The Constitutionality of Minimum Age Requirements for Public Office: Reading Joseph Story on Constitution Day

Paul R. Baier
Louisiana State University Law Center
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*I know of no true measure of men except the total of human energy which they embody—counting everything, with due allowance for quality, from Nansen's power to digest blubber or resist cold, up to his courage, or to Wordsworth's power to express the unutterable, or to Kant's speculative reach. The final test of this energy is battle in some form—actual war—the crush of the Arctic ice—the fight for mastery in the market or the court. Many of those who are remembered have spared themselves this supreme trial, and have fostered a faculty at the expense of their total life. It is one thing to utter a happy phrase from a protected cloister; another to think under fire—to think for action upon which great interests depend.

Oliver Wendell Holmes, Jr.1

Actual war—the crush of the Arctic ice—hit me on Constitution Day, Fall Term 1999. I mean Mr. Wilfong's suit against Secretary of State Walter Fox McKeithen2—brought upon a claim that Louisiana's minimum age requirement for elected statewide public office, fixed at twenty-five in Louisiana's 1974 Constitution, clashed with the very same Constitution's prohibition against age discrimination. Is it legally possible for one provision of our Organic Law to conflict with another? Surely this is an intriguing case.

My law school dean, Erwin N. Griswold, advised those of us who make our living as professors of law that "teaching alone is not enough."3 We live half a life

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1. George Otis Shattuck, Answer to Resolutions of the Bar (Boston, May 29, 1897) in The Occasional Speeches of Justice Oliver Wendell Holmes 92, 95 (Mark DeW. Howe ed. 1962). Mr. Shattuck was young Holmes's mentor in his early days of practice at the Boston Bar. Of his friend Shattuck, Holmes recalled:

   He needed the excitement of advocacy or of some practical end to awaken his insight, but when it was awakened there was no depth of speculation or research which he was not ready and more than able to sound. His work may not always have had the neatness of smaller minds, but it brought out deeply hidden truths by some invisible radiance that searched things to their bones.

   Id. at 93.


3. Erwin N. Griswold, Teaching Alone Is Not Enough, 25 J. Legal Educ. 251 (1973). "It was always my belief that the law schools should keep close to the practitioners and work with them in various ways in the interest of the legal profession." Id. at 254. Harvard Law School's Dean Griswold
if we confine ourselves to the classroom. "The professor, the man of letters, gives up one-half of life that his protected talent may grow and flower in peace. But to make up your mind at your peril upon a living question, for purposes of action, calls upon your whole nature." Hence, following Holmes, I have on occasion ventured forth from my cloister to fight for mastery in court.

This time, on Constitution Day, September 17th, Fall Term 1999, I urged rejection of an earnestly pleaded constitutional claim, one which seemed to me, at

commented the model of Yale Law School Professor Alexander Bickel:

Among a faculty that is often consulted and sought out by policy makers, Bickel is still felt to be especially active in public affairs. He terms this involvement "partly self-starting and partly very natural in our profession. In the world of legal scholarship such involvement is almost always implicit or, if you chose to make it so, then it's explicit." Why Bickel has chosen to "make it explicit" is not a question that occurs to people who know him. His qualified restlessness, his personal energy ... seem to make such involvement natural. In addition, Bickel comes from an intellectual tradition ... which values involvement and rejects the scholar as a "self-segregated hermit." Professor Leon Lipson suggests that what Bickel inherited is "necessarily—probably not at all—styles of reasoning and expression, but rather the ethical and intellectual obligation, the felt duty to put oneself in the flow."

And that he does.

Dean Griswold added: "I like that and commend it to you." Id. at 252, quoting the Yale Law Report.


5. Hulit v. St. Vincent's Hospital, 520 P.2d 99 (1974). A married couple wanted to share the birth of their child using the LaMaze method of childbirth. Their attending obstetrician sought to accommodate their wishes. Dr. Hulit sued his own hospital and colleagues over this troubling medico-legal question, won an injunction below, and I was off to Helena, Montana, to argue my first case in a court of law as amicus curiae for the International Childbirth Education Association urging the constitutional rights of doctor and married couple at childbirth.


Allen v. Louisiana State Bd. of Dentistry, 543 So. 2d 908 (La. 1989), rev'g, 531 So. 2d 787 (La. App. 4th Cir. 1988). Justice Luther Cole's soldier-like opinion for the Louisiana Supreme Court condemned the State Board of Dentistry's prosecutor's drafting the decision suspending a dentist's license to practice, which I opposed on due process grounds. This commingling of prosecutorial and adjudicative functions "is anathema under our notions of due process." 543 So. 2d at 916. As a result, retired judges now serve as agency independent counsel and Louisiana administrative practice has been changed for the better throughout the state. Dean Griswold followed every step of this long, hard fight and encouraged me along the way. When I first reported to him the objectionable state practice of commingling of prosecutorial and adjudicative administrative practice—this was at an Old Ebbitt Grill lunch in Washington, D.C.—he exclaimed, "That's done all the time up here. " "Yes, I know, but it's wrong." "Oh, I agree with you," he said encouragingly.

United States v. Louisiana, 9 F.3d 1159 (5th Cir. 1993), as Special Counsel for Louisiana Attorney General Richard P. Ieyoub; rebuttal argument against United States urging reversal. This was The Louisiana Higher Education Desegregation Case, in which the district court had dismantled Louisiana's four higher-education governance boards and the Southern University Law Center, all of which we stoutly opposed in the Fifth Circuit. Held: Remedial order vacated; summary judgment on liability reversed; remanded. Then this sorry twenty-year-old litigation was sweetly settled and Southern University Law Center continues its vital work today.

For other entries in The Baier Docket Book, see Appendix A, infra, "Apologia Pro Vita Sua: Some Appeals I Have Known."
best, rooted in the misguided enthusiasm of youth. Meanwhile, my pro bono client, Mr. McKeithen, remains Louisiana's Secretary of State, for the very good reason that the trial court rejected young Wilfong's claim. No appeal was lodged. The details remain hidden from the reports.

I bear my legal soul in writing about this case. I seek to instruct as to vital points of constitutional adjudication: the tendency of abstract formulas to miss the mark; the need for caution and common sense in construing our living Organic Law; the need for drawing boundary lines of experience in the law of equal protection. I offer a few practice pointers of legal research and analysis under fire. And I also take this opportunity as a grateful teacher to say a word to my former students about the fraternity of the fight, the camaraderie of the Bench and Bar.

I

A. First: "Read the words, read the words, read the words." 6

Constitutional adjudication most assuredly should begin with the words in question, preferably read with the eye of a "master of both microscope and telescope." One must first see the small details of black ink in a sentence or two; next it is vital to step back to see the whole page; thence backwards still to view the document as a whole. One must also keep in mind the Cosmos of the Constitution—I mean its conception, intended reach, and interpretive leeways. Only then can you catch a glimpse, if you will, of the Horsehead Nebula in the Constellation Orion. Getting it into proper focus is a large task indeed:

This brings into focus the part played by the bar in constitutional litigation. An adequately equipped professional bar is the mainstay of the Anglo-American legal order, for it is a necessary adjunct of our courts. If the bar is to fulfill its duties in this most important domain of law, it must realize the nature of issues raised by constitutional controversies and be capable of assisting courts in their solution. The intellectual direction of the bar will certainly in the future be decided by the law schools. The aims and atmosphere of our law schools, the ideas and philosophy which underlie their curricula, the breadth of scholarship and understanding of their faculties, will determine the quality of our lawyers. With legal education rests the responsibility for training men fitted for constitutional adjudications. 8

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6. This, Erwin Griswold believed, was the most important lesson he taught his students. Ex rel. E.N.G., over lunch, Old Ebbitt Grill, Washington, D.C.
7. The figure is Chief Justice Hughes's, his description of Louis D. Brandeis: "Mr. Justice Brandeis is—if I may use another figure—the master of both microscope and telescope. Nothing of importance, however minute, escapes his microscopical examination of every problem, and, through his powerful telescopic lens, his mental vision embraces distant scenes, ranging far beyond the familiar worlds of conventional thinking." Charles Evans Hughes, Mr. Justice Brandeis, in Mr. Justice Brandeis 3-4 (Felix Frankfurter ed. 1932).
8. Felix Frankfurter, Supreme Court Decisions: "What Stuff 'Tis Made Of," in Felix
And so, let us start with the words. Here is the minimum age requirement at issue in this Wilfong case. I quote the pertinent part of Article IV, § 2, of the Louisiana Constitution of 1974, viz.:

§ 2. To be eligible for any statewide elective office, a person, by the date of his qualification as a candidate, shall have attained the age of twenty-five years, be an elector, and have been a citizen of the United States and of this state for at least the preceding five years.

Notice the provision says "shall have attained the age of twenty-five years." There are no ifs, ands, or buts. There is nothing nebulous about the minimum age required. A well-trained legal mind thinks immediately of our venerable friend, "The Plain Meaning Rule." Twenty-five, that's it.

Now, Mr. Wilfong admits his age is only twenty-three, beneath the line drawn by Article IV, § 2. 'But, says his petition for injunction, and here I had better quote it precisely, paragraphs 4 and 5:

4.
Petitioner submits that said constitutional requirement is in direct contradiction with La. Constitution Art. I, Sec. 3 which provides for equal protection of the laws and further prevents any discrimination on the basis of age.

5.
Petitioner submits that the conflict between the two constitutional provisions cannot sustain a rational basis nor a strict scrutiny review and as such are inherently in conflict and unconstitutional.9

These are bold claims, to be sure. Fair appraisal, I should tell my students, requires reading the words of Article I, § 3, supposedly clashing with Article IV, § 2, with a microscope. Here they are, again in pertinent part:

§ 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.

The words say, "No law shall arbitrarily, capriciously, or unreasonably discriminate" against a person because of age. One might well wonder what "law" the Legislature has passed about which petitioner complains? Unhappily, here Mr. Wilfong runs headstrong into the thinking of the First Circuit Court of Appeal, our first precedent en route to the Horsehead Nebula: "Of course, the constitutional provision above quoted prohibits discrimination by laws, and


plaintiff can point to no law which discriminates against him.” Thus, as we told the trial court in our memorandum in opposition, “[Steven S. Wilfong] can point to no law that discriminates against him.” There is none, unless the prohibition of Article I, § 3 also runs against the plain law of twenty-five laid down in Article IV, § 2. But this would mean, would it not, the Framers unwittingly contradicted themselves. Such an outcome, I suggested on Constitution Day, is out of focus. Better to say, from the perspective of both microscope and telescope, the Framers drew the minimum line of reasonable discrimination at twenty-five for statewide elected officials. That, to my mind, is the beginning and, if one reads the words attentively, the end of the matter. Quod erat demonstrandum.

B. Second: Research, Research, Research

I have advised a generation of law students that: “[K]nowing the literal language of the Constitution, even by heart, is only the start of constitutional analysis.” This from a favorite little book of the Constitution, a handy vade mecum of constitutional law known to my students, judges, and practitioners alike as The Pocket Constitutionalist. “Constitutional law is mainly case law. To do well you have to know the cases.” And so, how do you dig them up, you may ask?

1. The Law Reviews

As for unearthing precedents under fire, I recommend the treasure-trove of legal perspiration—the other fellow’s labor—found in weighty law review notes. My learned friend and sometime correspondent Colonel Frederick Bernays Wiener, in his masterpiece Briefing and Arguing Federal Appeals, the locus classicus of appellate advocacy instruction, puts the point well in his suggestions for writing

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13. Id. at viii.
14. In Louisiana ex rel Guste v. Roemer, 949 F.2d 145 (5th Cir. 1991), I found a case involving an analogous turf war between the Governor and the President of the Senate of Puerto Rico over a matter that was essentially an internal political conflict between two coordinate branches of state government. Said the federal First Circuit, in reversing the district court’s refusal to remand the case back to state court following the Governor’s removal to federal court: “We conclude that the district court committed jurisdictional error in retaining this case. And, despite [the Governor’s] complex, and often heroic, arguments to the contrary, the error is a fairly obvious and serious one.” This was our point precisely in Guste v. Roemer. The name of this case, believe it or not, is Agosto v. Romero! See Hernandez-Agosto v. Romero-Barcelo, 748 F.2d 1, 4 (1st Cir. 1984).
15. When you want the best advice on handling an appeal, turn to the classics. The classic book about how to write a brief and argue an appeal is Effective Appellate Advocacy, by Colonel Frederick Bernays Weiner. It originally appeared in 1950. Although revised and
and research: "I am not ashamed to acknowledge that, on numerous occasions, referring to law review notes has saved me much work in collecting cases, and has turned up worthwhile ideas that advanced my own arguments." 16 In Wilfong's case, I had less than a fast forty-eight-hours from phone call to suiting up for court to research the precedents. I turned first to "Developments—Election Law" in our old standby The Harvard Law Review. I hit gold, as witness the following section of our brief in opposition:

**Second. From the law reviews:** "Forty-four states limit eligibility for important state offices to those persons who satisfy minimum age requirements. It seems clear that the state has strong interests in establishing minimum ages for holding office. . . . The legislative purpose underlying age requirements is to ensure that public officerholders are mature enough to deal with public affairs responsibly and effectively." 17

To my mind, this certainly answers Wilfong's plea that neither rational basis nor strict scrutiny review justifies keeping him off the ballot. And more:

Age qualifications are uniformly required and strictly upheld. Restrictions on age and mental capacity provide some assurance of a responsible attitude, a capacity for mature reflection, a background of experience, stability of political thought and the physical and mental vitality necessary for effective representation. Since this restriction is not unique to election laws, a protective attitude can be justified by its wide application and general acceptance. Viewed as an individual qualification, reasonable age requirements can be adequately supported. 18

This from another law review, which we happily quoted in our brief.

2. Annotations

Colonel Wiener advises use of encyclopedias and annotations of cases only as leads for further research; there is no substitute for painstaking reading of the reported cases yourself. But as to the editorial staff of, let us say, The American Law Reports, F.B.W. wisely muses: "I profit by their labors, which shorten my own correspondingly." 19 Indeed, in Wilfong's case, we built our brief in opposition

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17. Memorandum in Opposition, supra note 11, at 2 (citing Developments—Election Law, 88 Harv. L. Rev. 1111, 1223-25 (1975)).
upon the rock of the American Law Reports (3d), — "a helpful annotation, 'Validity of Age Requirement for State Public Office,'" as we told the trial court. Of this annotation, including its current pocket part, we could say with confidence, "It shows that no court in the United States has obliterated State constitutional, minimum age requirements for public office through [plaintiff's] . . . equal protection argument." In short, the collected cases confirmed our instincts.

C. Third: The Precedents

1. State Court Decisions

Two state supreme courts have specifically rejected Fourteenth Amendment equal protection attacks on state constitutional age requirements for state office. "We are satisfied that the minimum age requirements set forth in the New Jersey Constitution relate to the State’s interest in maintaining the integrity of the ballot by ensuring competent candidates. In this context the requirements are reasonable"—so holds the New Jersey Supreme Court, Wurtzel v. Falcey. Of course, if tradition and experience play a part in classification based on age, which indeed they do, one would anticipate judicial reference to the federal analogy, viz: "the age requirements fixed in the U.S. Constitution for members of Congress, Art. I, § 2 (Representatives, twenty-five years) and § 3 (Senators, thirty years)." And, nota bene, New Jersey’s High Court expressly rejects application, doubtless by rote recital, of the so-called "compelling interest" equal protection formula: "Nor are we persuaded by appellants' contention that the State must show a compelling interest to justify the classifications created by these age requirements." Mr. Justice Stewart, a solid judge of uncommon common sense, put Wilfong's plea to rest a generation ago in Oregon v. Mitchell: "(t)est the power to establish an age qualification by the 'compelling interest' standard is really to deny a State any choice at all, because no State could demonstrate a 'compelling interest' in drawing the line with respect to age at one point rather than another." Wurtzel v. Falcey finishes up:

Rather, the power to establish an age requirement necessarily involves the power to choose a reasonable one, which is what the State has done. Therefore, an evidentiary hearing on the relative equality of persons eighteen and twenty-one years old, sought here by appellants, is irrelevant to their equal protection claim once the determination is made that the age classifications provided by the State Constitution are reasonable. This

21. Memorandum in Opposition, supra note 11, at 3.
23. Id.
24. Id.
demonstration would not bear on the issue of whether both groups possess the same maturity and experience, far more critical to the State’s interest in ensuring competent candidates—if indeed such a contention is susceptible of proof. In short, this case simply raises an objection as to where the line was drawn without actually projecting a constitutional infringement.26

Amen.

And the Minnesota Supreme Court, during the Bicentennial of the American Declaration of Independence, mind you, held, unanimously:

Minnesota has a legitimate interest in assuring that those who hold public office possess maturity, experience, and competence. Virtually the only way to accomplish this objective is to set a minimum age for holding office. It would not be feasible to conduct a hearing on the maturity experience, and competence of each aspirant to public office. . . . Having concluded that the establishment of a minimum age is necessary to insure the fitness of those who hold office in Minnesota, it follows that the attending discrimination between those candidates who are over the minimum age and those aspirants to office who are younger than the minimum age is reasonably necessary to the accomplishment of legitimate state objectives.27

Of this case, we told the trial court: “Significantly, the United States Supreme Court dismissed the appeal in Meyers ‘for want of a substantial federal question,’” which is lawyers’ talk for locking the door completely.28

2. Reported Federal Decisions

The Texas Constitution says that the Governor “shall be at least thirty years of age,”29 which is five years above Louisiana’s populist tradition. What of a twenty-nine-year-old’s claim that this is age discrimination in violation of equal protection, viz.:

Plaintiffs claim that it is constitutionally impermissible to deny a citizen who is over eighteen years of age elective office simply because he has not reached the age of thirty years. Plaintiffs contend that such invidious discrimination against otherwise qualified citizens cannot be justified by any compelling state interest and thus denies those persons

26. 354 A.2d at 619 (citations omitted).
29. Texas Const., art. IV, § 16.
between the ages of 18 and 30 the equal protection of the laws, as well as First Amendment freedoms of association, petition, and speech. 30

Not at all said the three-judge federal district court in the Western District of Texas:

The Framers of the United States Constitution saw the wisdom in establishing minimum age requirements for President, Vice-President, and Members of Congress. Until the Supreme Court holds otherwise, this Court has reached the "formidable 'Stop' sign" referred to by Mr. Justice Harlan in Oregon v. Mitchell, through which we will not run. 31

Here the wisdom of the ages is invoked against Wilfong's claim. One thinks of George Washington's seasoned leadership, of Dr. Franklin's sage countenance, of Cicero's De Senectute.

So too, the Sixth Circuit United States Court of Appeals has noted:

The prescribing of minimum ages for public officials is sanctioned by time-honored precedent. The Constitution of the United States fixes a minimum age of thirty-five for President, thirty for United States Senators, and twenty-five for Representatives.

The Constitutions of three of the four States within the Sixth Circuit prescribe minimum ages for State officers. In Michigan, Kentucky, and Tennessee the minimum age for the office of Governor is thirty. State Senators in Kentucky and Tennessee must not be less than thirty years of age, and in Michigan, twenty-one. In Michigan, Kentucky, and Tennessee members of the House of Representatives must be at least twenty-one years of age. Justices of the Kentucky Court of Appeals and the Supreme Court of Tennessee must be not less than thirty-five years of age.

In an analogous situation, a three judge court recently held that the Illinois twenty-one year age requirement for local school board membership is reasonable. The court specifically rejected the contention that the compelling state interest standard was applicable. 32

31. Id. at 1283 (internal citations omitted). On appeal to the United States Supreme Court, this much of the judgment below was affirmed, sub nom., in American Party of Texas v. White, 415 U.S. 767, 94 S. Ct. 1296 (1974).
"The best case!" for our side—this is how Celia Cangelosi, a tough lawyer who defended the Commissioner of Elections on Constitution Day, described her discovery—is *Stiles v. Blunt*. This is an opinion of the United States Court of Appeals for the Eighth Circuit rejecting a claim that Missouri's minimum age requirement for state representatives, fixed at twenty-four years in the Missouri Constitution (Article III, § 4), violates the Fourteenth Amendment. Mind you, this comes in the last decade of what might fairly be called The Egalitarian Century. But, as with all claims of legal right, contrary interests, if not common sense, sometimes stop them short. "Neither a suspect class, nor a fundamental right is implicated by the minimum age requirement," said the Court. "Contrary to appellant's assertion, the right to run for public office, unlike the right to vote, is not a fundamental right." Neither "strict" nor "heightened" scrutiny is appropriate in reviewing these age requirements under federal equal protection analysis. All that is required is a minimum "rational relationship" between the twenty-four-year-old floor and Missouri's legitimate objective "of insuring that its lawmakers have some degree of maturity and life experience...." Just how much is required, is none of the court's business: "We are not permitted to substitute our view of what year an individual should be permitted to run for state representative." Rather, "[t]he issue of whether the minimum age should be 18, 21, 24, or some other age is a classic example of legislative line-drawing that we must leave undisturbed." Each of these ages possesses a measure of maturity and life experience. The higher the age, the higher the measure, or so the People of Missouri might think (never mind Mozart wrote his first libretto at age four).

The Eighth Circuit wound up its opinion this way:

While contested elections may indeed enhance the responsiveness and robustness of our political system, we believe that these arguments are best made to the Missouri legislature or the Missouri citizens in the context of an effort to amend the Missouri Constitution. We are not

33. LSU Law, J.D. 1976. I owe to Celia the courthouse thrill of getting a real judgment signed. She let me do this in *Louisiana Paddlewheels v. Riverboat Gaming Commission*, 646 So. 2d 885 (La. 1996). In *Wilfong*, Celia represented the Commissioner of Elections. While sitting at counsel table, she told me that the Commissioner has nothing to do with the printing of the ballots. I suggested an immediate huddle with the other side and, before court convened on Constitution Day, we brokered a voluntary dismissal of the Commissioner of Elections on the spot.

34. 912 F.2d 260 (8th Cir. 1990).

35. All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.


37. *Id.* at 265.

38. *Id.* at 267.

39. *Id.*

40. *Id.*
permitted to substitute our policy judgment for that of the state under the
guise of applying the rational relationship test.\textsuperscript{41}

The Supreme Court of the United States, take note, denied certiorari.\textsuperscript{42} Celia
was right.

It made no difference to the federal Eighth Circuit that John Stiles was
close, very close, to Missouri’s constitutional cut-off. You must be twenty-
four on the date of swearing-in: “Calculating appellant’s age from his date of
birth, he will be a little over 23 ½ years old on November 1, 1990.”\textsuperscript{43} Nor did
the court accept Stiles’s contention that his age should be calculated from the
date of his conception, pursuant to the Missouri General Assembly’s finding
that “life begins at conception.”\textsuperscript{44} To this fantastic construction, the Eight
Circuit responded, bluntly:—“Age has always been calculated from the date
of birth, which, unlike the precise date of conception, can be determined with
certainty.”\textsuperscript{45} I think, rather, of Holmes’s insight: “The passion for equality
sometimes leads to hollow formulas,” Postal Telegraph-Cable Co. v. Tonopah
& Tidewater Railroad Co.\textsuperscript{46}

\textbf{D. Fourth: The Constitutional Cosmos, State Sovereignty}

In reading the Constitution, state or federal, one must always keep in
focus the necessary prerogatives of the Sovereign. The United States Supreme
Court has plainly recognized that fixing age requirements for state offices “is
a decision of the most fundamental sort for a sovereign entity. Through the
structure of its government, and the character of those who exercise
government authority, a State defines itself as a sovereign.”\textsuperscript{47} And while the
Fourteenth Amendment’s Equal Protection Clause contemplates interference
with state authority, “this Court has never held that the Amendment may be
applied in complete disregard for a State’s constitutional powers. Rather, the
Court has recognized that the States’ power to define the qualifications of their
officeholders has force even as against the proscriptions of the Fourteenth
Amendment.”\textsuperscript{48} Thus, above Steven Wilfong’s textual challenge to
Louisiana’s age requirements for public office necessarily hangs—fatally
hangs—the limiting cosmos of Our Federalism: “Each state has the power to

\textsuperscript{41} Id.
\textsuperscript{43} Stiles, 912 F.2d at 261.
\textsuperscript{44} Mo. Ann. Stat. § 1.205 (West Supp. 1999).
\textsuperscript{45} Stiles, 912 F.2d at 269.
\textsuperscript{46} 248 U.S. 471, 475, 39 S. Ct. 162, 164 (1919).
\textsuperscript{47} Gregory v. Ashcroft, 501 U.S. 452, 460, 111 S. Ct. 2395, 2400 (1991) (rejecting equal
protection challenge to Missouri’s constitutional requirement, art. V, § 26, of mandatory retirement for
most state judges at age seventy).
\textsuperscript{48} Id. at 468, 111 S. Ct. at 2405.
prescribe the qualifications of its officers and the manner in which they shall be chosen."

At this point, I digress to point out that research under fire requires keen lieutenants. I confess that Gregory v. Ashcroft, with its apt thoughts and sledgehammer sentences, completely escaped my memory. But my sidekick, a first-rate Sancho Panza, rescued me. I mean Carlos Romanach, Esq., who has proudly reached man's estate and whose practice is no longer confined to law books behind the scenes. Because of Sancho Panza Romanach, we could bray at nisi prius like Gods on Mount Olympus:

While the Equal Protection Clause provides a check on such state authority, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State’s constitutional prerogatives." This rule "is no more than . . . a recognition of a State’s constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders."

E. Fifth: And in Louisiana

Here it should be enough to say that the age qualifications written into Louisiana’s Organic Law reflect the same historic tradition, common sense, and experience of the Framers of the United States Constitution, parallel provisions in innumerable state constitutions, esteemed commentators—you will hear from Joseph Story, LL.D, and Christopher J. Roy, Sr., in a moment—and an unbroken line of jurisprudence rejecting the exuberant plea of youth of denial of equal protection.

This should be enough, if fundamentals are kept in mind. But what of the claim that Louisiana’s Declaration of Rights goes beyond federal equal protection? What is the reach of Article I, § 3? Here, I submit, the Convention records are cloudy, and there is no guidance whatsoever as to the thorny question of how a court knows when discrimination based on age is arbitrary, capricious, or unreasonable. What is the measure of judgment? By what proofs?

1. Framers’ Intent

My Cajun friend Chris J. Roy, Sr., Vice-Chairman of Louisiana's 1973 Constitutional Convention and a member of the Committee on Bill of Rights, voiced the aim of Article I, § 3 on the Convention floor. According to Framer Roy:

Today, I ask you to change this idea or notion of discrimination. Not as some intellectual far-out foreigner, but as a young Louisianian, born,

51. Id. at 462, 111 S. Ct. 2401 (internal citations omitted) (quoting Sugarman v. Dugall, 413 U.S. 634, 648, 93 S. Ct. 2842, 2850 (1973)); Memorandum in Opposition, supra note 11, at 4.
nurtured, reared, and educated by our schools. Not as a sanctimonious know-it-all, but as an honest, dedicated man who, but for his Cajun accent, has never felt the pains of discrimination, and who abhors arbitrary standards of all discrimination.

What do I ask? Only that you treat, and really read and consider what we have written, that no person will be denied the equal protection of the laws in this state, or subject to the whim or caprice of state law or conduct, because of birth, race, age, sex, social origin, or physical condition. In layman’s language, this section simply means, that if a person is denied the equal protection of, or is discriminated against, by state law or conduct, based on arbitrary standards, that law will be stricken down. It does not mean that no law may be enacted which treats these categories equally [sic], but that all laws must be reasonable with respect to any discrimination imposed upon any person of this great state. Legally, it merely shifts to the state, the burden of proving that if a law or policy is discriminatory with respect to any of these categories, the state must prove that the basis for the discrimination is founded on reason. Are we asking so much of this state? Is it wrong to say that if you, the state, choose to discriminate against me, there must be a reasonable basis upon which the discrimination lies? We think not.52

Reliance on federal equal protection, Mr. Roy explained, was not enough: “[T]he federal courts have failed to apply the Fourteenth Amendment to all of these classes.”53

We feel that we have to enumerate these various rights because we think that our citizens are entitled to have our court protect them in the future. It’s been too many times that even the Supreme Court of the United States has dodged the issue with respect to equal protection. We want to make sure that our justices can clearly understand that when you’re going to discriminate, when the state will discriminate against a person for any one of these categories, then the state must show a reasonable basis for it.54

Now, to mind, what my Brother Roy is saying, quite accurately, is that nowhere in the federal Equal Protection Clause is there a specific prohibition against discrimination based on age, to take only the category of interest here. And, most assuredly, Framer Chris Roy & Co. intended a dramatic shift of the burden of proof of reasonableness to the state. But the test expressly mentioned is the familiar one of “reasonable basis,” is it not?

Senator “Sixty” Rayburn challenged Mr. Roy immediately on age discrimination: “We have in this state a law that says ‘you cannot be a law

53. Id.
54. Id. at 1017.
enforcement officer if you are over the age of thirty-five.' What effect would this language have on that?" Mr. Roy's response?

Senator Rayburn, it'll have none unless the provision or the law is unreasonable and arbitrarily discriminates. . . . It would simply shift, Senator Rayburn, the burden of proof from the individual when he shows that he is discriminated against because of an age factor that has nothing to do with the job. It would simply shift the burden to the state to show that the age factor was a legitimate consideration, and if it showed it, then the law, of course, would be constitutional.56

Again, from Framer Roy: "Age is not a reasonable basis unless the legislature or the state shows that it is a fair consideration."57 Mr. Rayburn, on the other hand, saw trouble ahead:

I had hoped to offer an amendment which would simply say "except as otherwise provided in this constitution" in the event this particular section would pass. I can see, here and now, a field day for the lawyers of this state if you had passed Section 3 with the language and its contents as they are before us this moment. It's a bird's nest on the ground for 'em. Just look at it, there's not one thing that nobody could do that somebody else couldn't say "they are discriminating against me."58

Undaunted, Mr. Roy earnestly urged "that our great state should lead our own citizens to a body politic in which we recognize the sacredness of the individual . . . and that our great courts should interpret our new ideals of equal protection."59

Now, as originally proposed by the Bill of Rights Committee, Article I, § 3, stated in pertinent part, "nor shall any law discriminate against a person in the exercise of rights on account of . . . age . . ."60 Measured by its text, this is an absolute prohibition, no ifs, ands, or buts about it. Nothing in the proposed text limits the prohibition to laws which "arbitrarily, capriciously, or unreasonably discriminate" against any person by reason of age. Thus, one delegate complained: "They say that no law shall discriminate because of . . . well, let's go through a couple of examples—age, . . . you could vote when you are born."61 Delegate De Blieux voiced his support for the original proposal, "with one small objection. I have an amendment prepared for that and that is I would just like to eliminate the word 'age' out of this section.62 Mr. Pugh, a lawyer whose horse sense I have

55. Id. at 1016.
56. Id.
57. Id. at 1017.
58. Id. at 1019-20.
59. Id. at 1016.
60. Id. at 1015-16.
61. Id. at 1024 (Delegate Arnette).
62. Id. at 1018.
always admired, suggested inserting "the word 'reasonably' between the words 'law and discriminate." 63

An overnight compromise sweetly settled the provision at issue here: "No law shall arbitrarily, capriciously, or unreasonably discriminate against any person by reason of . . . age . . ." Mr. Dennery explained:

The authors believe that there is absolutely no basis for any discrimination of any sort on the basis of race or religion, but they do believe that there can be discrimination if it is not arbitrary, not capricious, and not unreasonable as far as the other items contained in the original committee report are concerned. With the question of birth and age, for instance, a reasonable discrimination is understandable because of driver's licenses, for example, or for retirement purposes.64

Delegate De Blieux was satisfied: "This particular amendment takes care of that situation. There are some reasonable bases, as I told you yesterday, that I was afraid of by the provision as to no discrimination as to age. This amendment takes care of that situation."65 It was adopted by the Convention overwhelmingly, 100-6; Article I, § 3 was adopted in its current form, 102-3.66

Whatever else can be said of the Framers' intent, Messieur Roy surely spoke truth when he advised the Convention at the outset of debate on Article I, § 3 of the Declaration of Rights:

More than two thousand years ago, in book four of "The Politics", the world's greatest philosopher, Aristotle said, "if liberty and equality, as thought by some, are chiefly to be found in democracy, it will be best attained when all persons alike, share in the government to the utmost." . . . Surely there will be questions of interpretation which will necessarily follow this section, and all sections and articles of this new constitution, but our courts will interpret our state constitution. We're on the threshold, finally, of forging an instrument which, for our citizens, may result in all persons sharing alike in liberty and equality of this democracy, as Aristotle stated.67

But where, one naturally wonders, does this leave Steven Wilfong? And what of Mr. Roy's fervent wish: "[W]e don't want the courts to be confused anymore."68

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63. Id. at 1027.
64. Id. at 1029 (Aug. 30, 1973).
65. Id.
66. Id. at 1030.
67. Id. at 1016.
68. Id. at 1017.
We reach Orion. Article I, § 3, according to Justice Dennis's microscope and telescope, "calls for more than minimal scrutiny of certain types of classifications, and assigns the state the burden of showing that such legislation is not arbitrary, capricious, or unreasonable."70 "When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis."71 Rejecting federal multi-level judicial scrutiny, the Sibley court espoused "a comprehensive system based upon the unitary standard," which would inquire in all instances whether there is "an appropriate governmental interest suitably furthered" by the governmental action in question.72 Doing away with mouthing formulas, as Justice Dennis recognized, is a good thing. Constitutional adjudication, we are advised, would gain in flexibility, accuracy, and openness. The constitutionality of governmental action would not depend upon the level of scrutiny applied in a particular case, and the need now felt in a considerable number of cases to manipulate principle and precedent in order to reach a proper result would be eliminated. Judicial attention would be focused on the merits of a case and not diverted toward abstract questions. By removing the blinders imposed by a priori categories, the Court would naturally focus upon governmental and individual interests, resulting in a more precise and reliable evaluation of constitutional questions.73

Mr. Justice Holmes put it another way: "Think things, not words," I tell my students.

Justice Jack Watson dissented: "There is no need to adopt the majority's equal protection analysis which blatantly expands judicial authority in derogation of legislative power."74 "The newly discovered requirement that the state justify its legislation in court is an unwarranted invasion of matters best left to resolution in the halls of the legislature."75 Justices Marcus and Blanche also found themselves on the downside.

It seems to me that Sibley is plainly right to require the state to prove that a law which discriminates by reason of age is not arbitrary, capricious, or unreasonable. This is a dramatic change enough. Beyond this, the Convention debates leave me...
dubitante whether anything beyond our old friend Messieur Rationalité was intended. You can read the transcripts for yourself. As to Mr. Roy’s fervent wish to avoid judicial confusion, the record on this score is not too good either.

3. *Manuel v. State*76

This is the minimum age drinking case that caused quite a ruckus at 301 Loyola Ave. Our state supreme court first held that a minimum drinking age of twenty-one unconstitutionally discriminates against eighteen to twenty-year-olds, but on rehearing the court changed its mind. Justice Harry Lemmon, in explaining his change of position, relies on a pile of statistics, affidavits, and live proof, all of which is set forth in fine detail in the published rehearing opinion and in its accompanying appendix. Judge Lemmon purports to follow *Sibley*, but the court is split hard. Witness Justice Kitty Kimball’s opening roar on the precise reach of Article I, §3:

The function of this Court is to enforce the Constitution of the State of Louisiana, not to find ways to justify unconstitutional legislative enactments that we believe, on the basis of “experience and logic” (as opposed to the record evidence), are nevertheless sound policy. Because the majority herein has conveniently ignored the Constitution of the State of Louisiana, ignored the record evidence, sidestepped the manifest error rule, and disavowed this Court’s prior jurisprudence in this area to reach a result not otherwise properly attainable, I respectfully dissent.77

Now I have the utmost respect for Justice Kimball; I admire her judicial backbone. But my academic duty to the law reviews compels me to say here that she is wrong on all accounts. The judicial process, “this Court’s prior jurisprudence,” indeed the meaning of Article I, §3, are not as static as one might think. There is an evolution going on here, an ebb and flow, from the Convention debates to the latest jurisprudence. This is the creative element in constitutional law that appeals to me, just as it agonizes the black-letter lad who clings to his pad and pencil as a child clings to its teddy bear. The *Manuel* majority, I daresay, hardly substitutes its beliefs as to sound social policy for those of the Legislature. And our Supreme Court itself, clearly, is still struggling with *Sibley*.

What interests me most about *Manuel*, however, is not its recital of *Sibley* standards and their evolution over time, viz: “When a statute classifies on the basis of . . . age . . . it is presumed to deny the equal protection of the laws and to be unconstitutional unless the state or other advocate of the classification shows that the classification substantially furthers an important governmental objective.”78

“This intermediate type of analysis was not fully articulated in this court’s

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76. 692 So. 2d 320 (La. 1996).
77. Id. at 354-55 (Kimball, J., dissenting).
interpretation of Article I, § 3 until its decision in Sibley. The intermediate scrutiny standard adopted by Sibley for review of age classification statutes falls far below the strict scrutiny standard in the federal system. These are the usual liturgy of the classroom. Notice that, however appealing the plea for a comprehensive, unitary measure of judgment, the court cannot escape formulae, for law there must be. But much more importantly, the court cannot escape responsibility for judgment.

What interests me most about Manual is its application of these abstract formulae, whatever they are. The fighting point is over the state’s burden of proof under Article I, § 3 and how freely a court may review what the Legislature has done and on what basis. Justice Kimball insists on record evidentiary proof that the discrimination is rational, which she finds wanting. On reflection, Justice Lemmon, adjusting his microscope and telescope, is satisfied with the state’s statistics, expert witnesses, and Captain Ronnie Jones’s live testimony. The Horsehead Nebula comes into precise focus, if I may say so, when Justice Lemmon says:

In the present case, there is a common sense and experience-based relationship between the classification resulting from the increase in the minimum drinking age and the statutory objective of reducing youthful drinking and driving to improve highway safety. That relationship is supported by statistical data, when viewed in proper focus.

Captain Ronnie Jones, Commander of the Louisiana State Police, Troop A, testified based on personal experience in the bloody field of alcohol, crushed cars, and killed youth that the minimum drinking age laws could be “the most critical and fundamental improvements in traffic safety when it comes to alcohol in this state.” In Captain Jones’s opinion, access to use of alcohol by eighteen to twenty-year-olds has a detrimental effect on highway safety because that age group “is not only inexperienced at driving but is also inexperienced at drinking.” Now here is an expert opinion I would hardly doubt. Were I a legislator, I would certainly side with Captain Jones and with the host of other experts armed with their reports and statistics who urged adoption of the drinking law. But were I a judge, whether I agree or disagree with Captain Jones, I submit, has nothing to do with my duty of judging the constitutionality of the drinking law. So long as the legislative record fairly supports the link between the theory of law and highway experience, that is enough for me.

If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement

79. Manuel, 692 So. 2d at 324.
80. Id. at 345.
81. Id.
82. Id. at 351-52 (Appendix to majority opinion).
83. Id. at 352.
or disagreement has nothing to do with the right of a majority to embody their opinions in law.\footnote{Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 546 (1905) (Holmes, J., dissenting).}

Justice Holmes, of course, was speaking of the supposed theory of "Liberty of Contract" enshrined by Justice Peckham & Co. for a good while in the Fourteenth Amendment. I would say the same thing if the theory of the law rested upon an empirical foundation of highway safety statistics, so long as the legislative record fairly supports the link between the law and the facts. A judge need not be convinced one way or the other. The exact degree of fit would not trouble me, unless the data bordered on the absurd, as it almost did in Craig v. Boren.\footnote{Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451 (1976).}

The fine print of the majority's appendix in Manuel, may I say, satisfies me.

4. Meeting the State's Burden of Proof

Justice Kimball's insistence upon evidentiary proof—State Exhibit A through, let us say, Exhibit Q (doubtless a mountain of reports and statistics); State Expert Witness Horst Overshoe, Ph.D., Professor of Highway Safety, advisor to the National Transportation Safety Board; and, of course, our friend Captain Ronnie Jones of Troop A—all of which must be spread upon the trial record with the district court's findings subject to the manifest error rule, raises thorny questions that, I'm afraid, have never been given any thought.

I assume that the Louisiana Legislature debated the burning issue of raising the minimum drinking age to twenty-one.\footnote{Manuel v. State, 677 So. 2d 116, 132-33 (La. 1996) (footnotes omitted) (Bleich, J., concurring).}

Were I to check, I would probably find a weighty legislative record, including Captain Jones's testimony to be sure, in the legislative hearings. Why must all of this be retried in court?

It seems to me a waste of Captain Jones's vital law enforcement energy to subpoena him to court for a de novo rehearing. A reviewing court might just as well read the legislative record, avoiding altogether the unseemly retrial in court of law of the Legislature's findings of fact.

And what of, let us say, a Yale Law School Professor brought into the courtroom to testify that Louisiana's raising the drinking age from eighteen to twenty-one is bunk? Should this make a difference? I doubt it. Delegate Munson informed the Constitutional Convention and Framer Roy, in no uncertain terms:
“Do you realize that I, and I believe some others, could really care less what the Yale University Law School thinks about the Equal Rights Amendment, or any other subject, for that matter?" Mr. Roy cautioned the entire Convention, “I’m not trying to influence you by any Yale thinking.”

Article I, § 3, as I have said, was plainly intended to place the burden of proving that a challenged age discrimination is not arbitrary, capricious, or unreasonable upon the state. But nowhere in the Convention debates or in any of the reported cases, is any thought given to the measure of proof required of the state. De novo review, I trust all would agree, is a bad idea. The state, it seems to me, would be well advised in the future to rest on the legislative record, duly introduced into the judicial record, and to leave Professor Overshoe to his classes and Captain Jones to the Airline Highway. At a minimum, more thought needs to be given by our courts to the question of meeting the state’s burden of proof under Article I, § 3.

5. Framers’ Intent, Article IV, § 2

The very same Constitutional Convention that heard the debates over Louisiana’s “new ideals of equal protection,” as Mr. Roy voiced them, fixed the minimum age for running for statewide office in Article IV, § 2. Attention focused on the office of Governor. The Committee on the Executive was willing to lower the minimum age from thirty to twenty-five, but no lower. This was “in line with practicalities and 1973 as against 1921,” according to Delegate Stagg.

Mr. Tobias, “the youth representative in this convention,” rose immediately in support of Amendment No. 1, which would have lowered the required age to 18 for all statewide offices. “Is it not fair that any elector should be allowed to participate in every election of this state to the maximum extent that he ought to?” This sounds much like Mr. Roy’s reference to Aristotle’s Politics, with its plea for democratic political equality, does it not? After all, eighteen-year-olds can vote; they can “fight and risk their lives for their country”; and the Convention had already agreed in the Legislative Article that eighteen-year-olds can serve as state Representative or Senator. Mr. Guarisco was not convinced: “Do you think it’s fair to the rest of the citizens of the state to have someone who just got out of his pampers being governor of the state?”

87. Convention Transcripts, supra note 52, at 1016.
88. Id.
90. Id.
91. Id. at 549.
92. Id. at 548-49.
93. Id. at 550.
94. La. Const. art. III, § 4 (“An elector who at the time of qualification as a candidate has attained the age of eighteen years”).
95. Convention Transcripts, supra note 89, at 549.
Mr. Tobias: They have the right to either vote for them or not to vote for them.

Mr. Guarisco: Do you think that the framers of the United States Constitution were unfair when they made the president reach the age of 35 and Senators reach the age of 30 and a Representative reach the age of 25 before he can hold those offices?

Mr. Tobias: The United States Constitution was drafted in the late 18th century. I think times have changed considerably and a lot of young people are better educated than some of their children at that time.

Mr. Guarisco: Don’t you think that you are misconstruing education and knowledge for experience and judgment and good sense?

Mr. Tobias: No.96

Mrs. Taylor, another champion of eighteen-year-olds, invoked the new ideals of equal protection: “Think in terms of many of them who for the first time had a gun placed in their hands to represent you, to protect you, and now they’re coming back to a democratic system where there would be no discrimination against any person.”97 “I would think you would give them the opportunity that other persons have who are electors, and that is if it is their desire to run as governor of the state of Louisiana to give them the opportunity also.”98

There was talk of Alexander the Great conquering the world by the time he was twenty-one;99 Mozart writing his first opus at age four.100 On the other hand Delegate Ullo advised Mrs. Taylor that Albert Einstein wrote his Theory of Relativity at age twenty-seven.101 Mr. Abraham spoke instead of general principle:

If we’re going to leave the final decision to the people, well then let’s leave the final decision of the people on everything and don’t worry about writing a constitution. Let them write the constitution and laws and things like that. We’re here to try to decide what is going to be best for this state in order to present it to the people. And in good conscience we must try to come up with a recommendation that is sound. . . . [W]e all seem to agree that an 18 year old does not have the experience necessary to handle some of these jobs. . . . Now we’ve lowered the requirement from 30 years to 25 years. I don’t think we ought to go any lower than that. I’m real concerned about this. I’m not in favor of precluding youth from everything, but I think that we’re going to have to be sensible about this and reasonable about it. I just don’t see how lowering the requirement to 18 years is a reasonable thing to put before the people of this state.102

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96. Id.
97. Id. at 550.
98. Id.
99. Id. (Mr. Jenkins).
100. Id. at 551 (Mr. Duval).
101. Id.
102. Id.
Quite to the contrary, Delegate J. Jackson warned the Convention delegates of a coming court challenge:

I don't think that there's too much difference between an office of being a Senator and someone being about to hold statewide office because both offices have statewide implications. I would suggest to you that it would be a contradiction if in this executive proposal we maintain the age of 25 but yet in the legislative proposal we say that the age is 18. I think we open the door for some kind of constitutional court action against this proposed constitution.  

Surely this was a prescient statement. Indeed, Mr. Wilfong's lawyers relied on it in their judicial quest to secure Wilfong's name on the ballot for Secretary of State. Other delegates saw a "marked distinction between a statewide elected office and a legislator."³⁴ "[A] legislator is responsible to a very small area and he is responsible to a very limited number of people. A person elected to a statewide office is accountable to sixty-four parishes and over two million people."³⁵ "I think that the age of twenty-five is a reasonable standard on a statewide basis," said Mr. Juneau. At this point, Article IV, § 2's proposal runs into Mrs. Taylor's absolute:

Mrs. Taylor: Would you agree that there is no place for discrimination in the constitution?  
Mr. Juneau: That is correct. In further response to the question, I am in favor of reasonable standards which apply to all people regardless of race, creed, color or religion.³⁶  

Christopher J. Roy, Sr., "Framer Roy," as I have called him, had the last word—almost. This time he quotes, not Aristotle, but Mark Twain:

Mr. Roy: Mr. Chairman, ladies and gentlemen, I rise in opposition to this particular amendment. I do not think that this is an issue of just a legislative type position but some executive background that is needed which comes only with experience. I am reminded of what Mark Twain said when talking about his old man, about what these eighteen year-olds say. Mark Twain said, "When I was fourteen years old, my old man was so dumb that I could hardly stand to be around him, but when I became twenty-one years I was amazed to find out how much he had learned in just seven years." Now that is exactly what we are talking about here. If we reduce the age down to sixteen years of age to vote, then we are going to have some of these proponents saying that since you can vote at sixteen, you ought to be governor at sixteen. If we reduce it down to

103. Id. at 551.  
104. Id.  
105. Id. at 552 (Delegate Juneau).  
106. Id.
fourteen, the same reasoning of change. Well, that is illogical. To me a man gets experience, and I have learned a world of stuff here and I happen to be a good bit older than twenty-five years of age, and I do not think that I would be competent to serve as governor of this state with the little experience that I have had. I think we need a minimum age of some sort and I am opposed to this amendment...  

Mr. Tobias, in fact, had the very last word: "In my opinion, the reasons against this amendment advanced before you today are nothing but a lot of bull."  

What was the vote? Mark Twain won over Aristotle. The Convention rejected the amendment, 30-71. The people of Louisiana, in ratifying Article IV, § 4, have spoken. You must be twenty-five to be Secretary of State.

Now, I can hardly imagine a judge, whether federal or state, upsetting the Sovereign’s vote on Article IV, § 4 based on an independent judicial finding that eighteen to twenty-four-year-olds are denied equal protection by Louisiana’s rule of twenty-five for statewide office. Surely it is not enough to quote either Delegate Jackson’s forecast of a constitutional challenge or Mr. Tobias’s low opinion of the reasons advanced for Article I, § 4’s discrimination based on age. Even assuming judicial review of Article IV, § 2 is somehow possible under the same Constitution’s Article I, § 3, which I submit it is not, picking and choosing between Aristotle and Mark Twain is simply not the function of a court. I daresay, not even the late Mr. Justice Brennan, who was willing to let Congress lower the voting age to eighteen in state elections, would go so far as a judge. "The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication."  

The values at issue are incommensurate. And the law of equal protection has always tempered Mrs. Taylor’s passion for equality with Mr. Roy’s recognition of practical experience. Exactly where the line should be drawn is up to the People. Moreover, just how the State would meet its burden of proof beyond the records of the Convention escapes me. How old one must be to be Governor of Louisiana, or Secretary of State, is not a question of statistics, of highway safety, alcohol, and young drivers combined. Empirical proof is impossible. Justice Lemmon’s

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107. Id.  
108. Id.  
109. Id.  
111. Whether or not this judgment is characterized as ‘factual,’ it calls for striking a balance between incommensurate interests. Where the balance is to be struck depends ultimately on the values and the perspective of the decisionmaker. It is a matter as to which men of good will can and do reasonably differ.” Oregon v. Mitchell, 400 U.S. at 206, 91 S. Ct. at 306 (Harlan, J., concurring in part and dissenting in part). “I fully agree that judgments of the sort involved here are beyond the institutional competence and constitutional authority of the judiciary. They are pre-eminently matters for legislative discretion, with judicial review, if it exists at all, narrowly limited.” Id. at 206-07, 91 S. Ct. at 306.
Manuel test of "common sense and experience-based relationship" fits this area about as well as any. Here I am both convinced and satisfied.

F. Sixth: Writing a Fighting Brief; An Effective Opening

Here you must hit hard, like a commanding general at war. You must open your brief with force and conviction. Above all else, you must write a fighting brief. This is advocacy, not scholarship, as Colonel Wiener advises so well." It helps to add the jugular citation that destroys the other side's bunker immediately. Thus:

Petitioner's application for a preliminary injunction should be denied. Article I, § 3 has no application to the constitutional age requirements set forth for public offices, including Secretary of State, in Louisiana's organic law. These constitutional age requirements cannot be nullified by the Judiciary under the guise of either state or federal equal protection analysis. The short answer to young Steven Wilfong's claim is this: "The fact that these age qualifications are in the Constitution decides their constitutionality."  

Whatever else the reader thinks of this opening, it is the fact that the trial court dismissed Wilfong's petition for injunction on precisely the grounds urged in this opening paragraph.

II

I want to say a word more about Wilfong's claim, in his sworn affidavit in support of preliminary injunction, that "the laws of this state are inherently conflicting and act to deprive him of equal protection of the law."" Doubtless, this from a young tyro. Wilfong's advocates added in their memorandum in support:

While petitioner admits he lacks the age to qualify under La. Const. Art. 4, Sec. 2, he contends this denies him equal protection of the law as dictated by La. Const. Art. I, § 3. This inherent conflict of law leads to absurd consequences.

For example, Mr. Wilfong, since he is more than 18 years of age, can become a state representative or state Senator. La. Const. Art. 3, Sec. 4. And once a legislator, either representative or senator, he can become the

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112. Briefing and Arguing Federal Appeals, supra note 16, at 9 ("Section 7. What happens when a case is not presented in advocate's fashion?").
presiding officer of that chamber. Then further, he is in line of succession for Governor. La. Const. Art. 4, Sec. 14.

Thus, Mr. Wilfong can become Governor at 18, but cannot even run for the office of Secretary of State until he is 25. This is clearly an absurd result which the law could never have expected. And it is one that clearly denies petitioner equal protection of the law.115

Now, I said in open court that I admire Steven Wilfong's spunk. And it is a fact that his claim of "inherent conflict" between Article I, § 3 and Article IV, § 2, was given initial encouragement by my friend and lively conversationalist Judge Mike McDonald, who in an election challenge case, brought earlier by Secretary of State McKeithen's daughter Marianne, disqualified Wilfong on the sole ground that he was not twenty-five. Judge McDonald intimated, however, that an inherent conflict may exist between these articles. But that was not for him, confined as he was by the pleadings to the question of Wilfong's age. Wilfong's constitutional petition was filed the next day.

I rather suspect that Judge McDonald's initial encouragement was more a rule-day, Monday-morning, kneejerk reaction than anything else. We have all heard of the dangers of dictum. All I will add is Holmes's aperçu, another fit thought from the master apropos the tendency of a tyro to trouble himself over differences of degree:

In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. It is evident in the beginning that there must be differences in the legal position of infants and adults. In the end we establish twenty-one as the dividing point. . . . When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful.116

Running for Secretary of State at twenty-three is unlawful. To paraphrase Justice Holmes, I do not think we need trouble ourselves with the thought that the supposed clash of Article I, § 3 with Article IV, § 2, depends on differences of degree. "The whole law does so as soon as it is civilized . . . and between the variations according to distance that I suppose to exist and the simple universality

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of the rules in the Twelve Tables or the Leges Barbarorum, there lies a culture of two thousand years."

But we must descend from Mt. Olympus and return to the classroom. One constitutional provision, I should tell my students, does not eradicate another. "One provision of the basic law of the state simply cannot devour another equal provision."

Both "should be construed, if possible, to allow each provision to stand and be given effect." The other day the Louisiana Supreme Court sustained Louisiana's constitutional mandatory retirement age of seventy for judges. There is not a whisper in the opinion that mandatory retirement of Louisiana's judges at age seventy somehow or other discriminates against them on the basis of age in violation of Article I, § 3.

III

A word of gratitude to my former students and I am done. Wade Shows, Esq., brought me into Wilfong's case on the eve of the fight. I gave Wade his lowest grade at LSU Law School. It was Contracts, he tells me. Yet we remain good friends and Brothers at the Bar. Indeed, we both smiled when Wade confessed to his lowest grade from his former teacher in open court when we were on opposite sides in another constitutional skirmish. Now, it turns out, he is my mentor. "Take a knee," Wade advised me in Wilfong's case, to cut off further argument. This is football talk—the Joe Pisarcik Rule—for quitting while you're ahead.

The camaraderie among court and counsel on Constitution Day, all of whom were LSU Law graduates, save one poor soul from Loyola, touched me deeply. This is the joy Holmes knew, "the brotherhood of fight."

My students were also in court on Constitution Day, Fall Term 1999, sitting at the feet of Judge Downing and observing their professor practice what he


118. Indeed, Justice Richard Neely of the West Virginia Supreme Court has loudly dissented from any implication "that this Court, sworn as we are to uphold the Constitution of the State of West Virginia, and bounded as we are by the limits of human rationality, would hold a state constitutional provision unconstitutional under the State Constitution." Pittsburgh Elevator Co. v. W. Va. Bd. Of Regents, 310 S.E.2d 675, 691 (W. Va. 1983) (Neely, J., concurring in part and dissenting in part).


122. Pisarcik quarterbacked for the New York Giants circa 1970s. Ahead by less than a touchdown, with only seconds to play and on the Philadelphia Eagles' goal line, instead of taking a knee to win the game, Pisarcik tried a handoff to running back Larry Czonka. It was late, a fumble ensued, and some lucky Eagle (Herman Edwards) recovered and flew across the field for a game-winning touchdown, 19-17. The Eagles, not the Giants, made the playoffs! Take note, ye lawyers. I owe the details of this sorry exchange to my LSU Honors College colleague and friend, James D. Hardy, Jr., Professor of History and distinguished New York sports historian.

123. Remarks to the Essex Bar, in The Occasional Speeches of Justice Oliver Wendell Holmes, supra note 1, at 49.
preaches. This was after our class at the Law Center earlier in the day. Now we were together in a real courtroom over a "real writ." Judge Downing, a real bibliophile with a zest for history and Blackstone, took note of an old book I had brought to court, laying it teasingly before him as I sat at counsel table. It caught his judicial eye, as teasing bait catches fish. "Professor, what’s in that book?" And so I found myself, can you imagine, reading Joseph Story on Constitution Day,—what Story said in his Commentaries on the Constitution about youth, age, and qualification for public office:

§ 617. First, in regard to age. The representatives must have attained twenty-five years. And certainly to this no reasonable objection can be made. If experience, or wisdom, or knowledge be of value in the national councils, it can scarcely be pretended, that an earlier age could afford a certain guaranty for either. That some qualification of age is proper, no one will dispute. No one will contend that persons who are minors, ought to be eligible . . . . Would the attainment of twenty-one years of age be a more proper qualification? All just reasoning would be against it. The characters and principles of young men can scarcely be understood at the moment of their majority. They are then new to the rights of self-government; warm in their passions; ardent in their expectations; and, just escaping from pupilage, are strongly tempted to discard the lessons of caution, which riper years inculcate. What they become, remains to be seen; and four years beyond that period is but a very short space in which to try their virtues, develop their talents, enlarge their resources, and give them a practical insight into the business of life adequate to their own immediate wants and duties.125

124. In one of their many exchanges, Sir Frederick Pollock wrote to Holmes: "Both from my own experience and from information I believe students' main trouble is to make out the connexion of the book-law they are examined in with the live business of the Courts." 2 The Correspondence of Mr Justice Holmes and Sir Frederick Pollock 1874-1932, 127 (Mark DeW. Howe ed. 1941) (Feb. 11, 1924). Holmes wrote back: "I quite understand the difficulties of connecting the books with life. I remember a chap who has just left the Law School writing to another that he had seen a real writ (or deed, I forget)." Id. at 128 (Mar. 7, 1924).

125. Joseph Story, LL.D., 1 Commentaries on the Constitution of the United States 427-28 (E. H. Bennett 3d ed., Boston 1858) (footnote citing Tucker's Blackstone omitted). After the arguments, Judge Downing invited me to his chambers, doffed his robe, and showed me a real Constitution Day treasure, an original edition of the first volume of William Cranch's Reports of Supreme Court opinions, including Marbury v. Madison, 1 Cranch. 137 (1803). This tops Story's Commentaries (Boston 1833) by thirty years. Not to be outdone, I mentioned finding an original edition of The Federalist Papers (J. & A. McLean, New-York 1788) (Vol. 2, which contains Hamilton's 78th on judicial review) while on a fleamarket crawl along the Virginia countryside during my year working at the Supreme Court as a Judicial Fellow. This was during the Bicentennial of the American Revolution, 1976. I told Judge Downing that when Chief Justice Burger visited LSU Law Center, I showed him this volume and told him what I paid for it—"A dollar!" His response?—"Paul, how would you like to double your money?"
APPENDIX A

APPOLOGIA PRO VITA SUA: SOME APPEALS I HAVE KNOWN

1. *Baier v. Parker*, No. 81-3622 (5th Cir. 1982) (unreported). This was a constitutional challenge to confidentiality orders issued by the United States District Court for the Middle District of Louisiana (Parker, C.J.) in the *East Baton Rouge Parish School Desegregation Case*. The district court ordered all proposals offered during settlement negotiations placed under judicial seal; then, after negotiations broke down, the court framed its own desegregation decree without indicating the source of its remedial ideas, including closing Southdowns Elementary School, which parents in the neighborhood opposed. To their amazement, parents were told by their elected representatives that the federal court had forever barred members of the East Baton Rouge Parish School Board from disclosing to their constituents what was proposed during the unsuccessful settlement negotiations held at the federal courthouse. Although their representatives wanted to talk, their lips were sealed. This, according to our lights, violated the First Amendment. The School Board itself also objected to the district court’s perpetuating its confidentiality orders, arguing they abridged the First Amendment right of Board members to speak out on the soundness of the district court’s plan by reference to the sealed negotiations and the corollary “right to hear” of concerned parents throughout the Parish. *See* Baier v. Parker, 543 F. Supp. 288, 296-300 (M.D. La. 1981). Fortunately, desegregation in the dark ended quietly in Baton Rouge at 4:05 p.m. C.S.T. on Monday, November 22, 1982, when the district court “sua sponte” lifted the challenged gag orders a full year and a half after they were imposed and while three appeals, including *Baier v. Parker*, were pending in the Fifth Circuit. Two weeks later the Fifth Circuit denied rehearing and rehearing en banc in *Baier v. Parker* without a word. Of course the constitutional challenge was now moot. It was so held in *Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425, 1441 n.15 (5th Cir. 1983), wherein the first amendment question was silently laid to rest, deep in a footnote, without facing the merits. All of which, in turn, sparked commentary from counsel’s academic cloister, *viz.*: Paul R. Baier, *Fifth Circuit Symposium, Constitutional Law [First Amendment, Theory and Practice]*, 29 Loy. L. Rev. 647, 650-56 (1983).

2. *Valley v. Rapides Parish School Board [Forest Hill I]*, 646 F.2d 925 (5th Cir. 1981), *rev'd in part*, 499 F. Supp. 490 (W.D. La. 1980). This appeal raised an important legal question never before decided by any federal appellate court, *viz.*, the power of a federal court pursuant to a federal court desegregation decree to close a rural community’s only school against the express wishes of the local school board and the parties. With Chris J. Roy, Sr., I represented the intervenor Forest Hill citizens who opposed the closing of their school. Held: “The closing of a facility built and maintained at the expense of local taxpayers is a harsh remedy, which should only be employed if absolutely necessary to achieve the goal of a unitary system after all other reasonable alternatives have been explored.” 646 F.2d at 940. *Reversed and remanded!* Glory be! This was the first time in the
history of the Fifth Circuit that the court reversed a district court's desegregation decree for possibly going too far.

3. Valley v. Rapides Parish School Board [Forest Hill II], 702 F. 2d 1221 (5th Cir. 1983). The second-round Forest Hill appeal, contesting the district court's reaffirmance of its decision to close Forest Hill Elementary School. The appeal was argued on May 26, 1981 and, after a wait of twenty-two months, on March 30, 1983, the Fifth Circuit split hard, 2 to 1, affirming the district court's decision closing Forest Hill Elementary School (Politz, J., joined by Randall, J. and Clark, C.J., dissenting). A heartbreaker. For the ironic last word, see my article, Framing and Reviewing a Desegregation Decree: Of the Chancellor's Foot and Fifth Circuit Control, 47 La. L. Rev. 123 (1986) (scholarship, if I may say so, informed from the inside).

4. Louisiana ex rel. Guste v. Roemer, 949 F.2d 145 (5th Cir. 1991), from the federal district court's ruling that Governor Roemer, not Attorney General Guste, was the State's legal representative in The Louisiana Higher Education Desegregation Case. As Special Assistant Attorney General and personal counsel to Attorney General William J. Guste, Jr., we urged that the ruling below effectively denied Attorney General Guste his state constitutional office as "chief legal officer" of the state. The Fifth Circuit (per Politz, C.J.) certified this state constitutional turf war between the Governor and the Attorney General to the Louisiana Supreme Court, as we had urged over the opposition of Governor Roemer and his counsel. Then it was all sweetly settled.

5. James v. Whitley, 39 F.3d 607 (5th Cir. 1994), cert. denied, 514 U.S. 1069, 115 S. Ct. 1704 (1995). A battle for habeas corpus on Nolan James's claim of race discrimination in the selection of grand jury foremen in Ascension Parish, Louisiana. Judge Frank Polozola of the Middle District issued the writ, and together with my friend and legal Brother Hillar C. Moore, III (court-appointed) and former Criminal Justice I student Alan Robert (LSU Law, J.D. 1974), we were off to the State Penitentiary at Angola—this was my first trip—thence to the Fifth Circuit as appellee's counsel. We called ourselves "The James Gang." We were heartened during oral argument at 500 Camp Street when Judge John Minor Wisdom voiced his opinion that "You could take judicial notice" of a claim of race discrimination in the selection of grand jury foremen in Ascension Parish, Louisiana. But then Homer nodded: The Fifth Circuit unanimously reversed Judge Polozola's issuance of the Great Writ. We lost, we were advised, for want of positive proof of the number of grand jury forepersons selected over the sixteen years in question—nevermind, as we advised the court in our petition for rehearing, that Louisiana's Code of Criminal Procedure, of which the Fifth Circuit is required to take judicial notice, requires the impaneling of two grand juries a year. Two times sixteen is thirty-two, and the record showed positively that all thirty-two grand jury foremen in sixteen years were white. Certiorari was denied. The James Gang packed their briefcases and went home licked lawyers. All of which spawned unsolicited mail from Angola and a further entry on the Baier Docket Book, Item 12 below.
6. *United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431 (1995), the ill-fated fight for Congressman Cleo Fields's Congressional District. As Special Assistant Attorney General, I sat in silence at the counsel table between Attorney General Ieyoub, whom I had counseled for the argument, and Solicitor General Drew Days, marveled at it all, and went home with General Ieyoub a Pyrrhic victor—the Supreme Court of the United States ordered Hays & Co. dismissed for want of standing after the case had been in the federal district court for, believe it or not, over two years!

7. *Louisiana Paddlewheels v. Riverboat Gaming Commission*, 646 So. 2d 885 (La. 1996), on behalf of a competitor of Merv Griffin's "Player's Casino." Louisiana Paddlewheels wanted some of the action but was blocked by special act of the Legislature prohibiting additional riverboats on Lake Charles unless Calcasieu Parish voted "yes." The statute reversed the rules of riverboat gaming in one parish alone, which we urged violated equal protection and the constitutional prohibition of special laws. The Supreme Court agreed and declared the statute unconstitutional. A big chip case.

8. *Brown v. Department of Public Safety & Corrections*, 680 So. 2d 1179 (La. 1996), declaring unconstitutional a statute forbidding contributions to political action committees formed to oppose repeal of video-poker by popular referendum. As amicus curiae, we successfully opposed the statute on First Amendment grounds.


10. *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464 (1998), the Federal Election Day Case, as Special Assistant Attorney General. This case was argued on the opening day of the October Term, 1998 by Attorney General Richard P. Ieyoub. I was at his side at counsel table as "Colonel Baier," his coach and Supreme Court spotter. Alas, the court declared Louisiana's October open primary law as applied to Congressional elections a plain violation of the Federal Election Day Law. We didn't read the federal Election Law or its history that way, did our duty, and lost the case. So it goes.

11. *Campbell v. Louisiana*, 523 U.S. 392, 118 S. Ct. 1419 (1998), another joint appearance with Attorney General Ieyoub. Delicate issues of standing were raised: Campbell was a convicted white murderer who claimed blacks had never served as grand jury foremen in Evangeline Parish, Louisiana. I advised the Attorney General in advance of our appearance that Louisiana would lose the case, but we were obliged to do our duty. True to my instincts, we lost. We were consoled, however, in knowing we were only defending the constitutional errors of the Louisiana Supreme Court.
12. Young v. Cain, No. 99-30870 (5th Cir. 1999). On appeal from the district court's dismissal of a prisoner's pro se habeas corpus petition claiming race discrimination in the selection of grand jury foremen in Washington Parish, Louisiana. This case came to me by way of mail from Angola State Penitentiary after our reported defeat in Nolan James, Item 5 above. After two trips to Angola, consultation with Robert Young, a painstaking search of the record, and encouragement from Jerry McKernan, Esq., trial counsel in Young's criminal case, an application for a certificate of appealability was duly filed, under the watchful eye of co-counsel and professorial advisor Julian Murray, Esq. On Christmas Eve, Eve, December 23, 1999, Judge W. Eugene Davis signed an order granting Young's request for a COA, viz.:

Young argues that the district court's reliance upon Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 1427 (1998), is misplaced as the district court relied upon Justice Thomas's dissent rather than the Court's majority opinion in determining that Young's conviction by the petit jury foreclosed his challenge regarding the selection of the grand jury foreman. Young's request for a COA is granted.

Said Robert Young writing from his cell at Angola: "I understand this is just the COA, nonetheless it's really a good feeling to finally see the word GRANTED. Indeed prayers have been answered." Robert Young to Paul R. Baier, Jan. 10, 2000 (copy on file with the Louisiana Law Review).

Looking back over twenty years and these twelve cases, what do I say? What comes to mind is Holmes's speech to the Boston Bar on the eve of his mounting Mt. Olympus:

I look into my book in which I keep a docket of the decisions of the full court which fall to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly half a lifetime! A thousand cases, when one would have liked to study to the bottom and to say his say on every question which the law ever has presented, and then to go on an invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical, philosophic exposition, setting forth the whole corpus with its roots in history and its justifications of experience real or supposed!

Alas, gentlemen, that is life.

Speech, At a Dinner Given to Chief Justice Holmes By the Bar Association of Boston (Mar. 7, 1900), in The Occasional Speeches of Justice Oliver Wendell Holmes, supra note 1, at 123. "We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done." Id. at 123-24.