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Hiroharu Saito
University of Tokyo

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EQUAL PROTECTION FOR CHILDREN: TOWARD THE CHILDIST LEGAL STUDIES

Hiroharu Saito*

ABSTRACT

This Article focuses on one doctrinal question, which has not yet been examined by the Supreme Court of the United States: the appropriate review standard for discriminations against children (children *qua* children) under the Equal Protection Clause. This Article extensively argues, by applying the traditional three-factor criteria (visible and immutable/irreversible trait, limited access to politics, and existence of prejudice), that we should treat children as a suspect or quasi-suspect class and that we should apply heightened scrutiny for children–adults classifications. It also refutes erroneous arguments commonly seen in the courts that have justified the application of rational basis review for children—the argument to lump the elderly and children together as age discriminations and the argument to consider childhood as a temporal stage of life. This Article particularly highlights that people’s cognitive structures are different between discriminations against the elderly and children. The constitutional argument in this Article has a potential to develop a new critical framework for the jurisprudence on children and the law—the “childist legal studies.”

INTRODUCTION

The aim of this Article is to discuss the appropriate standard of review for discriminations against children (children *qua* children) in our society. The adult-centric view of the world has been so pervasive in today’s society that the legitimacy of children–adults classifications—the practice of classifying people into the categories of “children”¹ and “adults” on the basis of age and treating children differently from adults—has been rarely questioned.² Many people have a

* Assistant Professor of Law (Children & the Law; Law & Social Sciences), University of Tokyo. LL.M., Harvard Law School. M.A. (Education) & LL.B., University of Tokyo. I thank Professors Shozo Ota and Elizabeth Barholet for their helpful comments on an earlier draft. I also thank participants at the 2019 Conference of RCSL, International Sociological Association (held at Oñati International Institute for the Sociology of Law), the 2019 Conference of Japan Association of Sociology of Law (held at Chiba University), and the Fundamental Jurisprudence Workshop at University of Tokyo. This study was financially supported by a grant from the Japan Society for the Promotion of Science (KAKEN 18K12613).

1. In this Article, I use the term “children” as a concept opposed to adults. The term is used comprehensively for all age groups before adulthood (i.e., including infants, toddlers, preschoolers, school-aged children, adolescents, and minors).

2. *But see infra* Section I.B for the cases in which children–adults classifications were challenged in the lower federal and state courts.

misconception that the border between children and adults is natural, universal, and inefaceable. However, it is just an artificial *invention* that emerged in the 17th century (in Europe) with the establishment of the modern school education system.³ During the medieval times, the concept of childhood did not even exist—there was no real border between children and adults.⁴ This Article casts doubt on the conventionalized children–adults classifications. Children can be treated differently from adults if necessary, but children–adults classifications in society should be examined cautiously. Specifically, this Article argues that children should be treated as a suspect or quasi-suspect class and that the courts should adopt heightened scrutiny⁵ upon reviewing the constitutionality of children–adults classifications under the Equal Protection Clause. This Article makes two contributions.

First, its practical contribution is to help establish the standard of review for child discriminations under the Equal Protection Clause. The Supreme Court of the United States has never rendered a decision over discrimination against children on the basis of age under the Equal Protection Clause.⁶ Thus, the standard for reviewing child discriminations has not been examined at the Supreme Court level. However, by generalizing the scope of the Supreme Court decisions in the cases of discriminations against the elderly, the lower federal courts and state courts have taken the position that *any* discriminations based on age—including child discriminations—shall be subject to rational basis review as if the standard had been already established.⁷ As a result, the appropriate standard for reviewing child discriminations and the differences between the child and elder discriminations have been discussed minimally.⁸ This Article provides an extensive analysis of the standard of review for child discriminations (i.e., children–adults classifications).

Second, its theoretical contribution is to develop a new critical framework for the jurisprudence on children and the law. Various frameworks have been offered by a diverse group of scholars and advocates since the modern children’s rights movement first emerged in the 1960s.⁹ But, we still lack a coherent general principle for children’s legal status today. Representative views can be briefly categorized into six different frameworks: authorities, liberation, protection, potential adults,

3. See generally PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD 329–36 (Robert Baldick trans., Alfred A. Knopf, Inc. 1962) (1960). See, e.g., RICHARD FARSON, BIRTHRIGHTS 17–25 (1974); JOHN HOLT, ESCAPE FROM CHILDHOOD 27–36 (1974) (for the expression of “invention”). See also Hillary Rodham, *Children Under the Law*, 43 HARV. ED. REV. 487, 507–09 (1973) (arguing for the abolition of minority status).

4. See ARIÈS, *supra* note 3, at 128–33, 329–36. When a person reached the age of about seven (i.e., at the age when a person could participate in verbal communications with other people for oneself), he or she was treated equally to older people and freely participated in social activities including gambling and romance. See *id.* at 71–72, 100–06, 411.

5. In this Article, I collectively refer to strict scrutiny and intermediate scrutiny as heightened scrutiny. I do not discuss the difference between the two in detail in this Article. See *infra* note 64.

6. See *infra* Section I.A.

7. See *infra* Section I.B.

8. See *infra* Part III.

9. See generally Martha Minow, *What Ever Happened to Children’s Rights?*, 80 MINN. L. REV. 267, 268–80 (1995); Rodham, *supra* note 3, at 488–505 (for the children’s rights movement in the 1960s and 70s). The Supreme Court’s landmark decision to recognize children’s rights was also in 1967. See *In re Gault*, 387 U.S. 1 (1967).

abilities, and relationships.¹⁰ The *authorities framework* views children as dependent objects controlled by either parents or the state.¹¹ It has often been described as the existing legal regime, but at the same time, it has been criticized as the outdated framework.¹² Both of the liberation and protection frameworks became active in the 1960s to 1970s. The *liberation framework* views children as (perfectly) autonomous people who should receive (totally) equal treatments as adults;¹³ the *protection framework* views children as people who need special assistance and protection.¹⁴ The *potential adults framework* falls somewhere in between liberation and protection (i.e., a combination of the two); it respects children's autonomy to a certain degree but not as radically as the liberation framework does.¹⁵ The *abilities framework* places emphasis on developmental psychology—the actual status and developments of children's abilities.¹⁶ The *relationships framework* values the relationships children have with parents, the state, and others.¹⁷ Each scholar and advocate has supported one (or some combination) of the six frameworks above and has sought

10. See Minow, *supra* note 9, at 268 (listing liberation, protection, potential adults, authorities, and social resource distribution as the legal frameworks to think about children). I add development and relationships while omitting social resource distribution.

11. See, e.g., MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 17–49 (2005) (emphasizing the value of parents' rights in children and the law). See generally Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1457–67 (2018); Minow, *supra* note 9, at 281–87.

12. See Dailey & Rosenbury, *supra* note 11, at 1467–78. But see Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J. F. 942, 943–47 (2018) (supporting the authorities framework still today, particularly supporting the idea of maximizing the parental authority).

13. See, e.g., *infra* notes 22–23; See also Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L. Q. 1315, 1326, 1367–68 (1995) (suggesting that children should have the empowerment rights—the rights to become powerful—and should be treated nonpaternalistically).

14. See generally Minow, *supra* note 9, at 268–78. See also JOSEPH M. HAWES, THE CHILDREN'S RIGHTS MOVEMENT 115–21 (1991); ROSALIND EKMAN LADD, CHILDREN'S RIGHTS RE-VISIONED: PHILOSOPHICAL READINGS 2 (1996) (for the tension between liberationists and protectionists).

15. See, e.g., Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2178–79 (2011) (suggesting a developmental theory to secure children's future autonomy when they become adults); Catherine E. Smith & Susannah W. Pollvogt, *Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases*, 48 U.C.D. L. REV. 655 (2014) (viewing children as proto-citizens for discussing children's legal status); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 824 (1999) (suggesting to show the appropriate level of respect for children even if they do not have complete capacity); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1749 (1993) (considering children as the “next generation” and suggesting a more child-centered analysis of family law).

16. See, e.g., Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”*, 64 AM. PSYCHOL. 583, 583–87 (2009) (arguing that children's legal status should be determined by children's maturity of abilities relevant to each legal area).

17. See, e.g., Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 3 (1986) (noting that “[t]he starting point for this framework is a recognition of the relationships children have with parents and with the state”); David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1137 (2003) (arguing for the importance of “recognizing the rights of children to maintain vital family relationships”); Dailey & Rosenbury, *supra* note 11, at 1506–14 (suggesting a framework of relationships, responsibilities, and rights; discussing relationships with parents, other adults, and other children).

his or her *ideal* design of children's legal status at the ideological or policymaking level.¹⁸ However, there has been no majority view—all of the frameworks have failed to gain a considerable academic support or a strong political support.¹⁹ Our experiences in the last half-century have taught us that it is infeasible to build a coherent framework for children's legal status when leaving the issue for ideological or political discussions.

Therefore, this Article takes another approach. It refrains from arguing the most *ideal* legal status of children at the ideological or policymaking level. Instead, this Article makes a constitutional doctrinal argument. This Article discusses the review standard to judge the constitutional *bottom* line of children's legal status (i.e., children–adults classifications)—rather than the most *ideal* line at the ideological or policymaking level. Some scholars have previously offered their arguments about children's legal status at the constitutional level. However, their arguments were: (i) merely describing or reconsidering the Supreme Court cases from their own ideological or policymaking framework apart from the existing constitution;²⁰ or (ii) limiting their scope to the context of the minority children versus the majority children.²¹ In contrast, this Article offers an argument for the legal status of children *qua* children within the existing constitutional doctrine.

To avoid misunderstanding, I would like to note the differences between this Article's argument and the child liberation arguments. Liberationists considered children as a minority group oppressed in society just like blacks and women.²² They progressively advocated that children should be granted totally equal rights,

18. See Elisa Poncz, *Rethinking Child Advocacy after Roper v. Simmons: "Kids Are Just Different" and "Kids Are Like Adults" Advocacy Strategies*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 273, 291 (2008) (discussing that the child advocate's position is heavily influenced by his or her moral, political, philosophical and religious views).

19. See generally Minow, *supra* note 9, at 294. It is also important to note that ideologies over children's issues are more complicated than a simple conservative–liberal dimension. See Elizabeth Bartholet, *Thoughts on the Liberal Dilemma in Child Welfare Reform*, 24 WM. & MARY BILL RTS. J. 725, 725 (2016) (discussing that there are different positions and dilemmas even among liberal groups because their policy focuses are usually on adults and not on children).

20. See, e.g., Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2178–79 (2011) (describing the Supreme Court cases from a choice theory of rights and advocating that the courts should adopt a developmental theory); Dailey & Rosenbury, *supra* note 11, at 1453 (reexamining the Supreme Court cases from their relationship-based framework “[i]n a direct departure from existing constitutional law”). See also Cheryl Bratt, *Top-Down or from the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 YALE L.J. F. 917, 917–20 (2018) (criticizing the constitutional infeasibility of the reforms suggested by Dailey and Rosenbury, *supra*, and proposing a youth-led and community-based approach for more practical reforms).

21. See, e.g., Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1608–21 (2013) (arguing that discriminations against children of same-sex parents are subject to intermediate scrutiny); Smith & Pollvogt, *supra* note 15 (discussing the constitutional rights of black children, non-marital children, undocumented immigrant children as well as children of same-sex parents).

22. See HOWARD COHEN, *EQUAL RIGHTS FOR CHILDREN* 15–16 (1980) (referring to the civil rights movement and the women's movement in the context of emphasizing the importance of raising the issue of children's rights); FARSON, *supra* note 3, at 10–11, 216–17 (discussing liberation of children in a parallel way to the emancipations of blacks and women); HOLT, *supra* note 3, at 17–20 (noting that giving the equal rights to children is in the same direction as the equal rights of adult women, racial minorities, and other minority groups).

privileges, and responsibilities as adults.²³ I agree with liberationists that we should consider children as an oppressed minority group—this Article restates it in the constitutional term that we should consider children as a (quasi-) suspect class. However, unlike liberationists, this Article does not argue for the totally equal *treatment* of children in society as adults. Instead, this Article argues for equal *protection* for children under the Constitution.

This Article proceeds in six parts. Part I describes the current doctrinal status of children under the Equal Protection Clause in the Supreme Court, lower federal courts, and state courts. Part II overviews the essence of the traditional three-factor criteria to qualify a minority group as a (quasi-) suspect class. Part III discusses how children meet all of the three factors in the traditional criteria. Part IV and V refute two common arguments used by the courts to justify the application of rational basis review to child discriminations. Specifically, Part IV refutes a common argument to lump elder and child discriminations together as age discriminations. This part highlights the differences of people's cognitive structures between discriminations against the elderly and children. Part V refutes another common argument that considers childhood as a universal and temporal stage of life. Part VI makes tentative assessments of some key issues in future applications of heightened scrutiny to child discriminations.

I. CURRENT STATUS OF CHILDREN AND EQUAL PROTECTION

A. The Supreme Court

The Fourteenth Amendment provides equal protection, “No State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws.”²⁴ The Supreme Court has construed that this equal protection guarantee also applies against the federal government generally in the same way as against the state as an aspect of Due Process under the Fifth Amendment.²⁵

The original purpose of the Equal Protection Clause, at the time of its establishment in 1868, was to protect emancipated blacks after the Civil War.²⁶ But, as is clear from its language, it is a general principle applicable to “any person.” Without doubt, the Equal Protection Clause applies to children, who are also persons.²⁷ The Court in *Tinker v. Des Moines Independent Com. Sch. Dist.* stated

23. For example, they claimed that children should have the rights to political participation, to justice (e.g., to due process in the juvenile justice system), to legal self-determination (e.g., to obtain medical treatment without parental consent), to financial responsibility (e.g., to own property and to sign contracts), to barrier-free (for children qua children) design of society, to work, to travel, to choose their own guardians, to control their own education, to access information, to privacy, to use drugs, to drive, and to sexual freedom. See generally COHEN, *supra* note 22, at 101–47 (chapters VIII–X); FARSON, *supra* note 3, at 42–212 (chapters 4–12); HOLT, *supra* note 3, at 15–16, 118–210 (chapters 17–27).

24. U.S. CONST. amend. XIV, §1 (emphasis added).

25. See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

26. See *Slaughter-House Cases*, 83 U.S. 36, 81 (1872).

27. Some commentators, in the context of abortion, argue even unborn children (i.e., fetuses) are “persons” under the Equal Protection Clause. See, e.g., Charles I. Lugosi, *Beyond Personhood: Abortion, Child Abuse, and Equal Protection*, 30 OKLA. CITY U. L. REV. 271, 287 (2005); cf. Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5–21 (1977) (construe to limit the meaning of “person[s]” to “citizens”). But the Supreme Court has not taken such a

broadly that children are “person[s]” under the Constitution.²⁸ The Court explicitly stated in *In re Gault* that children are persons under the Fourteenth Amendment although the clause at issue was the Due Process and not the Equal Protection.²⁹ The Court has recognized children as “persons” in terms of the Equal Protection as well. The *Levy v. Louisiana* Court emphasized that, regardless of their legitimacy, children are “clearly ‘persons’ within the meaning of the Equal Protection Clause of the Fourteenth Amendment.”³⁰ Also, *Brown v. Board of Education* was not merely a landmark case for racial segregation; the *Brown* Court upheld the constitutional rights of children themselves—not the rights of their parents—under the Equal Protection Clause.³¹ In a nutshell, the Court has vindicated the constitutional rights of the minority children compared to the majority children (e.g., nonmarital children versus marital children, and black children versus white children³²) under the Equal Protection Clause.

However, the Court has never reviewed discriminations against children *qua* children on the basis of age (i.e., children–adults classifications) under the Equal Protection Clause.³³ The review standard for children–adults classifications has not been established at the Supreme Court level.

On the other hand, the Court has previously made decisions on four cases over the issue of discriminations against the elderly (or veterans). More specifically, the discriminations reviewed were the compulsory retirements of uniformed state police officers at age 50,³⁴ Foreign Service officers at age 60,³⁵ and state court judges at age 70,³⁶ and disadvantages in promotion and salary against veteran faculties and

limited interpretation. *See, e.g.,* *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (noting that “an alien as well as a citizen is a ‘person’ for equal protection purposes”). Even under the above-mentioned limited interpretation, the Equal Protection Clause would still apply to children as “proto-citizens.” *See* Smith & Pollvogt, *supra* note 15, at 674.

28. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (noting that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution” to recognize students’ rights to wear political armbands at school under the Free Speech Clause of the First Amendment).

29. *In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

30. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (also noting that “[illegitimate children] are humans, live, and have their being” and explicitly denied the premise to see nonmarital children as ‘nonpersons’).

31. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down the racial segregation in public schools that was challenged by the school children themselves as the plaintiffs).

32. *See also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 121–24 (1973) (Marshall, J., dissenting) (arguing that discriminations against poor children, in school districts with a low tax base, shall be subject to strict scrutiny under the Equal Protection).

33. *But cf.* *Stanton v. Stanton*, 429 U.S. 501, 504 n.4 (1977) (noting that “[the state] is free to adopt either 18 or 21 as the age of majority for both males and females for child-support purposes” while emphasizing that “the two sexes must be treated equally” in the case of sex-discrimination—striking down a statute establishing 21 as the age of majority for male and 18 for female for the purpose of child support); *Oregon v. Mitchell*, 400 U.S. 112, 295 n.14 (1970) (Stewart, J., dissenting) (implying that “[t]he establishment of an age qualification is not state action aimed at any discrete and insular minority” in the case in which the Court held the amendments of federal law to enfranchise 18-year-olds in federal elections were within the power of Congress).

34. *See* *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

35. *See* *Vance v. Bradley*, 440 U.S. 93 (1979).

36. *See* *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

librarians at state universities.³⁷ In those cases, the Court has repeatedly denied recognizing the elderly as a suspect or quasi-suspect class; the Supreme Court has always adopted rational basis review to uphold the challenged elderly–non-elderly classifications.³⁸

The issue of the elderly–non-elderly classifications has been recklessly rephrased as *age* classifications. The expression of *age* classifications was initially a mere rephrasing of the elderly–non-elderly classifications.³⁹ However, due to this rephrasing, Court decisions in the elder cases have often been generalized to *any age* classifications as if their scope undoubtedly covers children–adults classifications.⁴⁰

B. Lower Federal Courts and State Courts

This generalization has been pervasive in the lower federal courts and state courts. The lower federal and state courts have already reviewed a number of different children–adults classifications under the Equal Protection Clause until today. In those cases, the courts have constantly denied recognizing children as a suspect or quasi-suspect class, adopted rational basis review, and upheld the children–adults classifications. The topics of children–adults classifications that have been reviewed are such as: participations to society (i.e., minimum age requirements for state representatives,⁴¹ civil service,⁴² and jury service⁴³); freedom

37. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

38. See *Murgia*, 427 U.S. at 312–313; *Bradley*, 440 U.S. at 96–97; *Gregory*, 501 U.S. at 470; *Kimel*, 528 U.S. at 83–84.

39. The Court opinions in the earlier cases were more careful about the language and explicitly limited the scope of opinions to the specific issues in question. See *Murgia*, 427 U.S. at 312 (“[R]ationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection.”); *Bradley*, 440 U.S. at 97 (“[W]hether § 632 [of the Foreign Service Act of 1946] violates equal protection should be determined under the standard stated in [*Murgia*].”). However, the Court later began to rephrase it as age classifications. See *Gregory*, 501 U.S. at 470 (“[A]ge is not a suspect classification under the Equal Protection Clause. . . . The State need therefore assert only a rational basis for its age classification.”); *Kimel*, 528 U.S. at 83 (“States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.”).

40. See, e.g., DOUGLAS E. ABRAMS, SUSAN V. MANGOLD, & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 855 (6th ed. 2017) (noting in the chapter of Regulations of Children’s Conduct that “age classifications are not suspect” and “need satisfy only rational basis scrutiny” with a reference to *Kimel*).

41. See *Stiles v. Blunt*, 912 F.2d 260, 264–65 (8th Cir. 1990) (citing *Murgia*, 427 U.S. at 316–17) (upholding the minimum age requirement—age of 24—for the Missouri House of Representatives; holding that “the minimum age requirement” did not implicate a suspect class); *Wurtzel v. Falcey*, 354 A.2d 617, 618 (N.J. 1976) (upholding the minimum age requirement for New Jersey members of the assembly at 21 and state senators at 30; holding that rational basis review was the review standard for classifications based on age; a case before *Murgia*).

42. See *Arritt v. Grisell*, 567 F.2d 1267, 1272 (4th Cir. 1977) (citing *Murgia*, 427 U.S. at 312–14) (upholding the 18–35 age limitation for city police officers; holding that the 18–35 age limitation was not considered suspect).

43. See *United States v. Duncan*, 456 F.2d 1401, 1406 (9th Cir. 1972) (upholding the 21-year minimum age requirement for grand jurors; a case before *Murgia*), *vacated*, 409 U.S. 814 (1972), *rev’d on other grounds*, 470 F.2d 961 (9th Cir. 1972).

of conduct (i.e., curfews,⁴⁴ drinking,⁴⁵ driving,⁴⁶ gun purchasing,⁴⁷ sexual conduct,⁴⁸ and censorship⁴⁹); juvenile justice system;⁵⁰ and a few others (i.e., marriage,⁵¹ statute

44. The courts have not agreed on the standard of review for juvenile curfews—regulations on minors to be in public place in the midnight unaccompanied by supervising adults. *See generally* Calvin Massey, *Juvenile Curfews and Fundamental Rights Methodology*, 27 HASTINGS CONST. L.Q. 775 (2000) (describing the different approaches in federal courts of appeals). Some courts have adopted heightened scrutiny because the right to free movement is a fundamental right. However, even in those cases, the courts have not considered children as a suspect class. *See, e.g.*, *Commonwealth v. Weston W.*, 913 N.E.2d 832, 839, 846 (Mass. 2009) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)) (applying strict scrutiny to strike down the criminal sanctions in the city curfew ordinance; holding that age was not a suspect classification); *Ramos v. Town of Vernon*, 353 F.3d 171, 181 (2d Cir. 2003) (striking down the nighttime juvenile curfew ordinance of the town by applying intermediate scrutiny with a note to highlight importance of avoiding stereotypes, generalizations, and assumptions about youth although denying to see “youth” as a suspect class); *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (upholding the nighttime juvenile curfew statute of D.C. under intermediate scrutiny; the issue of suspect class was not raised but noting that age was not a suspect class).

45. *See Gabree v. King*, 614 F.2d 1, 2 (1st Cir. 1980) (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1973); *Murgia*, 427 U.S. at 313 (upholding the Massachusetts statute’s drinking age at 20, raised from 18); *Felix v. Milliken*, 463 F. Supp. 1360, 1372–74, 1389 (E.D. Mich. 1978) (citing *Murgia*, 427 U.S. at 314–15, 317) (upholding the Michigan statute’s drinking age at 21, raised from 18; holding that the age group at 18–21 was not a suspect category); *City of La Crosse v. Gilbertson*, No. 92-9206-FT, 1993 WL 193323, at *2 (Wis. Ct. App. Apr. 22, 1993) (citing *Murgia*, 427 U.S. at 314–15) (upholding the city ordinance’s drinking age at 21; holding that adults under 21 were not a suspect or quasi-suspect class).

46. *See Lopez v. Motor Vehicle Div., Dep’t of Revenue*, 538 P.2d 446, 449 (Colo. 1975) (upholding Colorado’s stricter rules on the 18–21 age group than adults for suspension of driving licenses; a case before *Murgia*); *Berberian v. Petit*, 374 A.2d 791, 793–94 (R.I. 1977) (citing *Murgia*, 427 U.S. at 312) (upholding Rhode Island’s statutory age at 16 to be issued a learner’s permit to operate a motor vehicle; holding that “the class of potential motor vehicle operators under 16” was not a suspect class).

47. *See NRA v. ATF*, 700 F.3d 185, 211–12 (5th Cir. 2012) (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000)) (upholding the federal laws that regulate the sales of firearms to persons under 21; holding that age was not a suspect classification).

48. *See People v. Dozier*, 72 A.D.2d 478, 480, 486 (N.Y. App. Div. 1980) (upholding the New York statutory rape law that proscribes sexual intercourse with female under 17 and male at 21 or older; holding that age was not a suspect classification; not citing the Supreme Court cases); *State v. Elam*, 273 S.E.2d 661, 665 (N.C. 1981) (upholding the North Carolina statute regulating indecent liberties that requires the victim to be under 16 and the defendant to be over 16 and have five-year difference from the victim’s age; holding that age classifications were not suspect; not citing the Supreme Court cases).

49. *See Universal Film Exchs., Inc. v. City of Chicago*, 288 F. Supp. 286, 291 (N.D. Ill. 1968) (upholding Chicago’s film censorship ordinance prohibiting exhibition of films that are obscene in eyes of children under 18; decided before *Murgia*).

50. *See Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1153–55 (D.C. Cir. 2004) (citing *Kimel*, 528 U.S. at 83–84) (upholding the no-citation policy for minors, in combination with the transit authority’s zero tolerance policy, under which minors unlike adults could be arrested and incarcerated for eating a french fry in a railway station; holding that “youth—like those based on age in general” was not a suspect class); *Febres v. City of New York*, 238 F.R.D. 377, 385–86 (S.D.N.Y. 2006) (citing *Kimel*, 528 U.S. at 83; *Gregory*, 501 U.S. at 470; *Bradley*, 440 U.S. at 97; *Murgia*, 427 U.S. at 313–14) (upholding the state police program to execute and maintain Juvenile Reports only for juveniles; holding that age was not a suspect class); *State v. C.M.*, 746 So. 2d 410, 414–15 (Ala. Crim. App. 1999) (citing *Murgia*, 427 U.S. at 307) (upholding the Alabama law that imposes stricter residential restrictions on juvenile sex offenders than adult sex offenders; holding that age was not a suspect class); *In re Walker*, 191 S.E.2d 702, 709–10 (N.C. 1972) (upholding the state juvenile justice system under which undisciplined children—without committing a criminal offense—could be subjected to probation and incarceration while adults were not; a case before *Murgia*).

of limitations for medical malpractice,⁵² public assistance,⁵³ and housing restriction⁵⁴).

In general, the courts have been highly deferential to the Supreme Court opinions in the elderly cases. Most of the courts declined to treat children as a suspect or quasi-suspect class and adopted rational basis review by citing the Supreme Court cases without any substantial analysis of the differences between the elderly and children.⁵⁵ Many courts took the generalized view that the Supreme Court in the elderly cases had established the doctrine to deny *any* age classifications as a (quasi-) suspect class and to hold rational basis review as the review standard; they noted age was not a (quasi-) suspect class just by citing the Supreme Court cases.⁵⁶ This generalized view has been so pervasive even among the litigating lawyers that they often failed to raise the issue of whether children were a (quasi-) suspect class.⁵⁷ Some courts were aware of the limited scope of the Supreme Court cases (i.e., only

51. See *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (upholding the New York statute that prohibits marriage by females under 18 without parental consent; applying rational basis review to hold the constitutionality of the statute although equal protection was not at issue).

52. See *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1245–46, 1249 (7th Cir. 1989) (citing *Murgia*, 427 U.S. at 313) (upholding the two-year statute of limitations on medical malpractice that requires child victims to institute their claims within the same period as adults from the age of 6; holding that “persons legally disabled because of minority and mental capacity” was not a suspect classification); *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 692 P.2d 290, 291, 293–94, 296–97 (Ariz. Ct. App. 1983) (citing *Murgia*, 427 U.S. 307) (upholding the three-year statute of limitations on medical malpractice that applies to children at ages 7–18 as the same as adults; holding that “the legally imposed status of minority” was not a suspect classification), *vacated*, 692 P.2d 280 (Ariz. 1984) (en banc); *Rohrbaugh v. Wagoner*, 413 N.E.2d 891, 893–95 (Ind. 1980) (citing *Murgia*, 427 U.S. 307) (upholding the two-year statute of limitations on medical malpractice that applies to children from the age of 6; holding that children at ages 6–18 were not a suspect class).

53. See *Williams v. City of Lewiston*, 642 F.2d 26, 28 (1st Cir. 1981) (upholding Maine’s public assistance program that offers minors (i.e., under 18) only residence in a shelter while providing cash to adults; holding that minors were not a suspect class; not citing the Supreme Court cases).

54. See *White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 350–51 (Fla. 1979) (citing *Murgia*, 427 U.S. 307) (concluding that the condominium association’s restriction against residency by children under 12 did not violate equal protection; holding that age was not a suspect classification).

55. There have been some cases that do not cite the Supreme Court cases. Some of these cases were decided before *Murgia* in 1976. See *United States v. Duncan*, 456 F.2d 1401 (9th Cir. 1972); *Universal Film Exchs., Inc. v. City of Chicago*, 288 F. Supp. 286, 291 (N.D. Ill. 1968); *Lopez v. Motor Vehicle Div., Dep’t of Revenue*, 538 P.2d 446 (Colo. 1975); *Wurtzel v. Falcey*, 354 A.2d 617 (N.J. 1976); *In re Walker*, 191 S.E.2d 702, 709 (N.C. 1972). Others were decided after *Murgia* but without explicit citation of the Supreme Court cases. See *Williams*, 642 F.2d at 28; *People v. Dozier*, 72 A.D.2d 478 (N.Y. App. Div. 1980); *State v. Elam*, 273 S.E.2d 661, 665 (N.C. 1981).

56. See generally the cases listed in *supra* notes 41–54, except for those mentioned in *supra* note 55 and *infra* notes 58–59.

57. See, e.g., Reply Brief of Plaintiffs-Appellants at 19–22, 25, *NRA v. ATF*, 700 F.3d 185 (5th Cir. 2012) No.11-10959, 2012 WL 604821, at *19–*22, *25 (focusing only on the fundamentality of the restricted right when arguing for strict scrutiny, and not raising the issue of suspect class); *Hutchins v. District of Columbia*, 188 F.3d 531, 556 (D.C. Cir. 1999) (Rogers, J., concurring in part and dissenting in part) (noting that “[appellees-plaintiffs] do not allege that youth is a suspect classification”). *But see* Appellant’s Reply Brief at 8–14, *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004) No. 03-7149, 2004 WL 1536069, at *8–*14 (arguing that youth should be considered as a quasi-suspect class).

within the elderly–non-elderly classifications) but, after all, decided to expand their scope to children–adults classifications without any substantial discussion.⁵⁸

Only a few courts noted, upon citing the Supreme Court cases, some substantial analyses about the differences between the elderly–non-elderly and the children–adults classifications. In order to apply rational basis review (i.e., the same review standard for the elderly), these courts observed that children were even less likely to fall under a suspect or quasi-suspect class than the elderly.⁵⁹ However, their observations were quite superficial—this issue is addressed in Part IV.

II. THE TRADITIONAL THREE-FACTOR CRITERIA

Due to the pervasive notion that the Supreme Court has already established the review standard for *any* age discrimination, the question whether children can be considered as a suspect or quasi-suspect class has never been extensively explored. In order to make a thorough analysis, I begin with overviews of the essence of the traditional three-factor criteria to determine the level of judicial review.

The Court has established a framework of tiered judicial review by the nature of the classification under the Equal Protection Clause. The Court has recognized race⁶⁰ and alienage⁶¹ as suspect classes, classifications which are subject to strict scrutiny—the classifications must be (i) justified by a compelling governmental interest and (ii) narrowly tailored to achieve the interest. The Court has recognized sex⁶² and illegitimacy⁶³ as quasi-suspect classes, classifications which are subject to intermediate scrutiny—the classifications must be (i) justified by an important and legitimate governmental objective and (ii) substantially related to the achievement of the objective. Strict scrutiny and intermediate scrutiny are fairly close⁶⁴ and together called heightened scrutiny. In contrast, the Court has

58. See, e.g., *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1245–46 (7th Cir. 1989) (citing *Murgia*, 427 U.S. 307) (“Although the classification contained in the malpractice statute of limitations disadvantages minors rather than the elderly as in *Murgia*, the reasoning behind the Supreme Court’s refusal to extend heightened scrutiny to classifications of the aged applies equally to this statute disadvantaging minors.”); *Gabree v. King*, 614 F.2d 1, 2 (1st Cir. 1980) (citing *Murgia*, 427 U.S. 307) (using the expression, “[b]y the same token”).

59. See *Hedgepeth*, 386 F.3d at 1153–55 (analyzing that “[y]outh is more often relevant [to legitimate state concerns] than old age” and “[y]outh is also far less ‘immutable’ than old age: minors mature to majority and literally outgrow their prior status; the old can but grow more so” while admitting the youth’s lack of voting rights); *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990) (citing *Felix v. Milliken*, 463 F. Supp. 1360, 1373 (E.D. Mich. 1978) (“[Minimum age] requirements do not result in an absolute prohibition but merely postpone the opportunity to engage in the conduct at issue”); *Felix*, 463 F. Supp. at 1372–74 (“[A]ge, especially at lower end of the spectrum, is not a suspect classification.”).

60. See, e.g., *Johnson v. California*, 543 U.S. 499 (2005); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Brown v. Bd of Educ.*, 347 U.S. 483 (1954); *Korematsu v. United States*, 323 U.S. 214 (1944).

61. See, e.g., *Bernal v. Fainter*, 467 U.S. 216 (1984); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971).

62. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976).

63. See, e.g., *Clark v. Jeter*, 486 U.S. 456 (1988).

64. Intermediate scrutiny especially became closer to strict scrutiny after *United States v. Virginia*, 518 U.S. 515 (1996). See Cass R. Sunstein, *Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4,

declined to find elderly (veterans),⁶⁵ poverty,⁶⁶ disability,⁶⁷ and sexual orientation⁶⁸ as suspect or quasi-suspect classes; the Court has applied rational basis review for these classifications—the classifications are upheld insofar as they are rationally related to a legitimate governmental interest. In general, heightened scrutiny leads to unconstitutional judgment⁶⁹ while rational basis review results in upholding constitutionality of the classifications.⁷⁰ Therefore, the standard of review to be applied is important.

The underlying criteria for the Court for qualifying certain groups as suspect or quasi-suspect classes have been already established. Its fundamental principle is from the perspective of participation and representation in politics, which was first noted by Justice Stone's footnote of *United States v. Carolene Products Co.* Justice Stone suggested—with an expression of “discrete and insular minorities”—that the level of judicial review should be stricter if the interests of the minorities were likely to be ignored or undervalued in the legislative process.⁷¹ Commentators have further elaborated this principle and have identified three major factors for the Court to determine the qualification for a suspect or quasi-suspect class: (i) a visible and immutable (or irreversible) trait; (ii) limited access to politics; and (iii) existence of prejudice or stereotype.⁷²

75 (1996) (describing that *Virginia* “pressed [intermediate scrutiny] closer to strict scrutiny” although intermediate scrutiny standard “has operated quite strictly ‘in fact’” even before *Virginia*).

65. See *supra* Section I.A.

66. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973).

67. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–47 (1985) (judging that the mentally retarded group is not a suspect or quasi-suspect class and applying rational basis review).

68. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis review to discrimination based on homosexual or bisexual orientation).

69. See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (expressing that strict scrutiny is “‘strict’ in theory and fatal in fact”).

70. These are just general outcomes after the review; it never means heightened scrutiny automatically results in unconstitutionality and rational basis review in constitutionality. In fact, the Court has upheld the classification under heightened scrutiny and has denied it under rational basis review—rational basis review with a bite—in some (exceptional) cases. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding a race-based affirmative action under strict scrutiny); *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding a sex-based classification under intermediate scrutiny); *Romer*, 517 U.S. 620 (striking down a sexual-orientation-based discrimination under rational basis review); *Cleburne*, 473 U.S. 432 (striking down a discrimination against the mentally retarded under rational basis review).

71. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

72. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 145–70 (1980) (discussing extensively the evolution of suspect classes); Karst, *supra* note 27, at 22–26. See also *Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973) (plurality opinion) (focusing on the same three factors when elaborating an opinion that sex should be treated as a suspect class which shall be subject to strict scrutiny).

A. Visible and Immutable/Irreversible Trait

The first factor is the definition of the targeted group. It requires the group to have a visible and immutable (or irreversible) trait. If a minority group is defined by a visible and immutable (or irreversible) trait, the group will be easily attached to distorted stereotypes and social stigma.⁷³ More specifically, a visible and immutable trait can draw a clear distinction between the majority group and the minority group. Therefore, the majority would have never been in the minority group's position before and would not need to worry about the situation of themselves being in that group's position in the future.⁷⁴ Social psychology studies have also pointed out that such an unconcealable trait is likely to be used for the first clues to evaluate the person in interpersonal relationships and that it is likely to trigger social stigma.⁷⁵

Aside from an immutable trait, a similar argument would apply to an irreversible trait. If the alteration of characteristics were only in one direction from the minority to the majority, a person would not have any fear of being discriminated ever again once he or she joined the majority from the minority.⁷⁶ Consequently, if the trait of the minority is immutable or irreversible, the majority would lack the abilities to empathize with the minority group and to appropriately generalize of the minority group's characteristics.⁷⁷

Existing (quasi-) suspect classes certainly have an immutable or irreversible trait. Whites have never experienced the blacks' position before, and whites will never be in the blacks' position because the race is automatically defined by the color of people's skin, which is visible and immutable. Sex is also a visible and immutable trait; men never naturally transform to women, and vice versa although it is possible with today's medical technology to transform a person's (apparent) sex through a sex reassignment surgery with financial and physical burdens. Most men, with exceptions of transsexuals, have never been and will never be in the women's position. In the cases of alienage and illegitimacy, the defining characteristics are not immutable—aliens can be naturalized and persons born out of wedlock can be legitimized under certain conditions and procedures. However, alienage and illegitimacy are visible and irreversible traits—these traits appear on public record, and the alterations of these characteristics are usually in one direction only (from alien to citizen and from “illegitimates” to “legitimates”). Once a person is

73. See, e.g., Karst, *supra* note 27, at 23 (claiming that “[c]lassification on the basis of a trait that is immutable and highly visible . . . lends itself to a system of thought dominated by stereotype, which automatically consigns an individual to a general category”).

74. See ALLAN IDES ET AL., *CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS* 234 (8th ed. 2019).

75. See generally Jennifer Crocker et al., *Social Stigma*, in 2 *HANDBOOK OF SOCIAL PSYCHOLOGY* 504, 507 (Daniel T. Gilbert et al. eds., 4th ed., 1998) (noting that “visibility” is one of the critical factors for stigma); EDWARD E. JONES ET AL., *SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS* 27–36 (1984) (discussing how “concealability” is one important factor that influences the severity of stigma).

76. Cf. IDES ET AL., *supra* note 74, at 266–67 (noting the one-way nature of the mutability of alienage in the context of equal protection).

77. See ELY, *supra* note 72, at 160 (pointing out that “the decision-maker’s ability to generalize will be distorted by his or her perspective” and that immutability influences such distortion). This issue is related to a psychological effect called the “in-group–out-group bias,” and linked closely to the next factor of limited access to politics. See *infra* Section II.B.

naturalized or legitimized to join the majority, he or she need not be afraid of being discriminated as an alien or an “illegitimate” ever again.

On the other hand, groups that have failed to be qualified as (quasi-) suspect—such as poor, disabled, and sexual orientation—have neither immutable nor irreversible traits.⁷⁸ A rich person may become poor at any time. An unimpaired person may turn into disabled by accidents or disease at any time. People occasionally change or realize their sexual orientation as time passes. Also, in the case of sexual orientation, such an inner trait is often not visible to other people.

B. Limited Access to Politics

The second factor is the limited access to politics. If the group were or had been excluded from the political process, their interests would be undervalued in the legislative process.⁷⁹ Denial of the right to vote or to hold office would directly place the group into the position of “discrete and insular”⁸⁰ minorities—the group would have no delegate representing their own interests in the legislative process. Furthermore, even if legislators from the majority group intended to be generous and respectful to the minority group’s interests, the legislators’ view about the group would be inevitably unfair and distorted. Under the “we-they” framework, as suggested by Ely, legislators could not escape being biased in favor of the majority group (i.e., “we” that legislators belong to) while maintaining over-generalized stereotypes about the minority group (i.e., “they,” to which no legislator belongs).⁸¹

Incidentally, this idea of “we-they” cognitive framework is well supported by the findings of social psychology studies. There is a psychological effect called the “in-group–out-group bias.”⁸² In the term of social psychology, “we” (the group one belongs to) is called the “in-group,” and “they” (the group one does not belong to) is called the “out-group.” It has been demonstrated that people have a bias in favor of the in-group:⁸³ for instance, people evaluate that the abilities and personalities of the in-group are superior to those of the out-group;⁸⁴ people learn

78. I also discuss the trait of elderly (veteran) in detail *infra* Section IV.A.

79. See generally ELY, *supra* note 72, at 161; Karst, *supra* note 27, at 24–26.

80. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (noting aliens as a prime example of “discrete and insular” minority).

81. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933–34 n.85 (1973).

82. See generally John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1084, 1087–88 (Susan T. Fiske et al. eds., 5th ed. 2010).

83. The in-group–out-group bias can be triggered easily. Studies have observed the in-group favoritism even in case where participants are randomly assigned to hypothetical and unsubstantial groups. See, e.g., John W. Howard & Myron Rothbart, *Social Categorization and Memory for In-Group and Out-Group Behavior*, 38 J. PERSONALITY & SOC. PSYCHOL. 301 (1980) (analyzing in-group favoritism in groups based on aesthetic preferences of modern painters, Klee vs. Kandinsky); Henri Tajfel et al., *Social Categorization and Intergroup Behavior*, 1 EUR. J. SOC. PSYCHOL. 149 (1971) (analyzing in-group favoritism in groups based on estimations of dots numbers, over- vs. under-estimators).

84. See, e.g., Charles K. Ferguson & Harold H. Kelley, *Significant Factors in Overevaluation of Own-Group’s Product*, 69 J. ABNORMAL & SOC. PSYCHOL. 223 (1964) (conducting an experiment to find that participants over-evaluated the quality of the in-group products after they completed a series of tasks in ad hoc groups); Howard & Rothbart, *supra* note 83, at 302–08 (performing three experiments to find

and remember bad behaviors of the out-group better than those of the in-group;⁸⁵ and people prefer to distribute more interests to the in-group than to the out-group.⁸⁶ Also, there is an effect called the out-group homogeneity—people tend to see out-groups as less diverse than in-groups.⁸⁷ People focus on typical characteristics of the out-groups while they identify individual differences of the in-groups. Furthermore, social psychology studies have implied that the powerless are more prone to be over-generalized;⁸⁸ namely, stereotyping can be escalated particularly against the powerless ruled groups (i.e., the groups who lack the access to politics). This behavior derives from the social hierarchy where the ruled need to attend to the rulers who control their fate, while the rulers lack such incentive to pay close attention to the ruled.⁸⁹

Historically, blacks, women, and aliens have been denied the right to vote and hold office. The Fifteenth Amendment was ratified in 1870 to prohibit disenfranchisement based on race.⁹⁰ But, blacks continued to suffer, primarily in Southern states, from a variety of voting restrictions—discriminatory devices such as literacy tests, poll taxes, and grandfather clauses—to disenfranchise black voters.⁹¹ As a matter of fact, the Voting Rights Act of 1965,⁹² was created—a century after enactment of the Fifteenth Amendment—because enforcement of the voting rights of racial minorities was still necessary.⁹³ Women had to wait until the ratification of the Nineteenth Amendment in 1920 for their constitutional right to vote.⁹⁴ Aliens have no constitutional right to vote to date.⁹⁵ No state allows aliens to

that participants judge statements of good behaviors as more and bad behaviors as less applicable to the in-group).

85. See, e.g., Howard & Rothbart, *supra* note 83, at 309–10 (finding that participants can recall statements of bad behaviors better when the statements belong to out-group than when belong to in-group).

86. See, e.g., Tajfel et al., *supra* note 83, at 176 (finding that experimental participants preferred to give relatively more rewards to the in-group than to the out-group).

87. See, e.g., Charles M. Judd & Bernadette Park, *Out-Group Homogeneity: Judgments of Variability at the Individual and Group Levels*, 54 J. PERSONALITY & SOC. PSYCHOL. 778, 786 (1988) (finding that experimental participants' perceptions of in-groups were more varied than out-groups).

88. See Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621 (1993) (reviewing experimental studies to suggest a theory that there is a mutual reinforcing relationship between power and stereotyping).

89. See *id.* at 623–24.

90. U.S. CONST. amend. XV.

91. See, e.g., EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* 283–309 (1992) (chronicling the systematic attempts to suppress black voters in the Southern states and the efforts to overcome that suppression).

92. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

93. See generally *Voting Rights Act of 1965*, 1966 DUKE L.J. 463 (1966). See also Samuel Issacharoff, *Voting Rights at 50*, 67 ALA. L. REV. 387 (2015) (chronicling the impact of Voting Rights Act up to the present era).

94. U.S. CONST. amend. XIX.

95. See *Sugarman v. Dougall*, 413 U.S. 634, 647–49 (1973) (reminding that “[t]his Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause” while holding alienage as a suspect class and invalidating a state restriction against aliens on employment in the state civil service).

vote in statewide elections.⁹⁶ Reflecting the origin of the country—a country of immigrants—many states had maintained alien suffrage in early American history; but they have shifted to disenfranchise aliens as the concept of citizenship was established and the attitude of nationalism was developed throughout the War of 1812 and World War I. Arkansas became the last state to abolish alien suffrage, and it was in 1926.⁹⁷ In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁹⁸ even made it a crime for aliens to vote in federal elections.

While direct forms of political access such as voting and office holding are important, indirect participation in the political process also matter. If the group were deprived of participation in society in a boarder sense, legislators could not understand and empathize with the minority group.⁹⁹ In fact, the Supreme Court has been aware of the lack of the suspect classes' participations to society. The Court has attempted to remedy it. In the case of blacks, for instance, the Court has denied the "separate but equal" doctrine and has emphasized that racial separation is inherently unequal¹⁰⁰—the Court has required real opportunity for blacks' equal participation in society. In the case of aliens, the Court has promoted aliens' participation in the justice and civil service by invalidating legal obstacles such as prohibitions of aliens' membership in the bar¹⁰¹ and employment in the state civil service.¹⁰² The Court has also required opportunity be given for women's equal participation in society.¹⁰³

C. Existence of Prejudice or Stereotype

The last factor is whether the minority group has been targeted by prejudice or stereotype. If the majority including legislators have a shared hostility or dislike against a minority group, or if they have a shared exaggerated negative overgeneralization about a minority group, the interests of that minority group would be undervalued in the legislative process.¹⁰⁴ In psychological terms, the first

96. *Cf.* a few districts in Maryland (e.g., the city of Takoma Park) allow aliens to vote in local level elections.

97. *See* Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 *LAW & INEQ.* 271, 282 (2000). *See also* Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 *LOY. L. REV.* 447, 466–69 (2017) (examining the history of noncitizen suffrage).

98. Pub. L. No. 104-208, Div. C, 110 Stat. 3009-572 (codified at 18 U.S.C. §611 (2012)). *See generally* Mortellaro, *supra* note 97, at 469–71 (detailing the impact of the Act).

99. *See* ELY, *supra* note 72, at 161 (noting the value of "increased social intercourse" in addition to the direct political access); Karst, *supra* note 27, at 25–26 (noting that "[v]oting and officeholding are not, after all, the only forms of participation in society's decision" and underlining the importance of "the removal of legal obstacles to a wide range of types of participation as a member of society").

100. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

101. *See In re Griffiths*, 413 U.S. 717, 718 (1971).

102. *See* *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973).

103. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 556–58 (1996) (emphasizing that women should have the opportunity to receive the same military education and military status as men).

104. *See* ELY, *supra* note 72, at 152–57 (suggesting two forms of prejudice: the "first-degree prejudice" referring to hostility; and the other (second-degree) prejudice referring to negative overgeneralization); Karst, *supra* note 72, at 23 (referring to the factor of prejudice as "the value of respect").

condition is an issue of prejudice (at the level of emotion) while the second condition is an issue of stereotyping (at the level of cognition).¹⁰⁵

Deeply rooted in the history of black slavery, hostility and dislike against racial minorities have been widespread in U.S. society.¹⁰⁶ Persons born out of wedlock used to be called “bastards” and have long suffered hostility and dislike from society.¹⁰⁷ Also, as the language “xenophobia” indicates, aliens have often received hostility and dislike from society¹⁰⁸—President Donald Trump’s explicit statements of anti-Muslims¹⁰⁹ and a U.S.–Mexico wall¹¹⁰ during his presidential campaign reminded us of the persistent xenophobia still existent today. In the case of sex, our society has long shared an exaggerated negative stereotype about women—the stereotype that women are timid and delicate in nature and should be protected by men.¹¹¹

105. Psychology considers that people’s attitudes are consisted of cognitive, affective, and behavioral components. By the common definition in psychology, stereotyping is taken as cognitive component, prejudice as affective component, and discrimination as behavioral component. See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357 (Daniel T. Gilbert et al. eds., 4th ed., 1998). Therefore, in order to avoid confusion, this Article refrains from using the expressions “first-degree prejudice” and “second-degree prejudice” suggested by Ely. See ELY, *supra* note 104.

106. See generally U.S. COMM’N ON CIVIL RIGHTS, INTIMIDATION AND VIOLENCE: RACIAL AND RELIGIOUS BIGOTRY IN AMERICA (1983) (describing the problem of violence against racial minorities in the early 1980s).

107. See, e.g., Kingsley Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 215, 215 (1939) (noting that “[t]he bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured”). See also Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011) (examining the history of persons born out of wedlock suffering from legal and societal disadvantages).

108. See, e.g., Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497 (2002) (detailing the impact of xenophobia on American litigation); Harry N. Scheiber, *Xenophobia and Parochialism in the History of American Legal Process: From the Jacksonian Era to the Sagebrush Rebellion*, 23 WM. & MARY L. REV. 625 (1982) (detailing the history and reality of xenophobia in the American legal system).

109. See Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States’*, WASH. POST (Dec. 7, 2015, 6:12 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/> [https://perma.cc/2PKH-3MJW] (noting that Trump was in favor of a “total and complete shutdown” of Muslims entering the United States).

110. See Jerry Markon, *Trump Says Building a U.S.-Mexico Wall is ‘Easy.’ But Is It Really?* WASH. POST (July 17, 2015), https://www.washingtonpost.com/politics/trump-on-the-us-mexico-border-building-a-wall-is-easy/2015/07/16/9a619668-2b0c-11e5-bd33-395c05608059_story.html [https://perma.cc/NP65-U8V7] (noting that Trump was proposing to build a gigantic wall at the U.S.–Mexico border to shutdown illegal migrants from Mexico).

111. Even the Supreme Court had been controlled by this stereotype of women until the late 20th century. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (denying the women’s right to obtain a bartender’s license unless they are the wife or daughter of the male owner by supporting the belief of Michigan legislature that “the oversight assured through ownership of a bar by a barmaid’s husband or father minimizes hazards that may confront a barmaid without such protecting oversight”); see also *Bradwell v. State*, 83 U.S. 130, 141 (1873) (denying the women’s right to practice law in Illinois, and Justice Bradley noting, in his concurring opinion, that “[m]an is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life”).

III. CHILDREN AND THE THREE-FACTOR CRITERIA

Now, are children a (quasi-) suspect class? This Article is not the first to raise this question although only a few of us have taken the question seriously before. For example, Hillary Rodham Clinton argued in the 1970s for considering children as a suspect class.¹¹² More recently, the appellant in *Hedgepeth v. Washington Metro. Area Transit Auth.* argued for taking children as a quasi-suspect class.¹¹³ However, the focus of the previous arguments was primarily on the factor of limited access to politics while the other two factors have not been sufficiently discussed. Part III of this Article extensively discusses all of the three factors. In order to examine whether children meet the criteria, I analyze the three factors one by one—visible and irreversible trait of children, children’s limited access to politics, and existence of stereotype about children.

A. Visible and Irreversible Trait of Children

Being a child is defined by age and is certainly visible. It is generally easy to tell from a person’s appearance whether he or she is a child.

The characteristic of children is also irreversible. Children eventually become adults as they age. In that sense, unlike race and sex, the characteristic of children (i.e., young age) is not immutable. However, this characteristic is changeable in only one direction from the minority to the majority, like alienage and illegitimacy. Adults will never go back to being children once they have reached the threshold age. Therefore, adults never have to be afraid of being discriminated against as children in the future.

The situation of children is even worse compared to alienage and illegitimacy. In the cases of alienage and illegitimacy, certain legal and administrative procedures are required to be naturalized and legitimized, and only a portion of the minority group (i.e., aliens and “illegitimates”) can actually transfer to the majority group (i.e., citizens and “legitimates”). But, in the case of children, almost *all* of the children will *automatically* become adults one day (as long as they survive until the threshold age).¹¹⁴ In this situation, adults would feel that the *current* children should accept the same disadvantages borne by the *past* children (i.e., current adults). Thus, it would be more difficult for the majority (i.e., current adults) to adequately empathize with the minority (i.e., current children).

Later, from the late 20th century, the Court began to recognize the sex stereotype. *See, e.g.,* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982) (noting that “validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women”); *Frontiero v. Richardson* 411 U.S. 677, 684–85 (1973) (noting that “[t]raditionally, such [sex] discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage” and that, as a result, “our statute books gradually became laden with gross, stereotyped distinctions between the sexes”).

112. *See* Rodham, *supra* note 3, at 511–12 (arguing the political powerlessness of children).

113. *See* Appellant’s Reply Brief at 8–14, *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004), 2004 WL 1536069, at *8–*14 (mainly arguing the political powerlessness of children; also trying to argue for the other two factors, but failing to provide a substantial argument for the factor of immutable trait, and the argument for the factor of prejudice was no more than describing the existing legal systems that have imposed constraints on children).

114. *Cf.* To be precise, not all of the children will reach the threshold age. *See infra* Section V.A.

B. Children's Limited Access to Politics

Children have been deprived of access to politics. The situation of children is actually worse than other (quasi-) suspect classifications such as race and sex.¹¹⁵

The Twenty-Sixth Amendment was ratified in 1971 to guarantee the constitutional right to vote for persons who are 18 or older.¹¹⁶ Consequently, the current voting ages for federal and state level elections are all 18, employing the minimal requirement under the Twenty-Sixth Amendment.¹¹⁷ In other words, persons under the age of 18 have never been guaranteed the U.S. constitutional right to vote, and as a matter of fact, they have not been enfranchised for federal or state level elections. At the local municipal level, a few pioneer cities have recently adopted lower ages for voting.¹¹⁸ The city of Takoma Park, Maryland became the first city in the history of the U.S. to lower its voting age for local elections to 16 in 2013.¹¹⁹ Hyattsville, Maryland followed Takoma Park and lowered its voting age to 16 for local elections in 2015.¹²⁰ Berkeley, California lowered its voting age to 16 for its municipal school board elections in 2016.¹²¹ Cambridge, Massachusetts and New York City, New York have set their voting age to 12 and 11 respectively for their participatory budgeting elections, which allow voters to decide how to allocate the city's budget.¹²² However, these are still rare cases. Most persons at age 17 have not been enfranchised even at the local municipal level.

Moreover, until the Twenty-Sixth Amendment, not only those under 18 but also those under 21 had been disenfranchised. As described in Section II.B, blacks and women had been historically excluded from the political process, and it is one of the critical reasons why the Supreme Court has treated them as suspect and quasi-suspect classes. However, young people at the age of 18, 19, and 20 had been

115. The purpose of this section is to point out the *fact* that children have had limited access to politics for a long time, which is even longer than other (quasi-) suspect classifications. This section does not intend to argue whether children *should* have political rights or not. As described in *supra* Section II.B., a minority group's interests would be undervalued in the legislative process if the group is excluded from the politics—regardless of the legitimacy of exclusion. The issue of whether children should have more political rights will be discussed separately in *infra* Section VI.D.

116. U.S. CONST. amend. XXVI.

117. See generally Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–02, 144–49 (2014).

118. See generally Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039 (2017).

119. See GENERATION CITIZEN, LOWERING THE VOTING AGE FOR LOCAL ELECTIONS IN TAKOMA PARK AND HYATTSVILLE, MD 2 (2016), <http://vote16usa.org/wp-content/uploads/2016/10/Final-MD-Case-Study.pdf> [<https://perma.cc/F9HA-YD53>].

120. See *id.*

121. See Berkeley, California, *School Director Election Youth Voting, Measure Y1 (November 2016)*, BALLOTEDIA, [https://ballotpedia.org/Berkeley,_California,_School_Director_Election_Youth_Voting,_Measure_Y1_\(November_2016\)](https://ballotpedia.org/Berkeley,_California,_School_Director_Election_Youth_Voting,_Measure_Y1_(November_2016)) [<https://perma.cc/6EGX-XB9F>].

122. See *FAQs*, CITY OF CAMBRIDGE PARTICIPATORY BUDGETING, <https://pb.cambridgema.gov/> [<https://perma.cc/AYT2-UN6X>]; *PB Cycle 1 (Pilot)*, CITY OF CAMBRIDGE PARTICIPATORY BUDGETING, <https://pb.cambridgema.gov/pbcycle1> [<https://perma.cc/M5H2-24MD>]; *Participatory Budgeting*, N.Y. CITY COUNCIL, <https://council.nyc.gov/pb/participate/> [<https://perma.cc/M723-EQKH>]; Sam Bleiberg, *Participatory Budgeting is \$1M in Betterment Through Balloting*, THE VILLAGER (Apr. 10, 2018), <https://www.thevillager.com/2018/04/participatory-budgeting-is-1m-in-betterment-through-balloting/> [<https://perma.cc/SNS4-7JRD>] (noting that the initial voting age of 14 was lowered to 11 in 2018).

excluded from the political process for a much longer period of time than blacks and women. One and a half century has passed since the Fifteenth Amendment (ratified in 1870) prohibited disenfranchisement based on race; one century has passed since the Nineteenth Amendment (ratified in 1920) granted women the constitutional right to vote. But, we had to wait until just a half century ago for the Twenty-Sixth Amendment (ratified in 1971) to grant persons at age 18, 19 and 20 the constitutional right to vote.

Furthermore, ages of holding office are even higher than the voting ages in general. For the federal candidacy, the Constitution has set a minimum age of 35 for the President,¹²³ 30 for a Senator,¹²⁴ and 25 for a Representative¹²⁵—these ages have remained the same since their establishment in 1789. For state legislators, ages of holding office differ by state. The ages range between 18 and 30, but states that qualify 18-year-olds for legislators are limited to 12 states.¹²⁶ Half (25) of the states set the age of candidacy for state Senate at 25 or older, and the majority (33) of the states set the age for the House at 21 or older.¹²⁷ Young people below those ages lack the right to hold office. They lack the right to represent themselves in the political process.

Even worse, children have been historically deprived of participation in society in a boarder sense as well—their indirect participation to politics have also been limited. Particularly, the right to freedom of speech is an essential vehicle for participation in society—you cannot make the society appropriately understand your situations and thoughts without free speech. However, in the case of children, their constitutional rights of free speech under the First Amendment had not been guaranteed until *Tinker* in 1969.¹²⁸ Even after *Tinker*, children’s rights to free speech have remained imperfect—the Court has repeatedly held the constitutionality of school disciplinary actions to control children’s free speech.¹²⁹

123. See U.S. CONST. art. II, §1, cl. 5.

124. See U.S. CONST. art. I, §3, cl. 3.

125. See U.S. CONST. art. I, §2, cl. 2.

126. See *Who Can Become a Candidate for State Legislator*, NAT’L CONF. OF ST. LEGISLATORS (Apr. 22, 2015),

<http://www.ncsl.org/research/elections-and-campaigns/who-can-become-a-candidate-for-state-legislator.aspx#Candidate%20Qualifications> [<https://perma.cc/D9JC-UX3C>]. States that qualify 18-year-olds for legislators are California (Senate and House), Hawaii (Senate and House), Kansas (Senate and House), Louisiana (Senate and House), Massachusetts (Senate and House), Montana (Senate and House), New Hampshire (House), New York (Senate and House), Rhode Island (Senate and House), Washington (Senate and House), West Virginia (House), and Wisconsin (Senate and House). See *id.*

127. See *id.*

128. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (clarifying that “First Amendment

rights . . . are available to teachers and students” and striking down the school suspension for students wearing black armbands to express their objections to the Vietnam War).

129. See *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007) (upholding the school suspension for a student who unfurled a banner to promote illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (upholding the school censorship to delete two student-made articles—about pregnancy and divorce—from the school newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (upholding the school disciplinary actions including suspension for a student who used sexual innuendo in his speech during the campaign for a student-office election).

C. Existence of Stereotype about Children

The last factor to be examined is whether there exists prejudice or stereotype about children. A larger space is needed for this factor than the previous two factors because it is difficult to discuss. Children perhaps have not been the target of strong hostility (i.e., prejudice),¹³⁰ but we generally think that children lack in capacity and experience as compared to adults.¹³¹ Is this exaggerated negative stereotyping, or is this not stereotyping at all because people's generalization is based on the reality?

It is important not to confuse the issue here. It would be true that the capacity of most children is somewhat inferior to that of most adults in some aspects. Children usually acquire capacity and experience as they grow older. I have no intention to insist that the capacity of children is *totally the same* (i.e., 50–50) as that of adults. However, I think that *the gap* in capacity between children and adults is overly exaggerated in our beliefs. It seems that many of us often recognize the capacity of adults as 100 and that of children as 0 while it is 70–30 or 60–40, in reality. This is exaggerated negative stereotyping because it would lead to an underestimation of children's interests in the legislative process.

The concept of childhood is just an artificial *invention* from the 17th century.¹³² Psychologically speaking, an exaggerated stereotype can be automatically evoked whenever we categorize something. Once a certain value is arbitrarily set as the threshold to categorize the mass into two classes, humans start to recognize inter-class differences and intra-class similarities greater than reality.¹³³ The case of dividing people into children and adults by a certain threshold age would be no exception.

Actually, the *Gault* Court was aware of such an exaggerated negative stereotype of children and emphasized that special treatment of children cannot be justified by such a stereotype: “[s]o wide a gulf between the State's treatment of the adult and of the child [in the criminal justice system] requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide.”¹³⁴

I present below some specific topics that indicate people's negative stereotyping of children. Having said that, it is difficult to demonstrate the gap between a stereotype and reality because an objectively measurable criterion is rarely

130. Prejudice (hostility and dislike) against children may exist, but I will address this issue at another time.

131. See, e.g., *Thompson v. State*, 487 U.S. 815, 825–26 n.23 (1988) (listing children along with the “insane” and those who are “ill with loss of brain function,” and summarizing how the law has historically treated children as those who lack in capacity).

132. See *supra* Introduction.

133. See, e.g., Henri Tajfel & A. L. Wilkes, *Classification and Quantitative Judgment*, 54 BRIT. J. PSYCHOL. 101 (1963) (measuring the impact of categorization by a simple experiment, in which participants made judgments of length of various lines; when a longer half of lines were labeled as class A and a shorter half as class B, the deviation of the judged differences from the actual differences between adjacent lines was greatest between the shortest line of class A and the longest of class B—being judged as sesquialteral large as the real difference).

134. *In re Gault*, 387 U.S. 1, 29–30 (1967) (a landmark decision that recognized the constitutional rights of children—admitting the due process rights of juvenile defendants). See *supra* Section I.A.; see also *Ramos v. Town of Vernon*, 353 F.3d 171, 181 (2d Cir. 2003) (explicitly noting the importance of avoiding stereotypes and generalizations).

available.¹³⁵ Thus, I argue the capacity of children and adults respectively, instead of addressing the discrepancy between the two. The purpose is to show that: (i) adults, in reality, are not as capable as people believe; and (ii) children, in reality, are not as incapable as people believe.

The types of human abilities are almost unlimited. Consequently, it is not feasible in this Article to thoroughly review the differences in every aspect of the capacity of children and adults. Therefore, this Article takes up topics related to people's decision-making abilities, in which jurists would have great interest.

1. Adults Are Less Capable Than We Believe

I first discuss the gap between our beliefs and the realities of adults' capability for decision making. When compared with children, we often feel adults are perfect beings. However, adults are less capable than we believe. In reality, one's decision making is quite unstable even after he or she becomes an adult. I overview below the studies of two different topics: vulnerability to cognitive biases (irrational behaviors) and vulnerability to situations (unethical behaviors).

a. Vulnerability to Cognitive Biases—Irrational Behaviors

We often embrace an illusion that rational persons (although there may be certain individual differences) always make reasonable decisions. However, the dramatic development of behavioral economics in recent years have revealed that such beliefs are false. It is being unraveled that people—even adults, and even in important issues—make irrational decisions at times, and that the irrationalities have certain systematic patterns (i.e., not just random variations among individuals).

Behavioral economics is a discipline that employs findings and methodologies of psychology and cognitive sciences to construct theories of human economic behaviors in a way more consistent with reality.¹³⁶ It began to emerge in 1970s, and it was accepted as a new discipline in economics in 1990s.¹³⁷ Development of this new approach was a grand transformation in the studies of human behavior. Three behavioral economists have already received the Nobel Prize in Economic Sciences—Daniel Kahneman in 2002, Robert J. Shiller in 2013, and Richard H. Thaler in 2017.¹³⁸

Behavioral economics has had a great impact particularly because it has developed—beyond the disciplines of psychology and cognitive sciences—as a discipline in economics. Traditional economic theories (i.e., neoclassical economics)

135. See generally Charles M. Judd & Bernadette Park, *Definition and Assessment of Accuracy in Social Stereotypes*, 100 PSYCHOL. REV. 109 (1993) (highlighting the difficulty in assessing the accuracy of stereotypes by reviewing previous studies). In fact, social psychologists have been inactive in making empirical attempts to measure the accuracy or inaccuracy of stereotypes. See *id.* at 109.

136. See, e.g., SANJIT DHAMI, *THE FOUNDATIONS OF BEHAVIORAL ECONOMIC ANALYSIS* (2016) (discussing the basics of behavioral economics); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

137. See generally Colin F. Camerer & George Loewenstein, *Behavioral Economics: Past, Present, Future*, in *ADVANCES IN BEHAVIORAL ECONOMICS* 3, 5–7 (Colin F. Camerer et al. eds., 2004) (discussing the history of behavioral economics).

138. See *All Prizes in Economic Sciences*, NOBEL PRIZE, https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/ [<https://perma.cc/GD52-UZ5P>].

were built on the assumption that people always behave in an economically rational manner (i.e., *homo economicus*). Behavioral economics has addressed the weakness of the traditional rational persons model and tried to elaborate new models that are more consistent with real human behaviors. Behavioral economics has developed to counter the traditional model of rational persons and has cast light on the gap between the rational behaviors in theory and real human behaviors. In other words, it has empirically and theoretically highlighted the irrationality of human behaviors.

Behavioral economics covers a wide variety of cognitive biases.¹³⁹ As examples, I take up here the anchoring effect and the framing effect, both of which clearly show the vulnerability of people's (i.e., adults') decision making.

The anchoring effect is a cognitive bias illustrating how numerical values, totally irrelevant to the subject matter at hand, can subconsciously influence humans' estimations and evaluations.¹⁴⁰ When people make estimations of values, their estimations subconsciously start from a certain initial value. Although they adjust their estimations after departing from the initial value, their ultimate conclusions are often influenced by the initial value (i.e., anchor). The problem is that even irrelevant values can work as anchors. For instance, in a classic experiment that asked participants to estimate the percentage of African countries among the United Nations members, the estimation of those who saw the number 10 prior to the question was 25% in average (median) while that of those who saw 60 was 45%.¹⁴¹

The framing bias is a cognitive bias that people's decision making can be subconsciously influenced by the frames to present choices.¹⁴² Specific examples are such as the effects of decoy option and default.¹⁴³ The effect of decoy option is that people's decision making can be easily manipulated by a decoy option. For instance, when subscribing to a magazine, most people would choose the cheaper option (A) if the subscription options were between (A) *web subscription for \$59* and (B) *print & web subscription for \$125*.¹⁴⁴ But, most people would choose option (B) if the options were among (A) *web subscription for \$59*, (B) *print & web subscription for \$125*, and (C) *print subscription for \$125*.¹⁴⁵ Although the options (A) and (B) are totally the same in both conditions, people's choices between the two options can be reversed due to the decoy option (C).¹⁴⁶ The effect of default also has a potent

139. See generally DHAMI, *supra* note 136; KAHNEMAN, *supra* note 136.

140. See generally DHAMI, *supra* note 136, at 46, 1344–45, 1370–75 (discussing the anchoring effect); KAHNEMAN, *supra* note 136, at 119–28.

141. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974).

142. See generally DHAMI, *supra* note 136, at 106–07, 1455–56 (discussing the framing effect); KAHNEMAN, *supra* note 136, at 363–74.

143. The most famous example is the loss-gain framing, which will be described later with the prospect theory in Section IV.B.

144. DAN ARIELY, PREDICTABLY IRRATIONAL 1–6 (2008) (conducting the experiment of the *Economist* subscription offers with students at MIT Sloan School of Management). In his experiment, 68 participants chose (A) while 32 chose (B). See *id.* at 6.

145. In the experiment of Ariely, 16 participants chose (A), 84 chose (B), and no one chose (C). See *id.* at 5.

146. In the first condition with the two options, the option (B) looks unattractive because the price is more than double of the option (A). But, in the second condition with the three options, people cannot

influence in our society.¹⁴⁷ One breathtaking example is a case of donor consent for organ transplants. In Europe, it was found that the consent ratio was 98% or more in almost all of the countries with the opt-out system (seven European countries such as Austria¹⁴⁸) while the ratio was only 4–28% in the countries with the opt-in system (four European countries such as Denmark).¹⁴⁹

Furthermore, various cognitive biases influence not only the general public but also jurists. Studies have shown that even decision making of judges and lawyers can be affected by biases such as the anchoring and framing effects.¹⁵⁰ For example, in one experiment that asked the federal magistrate judges to determine damages in a traffic accident scenario, the amount awarded under the non-anchor condition was nearly twice as large as the amount under the anchor condition.¹⁵¹ Adults like jurists, who are believed to have a high level of ability to make rational judgments, cannot avoid the subconscious influences of cognitive biases.

To summarize, borrowing the words of Kahneman, even “an important choice is controlled by an utterly inconsequential feature of the situation.”¹⁵² Most importantly, the impact of cognitive biases is not limited to minor effects on trivial issues. They can largely influence people’s decision making in important issues. After all, the decision making of people (adults) is vulnerable and can be manipulated easily by the way choices are presented.

b. Vulnerability to Situations—Unethical Behaviors

We tend to think someone’s unethical behaviors are mainly attributable to his or her extreme personality. We tend to believe that good people (good adults) would never engage in unethical behaviors. However, this is a false belief. Studies have shown that people’s decision making and behaviors are susceptible to the

escape from the frame of comparing the options (B) and (C)—print & web is obviously better than solely print for the same price. *See id.* at 6.

147. The impact of defaults has been already underlined in discussions over the applications of behavioral economics to policy making in the real world. *See, e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008).

148. One exception among the seven countries with the opt-out system was Sweden that had a little lower consent ratio of 86%. *See* Johnson & Goldstein, *infra* note 149.

149. *See* Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 *SCI.* 1338 (2003). In addition to these field data from the real world, Johnson and Goldstein also conducted a controlled scenario experiment and confirmed statistically significant differences caused by the opt-in and opt-out formats. *See id.*

150. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777 (2001) (finding five common cognitive biases, anchoring, framing, hindsight, representativeness, and egocentric biases, influence judges’ decision making); Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 32 *PERSONALITY & SOC. PSYCHOL. BULL.* 188 (2006) (finding anchoring bias on judges’ decision making by an experimental study with German judges and prosecutors); Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers’ Intuitions Prolong Litigation*, 86 *S. CAL. L. REV.* 571 (2013) (finding four framing, confirmation, nonconsequentialist reasoning, and sunk-cost fallacy biases—i.e., cognitive biases related to the delay of decision making about settlement—influence lawyers’ decision making); *see also* Hiroharu Saito, *Japanese Divorce Lawyers: Their Success After Their Own Divorce*, 20 *ASIAN-PAC. L. & POL’Y J.* 1, 20–22 (reviewing studies related to cognitive biases in decision making of jurists).

151. *See, e.g.*, Guthrie et al., *supra* note 150, at 790–94.

152. KAHNEMAN, *supra* note 136, at 374.

situations. In recent years, it has become difficult to empirically study unethical behaviors of human being due to the research ethics issue. However, some classic studies have shown devastating findings. There are two well-known studies: the Milgram experiment and the Stanford prison experiment.

The Milgram experiment is a series of experiments conducted by Stanley Milgram around the 1960s.¹⁵³ It hypothesized that the Nazi Germany's slaughter of millions of people during World War II may not have been attributable to the extreme personality of their officers and that even ordinary people may engage in such a cruel act depending on their situations. The study, in fact, found that even ordinary people could easily obey authority to perform cruel behaviors. In the experiment, participants (neighbors of Yale University)—believing themselves to be participating in an experiment to uncover the effects of punishment on learning—were instructed: (i) to give an electrical shock to the paired learner whenever the learner failed to give a correct answer in the words-memory test; and (ii) to increase the level of the shock every time the learner failed.¹⁵⁴ As a result, after being repeatedly instructed by the experimenter to continue giving shocks,¹⁵⁵ a majority of the participants kept going to generate the highest 450 volts shock, even when the button had a frightening label of XXX (beyond the label of *danger: severe shock*).¹⁵⁶

The Stanford prison experiment conducted by Philip Zimbardo in 1971 suggested that people's behaviors are greatly influenced by their given roles in the situations.¹⁵⁷ In the experiment, participants (college students) were randomly assigned to the role of either *guard* or *prisoner*, and they spent one week in a mock prison.¹⁵⁸ As a result, it was reported that *guards* began to show overbearing attitudes

153. See generally STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL PSYCHOL. 371 (1963).

154. See MILGRAM, *supra* note 153, at 17–19. The learner was an accomplice and did not actually receive the electrical shocks. The real purpose of the experiment was to observe the participants' behaviors and obedience to authority (i.e., the authority of an academic research conducted at Yale). See *id.* at 14–17.

155. See *id.* at 21.

156. The detailed condition differed slightly by experiment, but in the standard condition, the learner began to cry out to stop the experiment at 150 volts shock, stopped responding to the questions after 300 volts, and became silent after 315 volts. See *id.* at 21. In the standard condition, 25 out of 40 of the participants kept going until the last 450 volts. See *id.* at 35 (the result of Experiment 2 in Table 2).

157. See Craig Haney et al., *A Study of Prisoners and Guards in a Simulated Prison*, 9 NAVAL RES. REV. 1 (1973); see also Philip Zimbardo, *The Story: An Overview of the Experiment*, STAN. PRISON EXPERIMENT, <http://www.prisonexp.org/the-story/> [https://perma.cc/3NGV-WPWV]. Please note, however, that there are also criticisms of the scientific validity of the Stanford prison experiment. The most recent and critical one—based on the audio recordings found in archives at Stanford—is that, inconsistent with their report, a student assistant who served as the warden was coaching *guards* to be tough during the experiment. See Ben Blum, *The Lifespan of a Lie*, MEDIUM (June 7, 2018), <https://medium.com/s/trustissues/the-lifespan-of-a-lie-d869212b1f62> [https://perma.cc/5VP5-PJBD]. Therefore, unlike the conclusion of their report, we cannot conclude that people's behaviors are naturally (without any guidance) determined by the given roles. Guidance from the authority or at least some type of induction seems to be needed for people to engage in the given roles in the situations. See also Philip Zimbardo, *Philip Zimbardo's Response to Recent Criticisms of the Stanford Prison Experiment*, STAN. PRISON EXPERIMENT, <http://www.prisonexp.org/response> [https://perma.cc/B325-HBEC] (discussing the rebuttal from Zimbardo).

158. Twenty college students participated, and the mock prison was designed to be as real as possible. For example, the *prisoners* were “arrested” in a formal procedure by a real police officer and taken to the

and aggressive behaviors against *prisoners*, which escalated as the time passed.¹⁵⁹ *Prisoners* began to take a passive response mode in interactions, and they suffered from emotional depression, rage, and anxiety.¹⁶⁰ In a nutshell, *guards* deeply engaged in their role to maintain the order of the prison, and *prisoners* were also strongly affected by their role. They knew in their mind that it was just a simulation experiment; however, they could not control themselves from behaving in accordance with their given roles in the situation.

The two studies mentioned above are classic studies performed in the 1960s and 70s. It is almost impossible today to replicate them or to conduct a similarly radical experiment because of the research ethics issue. Nevertheless, the core of their findings still stands: (i) people's behaviors are greatly determined by the situations; and (ii) even ordinary people (ordinary adults) can easily perform unethical behaviors.¹⁶¹

2. Children Are More Capable Than We Believe

I next discuss that children are more capable than we believe. Advanced studies in various areas have reported important findings about the reality of children's capability. But, many of us are still unfamiliar with, or are ignoring, those findings. As a result, there are discrepancies between our perceptions about children's capacity and its reality.

Specifically, I review findings in four different topics related to children's abilities of decision making. The four topics are: (a) moral judgment capacity of young children (preschoolers and elementary schoolers); (b) fundamental cognitive capacity of adolescents; (c) voting capacity of adolescents; and (d) overall decision-making capacity in daily life (in school life). I carefully picked up the topics that best show the discrepancies between our perceptions and the reality of children's capacity. These four topics may look somewhat disorganized, but adequate topics are limited. In order to show the discrepancies, the topics must include concrete empirical findings of children's good capacity, and the findings must be somewhat surprising to us.

It is not easy to study the real capacity of children. The impact of the current adult-centric society should be noted when examining the capacity of children. As suggested by the Stanford prison experiment, people's behaviors are determined by their situational roles.¹⁶² Children in the adult-centric society can be considered as in a similar position of prisoners in the experiment—incidentally, liberationists in the

police station in the beginning. Their initial plan was to observe the participants' behaviors for two weeks, but they had to terminate it due to the escalation of the participants' behaviors. See Haney et al., *supra* note 157, at 5–10.

159. See *id.* at 9–11, 13–15.

160. See *id.* at 9–11, 15–17.

161. See Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J. PERSONALITY & SOC. PSYCHOL. 398 (1991) (reviewing the accumulated studies to conclude that situations are determinants of social behaviors while noting that personality factors also matter); Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 AM. PSYCHOL. 1 (2009) (replicating the Milgram experiment quite recently, in a milder condition that the maximum level of the electric shock was at 150 volts, to find similar results).

162. See *supra* Section III.C.1.b.

1970s often described childhood as “prison.”¹⁶³ Children cannot escape from behaving in a way that conforms to the societal role of “children.” Thus, the social science studies of children’s capacity—especially studies that find children’s inferior capacity—should be treated with caution. Those studies may be merely observing children who are playing the given role of immature “children;” children’s capacity may be found differently under the conditions where children are more empowered. Considering this issue, there are three types of studies that can approach the real potential capacity of children (the selected topics include all of the three types): (i) basic studies of children’s fundamental (more biological than social) abilities, which would not be strongly influenced by the societal roles of children (e.g., studies of cognitive capacity of adolescents in topic (b)); (ii) studies of children who exceptionally showed abilities despite the given societal roles (e.g., a study of independent vegetarian children in topic (a)); (iii) studies of children under exceptional environments where they are freed from the typical societal roles (e.g., studies of voting capacity of 16- and 17-year-olds in Austria and Scotland in topic (c), and studies of unique democratic schools in topic (d)).

a. Moral Capacity of Young Children

The first topic is the capacity of young children (preschoolers and elementary schoolers). Some people call young children “monsters.” A heartwarming example is that my judge-friend often describes his beloved kids as “monsters in my family.” An unpleasant example is that I once heard a law professor shouting, “After all, [young] children are irrational monsters!” Children, regardless of their age, are “persons”¹⁶⁴ and not “monsters.” But, as the expression of “monster” implies, a lot of us today—including jurists who are supposed to be sensitive to prejudice and stereotyping—consider children incapable of making autonomous decisions. There exists a persistent view that children are amoral and fully dependent on the guidance of adult authority.

However, this view is inconsistent with the empirical findings. Studies of developmental psychology have confirmed that children, even at young ages, are competent to make their own autonomous moral decisions, independent of the guidance of adult authority.¹⁶⁵ Specifically, young children have competence to autonomously judge morally the difference between wrong or right and also to distinguish between moral and conventional obligations.¹⁶⁶ Preschoolers can judge

163. See FARSON, *supra* note 3, at 214 (noting that “[u]ntil society’s views as to what child might be undergo radical change, the child is trapped, a prisoner of childhood”); HOLT, *supra* note 3, at 22 (noting that the initial idea for the title of the book was “The Prison of Childhood”).

164. See *supra* Section I.A.

165. See generally PAUL L. HARRIS, TRUSTING WHAT YOU’RE TOLD: HOW CHILDREN LEARN FROM OTHERS 113–31 (2012).

166. Studies have indicated that people, including young children as well as adults, make judgments differently by the social domains such as moral, social-conventional, and personal domains—so called the “social domain theory.” In particular, the differences of young children’s judgments in between moral and conventional domains have been confirmed by a large body of studies. See generally Elliot Turiel, *The Development of Morality*, in 3 HANDBOOK OF CHILD PSYCHOLOGY 789, 826–38 (William Damon & Richard M. Lerner eds., 6th ed., 2006).

moral transgressions (e.g., hitting another child¹⁶⁷) as impermissible even in the absence of a rule. They evaluate moral transgressions as more serious offenses and as more deserving of punishment than just conventional transgressions (e.g., not sitting in the designated place on a rug¹⁶⁸). They evaluate conventional transgressions as more permissible than moral transgressions in the absence of a rule. The basic mechanism of young children's moral judgment is that they evaluate acts that cause harm and distress as morally wrong. In other words, they can empathize with the victims.¹⁶⁹ Moreover, studies have found that social interaction with peer children—not the guidance of adult authority—is the key factor in young children acquiring the skill of moral judgment.¹⁷⁰

Having said that, the findings above are about young children's decision making at the inner-emotional level. There are often gaps between people's inner-emotions and outer-behaviors, and thus, people's actual behaviors do not always reflect their judgments at the inner-emotional level. On this point, there is an intriguing study of vegetarian children, which interviewed a group of "independent" vegetarian children from the ages of 6 to 10, who grew up in the ordinary non-vegetarian families but somehow decided themselves to become vegetarians despite the inconvenience for their families.¹⁷¹ As a result, "independent" vegetarian children were found to become vegetarian primarily based on their own moral judgment (a judgment that meat-eating is not good because it causes suffering of animals).¹⁷² These "independent" vegetarian children are, of course, exceptional cases; however, the finding implies that (at least some) young children have the

167. See Judith G. Smetana, *Preschool Children's Conceptions of Moral and Social Rules*, 52 CHILD DEV. 1333, 1334 (1981) (conducting experiments with preschoolers from the ages of 2 to 5 at nursery schools to evaluate moral and conventional transgressions).

168. See *id.* at 1334.

169. See, e.g., Philip Davidson et al., *The Effect of Stimulus Familiarity on the Use of Criteria and Justifications in Children's Social Reasoning*, 1 BRIT. J. DEVELOPMENTAL PSYCHOL. 49 (1983) (interviewing 6–10 years old children to find that "others' welfare" (i.e. "appeal[ing] to the interests of persons other than the actor") is the children's major explanation for why they judge moral transgressions as wrong).

170. See, e.g., Michael Siegal & Rebecca McDonald Storey, *Day Care and Children's Conceptions of Moral and Social Rules*, 56 CHILD DEV. 1001 (1985) (finding that distinction between moral and conventional transgressions become salient among veteran children in a day-care center aged 3 to 5—those who have a sufficient experience of interactions with peer children—than among newly enrolled children at the same ages); Judith G. Smetana et al., *Abused, Neglected, and Nonmaltreated Children's Conceptions of Moral and Social-Conventional Transgressions*, 55 CHILD DEV. 277 (1984) (finding that groups of abused and neglected children aged 3 to 5—those who lack adequate guidance from the parents—are also capable of distinguishing between moral and conventional transgressions in a similar way to non-maltreated children).

171. Karen M. Hussar & Paul L. Harris, *Children Who Choose Not to Eat Meat: A Study of Early Moral Decision-Making*, 19 SOC. DEV. 627 (2010) (interviewing three different groups of children for the purpose of comparison: vegetarian children from meat-eating families (i.e., independent vegetarians); vegetarian children from vegetarian families; meat-eating children from meat-eating families).

172. Also, "independent" vegetarian children were found to be tolerant to meat-eaters. Their tolerance can be explained from the children's conception of commitment—probably independent vegetarians did not criticize meat-eaters because meat-eaters had not made a commitment to become vegetarian. See *id.* at 634–35.

capacity to act consistently on their own decisions as well as making decisions independently from adults.¹⁷³

b. Fundamental Cognitive Capacity of Adolescents

Next, I would like to look at the capacity of older children (adolescents). Adolescents are much closer to adults than young children are, but there is still a unique image of adolescents as different from adults. Many of us today have a general image that adolescents are energetic albeit reckless and immature.¹⁷⁴ This view began to emerge in the U.S. in the early 1940s, when the word “teenager” first appeared.¹⁷⁵

In fact, social behaviors of adolescents are not always the same as those of adults. Studies have shown that people’s psychosocial stability (i.e., psychological attitudes toward risk, sensation seeking, impulsivity, peer influence, and future orientation) continues to develop even after reaching the late 20s.¹⁷⁶ In other words, it is true that, compared to adults’ social behaviors, adolescents’ social behaviors tend to be more risk-taking, more impulsive, and more influenced by their peers. Probably due to such relatively unstable characteristics of adolescents’ behaviors, we tend to have a generalized picture of adolescents as immature persons.

However, it is not true that adolescents are inferior to adults in every aspect of their capacity. In particular, achievements of basic research in developmental psychology have shown that the fundamental cognitive capacity (e.g., working memory and verbal fluency) of a person continues to develop until the age of 16 but not more after that.¹⁷⁷ Namely, the fundamental cognitive capacity of adolescents at the age of 16 is no different from that of adults.

c. Voting Capacity of Adolescents

Not only basic studies but also applied studies of adolescents’ capacity have made progress. One example intimately related to children’s legal status is voting capacity (political maturity). Although voting is an important right in democratic society,¹⁷⁸ voting capacity of adolescents has been underestimated.

173. In addition, the findings imply young children’s capacity to be tolerant to the decision making of other people. *See supra* note 172.

174. *See* THOMAS HINE, *THE RISE AND FALL OF THE AMERICAN TEENAGER* 10, 16 (1999) (noting that “America created the teenager in its own image—brash, unfinished, ebullient, idealistic, crude, energetic, innocent, greedy, changing in all sorts of unsettling ways” and describing that “[t]oday’s teenagers serve a sentence of presumed immaturity, regardless of their achievement or abilities”).

175. *See id.* at 3–4.

176. *See* Steinberg et al., *supra* note 16, at 588–90 (2009) (employing five different measures to measure adolescents’ psychological stability: a risk perception measure, a sensation seeking measure, an impulsivity measure, a resistance to peer influence measure, and a future orientation measure).

177. Steinberg and colleagues measured experimental participants’ cognitive capacity by three widely-used tests: a test of resistance to inference in working memory, in which participants distinguish letters they saw in the present trial and in the previous trial; a digit-span memory test, in which participants recall forward and backward 13 sequences of digits they heard; and a verbal fluency test, in which participants generate as many words as possible in one minute that fit to the questions (e.g., beginning with a specific letter or in a specific category like “fruits”). *See* Steinberg et al., *supra* note 176, at 590–92.

178. *See supra* Section II.B.

In recent years, political debates surrounding lowering the voting age from 18 to 16 are active around the world, particularly in Europe.¹⁷⁹ Austria became the first European country to lower the voting age for all elections to 16 in 2007.¹⁸⁰ Scotland followed Austria and lowered the voting age to 16 in 2015 after they allowed 16-year-olds to vote in its independence referendum in 2014.¹⁸¹ At the state level, some pioneer local governments in Germany have adopted the voting age of 16 for state elections.¹⁸² In the U.K., major liberal parties have claimed enfranchisement of 16-year-olds in their manifestos although it has not been realized yet.¹⁸³ But, despite these movements, many people today stubbornly oppose lowering the voting age.¹⁸⁴ People tend to consider that adolescents below 18 lack the voting capacity (political maturity) to participate in elections.¹⁸⁵

However, studies in the areas such as political science have suggested that 16-year-olds are sufficiently capable of voting.¹⁸⁶ In a nutshell, political maturity for

179. See generally Tommy Peto, *Why the Voting Age Should be Lowered to 16*, 17 POL., PHIL. & ECONOM. 277, 278 (2018) (discussing the movements regarding voting age in Europe). There are also non-European countries with the voting ages below 18; for example, Brazil, Cuba, Ecuador, and Nicaragua have the voting age of 16, and East Timor, Indonesia, North Korea, and Sudan have the voting age of 17. See *The World Factbook (Suffrage)*, CIA,

<https://www.cia.gov/library/publications/the-world-factbook/fields/311.html> [https://perma.cc/2NUV-6ELQ]. There are also arguments for lowering the voting age in the U.S. See, e.g., Laurence Steinberg, Opinion, *Why We Should Lower the Voting Age to 16*, N.Y. TIMES (Mar. 2, 2018),

<https://www.nytimes.com/2018/03/02/opinion/sunday/voting-age-school-shootings.html>

[https://perma.cc/QEQ3-EW32]; *Why the Voting Age Should Be Lowered to 16*, ECONOMIST (Feb. 4, 2017),

<https://www.economist.com/leaders/2017/02/04/why-the-voting-age-should-be-lowered-to-16>

[https://perma.cc/NU5V-WNNH].

180. See The Associated Press, *Austria: Voting Age Lowered to 16*, N.Y. TIMES (June 6, 2007),

<https://www.nytimes.com/2007/06/06/world/europe/06fbriefs-austria.html> [https://perma.cc/7NCV-V3LV].

181. See Jan Eichhorn, *Votes at 16: New Insights from Scotland on Enfranchisement*, 71 PARLIAMENTARY AFF. 365, 366 (2018).

182. See *Teen Trend Setters: A State in Germany Lowers Voting Age to Sixteen*, SPIEGEL ONLINE (May 19, 2011),

<https://www.spiegel.de/international/germany/teen-trend-setters-a-state-in-germany-lowers-voting-age-to-sixteen-a-763402.html>. Also, Norway conducted trials to lower the voting age to 16 for local elections in about 20 selected municipals in 2011. See Johannes Bergh, *Does Voting Rights Affect the Political Maturity of 16- and 17-Year-Olds? Findings from the 2011 Norwegian Voting-Age Trial*, 32 ELECTORAL STUD. 90, 92 (2013).

183. See Peto, *supra* note 179, at 278.

184. See, e.g., ELECTORAL COMM'N, THE AGE OF ELECTORAL MAJORITY: REPORT AND RECOMMENDATIONS 3–5, 39–43 (2004) for the case of U.K. (the Electoral Commission recommending that the U.K. should remain the voting age at 18 based on the survey result that the majority people supported the current age).

185. See *id.* at 42 (noting the survey result that the major reasons why people think the voting age should be remain at 18 are such as “not enough life experience at 16,” “not mature enough at 16,” and “too young to make decisions at 16”). Alternatively, some people may oppose lowering the voting age merely because it is against their political interests. If that is the case, it is akin to gerrymandering and their opposition is obviously unjustifiable.

186. *But cf.* Tak Wing Chan & Matthew Clayton, *Should the Voting Age be Lowered to Sixteen? Normative and Empirical Considerations*, 54 POL. STUD. 533 (2006) (analyzing data of several surveys in the U.K. and concluding that political knowledge, consistency of political attitude, stability of political

voting of adolescents at the age of 16 and 17 is no different from that of adults. In order to examine their voting capacity precisely, it is essential to measure it under the situation where they are actually enfranchised—it is difficult for a person to get interested in politics regardless of age unless he or she actually has a voting right. Therefore, rare countries that provide good opportunities to study the voting capacity of 16-year-olds are Austria and Scotland, where the voting age was already lowered to 16. In fact, studies in Austria and Scotland found that the political maturity of 16- and 17-year-olds had increased after being enfranchised.¹⁸⁷ Then, a study in Austria (after enfranchisement) found that 16- and 17-year-olds had a comparable level to adults of political knowledge, political interests, non-electoral political engagement, and quality of vote choice.¹⁸⁸ Another study in Austria showed further that the turnout of 16- and 17-year-old voters was comparable to the overall turnout of all age groups, which was higher than the turnout of 18- to 25 year-old voters.¹⁸⁹

attitude are lower among adolescents than among adults). The study of Chan and Clayton received attention for their conclusion that 16-year-olds were politically immature. However, their study had a number of problems in their conclusion—in particular, their conclusion was inconsistent with the results of their analyses. For example, the results for political knowledge actually showed that political knowledge of 16- and 17-year-olds was higher than that of 18- and 19-year-olds in three out of the four questions asked (e.g., prime minister's name). *See id.* at 549. *See also* Peto, *supra* note 179, at 279–80 (summarizing the problems of the study of Chan and Clayton).

187. *See* Eva Zeglovits & Martina Zandonella, *Political Interest of Adolescents Before and After Lowering the Voting Age: The Case of Austria*, 16 J. YOUTH STUD. 1084, 1092 (2013) (comparing political interest of 16- and 17-year-olds in Austria measured by a survey in 2004 and by another survey in 2008; a four-scale question, “How interested are you in politics?” was used for the analysis); Eichhorn, *supra* note 181 (compared political interest of 16- and 17-year-olds between in Scotland and in the rest of the U.K. measured by surveys in 2015; seven questions related to participation, political confidence, use of information sources, and perceptions of relevance of elections were used for the analysis; finding political interest of 16- and 17-year-olds was higher in Scotland, where they were already enfranchised, than in the rest of U.K.). *But cf.* another study in Norway, where 16- and 17-year-olds were allowed to vote as a trial for 2011 local elections in about 20 selected municipalities, did not observe the increase of political maturity of 16- and 17-year-olds—implying that a mere trial for youth enfranchisement in local elections may be insufficient for increasing their political maturity. *See* Bergh, *supra* note 182.

188. *See* Markus Wagner, David Johann & Sylvia Kritzinger, *Voting at 16: Turnout and the Quality of Vote Choice*, 31 ELECTORAL STUD. 372 (2012). They analyzed survey data in 2009. *Id.* at 373. Political knowledge was measured by whether the respondent correctly placed a party in the left-right dimension. *Id.* at 375. Political interest was measured by eight questions about attention to politics in general and to upcoming European Parliament election. *Id.* Non-electoral political engagement was measured by asking hypothetical willingness to engage in several political activities (e.g., “contacting a politician, collecting signatures”). *Id.* Quality of vote choice—whether the respondent could choose the party that best represents the respondent's view—was measured by comparing the position of the party the respondent supported and the respondent's self-assessment of his/her position on the left-right dimension. *Id.* at 379.

189. *See* Eva Zeglovits & Julian Aichholzer, *Are People More Inclined to Vote at 16 than at 18? Evidence for the First-Time Voting Boost Among 16- to 25-Year-Olds in Austria*, 24 J. ELECTIONS, PUB. OPINION & PARTIES 351, 356–58 (2014) (analyzing data of the two official electoral lists for regional elections—the 2010 election in Vienne and the 2012 election in [small] Krems—containing the information of all eligible voters and whether or not they voted in the elections; showing the higher turnout of 16- and 17-year-olds, which cannot be explained solely by the first-time voting boost effect because voters among at the age of 18 to 20 were also the first time voters in these elections).

There has also been a study of voting capacity of 16-year-olds in the U.S., where the voting age is still 18.¹⁹⁰ The study has implied that 16-year-olds in the U.S. may have political maturity comparable to adults already even without enfranchisement.¹⁹¹ To be specific, it was found that the political knowledge, political interest, political skills, political efficacy, tolerance, and community service participation of 16-year-olds were equivalent to those of adults.¹⁹²

d. Overall Capacity of Decision Making in Daily Life

The last topic is children's overall capacity of decision making in daily life, which has been found in the studies of school education. Schools today generally have the characteristic of adults' top-down control of children. This characteristic is often caricatured as the "factory-model" school from the industrial era.¹⁹³ Everything at school is controlled by adults—adult-administrators manage school operations, and adult-teachers teach child-students under the standardized curriculum. Zero tolerance policies, widely disseminated in schools from the 1990s, have further strengthened this characteristic.¹⁹⁴ This kind of school system today can be considered as a realization of our notion that children are incapable of having a school life without a strong guidance of adult authority.

However, some exceptional schools (so called "democratic schools") have unique educational policies to trust children's freedom and autonomy to the maximum extent possible. The well-known examples are such as the Sudbury Valley School in Framingham, Massachusetts (the "SVS")¹⁹⁵ and the Summerhill School in U.K.¹⁹⁶ Details of the programs slightly differ by school, but major democratic

190. See Daniel Hart & Robert Atkins, *American Sixteen- and Seventeen-Year-Olds Are Ready to Vote*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 207–14 (2011) (analyzing the adult and youth samples of the National Household Education Survey in 1996).

191. *Id.*

192. Political knowledge (civic knowledge) was measured by questions such as related to political positions of the major political parties. *Id.* at 207. Political interest was measured by frequency of following national news. *Id.* at 207–08. Political skill was measured by questions concerning non-electoral political participations. *Id.* at 207. Political efficacy was determined by questions concerning subjective political understanding and efficacy (e.g., "My family has no say in what the government does."). Tolerance was assessed by tolerance to other persons' speech rights (e.g., whether a person should be permitted to make a speech opposing religion). *Id.* Community service was measured whether the respondent had engaged in any community service in the previous year. *Id.* at 208. See also Yves Dejaeghere & Marc Hooghe, *Brief Report: Citizenship Concepts Among Adolescents. Evidence from a Survey Among Belgian 16-Year Olds*, 32 J. ADOLESCENCE 723 (2009) (analyzing data of a 2006 survey of 16-year-old high school students in Belgian, where the voting age is still 18 like the U.S., and finding that 16-year-olds already have multi-dimensional complicated concepts of citizenship).

193. See, e.g., Audrey Watters, *The Invented History of 'The Factory Model of Education'*, HACK EDUC. (Apr. 25, 2015), <http://hackededucation.com/2015/04/25/factory-model> [https://perma.cc/6HDK-DSJ9].

194. See generally Cherry Henault, *Zero Tolerance in Schools*, 30 J. L. & EDUC. 547 (2001) (discussing zero-tolerance policies in schools).

195. See DANIEL GREENBERG, *FREE AT LAST: THE SUDBURY VALLEY SCHOOL 1* (1991). The SVS is probably the most well-known one in the U.S. It was founded in 1968 by Daniel Greenburg, and it is open to children between the ages of 4 and 19. *Id.*

196. The Summerhill School is the oldest of this kind, and it was founded by A.S. Neil in 1921 (first in Germany, and later moved to the U.K.). Neil pursued personal freedom of children upon raising them, and founded the school based on the idea that children could learn best with freedom from coercion. See

schools share two common features.¹⁹⁷ One feature is that children are not obliged to attend any fixed classes; each individual child decides how to spend his or her time at school.¹⁹⁸ Another feature is that the school is run democratically by children themselves. Anything related to the school operations (e.g., creation and revision of school rules, and employment of staff) is discussed and decided at school-wide meetings, where every child and adult equally has one vote regardless of age.¹⁹⁹ Some schools even have an internal judicial system (a jury-like forum mainly run by children) to deal with daily conflicts in school.²⁰⁰

People with the notion of the “factory-model” school may feel that this kind of democratic schools would be unable to function. But, these schools are not just temporal experiments. They have existed for decades²⁰¹ and have achieved successful outcomes. Particularly, in the case of the SVS, their education has been empirically evaluated by sociological interviews of their alumni/ae.²⁰² The interviews found, for instance: most of the former students further enrolled in institutions of higher education (both at undergraduate and graduate levels) including top-ranked universities;²⁰³ they held decent jobs in a wide range of fields;²⁰⁴ and most importantly, most of them felt in control of their lives²⁰⁵ and had a high level of satisfaction with their current lives.²⁰⁶

Although these schools are not common, their innovative experiences give a lot of insightful implications for school-age children’s capability of autonomous decision making, in an environment where they are free from adults’ control. School-age children can make decisions autonomously without the guidance of adult authority, operate their own community (e.g., school) in a democratic way, and even run their own judicial system.

A. S. NEILL, *SUMMERHILL SCHOOL: A NEW VIEW OF CHILDHOOD* (Albert Lamb ed., St. Martin’s Press 1993) (1960).

197. See, e.g., GREENBERG, *supra* note 195, at 1–8.

198. For example, although it may be a little extreme case, a child can do fishing “[a]ll day, every day, Fall, Winter, Spring.” *Id.* at 37.

199. The number of children outweigh that of adult staff members (for instance, the ratio is around 7:1 in the case of the SVS). *Id.* at 106. Also, an elected child serves as the chairman of the meetings. *Id.* at 108. Thus, the school is literally governed by children. See *id.* at 105–08.

200. For example, the SVS has a system called the “Judicial Committee.” *Id.* at 170. It is a jury-like forum that consists of several randomly chosen children of all ages and one adult staff. *Id.* It investigates—often by hearing the testimony from witnesses—and adjudicates on the complaints of someone breaking school rules (e.g., disruption of the quiet room). See *id.* at 169–72.

201. The oldest one, the Summerhill School in the U.K., has lasted for almost a century, and the SVS has already existed for half a century. See *supra* notes 194 and 195.

202. The interviews were conducted in 2002–2003 with 119 former students at different ages from early 20s to late 40s. See DANIEL GREENBERG ET AL., *THE PURSUIT OF HAPPINESS: THE LIVES OF SUDBURY VALLEY ALUMNI* 16–17 (2005).

203. See *id.* at 145–52.

204. See *id.* at 29–38. Also, they had a slight tendency to prefer creative jobs (e.g., arts and design). See *id.* at 145–52.

205. See *id.* at 331–37.

206. See *id.* at 338–45.

IV. DISTINCTIONS FROM THE ELDERLY

Part III discussed that children meet all of the traditional three factors. In conclusion, children should be treated as a (quasi-) suspect class, and heightened scrutiny should apply in the case of child discriminations.

The previous four Supreme Court cases related to age discriminations were about the elderly.²⁰⁷ Some circuit court judges have noted explicitly that the Court has not reviewed a single case of child discriminations.²⁰⁸ The Court has never examined the appropriate review standard for discriminatory classifications based on age against children. However, the lower federal courts and state courts have developed a pervasive view to see the elderly and children collectively as age discriminations.²⁰⁹

In Part IV, I refute this pervasive view among the courts. Although the elderly and children are classifications both based on age, the natures of the two are psychologically different from each other—people's cognitive structures (information processing) to view the child and elder discriminations are quite different. I analyze their differences in detail from two perspectives: the traditional three factors and the prospect theory, a famous theory in behavioral economics.

A. Analysis from the Three-Factor Criteria

The elderly differ from children in the traditional three factors. Children, as I analyzed in Part III, meet all of the three factors. However, the elderly lack at least two of the three factors: limited access to politics and a visible and immutable (or irreversible) trait.²¹⁰

First, the elderly have access to politics. The elderly have always had the right to vote in their history—unlike children (under 18) who have never been enfranchised up until today.²¹¹ As a matter of fact, the elderly are well represented in the political legislative process. They are even politically powerful. As of 2011, about the half of the U.S. Congress members are 60 or older—43% (188 out of 435) in the House of Representatives and 61% (61 out of 100) in the Senate.²¹² The number of members aged 65 or over is a little smaller but still 24% (106) in the House of Representatives and 42% (42) in the Senate.²¹³ Also, the oldest president in the

207. See *supra* Section I.A.

208. Some judges have noted this fact explicitly. See, e.g., *Ramos v. Town of Vernon*, 353 F.3d 171, 181 n.4 (2d Cir. 2003) (“We note, however, that the Supreme Court has never considered the issue. Although courts typically assume that no age cohort is a suspect class, old age has been the burdened class in all of the cases in which the Supreme Court has concluded that age is not a suspect class”) (citation omitted); *Hutchins v. District of Columbia*, 188 F.3d 531, 556 n.4 (D.C. Cir. 1999) (Rogers, J., dissenting) (“The Supreme Court has subjected classifications based on old age to rational basis review, but has not considered classifications based on youth.”) (citations omitted).

209. See *supra* Section I.B.

210. I will leave out the third factor, existence of prejudice, on the elderly in this Article; as noted in Section III.C, demonstrating the existence (or non-existence) of prejudice in society is no clear-cut issue.

211. See *supra* Section III.B.

212. See *The Capitol's Age Pyramid: A Graying Congress*, WALL STREET J. (Oct. 14, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748703673604575550390759179862>.

213. See *id.* The average age of Congress members has been steadily increasing since 1981. See *id.*

history was elected in the recent presidential election—Donald Trump took the oath of office at the age of 70 in 2017.²¹⁴

Second, the group of the elderly is not defined by a visible and immutable (irreversible) trait. The non-elderly eventually become the elderly some day, and the elderly cannot go back to being the non-elderly. This characteristic may seem “irreversible” because it is changeable in only one direction. In fact, some courts have considered the status of elderly somewhat immutable or irreversible on the ground that the elderly can never get rid of their status.²¹⁵ However, that interpretation misses the point of the immutable-trait factor. The essence of this factor is that such a trait would cause the majority’s lack of ability to empathize with the minority group.²¹⁶ The direction from the non-elderly to the elderly is from the majority to the minority. That is the opposite to the cases of children, aliens, and “illegitimates,” where the directions are from the minority to the majority. In cases where the direction is from the majority to the minority, the majority would maintain the capacity to appropriately empathize with the minority. Especially, in the case of elderly, almost *all* of the majority people (i.e. the non-elderly) bear the risk of turning to the minority (i.e., the elderly) in the future—almost *all* of the non-elderly will *automatically* turn to the elderly one day once they reach the threshold age. The non-elderly people are expected to be in the elderly’s position one day, and thus, have a fear of being discriminated as the elderly in the future. In this situation, the majority (i.e., the non-elderly) can easily empathize with the minority (i.e., the elderly). The non-elderly, of course, want to avoid imposing any future disadvantages on themselves.

To sum up, given the high proportion of the elder legislators, it is inappropriate to see the elderly as the political minority. Furthermore, even if the elderly were to be placed in the position of under-represented minority in the political legislative process, the majority (i.e., the non-elderly legislators) would still be capable of properly empathizing with the elderly. Using the expression of the “we-they” cognitive framework,²¹⁷ the elderly are “we” and not “they” from the eyes of legislators. Therefore, any disadvantages of the elderly can and should be rectified through the political legislative process while it is unfeasible to rectify those of children through it. Consequently, rational basis review is enough as the review standard for examining the elderly–non-elderly classifications. The same argument does not apply to the children–adults classifications.

B. Analysis from the Prospect Theory

In order to shed light further on the differences of people’s cognitive structures between the elderly–non-elderly discriminations and the children–adults

214. See Samantha Lee & Skye Gould, *Donald Trump is the Oldest President Elected in US History*, INSIDER (Nov. 9, 2016, 1:11 PM), <http://www.insider.com/donald-trump-oldest-president-us-history-2016-11> [https://perma.cc/8HPD-ANRY].

215. See *infra* Section IV.B.4. See *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1154 (D.C. Cir. 2004) (“Youth is also far less ‘immutable’ than old age: minors mature to majority and literally outgrow their prior status; the old can but grow more so.”).

216. See *supra* Section II.A.

217. See *supra* Section II.B.

discriminations, I next make an analysis using the prospect theory, a Nobel-prize winning theory in behavioral economics.²¹⁸ I begin with explaining the basics of the prospect theory. I then overview somewhat advanced studies of the prospect theory that are especially related to the situations of age discriminations. Finally, I apply the theory to the situations of elder and child discriminations.

1. Basics of the Prospect Theory

The prospect theory is a theory on how people subjectively value losses and gains, which can accurately explain people's decision making under uncertainty. It was proposed in 1979 by Daniel Kahneman and Amos Tversky²¹⁹ to replace the expected utility theory, which was a mainstream theory at the time in the traditional economics. The two core elements of the prospect theory are particularly useful for analyzing the cognitive structures of age discriminations: loss aversion²²⁰ and reference point.

a. Loss Aversion

A loss influences people's satisfaction greater than a gain when the objective value of the loss and the gain is equivalent. This human nature is called loss aversion. In other words, people are more sensitive to losses than gains.

This tendency can be recognized easily from a simple gamble:²²¹ you flip a coin; if the coin shows tail, you lose \$100; if the coin shows head, you win \$150. Do you want to participate in this gamble? The expected value of this gamble is undoubtedly positive (the expected value is precisely +\$25). However, you would perhaps hesitate to participate. Most people feel that the fear of losing \$100 is deeper than the hope of gaining \$150.²²²

One way to measure our loss aversion *ratio*, is to observe the gap between the people's maximum willingness to pay ("WTP") for a good and the minimum compensation required (i.e., willingness to accept ("WTA")) for the same good. Loss aversion ratio can be roughly estimated by WTA/WTP.²²³ For example, one classic experiment uses a coffee mug: sellers first obtain a coffee mug and are asked to determine the selling price; buyers are asked to decide the buying price. The valuation results of this experiment, when conducted by Kahneman and colleagues, were \$7.12 (i.e., WTA) for sellers and \$2.87 (i.e., WTP) for buyers in average

218. See *All Prizes in Economic Sciences*, *supra* note 138. See also *supra* Section III.C.1.a.

219. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979).

220. Loss aversion is certainly a core element of the prospect theory because a mathematical proof for the inconsistency between the traditional expected utility theory and the real human behaviors can be performed from the results of experimental studies of loss aversion. See Matthew Rabin, *Risk Aversion and Expected-Utility Theory: A Calibration Theorem*, 68 *ECONOMETRICA* 1281 (2000).

221. Another well-known example is the "Asian disease problem" also designed by Kahneman and Tversky. See Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453 (1981).

222. See KAHNEMAN, *supra* note 136, at 283–84.

223. The details of the experimental methodology to measure loss aversion ratios have been further discussed and refined to date. But the basic approach has not been changed. See, e.g., Tuba Tunçel & James K. Hammitt, *A New Meta-Analysis on the WTP/WTA Disparity*, 68 *J. ENVTL. ECON. & MGMT.* 175 (2014) (discussing the recent analysis about methodology).

(median).²²⁴ In the case of ordinary market goods (e.g., a mug), people's loss aversion ratio is known to be around 2²²⁵ (or 1.5 to 2.5 in the form of range²²⁶) in average. To put it plainly, in the case of ordinary market goods, we have the tendency to value losses twice as large as the objectively equivalent gains (i.e., to value gains half as small as the objectively equivalent losses).

b. Reference Point

Also, people's psychological values are determined by the relative changes of the holding values and not by their objective values. The initial status before the occurrence of a change is called the reference point. For example, imagine your income will be \$100,000 next year. If your current income (i.e., reference point) is \$80,000, the upcoming income will be a \$20,000 gain. But, if your current income (i.e., reference point) is \$120,000, then the income of next year will be a \$20,000 loss. Although the objective value of next year's income is the same amount \$100,000, you would feel happy in the former case while disappointed in the latter case.

Studies have further uncovered that the reference points are determined not only by the objective "status quo"²²⁷ but also by subjective factors such as "expectations."²²⁸ For instance, once you have a strong expectation that your income will be \$120,000 next year, \$120,000 will be your reference point for the next year's income. In that case, even if your current income is \$80,000, the upcoming income of \$100,000 will be considered as a \$20,000 loss.

Furthermore, people's decision making can be easily altered by the framing effect as described in Section III.C.1.a. Therefore, frames to recognize the situations can alter the subjective reference points even in the substantially same situations. A famous example is a scenario experiment of treatment choice for lung cancer, which asks the participants to choose between *surgery* (offering better long-term prospects but with a risk of immediate death during the surgery) and *radiation therapy*. The choice of *surgery* increases in a scenario that explains 90 percent of patients survived during the surgery, compared to a scenario that says 10 percent of patients die during the surgery.²²⁹ The discrepancy between the two scenarios can be well explained by

224. See Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1338–39 (1990).

225. See Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q. J. ECON. 1039, 1053 (1991) ("We have observed a ratio of just over 2:1 in several experiments.").

226. See Adam S. Booij et al., *A Parametric Analysis of Prospect Theory's Functionals for the General Population*, 68 THEORY & DECISION 115, 135 (2010) (listing the results of the present and previous studies, most of which are around 1.5 to 2.5); Nathan Novemsky & Daniel Kahneman, *The Boundaries of Loss Aversion*, 42 J. MARKETING RES., 119, 123 (2005) (reporting results that the median ratios in the seven experiments varied from 1.31 to 2.5); KAHNEMAN, *supra* note 136, at 284 (noting that the ratio is estimated "usually in the range of 1.5 to 2.5").

227. Cf. William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988) (the issue of reference point has been traditionally called the "status quo bias").

228. See, e.g., Botond Köszegi & Matthew Rabin, *A Model of Reference-Dependent Preferences*, 121 Q. J. ECON. 1133 (2006).

229. See Barbara J. McNeil et al., *On the Elicitation of Preferences for Alternative Therapies*, 306 NEW ENGLAND J. MED. 1259, 1260–61 (1982).

the change of reference point due to the gain–loss framing. In the first scenario, the decision is made in the gain domain, whether or not to live (i.e., the reference point is being dead). On the other hand, in the second scenario, the decision is made under the loss domain, whether or not to die (i.e., the reference point is being survive).

2. Issues of the Prospect Theory Related to Age Discriminations

Age discriminations have two special characteristics that may affect the analysis with the prospect theory: the nature of goods and the length of possession.

a. Nature of Goods—Goods without Prices

The first characteristic is the nature of goods. The goods in the context of age discriminations are civil rights or social rights such as labor rights, voting rights, drinking rights, and gun rights. They are not ordinary market products (e.g., a mug) that are commonly used in the studies of the prospect theory. To the best of my knowledge, there has been no empirical study that directly covers loss–gain psychological values of civil or social rights. But, studies have shown that loss aversion is certainly observed in public or non-market goods as well—for example, goods such as hunting permits,²³⁰ visibility,²³¹ safety,²³² and distasteful drink.²³³ Similar to the case of ordinary goods, the WTA for these public or non-market goods is higher than the WTP.

Interestingly, the ratios of WTA/WTP for public or non-market goods are larger than the ratios, 2 (1.5–2.5), for ordinary market goods.²³⁴ This is because it is more difficult for us to evaluate public or non-market goods than ordinary market goods. While our valuations of ordinary market goods can be influenced by the preconceived market prices, we have no preconceived notions about the prices of public or non-market goods.²³⁵ The specific ratios differ by studies, but the WTA/WTP ratio for public or non-market goods can be summarized to be around 10 in average.²³⁶ Thus, we can roughly say, in the case of public or non-market goods,

230. See Richard C. Bishop & Thomas A. Herberlein, *Measuring Values of Extramarket Goods: Are Indirect Measures Biased?*, 61 AM. J. AGRIC. ECON. 926 (1979) (studying the 1978 early season goose hunting permits for the Horicon Zone of East Central Wisconsin—each permit entitled a hunter to take one goose).

231. See Robert D. Rowe et al., *An Experiment on the Economic Value of Visibility*, 7 J. ENVTL. ECON. & MGMT. 1 (1980) (studying proposed visibility reductions in the Four Corners Region in the southwest by presenting photographs).

232. See Shelby Gerking et al., *The Marginal Value of Job Safety: A Contingent Valuation Study*, 1 J. RISK & UNCERTAINTY 185 (1988) (studying safety of working environment); Timothy L. McDaniels, *Reference Points, Loss Aversion, and Contingent Values for Auto Safety*, 5 J. RISK & UNCERTAINTY 187 (1992) (studying auto safety).

233. To be precise, avoidance of tasting distasteful drink (i.e., avoidance of an unpleasant experience). See Don L. Coursey et al., *The Disparity Between Willingness to Accept and Willingness to Pay Measures of Value*, 102 Q. J. ECON. 679 (1987) (studying sucrose octa-acetate (SOA), a safe substance with a very unpleasant taste—participants were asked WTA for tasting SOA and WTP for avoiding tasting SOA).

234. See *supra* Section IV.B.1.a.

235. See, e.g., Coursey et al., *supra* note 233, at 682.

236. See John K. Horowitz & Kenneth E. McConnell, *A Review of WTA/WTP Studies*, 44 J. ENVTL. ECON. & MGMT. 426, 433 (2002) (reviewing 45 preceding studies). The mean ratios by specific good types were as follows: around 10 for hunting, 7 for visibility, 10 for health and safety, and 4 for disgusting drink. *Id.* at 434. In their regression analysis, the impact of good type (i.e., whether or not public/non-

people have a tendency to value losses as ten times as large as the objectively equivalent gains (i.e., to value gains one-tenth as small as the objectively equivalent losses).

Considering that there are no market prices or price guides for civil rights and social rights—they are literally priceless—we can probably assume that the loss aversion ratios for civil rights and social rights would be also around 10, following the ratios for public or non-market goods.

b. Length of Possession—Emotional Attachment

The second feature is the length of possession of the goods. In the case of the elderly discriminations, the elderly at certain ages are deprived of their rights that they have possessed for a very long time (i.e., many decades) until the threshold ages.

Loss aversion can be affected by emotional attachment to the goods. The higher attachment the owner has to the goods, the more he or she becomes reluctant to relinquish it.²³⁷ In this respect, length of possession matters. The owner's emotional attachment to the goods usually increases as the length of possession increases. For example, a key chain trading experiment found that those who retained a key chain for one hour placed higher selling prices than those who held the key chain just for one minute; the mean WTA for the one-hour group (\$1.41) was one-and-a-half times as high as the mean WTA for the one-minute group (\$0.86).²³⁸ The situation tested in this example was limited to the short-term ownership on ordinary goods, and much is still unknown about the impact of length of possession. But, it would be plausible to assume that many of the elderly feel strong attachments to their civil and social rights because they have possessed those rights for decades and those rights are unavailable in the market after they relinquish them.

3. Application of the Prospect Theory to Age Discriminations

Now, applying the prospect theory, I explore the structures of people's cognitive biases in the context of age discriminations.

I start from examining a situation where children obtain new civil or social rights. Let us take an example of voting rights. Imagine that a hypothetical political system reform is being discussed in our society on whether or not to grant voting rights at the age of 14. Such a reform may somehow be reasonable because 14-year-olds have a certain capacity for judgment as to society and politics.²³⁹ In this case, the status quo—no voting rights for 14-year-olds—would be the reference point to evaluate the reform. More precisely, for the 14-year-olds themselves, their reference point would be the current status of not holding voting rights; for adults (including

market) was still statistically significant when other factors such as experimental design (e.g., whether hypothetical or real) and participants' type (e.g., students or not) were controlled. *See id.* at 434–37. *See also* Tunçel & Hammitt, *supra* note 223, at 181 (meta-analyzing 76 studies and also confirming the greater loss aversion ratios for public or non-market goods).

237. *See generally* Dan Ariely, Joel Huber & Klaus Wertenbroch, *When Do Losses Loom Larger Than Gains?*, 42 J. MARKETING RES. 134, 135 (2005); Nathan Novemsky & Daniel Kahneman, *How Do Intentions Affect Loss Aversion?*, 42 J. MARKETING RES. 139 (2005).

238. *See* Michal A. Strahilevitz & George Loewenstein, *The Effect of Ownership History on the Valuation of Objects*, 25 J. CONSUMER RES. 276, 280–81 (1998).

239. *See generally supra* Section III.C.2 (discussing children's decision-making capacity).

legislators), the reference point would be their own status in the past of not having the voting rights at the age of 14. In either case, the psychological value of voting rights would be recognized in the gain domain (i.e., whether to gain the voting rights).

How about a situation where the civil or social rights of the elderly are revoked? Imagine another hypothetical political system reform to deprive the elderly over the age of 70 of their voting rights. Considering the general decline in cognitive and judging capacities in the elderly, this reform may be somehow reasonable. When assessing this reform, the reference point would be the status quo—the elderly over 70 have the rights to vote. To be more precise, for the elderly who are currently over 70, their reference point would be the current status of having the voting rights; for the non-elderly adults too, the reference point would be the current system because they have a strong expectation that they will maintain the rights to vote when they reach over 70 in the future under the current system. In either case, the psychological value of voting rights would be recognized in the loss domain (i.e., whether to lose the voting rights).

To sum this all up, civil or social rights for children are recognized under the gain framing while those for the elderly are recognized under the loss framing. Consequently, the rights for children are likely to be devalued compared to the objectively equivalent rights for the elderly. Assuming that the loss aversion ratio of 10 for public and non-market goods applies to civil and social rights as well, people (including the legislators, children themselves, and the elderly themselves) tend to underestimate the value of the children's civil and social rights one-tenth as small as the same rights of the elderly. If we take into account the potential impact of the decades-long possession of the rights by the elderly,²⁴⁰ the overestimation of the elderly's rights (i.e., the underestimation of the children's rights) may be even greater than 10:1. Under this structure of cognitive bias, we would systematically show sensitive reactions to the issue of elderly–no-elderly classifications while we would have a belittling attitude toward the issue of children–adults classifications. Therefore, disadvantages of the elderly are relatively easier to be recognized while those of children are more difficult to be spotted even if the objective values at stake were equivalent.

4. Judges' Loss Aversion

In fact, this structural cognitive bias of loss aversion seems to have greatly influenced the opinions of some judges. For instance, it appeared prominently in the district judge's opinion in *Felix*,²⁴¹ a case that denied children's drinking rights, while it has also appeared in several other cases.²⁴² The *Felix* judge argued that age

240. See *supra* Section IV.B.1.2.b.

241. *Felix v. Milliken*, 463 F. Supp. 1360, 1373 (E.D. Mich. 1978).

242. See *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1154 (D.C. Cir. 2004) (noting, in the case of a non-citation policy for minors, that “[y]outh is also far less ‘immutable’ than old age: minors mature to majority and literally outgrow their prior status; the old can but grow more so”); *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990) (noting, in the case of a minimum age requirement for holding office, that “such requirements do not result in an absolute prohibition but merely postpone the opportunity to engage in the conduct at issue”); *Zielasko v. Ohio*, 873 F.2d 957, 962 (6th Cir. 1989) (Jones, J., dissenting) (highlighting the value of the elderly's voting right by stating that an elder “can *never*

is not a suspect class “especially at the lower end of the spectrum,” compared to the higher end.²⁴³ The judge rhetorically stated:

[W]hile discrimination against the elderly at a particular age imposes a disability that is never removed, drawing lines that affect young people has only a temporary effect. In other words, we are not involved with an absolute prohibition in any sense of the word but merely a postponement of the right to drink until age 21.²⁴⁴

The objective value at stake is completely the same between elder and child discriminations. In either situation, the issue in question is whether or not we should deprive the elderly or children of some legal rights that the majority adults hold, and whether or not we should prohibit the elderly and children from doing something that the majority adults may do. However, the judge’s opinion above is strongly empathetic to the elderly’s rights under the loss framing while showing little empathy to children’s rights under the gain framing. The judge’s fear for loss can be found from the expression, “imposes a disability that is never removed” on the elderly. In contrast, in the case of imposing a disability on children, the judge feels it as “merely a postponement of the right” because the reference point for a value judgment was the status quo that children were already imposed a disability.

V. FALLACY OF “CHILDHOOD AS A STAGE”

Another logic the courts have often used—to justify the application of rational basis review to child discriminations—is that childhood is a universal and temporal “stage” or “status” of life, which every person passes through before he or she becomes an adult.²⁴⁵ They think that it is fair to impose constraints on children because every person bears the hardships of childhood and every person will be released from the constraints once he or she reaches adulthood. Their argument views each person’s entire life as a unit and claims that each person has equal rights in his or her entire life.

However, this kind of “childhood as a stage” argument is not convincing. Part V points out three problems in its logic. After all, we should not rely on the “childhood as a stage” argument when reviewing child discriminations. Upon

vote . . . because he can never reverse the permanent and inevitable process of aging” in contrast to the minimum age requirement that “temporarily burden[s] a voter’s right”).

243. *Felix*, 463 F. Supp. at 1374.

244. *Id.* at 1373 (emphasis added).

245. See, e.g., *Gabree v. King*, 614 F.2d 1, 2 (1st Cir. 1980) (“[A]ge nineteen is a milestone which all must pass on the way to full majority.”); *Felix*, 463 F. Supp. at 1383 (E.D. Mich. 1978) (“[M]inority is a status rather than a fixed or vested right.”) (quoting *Allison v. Allison*, 337 N.E.2d 666 (1975)); *Rohrbaugh v. Wagoner*, 413 N.E.2d 891, 894 (Ind. 1980) (“[C]hildhood is a stage out of which millions of persons inevitably pass in an unending flow, day after day. Children become adults and are empowered.”); *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 692 P.2d 290, 293 (Ariz. Ct. App. 1983) (directly quoting the sentences above in *Rohrbaugh*); *Berberian v. Petit*, 374 A.2d 791, 794 (R.I. 1977) (“Indeed, the statutes complained of do no more than draw a line at a stage of an individual’s development.”); *City of La Crosse v. Gilbertson*, No. 92-2906-FT, 1993 WL 19323, at *2 (Wis. Ct. App. Apr. 22, 1993) (“[C]lassification based on age simply marks a stage that every person will reach during a normal life span.”).

judicial review, legitimacy of the different treatments between the *children at the moment* and the *adults at the moment* should be examined.

A. Not Everyone Reaches Adulthood

First of all, it is not true that *every* child will eventually reach adulthood. As a matter of fact, about one in 100 children die due to sickness, accident, or other causes before becoming adults in today's American society.²⁴⁶ The proportion is not high, but not negligible. Those children will never be empowered because they die before adulthood.

If you imagine a specific example of those children, you may become more empathetic toward them. Imagine you have a friend who is a 15-year-old girl with a severe illness and is given only six months to live. She is desperate to marry her boyfriend, to drink alcohol, and to vote for a politician who supports medical welfare programs for illnesses of her kind. Can you tell her that she *just has to wait* until reaching adulthood to do these things? Can you tell her that such constraints on children are totally fair because everyone becomes an adult one day?

I think the issue here is, again, the incapacity of the majority (including legislators and judges) to empathize with the minority under the “we–they” framework.²⁴⁷ All of the legislators and judges are adults who have successfully reached adulthood after childhood. They have never been and will never be in the position of children who die before adulthood. Therefore, they would undervalue the interests of persons who never reach adulthood, by considering childhood as a “stage.”

B. Imbalance with Older Stages

Second, the absurdity of the “childhood as a stage” argument would become clearer when it is compared with older stages. If being in a temporal stage were to be a legitimate ground for imposing constraints on children, the same argument should apply to stages older than childhood as well. For instance, most people eventually reach the age of 50—in fact, about 94 in 100 people reach at the age of 50 in today's American society.²⁴⁸ Thus, being under the age of 50 is also a universal and temporal stage—just like childhood.

Imagine a hypothetical situation where the legal ages for voting, marrying, drinking, and driving were all set at 50. Can you justify this situation by telling 40-year-olds that they *just have to wait* for 10 more years in order to be allowed to vote, marry, drink, and drive because it is a temporal stage everyone passes? Probably, you—especially those who are under 50—would strongly disagree and say, “Why do we have to wait? Explain a legitimate reason for imposing unnecessary hardships.”

246. See Elizabeth Arias et al., *United States Life Tables, 2014*, 66 NAT'L VITAL STAT. REP. 1, 6 (2017), https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_04.pdf [<https://perma.cc/3GR9-HGCE>] (showing the number of survivors out of 100,000 born alive is 99,195 at age 15 and 98,971 at age 20).

247. See *supra* Section II.B.

248. See Arias et al., *supra* note 246 (showing that the number of survivors out of 100,000 born alive is 94,328 at age 50).

This hypothetical example suggests that the persons' status of being in a temporary stage does not justify the constraints on them. The real issue we need to examine is whether there is a legitimate ground for imposing constraints on the target persons—not whether they are in a temporal stage.

C. Issue of Personal Identity

The third problem is from a philosophical standpoint. Can we really justify imposing constraints on children *by* granting them rights when they reach adulthood? We often intuitively consider that each person has a determinate, continuous, and immutable personal identity throughout his or her entire life. The “childhood as a stage” argument is certainly based on this view. It assumes that a person X in childhood who is imposed constraints is identical to the person X' in adulthood who obtains the rights. However, this view is not the only pebble on the beach. Philosophers have developed their discussions over the issues of personal identity and moral responsibility. Among others, the view of Derek Parfit²⁴⁹—one of the most influential philosophers in the late 20th century—is quite insightful for assessing the “childhood as stage” argument. In this section, I briefly overview the view of Parfit and apply it to the “childhood as stage” argument.

Parfit roughly classified thoughts of a person into two views: the reductionist view and the non-reductionist view. The non-reductionist view believes that a person is an independently existing entity distinct from his or her brain, body, memory, or experiences; for instance, the views considering a person as a purely mental entity—a Cartesian Pure Ego, a “soul,” or a “spirit”—are classified as the non-reductionist view.²⁵⁰ In contrast, philosophers including Parfit have suggested another view of personal identity called the reductionist view, which is the view that a person is fully explained by his or her brain, body, memory, or experiences.²⁵¹

Particularly, Parfit employed an idea that personal identity is consisted of the continuity of psychological characteristics. John Locke, in the 17th century, was the first to propose such a psychological criterion of personal identity. Locke suggested that consciousness—memory of past experiences—should be the criterion of personal identity.²⁵² Parfit further developed Locke's claim. Parfit claimed that psychological factors other than memory—such as an intention, a belief, a desire, and any other features—can also be taken into consideration.²⁵³ A thought experiment would help understand his claim. Imagine transplanting the brain information of X from X's brain to Y's brain; as a result, there will be Z who has X's brain information (i.e., psychological characteristics) and Y's body (i.e., physical characteristics). If you think Z is X, you have a view of the psychological criterion of personal identity.²⁵⁴

249. See DEREK PARFIT, REASONS AND PERSONS 199–217 (1984).

250. See *id.* at 210.

251. See *id.* at 210–11.

252. See JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 296–314 (Penguin Books 1997) (1964).

253. PARFIT, *supra* note 249, at 204–05.

254. See *id.* at 208–09. If you think Z is Y, you take another view, the physical criterion of personal identity. See *id.*

With regard to the psychological criterion, Parfit suggested a concept called *Relation R*, which is consisted of *psychological connectedness* (“the holding of particular direct psychological connections”) and *psychological continuity* (“the holding of overlapping chains of *strong* connectedness”).²⁵⁵ For instance, in my case, I have direct psychological connections (i.e., *psychological connectedness*) to myself yesterday—I have fresh memories of my experiences yesterday (e.g., I ate pasta for lunch and I attended a meeting with colleagues on campus) and my other psychological features have not changed much from yesterday. On the other hand, I am not strongly connected to myself 20 years ago—I do not remember what I did on a specific day of 1998 (e.g., what I ate on August 1, 1998) and my psychological features today are quite different from 20 years ago (e.g., unlike 20 years ago, I now have a passion for academics and prefer writing articles to playing soccer on the weekends) although I have some memories of those good old days (e.g., I often enjoyed playing soccer with friends on the weekends). But, myself today and myself 20 years ago still have *psychological continuity* because there have been overlapping chains of *psychological connectedness*—myself today and myself yesterday are strongly connected, myself yesterday and myself two days ago are strongly connected, and so on.

Most importantly, Parfit emphasized that *Relation R* is a matter of degree.²⁵⁶ He further claimed the importance of focusing on the degree of *Relation R* upon discussing moral issues of persons. Based on his view, moral responsibilities of persons should be weighted in accordance with the degree of *Relation R*. As I described above with my case, oneself 20 years ago or oneself 20 years later usually has limited *Relation R* with oneself today while oneself yesterday or oneself tomorrow has nearly 100% *Relation R*. Thus, from Parfit’s view, oneself 20 years ago and oneself 20 years later are different persons from oneself today to a great extent in a moral sense—they are the same persons as oneself today only to a limited extent of the weak *Relation R*.²⁵⁷ Another thought experiment would help clarify this view. Imagine that X got a severe injury on the brain. The doctors tried their best to transplant X’s brain information to Y’s brain, but due to the injury, only one-fifth of X’s brain information was successfully transplanted to Y’s brain (assuming the rest of X’s brain information was abandoned). After the treatment, there was Z who had one-fifth of X’s and four-fifth of Y’s psychological characteristics. Is Z considered the same person as X in a moral sense? Can you punish Z for the former wrongdoings of X? If you feel hesitation, you somehow take the view of *Relation R*—weak *Relation R* between X and Z makes you feel hesitation. The same view shall apply to oneself today and oneself 20 years later.

When we observe the “childhood as a stage” argument from Parfit’s philosophical view of personal identity, we can realize the problem. The person X in childhood is, to a large extent, a different person from X’ in adulthood. Adults usually do not keep strong *Relation R* with themselves in their childhood. In my case,

255. See *id.* at 206, 215.

256. See *id.* at 206.

257. Parfit simply emphasizes the importance of *Relation R*. But, his view can be further elaborated to consider that personal identity is also a matter of degree defined by *Relation R* (i.e., it is not necessary to define personal identity as an all-or-nothing issue). See Susumu Morimura, *Paternalism and the Indeterminacy of Personal Identity*, 39 ARSP BEIHEFT 102 (1991).

when I reached the age of 18, I had only vague memories of my experiences and thoughts at age 13 and had more limited memories of those at age 8. Therefore, granting rights to X' in his or her adulthood cannot justify the constraints on X in his or her childhood—X and X' at the two time points are largely different persons in a moral sense. Parfit himself discussed this issue with an example called the “child’s burden” case.²⁵⁸ He noted, “[T]his child’s relation to his adult self [is regarded] as being like a relation to a different person. He is thus more likely to claim that it is unfair to impose burdens on this child merely to benefit his adult self.”²⁵⁹ He also emphasized, “It will not be *he* who benefits. It will only be his adult self.”²⁶⁰

I do not mean that *all* of us should take Parfit’s view. Everyone has his or her own view of personal identity. However, I would like to highlight two points. One is that the “childhood as a stage” argument is unconsciously based on a specific view of personal identity—the view that each person has a determinate, continuous, and immutable personal identity throughout his or her entire life—with which not everyone agrees. Another is that if you feel Parfit’s view convincing, it is illogical to support the “childhood as a stage” argument.

VI. FUTURE WITH HEIGHTENED SCRUTINY

The purpose of this Article is to establish the general review standard for child discriminations. The specific consequences of applying heightened scrutiny to children—adults classifications would differ by legal area, topic, issue, facts of the cases, and social circumstances of the moment. Therefore, I do not discuss in this Article the consequence of each individual case. Instead, I would like to leave comments on some key issues in applications of heightened scrutiny for future discussions.

A. Person-by-Person Basis Treatments

Where rationality is the review standard, the state “does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.”²⁶¹ In the case of the elderly, the Supreme Court has clarified that classifications based on a general effect of old age on human ability are acceptable and has rejected person-by-person basis determinations.²⁶² In other words, the abilities of individual persons could be ignored under rational basis review.

258. See PARFIT, *supra* note 249, at 333. To be precise, Parfit compares two options to clarify the issue: (i) for this child’s own greater benefit in adult life or (ii) for the benefit of someone else such as this child’s younger brother. *Id.* Based on the non-reductionist view, there is no unfairness in the option (i) because there is an unquestionable identity between the child and the adult. *Id.* Based on the Parfit’s view, the option (i) seems to be similarly unfair to the option (ii) because the child is imposed hardship for the benefit of someone else who has little (or no) *Relation R* with him or her. *Id.*

259. *Id.* at 335.

260. *Id.* at 333.

261. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

262. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 85–86 (2000) (“[Decisions in *Murgia*, *Bradley* and *Gregory*] demonstrate that the constitutionality of state classifications on the basis of age cannot be determined on a person-by-person basis.”); *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (“The Missouri mandatory retirement provision, like all legal classifications, is founded on a generalization. It is far from

In contrast, under heightened scrutiny, person-by-person basis treatments are required; we cannot ignore individual persons who have above-average abilities. The Court has established this principle in *United States v. Virginia*—a sex discrimination case in which the Court struck down the single-sex education policy of a state military institute.²⁶³ The *Virginia* Court clarified that a classification solely based on generalizations or tendencies are unconstitutional under heightened scrutiny.²⁶⁴ Even if the rationale of classification is appropriate for most persons in the target group, the rationale may not be applicable to some persons who do not share the average characteristics of that group.²⁶⁵ Namely, individualized treatments are required to pass heightened scrutiny.

In the case of children–adults classifications, some forms of individual treatments already exist. First, minors can be “emancipated” under state laws in exceptional occasions. Emancipation allows children to gain some adult rights and obligations earlier. Emancipated children are freed from their parents’ control and allowed to make legal decisions on their own.²⁶⁶ The grounds for emancipation are based on independence. While specific events such as marrying and joining the military can trigger emancipation, the qualifications for emancipation can be also judged discretionally and individually with factors such as living apart from parents, financial independence, pregnancy, and high school graduation.²⁶⁷ In addition to the

true that all judges suffer significant deterioration in performance at age 70.”); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (“[T]he fact that individual Foreign Service employees may be able to perform past age 60 does not invalidate [the statute.]”); *Murgia*, 427 U.S. at 316 (“That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation.”).

263. 518 U.S. 515 (1996).

264. *See id.* at 516–17.

265. *Id.* at 541, 550 (noting that “[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females’” and that “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description;” also stating that “some women . . . do well under [the] adversative model,” “some women, at least, would want to attend [the institute] if they had the opportunity,” and “some women are capable of all of individual activities required of [the institute’s] cadets”) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)); *see also* *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 705–08 (1978) (ruling that a sex-discriminatory pension plan—a plan requiring female employees greater contributions because women live longer on average than men—violated Title VII of the Civil Rights Act of 1964; highlighting that not all of the individuals share “the characteristic that differentiates the average class representatives” and noting that “[m]any women do not live as long as the average man and many men outlive the average woman”).

266. For example, signing contracts, owning property, and consenting to medical care. *See generally* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 322–28 (2d ed. 1988) (discussing children’s rights of “own earnings,” “choice of domicile,” and “[dis]affirm contracts”); Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J. L. REFORM 239, 240–41 (1992) (listing that emancipated minors can “sign binding contracts, own property, keep their earnings, and disobey their parents”).

267. *See generally* Jennifer L. Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right to Make Decisions Regarding Life-Sustaining Treatment?*, 49 RUTGERS L. REV. 1, 28 (1996) (listing “marital status, pregnancy, membership in the armed forces, high school graduation, age, living apart from one’s parents, and managing one’s own financial affairs” as factors demonstrating independence); Sanger & Willemsen, *supra* note 266, at 262 (listing living separate and apart from parents and managing own financial affairs).

(comprehensive) emancipation, the children's legal decision making can be authorized sometimes on an ad hoc basis. For example, the Court has ruled in *Bellotti v. Baird* that: (i) the state must provide the opportunity for every pregnant child to go to the court to seek an authorization of abortion without parental consent; and (ii) the court must authorize the abortion if the child is mature enough (and well-informed) or the desired abortion would be in the child's best interests.²⁶⁸

Having said that, utilization of those individual treatments is still limited. The scopes of both emancipation and an ad hoc basis authorization are basically within the context of children's legal decision making; thus, they do not allow individual treatments for other minimum age requirements such as voting and drinking.²⁶⁹ Besides, discretionary emancipation has not been used effectively to empower children; instead, emancipation petitions have often come from parents seeking to end their liabilities for their children (e.g., support obligations).²⁷⁰ In the future with heightened scrutiny, basically all kinds of children-adults classifications will be required to prepare workable person-by-person basis treatments (i.e., exceptional measures to treat individual children as adults whenever appropriate).

B. Evidence-Based Approach

Under rational basis review, the classification is considered presumptively rational. Thus, it is not required for the state to demonstrate the relationship—courts generally defer to the belief of state's legislature in rationality. However, where heightened scrutiny is the standard, it is necessary for the state to demonstrate substantial relationship between the measure and the objective.

More specifically, the Supreme Court has indicated two points about heightened scrutiny. One is that a loose-fitting regulation—of which cause-and-effect relationship applies to only a small proportion of the classified group—cannot be justified. Another is that the state must provide empirical evidence to show the cause-and-effect relationship between the measure and the objective. In *Craig v. Boren*, the Court struck down a sex-discriminatory state statute that prohibited the sales of “nonintoxicating” beer to males under 21 and females under 18.²⁷¹ The statistical evidence, provided by the state, showed sex difference in alcohol-related driving offenses—the arrest rates of the age group 18–20 were 2% for males and 0.18% for females.²⁷² However, the Court denied the substantial relationship between the regulation and the state objective (i.e., the enhancement of traffic safety).²⁷³ The Court underlined that, given the low ratio (i.e., 2%) of alcohol-related driving offenders to the target group (i.e., 18–20-year-old males), the use of sex as a

268. 443 U.S. 622, 643, 647–48 (1979) (a case of abortion decision under the state regulation that required parental consent for an abortion).

269. See generally PUBLIC COUNSEL, SO YOU WANT TO BECOME EMANCIPATED? 2 (2013), <http://www.publiccounsel.org/tools/publications/files/So-you-Want-to-Become-Emancipated.pdf> [<https://perma.cc/U3B5-8EE3>].

270. See Sanger & Willemsen, *supra* note 266, at 247 (“[A]t times emancipation may facilitate an abdication by parents of caretaking responsibilities, an abandonment of sorts.”).

271. *Craig v. Boren*, 429 U.S. 190, 199–204 (1976).

272. *Id.*

273. *Id.*

proxy for the regulation of drinking and driving was an “unduly tenuous ‘fit.’”²⁷⁴ The Court pointed out a lack of other empirical evidence as well: evidence about the risk of drinking “nonintoxicating” beer, as distinct from alcohol beverages in general;²⁷⁵ and evidence of the regulation’s effect that prohibited only selling and not drinking (i.e., males under 21 can just ask their female peers to buy the beer for them).²⁷⁶

Craig was the case where the Court ruled in terms of sex discrimination; but the same argument would apply if the case were to be judged from the aspect of age discrimination under heightened scrutiny. The state would be required to provide: evidence of the danger of drinking “nonintoxicating” beer; evidence of the effect of the regulation in reducing young people’s drinking when prohibiting only selling and not drinking; and evidence that younger people tend to have alcohol-related traffic accidents more than older people—it must be a general tendency of entire younger people (not a tendency of only a few younger people).

The two points above—not accepting a loose-fitting regulation and requiring empirical evidence—would be applicable to children–adults classifications in general.²⁷⁷ As a result, the adoption of heightened scrutiny will encourage the state to employ a more evidence-based approach to children–adults classifications in the legislative process.

C. Seemingly Beneficial Classifications

Some children–adults classifications seem to provide a benefit, rather than a disadvantage, to children. Should heightened scrutiny still apply to such classifications?

The Supreme Court has established the basic principle for reviewing the minority-beneficial classifications; that is, to use the same review standard as when reviewing the majority-beneficial classifications. Particularly, the Court has repeatedly adopted heightened scrutiny even where the sex-based classifications are apparently beneficial to women.²⁷⁸ The Court has also applied strict scrutiny when reviewing affirmative actions for the racial minority.²⁷⁹ A major reason for not

274. *Id.* at 200–02.

275. *Id.* at 203.

276. *Id.* at 204.

277. *See also* *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (striking down the California law that prohibited the sale and rental of violent video games to minors by applying strict scrutiny (not intermediate scrutiny); although the issue was under the First Amendment, the Court highlighted the lack of evidence by noting that the state failed to “show a direct causal link between violent video games and harm to minors”).

278. *See, e.g.,* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (striking down, under intermediate scrutiny, the female-only admissions policy of a state nursing university); *Caban v. Mohammed*, 441 U.S. 380 (1979) (striking down, under intermediate scrutiny, the state statute that gave an unwed mother, but not an unwed father, the right to prevent adoption of their child by withholding her consent); *Orr v. Orr*, 440 U.S. 268 (1979) (striking down the state statute, under which only husbands had the obligations to pay alimony after divorce, under intermediate scrutiny); *Craig*, 429 U.S. 190 (1976) (striking down, under intermediate scrutiny, the state statute that prohibited sales of beer to males under 21 while not prohibiting sales to females at the age of 18–20).

279. *See, e.g.,* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding, under strict scrutiny, the admissions policy of the University of Michigan Law School that considered race as one of the factors);

changing the review standard for affirmative actions is that the minority-beneficial classifications may reinforce the stereotypes of the minority group and strengthen the inferior status of the minority group in society²⁸⁰—in this sense, affirmative action may actually harm the minority group.

This principle would similarly apply to children–adults classifications as well. Even if the classification is seemingly beneficial to children, the classification should be examined carefully under heightened scrutiny whether it carries stereotypic notions. Juvenile justice is one of the examples of child-beneficial classifications. Juvenile delinquents have been privileged under the juvenile justice system. Most (46) states had created juvenile courts by 1925.²⁸¹ Since then, delinquents—juveniles who committed an act that would have been charged as a crime if committed by an adult—have received more rehabilitative treatments under the juvenile justice system than adults under the criminal justice system. However, at the same time, the special treatments to juveniles may have reinforced a stereotype of juveniles that they are inferior to adults. Notoriously, the due process rights had not been granted to juveniles until *In re Gault* in 1967.²⁸² Besides, only juveniles have been sanctioned for status offences while the same acts have not been sanctionable if committed by an adult. This Article has no intention to question the philosophy or the constitutionality of the entire juvenile justice system. But, we should be aware of the risks that the classifications seemingly beneficial to children may actually harm children in some aspects. Therefore, child-beneficial classifications should be still reviewed carefully under heightened scrutiny, in order to avoid the legislature’s stereotypic notions.

D. Voting Rights

The Twenty-Sixth Amendment guarantees citizens the constitutional right to vote at the age of 18. Consequently, not granting voting rights to persons under 18 does not violate the Twenty-Sixth Amendment. However, the constitutionality of voting ages at 18 or younger should be still reviewed in the light of the Equal Protection Clause.

The Twenty-Sixth Amendment stipulates: “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”²⁸³ Its scope is

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding that strict scrutiny shall apply to affirmative actions by the federal government—not only actions by the state government); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (striking down, under strict scrutiny, the city’s affirmative action that required constructors to subcontract at least 30% of the contract to enterprises owned by racial minorities).

280. See, e.g., *Miss. Univ. for Women*, 458 U.S. at 725 (noting that “[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions” and that “if the statutory objective is to . . . ‘protect’ members of one gender because they are presumed . . . to be innately inferior, the objective itself is illegitimate”).

281. See DOUGLAS E. ABRAMS, *A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI I* (2003).

282. 387 U.S. 1 (1967) (holding the due process rights of juveniles similar to adults, including the right to notice of charges, the right to counsel, the right against self-incrimination, and the right of confrontation).

283. U.S. CONST. amend. XXVI, §1.

limited to people who are 18 or older; the provision has just made it clear that the voting ages higher than 18 (e.g., 21) are unconstitutional. However, the provision has remained in silence about treatments of persons under 18; the provision has never stated it is constitutionally safe to not enfranchise persons under 18.

In fact, the Supreme Court has struck down several election laws restricting voter eligibility under the Equal Protection Clause.²⁸⁴ If the restrictions were outside the scope of explicit provisions (i.e., restrictions based on race, sex, tax (only in federal elections) and age (only 18 or older)),²⁸⁵ they have been reviewed under the Equal Protection Clause.²⁸⁶ As voting ages at 18 or younger are restrictions of suffrage not stipulated in the explicit provisions, its constitutionality could be reviewed under the Equal Protection Clause.

The review standard under the Equal Protection Clause would be heightened scrutiny as the same as any other children–adults classifications. Actually, strict scrutiny may be preferable to intermediate scrutiny. The Court has generally applied strict scrutiny in the past cases of voter eligibility by recognizing voting rights as fundamental rights.²⁸⁷ The Court has never reviewed the constitutionality of age restrictions for voting under the Equal Protection Clause.²⁸⁸ However, given that the fundamentality of voting rights is undeniable for persons under 18 as well,²⁸⁹ use of strict scrutiny to age restrictions for voting (at the ages of 18 or younger) seems plausible.

Whether to uphold or to strike down the voting ages at 18 in federal and state elections would depend on the environment surrounding our society at the time—the governmental objectives and substantial relationships (or narrowly tailored) must be examined in each case at each time. But, the claim of youths’ lack of voting capacity *alone* would probably fail to sustain the voting age at 18 under

284. See, e.g., *Hill v. Stone*, 421 U.S. 289 (1975) (striking down the state’s tax rendering requirements to be enfranchised for the city bond issue elections); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (striking down the state law that restricted voter eligibility for the school district elections to those who owned or leased taxable realty and those who are parents of children attending public schools); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down the poll tax requirement to be enfranchised in the state elections; outside the scope of the Twenty-Four Amendment prohibiting tax-based restrictions in federal elections).

285. See U.S. CONST. amends. XV, XIX, XXIV, XXVI.

286. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 135–144 (Douglas, J., concurring in part and dissenting in part) (discussing that the authority of Congress to guarantee voting rights to 18–20-year-olds derives from the Equal Protection Clause; the case before the ratification of the Twenty-Sixth Amendment).

287. See, e.g., *Harper*, 383 U.S. at 670 (noting that the right to vote is a fundamental political right and applying strict scrutiny). But see Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL’Y 143, 151 (2008) (noting that the Supreme Court’s approach to voting rights may have been more ambiguous).

288. Although not stated outright, the language of the Supreme Court opinions in some cases may read as excluding age-based restrictions from the subject of strict scrutiny. See *Kramer*, 395 U.S. at 627 (noting that strict scrutiny shall apply “if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others”); *Hill*, 421 U.S. at 295 (noting that strict scrutiny shall apply for “restrictions of the franchise other than residence, age, and citizenship”). But the age restrictions were not challenged in these cases—the language above should be construed that the Supreme Court simply noted the fact that the persons who had been disenfranchised under the (tax-based) restrictions in question had fulfilled any other requirements for voting.

289. See *supra* Section III.B.

heightened scrutiny because the sufficient voting capacity of 16- and 17-years-olds in developed countries today has been shown by empirical evidence.²⁹⁰

CONCLUSION

This Article has explored a single doctrinal question: the appropriate review standard for discriminations against children *qua* children. Children meet all of the traditional three factors for the Supreme Court to recognize a minority group as a suspect or quasi-suspect class. The trait of children is visible and irreversible. Children have limited access to politics even today. There also exist exaggerated negative stereotypes of children although we are often unaware of them from the adult-centric viewpoint. The natures of children are different from those of the elderly (from both of the traditional three factors and the prospect theory); thus, the fact that the Court has adopted rational basis review for elder discriminations cannot justify the application of rational basis review to child discriminations. Also, the “childhood as a stage” argument is a rhetorical fallacy, which cannot justify the application of rational basis review. Therefore, we should treat children as a suspect or quasi-suspect class for which heightened scrutiny shall apply under the Equal Protection Clause.

I hope this Article’s argument will help develop a new critical framework of children and the law. Once heightened scrutiny is established, we will become more sensitive to and critical of systematic disadvantages and discriminations of children *qua* children. The previous frameworks²⁹¹ in the area of children and the law have lacked the viewpoint of discriminations against children. Their discussions have taken the distinction between children and adults for granted,²⁹² but it is problematic to start discussions from such premise. It is like discussing women’s legal status on the premise of distinguishing superior men and inferior women, or like discussing blacks’ legal status on the premise of distinguishing white masters and black slaves.

It is, of course, necessary for jurists to deal with urgent child-related issues surfaced in society such as abuse and neglect, adoption, delinquency, and others. But, at the same time, overall legal status of children should be reconsidered. For example, in the area of gender and the law, as the term “feminist legal theory”²⁹³ indicates, the viewpoint to discuss overall legal status of women has been already established. We all know that the holistic idea of prohibiting gender discriminations is essential while urgent social issues related to women such as domestic violence also need to be addressed. Similarly, I contend the importance of the holistic idea of prohibiting unjust discriminations against children.

I suggest calling this type of critical framework for children’s legal status as the “childist legal studies.” The concept of the “childist legal studies” would

290. See *supra* Section III.C.2.c.

291. See discussion of the six frameworks listed in *supra* Introduction.

292. See *supra* Introduction. One exception is the framework of liberation, which argued for the totally equal treatments of children as adults.

293. See, e.g., MARTHA E. CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 1 (3d ed. 2013) (describing the feminist legal theory as “[f]eminist tend to start with the assumption that law’s treatment of women has not been fair or equal and that change is desirable”).

include any child-centered legal perspectives that are sensitive to and critical of disadvantages and discriminations of children *qua* children in society. The expression of “childism” or “childist” has already emerged in some areas outside of legal academia such as psychiatry, ethics, and psychology.²⁹⁴ But, this Article is probably the first to propose a legal framework of this kind.²⁹⁵

I believe the significance of the “childist legal studies” framework will gradually increase in the coming decades. Children–adults classifications will become much more practical and realistic issues in society as technology advances. Particularly, the rapid advance of artificial intelligence (AI) technology is expected to change our society profoundly in the next 20–30 years;²⁹⁶ society will become more barrier-free for children. For instance, self-driving technology has already reached the stage of practical use.²⁹⁷ Once self-driving cars become widely used, the question of whether 5-year-olds should be allowed to drive will be a realistic issue. Another example is the advancement of technology to support people’s decision making—AI services that provide custom-made advice to each user are already commonly used in the area of investment management.²⁹⁸ If those technologies further develop, any 5-year-old child may become capable of making political decisions and daily decisions consistent with his or her best interests. If that happens, the question of whether 5-year-olds should be allowed to vote or to sign contract will be realistic.

294. See, e.g., MARGARET CROMPTON, *CHILDREN AND COUNSELING* (1992) (a social worker advocating a movement for “childism”); ELISABETH YOUNG-BRUEHL, *CHILDISM: CONFRONTING PREJUDICE AGAINST CHILDREN* 37 (2012) (a psychologist defining “childism” as “a prejudice against children on the ground of a belief that they are property and can (or even should) be controlled, enslaved, or removed to serve adult needs” in order to discuss abuse and neglect); Chester M. Pierce & Gail B. Allen, *Childism*, 5 *PSYCHIATRIC ANNALS* 266–70 (1975) (two psychiatrists defining “childism” as “the automatic presumption of superiority of any adult over any child . . . [which] goes beyond the biologic necessity that requires adults to sustain the species by means of authoritative, unilateral decisions”); John Wall, *Fatherhood, Childism, and the Creation of Society*, 75 *J. AM. ACAD. RELIGION* 52, 52, 65 (2007) (a religious ethicist using the concept of “childism” that “takes as its central point of departure not the family but the child” “in analogy to feminism, womanism, humanism, and the like” and identify his own view as a fully “childist” perspective); see also Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 *U. CHI. L. REV.* 1317, 1336 (1994) (a legal scholar just noting that a feminist perspective is not a “childist” perspective).

295. Cf. YOUNG-BRUEHL, *supra* 294. Young-Buehl contributed to informing the term “childism” in legal academia, evidenced by the fact that several law review pieces refer to the term by citing Young-Buehl’s book. See, e.g., Claudia M. Gold, *Child Protection and Infant Mental Health: An Essential Partnership*, 115 *W. VA. L. REV.* 1127, 1129–30 (2013); Molly Smolen, *Redressing Transgression: In Defense of the Federal Sentencing Guidelines for Child Pornography Possession*, 18 *BERKELEY J. CRIM. L.* 36, 56–57 (2013).

296. See, e.g., Christianna Reedy, *Kurzweil Claims That the Singularity Will Happen by 2045*, *FUTURISM* (Oct. 5, 2017), <https://futurism.com/kurzweil-claims-that-the-singularity-will-happen-by-2045/> [<https://perma.cc/ZK7S-T9RF>] (noting the predictions by Ray Kurzweil, a director of engineering at Google Inc., that computers will achieve human-level intelligence by 2029 and that AI will become smarter than human beings (i.e., the event of “singularity”) by 2045).

297. See, e.g., Harry Surden & Mary-Anne Williams, *Technological Opacity, Predictability, and Self-Driving Cars*, 38 *CARDOZO L. REV.* 121 (2016).

298. See, e.g., Tom Baker & Benedict Dellaert, *Regulating Robo Advice Across the Financial Services Industry*, 103 *IOWA L. REV.* 713 (2018).

There are still many practical issues remaining. Although I left comments on some key issues in Part VI, the substance of heightened scrutiny needs to be assessed for each topic in each legal area based on the social circumstances of the moment. But, as the first step, I hope this Article helps people realize the viewpoint of child discrimination and begin to become more sensitive to children–adults classifications.