UNCAPPING MANDATORY RETIREMENT FOR FACULTY:
A CONCURRING AND DISSenting OPINION

IHELG Monograph
93-9

TIAA-CREF Legislative Benefit Issues Symposium, St. Louis, Missouri, May 4, 1993

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Although I only became 42 in February, 1993, retirement is one topic that (to use a political scientist's term) becomes more salient to me each year. In one of my insurance policies -- something else that was never of importance to me -- I aged an entire category, no longer eligible for the "35-41" cohort. Since I began school at the age of 5, I have always been the youngest in my cohort (a sociologist's term), if I had thought about being in a cohort, and when I began teaching in 1982 at my University, my provost told me I was the youngest tenured member of the faculty, at 31. I confess, however, that I have been feeling older lately. I routinely know more about rock and roll than do my impossibly young law students, and I routinely draw from movies of my youth to
make a point in class about the law, only to be faced with the painful, loud silence of non-recognition. The most humiliating recent example was one student who prefaced her answer with, "with all due respect, Professor Olivas, I usually don’t rent videos from the classics section!" I was mortified, and immediately banned "with all due respect" from my class, especially when it is used to make me look like an old fogy.

But in one crucial area, I'm not the old fogy, and in this area of our discussion today, I strongly suspect how one stands on the issue of mandatory retirement correlates highly (to use another sociologists’ term) with which insurance cohort one is in. Unlike many of the speakers and scholars in this area, I believe Congress made a mistake in uncapping mandatory retirement for all professions, and I believe the consequences of this political decision will haunt our country in the years to come.

Thus, like Justice Thurgood Marshall (concededly, an ode to the wisdom of uncapping), I write today to concur in part, dissent in part, and remand for reconsideration. Having spent eight years
in the Catholic seminary, things tend to fall into threes for me, so I will limit myself to three observations: the nature of age discrimination, the arguments (too little and too late) against uncapping, and the role of faculty governance in determining retirement plans.

Given my contrarian nature, I begin with my dissent, as my concurrences resemble those of others who have spoken here or written on this issue. While I agree that persons should not be discriminated against on account of age in hiring or firing, I do not believe an agreed-upon age for mandatory retirement constitutes such an act of discrimination. Let me give examples drawing from industry practices, using a leading Supreme Court case, *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), and a higher education case, *Rehor* v. *Case Western Reserve University*, 331 N.E. 2d 416 (1975).

*Weber*, a leading affirmative action decision, upheld the legality of employer/employee agreed-upon affirmative action plans. In Kaiser Aluminum's Gramercy, Louisiana plant, a virtually all-
white trade union and employer hiring practice had conspired to exclude black workers in the general plant from securing the prime trade craft positions, only a few of which opened up each year. These positions were based entirely upon seniority, a facially race-neutral and widely employed mechanism for guild selection. However, in many industries and regions, seniority is a not-subtle racial algorithm, one that perpetuates white privilege. In *Kaiser*, a modest affirmative action plan that required one for one black/white placement in the prized program was challenged by Brian Weber, a white worker whose seniority had "earned" him the next place in the queue. Like many disgruntled whites who perceive they have been passed over or denied benefits because "less deserving" people of color were allowed to cut in front, he argued that he had never discriminated against blacks. "Don’t white people have rights?" could be their coda. Yet, due to the racially exclusionary practices, only 5 of 273 (1.8%) of the craft workers were black, in a local workforce that was 39% black. (If I were meanspirited, I would point out here that these figures are not far
different from higher education faculty data. In my own profession, only 100 of nearly 6500 law teachers are Latinos, and blacks in traditionally white law schools resemble the Gramercy Kaiser Aluminum plant’s craft shop. But I’m not that cynical.) The Supreme Court upheld the voluntary plan, arguing that it was justifiable under Title VII and under the voluntary circumstances. Even so, seniority by race -- an imperfect proxy for age -- was upheld, and appears to be a safe criterion, at least the seniority half.

Let me segue into higher education, and discuss the Rehor case in brief. Case Western Reserve University in Cleveland is one of a number of fascinating institutions that merged from different institutions to make a more secure union as a consolidated college. In 1942, Cleveland College merged with Western Reserve University, and the amalgamated WRU merged in turn with the Case Institute of Technology in 1967, forming CWRU. Professor Charles Rehor had joined the English faculty at Cleveland College in 1929, and in 1969 was to turn 65 years old. In April, 1969, the newly-
constituted Board of Trustees enacted a new mandatory retirement policy, merging the Case age of 65 and the Western Reserve 70 years policy. The amended retirement policy provided that retirement of all faculty members was to be at age 65, subject to the following conditions: (a) Contributions by the university to its retirement pension program would cease at age 65; (b) upon reaching the designated age of 65, the faculty member would have the option of continued employment either full time or part time to age 68; (c) between the ages of 68 and 70 the faculty member could petition to be reappointed on a part-time or full-time basis, and, upon recommendation of the appropriate university committees, could be reappointed for a one-year or two-year period; and (d) reappointments on an annual basis only could be continued beyond age 70, these to be initiated only by the university committees. At the time, this was a model policy, balancing faculty and institutional interests.

Professor Rehor took advantage of the amended policy, teaching until 1973, by which time he was 68. In consideration for his
teaching each year past 65 years of age, he also received an additional salary increment. However, after the age 68, he was not offered a renewal, and he sued to be able to teach until he was 70, a benefit he had expected under his original WRU policy. In a very carefully written opinion, the court held for the University, reasoning that the contractual provisions of the merged policies had been arrived at in good faith and with full notice and substantial faculty participation. (I will come back to this important governance principle in a minute.)

I can imagine your thinking at this point: What’s his point? What do these two cases have in common? There is a there here, organized in my view of the world as the why argument and the how argument. Stated starkly, I believe the uncapping of mandatory retirement is a political instrument to maintain majority privilege, particularly majority male privilege. When uncapping rumbles started in the 1970’s, I remember that ACE and other centrist organizations at One Dupont Circle said, in effect, to uncap would not allow us the flexibility to hire women and minority
faculty. I thought at the time, and continue to believe that these organizations were cynically invoking the needs of these excluded groups only to fend off federal interference, and my agreement at the time was more an eclipse of two opposing bodies aligned for the moment than a true alliance of significance. (Indeed, the next time I felt this way was when I argued against employer sanctions in immigration legislation, only to find myself supporting the view of the Chamber of Commerce; ours was the quintessential odd bedfellows convergence of interests, mine deriving from the likely discriminatory effect, theirs fearing excessive paperwork requirements.)

This is the fear I have in uncapping: that it will have a deleterious effect on the availability of new positions to be filled by junior faculty -- male or female, majority or minority (or increasingly, foreign-born). The faculty now reaching retirement age continue to benefit from waves of benefits keyed to their circumstances and generation. These men did not compete with women or with people of color, even with the stigma of being born
advantaged. Like Brian Weber, they do not feel as if they were advantaged, and Gramercy plant statistics or EEOC faculty data will not convince them otherwise. Even after having it all to themselves for all this time, the rules changed in their favor once again. How grand the design of being born into a circumstance where college faculties grew rapidly, where tenure track positions flowed even to ABD’s, where postdocs were not an essential route to a science faculty, and where the rules of the game could be changed one last time: to uncap the retirement age.

In your materials, you have my AAUP colleague Mary Gray’s thoughtful paper, encapsulating the AAUP position that we will not oppose uncapping or seek further delay in its implementation. I certainly concur with her perceptive and well documented views on the appropriate faculty role and the necessary institutional considerations to structure this postmodern policy. Out of solidarity, I even accept the policy. But I strenuously disagree with her assertion that "Age 70 has been arbitrarily used to deprive faculty members of tenured positions," when a reasonable
industry practice of longstanding uniform application is the very opposite of arbitrariness. The Professor Rehors of the world enjoyed long periods of security, and reasonably-drafted rules of disengagement. They were not stigmatized, but rewarded. They could plan their phased retirements, often got choice assignments and accounting sleight-of-hand to "load up" their retirement portfolios, and in some cases could take advantage of early retirement plans that (too) generously accelerated their benefits while still enabling them to move to other pastures as distinguished senior faculty. If this is being put out to pasture, we need to revise the metaphor -- heretofore used as a pejorative. Some of my professors from the 1960's and 1970's are happily double-dipping from a combination of state retirement systems and new tenured positions. The beneficiaries of this system are, with few exceptions, Anglo men. In many instances, no searches are conducted for these "stars." In the meantime, where will we find positions for those now in training? I recently chaired a search committee at my institution that drew over 300 applicants, and in
some disciplines, this is a common ratio. How much cumulative
disadvantage do the academic Brian Webers need? How much more do they
deserve? I confess at times I fear the AARP as much as I fear the
NRA, especially now that one can become a member at 50. With
uncapping, will they rename themselves? I ask, only partially
facetiously, will we ever have any retirees?

If I had more time, I would sketch out my concerns over the
means necessary to ensure continued competence and to involve
faculty at least as carefully as Case Western Reserve University
and the University of Chicago have done. I certainly agree with
AAUP colleagues that age and competence are different criteria, and
must not be confused. I also share Ernie Benjamin’s distrust of
the assessment movement, and even cast the lone dissenting trustee
vote against renaming the SAT to the Scholastic Assessment Tests,
arguing that assessment would become the same albatross as aptitude
became. But that’s a different dissent, and a different day.

One final dissent for today. I do not share other speakers’
optimism that faculty will continue to retire at the once-
traditional age of 65-70. The early data we have are, of necessity, drawn from a faculty population that had the expectation of mandatory retirement at 65-70. These surveyed faculty already had their plans in place, and who would have guessed that Congress would have given them the keys to the store? As today’s younger and middle aged faculty near 65, they will not be required to plan for retirement. The removal of this socially useful and rationally related means of societal transition will inevitably lead to older faculty clinging on to their tenured sinecures for a longer period of time, with increasingly expensive transaction costs required to assess competence. I believe the uncapping to be a major, irreversible step towards intergenerational selfishness and demographic warfare, other examples of which include the unwillingness of adults to support school bond issues and the proliferation of senior benefits -- including the sacred cow of Social Security COLA’s.

I have one last fear: that some day I’ll see these thoughts haunt me in a confirmation hearing. If that day comes, I will
plead youthful ignorance and inexperience, and throw myself on the
mercies of fellow seniors; perhaps I will attribute this
unfortunate lapse to youthful indiscretions or political error.
But I will also have access to data by then that will surely prove
me correct in my prediction that Congress made a mistake in
uncapping mandatory retirement. If I should get Borked (i.e.,
intransitive verb, "to fail to be confirmed due to scholarly
writings"), I’ll simply return to my position as Professor - for -
Life, where they’ll have to dynamite me out of the classroom,
clutching my Mac in a death-grip. I would remand this issue for
reconsideration, in accord with these principles.