ANALYSIS

Legal Problems:

(1) Does the Act violate the Equal Protection Clause of the Fourteenth Amendment?

(2) Would Congress have authority under Section Five of the Fourteenth Amendment to enact a statute barring states from establishing a maximum age for firefighters?

DISCUSSION

Summary

The lowest level of equal protection scrutiny—so-called “rational basis” scrutiny—applies when a state government engages in age-based discrimination. The question is whether the distinctions drawn by the Act on the basis of age are rationally related to a legitimate governmental purpose. The court is likely to answer that question in the affirmative because safe and efficient firefighting is a legitimate governmental purpose and, in light of the legislative committee’s findings, the Act is rationally related to that purpose.

With respect to Congress’s power to enact a statute barring states from establishing a maximum age for firefighters, Congress has the power to enforce the Fourteenth Amendment pursuant to its powers under Section Five of the Fourteenth Amendment. However, Congress can exercise its authority only if it does so in a way that is “congruent and proportional” to any constitutional violation that it may be addressing. A federal statute prohibiting states from having a mandatory retirement age for firefighters would not meet that standard. The statute would be unconstitutional because it would ban conduct by a state that is not itself unconstitutional and that is not related to any constitutional violations by the state.

Point One (50%)

A court would assess the constitutionality of the Act under the “rational basis” test. Here, the state has a “legitimate interest” in promoting safe and efficient firefighting, and lowering the retirement age is “rationally related” to achieving this interest. Thus, a court is likely to conclude that State A has not violated the Equal Protection Clause of the Fourteenth Amendment.

The applicable constitutional provision is the Equal Protection Clause of the Fourteenth Amendment, which states: “Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” Amend. XIV, Sec. 1. The allegedly unconstitutional discrimination is age-based discrimination because employees like the firefighter cannot continue as firefighters once they reach 50 years of age.

The Supreme Court has developed three levels of scrutiny for equal protection claims: strict, intermediate, and the lowest, “rational basis.” The Court has consistently applied rational basis scrutiny to age-based classifications. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S.
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Under the rational basis test, the issues are whether State A has a “legitimate interest” that is served by the discriminatory classification and whether the means used to achieve this legitimate state interest are “reasonably related” or “rationally related” to that state interest. The Court generally applies this test with substantial deference to legislative judgment. See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

Here, the firefighter will likely argue that State A is violating his right to the “equal protection of the laws” by depriving him, and other firefighters, of employment solely because they have reached the age of 50. More specifically, he will argue that he and the other firefighters 50 and older are being forced to retire without regard to whether they are capable firefighters, an action not taken against those under the age of 50.

State A will likely argue that lowering the retirement age for firefighters will improve workforce quality, enhance public safety, and reduce expenses. Because these are “legitimate” state interests, this argument is likely to succeed.

Given the legitimacy of State A’s objectives, the question then becomes whether a mandatory retirement at age 50 is reasonably related to attaining those objectives. Although the firefighter may be a qualified firefighter notwithstanding his age, that is not the relevant question. The question is whether State A has reason to believe that one’s physical fitness and ability to be a firefighter, in general, decline with age. The question specifies that the legislature heard evidence from relevant professionals in support of that position. Hence, the conclusion that a mandatory retirement age would, in general, improve the fitness of the workforce is reasonable. Under the rational basis test, it is not necessary for the fit between ends and means to be perfect. The fit merely has to be “reasonable” or “rational.” See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 756–58 (8th ed. 2010) (discussing application of rational basis test to mandatory retirement rules).

The fact that State A may have also enacted the statute to save money does not alter this analysis. One legitimate purpose to which the lines drawn by the statute are rationally related is sufficient to uphold a statute under the lenient rational basis test. Because State A has a legitimate governmental purpose for enacting this statute, and because lowering the retirement age is rationally related to the achievement of this purpose, a court is likely to conclude that the Act does not violate the Equal Protection Clause of the Fourteenth Amendment.

**Point Two (50%)**

Because age-based discrimination, in the form of a mandatory retirement age, is not a plausible constitutional injury, Congress does not have the authority under Section Five of the Fourteenth Amendment to enact legislation to remedy that injury.
Congress’s powers are limited to those expressed or implied in the Constitution. To enact a law on a particular topic, Congress must rely on some identified grant of legislative authority in the Constitution. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Section Five of the Fourteenth Amendment is one such grant of authority. See City of Boerne v. Flores, 521 U.S. 507 (1997).

While a mandatory retirement age for firefighters does not violate the Equal Protection Clause of the Fourteenth Amendment (see Point One), “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’[s] enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . .” Id. at 518. Congress’s power, however, is remedial. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. Id. at 519. In drawing “the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law,” the Court, in City of Boerne v. Flores, stated that the constitutional question is whether there is a “congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end.” Id. at 519–20. Lacking such a connection, legislation may become substantive in operation and effect. The proportionality requirement of Flores allows Congress to outlaw conduct that courts likely would hold unconstitutional under existing judicial precedent. Congress may also outlaw a broader range of conduct to prevent constitutional violations. But Congress cannot rely on its Fourteenth Amendment enforcement power to prohibit a kind of behavior that is unlikely to involve a constitutional violation at all.

Because age is not a suspect classification under the Equal Protection Clause, 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. The proposed federal statute would prohibit mandatory retirement requirements that courts likely would find constitutional. See Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding that a federal statute generally prohibiting age discrimination by employers (including states) exceeded the power of Congress to legislate pursuant to Section Five of the Fourteenth Amendment). Indeed, Congress’s primary goal here would be to outlaw a kind of discrimination that does not violate the Fourteenth Amendment. Flores clearly held that Congress cannot, under its Fourteenth Amendment power, legislate to prohibit constitutional behavior where there is no constitutional injury to be prevented or remedied. Therefore, a court would likely hold that Congress would not have the power under Section Five of the Fourteenth Amendment to enact a statute barring age requirements for firefighters.

[NOTE: This question does not raise any questions about sovereign immunity under the Eleventh Amendment inasmuch as Congress can abrogate that immunity when it acts pursuant to Section Five of the Fourteenth Amendment. In addition, this question does not ask whether Congress could pass such a statute under its Commerce Power. See, e.g., the Age Discrimination in Employment Act.]