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SUBSTANTIVE EQUAL PROTECTION: THE REHNQUIST COURT AND THE FOURTH TIER OF JUDICIAL REVIEW

James A. Kushner*

I. INTRODUCTION

The nature of power inexorably urges decision makers to retain the discretion and opportunity to engage in subjective judgment in the form of rule making, administration, or constitutional interpretation. Regardless of ideological commitment and despite the establishment of principles, legislators, administrators, and judges seek to retain the authority and privilege to apply rules and make exceptions as circumstances dictate. Both conservatives\(^1\) and liberals\(^2\) seek to apply ad hoc "balancing" models of decision making in frameworks which protect certain sets of values over others. While the Warren Court sought to delegate such authority in the economic regulatory arena to legislators, that Court is noted for its retention of this power to protect individual liberties and fundamental rights. The Burger Court tended simply to shift directions, delegating authority in cases focusing upon minority groups and the poor while increasing the Court's role in the brokerage of economic opportunities. Rather than invoking the discredited Lochnerization\(^3\) of the due process

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3. In Lochner v. New York, 198 U.S. 45 (1905), the Court struck down a limitation on bakery workers' employment hours, based on its notion of freedom of contract. For other versions of Lochner, see Adkins v. Children's Hosp., 261 U.S. 525 (1923)
clause of an earlier era permitting courts substantively to review the wisdom of legislation, it chose the equal protection clause as one vehicle to enhance subjective judicial decision making. The judicial philosophies of the justices comprising the Rehnquist Court appear to support the continued utilization of a distinct substantive equal protection.

II. EQUAL PROTECTION REVIEW AND THE CLASSIFICATION MODELS

The Court generally has been vigilant when the politically powerless have been subject to discriminatory legislation or government conduct. That vigilance was first enunciated as a dual standard of scrutiny in Chief Justice Stone’s footnote four of United States v. Carolene Products Co. The footnote suggested a narrower scope for the traditional presumption of constitutionality where individual liberties or discreet and insular minorities are burdened by the absence of protections typically afforded by the political process.

The Warren Court dramatically adhered to this two-tier system suggested by Carolene Products. If the targets of unfriendly legislation were classified

(invalidation of the minimum wage for women); Coppage v. Kansas, 236 U.S. 1 (1915) (state prohibited from barring “yellow dog” contracts which condition employment on the promise to refrain from unionizing); Adair v. United States, 208 U.S. 161 (1908) (invalidation of federal “yellow dog” prohibition); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (invalidation of insurance legislation). Gerald Gunther correctly evaluated the Lochner era cases as expressions of the Court’s refusal to redress inequities. See G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 520 (10th ed. 1980). The 1930’s depression engendered a new social welfare philosophy, postulating that it was the government’s duty to utilize resources to alleviate social and economic suffering, repudiating the Lochner principle. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (minimum wage for women sustained); Nebbia v. New York, 291 U.S. 502 (1934) (milk price control sustained); see also Ferguson v. Skrupa, 372 U.S. 726 (1963) (sustained prohibition of debt-adjustment by non-lawyers); Day-Bright Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (sustained four-hour leave with pay to facilitate voting); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (right to work laws sustained); Olsen v. Nebraska, 313 U.S. 236 (1941) (employment agency fee regulation sustained).


as "suspect," the legislation received strict scrutiny from the Court, requiring justification by a compelling state interest attainable through no less restrictive or discriminatory alternative strategies.

While the identity of these discreet minority groups has generally been set, it is remotely possible that there may be some additions. The first suspect classifications identified were those based on race and national origin.

In establishing alienage as a suspect classification, the Warren Court suggested a trend of inclusion which almost captured gender-based classification. The Burger Court withdrew from the expansive path of the Warren Court and ostensibly reduced the status of alienage to semi-suspect, along with gender and illegitimacy. This called for mid-tier justification scrutiny, requiring the government to demonstrate that the measure serves an important governmental purpose.

The rationale for class distinctions typically invokes comparisons to racial classifications. These classes possess attributes of (1) an immutable characteristic such as color, national origin, or sex (2) a status of political powerlessness such as that of blacks, aliens, or women, and (3) a history of class-based discrimination such as that based upon race, national origin,

11. Strauder v. West Virginia, 100 U. S. 303, 308 (1880) (race, with dicta extending to Celtic Irishmen).
19. Id.
20. Id.
21. Id. at 686 n.17.
22. Id.
23. Id. at 684.
24. Id. at 685.
alienage, illegitimacy, or sex28 and class stigmatization. Gender fits the suspect model. Hence, its treatment suggests, and reference to Carolene Products supports, the notion that political powerlessness alone is the test; yet children, gays, and family farmers might thereby qualify. Powerlessness plus a history of discrimination would offer the most rational and predictable criteria, but the Court appears to be looking for class stigmatization: the question-begging indicia of caste.26

Suspectness almost universally and automatically results in invalidation and accordingly is considered disfavored.27 Where the challenger is unable to demonstrate suspectness, the legislation is reviewed by the test of rationality,28 that is, invalidated only upon a showing of arbitrariness.29

The Warren Court further built upon Chief Justice Stone's model in identifying certain rights as fundamental so that their denial would be judged by the strict scrutiny standard.30 The right to vote,31 to procreate,32 to enjoy rights associated with family33 and personal autonomy,34 to travel between states without the penalty of durational residency requirements for state privileges or services,35 and to fair proceedings when criminally charged36 were held to permit invocation of strict scrutiny.

The rational basis test allows reasonable37 legislation to take one step at a time38 in serving needs of health, safety, and welfare.39

25. Id.
26. Plyler v. Doe, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").
32. See Griswold v. Connecticut, 381 U.S. 479 (1965) (right to obtain information and devices designed to prevent procreation protected under due process).
The Burger Court, in a move to weaken the activist equal protection trend started by the Warren Court, established a middle ground between the rubber stamp of the rational basis test and the fatal-in-fact, inexorable result under strict scrutiny. In cases involving classifications touching upon gender, alienage, illegitimacy (rather than race, religion, or national origin) and not involving a right deemed "fundamental," the Court established a mid-tier scrutiny requiring that the classification actually serve an important (as opposed to compelling) governmental interest that cannot be served by less discriminatory means.

Then the Burger Court, having launched the middle tier analysis as a device to avoid strict scrutiny, commenced to add teeth to the rational basis test so as to escape the rigor of mid-tier review and to return to an era when


the Court could invalidate social and economic legislation with which it disagreed under a theory of substantive equal protection.46

Alternative models of this rational basis "with teeth" standard have been advanced by the bench47 and by scholars.48 They have ranged from a balancing of interests test similar to that under due process analysis,49 to the extreme of presumed constitutionality50 or unconstitutionality.51

The fundamental rights doctrinal development, identical under both the due process and equal protection clauses of the fourteenth amendment, requires additional description.


48. E.g., Loewy, A Different and More Viable Theory of Equal Protection, 57 N.C.L. REV. 1, 53-54 (1978) (bias against politically powerless groups requires proof of nondiscriminatory purpose and that any discriminatory effect is an incidental adjunct); Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM. L. REV. 1023, 1077 (1979) ("government [may not] impose a negative signification on morally irrelevant factors, in particular, personal traits.").


51. Note, A Madisonian Interpretation of the Equal Protection Doctrine, 91 YALE L.J. 1403, 1429 (1982) (state classifications more likely to be unconstitutional than federal because it is easier to influence a single state than the entire nation).
III. FUNDAMENTAL RIGHTS

Although the Court has identified certain rights as fundamental for as long as sixty years, Chief Justice Stone's 1938 footnote four of Carolene Products first posited that the unpopularity of certain classes of individuals and the importance and vulnerability of certain rights might require greater scrutiny by the courts to protect against abridgement. The Supreme Court has established a strict form of judicial review not only for suspect legislative classifications based on race and national origin but also for those classifications that limit the exercise of defined fundamental rights. Under a traditional analysis, such classifications will be sustained only upon the showing of some compelling governmental interest incapable of achievement through less restrictive means.

Defining fundamental rights is yet another concept targeted for Supreme Court debate. The approaches are varied, but basically they consist of the interpretivist's strict construction and the noninterpretivist's broad interpretation of the Constitution.

In the parallel development of substantive due process, with its strict scrutiny indistinguishable from that under equal protection, the Court has identified personal privacy and autonomy as included in a fundamental rights grouping. Griswold v. Connecticut suggested these rights were either explicit in the Constitution, implicit in the "penumbras" of specifically guaranteed rights, or just beyond the words of the Bill of Rights. Justice Harlan, concurring in Griswold, further argued that, upon earlier precedent, such fundamental rights were not limited to explicit or penumbral rights but could include any rights found fundamental to a scheme of ordered liberty.

The interpretivist cautions the Court not to follow the open-ended Griswold "penumbra[l]" analysis but to "stick close to the text and the history, and their fair implications, and not construct new rights."

52. Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (may not prohibit school from teaching a foreign language).
59. 381 U.S. 479 (1965).
60. Id. at 499-502 (Harlan, J., concurring).
61. Id. at 500 (Harlan, J., concurring).
62. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J.
The non-interpretivist approach, stemming from the *Carolene Products* footnote and exemplified in *Griswold*, holds that the judiciary is not limited to protecting those rights specified in the text of the Constitution. Rather, it may examine how a legislative act affects "interests of the discreet and insular minority," and a fundamental right may emanate from the Constitutional text because specific guarantees carry "penumbras."

It seems apparent that the approach the Court follows is dependent upon which view can muster the majority of the Justices. And it is even more apparent that today's Court tends to follow an inconsistent ideological approach.\(^{63}\)

Although there is no specific textual language preserving a "right to privacy," the Court expanded the *Griswold* doctrine to encompass the right to an abortion, qualified by the limitations of *Roe v. Wade*.\(^{64}\) Yet, the Court, in the very same year, was unwilling to recognize education as a fundamental right in *San Antonio Independent School District v. Rodriguez*,\(^{65}\) stating, "[E]ducation . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find . . . it is implicitly so protected."\(^{66}\) One can only wonder why one personal interest should be recognized implicitly as a fundamental right and not the other. Ex-Supreme Court nominee Robert Bork argues that the "choice of 'fundamental values' by the Court cannot be justified. Where constitutional materials do not clearly specify the values to be preferred, there is no principled way to prefer any claimed human value to any other."\(^{67}\) But Justice Marshall in dissent to *Rodriguez* stated:

> [T]he process of determining which interests are fundamental is a difficult one . . . . [b]ut . . . not insurmountable . . . . [A]lthough not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.\(^{68}\)

Although the Court utilized two different approaches in defining fundamental rights, "the *Rodriguez* case suggested that the Court was adhering to the basic framework already developed. Classifications affecting fundamental rights would still receive strict scrutiny but there would not be any further expansion of this approach."\(^{69}\) The Burger Court appeared to follow the inter-

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1, 8 (1971).


64. 410 U.S. 113 (1973).


66. *Id.* at 35.


68. 411 U.S. at 102 (Marshall, J., dissenting).

69. Treiman, *Equal Protection and Fundamental Rights — A Judicial Shell*
pretivist method after *Roe v. Wade* in defining fundamental rights. Further, one scholar argues that "the Court will continue to honor these rights [those previously defined] in the years ahead."70

The Warren Court chose voting,71 access to criminal justice,72 and the right of travel73 as fundamental rights, requiring a compelling state interest to justify encroachment.74 *Rodriguez*, in rejecting education as a fundamental right signified the hostility of the Burger Court toward the proliferation of additional fundamental rights.75 The present Court has opted to expand protection through the use of lower tier rational basis scrutiny,76 the privileges and immunities clause,77 the first amendment,78 and the contract clause.79

Those rights deemed fundamental under the equal protection or due process clauses80 are entitled to strict scrutiny, requiring a compelling state interest that cannot be attained through less discriminatory means to justify their abridgment. However, although the Court purports to use strict scrutiny with respect to classifications burdening defined fundamental rights, "the Court has used judicial scrutiny ranging from tier one rational basis to tier three strict scrutiny and tier four substantive equal protection in many cases where the law affected the exercise of fundamental rights."81 Arguably, the net result of applying a rational basis test is to limit the exercise of defined fundamental rights - possibly those that the Burger Court believed to be unconstitutionally created. One mechanism the Court employs to reduce the level of scrutiny is to characterize the classification as not posing a significant or insurmountable...
impediment to the exercise of a fundamental right, thus avoiding the justifica-
tion obligation.82

The Court has demonstrated a trend suggesting that it will “focus on the
directness and substantiality of the burden or obstacle in the way of the exer-
cise of the fundamental right.”83 Harris v. McRae84 raised the issue of
whether the Hyde Amendment, which permits state denial of federally funded
abortions except where the mother's life is endangered, constitutes a constitu-
tional infringement on or impediment to the exercise of the fundamental right
of autonomy over the decision to abort. Advocates of the Hyde Amendment,
who intervened in the litigation, maintained that Harris, in rejecting the chal-

 lenge, was a “correct and disciplined decision”:

It properly recognizes that the fundamental question raised by the laws
restricting public funds for abortions is not whether the laws are “fair,” but
rather, to whom the Constitution allocates the power to decide what is fair in
determining how to disburse public funds. The Harris Court rightly held that
the authority resides with the legislature and not with the pregnant woman,
her physician, or the judiciary. Any other conclusion would have distorted the
character of our constitutional order merely to satisfy the policy preference
held by some for publicly financed abortion.85

Critics of Harris argue that, under the guarantee of equal protection im-

 plcit in the fifth amendment, once the Supreme Court labels a right funda-
mental, any governmental impingement on the right is subject to strict scru-
tiny. Justice Brennan, dissenting in Harris, stated:

The Hyde Amendment’s denial of public funds for medically necessary
abortions plainly intrudes upon [their] constitutionally protected decision, for
both by design and in effect it serves to coerce indigent pregnant women to
bear children that they would otherwise elect not to have.86

Thus, Justice Brennan asserts that this is a substantial obstacle to the exercise
of a defined fundamental right, triggering invocation of strict scrutiny analy-

sis. The majority in Harris, however, in not applying such analysis argued, as
described by commentators, that “[s]pending priorities are to be decided at

82. Regan v. Taxation With Representation, 461 U.S. 540 (1983) (denial of tax-
exempt status for defendant organization due to its lobbying activities does not violate
first amendment rights); Harris v. McRae, 448 U.S. 297 (1980) (sustaining Medicaid
denial for even therapeutically necessary abortions for poor women); Califano v.
Aznavorian, 439 U.S. 170 (1978) (sustaining denial of Social Security benefits to trav-

 elers remaining outside the United States beyond 30 days).
83. Treiman, Equal Protection and Fundamental Rights — A Judicial Shell
84. 448 U.S. 297 (1980).
85. Horan & Marzen, Recent Developments in Health Laws — The Supreme
Court on Abortion Funding: The Second Time Around, 25 St. Louis U.L.J. 411, 412-
86. 448 U.S. at 330 (Brennan, J., dissenting). The majority would demand a
more onerous penalty. 448 U.S. at 317 n.19.
the ballot box; not before the bench." The denial of funding, according to the Court, may have an impact on the indigent, but such impact does not itself render the funding restrictions constitutionally invalid. Poverty, standing alone, is not a suspect classification. In addition, the Court concluded that, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."

The flaw in the reasoning of the Court and its supporters lies in their discussion of the impact of denial of such funds and in their failure to analyze the case as a classification implicating a fundamental right and thus requiring strict scrutiny. In its conclusion, the Court stated:

Where . . . Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that the congressional action be rationally related to a legitimate government interest.

To which Justice Brennan replied in dissent:

As a means of preventing abortion it is concededly rational - brutally so. But this latter goal is constitutionally forbidden.

Under the Griffin/Douglas analysis, the Warren Court fashioned a fundamental right to the procurement of fairness in the justice system. The Warren Court approach was a hybrid due process/equal protection analysis which held that in order for the state to grant equal protection of the law, one must have access to the courts to enforce equal protection. Therefore, denial of transcripts, imposition of fees or denial of counsel for criminal defendants in their first appeal could result in meaningless court access and appellate review for the poor.

The distinguishing characteristic between the Warren Court approach and that of the Harris Court is subtle. Whereas the Warren Court arguably

87. Horan & Marzen, supra note 85, at 422.
89. 448 U.S. at 326.
90. Id. at 331 n.4 (Brennan, J., dissenting).
93. But cf. United States v. Kras, 409 U.S. 434 (1973) (bankruptcy filing fees not insurmountable as fees are affordable and alternative dispute resolution is available).
fashioned a wealth classification for a "discreet and insular minority"—the poor—under the guise of protecting fundamental rights, the *Harris* Court adopted Justice Harlan's dissenting view in *Douglas*:

The states . . . are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich. . . . The Equal Protection Clause does not impose on the states an "affirmative duty to lift the handicaps flowing from differences in economic circumstances."\(^{94}\)

A variation on the theme of judicial subjectivity can be seen in *Bowers v. Hardwick*,\(^{96}\) sustaining criminal sodomy statutes as applied to homosexuals. The Court simply trivialized and avoided the *Griswold*—type right of privacy to characterize the claim as the right to sodomy. The Ratchet of constitutional jurisprudence under the Burger and Rehnquist Courts appears to have reversed directions from the rights-expansion model of the Warren Court. Cases such as *Harris* and *Bowers* suggest an alternative model of equal protection: a fifth tier of judicial review wherein the Court simply sidesteps the need to apply rigorous scrutiny by halting the growth of fundamental rights, as in the case of education; ignores their infringement, as in *Harris* and *Bowers*; or narrows the existing coverage by a rule requiring direct, substantial, and absolute obstruction of the opportunity to exercise the right as in *Harris*; or requires the imposition of a penalty for having exercised a fundamental right as in the travel cases. The Court has not chosen to veer from the articulated two tiers of fundamental rights analysis under the equal protection and due process clauses, with their all-or-nothing validation system. The current scheme of rules, like the earlier related suspect classification model, discourages rights identification and expansion. The Court has, however, invalidated a series of travel and residence-related statutes under the substantive equal protection model.\(^{98}\)

Having surveyed the tiers of judicial review employed in scrutinizing fundamental rights and the various classifications, this Article will inspect more closely the operable models.

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94. 372 U.S. at 361-62 (Harlan, J., dissenting).
95. 106 S. Ct. 2841 (1986).
96. *See* Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (invalidating statute which gives property tax exemption to Vietnam veterans who resided in the state on a certain date but not those veterans who moved to the state later); Zobel v. Williams, 457 U.S. 55 (1982) (larger distributions of oil reserve proceeds to longer-term residents); *cf.* Attorney Gen. v. Soto-Lopez, 476 U.S. 898 (1986) (civil service preference for veterans who were residents when they entered military invalidated, with four justices urging strict scrutiny and two following the substantive equal protection model).
IV. MODELS OF JUDICIAL REVIEW

Where a plaintiff is able to present evidence suggesting purposeful discrimination, the defendant has the burden either to disprove the foundation for the inference by demonstrating a lack of disparate impact and any other indicia of bias or to justify the classification with a valid reason. As a scheme to protect the politically powerless, the Court imposes differing standards depending on the danger of such bias. Where race, alienage, or national origin is implicated, so-called "suspect" classifications, a compelling state interest that can be attained by no less discriminatory alternative means must be identified to sustain such discrimination.

In the semi-suspect categories of alienage, illegitimacy, and gender, the Court imposes a mid-range scrutiny requiring an important governmental interest that is actually served by the regulation to justify discrimination. Alternatively, where government regulation directly burdens a fundamental right, such as voting, interstate travel, access to a fair trial, or the rights of family and personal autonomy, and turns on an irrelevant criterion such as wealth, the Court applies the strict scrutiny reserved for "suspect" classifications.

Traditionally, virtually all other classifications were within the discretion of the legislature to make in regulating matters of social and economic concern and were reviewed by a standard requiring a rational basis for the


105. Id. at 193.

106. Id.


classification or restriction.\textsuperscript{114}

In a significant pattern, the Court has embarked on a fourth tier, using enhanced rational basis scrutiny in reviewing certain classifications touching on concerns embraced by the Court. For example, although the mentally retarded are not singled out for upper tier scrutiny, the Court invalidated the exclusion of a group home from a residential neighborhood on irrationality grounds.\textsuperscript{116}

Although the Court's current decisions suggest at least a four tier modeling of equal protection, the variation in approaches and applications strongly suggests that the Court has really embarked on a model of substantive equal protection. Under that model, the Court validates or invalidates on the basis of its ad hoc evaluation of the wisdom or lack thereof of any policy, not unlike the review exercised under the due process clause in the "Lochner" era.\textsuperscript{116}

The following sections review the different standards, types of evidence that the Court accepts, and analyzes the apparent criteria the Court uses to characterize and evaluate defendant-offered justifications under the various tiers. This analysis begins with the Court's work in the realm of nonfundamental rights and nonsuspect classifications.

\textsuperscript{114} New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976); see Note, Legislative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123 (1972); see also Loewy, A Different and More Viable Theory of Equal Protection, 57 N.C.L. REV. 1, 49-53 (1978).


\textsuperscript{116} Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum hours law for bakers). The Lochner era due process invalidation, like the recent substantive equal protection cases, focuses on the legitimacy of government purpose or ends scrutiny as compared to the means-oriented scrutiny of the rational basis cases. It has been argued, but without appropriate comparison with Lochner, that the new inappropriate government purpose unifying theme is a positive trend. Note, Impermissible Purposes and the Equal Protection Clause, 86 COLUM. L. REV. 1184 (1986).
V. TIER I: THE RATIONAL BASIS TEST

Respect for the legislative process\textsuperscript{117} and the doctrine of separation of powers traditionally demand that the Court avoid playing the role of an appellate legislature and that it intervene only in cases presenting egregious facts, such as where particularly important interests are presented or members of politically unpopular groups challenge unfairness. In other cases, the general presumption of legislative validity and correctness\textsuperscript{118} holds that as long as the means are debatably related to a valid health, safety, or moral\textsuperscript{119} concern of government\textsuperscript{120}, the Court will recognize a rational basis. This is particularly


\textsuperscript{118} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).


\textsuperscript{120} Wayte v. United States, 470 U.S. 598, 610-14 (1985) (rational basis review of selective prosecution claims justified by prosecutorial efficiency); Jones v. Helms, 452 U.S. 412, 422 (1981) (felony provision for leaving state without supporting dependent child encourages parent's support obligation); Minnesota v. Cloverleaf Creamery Co., 449 U.S. 545, 456 (1981) (ban on plastic nonreturnable milk cartons is rationally related to state's interest); Parham v. Hughes, 441 U.S. 347, 351-52 (1979) (sustained denial of father's suit for wrongful death of illegitimate child or alternatively a claim of sex discrimination since the father could have legitimated the child via a statutory scheme and it was not irrational for a state to discourage "irresponsible liaisons beyond the bound of marriage"); Vance v. Bradley, 440 U.S. 93, 97 (1979) (sustained foreign service retirement rule to ensure the professional competence, and physical and mental reliability of those in foreign service); Washington v. Confederated Bands of the Yakima Nation, 439 U.S. 463, 499 (1979) (upheld as rational partial state criminal jurisdiction until tribe approval as an attempt to accommodate state and tribal interests); Cland v. National College of Business, 435 U.S. 213, 220 (1978) (per curiam) (veterans education benefits unavailable for programs recently established or composed predominantly of veterans); Fuller v. Oregon, 417 U.S. 40, 49-50 (1974) (reimbursement for publicly supplied legal services applicable only to those convicted justified by fairness in not pursuing those unjustly accused); Hurtado v. United States, 410 U.S. 578, 590 (1973) (sustained policy of compensating material witnesses only $1 per day while nondetained receive $20 per day); Lehmannen v. Lake Shore Auto Parts, 410 U.S. 536, 364-65 (1973) (corporate-only personal property tax); McGinnis v. Royster, 410 U.S. 263, 268-70, 276-77 (1973) (denial of credit for good behavior for pre-sentence incarceration); James v. Strange, 407 U.S. 128, 140 (1972) (legal defense recoupment law invalid for lack of debtor exemptions available to other debtors); Lindsey v. Normet, 405 U.S. 56, 70-76, 79 (1972) (summary eviction valid but not double bond
true where the law regulates employment,\textsuperscript{121} business,\textsuperscript{122} real estate,\textsuperscript{123} and

for tenants); McDonald v. Board of Election Comm’rs, 394 U.S. 802, 809 (1969) (absentee ballots denied those incarcerated in home county awaiting trial); Rinaldi v. Yenger, 384 U.S. 305, 308-09 (1966) (invalid to recover transcript costs only from those sentenced to incarceration); Tigner v. Texas, 310 U.S. 141, 147-48 (1940) (sustained farm exemption from antitrust law); Hayes v. Missouri, 120 U.S. 68, 71 (1887) (legislation may be limited in object to which it is directed or by the territory within which it is to operate; here allowing more peremptory jury challenges in larger cities); cf. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977) (sustained congressional resolution of Indian claims despite exclusion of group from distribution); Abramson, \textit{Equal Protection and Administrative Convenience}, 52 \textit{Tenn. L. Rev.} 1 (1984); Barret, \textit{The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications}, 68 Ky. L.J. 845 (1979-1980).

121. Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 291-92 (1984) (certain employees may be excluded from labor code protection; here professional employees may meet and confer unless they have selected exclusive representative); Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174-79 (1980) (certain classes of retired workers denied dual receipt of both pension and Social Security benefits); Vance v. Bradley, 440 U.S. 93, 97 (1979) (upheld requiring mandatory retirement of foreign service officers at age 60 while other civil service members not so required); Alexander v. Fioto, 430 U.S. 634, 639-40 (1977) (prospective military pension induces re-enlistment so may be limited to re-enlisting pre-war reservists); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-16 (1976) (per curiam) (mandatory retirement of uniformed police at age 50 not imposed on other government employees); Richardson v. Belcher, 404 U.S. 78, 81-82 (1971) (Social Security disability benefits reduced by amount of public workers’ compensation award); Barbier v. Connolly, 113 U.S. 27, 31 (1884) (equal protection not to interfere with police powers such as laundry hour rules).


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social welfare programs. Legislation may still be challenged where it is arbitrary in that it fails to bear a reasonable relationship to a legitimate government interest.

There appears to be an increasing trend on the Court to invalidate legislation under the rational basis test. But such invalidations do not rest upon the laws being suspect in that less discriminatory policies could have been employed.

In McGowan v. Maryland, the Warren Court, in sustaining Sunday closing laws which provided for the sale of some goods on Sundays and yet barred the sale of others at the discretion of each county, restated the traditional rational basis test: "[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly


126. G.D. Searle & Co. v. Cohn, 455 U.S. 404, 408-12 (1982) (unregistered foreign corporation may be denied benefit of statute of limitations that runs from registration despite availability of long-arm jurisdiction).


128. Id. at 425-27.
circumstanced shall be treated alike."\textsuperscript{129} This test is consistent with the substantive due process deference that the New Deal Court consistently provided to legislation as the primary agency of reform responsive to the popular need.\textsuperscript{130}

The Court has identified social and economic legislation as the area deserving of mere rational basis review. Accordingly, \textit{Dandridge v. Williams}\textsuperscript{131} approved of a maximum family welfare grant withholding additional aid after birth of the eighth child. The Court emphasized the social and economic basis of the legislation in sustaining the classification.\textsuperscript{132}

In \textit{City of New Orleans v. Dukes}\textsuperscript{133}, the rational basis test was expanded to its limit when the Court upheld legislation restricting pushcart vendors in the historic French Quarter of New Orleans to those who had been in operation for seven years. This monopoly-creating grandfather clause was upheld in light of the historic and aesthetic environment of the district and the danger that new vendors would change the character of the streets now augmented by a few old-time pushcarts. The Court reiterated the minimal scrutiny required of economic legislation in validating the scheme.\textsuperscript{134}

The sections that follow attempt to provide some sense of classification to the multifarious judicial pronouncements on business, economic, and social regulation under the equal protection clause. Most of the reported decisions precede the development of the more rigorous substantive equal protection model. Historically, railroads\textsuperscript{135} and public utilities\textsuperscript{136} have been singled out

\begin{itemize}
\item \textsuperscript{129} F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
\item \textsuperscript{132} 397 U.S. at 485. \textit{But cf:} Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (welfare grant classification invalid where fundamental right, such as interstate travel, is implicated where the effect is to penalize exercise of the right).
\item \textsuperscript{133} 427 U.S. 297 (1976) (per curiam) (overruling Morey v. Doud, 354 U.S. 457 (1957) (invalidation of American Express exemption from money order regulation under a “closed class” theory)).
\item \textsuperscript{134} 427 U.S. at 303-04.
\item \textsuperscript{136} Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 367-69 (1940) (public utility regulation).
\end{itemize}
for special rules. The Court, typically sustaining business regulation, has upheld the most subtle of classifications.\(^\text{137}\) Generally, classifications utilized in business regulation pass constitutional\(^\text{138}\) muster under the equal protection clause except where the most arbitrary of rules are promulgated.\(^\text{139}\) Such rules would most likely be equally violative under the due process clause or the proscriptions against the taking of property contained in the fifth and fourteenth amendments. The following sections collect the decisions involving the regulation of business and other classifications touching on social and economic life.

A. Natural Resources

The regulation of scarce natural resources, such as clean air, water, and developable land, like other property-related regulation, is accorded maximum deference where legislatures act to protect sensitive and valuable state assets.\(^\text{140}\)

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B. Taxation

Classifications utilized in the structuring of federal, state, and local gross receipts, income, inheritance, license, privilege, property, sales, use, severance, windfall profits, and other taxes are accorded deference and are typically sustained under equal protection scrutiny unless found to be irrational. The legislature need believe only that the tax-


149. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930) (graduated oil tax based on gravity scale).


152. See generally Exxon Corp. v. Eagerton, 462 U.S. 176, 195-96 (1983) (pass-through prohibition rationally related to consumer protection and royalty-owner exemption rationally related to encouraging investment); Gurley v. Rhoden, 421 U.S. 200 (1975) (sales tax on gasoline, including excise taxes); Lehnhausen v. Lake Shore Auto
ation scheme will achieve the legislative purpose, not that the objective is actually promoted.\textsuperscript{183}

Recently, however, the Court has shown an increased willingness to scrutinize and invalidate state taxes under the equal protection clause.\textsuperscript{184}

\textbf{C. Property}

Property rights, as distinguished from land regulation, may be defined by the state subject to claims of uncompensated taking under the fifth amendment\textsuperscript{166} or violation of contract.\textsuperscript{168} Equal protection challenges to property regulation, absent claims premised on suspect classifications or fundamental rights, are typically sustained under the rational basis test.

Land regulation, if its character is offensive in invading privacy\textsuperscript{187} or destroying property value,\textsuperscript{188} may violate the taking or due process clause, but

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153. Western \& S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981) (sustained retaliatory tax against foreign insurers' premiums where that insurer's state engages in the same policies as a means to promote interstate commerce); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (regardless of whether in fact the stated goals of the legislature will result is immaterial - as long as the legislature could rationally have decided this, the statute is valid).

154. Williams v. Vermont, 472 U.S. 14 (1985) (invalidation of use tax applied to new residents with automobiles purchased out of state where sales tax credit was given to other state residents purchasing out of state despite rationality of scheme); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (invalidation of tax preference for domestic insurers under rational basis).


except for those few rules violative of other fundamental rights, classifications affecting development, landlords, and tenants will generally survive review under the due process and equal protection clauses, for the test is but a mere rational basis.

D. Labor Regulation

Rules and laws regulating the conditions of employment such as collective bargaining, retirement, and workers compensation are generally sustained under the rational basis minimum scrutiny standard enjoyed by business and economic legislation.


161. Lindsey v. Normet, 405 U.S. 56 (1972) (summary eviction rules upheld yet invalidating a double bond solely for tenant appeals; due process); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946) (fire protection for lodging houses may require expensive modifications if not constructed according to newer code; due process).


163. Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922) (service letters required for corporate employees); St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203 (1902) (inspection law as applied to mines with five or more employees).

164. Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (windfall of Social Security plus pension eliminated but leaving certain classes of persons receiving both if they meet period of service and current status tests); Alexander v. Fiooto, 430 U.S. 634 (1977) (military retirement to pre-World War II reservist only if actively served during the war); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) (mandatory uniformed police retirement based on age).

165. Ward & Gow v. Krinsky, 259 U.S. 503 (1922) (may exempt farm laborers, domestic servants, and employers of three or fewer employees); Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571 (1915) (applicable to employers with five or more employers).

E. Sunday Closing Laws

Sunday closing laws were upheld in *McGowan v. Maryland*\(^{167}\) over equal protection challenges. *McGowan* held that in pursuit of a common day of rest stores could be closed and that it was not irrational to exempt certain items necessary for a day in the country, the beach, or a ride in the family Buick (such as oil, gas, and suntan lotion).\(^{168}\) The problem with Sunday closing laws, apart from the obvious tension with free exercise of religion and establishment of religion clauses of the first amendment,\(^{169}\) is that the exceptions list has become prolix and inscrutable.\(^{170}\) Further, changing demographics and geography, including increased air pollution and the need to reduce peak energy use periods, suggest the need to change the traditional five day work week.\(^{171}\)

F. Business Licensing

The Court has generally approved business licensing despite discriminatory results\(^{172}\) and even exclusion from one's occupation.\(^{173}\)

both if they meet period of service and current status tests); Alexander v. Fioto, 430 U.S. 634, 639-40 (1977) (military retirement to pre-World War II reservists only if actively served during the war); City of Charlotte v. Local 660 International Ass'n of Firefighters, 426 U.S. 283, 288-89 (1976) (employer may refuse to withhold union dues despite withholding for certain other causes if not all of its employees are represented by the union thus making the task unduly burdensome).


168. 366 U.S. at 426-27.


In validating most business licensing schemes, the Court has sustained the use of clauses providing exclusion from licensing for individuals and entities engaged in an occupation for a set number of years. But grandfather clauses may be subject to invalidation where devised as a scheme to exclude a class.

G. Other Government Classification

Legislatures make a myriad of distinctions based upon narrowly distinguishable yet similarly situated entities. Age classifications are an example where a line is simply drawn at an arbitrary dividing point, such as unsupervised playing of video games at age seventeen, mandatory retirement at age fifty, or sixty and other age-based assistance program classifications. Statutes of limitation also are ostensibly arbitrary in cutting off actions after a given period. Such line drawing in the regulation of advertising, automobile guest statutes, consumer safety, the criminal justice

Piper, 470 U.S. 274 (1985) (state residency, at least as applied to border resident, violative of article IV privileges and immunities clause).


175. Cf. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) (sustaining voter literacy test with grandfather provision voided by state supreme court); Lane v. Wilson, 307 U.S. 268 (1939) (longtime white voters excused from short registration period set for previously disenfranchised blacks); Guinn v. United States, 238 U.S. 347 (1915) (grandfather clause exception to voting literacy test designed to keep blacks disenfranchised).


181. Railway Express Agency v. New York, 336 U.S. 106 (1949) (vehicle advertising for hire banned while permitting other vehicle advertisements including billboards and other media); Packer Corp. v. Utah, 285 U.S. 105 (1932) (sustaining ban on cigarette advertisements on street car signs and billboards exempting newspaper and periodical advertisements); Halter v. Nebraska, 205 U.S. 34 (1907) (sustaining statute which allowed American flag to be displayed on newspapers, periodicals and books but not advertisements).


process,\textsuperscript{184} criminal sentencing,\textsuperscript{185} damages,\textsuperscript{186} horse racing,\textsuperscript{187} insurance,\textsuperscript{188} nuclear accidents,\textsuperscript{189} pensions,\textsuperscript{190} retail sales,\textsuperscript{191} sovereign immunity,\textsuperscript{192} and video games,\textsuperscript{193} is part of the classification-and-compromise legislative process and is typically sustained unless wholly arbitrary.\textsuperscript{194}

for hire ban on vehicles for traffic safety); Kotch v. Board of River Port Pilot Comm’rs, 330 U.S. 552 (1947) (practice which allows river pilot licenses to be given only to family and friends of pilots advances espirit de corps of the pilots and the safety of the public).


186. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) (wrongful death action may deny one form of compensatory damages available under maritime law).


193. Cf. Murphy v. California, 225 U.S. 623 (1912) (fourteenth amendment does not prohibit a city from enacting a statute allowing billiards for hire only for guests in hotels with at least 25 guest rooms).

Social welfare legislation, particularly public assistance and benefit programs, because of its reformative purposes and the laudatory goals of addressing the needs of the poor and service-dependent, is given broad deference by the Court in allowing classifications schemes. Dandridge v. Williams\textsuperscript{196} upheld a maximum welfare grant rule for families with eight children. The Court found that the state's interest in allocating scarce funds justified the limitation. Jefferson v. Hackney\textsuperscript{196} sustained a Texas scheme of funding the blind and disabled, a predominantly white class, at 95 to 100 percent of their need, while aid to families with dependent children, aid for a predominantly nonwhite class, was funded at only 75 percent of need. Jefferson can be distinguished on the justified sympathy evoked by the immutability of the disabled when compared to the often held stereotypes of transitoriness, voluntariness, or fault associated with traditional welfare recipients.\textsuperscript{197} Jefferson fails as a race discrimination case in that there is little proof beyond impact of the arguably justifiable rules. Yet where intentional race,\textsuperscript{198} sex,\textsuperscript{199} illegitimacy,\textsuperscript{200} or other improper classifications\textsuperscript{201} are presented, the Court will utilize stricter scrutiny. Further, where a scheme makes an arbitrary classification such as the denial of food stamps to a household that contains someone who was a dependent of a taxpayer in the prior year, the Court will not hesitate to invalidate the distinction.\textsuperscript{202} Generally, however, classifications established under pro-


\textsuperscript{196} 406 U.S. 535 (1972); see also Schweiker v. Hogan, 457 U.S. 569 (1982) (sustaining more generous Medicaid income criteria for the "categorically needy" such as the aged, blind, and disabled as compared to the "medically needy").


\textsuperscript{202} Department of Agric. v. Moreno, 413 U.S. 528 (1973).
grams dealing with aid to dependent children,\textsuperscript{203} black lung disease victims,\textsuperscript{204} food stamps,\textsuperscript{205} Medicaid,\textsuperscript{206} Social Security,\textsuperscript{207} S.S.I. aid to the aged and disabled,\textsuperscript{208} unemployment compensation,\textsuperscript{209} and veterans benefits,\textsuperscript{210} are sustained.

I. Health Legislation

Government classifications established in setting health standards\textsuperscript{211} or seeking to protect the public health,\textsuperscript{212} such as in the case of quarantine or

\begin{itemize}
  \item 203. Harris v. Rosario, 446 U.S. 651 (1980) (per curiam) (sustained lower welfare benefits to Puerto Rico than to states).
  \item 208. Schweiker v. Wilson, 450 U.S. 221 (1981) (subsistence allowance provided by supplemental security income disability may be denied to those ages 21 through 64 in mental hospitals not eligible for Medicaid).
  \item 209. Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1977) (per curiam) (sustaining unemployment compensation only for night students); Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471 (1977) (sustaining unemployment benefit denial to workers whose unemployment results from a labor strike as state discretion on coverage).
  \item 212. Hayman v. City of Galveston, 273 U.S. 414 (1927) (exclusion of osteopaths
\end{itemize}
inspection of laws or rules designed to extend health care benefits are accorded maximum deference under the rational basis test.

J. Aesthetics

The Court has displayed extraordinary deference to laws premised on aesthetic considerations. In City of New Orleans v. Dukes, the aesthetic qualities of New Orleans' Vieux Carré district in large part accounted for the approval given a scheme which allowed established pushcart vendors to continue to do business in the district while prohibiting new vendors. Dukes is consistent with a pattern of decisions under the taking clause of the fifth amendment, the due process clause of the fourteenth amendment, and the press and speech clause of the first amendment.

K. Community Development

Young v. American Mini Theaters, Inc., in the interest of neighborhood stabilization, upheld zoning laws directed at the content of expressive activity protected by the first amendment. The laws restricted the location of theaters exhibiting sexually explicit adult films. This type of regulation, serving goals of community development and improvement, is typically upheld unless it touches upon a suspect classification in its administration. The Court has given its greatest deference under the rational basis test to classifications from public hospitals.

designed to reform societal evils.

L. Remedial Legislation

Where legislatures pass reformatory measures directed at problems facing the community, the Court will employ the lower-tier rational basis scrutiny in reviewing the measures. In McDonald v. Board of Election Commissioners of Chicago,223 the Court upheld the denial of absentee voting procedures to county prisoners even though doing so effectively denied the prisoners' franchise. The Court reasoned that absentee balloting is not constitutionally mandated and the state was engaged in remedial legislation by continuously expanding the classes permitted access to absentee balloting.224 McDonald is noteworthy because it involves the right to vote and the result of denying access to that right would appear to elevate the state's burden of justification to strict scrutiny under the fundamental rights model. The reformatory motive of the state legislature, however, reduced that burden to one of extraordinary deference to the state. While all social legislation tends to be in the nature of reform, a reformatory motive will not validate the use of impermissible classifications.225

The rationale for giving a wide berth to reform legislation is that the give and take of the legislative compromise process is bound to make subtle, even apparently arbitrary distinctions, as exceptions and exemptions are created to mollify opposition. Thus, the distinction between the evil of trucks that lease advertising space as compared to the acceptable advertisements by truck owners offering their own products or services made in Railway Express Agency, Inc. v. New York,226 or the licensing only of pushcarts that had been in operation for more than six years in City of New Orleans v. Dukes,227 is explained by the need for reform. The Court has recognized that if reform is to occur, it will succeed "one step at a time."228

227. 427 U.S. 297, 305 (1976) (per curiam) (legislature can prohibit pushcart vendors from operating except those who have been working for eight years or more).
This doctrine was first articulated in *Williamson v. Lee Optical of Oklahoma, Inc.*,229 where ready-to-wear eyeglasses were exempt from regulations requiring eyeglasses to be fitted or lenses replaced only by licensed ophthalmologists or optometrists. Without the possibility of exemptions from reform legislation, such as nondiscrimination laws, legislative reform in the face of close political battles and powerful lobbies might not proceed. But *McDonald v. Board of Election Commissioners of Chicago*230 may show how the doctrine can be abused. There the franchise was effectively denied to those awaiting trial in their home county’s jail by denying access to absentee ballots or a jail voting booth. Such denial was justified, in the Court’s eyes, because legislation was moving a step at a time to extend voting rights by creating the absentee ballot. This case stands as an example that too much deference can insulate the legislature from the system of checks and balances through the convenient talismanic invocation of reformation as a justification for discrimination.

Where the reform effort is designed to eliminate or prevent sharp or fraudulent practices, maximum deference is given to legislative classification. In *Weinberger v. Salfi*,231 the Court upheld a denial of surviving spouse Social Security benefits based upon the legislatively formulated presumption of fraudulent marriage where nuptials took place less than six months before death. Similarly, the Court upheld a rather arbitrary definition of a credit transaction in order to apply the truth-in-lending statute to any transaction involving four or more payments.232


229. 348 U.S. 483 (1955); see also Califano v. Jobst, 434 U.S. 47, 54-58 (1977) (Social Security benefits of surviving disabled child terminate on marriage to individual not entitled to Social Security benefits even if spouse is also disabled).


231. 422 U.S. 749 (1975).

232. Mourning v. Family Publications Serv., 411 U.S. 356, 363-75 (1973); see also Barry v. Barchi, 443 U.S. 55, 67-68 & n.12 (1979) (stricter standards for staying harness racing suspension than for thoroughbreds due to need for appearance of integrity); Friedman v. Rogers, 440 U.S. 1, 15 (1979) (use of an optometry trade names to indicate competition banned as possibly deceptive); Cleland v. National College of Business, 435 U.S. 213, 220 (1978) (per curiam) (education aid to veterans denied where 85% of a class composed of veterans or courses offered for less than two years to avoid courses created just to exploit veterans); Ferguson v. Skrupa, 372 U.S. 726, 727 (1963) (only lawyers permitted to engage in “debt adjusting” because of trust relation requirement); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 223 (1949) (insurers barred
M. Invalidation: In General

Where the plaintiff's prima facie challenge to a statute, ordinance, regulation or practice is not rebutted by the defendant's justification or denial, or where the justification proves to be a pretext, the remedy is invalidation. Alternatively, upon finding that discrimination is the substantial motivating factor in the administration of a neutral law, the remedy is invalidation of the action taken or threatened.

The maze of equal protection cases suggests a haphazard, unpredictable pattern of judicial claim receptivity. The vagueness of standards can encourage defendants to settle so as to avoid potential invalidation. Alternatively, such confusion can encourage government officials to ignore the law, as cynicism over the crazy quilt of cases suggests that any practice or classification has a good chance of validation.

In cases not presenting burdens on fundamental rights or suspect classes, practices and distinctions are upheld unless found to be arbitrary or, alternatively, standardless.

Where the Court can conjure no relationship between the expressed or apparent legislative goal and the means chosen, the classification is susceptible to a finding of irrationality. The Court has found classifications irrational in cases involving the regulation of access to justice, gender, insurance,

from engaging in business of undertaking due to danger of overreaching to obtain life insurance proceeds).

233. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882-83 (1985) (domestic tax preference deemed unrelated to goal of encouraging domestic investment by foreign insurers); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (preference for male as estate administrator based on stereotype that women lack business acumen); cf. Hayes v. Missouri, 120 U.S. 68, 71 (1887) (fourteenth amendment does not prohibit legislation limited as to the objects to which it is directed or by the territory within which it is to operate).

234. Department of Agric. v. Moreno, 413 U.S. 528, 535-38 (1973) (despite desire to prevent fraud, denying food stamps to families containing unrelated persons is overinclusive and only designed to punish communes); Lindsey v. Normet, 405 U.S. 56, 74-79 (1972) (double bond requirement for tenants appealing evictions unrelated to rent or damages is improper); Smith v. Cahoon, 283 U.S. 553, 567 (1931) (no apparent reason to exempt certain carriers from a regulatory statute; F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("reasonable, non-arbitrary...having fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike"). But see Heath & Milligan Mfg. Co. v. Worst, 207 U.S. 338, 354 (1907) (citing County of Mobile v. Kimball, 102 U.S. 691, 704 (1881)), (discretion despite the result being "ill-advised, unequal and oppressive legislation").

235. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (six justices in concurring opinions would invalidate limit on civil rights jurisdiction when state fails to hold hearing in limited number of days); Lindsey v. Normet, 405 U.S. 56 (1972) (double bond for tenant appealing eviction unrelated to rent or damages reversed).

236. Reed v. Reed, 404 U.S. 71 (1971) (preference for male as estate administrator based on stereotype that women lack business acumen).

237. Smith v. Cahoon, 283 U.S. 553 (1931) (regulation of carriers which exempts certain food products carriers found to be arbitrary).
social welfare programs,\textsuperscript{238} taxes,\textsuperscript{239} and other subjects.\textsuperscript{240} But a scheme is not arbitrary simply because less burdensome alternative strategies exist.\textsuperscript{241}

Where a classification procedure lacks any criteria it is subject to invalidation. This is an outgrowth of the due process-based first amendment concept of overbreadth\textsuperscript{242} which prevents the chilling of expressive rights by undefined standards for permissive speech.\textsuperscript{243}

VI. TIER II: MID-RANGE: THE IMPORTANT GOVERNMENT INTEREST TEST

Cases involving discrimination on the basis of gender,\textsuperscript{244} illegitimacy,\textsuperscript{245} and arguably alienage\textsuperscript{246} are provided additional protection by the Court, albeit slightly less rigorous scrutiny than that accorded to classifications based on race, national origin, or religion.

Under the mid-range scrutiny standard, the classification must actually serve\textsuperscript{247} an important governmental interest\textsuperscript{248} and not simply arguably serve

\begin{itemize}
\item \textsuperscript{238} Department of Agric. v. Moreno, 413 U.S. 528 (1973) (despite desire to prevent fraud, denying food stamps to families containing unrelated persons is overinclusive and only designed to punish communes).
\item \textsuperscript{239} Williams v. Vermont, 472 U.S. 14 (1985) (sales tax credit for use tax on vehicles purchased out-of-state restricted to residents of state and not to those moving to state at later time serves no valid purpose); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (domestic tax preference deemed unrelated to goal of encouraging domestic investment by foreign insurers); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928) (tax on corporations but not individuals engaged in transportation deemed arbitrary).
\item \textsuperscript{240} Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936) (controlled milk price differential to dealers in business before a set date).
\item \textsuperscript{241} G.D. Searle & Co. v. Cohn, 455 U.S. 404, 420 (1982) (upheld tolling of statute of limitations against unregistered foreign corporations over dissent's suggestion of longer statutes rather than none); Olsen v. Nebraska \textit{ex rel.} Western Reference & Bond Ass'n, 313 U.S. 236, 246-47 (1941) (need for legislation irrelevant).
\item \textsuperscript{242} Lovell v. City of Griffin, 303 U.S. 444, 450-51 (1938) (city ordinance which requires city manager's permission to distribute literature).
\item \textsuperscript{244} Craig v. Boren, 429 U.S. 190 (1976).
\item \textsuperscript{245} Lalli v. Lalli, 439 U.S. 259 (1978).
\item \textsuperscript{247} Craig v. Boren, 429 U.S. 190, 204 (1976); see also Emden, Intermediate Tier Analysis of Sex Discrimination Cases: Legal Perpetuation of Traditional Myths, 43 ALB. L. REV. 73 (1978); Fox, Equal Protection Analysis: Lawrence Tribe, the Middle Tier, and the Role of the Court, 14 U.S.F. L. REV. 525 (1980); Comment, Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth
some rational basis. Mid-range scrutiny differs from the strict scrutiny in that it does not demand the least restrictive or least discriminatory alternative be employed, as is required of suspect classifications and fundamental rights cases. Nevertheless, gender and other semi-suspect classes often employ a less discriminatory alternatives analysis in explaining the impermissibility of the classification challenged. The Court's strict scrutiny review is slightly more rigorous.

VII. Tier III: Strict Scrutiny: The Compelling State Interest Test

In cases presenting a suspect classification or a direct infringement on a fundamental right, the Court demands strict scrutiny. Under this rigorous standard, the state must demonstrate the existence of a compelling state interest, such as national security or serious health, safety, or welfare con-


cerns. The Court has rejected cost the apportionment of state services on the basis of past tax contribution, and administrative convenience as state interests that are compelling.

In addition, upon demonstration of such an interest, the defendant must survive an examination of the choice of means so that the Court can determine whether there exists any less discriminatory alternatives to achieve the compelling governmental interest. Almost invariably, the government’s classification is unable to survive this rigorous scrutiny. As a result, the Court, in order to sustain classifications of which it approves where the test would require invalidation, often avoids the standard by finding the suspect classification label to be inapplicable or the fundamental interest to be only incidentally implicated.

Even if a defendant is able to identify a compelling state interest, the Court demands a showing that the means adopted to serve the vital interest are no more restrictive or discriminatory than is necessary to achieve the objective.


255. Id. at 632-33.

256. Id. at 633-38 (welfare durational residency rejected as means of providing budget predictability, as rule of thumb to determine residency, as safeguard against fraudulent receipt, or as a way to encourage indigent to enter the work force); see also Anderson v. Martin, 375 U.S. 399 (1964) (identification of political candidates’ race not compelling); Avery v. Georgia, 345 U.S. 559 (1953) (prima facie jury exclusion case not rebutted by token black inclusion).


The Court has experimented with various techniques to invalidate classifications touching on social and economic matters, classifications which fall just short of irrationality.

VIII. TIER IV: INTERESTS ARTICULATED BY THE STATE OR ASSUMED BY THE COURT - TOWARD SUBSTANTIVE EQUAL PROTECTION

In mid-tier scrutiny cases, the government's interest must be actually served.261 Even prior to the enunciation of intermediate level scrutiny, the Court had on occasion required that a rational basis actually be served in order to withstand rational basis scrutiny.262 The legislature must articulate a valid purpose.263 The state or the court on its own simply may not advocate or identify an arguably valid interest. There must be proof to support rationality of the legislation rather than the traditional rule that such proof is unnecessary.264 This "semi-semi" suspect standard may be an occasional fluke. On the


262. Gunther, The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972); cf. Trimble v. Gordon, 430 U.S. 762 (1977) (intestate succession statute which allows illegitimates to inherit only from mothers found invalid); Department of Agric. v. Moreno, 413 U.S. 528 (1973) (food stamp denial to households with unrelated persons found irrational despite desire to prevent fraud because of overinclusiveness and motive to punish communes).

263. Weinberger v. Wiesenfeld, 420 U.S. 636, 648-52 (1975) (limit on Social Security survivor benefits to widowers); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (school financing scheme furthers articulated state purpose); McGinnis v. Royster, 410 U.S. 263, 270 (1973); (denial of pre-sentence credit for good behavior furthers articulated state purpose); see also Williams v. Vermont, 472 U.S. 14 (1985) (limiting sales tax credit for vehicles purchased out-of-state to residents serves no valid purpose); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (tax which discriminates in favor of domestic insurance companies and against foreign insurance companies is valid if purpose is rational but invalid if purpose is to be achieved through discrimination).

264. Flemming v. Nestor, 363 U.S. 603, 611 (1960) (utterly lacking in rational justification); see also Schweiker v. Wilson, 450 U.S. 221, 235 (1981) (congressional purpose to fund institutions receiving Medicaid and not those not receiving Medicaid held rational); Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980) (not permissible for Congress to draw lines between groups of employees for phasing out benefits); McGinnis v. Royster, 410 U.S. 263, 277 (1973) (interest advanced in litigation by the state not necessarily legislatively stated purpose); Lindsey v. Normet, 405 U.S. 56, 70 (1972) (double bond requirement for tenant appealing wrongful detainer action does not effectuate state's purpose); Schilb v. Kuebel, 404 U.S. 357, 364 (1971) (fee charged on only one type of pretrial release upheld); Dandridge v. Williams, 397 U.S.
other hand, it may be indicative that the rush to declare new suspect and semi-suspect classes or to establish additional fundamental rights may not be an essential quest on the road to equality. Where a scheme appears arbitrary, the Court may require the defendant to make a showing that the means serve a valid health, safety, or welfare concern; rather than merely having the defendant articulate a valid concern, or expecting the court to discover its own rationale for the measure. City of Cleburne v. Cleburne Living Center, Inc., in invalidating the exclusion of a group home for the mentally retarded under the rational basis standard, appears to adopt this more rigorous rational basis scrutiny. This "rational basis with bite" is most often applied where the state is seeking to serve only semi-important state interests.

In Zobel v. Williams, the Court reviewed a scheme to dispose of Alaskan oil revenues accumulated by the state which allowed larger allotments for longer-term residents. The Court invalidated the scheme under the equal protection clause for fear it would encourage similar state preferences which in turn would create a permanent class structure based on length of residence and resulting in the failure of the common market attributes of the nation. Such fear of a class-based society was also expressed in Plyler v. Doe which refused to allow the exclusion of resident illegal alien children from public


265. Cf: Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463-64 (1981) (if the legislature had evidence before it that leads to a reasonable conclusion which statute is based upon, then fact that conclusion later found to be erroneous is irrelevant and statute is valid).


268. 473 U.S. 432 (1985). See also Hutchinson, More Substantive Equal Protection? A Note on Plyler v. Doe, 1982 Sup. Ct. Rev. 167. Compare Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (invalidation of an insurance tax favoring in-state insurers; articulating an ends scrutiny but premised on achieving valid ends by discriminatory means; the failure to endorse the scheme in light of valid legislative goals indicates a new level of scrutiny) with Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159 (1985) (validating regional banking permitting regional out-of-state banks to acquire local banks where reciprocity provided; distinguishing Ward; here reverting to traditional deferential scrutiny where discrimination resulted as to most banks; perhaps because the measure was reforming and expanding bank holding opportunities; lacking the blatant economic protectionism motive of Ward).

269. See Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 909 (1986) (invalidation of public employment veterans' preference for those who were residents when they entered the military); Logan v. Zimmerman Brush Co., 455 U.S. 422, 441, 444 (1982) (majority would invalidate on equal protection as well as due process grounds a civil rights jurisdictional limit requiring dismissal if state fails to hold hearing within limited time period).

270. 457 U.S. 55, 64 (1982).

271. Id. at 202.
The obvious insurers

Bernalillo County Assessor, invalidating a state veterans' tax preference limited to Vietnam veterans residing in the state as of 1976.

Substantive equal protection was invoked in two tax cases, Metropolitan Life Insurance Co. v. Ward, and Williams v. Vermont. In Ward, the Court invalidated a tax on insurance premiums which preferred domestic insurers with a 1% tax as compared to the 3 to 4% imposed on foreign insurers. The Court, finding the parties waived any challenge to the validity or rationality of the means, focused only on the state's interest. Although the state has an obvious rational interest in encouraging local investment and the growth of its domestic insurance industry, the Court invalidated the scheme because ruling that a purpose designed to discriminate against other states' residents violated equal protection. Implicitly in this was an invalidation of the means employed to serve what ought to have been recognized as rational ends.

In Williams, at issue was a Vermont law under which cars registered in the state were subject to a use tax. The tax was not imposed when the registered car was purchased in Vermont and sales taxes were paid. Further, Vermont granted a credit for use and sales taxes paid in another state to the extent that the other state reciprocated that credit. However, the credit was available only to Vermont residents. The dissent recognized a valid desire to have new residents pay for the privilege of using the extensive highway system. The fourth tier cases, like Lochner, reflect a focus on the proper ends of government regulation rather than the means scrutiny of the post-New Deal jurisprudence. Is substantive equal protection a viable theory for the Rehnquist Court?

IX. THE FOURTH TIER AND THE REHNQUIST COURT

The new substantive equal protection fourth tier is a unique development in the evolution of fourteenth amendment judicial review jurisprudence. Unlike the hidden agendas of conservative economic development in the Lochner era or the liberal preference for federal reformatory legislative autonomy during the New Deal, substantive equal protection has been both a strategy for the left and the right. Liberals attempting to invalidate classifications falling

272. Id. at 218-19.
under the minimal scrutiny of McGowan v. Maryland, joined with conservatives in search of the discretion to judge as well as abandonment of the upper tier rigidity of both the Warren Court strict scrutiny legacy and the more recent Burger Court middle tier scrutiny.

Viewing the six major substantive equal protection cases of the 1980's, a pattern of near universal adoption is revealed. Chief Justice Burger authored the Court's majority opinions in Zobel and Hooper, Justice Brennan authored Plyler, and Justice White has authored the Court's effort in Cleburne and Williams with Ward authored by Justice Powell. Chief Justice Rehnquist and Justice O'Connor joined the group only in the Cleburne ruling. Alternatively, Justice Powell utilized the model or agreed with its application in each decision in which he participated.

Only in Plyler did Chief Justice Burger not accept the new model; while Justices Brennan, Marshall, and Blackmun supported the model in every case but Ward. Justice Stevens agreed in all but Hooper.

Despite the Court's loss through retirement of two authors of substantive equal protection decisions, Chief Justice Burger and Justice Powell, the doctrine is safe. The five justices who joined to support the model in five of the six cases remain on the Court. Little is known of the equal protection views of Justice Scalia, and while Anthony Kennedy, the most recently appointed


280. See also Department of Agric. v. Moreno, 413 U.S. 528 (1973) (early version of substantive equal protection under the Fifth Amendment). But cf. Attorney Gen. v. Soto-Lopez, 476 U.S. 898 (1986) (Justice Brennan, on a right to travel roll after Zobel and Hooper, attempted to upgrade prior residence-based privileges to strict scrutiny; here offering prior state resident veterans a state employment preference, but was only able to garner a plurality of four).


283. Justice Powell did not participate in Hooper and Williams.

284. Justice Scalia, while on the court of appeals, joined in a traditional lower tier decision upholding the railroad retirement pension scheme allowing a Social Security setoff to certain recipients. Givens v. Railroad Retirement Bd., 720 F.2d 196 (D.C. 
Justice, has authored a number of equal protection opinions while sitting on the Court of Appeals, no signal of personal judicial philosophy emerges; their likely close association with the Rehnquist-O’Connor camp, however, suggests occasional support for the model. Indeed, the only real difference between the one out of six adherence by the minority with the five out of six record of the majority lies in the nature of the doctrine. It is not so much reluctance to adopt the model as the inherently subjective nature of a substantive equal protection standard. Chief Justice Rehnquist and Justice O’Connor simply found no constitutional objection to the classification employed in the substantive equal protection opinions they failed to endorse.

The more interesting question is whether the fourth tier reflects good structural constitutional analysis.

No one appears deeply troubled by the methodology employed despite the occasional cry of “Lochner” by voices disagreeing with the results of the model’s application. Conservative jurists have had the ability to invalidate some distasteful classifications and the liberals have enjoyed the new teeth of formerly toothless lower tier rational basis allowing invalidation of arbitrary and unfair laws.

The new composition of the Rehnquist Court suggests the doctrine must await any significant role in liberalizing the Court’s jurisprudence; the likely role may be to continue the pattern of invalidating statutory classifications offensive to the majority. To some, this may give rise to serious concern, in that the new majority on a reconstituted conservative Court could use the doctrine to challenge environmental and economic protection laws long immune from judicial assault under the judicial restraint of the near-discarded New

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Cir. 1983), cert. denied, 469 U.S. 870 (1984). The decision is not significant, however, as it involves both a federal statute and one touching on social welfare legislation. Cf. Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (mandatory military discharge for homosexual conduct sustained in an opinion authored by Judge Bork and joined by Judge Scalia).

285. Judge Kennedy may be characterized as “mainstream” based upon his several equal protection opinions which tend to follow in lock step with Supreme Court precedent. Those opinions do not disclose or suggest Judge Kennedy’s view on substantive equal protection. See Sullivan v. I.N.S., 772 F.2d 609 (9th Cir. 1985) (upheld deportation of homosexual despite hardship on statutory grounds not reaching the equal protection clause); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981) (military discharge for homosexual activities following a three tier traditional model; acknowledging that equal protection covered by fifth amendment and that consensual homosexual conduct may be protected as a fundamental right); In re Paris Air Crash, 622 F.2d 1315 (9th Cir.), cert. denied, 449 U.S. 976 (1980) (traditional rational basis deference to the denial of punitive damages in wrongful death actions); Flores v. Pierce, 617 F.2d 1386 (9th Cir.), cert. denied, 449 U.S. 875 (1980) (discriminatory denial of liquor licenses to Mexican-Americans through circumstantial proof of intent); James v. Ball, 613 F.2d 180 (9th Cir. 1979), aff’d 451 U.S. 355 (1981) (one person-one vote applied to large water district); Fisher v. Reiser, 610 F.2d 629 (9th Cir. 1979), cert. denied, 447 U.S. 930 (1980) (sustaining denial of workers’ compensation cost-of-living adjustment to nonresidents).
Deal lower tier. The lower tier, due to the current Court's disdain for wealth redistribution, is likely to enjoy a prolonged existence; the Rehnquist Court is not about to reconsider decisions such as Rodriguez, Dandridge v. Williams, or Harris v. McCrea.

It can be argued that several unifying themes appear in the substantive equal protection cases, themes which might allow the model to be narrowed. The six cases reviewed suggest four alternative analyses justifying a variation on traditional rational basis validation. First, cases such as Hooper, Zobel, Ward, and Williams suggest a common market economic explanation with the Court playing a traditional role of assuring free trade and avoiding a balkanization of the states.286 Cleburne, Plyler, and Zobel represent an anti-caste principle reflecting the high water mark of the Burger Court egalitarian ideal. Third, all of the cases may represent protective scrutiny for the politically disadvantaged, the out-of-state resident, the nonvoting alien or the retarded.287 Finally, Ward and Williams suggest a new means scrutiny whereby discriminatory methods will not be justified simply because they advance a rational state purpose.288 A decision such as Kotch v. Board of River Port Commissioners,289 sustaining, under the traditional lower tier, a scheme whereby pilot certification was limited to friends and relatives of existing pilots might well be invalidated under the discriminatory means test as well as the possible new substantive equal protection model, if that concept is not to be cabined by the identified four unifying principles.

The danger of substantive equal protection, like the principle of Lochner, is that the new subjectivity of the equal protection together with the expanding protections for property rights under the taking290 and contract291 clauses may provide the rationale for dismantling institutions such as rent and growth control or the environmental protection of the workplace or residence. The Rehnquist Court, contrary to the urging of liberals, should adhere to the concept of judicial restraint which the conservatives under the Burger Court have es-

poused but not followed or face a future constitutional crisis replicating the *Lochner* era. Ironically, the liberal hope that the Court exercise willpower in avoiding the urge to exercise its power subjectively, lies in the Rehnquist Court commitment to positive law and legislative hegemony.