STATE CONSTITUTIONAL LAW—EQUAL PROTECTION—PENNSYLVANIA SUPREME COURT UPHOLDS MANDATORY RETIREMENT AGE PROVISION OF THE PENNSYLVANIA STATE CONSTITUTION. *DRISCOLL v. CORBETT*, 69 A.3D 197 (PA. 2013).

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I. INTRODUCTION

Few employees are given an age-based time limit on their term of employment, and fewer still are able to review that time limit for its legitimacy. However, that is exactly what the Pennsylvania Supreme Court did in *Driscoll v. Corbett*[1] when they held that the mandatory retirement provision of the Pennsylvania Constitution[2] did not violate the constitutional provisions of equal protection,[3] ultimately finding the mandatory retirement provision to be constitutional.[4] In its holding, the court applied a rational basis test to the mandatory retirement provision,[5] particularly because the status of the law in review was a constitutional amendment.[6] The court then stated that the retirement

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1. 69 A.3d 197 (Pa. 2013).

2. PA. CONST. art. V, § 16(b).

3. *Id.* art. I, §§ 1, 26.

4. *Driscoll*, 69 A.3d at 215. For details on the holding that do not pertain to equal protection, see *infra* note 69.

5. The rational basis test is the lowest level of judicial scrutiny given in an equal protection analysis. Darlene M. Severson, Case Note, *Age Discrimination Law—Mandatory Retirement of Judges: Law and Policy*—Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.),* cert. granted*, 111 S. Ct. 507 (1990)*, 17 WM. MITCHELL L. REV. 858, 874 (1991) ("[T]he rational basis standard merely requires that judicial inquiry be limited to whether the statutory scheme is rationally related to a legitimate state purpose.").

6. *Driscoll*, 69 A.3d at 210 ("In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people . . . ." (quoting Gregory v. Ashcroft, 501 U.S. 452, 471 (1991))).

provision survived rational basis review, because considerations of increased judicial manpower and "the orderly attrition of judges" were goals that had a rational connection to societal interests.[7] This Comment seeks to analyze the soundness of the court's opinion, specifically whether a different level of equal protection scrutiny should have been implemented for age-based discrimination, and whether the mandatory retirement provision would have passed under a heightened level of scrutiny. Ultimately, this Comment will advocate for a higher level of scrutiny concerning equal protection as it pertains to age, but will leave open the issue as to whether the retirement provision would pass under heightened scrutiny. This Comment will then recommend that constitutional changes should invariably be made through the legislative process.

II. STATEMENT OF THE CASE

Petitioners in *Driscoll* were several Pennsylvania judges.[8] The judges filed complaints in the Commonwealth Court of Pennsylvania, asserting that the mandatory retirement provision of the Pennsylvania Constitution[9] was unconstitutional.[10] Soon after the complaint was filed in state trial court, Petitioners submitted applications for extraordinary relief to the Pennsylvania Supreme Court, asking it to assume plenary jurisdiction, which the Pennsylvania Supreme Court granted.[11] Both Petitioners and the Commonwealth submitted briefs and presented oral argument on the issue.[12] In presenting their case, Petitioners argued that the provision was inconsistent with article I of the Pennsylvania Constitution.[13] Petitioners stated that, under article I, the mandatory

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7. *Id.* at 211 (quoting Keefe v. Eyrich, 489 N.E.2d 259, 264 (Ohio 1986)).

8. *Id.* at 200. Among them was Westmoreland County Common Pleas Judge John Driscoll. Paula Reed Ward, *Pa. High Court Rejects Changing Mandatory Retirement for Judges*, PITTSBURGH POST-GAZETTE (June 18, 2013), http://www.post-gazette.com/news/state/2013/06/18/Pa-high-court-rejects-changing-mandatory-retirement-for-judges/stories/201306180216. Driscoll was one of four judges to initially file the complaint. *Id.* The movement of judges grew to about a dozen by the end of the case. Emilie Lounsberry, *Efforts Underway to End Mandatory Retirement Age for Judges*, PHILA. INQUIRER (June 24, 2013), http://articles.philly.com/2013-06-24/news/40148311_1_retirement-age-federal-judges-tilson.

9. PA. CONST. art. V, § 16(b) ("Justices, judges, and justices of the peace shall be retired on the last day of the calendar year in which they attain the age of 70 years.").

10. *Driscoll*, 69 A.3d at 200–01.

11. *Id.* at 201.

12. *Id.*

13. *Id.* Specifically, Petitioners tried to use sections 1, 25, and 26 of the state constitution. *Id.* at 201–02. Section 1, known as the Declaration of Rights, states: "All men

retirement provision violated the "equal protection" provisions of the Pennsylvania Constitution,[14] as well as other provisions.[15] The Pennsylvania Supreme Court took each provision in turn,[16] ultimately holding that the mandatory retirement provision was constitutional, such that it did not violate the equal protection provisions of the state constitution.[17]

III. BACKGROUND

A. Equal Protection

Equal protection analysis under the Pennsylvania Constitution has its roots in the Equal Protection Clause of the United States Constitution and its case law.[18] Such an adoption of the federal equal protection analysis by a state is known as "lock-stepping."[19] As the Pennsylvania

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are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1. Section 25 is titled "Reservation of Powers in People," and states: "[W]e declare that everything in [article I] is excepted out of the general powers of government and shall forever remain inviolate." *Id.* art. I, § 25. Section 26 is known as the equal protection provision. See *infra* note 14 for the language of the provision.

14. The equal protection provisions of the Pennsylvania Constitution are not actually titled equal protection: Article I, section 1 is titled "Inherent Rights of Mankind," while article I, section 26 is titled "No Discrimination by Commonwealth and its Political Subdivisions." PA. CONST. art. I, §§ 1, 26. Section 26 states: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." *Id.* art. I, § 26.

15. *Driscoll*, 69 A.3d at 201–04. The *Driscoll* court considered two other arguments made by Petitioners. One was the Declaration of Rights provision of the Pennsylvania Constitution. *Id.* at 201–02. Petitioners used the Declaration of Rights and Reservation of Powers provisions to assert that their position as judges was a right vested in section 1, and that any law, including a constitutional amendment, which would transgress that right is not valid. *Id.* The other constitutional challenge was a due process argument, "stating that their election successes invested them with a property right to retain their judgeships for a full ten years despite their reaching the age of 70." *Id.* at 204.

16. The Pennsylvania Supreme Court held that the mandatory retirement provision did not violate the Declaration of Rights provision, nor were Petitioners' due process rights violated. *Id.* at 215.

17. *Id.*

18. *See generally* Love v. Borough of Stroudsburg, 597 A.2d 1137, 1139 (Pa. 1991) ("The equal protection provisions of the Pennsylvania Constitution are analyzed by this [c]ourt under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.").

19. Lock-stepping can be problematic when there are different wordings between state constitutional equal protection provisions and the Equal Protection Clause. *See*

Supreme Court reaffirmed equal protection lock-stepping in their *Driscoll* reasoning, it is necessary to examine the Federal Equal Protection Clause.[20] Analysis of the Equal Protection Clause is needed when there is a law that affects a certain class of people.[21] There are three levels of scrutiny, or lenses, that the court can use to evaluate the law: strict scrutiny, intermediate or heightened scrutiny, and rational basis.[22] Determination of the appropriate level of scrutiny is reliant upon the class of people affected: strict scrutiny is used when the law discriminates against a suspect class, such as race;[23] intermediate scrutiny is used when the law discriminates against a "sensitive classification,"[24] such as gender[25] or children born out of wedlock;[26] rational basis review generally applies to everything else.[27] Classifications under strict scrutiny require the law in question to be narrowly tailored to a compelling government interest to be considered constitutional.[28] Classifications under intermediate scrutiny require the law in question to be substantially related to an important government objective.[29] Finally, classifications that apply the rational basis test only require that the law be rationally

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ROBERT WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 210 (2009). There are many states that have significant differences in their equal protection provisions, from the prohibition of special privileges or discrimination based on sex, to guaranteeing equality in special instances, like public schools and taxation. *Id.* Despite this, most of the state courts revert to using a federal analysis, usually without acknowledging the difference between state and federal guarantees. *Id.*

20. Evidence of such lock-stepping is reflected off of the court's reliance on federal precedent. *See Driscoll*, 69 A.3d at 210 (quoting Gregory v. Ashcroft, 501 U.S. 452, 471 (1991)).

21. Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 41 U.C. DAVIS L. REV. 213, 256 (2010).

22. *Id.*

23. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); City of Richmond v. Croson, 488 U.S. 469 (1989).

24. *See* Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.), 883 A.2d 518, 533 (Pa. 2005).

25. *See* Craig v. Boren, 429 U.S. 190 (1976).

26. *See* Trimble v. Gordon, 430 U.S. 762 (1977).

27. *See generally Kramer*, 883 A.2d at 533 ("[C]lassifications which involve none of these classes or rights are upheld if there is any rational basis for the classification.").

28. *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (holding that prevention of espionage and national security considerations can be considered a legitimate compelling government interest). For a law to be narrowly tailored, it must use the least restrictive method available in pursuing a compelling government interest. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800–01 (2006). A compelling government interest typically involves "only the most pressing circumstances," as the law in question typically impinges on "someone's core constitutional rights." *Id.*

29. Severson, *supra* note 5, at 874.

related to some legitimate purpose of the state, making it the lowest level of scrutiny.[30]

B. Mandatory Retirement Provisions on a Federal Level

The first United States Supreme Court case that dealt with mandatory retirement was *Massachusetts Board of Retirement v. Murgia*,[31] a case that "involved a state law requiring retirement of state police at age fifty."[32] Appellee Murgia brought a civil action in the United States District Court for the District of Massachusetts, alleging that the mandatory retirement statute violated his equal protection rights.[33] The district court judge dismissed Murgia's claim because "the complaint did not allege a substantial constitutional question."[34] On appeal, the United States Court of Appeals for the First Circuit remanded the case for procedural reasons.[35] The panel held that the statute violated Murgia's equal protection rights, and the Supreme Court noted its jurisdiction in the matter.[36] The Court in *Murgia* stated that age-based discrimination with regard to mandatory retirement was subject to rational basis review.[37] This led the majority to hold that the purpose of the law was rationally related to the classification.[38] The dissent[39] disagreed with the majority's classification, advocating for a heightened level of scrutiny.[40]

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30. *Id.*

31. 427 U.S. 307 (1976).

32. Severson, *supra* note 5, at 871.

33. *Murgia*, 427 U.S. at 309–10.

34. *Id.* at 310.

35. *Id.* Specifically, the First Circuit determined that it would be necessary to "convene a three-judge court." *Id.*

36. *Id.*

37. *Id.* at 312–13. Specifically, the Court held that strict scrutiny was not the appropriate level, because those of older age have not been subject to a history of intentional unequal discrimination. *Id.* This is irrelevant of the fact that people of old age have experienced some level of discrimination, as it never rose to the level of political powerlessness that classifications under strict scrutiny have faced. *Id.*

38. *Id.* at 314–15.

39. *Murgia*, 427 U.S. at 317 (Marshall, J., dissenting).

40. Severson, *supra* note 5, at 873 (citing *Murgia*, 427 U.S. at 325). Justice Marshall made it a point to illustrate some of the protections afforded to the elderly, including anti-discrimination legislation and legislation that "provides them with positive benefits not enjoyed by the public at large." *Murgia*, 427 U.S. at 325 (Marshall, J., dissenting). Further, while discrimination against the elderly is not widespread, it "is centered primarily in employment." *Id.* Justice Marshall went on to say: "The advantage of a flexible equal protection standard, however, is that it can readily accommodate such variables." *Id.*

The next case to handle mandatory retirement provisions was *Vance v. Bradley*.[41] This time the Court was dealing with a mandatory retirement provision of a Foreign Service officer.[42] The Court again used the rational basis test, finding that the goals of offering new promotion opportunities and legislative convenience were rationally related to the classification.[43] Justice Marshall again spearheaded the dissent, stating that there was no evidence that people over a certain age performed their duties less capably than younger employees.[44]

Gregory v. Ashcroft[45] is the final pertinent Supreme Court case that deals with mandatory retirement provisions. Similar to *Driscoll*, *Gregory* concerned a Missouri state constitutional provision mandating that judges retire after reaching age seventy.[46] After ruling that the constitutional provision did not violate the Age Discrimination in Employment Act ("ADEA"),[47] the Court went on to affirm that age is subject to rational basis review, and that the state's goal of upholding the judiciary was rationally related to the constitutional provision.[48] The Court also made it a point to note that, because the law in question was a constitutional provision, even more deference was to be given.[49]

C. The Pennsylvania Mandatory Retirement Provision and Gondelman[50]

Article V of the Pennsylvania Constitution was amended in 1968 and ratified by a convention held in 1967–68.[51] The purpose of the convention was to "consider certain proposed changes to the state charter, including

41. 440 U.S. 93 (1979).

42. *Id.* at 95.

43. Kohn, *supra* note 21, at 224 (citing *Vance*, 440 U.S. at 101–09).

44. *Id.* ("The Court did not appear bothered by . . . [the] 'record devoid of evidence that persons of [age sixty] or older are less capable of performing their jobs than younger employees.'" (quoting *Vance*, 440 U.S. at 112 (Marshall, J., dissenting))).

45. 501 U.S. 452 (1991).

46. *Id.* at 470.

47. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2012). The Court held that the ADEA, which prohibits the discrimination of individuals in employment based on age, did not apply to judges, who were "appointee[s] on the policy-making level" subject to an exception of the Act. *Gregory*, 501 U.S. at 467.

48. *Gregory*, 501 U.S. at 470, 472 (holding that there is "a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks" that are assigned to judges).

49. *Id.* at 471 ("We will not overturn such a law unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the people's actions were irrational." (quoting *Vance*, 440 U.S. at 97)).

50. Gondelman v. Commonwealth, 554 A.2d 896 (Pa. 1989).

51. Driscoll v. Corbett, 69 A.3d 197, 200 (Pa. 2013).

changes to article V."[52] Various subcommittees invariably created proposed revisions that were subject to a public hearing, convention debate, and eventually ratification.[53] Article V was completely replaced as a result.[54] The amendment stated: "Justices, judges, and justices of the peace shall be retired upon attaining the age of seventy years."[55]

Article V, section 16 was inevitably challenged in *Gondelman* many years later. Several judges, spearheaded by an attorney looking to become a judge, challenged the validity of the article's mandatory retirement provision in the Pennsylvania Supreme Court.[56] Appealing to *Vance*, the court adopted federal precedent and held that the mandatory retirement provision was subject to the rational basis test.[57] The court also held that the concern of judicial ability degrading with age was rationally related to the goals of the provision.[58] The precedent set in *Gondelman* paved the way for the Pennsylvania Supreme Court's analysis in *Driscoll*.

IV. *DRISCOLL* MAJORITY'S REASONING

Relying heavily on *Gondelman* and *Gregory*, the *Driscoll* court addressed Petitioners' equal protection argument.[59] The *Driscoll* court first found that article V, section 16(b) was subject to a rational basis review because the court was dealing with a constitutional provision, and "not merely with government action."[60] Such a provision "reflects both the considered judgment of the state legislature that proposed it and that of the citizens . . . who voted for it."[61] As such, the court balanced the

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52. *Id.*

53. *Id.*

54. *Id.*

55. PA. CONST. art. V, § 16(b) (amended 2001). The language was subsequently changed in 2001 to say that judges will retire on the last day of the calendar year in which they reach age seventy. PA. CONST. art. V, § 16(b).

56. Gondelman v. Commonwealth, 554 A.2d 896, 897 (Pa. 1989).

57. *Id.* at 900. The court reiterated *Vance*, holding "that: a) the aged, as a group, are not entitled to special judicial protection; and b) the rational basis test is the appropriate standard to be applied where a classification is based on age." *Id.*

58. *Id.* at 903. The court also addressed the Declaration of Rights argument that would later be seen in *Driscoll*, holding that article I cannot be used to invalidate constitutional amendments that were created and ratified by the people. *Id.* at 904. The court said: "Article V, section 16(b), comes from the same source as the rights enumerated in [a]rticle I. It is absurd to suggest that the rights enumerated in [a]rticle I were intended to restrain the power of the people themselves." *Id.*

59. *Driscoll*, 69 A.3d at 209.

60. *Id.* at 210 (quoting Gregory v. Ashcroft, 501 U.S. 452 (1991)).

61. *Id.* (quoting *Gregory*, 501 U.S. at 471).

citizens' equal protection rights with the people's right to amend constitutional provisions, and concluded that a provision enacted by the people would not be subjected to heightened or strict scrutiny.[62]

The court also made it a point to reference *Gondelman*, stating that it "decline[d] to reconsider [the case's] precedent."[63] As such, *Gondelman*'s reasoning concerning its equal protection analysis was upheld.[64] In upholding *Gondelman*, the court considered Petitioners' empirical data that judges can still function past the age of seventy, but ultimately held that such demographic changes are irrelevant to the case at hand.[65] The court stated that the aforementioned data would be better suited to a legislative arena, such that "the proper channel . . . is via further revision to the [c]onstitution through an appeal to the General Assembly and the citizenry based on the factual proofs and policy arguments which they consider relevant."[66]

With regard to the rational basis section of the *Driscoll* court's equal protection reasoning, the court agreed with the framers.[67] The court cited the Ohio Supreme Court in examining the framers' intent: "[T]he amendment at issue . . . not only provides for the retirement of judges, but for their re-appointment as well. The restriction therefore results in an increase of judicial manpower by bringing in younger judges, while retaining the services of willing and able retired judges."[68] The court agreed with this reasoning, and held that the mandatory retirement provision of the state constitution was constitutional.[69]

Justice Eakin's concurrence[70] elaborated on the *Driscoll* court's rationale. In the concurrence, Justice Eakin provided further justification

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62. *Id.*

63. *Id.*

64. *See id.* at 210–11.

65. *Driscoll*, 69 A.3d at 211–12 ("Petitioners cite to no authority suggesting that a constitutional amendment that was valid at its inception can become unconstitutional due to societal changes that have occurred with the passage of time.").

66. *Id.* at 212.

67. *Id.* at 211 ("Petitioners overlook that '[t]he wisdom of the policy behind legislative enactments is generally not the concern of the court.'").

68. *Id.* (quoting State *ex rel.* Keefe v. Eyrich, 489 N.E.2d 259, 264 (Ohio 1986)).

69. *Id.* at 211, 215. The court also addressed Petitioners' Declaration of Rights and due process arguments. *Id.* at 208, 213. In addressing the Declaration of Rights argument, the court used a similar analysis to *Gondelman*'s, holding that article I cannot render a constitutional provision approved by the people inviolate. *Id.* at 209 ("One such natural right of the people is the right to alter their government as they see fit . . . ."). The due process argument advocated by Petitioners was rejected as well; the court held that "judges have no property interest conferred by their election or retention in serving as commissioned jurists" and that the right to pursue a chosen profession is not a fundamental right. *Id.* at 213–14.

70. *Id.* at 215 (Eakin, J., concurring).

for the mandatory retirement provision, arguing that the state constitution was designed to ensure that the judiciary would be insulated from political pressure.[71] Judges are elected to ten year terms.[72] When a judge is up for re-election, she does not have a political opponent running against her, but instead is subject to a "yes or no" retention election.[73] Justice Eakin stated that as a result, judges are "uniquely positioned and sequestered in various ways to protect their impartiality and independence," and that the retirement provision serves as a concrete limit on judicial invulnerability.[74]

V. AUTHOR'S ANALYSIS

A. Determining the Level of Scrutiny: The Past Precedent Paradox

The *Driscoll* court's reasoning in selecting a lower level of scrutiny must be reexamined. In ruling that age is subject to rational basis review, the court paid special notice to the type of law in question: a constitutional provision approved by the people.[75] However, such a statement appears to be contradictory to an earlier Pennsylvania Supreme Court decision, *Hunt v. Pennsylvania State Police*.[76] *Hunt* involved an individual whose prior convictions were expunged by the state trial court.[77] In enforcing the expungement order, the Pennsylvania Supreme Court cited an earlier decision and stated: "[S]tare decisis has 'special force' in matters of statutory, as opposed to constitutional, construction."[78] The court went on to note that this is because, "in the statutory arena[,] the legislative body is free to correct any errant interpretation of its intentions, whereas, on matters of constitutional dimension, the tripartite design of government calls for the courts to have the final word."[79]

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71. *Driscoll*, 69 A.3d at 215 (Eakin, J., concurring).
72. *Id.*
73. *Id.*
74. *See id.* at 216. Justice Eakin goes on to say that such a limit does not threaten the independence of the judiciary; it serves as a timer to denote when the power will pass from one judge to another. *Id.*
75. *See id.* at 210 (majority opinion).
76. 983 A.2d 627 (Pa. 2009).
77. *Id.* at 629. The plaintiff filed a petition to compel the state police to comply with the expungement order. *Id.* at 629–30. The state police invariably filed preliminary objections, which the lower court denied, saying that the police do not have standing to challenge the order. *Id.* at 630. The court in *Hunt* affirmed the lower court's holding that the state police lacked standing to challenge the expungement order. *Id.* at 637.
78. *Id.* at 638 (quoting Shambach v. Bickhart, 845 A.2d 793, 807 (Pa. 2004)).
79. *Id.*

While such a statement appears to be dicta, it cannot be denied that the Pennsylvania Supreme Court believed that courts should have the final word with regard to constitutional interpretation.[80] Why then did the *Driscoll* court partly justify using rational basis review on the grounds that the court was interpreting a constitutional provision? An answer to this question could be taken from the authority on which the court relies. In the block quote that the *Driscoll* court used to justify its reasoning, the court cited *Gregory*, a United States Supreme Court case.[81] In adopting this outside authority, the Pennsylvania Supreme Court may have taken on a holding that, in some way, conflicts with previous precedent. The *Gregory* Court's holding states that constitutional provisions are given more deference because of the "considered judgment of the state legislature that proposed it and that of the citizens . . . who voted for it."[82] The *Hunt* court, by contrast, stated that statutory arenas should have the stronger precedent, and that constitutional issues should be left to the court system.[83]

The *Driscoll* court could be adopting precedent from a higher authority. At the same time, this would appear unconvincing, as the *Hunt* decision came after the *Gregory* holding.[84] This means that, if the Pennsylvania Supreme Court wanted to adopt a higher deference to provisions enacted in the Pennsylvania Constitution, they would not have stated, even in dicta, that stare decisis applies more to statutes than to constitutional provisions just four years prior. It could be argued that the *Driscoll* court was simply overturning some of its earlier dicta, but the court never explicitly stated this.[85] Another argument could be made that the *Hunt* and *Driscoll* courts were discussing two different things. The *Hunt* court was talking about how past precedent should apply more to statutory authority, in relation to expunging past offenses.[86] The *Driscoll* court, by contrast, was talking about how constitutional provisions should have more deference, in relation to equal protection.[87] However, the substance of the cases should not detract from the inherent meaning held in the words "deference" and "precedent." Precedent is defined as "[a] decided case that furnishes a basis for determining later cases

80. *See id.*
81. Driscoll v. Corbett, 69 A.3d 197, 210 (Pa. 2013).
82. Gregory v. Ashcroft, 501 U.S. 452, 471 (1991).
83. *Hunt*, 983 A.2d at 637.
84. *Hunt* was decided in 2009, while *Gregory* was decided in 1991. *Id.* at 627; *Gregory*, 501 U.S. at 452.
85. *See generally Driscoll*, 69 A.3d 197.
86. *See Hunt*, 983 A.2d at 637.
87. *See Driscoll*, 69 A.3d at 210.

involving similar facts or issues."[88] Deference is defined as "a way of behaving that shows respect for someone or something."[89] Stronger precedent, broadly speaking, receives more deference. To give more deference to authority is to acknowledge a stronger precedent. One entails the other.

The *Driscoll* reasoning heavily relied on another case, *Gondelman*.[90] Although the case was decided before *Gregory*,[91] *Gondelman* cited the same authority that was cited in *Gregory*, further reducing the *Driscoll* court's reasoning to the federal arena.[92] Additionally, while the *Gondelman* court was adopting years of federal precedent on mandatory retirement provisions that originated in 1976,[93] the *Gregory* Court was merely affirming that same federal precedent.[94] Therefore, when the *Gregory* Court held that constitutional provisions enacted by the people are given extra deference, the Court was making dicta, unnecessary to its central reasoning.[95] Given that all of *Driscoll*'s reasoning with regard to the level of scrutiny came from past federal cases, examination into the origins of this precedent is necessary.

B. Misplaced Federal Precedent and the Argument for Intermediate Scrutiny

If *Driscoll* can be reduced to *Gondelman* and *Gregory*, then both *Gondelman* and *Gregory* can be reduced to *Murgia*.[96] *Murgia*'s reasoning for having a rational basis test with regard to mandatory retirement provisions is based on two justifications: (1) "the 'aged' had not experienced 'a history of purposeful unequal treatment,'" and (2) "old age does not define a 'discrete and insular' group in need of 'extraordinary

88. BLACK'S LAW DICTIONARY 1295 (9th ed. 2009).

89. *Deference Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/deference (last visited Mar. 10, 2014).

90. *See generally Driscoll*, 69 A.3d 197 (citing *Gondelman* throughout the opinion).

91. The *Gregory* case was decided in 1991, while *Gondelman* was decided in 1989. *See* Gregory v. Ashcroft, 501 U.S. 452, 452 (1991); Gondelman v. Commonwealth, 554 A.2d 896, 896 (Pa. 1989).

92. *Gondelman* cited several federal cases in its reasoning for utilizing the rational basis test, the most pertinent being *Vance* and *Murgia*, which were cited by *Gregory*. *See Gregory*, 501 U.S. at 470; *Gondelman*, 554 A.2d at 899.

93. *Murgia*, the first federal case to deal with retirement provisions, was decided in 1976. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

94. The *Gregory* Court stated: "This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause." 501 U.S. at 470.

95. *See id.* at 470–71.

96. *See supra* text accompanying note 31.

protection from the majoritarian political process.'"[97] Regarding the first line of thought, it appears that the *Murgia* Court, in arriving at its decision, had a specific politically powerful demographic in mind.[98] However, there is "extensive documentation of the plight of older workers."[99] For the second line of reasoning, the Court stated that being elderly "marks a stage that each of us will reach if we live out our normal life span."[100] This statement invariably assumes that, because old age is something that all individuals who die of natural causes will experience, it is not necessary to use a heightened level of scrutiny. It also groups those of old age together in an undiversified homogenous group.[101]

The assumptions held by the *Murgia* Court persisted. *Vance* held that an age-based law is rational, since "aging—almost by definition—inevitably wears us all down,"[102] offering no empirical studies or authorities (outside of *Murgia* and similar precedent), and instead relying on subjective experience. Further, in *Vance*, the dissent made it a point to note that there was no evidence that the elderly could not perform their jobs just as well as anyone else.[103] While it could be argued that the Court in *Vance* and *Murgia* should not be ruling on the empirical findings of the legislature, the Court may want to look into the past precedent reasoning. *Gregory*, for instance, did not examine whether or not the reasons for having mandatory retirement were based on evidence or preconceived notions of the elderly.[104] The Court stated: "It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age."[105] The only authority cited for this finding was older federal precedent, again based on the assumptions of *Murgia*.[106]

While the empirical assumptions in *Murgia* leave a lot to be desired, *Murgia* creates a legal assumption that persists through, and is complicated by, *Driscoll*. In holding that age "marks a stage that each of

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97. Kohn, *supra* note 21, at 233–34 (quoting *Murgia*, 427 U.S. at 313).

98. Specifically, the Court had in mind the class of people considered as the "young-old," a class of healthy individuals who are regarded as elderly. *See id.* at 235.

99. *Id.* An example of this can be seen in the "Wirtz Report," a report that documented employment-related age discrimination to be very prevalent, based on misplaced elderly stereotypes. *Id.* (citing W. WILLARD WIRTZ, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 5–9 (1965)).

100. *Murgia*, 427 U.S. at 313–14.

101. *See* Kohn, *supra* note 21, at 235.

102. *Id.* at 224 (quoting Vance v. Bradley, 440 U.S. 93, 112 (1979)).

103. *Vance*, 440 U.S. at 112 (Marshall, J., dissenting).

104. *See* Gregory v. Ashcroft, 501 U.S. 452, 472 (1991). This idea was also articulated with the lower court's *Gregory* ruling. Severson, *supra* note 5, at 860 (citing Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990)).

105. *Gregory*, 501 U.S. at 472.

106. *See id.*

us will reach if we live out our normal life span," the *Murgia* Court denies that age is immutable.[107] One of the inherent qualifications of subjecting a law to intermediate scrutiny is that the class's characteristics must be based on something immutable.[108] While age could be considered mutable, in that it is chronologically changing, no individual can control it.[109] It is something everyone is born with, the inherent ability to grow older. Therefore, age is an inherent immutable trait, occurring gradually over time, and any law that singles out individuals based on age should be given heightened scrutiny. This concept was rejected in *Murgia*, and confused in *Gregory* and *Driscoll*. When the *Gregory* Court stated that the type of law can lower the level of scrutiny, it muddled the equal protection analysis. The different levels of scrutiny are generally not determined by the law in question, but by the class of people being affected.[110]

If the *Driscoll* court's analysis is based on faulty precedent and misplaced concepts, should the court have struck down the constitutional provision? Even if the court applied an intermediate scrutiny test, there remains the issue of whether article V, section 16(b) would pass the test. That part of *Driscoll*'s reasoning is examined below.

C. Passing Intermediate Scrutiny

Intermediate scrutiny requires the law be substantially related to an important goal of the legislature.[111] In analyzing the statute or constitutional provision, courts "may scrutinize the ends and means of the challenged statute" or provision in question, as opposed to stating

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107. Kohn, *supra* note 21, at 234 (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976)). Immutable traits are generally seen as traits determined by birth or nature, not by social construct. *Id.* at 236 n.117.

108. *See supra* text accompanying note 24.

109. Kohn, *supra* note 21, at 236.

110. *See, e.g.*, City of Richmond v. Croson, 488 U.S. 469 (1989) (holding that strict scrutiny applies to city contract requiring thirty percent of its subcontractors to be minorities); Trimble v. Gordon, 430 U.S. 762 (1977) (holding that intermediate scrutiny should be applied to children born out of wedlock, as that is a trait determined at birth); Craig v. Boren, 429 U.S. 190 (1976) (holding that intermediate scrutiny applies to immutable characteristics determined at birth, such as gender); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that strict scrutiny applies to classes of individuals that have a history of discrimination); Kroger Co. v. O'Hara Twp., 392 A.2d 266, 274 (Pa. 1978) (stating that even if the United States Supreme Court's interpretation of the Equal Protection Clause is not binding on the Pennsylvania Supreme Court, the state courts "should be guided by the same principles in interpreting [their] [c]onstitution," and "[t]o do otherwise would be to place [the Pennsylvania Supreme Court's] subjective value judgment . . . above the value judgment contained in [the] state [c]onstitution").

111. *See supra* text accompanying note 29.

whether it is prima facie valid.[112] While not definitive, intermediate scrutiny "is more likely to be satisfied if there are no better alternatives available to carry out the asserted objectives."[113]

Though it may seem clear that the mandatory retirement provision of the Pennsylvania Constitution passes the rational basis test, whether it passes heightened scrutiny is a more difficult issue to assess. The *Driscoll* court cited the Ohio Supreme Court's reasoning that such provisions allow for the re-appointment of retired judges under a senior status, which in turn opens up their old positions, allowing for an increase in judicial manpower, and promoting the fitness and efficiency of the judiciary.[114] While judicial fitness and efficiency—and more job openings—are good reasons for enacting a law, the provision must be substantially related to those reasons.[115]

It could be argued that the mandatory retirement provision does not pass intermediate scrutiny. First, examining the ends and means of the mandatory retirement provision reveals conflicting empirical data.[116] While there is merit to the belief that individuals deteriorate with age, it is not age that causes the deterioration.[117] Rather, the cause of mental erosion could be one of many diseases that commonly appear in an individual's old age, such as Alzheimer's disease or dementia.[118] Intellectual functions might not deteriorate in everyone with old age.[119] The elderly are also not one big group necessarily. They can be parsed into subcategories, such as the "young-old," ages sixty-five to seventy-four; the "middle old," ages seventy-five to eighty-four; and the "old-old"

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112. Severson, *supra* note 5, at 874 (citing Plyler v. Doe, 457 U.S. 202, 218 n.16 (1982)).

113. *Id.* at 875 (citing *Trimble*, 430 U.S. 762).

114. Driscoll v. Corbett, 69 A.3d 197, 211 (Pa. 2013) (quoting State *ex rel.* Keefe v. Eyrich, 489 N.E.2d 259, 264 (Ohio 1986)).

115. *See supra* text accompanying note 29. It would appear unlikely that, as a guideline, the only way to improve judicial efficiency would be through legislating age. *See infra* text accompanying note 117.

116. Conflicting data includes the information that Petitioners in *Driscoll* relied on. 69 A.3d at 211.

117. Severson, *supra* note 5, at 878 n.117 (quoting Robert N. Butler, *Dispelling Ageism: The Cross-Cutting Intervention*, 503 ANNALS 138, 142 (1989)).

118. *Id.*

119. *Id.* In fact, there is some proof that intellectual function may, with age, improve. *Id.* at 878 n.118 ("[T]here is also evidence that healthy older adults can improve their intellectual performance following cognitive training and may even demonstrate superior performance in select domains such as knowledge about their profession or life matters." (quoting Ursula M. Staudinger, Steven W. Cornelius & Paul B. Baltes, *The Aging of Intelligence: Potentials and Limits*, 503 ANNALS 43, 44 (1989)) (internal quotation marks omitted)).

who are age eighty-five and older.[120] Given the nuances regarding age subcategories and the nature of mental deterioration, it is possible that the mandatory retirement provision in the Pennsylvania Constitution is not substantially related to the goal of maintaining the integrity of the judiciary. Second, there could be other alternatives that would better serve the objective of maintaining the judiciary. A provision could be enacted that addresses the diseases that cause impaired intellectual capability, or establishes a type of judicial intellectual review. While the thought of regularly monitoring judges' mental prowess may seem uncomfortable, it may serve government interests more than simply categorically retiring all judges above a certain age.

However, it is possible to make an argument that mandatory judicial retirement passes intermediate scrutiny. While it is true that there is conflicting data regarding age and mental deterioration, this does not necessarily preclude the data relied upon by the framers of the state constitution. The framers could have reasons for dismissing the conflicting data that outweigh contrary consideration. An argument could also be made that other considerations, like job openings, are better served by this provision.[121] However, as the law in question opens those jobs up by removing individuals based on age, the provision might not be substantially related to such a goal.

Even though the data seems to suggest that this provision would not pass intermediate scrutiny,[122] such a question can only be answered by a court that looks into all of the evidence surrounding mandatory retirement provisions. Ultimately, this Comment is ill-equipped to decide if the mandatory retirement provision will pass under heightened scrutiny, and this question must be left unanswered.

D. Recommendations

Age can be considered a class of people subjected to intermediate scrutiny. Evidence such as the nature of age in relation to mental

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120. Kohn, *supra* note 21, at 235 (citing Carol D. Austin & Marin B. Loeb, *Why Age Is Relevant in Social Policy and Practice*, *in* AGE OR NEED?: PUBLIC POLICIES FOR OLDER PEOPLE 263, 267 (Bernice Neugarten ed., 1982)).

121. The concurrence in *Driscoll* offers additional reasons, such as maintaining a check on an isolated judiciary; whether such a reason would be substantial enough to have a mandatory retirement provision is unknown, but unlikely. *See* 69 A.3d at 215 (Eakin, J., concurring).

122. One such instance of data is that the average life expectancy could have gone up since the provision was enacted. Brad Bumsted, *Pennsylvania One Step Closer to Raising Retirement Age to 75*, TRIBLIVE (Oct. 15, 2013), http://triblive.com/news/adminpage/4887093-74/judges-age-retirement#axzz2r9TARXxy.

capacity,[123] actual causes of mental and physical deterioration,[124] and different age subcategories,[125] could mean that Pennsylvania's mandatory retirement provision can be replaced with another law that would better serve the goals of the framers.

However, given the amount of federal precedent with regard to what level of scrutiny the elderly fall under, it was unlikely that Petitioners' argument in *Driscoll* for a heightened level of scrutiny would pass muster.[126] It would seem as if the federal court system has been foreclosed as a potential avenue of changing mandatory retirement. It is possible for this issue to come up again in state court, and for the Pennsylvania Supreme Court to reanalyze what level of scrutiny should be given to age. However, Petitioners in *Driscoll* already attempted to argue that mandatory retirement should be subjected to heightened scrutiny in state court and did not succeed. Perhaps, then, the only potential route that can be taken at this point would be to enact legislation that would abolish the retirement provision completely.[127] While such a course of action would involve diving headfirst into the political arena, it appears to be the one option that Petitioners have.

VI. CONCLUSION

Driscoll v. Corbett[128] reaffirms *Gondelman v. Commonwealth*'s[129] adaptation of federal precedent. Both cases hold that laws targeting the elderly are subject to rational basis review and that mandatory retirement provisions are constitutional. Both cases uphold years of federal precedent, without substantially checking the data that was initially relied upon. *Driscoll* specifically adopts precedent that states that constitutional provisions are subject to an even lower level of scrutiny than statutory provisions. *Driscoll* also declines to consider

123. *See supra* text accompanying note 117.

124. *See supra* text accompanying note 118.

125. *See supra* text accompanying note 120.

126. After *Driscoll* was decided, several Petitioners decided to take the fight into the federal arena. *See* Lerner v. Corbett, No. 1:12-CV-2577, 2013 WL 5314894 (M.D. Pa. Sept. 24, 2013). The court applied federal precedent and held that the provision is constitutional under rational basis review. *See id.*

127. Legislation has already been suggested to increase the mandatory retirement age of judges to seventy-five. Joseph A. Slobodzian, *Challenge Rejected to Pa. Judges' Age-70 Retirement*, PHILLY.COM (Sept. 26, 2013), http://articles.philly.com/2013-09-26/news/42396150_1_retirement-age-age-70-retirement-judges. Of course, abolishing a provision is different from modifying it.

128. 69 A.3d 197 (Pa. 2013).

129. 554 A.2d 896 (Pa. 1989).

Petitioners' empirical evidence concerning age. Under heightened scrutiny such evidence would have to be considered, but in upholding federal precedent, *Driscoll* makes sure that such evidence cannot be considered in a judicial light. The holding in *Driscoll* ultimately reinforces the notion that, to those wishing to challenge mandatory retirement, the judicial arena has been all but foreclosed.