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

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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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1. Lochner v. New York, 198 U.S. 45 (1905).

2. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part, dissenting in part); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting); *cf.* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

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[4] 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.*[5] 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.[6]

The Warren Court dramatically adhered to this two-tier system suggested by *Carolene Products.*[7] If the targets of unfriendly legislation were classified

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(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).

4. *But see* Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547 (1979) (the stigma of the separate but equal legacy and reluctance to attain school integration in the metropolitan setting).

5. 304 U.S. 144, 152 n.4 (1938); *see also* Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982). For support of the heightened scrutiny model, see Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89 (1984).

6. *Cf.* Korematsu v. United States, 323 U.S. 214, 216 (1944); Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977).

7. Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494, 498 (1977).

as "suspect," the legislation received strict scrutiny from the Court,[8] requiring justification by a compelling state interest[9] attainable through no less restrictive or discriminatory alternative strategies.[10]

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.[11]

In establishing alienage as a suspect classification,[12] the Warren Court suggested a trend of inclusion which almost captured gender-based classification.[13] The Burger Court withdrew from the expansive path of the Warren Court and ostensibly reduced the status of alienage to semi-suspect,[14] along with gender[15] and illegitimacy.[16] 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[17] such as color,[18] national origin,[19] or sex;[20] (2) a status of political powerlessness[21] such as that of blacks, aliens, or women,[22] and (3) a history of class-based discrimination[23] such as that based upon race,[24] national origin,

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8. Loving v. Virginia, 388 U.S. 1, 9 (1967) (race); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (national origin); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (race, with dicta extending to Celtic Irishmen).

9. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

10. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

11. Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (race, with dicta extending to Celtic Irishmen).

12. Graham v. Richardson, 403 U.S. 365, 372 (1971).

13. Frontiero v. Richardson, 411 U.S. 677, 686-88, 691-92 (1973) (Powell, J., concurring) (plurality opinion).

14. Plyler v. Doe, 457 U.S. 202, 223 (1982) (public school exclusion of illegal aliens invalidated under lower-tier rationality); Ambach v. Norwick, 441 U.S. 68, 80 (1979) (governmental function, lower-tier or mid-tier scrutiny in exclusion of aliens from teaching); Mathews v. Diaz, 426 U.S. 67, 82-83 (1976) (congressionally established alien exclusion from Medicare governed by rational basis). *But see* Bernal v. Fainter, 467 U.S. 216, 219 (1984) (suspect status applied to exclusion from notaries public by state).

15. Craig v. Boren, 429 U.S. 190, 199 (1976).

16. Lalli v. Lalli, 439 U.S. 259, 265 (1978).

17. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (gender); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972) (illegitimacy). *See generally* Abrams, *Primary and Secondary Characteristics in Discrimination Cases*, 23 VILL. L. REV. 35 (1977-1978).

18. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

19. *Id.*

20. *Id.*

21. *Id.* at 686 n.17.

22. *Id.*

23. *Id.* at 684.

24. *Id.* at 685.

alienage, illegitimacy, or sex[25] 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 family[33] 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 charged[36] were held to permit invocation of strict scrutiny.

The rational basis test allows reasonable[37] legislation to take one step at a time[38] in serving needs of health, safety, and welfare.[39]

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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.").

27. Schwartz, *A "New" Fourteenth Amendment: The Decline of State Action, Fundamental Rights, and Suspect Classifications Under the Burger Court*, 56 CHI. [-]KENT L. REV. 865, 891 (1980).

28. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

29. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985) (group home exclusion found irrational); Department of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (food stamp denial found irrational).

30. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (interstate travel).

31. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966); *cf.* Baker v. Carr, 369 U.S. 186, 237 (1962).

32. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (right to obtain information and devices designed to prevent procreation protected under due process).

33. *E.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (interracial marriage prohibition invalidated); *see also* Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring).

34. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

35. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969).

36. *E.g.*, Griffin v. Illinois, 351 U.S. 12, 17-18 (1956); *cf.* Boddie v. Connecticut, 401 U.S. 371, 375-77 (1971) (denial of access to civil proceeding where state holds monopoly, as in seeking a marriage dissolution, prohibited under due process).

37. New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (per curiam) (pushcart vendor restrictions in historic district).

38. Williamson v. Lee Optical, 348 U.S. 483, 489 (1955); *cf.* Railway Express Agency v. New York, 336 U.S. 106, 109-11 (1949).

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.[40] In cases involving classifications touching upon gender,[41] alienage,[42] illegitimacy,[43] (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.[44]

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[45] and to return to an era when

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39. New Orleans v. Dukes, 427 U.S. 297, 300 (1976) (per curiam); *see also* Bowers v. Hardwick, 106 S. Ct. 2841, 2846 (1986) (sodomy statute as applied to homosexuals sustained under due process challenge with Court citing morals as an adequate basis).

40. Craig v. Boren, 429 U.S. 190 (1976) (gender); Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029 (1980); Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F. L. REV. 525 (1980); 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); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); *see also* Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977).

41. Craig v. Boren, 429 U.S. 190, 197-99 (1976); *cf.* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ("sex . . . bears no relation to ability to perform or contribute to society"). *See generally* Abrams, *Primary and Secondary Characteristics in Discrimination Cases*, 23 VILL. L. REV. 35 (1977-1978).

42. Foley v. Connelie, 435 U.S. 291, 294-95 (1978); *cf.* Plyler v. Doe, 457 U.S. 202, 221, 230 (1982) (public school exclusion of illegal aliens invalidated under lower-tier rationality); Ambach v. Norwick, 441 U.S. 68, 73-74, 80-81 (1979) (political function, lower-tier or mid-tier scrutiny in exclusion from teaching); Mathews v. Diaz, 426 U.S. 67, 81-84 (1976) (congressionally established exclusion from Medicare governed by rational basis). *But see* Bernal v. Fainter, 467 U.S. 216, 220 (1984) (suspect status applied to exclusion from notaries public by state); *cf.* Graham v. Richardson, 403 U.S. 365, 372 (1971) (classifications based on alienage "are inherently suspect and subject to close judicial scrutiny").

43. Trimble v. Gordon, 430 U.S. 762, 766-67 (1977); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972). *But see* Lalli v. Lalli, 439 U.S. 259, 273 (1978) (ostensible reduction in standard because inquiry focused upon whether statute's relation to the state's interest so tenuous as to be irrational).

44. Craig v. Boren, 429 U.S. 190, 197 (1976); Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777, 777-78 (1981).

45. *See* Attorney Gen. v. Soto-Lopez, 476 U.S. 898 (1986) (public employment preference for veterans who are long-time residents invalidated on equal protection grounds); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (invalidating ordinance requiring special use permit for mentally retarded group home);

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 bench[47] 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 constitutionality[50] 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.

Williams v. Vermont, 472 U.S. 14 (1985) (invalidating resident-only exemption from a use tax imposed on motor vehicles purchased out-of-state); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (invalidating tax on non-resident insurers); Plyler v. Doe, 457 U.S. 202 (1982) (state cannot deny free public education to illegal alien school children).

46. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part, dissenting in part); Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167.

47. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (per curiam) (Marshall, J., dissenting); Davis, *Justice Rehnquist's Equal Protection Clause: An Interim Analysis*, 63 NEB. L. REV. 288, 304 (1984) (strict scrutiny covers only racial classifications); *see* Landever, *Perceptions of Judicial Responsibility — The Views of the Nine United States Supreme Court Justices as They Consider Claims in Fourteenth Amendment Noncriminal Cases: A Post-Bakke Evaluation*, 14 WAKE FOREST L. REV. 1097 (1978).

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.").

49. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 451 (1985) (Stevens, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (per curiam) (Marshall, J., dissenting); State *ex rel.* Bartmess v. Board of Trustees, 726 P.2d 801, 805 (Mont. 1986); *see also* Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977); Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, 1977 DUKE L.J. 143; Note, *A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in* City of Cleburne v. Cleburne Living Center, 20 LOY. L.A.L. REV. 921 (1987).

50. Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167, 192-93.

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,[52] Chief Justice Stone's 1938 footnote four of *Carolene Products*[53] 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[54] and national origin[55] but also for those classifications that limit the exercise of defined fundamental rights.[56] 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.[57]

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.[58]

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*,[59] suggested these rights were either explicit in the Constitution, implicit in the "penumbras" of specifically guaranted rights, or just beyond the words of the Bill of Rights. Justice Harlan, concurring in *Griswold*, further argued that, upon earlier precedent,[60] such fundamental rights were not limited to explicit or penumbral rights but could include any rights found fundamental to a scheme of ordered liberty.[61]

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."[62]

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52. Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (may not prohibit school from teaching a foreign language).

53. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

54. Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192-94 (1964).

55. *See* Hernandez v. Texas, 347 U.S. 475 (1954).

56. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (voting); Griffin v. Illinois, 351 U.S. 12, 17 (1956) (access to courts).

57. Shapiro v. Thompson, 394 U.S. 618, 634 (1965); *see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986); Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

58. 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 15.7, at 79-84 (1986).

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).

63. Treiman, *Equal Protection and Fundamental Rights — a Judicial Shell Game*, 15 TULSA L.J. 183, 214 (1979); *see also* Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, 1977 DUKE L.J. 143.

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

65. 411 U.S. 1 (1973).

66. *Id.* at 35.

67. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND L.J. 1, 8 (1971).

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 travel[73] 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 clauses[80] 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

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Game, 15 TULSA L.J. 183, 201 (1979).

70. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.7, at 371 (3d ed. 1986).

71. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

72. *See* Griffin v. Illinois, 351 U.S. 12 (1956).

73. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

74. *Id.*

75. Schwartz, *A "New" Fourteenth Amendment: The Decline of State Action, Fundamental Rights, and Suspect Classifications Under the Burger Court*, 56 CHI. [-]KENT L. REV. 865, 880-81 (1980).

76. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (mental retardation and group home living arrangements); Plyler v. Doe, 457 U.S. 202 (1982) (alienage and education).

77. Supreme Court v. Piper, 470 U.S. 274 (1985) (invalidation of attorney residency rule).

78. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (corporate referenda campaign expenditures); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial advertising); Buckley v. Valeo, 424 U.S. 1 (1976) (political campaign spending).

79. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (retroactive modification of employer's compensation obligations prohibited); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (modification of state's own bond obligations by diverting port authority revenues for mass transit prohibited).

80. Roe v. Wade, 410 U.S. 113 (1973).

81. Treiman, *Equal Protection and Fundamental Rights — A Judicial Shell Game*, 15 TULSA L.J. 183, 195 (1979).

impediment to the exercise of a fundamental right, thus avoiding the justification 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 exercise of the fundamental right."[83] *Harris v. McRae*[84] 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 constitutional 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 challenge, 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 implicit in the fifth amendment, once the Supreme Court labels a right fundamental, any governmental impingement on the right is subject to strict scrutiny. 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 analysis. The majority in *Harris*, however, in not applying such analysis argued, as described by commentators, that "[s]pending priorities are to be decided at

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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 travelers remaining outside the United States beyond 30 days).

83. Treiman, *Equal Protection and Fundamental Rights — A Judicial Shell Game*, 15 TULSA L.J. 183, 212 (1979).

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, 412-13 (1981).

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."[87] 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."[88]

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.[89]

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.[90]

Under the *Griffin*[91]/*Douglas*[92] 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.[93]

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

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87. Horan & Marzen, *supra* note 85, at 422.

88. 448 U.S. at 316; *see also* Califano v. Aznavorian, 439 U.S. 170 (1978) (sustained denial of Social Security benefits to travelers remaining outside the United States beyond 30 days); Califano v. Jobst, 434 U.S. 47 (1977) (Social Security may terminate on marriage of dependent survivor recipient). *But cf.* Sherbert v. Verner, 374 U.S. 398 (1963) (religious free exercise objection to working on Sabbath overrides state unemployment compensation benefit scheme), *accord* Thomas v. Review Bd., 450 U.S. 707 (1981) (religious objection to working on weapon's production overrides state unemployment compensation benefit scheme).

89. 448 U.S. at 326.

90. *Id.* at 331 n.4 (Brennan, J., dissenting).

91. Griffin v. Illinois, 351 U.S. 12 (1956).

92. Douglas v. California, 372 U.S. 353 (1963).

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*,[95] 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.[96]

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.[97] As a scheme to protect the politically powerless, the Court imposes differing standards depending on the danger of such bias. Where race,[98] alienage,[99] or national origin[100] 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.[101]

In the semi-suspect categories of alienage,[102] illegitimacy,[103] and gender,[104] the Court imposes a mid-range[105] scrutiny requiring an important governmental interest[106] that is actually served by the regulation to justify discrimination. Alternatively, where government regulation directly burdens a fundamental right, such as voting,[107] interstate travel,[108] access to a fair trial,[109] or the rights of family[110] and personal autonomy,[111] and turns on an irrelevant criterion such as wealth,[112] 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[113] and were reviewed by a standard requiring a rational basis for the

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97. Washington v. Davis, 426 U.S. 229, 241 (1976); *see also* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); *cf.* Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17 (1984).

98. Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984).

99. Bernal v. Fainter, 467 U.S. 216, 219 (1984).

100. Hernandez v. Texas, 347 U.S. 475 (1954).

101. *See* Korematsu v. United States, 323 U.S. 214 (1944).

102. Bernal v. Fainter, 467 U.S. 216 (1984) (suspect classification); Plyler v. Doe, 457 U.S. 202 (1982) (implicitly semi-suspect); Ambach v. Norwick, 441 U.S. 68 (1979) (semi-suspect); Foley v. Connelie, 435 U.S. 291 (1978) (non-suspect).

103. Lalli v. Lalli, 439 U.S. 259 (1978).

104. Craig v. Boren, 429 U.S. 190 (1976).

105. *Id.* at 193.

106. *Id.*

107. Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

108. Shapiro v. Thompson, 394 U.S. 618 (1969).

109. Griffin v. Illinois, 351 U.S. 12 (1956).

110. Zablocki v. Redhail, 434 U.S. 374 (1978).

111. Roe v. Wade, 410 U.S. 113 (1973).

112. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

113. Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981) (upheld California retaliatory tax on foreign insurers where higher taxes charged to California insurers in the foreign insurers' state in order to promote interstate California business); New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam) (sustained grandfather clause exemption from pushcart prohibition).

classification or restriction.[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.[115]

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.[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.

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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).

115. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); *see also* Williams v. Vermont, 472 U.S. 14 (1985) (invalidation on rationality grounds of a use tax for automobiles which allowed a credit to residents of Vermont who bought and paid sales tax for automobiles in another state, but disallowed the credit to those who bought and paid sales tax on the automobile in another state and later moved to Vermont despite presence of rational basis); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (court invalidated tax preference for domestic insurers under rationality test and rejected state's rational basis for the statute); *cf.* Attorney Gen. v. Soto-Lopez, 476 U.S. 898 (1986) (limitation of public employment veteran preference to veterans who were residents when they entered the military invalid, with plurality utilizing strict scrutiny). *See generally* 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); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); *Symposium — Equal Protection, The Standards of Review: The Path Taken and the Road Beyond*, 57 U. DET. J. URB. L. 701 (1980).

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[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[118] holds that as long as the means are debatably related to a valid health, safety, or moral[119] concern of government[120], the Court will recognize a rational basis. This is particularly

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117. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (identifying existence of anti-majoritarian operation); *see also* Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029 (1980); Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979); Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO ST. L.J. 639 (1981); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Michelman, *Politics and Values or What is Really Wrong with Rationality Review*, 13 CREIGHTON L. REV. 487 (1979); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972).

118. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

119. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (sodomy statute as applied to homosexuals sustained under due process).

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. 456, 465 (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); Cleland 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); Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356, 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,[121] business,[122] real estate,[123] and

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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. Yeager, 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, *Equal Protection and Administrative Convenience*, 52 TENN. L. REV. 1 (1984); Barrett, *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).

122. Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (windfall profits tax); Rice v. Norman Williams Co., 458 U.S. 654, 665 (1982) (liquor import rules requiring wholesalers designated by distillers in order to encourage interbrand competition and reduce intrabrand competition); G.D. Searle & Co. v. Cohn, 455 U.S. 404, 408-12 (1982) (state statute tolls statute of limitations for unrepresented foreign corporation); Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671 (1981) (retaliatory tax on foreign insurer premiums upheld where it bears a reasonable relationship to the rational state objective of promoting the state's interstate business); Barry v. Barchi, 443 U.S. 55, 67-68 (1979) (may distinguish thoroughbred from harness horses for regulation); Friedman v. Rogers, 440 U.S. 1, 17 (1979) (optometry trade name ban reasonably related to state's interest in administering state law); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 93-94 (1978) (nuclear accident liability limit); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 164-67 (1973) (due process is not violated by requirement that majority of owners of drugstores be operating pharmacists); Ferguson v. Skrupa, 372 U.S. 726, 732-33 (1963) (non-lawyer excluded from practicing "debt adjusting"); Flemming v. Nestor, 363 U.S. 603, 611 (1960) (need no proof on issue of rationality; here sustaining Social Security denial to deportee although denial based on conduct which was legal when performed); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 223-25 (1949) (conflict for undertaker selling burial insurance); Borden's Farm Prods. Co. v. Ten Eyck, 297 U.S. 251, 263 (1936) (validated milk price rule distinguishing well-advertised brands because Court does not concern itself with the accuracy of the legislative finding but only with the question of whether it so lacks any reasonable basis as to be arbitrary); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (violative to tax local companies with business in the state while exempting local firms

social welfare programs.[124] Legislation may still be challenged where it is arbitrary[125] 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.[126]

In *McGowan v. Maryland*,[127] 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:[128] "[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

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not engaging in local business); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (sustained limits on natural resource exploitation by restricting mineral spring pumping); *cf.* Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 464 (1981) (court found evidence before legislature reasonably supports classification and sustained plastic milk bottle ban under commerce clause challenge).

123. Texaco, Inc. v. Short, 454 U.S. 516, 538-40 (1982) (greater notice for large mineral interest holders under claims-lapse law to encourage multiple ownership); Hodel v. Indiana, 452 U.S. 314, 331-32 (1981) (surface mining regulation protecting prime farm land presumptively valid).

124. Schweiker v. Hogan, 457 U.S. 569, 588-89 (1982) (lower Medicaid income limit for medically needy than for categorically needy such as aged, blind, and disabled); Schweiker v. Wilson, 450 U.S. 221, 230-31 (1981) (no disability benefits paid to those institutionalized in mental hospitals); 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); Harris v. McCrae, 448 U.S. 297, 321-26 (1980) (abortion funding); Califano v. Boles, 443 U.S. 282, 288-94 (1979) (no widows' Social Security benefits for mothers of illegitimate children); Califano v. Jobst, 434 U.S. 47, 54-58 (1977) (termination of disabled child's Social Security benefits upon marriage to ineligible spouse); Maher v. Roe, 432 U.S. 464, 469-80 (1977) (abortion funding); Knebel v. Hein, 429 U.S. 288, 296-97 (1977) (definition of income for food stamp eligibility disallowing job training transportation costs); Mathews v. De Castro, 429 U.S. 181, 185-89 (1976) (Social Security dependent support for married but not divorced caretaker widow); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533-38 (1973) (denial of food stamps to household containing unrelated person fails to serve a legitimate government interest); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 44-53 (1973) (school financing); James v. Valtierra, 402 U.S. 137, 140-43 (1971) (public housing referendum); Dandridge v. Williams, 397 U.S. 471, 483-87 (1970) (maximum welfare grant despite family size); Flemming v. Nestor, 363 U.S. 603, 611-12 (1960) (loss of Social Security on deportation upheld despite retroactivity of rules to punish legal behavior).

125. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (exclusion of group home for mentally retarded is irrational).

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).

127. 366 U.S. 420 (1961).

128. *Id.* at 425-27.

circumstanced shall be treated alike."[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.[130]

The Court has identified social and economic legislation as the area deserving of mere rational basis review. Accordingly, *Dandridge v. Williams*[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.[132]

In *City of New Orleans v. Dukes*[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.[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[135] and public utilities[136] have been singled out

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129. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

130. Williamson v. Lee Optical, 348 U.S. 483, 488-89 (1955); Railway Express Agency v. New York, 336 U.S. 106, 109-10 (1949); Nebbia v. New York, 291 U.S. 502, 521 (1934).

131. 397 U.S. 471, 483-87 (1970); *see also* G.D. Searle & Co. v. Cohn, 455 U.S. 404, 408-12 (1982) (sustained tolling statute on unregistered foreign out-of-state corporations); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810-14 (1976) (upheld preference for in-state abandoned automobile hulk bounties).

132. 397 U.S. at 485. *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).

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)).

134. 427 U.S. at 303-04.

135. Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129 (1968) (full train crew requirements); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940) (higher tax rate); Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267 (1904) (grass cutting obligation); Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96 (1899) (attorneys' fees to prevailing plaintiffs); Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897) (invalidation of rail liability for attorney's fees up to $10 where failure to settle claim eventually established); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894) (rate invalidated but rail rate regulation found valid); Missouri Pac. Ry. v. Humes, 115 U.S. 512 (1885) (fences); Owen v. Meserve, 381 Mass. 273, 408 N.E.2d 867 (1980), *cert. denied*, 449 U.S. 1082 (1981) (railroad liable for negligent injury but not death to trespasser).

136. Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 367-69 (1940) (public utility regulation).

for special rules. The Court, typically sustaining business regulation, has upheld the most subtle of classifications.[137] Generally, classifications utilized in business regulation pass constitutional[138] muster under the equal protection clause except where the most arbitrary of rules are promulgated.[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.[140]

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137. Tigner v. Texas, 310 U.S. 141 (1940) (agriculture versus commerce in antitrust statute); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936) (less rigorous standards for fish canning compared to flour form of processing); Miller v. Strahl, 239 U.S. 426 (1915) (night watchman required in hotels with more than fifty guests); Rosenthal v. New York, 226 U.S. 260 (1912) (junk and used metal dealers); Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912) (multistore price cutters); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) (gas from rock-penetrating wells prohibited but wells not penetrating rock permitted); Engel v. O'Malley, 219 U.S. 128 (1911) (banks with deposits averaging over $500); Heath & Milligan Mfg. Co. v. Worst, 207 U.S. 338 (1907) (paint types).

138. Rice v. Norman Williams Co., 458 U.S. 654 (1982) (alcoholic beverage importers must designate authorized importer); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) (sustaining drug paraphernalia regulations); American Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976) (venue standards for nonresident corporations); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) (majority of corporate drugstore owner stock must be held by managing registered pharmacists); Borden's Farm Prods. Co. v. Ten Eyck, 297 U.S. 251 (1936) (milk price differential for dealers with well-advertised trade name).

139. Rice v. Norman Williams Co., 458 U.S. 654 (1982) (alcoholic beverage importers must designate authorized importer).

140. Texaco, Inc. v. Short, 454 U.S. 516 (1982) (validated lapsed claim statute requiring two-year grace period to file for unused mineral rights favoring multiple rights ownership); Hodel v. Indiana, 452 U.S. 314 (1981) (surface mining restrictions protecting prime farmland); Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456 (1981) (ban on the distribution of plastic milk containers did not violate equal protection clause since the stated goals were to promote resource conservation, to ease solid waste disposal and to conserve energy); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (higher hunting fees for nonresidents to reflect conservation costs); Bacon v. Walker, 204 U.S. 311 (1907) (may distinguish sheep from cattle in regulating public lands grazing); *cf.* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (validated Indian salmon harvesting preference over sport fishermen). *But cf.* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982) (commerce clause invalidation of restrictions on out-of-state groundwater sales).

B. *Taxation*

Classifications utilized in the structuring of federal, state, and local gross receipts,[141] income,[142] inheritance,[143] license,[144] privilege,[145] property,[146] sales,[147] use,[148] severance,[149] windfall profits,[150] and other[151] taxes are accorded deference and are typically sustained under equal protection scrutiny unless found to be irrational.[152] The legislature need believe only that the tax-

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141. Ohio Tax Cases, 232 U.S. 576, 590-91 (1914) (preferring public utilities over railroads in privilege tax measured by gross receipts). *But see* Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 402 (1928) (invalidated taxicab tax applicable to corporations but not individuals).

142. Regan v. Taxation With Representation, 461 U.S. 540 (1983) (I.R.S. may deny charitable status to organization performing substantial congressional lobbying); Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932) (exemption of out-of-state corporate but not individual income to avoid double corporate taxes).

143. Salomon v. State Tax Comm'n, 278 U.S. 484 (1929) (distinction of vested and contingent remainders).

144. Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412 (1937) (chain-store license tax distinguishing between number of stores); Fox v. Standard Oil Co., 294 U.S. 87 (1935) (license tax on stores, including filling stations with chain-stores, taxed more heavily). *But cf.* Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887) (license tax on sales representatives representing out-of-county companies violates commerce clause).

145. Ohio Tax Cases, 232 U.S. 576 (1914) (railroads treated less favorably). *But see* West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390 (1957) (privilege tax on goods delivered from outside city violates commerce clause); Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (chain-stores with stores in more than one county invalid criterion); Southern Ry. v. Greene, 216 U.S. 400 (1910) (more onerous tax invalid if placed solely on foreign corporation).

146. Allied Stores v. Bowers, 358 U.S. 522, 526-28 (1959) (exempts nonresident goods in transit); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 367-69 (1940) (higher tax rates for rails and utilities).

147. Gurley v. Rhoden, 421 U.S. 200 (1975) (sales tax computed on gasoline which includes excise taxes); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940) (higher tax rates for rails and utilities). *But see* Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935) (graduated sales tax based on sales volume invalidated).

148. *But cf.* Williams v. Vermont, 472 U.S. 14 (1985) (use tax preference for in-state residents giving them credit for retail sales tax paid on automobiles purchased out-of-state but not giving new residents credit found invalid).

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

150. Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (protection of consumers justifies pass-through prohibition on windfall profits severance tax and royalty-owner exemption reasonably encourages investment).

151. *But cf.* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (invalidated preferential premiums tax on in-state insurers); State v. American Bankers Ins. Co., 374 N.W.2d 609 (S.D. 1985) (invalidated higher premiums tax on unlicensed and foreign insurers).

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.[153]

Recently, however, the Court has shown an increased willingness to scrutinize and invalidate state taxes under the equal protection clause.[154]

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[155] or violation of contract.[156] 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[157] or destroying property value,[158] may violate the taking or due process clause, but

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Parts Co., 410 U.S. 356, 359-60 (1973) (rational to distinguish individuals from corporations); Nashville, C. & St. L, Ry. v. Browning, 310 U.S. 362, 368-69 (1940) (property distinctions rational); Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890) (no ironclad rule of equal taxation unless clear and hostile discrimination).

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).

155. Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

156. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977); *see also* Comment, *He Who Calls the Tune Must Pay the Piper: Compensation for Regulatory Takings of Property after* First English Evangelical Church v. County of Los Angeles, 53 MO. L. REV. 69 (1988).

157. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (statute requiring landlord to allow cable installation violates owner's right to exclude); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (right to exclude public); United States v. Causby, 328 U.S. 256 (1946) (airplane overflights). *But cf.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (due process not violated by statute which required half of the coal of a mine to remain in the ground for surface structure support).

158. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (invalidation of conditioning development on granting of public beach access); Agins v. City of Tiburon, 447 U.S. 255 (1980) (to constitute taking, mere diminution of value by down zoning insufficient); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (historic preservation development restrictions do not destroy property values); *cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987) (allowing a damage remedy for excessive land regulation).

except for those few rules violative of other fundamental rights,[159] classifications affecting development,[160] landlords, and tenants,[161] will generally survive review under the due process and equal protection[162] clauses, for the test is but a mere rational basis.

D. *Labor Regulation*

Rules and laws regulating the conditions of employment[163] such as collective bargaining, retirement,[164] and workers compensation,[165] are generally sustained under the rational basis minimum scrutiny standard enjoyed by business and economic legislation.[166]

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159. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (sign regulation and the first amendment); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (nude dancing ban offends first amendment); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalid to restrictively define "family" so that occupancy controls exclude relatives). *But cf.* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (deference in adult use zoning); Young v. American Mini Theaters, Inc. 427 U.S. 50 (1976) (adult entertainment zoning validated under first amendment); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (housing ordinance limit on number of unrelated persons sustained under due process over associational claims).

160. City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976) (sustaining super majority zone change referendum; due process); James v. Valtierra, 402 U.S. 137 (1971) (sustaining mandatory public housing referendum; equal protection); Gorieb v. Fox, 274 U.S. 603 (1927) (exceptions from building line restrictions; due process); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (zoning sustained in excluding certain businesses from particular districts; due process); Welch v. Swasey, 214 U.S. 91 (1909) (height limits distinguished by district; equal protection and due process). *But cf.* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (zoning exclusion of group home for mentally retarded invalid; due process).

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).

162. James v. Valtierra, 402 U.S. 137 (1971); Gorieb v. Fox, 274 U.S. 603 (1927); *cf.* Young v. American Mini Theaters, Inc., 427 U.S. 61 (1981).

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. Fioto, 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).

166. Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 291-92 (1984) (all employees need not be covered under "meet and confer" provisions of labor code); Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174-77 (1980) (windfall of Social Security plus pension eliminated leaving certain classes of persons receiving

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]

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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).

167. 366 U.S. 420 (1961). *But cf.* Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (employee statutory right to sabbath holiday violates establishment of religion clause).

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

169. *See* Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Kushner, *Toward the Central Meaning of Religious Liberty: Non-Sunday Sabbatarians and the Sunday Closing Cases Revisited*, 35 Sw. L.J. 557 (1981).

170. *Cf.* Caldor's, Inc., v. Bedding Barn, Inc., 177 Conn. 304, 417 A.2d 343 (1979); People v. Abrahams, 40 N.Y.2d 277, 353 N.E.2d 574, 386 N.Y.S.2d 661 (1976); Kroger Co. v. O'Hara Township, 481 Pa. 101, 392 A.2d 266 (1978).

171. Kushner, *supra* note 169, at 566 n.68.

172. Friedman v. Rogers, 440 U.S. 1 (1979) (optometry trade name ban imposed by regulatory board composed of non-commercial optometrists); Williamson v. Lee Optical, 348 U.S. 483 (1955) (prescriptions to replace eyeglasses unless ready-to-wear); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949) (insurance agents barred from engaging in the business of undertaking); Goesaert v. Cleary, 335 U.S. 464 (1948) (women denied bartender license unless wife or daughter of tavern owner); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (river boat pilot certification generally restricted in practice to friends and relatives of existing pilots); Barbier v. Connolly, 113 U.S. 27 (1885) (laundry zoning and operation restrictions); *cf.* Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 472 U.S. 159 (1985) (may restrict bank acquisitions to the regional area).

173. Ferguson v. Skrupa, 372 U.S. 726 (1963) (non-lawyer barred from "debt adjusting"); Goesaert v. Cleary, 335 U.S. 464 (1948) (women denied bartender license unless wife or daughter of tavern owner); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (slaughterhouse monopoly). *But cf.* Supreme Court of New Hampshire v.

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.[174] But grandfather clauses may be subject to invalidation where devised as a scheme to exclude a class.[175]

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,[176] mandatory retirement at age fifty,[177] or sixty,[178] and other age-based assistance program classifications.[179] Statutes of limitation also are ostensibly arbitrary in cutting off actions after a given period.[180] Such line drawing in the regulation of advertising,[181] automobile guest statutes,[182] consumer safety,[183] the criminal justice

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

174. City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam) (grandfather clause applying to pushcart vendors). *But cf.* Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936) (preferential controlled milk prices to dealers in business continuously since a set date invalid as mere economic advantage).

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).

176. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) (remanded equal protection question under state law).

177. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) (uniformed police).

178. Vance v. Bradley, 440 U.S. 93 (1979) (foreign service retirement justified by legislative convenience).

179. Bowen v. Owens, 476 U.S. 340 (1986) (Social Security to widowed spouse who remarries after age 60); Schweiker v. Wilson, 450 U.S. 221 (1981) (disability stipend denied to those age 21 to 65 in mental institutions).

180. *Cf.* G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) (sustained statute which allows tolling of the limitation period against foreign corporations not represented in New Jersey). *But cf.* Clark v. Jeter, 108 S. Ct. 1910 (1988) (six-year paternity statute invalid); Pickett v. Brown, 462 U.S. 1 (1983) (two-year paternity statute invalid; here permitting 60-day claim notice to county following disability cessation).

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).

182. Silver v. Silver, 280 U.S. 117 (1929).

183. Railway Express Agency v. New York, 336 U.S. 106 (1949) (advertising

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

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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 esprit de corps of the pilots and the safety of the public).

184. Johnson v. Louisiana, 406 U.S. 356 (1972) (less than unanimous jury verdicts in noncapital hard-labor cases).

185. Marshall v. United States, 414 U.S. 417 (1974) (may exclude addicts with two prior felony convictions from drug rehabilitation diversion program providing treatment in lieu of incarceration); McGinnis v. Royster, 410 U.S. 263 (1973) (no rational basis exists for denial of credit for good behavior for presentence incarceration in the county jail); Johnson v. Louisiana, 406 U.S. 356 (1972) (non-unanimous jury in noncapital hard-labor cases); Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51 (1937) (may double sentence on attempted escape); Graham v. West Virginia, 224 U.S. 616 (1912) (heavier penalties for habitual offenders); Pace v. Alabama, 106 U.S. 583 (1883) (held no person to be subject to greater or different punishment in similar circumstances yet sustained higher penalties for interracial fornication and adultery).

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).

187. Barry v. Barchi, 443 U.S. 55, 67-68 (1979) (different suspension procedures for harness as compared to thoroughbred racing for appearance of integrity).

188. Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949) (life insurers not permitted to engage in business of undertaking).

189. Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59 (1978) (limit on nuclear accident liability).

190. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) (federal pension withdrawal rule covering those withdrawing in five-month period prior to enactment sustained as rational).

191. Breard v. Alexandria, 341 U.S. 622 (1951) (privacy-based limits on door-to-door canvassers and peddlers); Schmidinger v. City of Chicago, 226 U.S. 578 (1913) (standard food sizes); Barbier v. Connolly, 113 U.S. 27 (1885) (laundry operating hours restrictions sustained).

192. Martinez v. California, 444 U.S. 277, 281 n.4 (1980) (sovereign immunity for parole-release decisions sustained over due process challenge).

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).

194. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) (federal pension withdrawal rule covering those withdrawing in five-month period prior to enactment sustained as rational over retroactive legislation fifth amendment challenge); Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456 (1981) (statute not arbitrary as long as there is some rational basis for the legislation, whether or not it turns out to be correct); Barry v. Barchi, 443 U.S. 55 (1979) (different suspension procedures for harness as compared to thoroughbred racing for appearance of integrity); Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59 (1978) (limit on nuclear accident liability); McGinnis v. Royster, 410 U.S. 263 (1973) (denial of credit for good behavior for presentence incarceration has a rational basis); Johnson v. Louisiana, 406 U.S. 356 (1972) (unanimous jury only in capital cases); Silver v. Silver, 280 U.S. 117 (1929) (automobile guest statute).

H. *Social Welfare Legislation*

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*[195] 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*[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.[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,[198] sex,[199] illegitimacy,[200] or other improper classifications[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.[202] Generally, however, classifications established under pro-

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195. 397 U.S. 471 (1970). *See generally* Coven & Fersh, *Equal Protection, Social Welfare Litigation, the Burger Court*, 51 NOTRE DAME LAW. 873 (1976). *But cf.* Comment, *Intermediate Equal Protection Scrutiny of Welfare Laws that Deny Subsistence*, 132 U. PA. L. REV. 1547 (1984).

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").

197. Dandridge v. Williams, 397 U.S. 471 (1970); *see also* Mathews v. Eldridge, 424 U.S. 319 (1976) (discounting the impact of the loss of disability benefits); United States v. Kras, 409 U.S. 434 (1973) (trivializing the ability of indigent to acquire bankruptcy court filing fees).

198. Jefferson v. Hackney, 406 U.S. 535, 548-49 (1972) (claim not proven by bare statistical argument).

199. Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Note, *Sex Classifications in the Social Security Benefit Structure*, 49 IND. L.J. 181 (1973). *But cf.* Heckler v. Mathews, 465 U.S. 728 (1984) (invalid sex-based Social Security rules on spousal benefits may be retained temporarily, here five years, to protect retirement expectations and fiscal impact).

200. Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (per curiam). *But cf.* Califano v. Boles, 443 U.S. 282 (1979) (may deny Social Security benefits to surviving unmarried mother).

201. *But cf.* Bowen v. Roy, 476 U.S.693 (1986) (rejecting Native American exemption from use of Social Security number for program identification); United Steelworkers v. Block, 578 F. Supp. 1417 (D.S.D. 1982) (restrictions on food stamps for striking workers not violative of first amendment freedom of association).

202. Department of Agric. v. Moreno, 413 U.S. 528 (1973).

grams dealing with aid to dependent children,[203] black lung disease victims,[204] food stamps,[205] Medicaid,[206] Social Security,[207] S.S.I. aid to the aged and disabled,[208] unemployment compensation,[209] and veterans benefits,[210] are sustained.

I. *Health Legislation*

Government classifications established in setting health standards[211] or seeking to protect the public health,[212] such as in the case of quarantine or

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203. Harris v. Rosario, 446 U.S. 651 (1980) (per curiam) (sustained lower welfare benefits to Puerto Rico than to states).

204. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (black lung benefits law sustained as rational despite use of irrebuttable presumptions in benefit applicability).

205. Lyng v. International Union, 108 S. Ct. 1184 (1988) (denial of food stamp eligibility to households with strikers); Lyng v. Castillo, 477 U.S. 635 (1986) (all immediate relatives in home considered part of one household for purposes of food stamp eligibility); Knebel v. Hein, 429 U.S. 288 (1977) (travel expenses under training program may be denied as deduction in computing income for food stamp eligibility).

206. Alexander v. Choate, 469 U.S. 287 (1985) (reduction of maximum hospitalization days not violative of rights of disabled); Harris v. McRae, 448 U.S. 297 (1980) (denial of Medicaid coverage for medically necessary abortion coverage); Maher v. Roe, 432 U.S. 464 (1977) (denial of Medicaid coverage for non-therapeutic abortion coverage); Beal v. Doe, 432 U.S. 438 (1977) (abortion funding denial not violative of supremacy clause).

207. Bowen v. Owens, 476 U.S. 340 (1986) (benefits to widowed spouse remarrying after age 60 but not to similarly situated divorced widows); Califano v. Boles, 443 U.S. 282 (1979) (no widows' Social Security benefits for mothers of illegitimate children); Califano v. Aznavorian, 439 U.S. 170 (1978) (extended foreign travel by recipients causes loss of benefits); Califano v. Jobst, 434 U.S. 47 (1977) (termination of disabled surviving child's Social Security benefits upon marriage to ineligible recipient); Mathews v. De Castro, 429 U.S. 181 (1976) (divorced woman under age 62 not entitled to Social Security if ex-husband retires or becomes disabled while married woman would receive Social Security); Richardson v. Belcher, 404 U.S. 78 (1971) (Social Security disability reduced by public workers' compensation but not private insurance); Flemming v. Nestor, 363 U.S. 603 (1960) (loss of Social Security rights after deportation is effective); *cf.* Weinberger v. Salfi, 422 U.S. 749 (1975) (widow's benefits denied where fail to meet nine-month duration of relationship requirement of Social Security).

208. Schweiker v. Wilson, 450 U.S. 221 (1981) (subsistance allowance provided by supplemental security income disability may be denied to those ages 21 through 64 in mental hospitals not eligible for Medicaid).

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).

210. Johnson v. Robison, 415 U.S. 361 (1974) (veterans benefits denied to conscientious objectors).

211. State of Missouri *ex rel.* Hurwitz v. North, 271 U.S. 40 (1926) (physician license revocation for then-illegal abortion performance).

212. Hayman v. City of Galveston, 273 U.S. 414 (1927) (exclusion of osteopaths

inspection[213] laws or rules designed to extend health care benefits,[214] 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*,[215] 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,[216] the due process clause of the fourteenth amendment,[217] and the press and speech clause of the first amendment.[218]

K. *Community Development*

Young v. American Mini Theaters, Inc.,[219] 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.[220] This type of regulation, serving goals of community development and improvement, is typically upheld[221] unless it touches upon a suspect classification in its administration.[222] The Court has given its greatest deference under the rational basis test to classifications

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from public hospitals).

213. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 147 (1837) (dictum) (consistency with commerce and police powers) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 12 (1824)).

214. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (sustained black lung disease benefits despite use of irrebuttable presumptions).

215. 427 U.S. 297, 304 (1976) (per curiam); *cf.* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 814 (1976) (sustained state preference for in-state abandoned automobile hulk bounties).

216. Berman v. Parker, 348 U.S. 26 (1954) ("public use" broadly defined under urban renewal).

217. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (restricted "family" zoning definition valid in single-family district).

218. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (adult use zoning permissible without proof of local need); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (billboard regulation); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (adult entertainment zoning).

219. 427 U.S. 50 (1976).

220. *Id.*; *accord* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

221. New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam) (city empowered to preserve charm, distinctive character, and economic vitality of city). *But cf.* Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (more exacting scrutiny where political speech restricted although deference is given to regulating commercial speech in the name of community improvement).

222. Moore v. East Cleveland, 431 U.S. 494 (1977) (restrictive housing occupancy regulation with a narrow definition of the word "family" invalidated).

designed to reform societal evils.

L. *Remedial Legislation*

Where legislatures pass reformative 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 reformative 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 reformative 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]

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223. 394 U.S. 802 (1969).

224. *Id.* at 809, 811; *see also* Geduldig v. Aiello, 417 U.S. 484, 492-97 (1974) (workers' compensation not yet covering pregnancy benefits); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) (state aid as effort to extend education); Lindsey v. Normet, 405 U.S. 56, 70-72 (1972) (upholding summary eviction proceedings which deny the right to raise affirmative defenses since summary eviction historically prevents the tenant from turning to self-help practices); Schilb v. Kuebel, 404 U.S. 357, 370-71 (1971) (bail reform upheld despite financial impact on indigent).

225. Erznozik v. City of Jacksonville, 422 U.S. 205, 215 (1975).

226. 336 U.S. 106 (1949).

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).

228. Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) (voting rights legislation); *see also* Fullilove v. Klutznick, 448 U.S. 448, 485 (1980) (affirmative action); Califano v. Jobst, 434 U.S. 47, 57 (1977) (Social Security disability marriage rule); New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (per curiam) (pushcart vendor grandfather clause provision); Geduldig v. Aiello, 417 U.S. 484, 495 (1974) (disability benefits); Jefferson v. Hackney, 406 U.S. 535, 546 (1972) (welfare benefit levels);

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]

Schilb v. Kuebel, 404 U.S. 357, 364 (1971) (bail); Dandridge v. Williams, 397 U.S. 471, 484-86 (1970) (welfare); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) (absentee voter ballots); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (consumer protection eyeglass regulation); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610 (1935) (dental advertising); Keokee Consol. Coke Co. v. Taylor, 234 U.S. 224, 227 (1914) (company store regulation); Ozan Lumber Co. v. Union County Nat'l Bank, 207 U.S. 251, 256-57 (1907) (patent transfers); Note, *Reforming the One Step at a Time Justification in Equal Protection Cases*, 90 YALE L.J. 1777 (1981). *But cf.* Erznozik v. City of Jacksonville, 422 U.S. 205, 215 (1975) (one step at a time doctrine less applicable where freedom of expression restricted).

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).

230. 394 U.S. 802 (1969).

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 a 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[233] or apparent[234] 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,[235] gender,[236] insurance,[237]

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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,[238] taxes,[239] and other subjects.[240] But a scheme is not arbitrary simply because less burdensome alternative strategies exist.[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[242] which prevents the chilling of expressive rights by undefined standards for permissive speech.[243]

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

Cases involving discrimination on the basis of gender,[244] illegitimacy,[245] and arguably alienage[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[247] an important governmental interest,[248] and not simply arguably serve

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).

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).

240. Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936) (controlled milk price differential to dealers in business before a set date).

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 suggestions of longer statutes rather than none); Olsen v. Nebraska *ex rel.* Western Reference & Bond Ass'n, 313 U.S. 236, 246-47 (1941) (need for legislation irrelevant).

242. Lovell v. City of Griffin, 303 U.S. 444, 450-51 (1938) (city ordinance which requires city manager's permission to distribute literature).

243. *Id.*; *cf.* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 628-35 (1980) (door-to-door charitable solicitation rule invalid under overbreadth, albeit for arbitrariness rather than lack of standard).

244. Craig v. Boren, 429 U.S. 190 (1976).

245. Lalli v. Lalli, 439 U.S. 259 (1978).

246. *Compare* Bernal v. Fainter, 467 U.S. 216 (1984) (strict scrutiny in restriction for notaries public) *and* Plyler v. Doe, 457 U.S. 202 (1982) (due process-oriented lower tier rational basis invalidation of exclusion of illegal aliens from public school) *with* Ambach v. Norwick, 441 U.S. 68 (1979) (mid-tier or rational basis standard validating exclusion from public school teaching).

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.[249] Nevertheless, gender and other semi-suspect classes often employ a less discriminatory alternatives analysis in explaining the impermissibility of the classification challenged.[250] 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.[251] Under this rigorous standard, the state must demonstrate the existence of a compelling state interest, such as national security[252] or serious health, safety, or welfare con-

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Amendment Doctrine, 14 HARV. C.R.-C.L. L. REV. 529 (1979); Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771 (1978); Note, *Equal Protection and the "Middle-Tier": The Impact on Women and Illegitimates*, 54 NOTRE DAME L. REV. 303 (1978); *cf.* Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912 (1981).

248. *Craig*, 429 U.S. at 191; *see also* Heckler v. Mathews, 465 U.S. 728, 745-48 (1984) (planned retirement in reliance on gender-based pension classification serves important government interest); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-27 (1982) (mere recitation of benign affirmative action not an important government interest); Kirchberg v. Feenstra, 450 U.S. 455, 459-61 (1981) (desire for one property manager does not justify husband's unilateral right to dispose of jointly held property); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150-54 (1980) (sufficient interest not present in scheme requiring proof of dependency for widower to receive workers' compensation benefits); Orr v. Orr, 440 U.S. 268, 278-79, 281 n.12 (1979) (rejecting administrative convenience or fiscal exigency or stereotype of women as more needy as a justification for women-only alimony); Lalli v. Lalli, 439 U.S. 259, 268 (1978) (illegitimacy paternity restrictions to avoid lengthy, difficult-to-prove, probate disputes); Califano v. Webster, 430 U.S. 313, 316-17 (1977) (articulated important governmental objective in Social Security computation scheme designed to ameliorate prior discrimination against women); Califano v. Goldfarb, 430 U.S. 199, 212-13 (1977) (focus on actual, not presumed, purpose in invalidating widower Social Security dependency proof requirement).

249. Dunn v. Blumstein, 405 U.S. 330, 337, 343 (1972) (voting); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race).

250. Craig v. Boren, 429 U.S. 190, 201 (1976).

251. Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Loving v. Virginia, 388 U.S. 1 (1967) (race in interracial marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (birth control counseling); McLaughlin v. Florida, 379 U.S. 184 (1964) (interracial cohabitation); Korematsu v. United States, 323 U.S. 214 (1944) (wartime area exclusion of those of Japanese ancestry).

252. Korematsu v. United States, 323 U.S. 214 (1944); *see also* Yamamoto, *Korematsu Revisited — Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

cerns.[253] The Court has rejected cost,[254] the apportionment of state services on the basis of past tax contribution,[255] and administrative convenience[256] 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.[257] 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[258] or the fundamental interest to be only incidentally implicated.[259]

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.[260]

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253. Tancil v. Woolls, 379 U.S. 19 (1964), *aff'd per curiam sub nom.* Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156 (S.D. Va. 1964) (official records may disclose race for vital statistics purposes). *But see* Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (prison racial segregation not justified by concerns of security and discipline); McLaughlin v. Florida, 379 U.S. 184 (1964) (sexual decency does not justify ban on interracial cohabitation); *cf.* Board of Directors v. Rotary Club, 107 S. Ct. 1940 (1987) (ensuring equal access for women); United States v. Paradise, 480 U.S. 149 (1987) (compelling interest to eliminate pattern of racial employment exclusion); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (ensuring equal access for women).

254. Shapiro v. Thompson, 394 U.S. 618, 627-33 (1969) (welfare durational residency test).

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).

257. Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 909-10 (1986) (plurality opinion).

258. Geduldig v. Aiello, 417 U.S. 484 (1974) (pregnancy benefit exclusion not sex-based).

259. Harris v. McRae, 448 U.S. 297 (1980) (personal autonomy intact despite denial of government-funded abortions for the poor); Califano v. Aznavorian, 439 U.S. 170 (1978) (travel rights not denied in refusing Social Security benefits to extended travelers); *cf.* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (concern for prison friction and minimal first amendment infringement justified ban on union organizing).

260. Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 909-10 (1986) (veterans' benefits prior residency requirement's goal could be realized with a credit for prior residence rather than total restriction for nonresidents); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974) (non-emergency health benefits residency); Dunn v.

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

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Blumstein, 405 U.S. 330, 343 (1972) (voting residency); Shapiro v. Thompson, 394 U.S. 618, 637 (1969) (better way to avoid fraud than to condition welfare on durational residency); Struve, *The Less-Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967) (states apply strict alternatives scrutiny in economic substantive due process cases).

261. Craig v. Boren, 429 U.S. 190, 204 (1976); Comment, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529, 542 (1979).

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;[265] rather than merely having the defendant articulate[266] a valid concern, or expecting the court to discover its own rationale for the measure.[267] *City of Cleburne v. Cleburne Living Center, Inc.*,[268] 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.[269]

In *Zobel v. Williams*,[270] 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*[271] which refused to allow the exclusion of resident illegal alien children from public

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471, 485 (1970) (maxium welfare grant); McGowan v. Maryland, 366 U.S. 420, 426 (1961) (law which restricts sale of certain merchandise on Sundays but exempts some stores upheld); Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (court interpreting what legislature might have included).

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).

266. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

267. Schweiker v. Wilson, 450 U.S. 221 (1981).

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.

schools.[272] *Zobel* was followed in a subsequent fourth tier ruling in *Hooper v. Bernalillo County Assessor*,[273] invalidating a state veterans' tax preference limited to Vietnam veterans residing in the state as of 1976.[274]

Substantive equal protection was invoked in two tax cases, *Metropolitan Life Insurance Co. v. Ward*,[275] and *Williams v. Vermont*.[276] 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.[277] 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 reformative 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.

273. 472 U.S. 612 (1985).

274. *Cf.* Attorney Gen. v. Soto-Lopez, 476 U.S. 898 (1986) (plurality of four based on fundamental right to travel infringement; joined by two concurring substantive equal protection opinions).

275. 470 U.S. 869 (1985).

276. 472 U.S. 14 (1985).

277. One commentator endorses an impermissible purpose analysis for uniform application of equal protection principles, an approach not expressly analyzed in light of the *Lochner* era. Note, *Impermissible Purposes and the Equal Protection Clause*, 86 Colum. L. Rev. 1184 (1986); *see also* Comment, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. Chi. L. Rev. 1454 (1986).

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,[278] a pattern of near universal adoption is revealed. Chief Justice Burger authored the Court's majority opinions in *Zobel* and *Hooper*,[279] Justice Brennan authored *Plyler*,[280] and Justice White has authored the Court's effort in *Cleburne* and *Williams*,[281] with *Ward* authored by Justice Powell.[282] 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.[283]

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,[284] and while Anthony Kennedy,[285] the most recently appointed

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278. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (exclusion of group home for mentally retarded invalid); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (veteran property tax preference limited to state residents before 1976 invalid); Williams v. Vermont, 472 U.S. 14 (1985) (resident vehicle use tax preference invalid); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (domestic insurer premium tax preference invalid); Plyler v. Doe, 457 U.S. 202 (1982) (improper to exclude undocumented alien children from free public education); Zobel v. Williams, 457 U.S. 55 (1982) (invalid to distribute mineral income based on length of state residency).

279. Chief Justice Burger also authored the concurring "swing" vote opinion based on substantive equal protection in Attorney Gen. v. Soto-Lopez, 476 U.S. 898 (1986).

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).

281. Justice White also authored a cryptic concurring opinion in Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 916 (1986) (White, J., concurring), which, in citing irrationality, represents a substantive equal protection opinion.

282. Justice Powell also authored Trimble v. Gordon, 430 U.S. 762 (1977), an apparent substantive equal protection decision joined by Justices Brennan, White, Marshall, and Stevens.

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 Pilot 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 taking[290] and contract[291] 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-

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286. *See* Anderson, *Equal Protection During the 1984 Term: Revitalized Rational Basis Examination in the Economic Sphere*, 36 DRAKE L. REV. 251 (1986-1987) (mechanism to invalidate questionable economic regulation).

287. Note, *A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in* City of Cleburne v. Cleburne Living Center, 20 LOY. L.A.L. REV. 921, 960-61 (1987).

288. *See* Comment, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454 (1986).

289. 330 U.S. 552 (1947).

290. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (invalidation of public beach access condition to development approval); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (cable line to tenant a physical occupation of owner's property); *cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987) (allowing a damage remedy for excessive land regulation).

291. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (pension reform invalidation); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (use of transportation bond proceeds for mass transit invalidated).

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.