination, but of course it was also about race, on several levels. *Rodriguez* was a desegregation case. Demetrio Rodriguez brought the lawsuit on behalf of a group of parents of students in schools in Edgewood, a neighborhood whose public schoolchildren, due in large part to housing discrimination, was more than 90 percent Mexican American.[41] More broadly, southern states' massive resistance to the Supreme Court's injunction in *Brown v. Board of Education* that they may not racially segregate their public schools was followed by more passive resistance. Minority-to-majority transfer schemes, whereby students could freely transfer out of schools in which they were a racial minority, were struck down by the Supreme Court in 1963.[42] Closing the public school system to avoid desegregation was ruled invalid in 1964.[43] Freedom of choice plans, which tended to replicate dual school systems, fell in 1968. Most jurisdictions ultimately settled on geographic zoning as the way to assign students to schools. The problem is that geographic zoning is vulnerable to white flight that can reproduce and reinforce racially identified neighborhoods and schools, such as in Edgewood.

The problem of white flight is stubborn enough on its own – as the busing saga demonstrated – but allowing schools to be financed through local property taxes greatly exacerbates the problem by effectively privatizing public schools. Well-financed schools attract more affluent residents, raising property values. The cycle

[35] *Id.* at 298 n.53.
[36] 397 U.S. 471.
[37] 432 U.S. 464.
[38] 448 U.S. 297.
[39] *Id.* at 343–344 (Marshall, J., dissenting).
[40] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
[41] *See id.* at 12.
[42] *See* Goss v. Knoxville Bd. of Educ., 373 U.S. 683 (1963).
[43] *See* Griffin v. Prince Edward County Sch. Bd., 377 U.S. 218 (1964).

then repeats. In this way, formally separate but formally equal schools were replaced by informally separate and formally unequal schools. This inequality, though naked, was ostensibly produced through private market ordering and was therefore invulnerable to constitutional attack.

In nearly every case in which the Burger Court conspicuously limited the respect that needed to be shown to the positive dimensions of constitutional rights – in *Dandridge*, in *Rodriguez*, in *Washington v. Davis*,[44] in *Maher* – those rights were bound up in race and class politics.

The right to grow old is different in this respect because "[a]ll children, except one, grow up."[45] The challenges of aging disproportionately affect the poor and the disadvantaged, of course, but none of us are immune entirely from them. Social Security and Medicare, both of which primarily benefit the elderly, remain two of the most popular government social programs. Research has suggested that media portrayals of these programs tend to be positive and tend to depict white recipients, and indeed that whites with conservative views on race view Social Security more positively than their liberal counterparts.[46] If the positive dimensions of social rights are ever to find favor with US courts, the rights of an aging population are more likely to be recognized than others.

12.3 PUTTING AGE DISCRIMINATION IN CONTEXT

Viewing social obligations toward older Americans as constitutionally enforceable may require a wholesale shift in cultural attitudes about duties toward others, but adopting a different posture toward rights would get some of the way there. American courts faced with rights disputes tend to load the weight of analysis on threshold legal questions, such as whether the Constitution contains particular rights, who is entitled to hold them, and what the standard of review is when those rights are abridged. Identifying rights with particular categories of deference is thought to discipline the inquiry and subject rights to the forms of analysis – interpretation of written texts, historical understandings, and legal precedents – that judges are competent to perform.

These questions are abstractions, deliberately so, and tend toward a style of slippery-slope reasoning familiar to US lawyers. To those socialized into American rights review, declaring a "right to grow old" seems to entail judges attempting to require the government to fund elder care, to make medical and drug payments, to make its buildings and services more accessible to people with physical and intellectual challenges, to impose certain accommodation requirements in workplaces

[44] 426 U.S. 229 (1976).
[45] J. M. Barrie, Peter and Wendy 1 (1911).
[46] *See* Nicholas J. G. Winter, *Beyond Welfare: Framing and the Racialization of White Opinion on Social Security*, 50 Am. J. Pol. Sci. 400 (2006).

and public-facing businesses, or even to restructure hiring practices or pension guarantees to enable older Americans to remain gainfully employed. A right to grow old might also seem to require a reassessment of the bounds of the category itself. If there is a right to grow old, why not a right to be sick; to be an addict; to be obese, or short, or tall; or to be less intellectually agile? What accommodations, and at what cost, do people in these conditions require of the government? Where does it end? Not knowing the answer to this question makes a right to grow old seem either unwieldy or lawless. There can be no such right. Right?

Many of the world's courts approach the positive dimensions of rights differently. They do not refuse to recognize them for fear of slippery slopes, chaotic decision-making, or empowering too many litigants. They also, and relatedly, do not assume that recognizing the need to protect or promote constitutional rights requires them to do so fully or immediately.

In thinking through what particularized, contextual decision-making might look like in the area of age-related burdens, consider two roughly contemporaneous Canadian cases decided under the Charter of Rights and Freedoms. In the first, *McKinney v. University of Guelph*, private universities in Ontario were sued by professors and a librarian over the schools' mandatory retirement age of sixty-five.[47] In the second, *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)*, a woman who lost her job just before turning sixty-five sued over being denied unemployment benefits, which were unavailable to those eligible for retirement benefits.[48]

Either of these cases would be straightforward losses under the US Constitution as interpreted by the Supreme Court. Never mind that the University of Guelph is a private institution and therefore immune to constitutional attack under US state action doctrine (and, it turns out, under Canada's as well). The key point is that age discrimination receives rational-basis review.[49] Any conceivable rational reason for age discrimination passes constitutional muster, and there will always be conceivable rational reasons for age discrimination. This is particularly so in the context of social welfare programs designed to address problems that typically arise at particular life stages.

The particular challenged provisions in *McKinney* and *Tetreault-Gadoury* had perfectly rational justifications. Mandatory retirement requirements cannot be viewed in isolation from other labor and welfare policies. Often they are the products of delicate collective bargaining or implicit trade-offs that include compensating pension or job security guarantees (including, in the case of a university, a tenure system). These requirements can create job opportunities for younger workers in tacit exchange for requiring those workers to help fund the retirement

[47] [1990] 3 S.C.R. 229 (Can.).
[48] [1991] 2 S.C.R. 22 (Can.).
[49] *Gregory*, 501 U.S. 452.

of their predecessors. In certain settings, moreover, the requirement obviates the need to dismiss older employees for performance reasons, which can be more acrimonious and dignity-effacing than mandatory retirement. The restriction of unemployment benefits considered in *Tetreault-Gadoury* was designed to prevent people over the age of sixty-five from receiving both pension and unemployment benefits at the same time and to prevent manipulation of the Unemployment Insurance Act by those who were planning to retire.

Unlike in the US, age discrimination is specifically prohibited under the Canadian Charter of Rights and Freedoms.[50] But rather than decide either that age discrimination was so constitutionally offensive that only the most compelling of reasons could permit it, or that age discrimination was easily justified on any conceivable rationale, the Canadian courts carefully examined the justifications themselves. Doing so enabled the Court to come out differently in the two cases based on relevant differences between them.

The *McKinney* Court acknowledged that the mandatory retirement policies at issue constituted age discrimination but held that the discrimination was justified under section 1 of the Charter, which says that the Charter's rights guarantees are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[51] Under the proportionality test the Canadian Supreme Court applies in rights cases, this inquiry requires the Court to assess the importance of the state's objectives, the fit between those objectives and the challenged practice, the necessity of the challenged practice in light of available alternatives, and the burden of the practice in relation to its benefits. Here Justice La Forest, writing for the majority, agreed with the universities' submission that mandatory retirement enables faculty renewal and bolsters tenure protections, which enhance academic freedom, and that these objectives could not easily be achieved without the policy.[52] The Court recognized that the important questions were not about whether there was age discrimination, which there obviously was, but whether it was justified in a way that respected both the rights of individual employees and the needs of an important societal institution.

The Court came out differently in *Tetreault-Gadoury*, which Justice La Forest also wrote. But the contrast with *McKinney* was not in whether particular rights were recognized or whether a particular standard of review applied. In both cases, the policy before the Court contravened section 15 of the Charter, which prohibits age discrimination. In both cases, the Court reached that view independent of whether the discrimination was intentional or invidious. Under the Charter, discrimination is actionable even if it is indirect or based solely on the adverse impact on a

[50] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.), § 15(1) [hereinafter Charter].

[51] *Id.*, sec. 1; *see McKinney*, 3 S.C.R., at 278.

[52] *See McKinney*, 3 S.C.R., at 282–289.

population.[53] In both cases, moreover, the objectives behind the policy were legitimate and important. The difference was that, in *Tetreault-Gadoury*, unlike in *McKinney*, the Court believed those objectives could be achieved without burdening the rights of sixty-five-year-olds. There was no evidence that sixty-five-year-olds were any more likely than others to abuse the system by seeking unemployment benefits for which, by not actively looking for work, they were ineligible.[54]

The Supreme Court of Canada differentiated cases on their facts, on the margins, rather than by putting them into separate legal categories. It was able to both recognize and discipline a right against age discrimination without abstracting away from the context of the cases. The next section generalizes this strategy and discusses others that enable courts around the world to do the same.

12.4 STRATEGIES

There are at least five distinct strategies that courts can deploy to discipline a right to grow old without extinguishing it: (1) proportionality, (2) polycentric constitutionalism, (3) a "minimum core" approach, (4) progressive realization, and (5) remedial flexibility. I briefly discuss each strategy below.

12.4.1 *Proportionality*

It is sometimes assumed that what makes courts around the world responsive to positive rights is constitutional enumeration. As I show above, this is not necessarily the case, as US constitutional rights are frequently atextual and sometimes have positive dimensions. What does differentiate the US approach to positive rights from that of many other courts is the all-or-nothing frame that US courts often apply. In cases like *Rodriguez*, courts suggest that positive rights can't be recognized because they can't be maximally enforced.

Proportionality – used nearly all the world over, save the US – is an essential tool for avoiding this dilemma. As the Canadian age discrimination cases show, proportionality analysis tends to divert judicial attention away from interpretive questions, such as whether the constitution recognizes particular rights, and towards questions of application, such as the degree of burden to the rights bearer, what justifications the government is relying on, and what alternatives are available to it. Under proportionality analysis, it becomes possible to treat the positive and negative dimensions of rights in just the same way, because the relevant question is not whether the right is *a right* but rather what the government is obligated to do, or

[53] *See Tetreault-Gadoury*, 2 S.C.R., at 41; *McKinney*, 3 S.C.R., at 279; Andrews v. Law Soc'y of Brit. Col., [1989] 1 S.CR. 143 (Can.).

[54] *See Tetreault-Gadoury*, 2 S.C.R., at 45.

refrain from doing, in virtue of the burdens it is placing on citizens. The answer to that question is neither "nothing" nor "everything." It is, in every case, "it depends."

The landmark Canadian case of *Eldridge v. British Columbia (Attorney General)* provides a striking example.[55] A nonprofit that had been providing sign-language interpretation for hearing-impaired patients in British Columbia hospitals at no cost to the province ceased operation and the province refused to pay for the service to continue. The Supreme Court of Canada held that the province was liable, not because disability rights are especially absolute or subject to some kind of "strict scrutiny" but rather because the ability to communicate with one's healthcare provider is vitally important in a hospital setting and the cost to the province to provide interpretation services was trivial.[56]

The province attempted to defend its actions using US-style slippery-slope arguments to the effect that a holding in favor of the patients in this case meant that the hospital would need to fund a host of language translation services, but Justice La Forest made short work of the claim, calling it "purely speculative" and noting the many relevant differences between people who cannot speak English or French and those who are hearing-impaired.[57] Justice La Forest noted those differences not to say that a different translation case would not arise or would necessarily come out differently but to say that such a claim and its outcome "cannot be predicted in advance."[58] A reluctance to decide hypothetical cases in advance of their concrete facts is a common feature of proportionality, which engages intimately with those facts to reach outcomes.

12.4.2 *Polycentric Constitutionalism*

Rights protection is not solely the province of courts. Indeed, the usual way in which communities protect the rights of their members is by making and enforcing laws in pursuit of public health, safety, and welfare. Whether by providing health care, health insurance, or various forms of assisted living, by promulgating pension or retirement rules, or by crafting other state-provided social insurance programs, legal accommodation of old age should occur primarily through legislation rather than court decisions. It is telling that accommodation and protection for people with disabilities, the closest analogue to a right to grow old, occurs primarily through the Americans with Disabilities Act (ADA),[59] the Rehabilitation Act,[60] the Individuals

[55] [1997] 3 S.C.R. 624 (Can.).
[56] *See id.* at 676, 686.
[57] *Id.* at 687–688.
[58] *Id.* at 688.
[59] Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (codified as amended in scattered sections of 29, 42, and 47 U.S.C.).
[60] Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

with Disabilities Education Act (IDEA),[61] and state and local law. What protections federal law offers against age discrimination also occur primarily via statutes: the Age Discrimination in Employment Act (ADEA)[62] and the Age Discrimination Act.[63] Both the negative and – especially – the positive dimensions of the rights these laws advance reflect a constitutional vision enacted through laws, not just litigation.

And yet, these laws need a firmer constitutional foundation. According to the Supreme Court, Congress's power to pass both the ADA and the ADEA stems entirely from its power to regulate interstate commerce rather than from its power to enforce the equality and rights guarantees of the Fourteenth Amendment.[64] The reason for this limitation is that the Court reviews disability and age discrimination under rational-basis review rather than heightened scrutiny. This means that states that discriminate rationally against older people or people with disabilities have not violated the Constitution, which in turn means that Congress cannot premise legislation-holding states to higher standards on its Fourteenth Amendment enforcement power.

Being forced to defend rights-protective statutes as an exercise of the Commerce Clause has significant costs. In the ADA and ADEA contexts, it means that individuals aggrieved under these laws cannot bring damages actions against states.[65] And a chillier wind blows. The Court has declared that the Commerce Clause cannot be used to require Americans to engage in activities, which threaten accommodation requirements.[66]

A right to grow old need not necessarily rely on a heightened scrutiny for individual acts of age discrimination. It could be enough for the Court to recognize the power of Congress to legislate in rights-protective ways even for rights that the Court does not view in the same terms.

12.4.3 *Minimum Core*

International human rights law has grappled with the problem of giving justiciable or administrable content to the positive dimensions of rights. The United Nations Committee on Economic, Social, and Cultural Rights has interpreted the

[61] Individuals with Disabilities Education Act (IDEA), Pub. L. No. 101–476, 104 Stat. 1103 (1990) (codified as amended and reauthorized at 20 U.S.C. §§ 1400–1485).

[62] Age Discrimination in Employment Act of 1967, Pub. L. No. 90–202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

[63] Age Discrimination Act of 1975, Pub. L. No. 94–135, 89 Stat. 728 (codified as amended at 42 U.S.C. §§ 6101–6107).

[64] *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

[65] *See Kimel*, 528 U.S., at 80.

[66] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 550–555 (2012) (opinion of Roberts, J.).

International Covenant on Economic, Social, and Cultural Rights (ICESCR) to protect a "minimum core" of the rights that instrument recognizes, whether to food, health, education, or water.[67] The idea of minimum core obligations counters the concern that positive rights may induce legal decision-makers to try to maximize the provision of services beyond state capacity or the allocative competence of adjudicators by, instead, defining the government's obligations in minimalist terms.

The minimum core idea has held an appeal in international human rights law insofar as it enables the Committee to articulate obligations that must be fully and immediately realized regardless of a country's level of development. Thus, the Committee has offered in its General Comment on the right to health that its minimum core includes the right of nondiscriminatory access to health facilities, goods, and services; basic access to nutritionally adequate and safe food; access to basic shelter, housing, sanitation, and potable water; the provision of "essential drugs;" equitable distribution of health facilities; and adoption and implementation of a national health strategy.[68] Many countries, of course, fall below this minimum core for many of their citizens, but the conceit is that it is nonetheless coherent to label this failure a human rights violation. To apply the same label, for example, to a poor country's failure to provide access to higher standards of care would make the human rights regime (even more) vulnerable to charges of ineffectual idealism.

The minimum core concept has had relatively little traction in national constitutions – it was conspicuously rejected in an early South African Constitutional Court decision[69] – but it is portable between international and domestic law.[70] In the *Rodriguez* case, for example, a minimum core idea would have permitted the court to hold that some but not all discrepancies between rich and poor neighborhood schools were constitutionally tolerable. Perhaps a court could order schools to equalize costs of books and teacher salaries but not necessarily the number of field trips or the food options in the cafeteria. Inequity and injustice would of course remain, but the point of the minimum core in a domestic context is that courts can play a role in mitigating injustice even where institutional constraints prevent them from eradicating it.

In applying this idea to the right to grow old, a court could potentially require, for example, that health insurance for older Americans cover, at least in part, the costs of long-term assisted living, or that the government require, by law, that employers offer

[67] *See* U.N. Comm. on Econ., Soc. & Cultural Rights, *Report on the Fifth Session*, Supp. No. 3, Annex III ¶ 10, U.N. Doc. E/1991/23 (1991).

[68] U.N. Comm. on Econ., Soc. & Cultural Rights, 22d Sess., *The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C, Dec. 4, 2000, ICESR General Comment 14 (2000), at ¶ 43.

[69] *See* Gov't of the Republic of S. Afr. v. Grootboom & Others, 2001 (1) SA 46 (CC) (S.Afr.).

[70] *See* David Landau, *The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures*, *in* Economic and Social Rights after the Global Financial Crisis 267 (Aoife Nolan ed., 2014).

employment guarantees for employees who must devote some time to caring for elderly relatives on a long-term basis. At a minimum, a right to grow old could simply mean that the government receives some deference from courts in the choices it makes in structuring programs of this sort.

12.4.4 *Progressive Realization*

The ICESCR obligates states to aim for "progressive realization" of the rights it identifies,[71] in recognition of the fact that, as Katharine Young writes, "[i]n international human rights law, waiting is an accepted part of rights realization."[72] A progressive realization norm generally assumes that "minimum core" is not an adequate global standard – it would, for example, give a pass to the wealthiest countries – but at the same time it concedes that states often lack the material, political, and institutional capacity to respect, protect, and fulfill rights fully and expeditiously. In addition to a variety of international human rights instruments, several domestic constitutions also include the language of progressive realization, and it has been much discussed in the South African constitutional context.[73]

Admittedly "progressive realization" might be a tough sell in the US. It sounds uncomfortably close to "with all deliberate speed," the much-maligned standard the Warren Court deployed in its too-deliberate implementation of *Brown v. Board of Education*.[74] The discomfort is well founded. Permitting a state to delay its implementation of constitutional rights allows it to smuggle political goals – up to and including outright resistance to the right – into claims of administrative necessity.

Still, the failure of the remedy ordered in *Brown* to overcome massive resistance to the implementation of that decision does not mean that progressive realization is never appropriate. That position overstates the capacity of judges to disrupt entrenched racial politics, and, in doing so, it denies courts a tool that may be necessary to the availability of positive rights. Judges don't like to order relief that will reliably be ignored or slow-walked. Without something like a commitment (concession?) to progressive realization, US courts are unlikely to find their way to positive rights.

A right to grow old could benefit from progressive realization through state duties to protect or promote the positive aspects of the right being stated in general terms:

[71] International Covenant on Economic, Social and Cultural Rights, Art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3.

[72] Katharine G. Young, *Waiting for Rights: Progressive Realization and Lost Time*, *in* The Future of Economic and Social Rights 654, 654 (Katharine G. Young ed., 2019).

[73] *See id.* at 661–662; S. Afr. Const. §§ 26–27; *see also* Maldives Const. § 23; Kenya Const. §§ 21, 82; S. Sudan Const. § 34; Zimbabwe Const. §§ 73, 75, 82; Fiji Const. §§ 31–38; Guyana Const. § 154a.

[74] Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

for example, a requirement that long-term care be facilitated without specifying exactly how much or through what channels, but by setting benchmarks for evaluation along the experimentalist model identified and championed by scholars such as Charles Sabel and William Simon.[75] Litigants could return to courts at a later date if progress is not forthcoming.

12.4.5 *Remedial Flexibility*

A final piece to the puzzle of respecting, protecting, and fulfilling a right to grow old comes, appropriately, at the end: flexible remedies. In part, the need for flexible remedies is but a restatement of the need for progressive realization. But there is a more specific point that bears mention. US courts tend to view dialogic approaches to remedies as exotic, even threatening to their credibility. Many constitutional courts around the world, including in Canada, Germany, Ireland, Israel, and South Africa, resort routinely to a remedial technique sometimes referred to as a "suspension of invalidity." This is a technique whereby a court issues a ruling on constitutionality but suspends the order for a set period of time to allow the state to structure the remedy as it sees fit. Thus, for example, in a South African case holding that a statute governing the procedure for criminal appeals was unconstitutional, the South African Constitutional Court suspended the validity of its judgment for more than a year to allow Parliament to develop new procedures for the processing of appeals.[76]

This technique is not entirely foreign to US courts. *Brown II* had something of this structure, as noted. Less high-profile but more to the point, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Supreme Court held that bankruptcy courts had been given too much power, but it delayed its judgment by four months to give Congress time "to reconstitute the bankruptcy courts or to adopt other valid means of adjudication."[77] The suspension of invalidity device demonstrates that progressive realization need not involve endless dialogue but is amenable to the adoption of quite specific and coercive benchmarks.

12.5 CONCLUSION

The right to grow old is a tall order in the US, but it is not an impossible one. The inevitability of aging means that such a right likely faces fewer obstacles than other rights that have significant positive dimensions. It does not require the invention of new substantive rights – indeed, it is already constitutionally protected. It does, however, require a recognition of governmental duties of protection and fulfillment

[75] *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).
[76] State v. Ntuli, 1996 (1) SA 1207 (CC) (S. Afr.).
[77] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1981).

of rights that are not typical (though they do exist) in US constitutional law. The anxiety US courts face about such duties could be soothed by incorporating elements of proportionality analysis, by giving deference to political bodies acting to protect the rights of older Americans, and by availing themselves of some of the tools of incremental or partial rights realization that have become familiar within international human rights law.