SUCCESSFUL RATIONAL BASIS CLAIMS IN THE SUPREME COURT FROM THE 1971 TERM THROUGH *ROMER V. EVANS*

ROBERT C. FARRELL*

The Supreme Court's 1996 decision in *Romer v. Evans*[1] was significant in that it was the first case in which the Court found unconstitutional a law that disadvantaged persons on the basis of their sexual orientation.[2] As remarkable as was the result in the case, equally remarkable was the manner in which the Court reached its result. The Court chose not to address the issue of heightened scrutiny for the challenged classification,[3] even though the Colorado Supreme Court had used heightened scrutiny in its decision below.[4] Instead, the Court ignored questions about the appropriate level of scrutiny and invalidated the Colorado rule on the basis of rationality review,[5] a review that is ordinarily deferential and minimal. Justice Scalia, dissenting, was of the view that the majority's decision in *Romer* was without precedent.[6] This is not true. Although the decision in *Romer* was not typical of rational basis decisions, it was hardly unprecedented.

This Article addresses successful rational basis claims under the Equal Protection Clause in the Supreme Court. These cases are sufficiently rare to stand out as unusual, but they do exist. In the past twenty-five years, the Court has decided ten such cases, while during the same time period, it has rejected rational basis arguments on one hundred occasions. This ratio of successful to unsuccessful claims is not surprising given that rational basis review is considered an extremely deferential standard. This Article examines the small number of successful rational basis claims in search of common and predictable patterns of selection, reasoning, and use as precedent. Unfortunately, the Court's selection of cases to which it will give a heightened, less deferential rationality review follows no obvious pattern. The Court never explains why it has selected a particular case for heightened rationality. The Court's analysis differs from case to case. None of these cases has had a significant precedential impact on

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* Professor of Law, Quinnipiac College School of Law. B.A., Trinity College; J.D., Harvard University. The author thanks Sean Hanlon, a student at Quinnipiac College School of Law, for his substantial assistance in the writing of this Article.

1. 517 U.S. 620 (1996).

2. *Id.* at 635.

3. *Id*. at 626 ("We granted certiorari and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.").

4. Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993) (holding that Amendment 2 was subject to strict scrutiny because it infringed the fundamental right of gays and lesbians to participate in the political process).

5. *Romer*, 517 U.S. at 631-32.

6. *Id.* at 644 (Scalia, J., dissenting) ("The foregoing suffices to establish what the Court's failure to cite any case remotely on point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here.").

subsequent cases. For the most part, once the case has been decided, the Court ignores it.

This results effectively in two sets of rationality cases, one deferential and one heightened, operating as if in parallel universes with no connection between them. Although the two lines of cases appear to be in conflict, Court opinions on one side ignore or minimize precedents going the other way. The Court has not overruled any of the successful rational basis cases discussed in this Article, yet they appear to conflict with the majority of cases that adopt the far more common deferential attitude. The two lines of cases stand in relation to each other as "matter and anti-matter," "two contradictory propositions [that] cannot live comfortably together: in the end one must swallow the other up."[7]

This Article takes as its starting and ending points two well-known, often-cited works from the rationality literature. It begins with Gerald Gunther's widely-cited article in the *Harvard Law Review* in which he identified the Court's use, during the 1971 Term, of a heightened rationality review with "bite."[8] It ends with *Romer*, a case in which the Court resuscitated from a presumed internment the use of heightened rationality.

I. THE EQUAL PROTECTION FRAMEWORK

At least since Joseph Tussman and Jacobus tenBroek's influential article,[9] it has been clear that the idea of equality that is embodied in the Equal Protection Clause[10] imposes a limitation on government's ability to classify. All laws classify,[11] and equal protection requires that such classifications have a certain relation to the purpose of a law. The rule is usually stated as requiring that a classification be rationally related to legitimate government purposes.[12] When

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7. GRANT GILMORE, THE DEATH OF CONTRACT 68 (1995). Gilmore's reference to "matter and anti-matter" pertained to the doctrine of consideration in contract law. The matter and anti-matter were bargain and reliance as alternative theories for making promises enforceable.

8. Gerald 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, 12 (1972).

9. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

10. U.S. CONST. amend. XIV, § 1.

11. *See* Toll v. Moreno, 458 U.S. 1, 39 (1982) (Rehnquist, J., dissenting) ("All laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment."); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-72 (1979) ("Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law."); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979) ("Every time an agency of government formulates a rule—in particular every time it enacts a law—it classifies.").

12. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the

the Court applies this standard, it is ordinarily extremely deferential to the democratically elected branches of government. The Court uses several techniques to demonstrate this deferential attitude. With regard to the "legitimate purpose" that the legal classification is supposed to serve, the Court does not insist that the defenders of the law identify the actual purpose of the law, but rather, only a conceivable, and sometimes hypothesized, purpose.[13] With regard to the required nexus—the rational relationship between the classification and purpose—the Court does not insist that such a connection exist in fact, but only that the legislature could reasonably have believed that there was such a connection.[14] The fact that the legislature is wrong about the relationship between classification and purpose does not invalidate the challenged statute.[15] When the Court is using these techniques of deference, it is obvious that it need not consider evidence either of purpose or of connection. This technique of rational basis review can be so deferential as to amount to no review at all. Any statute could survive a review that freely hypothesizes purpose and does not insist that there be any connection in fact between a classification and such a hypothesized purpose.

With regard to certain classifications, most notably race[16] and gender,[17] the

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application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes.").

13. *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

> [T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

Id. (internal quotation marks omitted in original) (citations omitted).

14. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) ("Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives." (emphasis in original)).

15. *See id.* at 464 ("Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation merely by tendering evidence in court that the legislature was mistaken.").

16. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984).

> A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose.

Id. (footnote and citations omitted).

17. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional

Court has adopted a formal level of heightened scrutiny. This Article is concerned with a different set of cases—those in which the Court, without adopting heightened scrutiny on a formal basis, has in fact applied a heightened level of scrutiny to the traditional standard of rationality. In these rationality cases, the Court uses techniques quite different from those it uses when being deferential. First, the Court looks for evidence of the actual purpose of a law.[18] The Court carefully evaluates this purpose to determine whether it is permissible. Frequently, the Court will invalidate the law because the purpose turns out to be impermissible.[19] In addition to this close review of legislative purpose, another technique of heightened rationality is to look to the record[20] to see if there is in fact some real correlation between classification and purpose. Under this sort of review, evidence from the record, rather than hypothesized information, is quite important. If the legislature's factual assumptions about the nexus between classification and purpose are incorrect, then the standard has not been satisfied.

II. GUNTHER'S MODEL FOR A NEWER EQUAL PROTECTION IN 1972

Twenty-five years ago, Gerald Gunther published in the *Harvard Law Review* an influential article in which he reviewed the Supreme Court's 1971 Term.[21] This is the article in which Gunther originated the now famous mantra, "'strict' in theory and fatal in fact."[22] Gunther wrote his article on the 1971 Term at a time when the Court was making a transition in leadership from Chief Justice Warren to Chief Justice Burger. A number of Court watchers were purporting to find major differences between the Warren and Burger Courts.[23] Gunther, however, found that such changes were more marginal, evidenced not so much by retreats from decisions of the Warren Court but by refusals to extend those decisions.[24] Gunther's article used the equal protection decisions of the Court's 1971 Term as evidence of this moderate change of direction.

The Warren Court's equal protection analysis, according to Gunther, had "embraced a rigid two-tier attitude. Some situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually none in fact."[25] Gunther was of the view that, contrary to the fears of the Burger Court's critics, the Court during the 1971 Term did not abandon the interventionist new equal protection and retreat to an extreme

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challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

18. *See, e.g.*, United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

19. *See, e.g.*, *id.*

20. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985).

21. Gunther, *supra* note 8.

22. *Id.* at 8.

23. *See id.* at 2.

24. *Id.*

25. *Id.* at 8.

deference in all cases. In fact, during the 1971 Term, equal protection arguments prevailed far more frequently than they failed.[26] What is perhaps most surprising is that a substantial number of these arguments were successful even while the Court purported to use minimal scrutiny. Gunther's article identified seven cases from the 1971 Term in which equal protection arguments were successful even though the Court made no mention of the strict scrutiny formula.[27] Following up on the metaphor that traditional minimal scrutiny had been "toothless,"[28] Gunther identified a new-found "bite" in the Court's minimal scrutiny decisions and suggested that the Supreme Court would be willing to use the Equal Protection Clause as an "interventionist tool" without resort to strict scrutiny.[29]

Although Gunther had identified seven successful rationality cases, he determined at the outset that one of the seven cases was not appropriately included in a discussion of equal protection cases.[30] In *Stanley v. Illinois*,[31] the Court had reviewed an Illinois statute under which children of unwed fathers became wards of the state upon the death of the mother. As Gunther pointed out, most of the Court's opinion involved a procedural due process issue—the lack of a hearing at which the father could prove his competence and care.[32] However, the Court was constrained from deciding the due process issue because the plaintiff had not raised it below.[33] The Court was thus forced to transform a due process issue into a comparative equal protection claim. The problem was not in the mere failure to provide the father a hearing, but the failure to provide the hearing while extending it to other parents. Although this reasoning made the father's claim technically an equal protection claim, Gunther determined that the case was only marginally concerned with equal protection and thus should be omitted from his discussion.[34]

This left Gunther with six minimal scrutiny cases in which equal protection was a central issue. With the benefit of twenty-five years of additional Supreme Court cases that were not available to Gunther in 1972, three more of his seven cases, involving gender, illegitimacy, and reproductive rights, should also be set aside. These three cases, which in 1972 looked to Gunther as involving minimal scrutiny with bite, the Court would later explain as having involved a formal level of heightened scrutiny after all.

In the first of these cases, *Reed v. Reed*,[35] the Court invalidated an Idaho

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26. *See id.* at 11-12 (indicating that of the fifteen basic equal protection decisions of the 1971 Term, the constitutional challenge was rejected in only four cases, succeeded in ten cases, and in one case the constitutional claim was remanded).

27. *Id.* at 18.

28. *Id.* at 18-19.

29. *Id.* at 12.

30. *Id.* at 25.

31. 405 U.S. 645 (1972).

32. Gunther, *supra* note 8, at 25.

33. *Id. See also Stanley*, 405 U.S. at 658.

34. Gunther, *supra* note 8, at 25.

35. 404 U.S. 71 (1971).

statute that preferred males over females in the selection of a probate administrator.[36] The Court explained that the equal protection issue was "whether a difference in the sex of the competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statute]."[37] The Court concluded that it did not since it was arbitrary to prefer men over women merely to avoid hearings on the merits.[38]

Even in 1972, Gunther was suspicious that, notwithstanding its language, *Reed* was not really a minimal scrutiny case. The result in the case, according to Gunther, was difficult to explain "without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis."[39] Gunther's suspicions were validated four years later, in 1976, in *Craig v. Boren*.[40] In that case, the Court created a new, formal, intermediate, heightened scrutiny for gender classifications—that the classification be substantially related to an important governmental purpose.[41] The Court claimed that previous cases had established the formula.[42] One of those "previous cases" that the Court identified was *Reed*.[43] Justice Rehnquist, dissenting in *Craig*, insisted that the new formula had been pulled from "thin air."[44] In the majority's revisionist history, however, *Reed* had already established a heightened scrutiny for gender classifications in 1971. Thus, as a result of the Court's historical analysis in *Craig*, *Reed* is better viewed as the beginning of the road to intermediate scrutiny, rather than as an example of heightened rationality.

The same can be said for another of Gunther's seven cases, *Weber v. Aetna Casualty & Surety Co*.[45] In that case, the Court invalidated a Louisiana statute that prohibited unacknowledged illegitimate children from recovering workers' compensation benefits for the death of their father.[46] As Gunther noted, the level of review that the Court used was unclear.[47] On the one hand, the Court cited as relevant precedent two of its earlier illegitimacy cases for the propositions that "rational relationship to . . . legitimate state purpose"[48] and "possible rational basis"[49] are the appropriate standards with which to review illegitimacy

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36. *Id*. at 76-77.
37. *Id.* at 76.
38. *Id.*
39. Gunther, *supra* note 8, at 34.
40. 429 U.S. 190 (1976).
41. *Id.* at 197.
42. *Id.*
43. *Id.* at 197-98.
44. *Id.* at 220 (Rehnquist, J., dissenting).
45. 406 U.S. 164 (1972).
46. *Id.* at 175.
47. Gunther, *supra* note 8, at 31.
48. *Weber*, 406 U.S. at 172 (citing, *inter alia*, Morey v. Doud, 354 U.S. 457 (1957)).
49. *Id.* at 173 (quoting Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73, 75 (1968)).

classifications. On the other hand, the Court identified as the "essential inquiry" a dual set of questions: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[50] These dual questions are not the language of minimal scrutiny. Further, the Court rejected the justification that a legitimate child is more likely to have a closer relationship with the father than an illegitimate child as "not compelling"[51] and stated that the distinction between legitimate and illegitimate bore "no significant relationship" to the state interest in minimizing problems of proof."[52] Again, this is not the language of minimal scrutiny.

Even in 1972, then, Gunther identified the *Weber* case and illegitimacy classifications in general as not clearly involving minimal scrutiny. The Court wrestled with this issue—the appropriate level of review for illegitimacy classifications—for another sixteen years before adopting a clear standard. During the intervening period, the Court frequently used a hybrid standard that included some of the language of minimal scrutiny and some of the language of heightened scrutiny.[53] Finally, in *Clark v. Jeter*[54] in 1988, a majority of the Court formally adopted for illegitimacy the same intermediate standard it had adopted for gender classifications in 1976 in *Craig v. Boren*—the classification must be substantially related to an important governmental interest.[55] In doing so, the Court once again conveniently revised its earlier case law by citing *Weber* as an example of a case that had applied that intermediate standard.[56] That *Craig v. Boren* had not explicitly created the intermediate standard until four years after *Weber* did not seem to be important to the Court. In any case, as a result of many years of case law unavailable to Professor Gunther when he wrote his article, *Weber* should also be set aside since it no longer appears to be a case of heightened rationality.

That reduces Gunther's seven cases to four; however, one more needs to be set aside. Gunther discussed *Eisenstadt v. Baird*,[57] in which the Court invalidated a Massachusetts statute that criminalized the distribution of contraceptives to unmarried persons.[58] The Court identified the appropriate equal protection

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50. *Id.*

51. *Id.* at 173-74.

52. *Id.* at 175.

53. *See infra* notes 135-38 and accompanying text.

54. 486 U.S. 456 (1988).

55. *Id.* at 461 ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." (citations omitted)).

56. *Id.* After stating the intermediate standard, the Court said: "Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'" *Id.* (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

57. 405 U.S. 438 (1972).

58. *Id.* at 443.

standard as "whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons."[59] In a footnote, the Court explained that if it were to determine that the contraception statute "impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest."[60] However, the Court did not believe that it needed to test the statute under strict scrutiny since "the law fails to satisfy even the more lenient equal protection standard."[61] The Court was unwilling to credit the asserted statutory purposes of deterring fornication and promoting health.[62] The one statutory aim that the Court was willing to credit—prohibiting contraception—was not permitted under *Griswold v. Connecticut*.[63]

Gunther's commentary on *Eisenstadt* was that the Court's actual scrutiny of the statute was far more intense than its articulated standard of review.[64] Gunther's explanation for the deviation was "the considerable pressure to strain for grounds of invalidation which would avoid the *Griswold v. Connecticut* issue."[65] If avoidance of *Griswold* was the intent, the Court was not successful. Even within the *Eisenstadt* opinion, the Court had cited *Griswold* as establishing a marital right of privacy.[66] However, the Court continued,

> The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[67]

One year later, in *Roe v. Wade*,[68] we would find out that the effect of this language in *Eisenstadt* was substantial. *Eisenstadt* stripped *Griswold* of its underpinning of privacy as subsisting within the marital union, extended the right to use contraceptives to unmarried persons, and most importantly, created a generalized right of privacy that included "the decision whether to bear or beget a child." As *Roe* would explain, this right of privacy would include the right to terminate a pregnancy.[69] Thus, if as Gunther suggested, the Court in *Eisenstadt* was attempting to avoid confronting the privacy implications of *Griswold*, it

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59. *Id.* at 447.
60. *Id.* at 447 n.7 (referring to Griswold v. Connecticut, 381 U.S. 479 (1965)).
61. *Id.*
62. *Id.* at 448-50.
63. *Id.* at 452-53.
64. Gunther, *supra* note 8, at 34.
65. *Id.* (footnotes omitted).
66. *Eisenstadt*, 405 U.S. at 453.
67. *Id.*
68. 410 U.S. 113 (1973).
69. *Id.* at 153.

failed to do so. With the benefit of *Roe* and its progeny, it is clear that *Eisenstadt* was a fundamental rights case in minimal scrutiny clothing. It should also be set aside in this discussion of heightened rationality.

This leaves three of Gunther's seven heightened rationality cases from the 1971 Term. The first of these was *James v. Strange*,[70] where the Court considered a Kansas recoupment statute under which the state could recover the expenses it had incurred while providing legal counsel to indigent criminal defendants. The district court had found the statute to be unconstitutional[71] since it was "an impermissible burden on the right to counsel established in *Gideon v. Wainwright*."[72] Although it was clear that Kansas had not denied the right to counsel in the strict sense,[73] it was at least arguable that the obligation later to pay for the counsel that had been provided might deter the exercise of the right. If the Court had decided this issue, it would have had to determine the limits of *Gideon* and to some extent would have to explicate the state's obligation "to remove financial barriers to indigents embroiled in the criminal process."[74]

The Court chose a simpler method of invalidating the statute. The debt of the indigent defendant who had been provided with counsel by the state was not treated the same as the debt of all other civil judgment debtors.[75] Except for a homestead exemption, the indigent defendant was denied the benefit of the entire array of protective exemptions, including the protection from unrestricted garnishment.[76] This was significant because "[t]he debtor's wages are his sustenance, with which he supports himself and his family."[77] Although the recovery of costs was a legitimate state interest, the Equal Protection Clause required the state to explain why indigent defendants had been singled out for less favorable treatment than other debtors.[78] This the state had not done.

Gunther viewed *Strange* as a clear example of the Court's use of means scrutiny rather than ends scrutiny. The Court accepted the recovery of costs expended as a legitimate interest, but required that the state serve that interest in a more even-handed way. As Gunther explained, the state had provided no articulated ground for the difference in treatment and the Court was unwilling to hypothesize an explanation.[79] Gunther considered means scrutiny to be a narrower, preferred ground of decision and less of an intrusion on legislative

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70. 407 U.S. 128 (1972).

71. Strange v. James, 323 F. Supp. 1230, 1234 (D. Kan. 1971).

72. *Strange*, 407 U.S. at 128-29 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

73. *See id.* at 134.

74. Gunther, *supra* note 8, at 26-27.

75. *See Strange*, 407 U.S. at 135.

76. *See id.*

77. *Id.*

78. *See id.* at 140. The Court cited *Rinaldi v. Yeager*, 384 U.S. 305 (1966), for the proposition that the Equal Protection Clause "imposes a requirement of some rationality in the nature of the class singled out," a requirement the Court then said was lacking in *Strange*. *Strange*, 407 U.S. at 140 (quoting *Rinaldi*, 384 U.S. at 308-09).

79. Gunther, *supra* note 8, at 33.

prerogatives in the constitutional system of separation of powers.[80] Gunther also considered *Strange* to be a good example of the Court's "avoidance" technique.[81] The Court wrote the opinion on narrow grounds in order to avoid wrestling with the difficult substantive issue of the extent to which the state had an affirmative obligation "to remove financial barriers to indigents embroiled in the criminal process."[82]

The final two cases of Gunther's seven both involved equal protection challenges to civil commitment proceedings. In *Jackson v. Indiana*,[83] the Court reviewed the civil commitment of Theon Jackson, a man with very limited mental abilities[84] who had been charged with robbery. Before his case went to trial, the trial court had held a competency hearing at which it found that Jackson lacked adequate comprehension to make his defense.[85] The court then ordered Jackson committed to the Department of Mental Health until the Department certified that he was sane.[86]

The civil commitment procedure for an individual, like Jackson, accused of a crime, differed from the two other sets of procedures that the state had adopted for the "feeble-minded" and for the "mentally ill."[87] In comparison to these two groups, it was easier for the state to have someone in Jackson's position committed initially and more difficult for him to obtain his release at a later time.[88] The Court found that these differences in procedure denied Jackson the

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80. *Id.* at 26.

81. *Id.* at 26-27.

82. *Id.*

83. 406 U.S. 715 (1972)

84. *Id.* at 717 (describing the petitioner as "a mentally defective deaf mute with a mental level of a pre-school child. He cannot read, write, or otherwise communicate except through limited sign language.").

85. *Id.* at 717-19.

86. *Id.* at 719.

87. *Id.* at 721-23.

88. For someone like Jackson, against whom criminal charges were pending, for the initial commitment the state had to show only an inability to stand trial. On the other hand, in order for the state to obtain a commitment on the grounds that a person was mentally ill, the state had to make "a showing of mental illness and . . . a showing that the individual is in need of 'care, treatment, training or detention.'" *Id.* at 728 (quoting IND. CODE § 22-1201(1) (1971)). This appeared to the Court to mean that the state had to show that the person to be committed was dangerous. *Id.* As for commitment of an individual identified as "feeble-minded," the state had to show that the person was "unable properly to care for [himself]." *Id.* at 721.

With regard to release, a person like Jackson, who was committed while criminal charges were pending, would not be released until the Department of Mental Health certified that he was sane. *See id.* at 719. A person committed as "feeble-minded," on the other hand, would be eligible for release "when his condition 'justifies it,'" and a person committed as mentally ill could be released "when the 'superintendent or administrator shall discharge such person *or* (when) cured of such illness.'" *Id.* at 728-29 (quoting IND. CODE §§ 22-1814, 22-1223 (1971)).

equal protection of the laws.[89] In doing so, the Court cited its earlier decision in *Baxstrom v Herold*.[90] That case had involved a prisoner civilly committed at the end of his prison sentence without the jury trial that was made available in other civil commitment proceedings. The Court in *Baxstrom* held that the previous criminal conviction was insufficient to justify a lower level of protection against indefinite commitment.[91] In comparison, then, Jackson's case was easier to resolve. If a criminal conviction was insufficient to treat one differently, the mere filing of charges was clearly insufficient.[92] The Court in *Jackson* made no mention of heightened scrutiny in the case,[93] but its close comparison of the differing procedures for commitment, its reference to "the record"[94] as not supporting the state's factual premise, and its failure to hypothesize reasons for the different treatment, all suggest something more demanding than traditional rationality.[95]

According to Gunther, the Court's reliance on equal protection in Jackson was another example of the "avoidance impulse," in that the Court was able to avoid "ventur[ing] into that uncertain realm of ultimate constitutional values."[96] The Court did not have to decide precisely what were the constitutional limits of the state's power to commit the mentally ill.

The last of Gunther's seven cases, *Humphrey v. Cady*,[97] also involved an

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89. *Id.* at 730.

90. 383 U.S. 107 (1966).

91. *Id.* at 114-15.

92. *See Jackson*, 406 U.S. at 724.

93. In fact, the Court cited *Baxstrom's* "no conceivable basis" standard. *Id. (*citing *Baxstrom*, 383 U.S. at 111-12).

94. The references to the record include the comment that it did not support the premise that petitioner's commitment was only temporary. *Id.* at 725. Further, the Court was "unable to say that, on the record before [it], Indiana could have civilly committed [Jackson] as mentally ill . . . or . . . as feebleminded." *Id.* at 727.

95. The Court also found that the state's incarceration of Jackson violated the Due Process Clause, because "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738.

96. Gunther, *supra* note 8, at 28.

97. 405 U.S. 504 (1972). Gunther might have added an eighth case, *Lindsey v. Normet*, 405 U.S. 56 (1972), to his list of seven. Gunther did discuss *Lindsey* at some length, but as an example of the Burger Court's unwillingness to extend the Warren Court's discoveries of fundamental rights in the Constitution. Gunther, *supra* note 8, at 13-14. In *Lindsey*, the plaintiffs challenged Oregon's summary process statute for landlord/tenant disputes. Under the statute, landlord/tenant claims were decided very quickly and the issues to be litigated were sharply limited. Plaintiffs had sought heightened scrutiny of the statute on the ground that it infringed on the implied fundamental right to housing. The Court rejected that claim, explaining that "the Constitution does not provide judicial remedies for every social and economic ill." *Lindsey*, 405 U.S. at 74. Having rejected the claim for strict scrutiny, the Court then went on to uphold the summary process statute, since "the provisions for early trial and simplification of issues are closely related to [the] purpose" of "prompt as well as peaceful resolution of disputes over the right to possession of real property." *Id.* at 70.

equal protection issue arising out of a civil commitment hearing, this time under the Wisconsin 1971 Sex Crimes Act.[98] Under the terms of that statute, a person who had been convicted of a sex crime could be committed to the "sex deviate facility" in lieu of a criminal sentence.[99] At the end of what would have been the maximum term of the criminal sentence, the defendant's term of commitment could be extended for up to five years if, at a hearing, the court found that the defendant's discharge would be dangerous to the public.[100] The defendant Humphrey argued that this extension of his commitment after the expiration of his maximum prison sentence was equivalent to commitment under the Wisconsin Mental Health Act.[101] Thus, he argued, he was entitled to a jury to determine whether he met the standards of commitment, just as would a person committed under the Mental Health Act.[102] The District Court below had dismissed the claim without an evidentiary hearing because the claim lacked merit.[103] The Court of Appeals "refused to certify probable cause for an appeal."[104]

The Supreme Court reversed.[105] It once again cited *Baxstrom*, to the effect that "the State, having made a jury determination generally available to persons subject to commitment for compulsory treatment, could not, consistent with the Equal Protection Clause, arbitrarily withhold it from a few."[106] The Court considered it appropriate to inquire what justifications might exist for treating those committed under the Sex Crimes Act differently from those committed

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The Court explained that the appropriate standard is whether "the classification under attack is rationally related to . . . [a permissible] purpose." *Id.* at 74.

However, the Court then applied this supposedly deferential standard to another part of the statute—the provision that required a party appealing a summary process action to post a bond of twice the amount of the rent expected to accrue pending the appellate decision. The Oregon Supreme Court had declared that the purpose of the double-bond requirement was to insure that the rent pending appeal was paid and to prevent frivolous appeals for the purpose of delay. *Id.* at 76 (quoting Scales v. Spencer, 424 P.2d 242, 243 (Or. 1967)). The Supreme Court found that the bond requirement, twice what was required of appellants in other civil actions, "bear[s] no reasonable relationship to any valid state objective and . . . arbitrarily discriminate[s] against tenants appealing in [summary process] actions." *Id.* at 76-77. The requirement did not assure payment of rent pending appeal because the amount was not related to the rent already accrued or to the damage sustained by the landlord. It did not screen out frivolous claims because the ability to afford the double-bond was not connected to the substantive merits of the appeal. *Id.* at 77-78.

98. *Id.* at 506 (citing WIS. STAT. ANN. § 959.15 (1958), as amended, ch. 975 (West 1971)).

99. *Id.*

100. *See id.* at 507.

101. *See id.* at 508 (citing WIS. STAT. ANN. § 51 (West 1957)).

102. *See id.* (citing WIS. STAT. ANN. § 51.03 (West 1957)).

103. *See id.* at 506.

104. *See id.*

105. *Id.* at 505.

106. *Id.* at 508 (citing Baxstrom v. Herold, 383 U.S. 107, 110-12 (1966)).

under the Mental Health Act.[107] The Court considered two such justifications, that the commitment was triggered by a criminal conviction[108] and that there might be some special characteristics of sex offenders.[109] The Court found that these justifications carried little weight.[110] At a minimum, according to the Court, the plaintiff's claims were substantial enough to warrant a remand for an evidentiary hearing.[111] But traditionally, under rational basis review, the state does not need to introduce or respond to evidence in order to demonstrate the rationality of its classification.

Gunther did not have much to say about *Humphrey*. He considered it an example of "avoidance," but a "less pronounced" example than other cases decided that Term.[112] Thus in *Humphrey*, commitment procedures under the Sex Crimes Act were invalidated not in accordance with any absolute standard that must be adhered to when anyone is committed (a due process issue), but rather because the standards were comparatively lower than those for commitment under the Mental Health Act. Gunther also noted that the underlying issue in *Humphrey* was an issue with which the Court was quite familiar—procedural fairness in a commitment process.[113] Gunther supposed that the Court's willingness to apply heightened scrutiny in a familiar context like this would not necessarily suggest that the Court would apply a similar heightened scrutiny "to new spheres of legislative activity."[114]

Gunther thus used the six rationality cases from the 1971 Term as evidence of a new model of equal protection.[115] As Gunther summarized the model, the new equal protection would be concerned with means, not ends.[116] Tolerance of overinclusive and underinclusive classifications would be reduced.[117] The Court would not exercise its imagination to identify legislative purpose but would insist that the state articulate its purposes.[118] The Court would insist on an "affirmative relation between means and ends. . . . To a large extent, that is an empirical inquiry. The model would have the Court assess the justification for the classification largely in terms of information presented by the defenders of the law . . . ."[119] The emphasis on means rather than ends would avoid "ultimate value judgments about the legitimacy and importance of legislative purposes."[120]

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107. *Id.* at 510.
108. *Id.*
109. *Id.* at 512.
110. *Id.* at 511-12.
111. *Id.* at 508.
112. Gunther, *supra* note 8, at 29 n.135.
113. *Id.* at 31.
114. *Id.* at 32.
115. *Id.* at 20.
116. *Id.* at 21.
117. *See id.* at 33.
118. *See id.* at 21.
119. *Id.* at 47.
120. *Id.* at 21-22.

Gunther indicated that parts of his model could be seen in the six equal protection cases he had discussed but that the Court's adherence to the model of "intensified rationality scrutiny" was "inchoate" and "fragmentary."[121] In the years that followed, the Court never adopted the full version of the Gunther model. First, rather than developing an extensive jurisprudence of minimal scrutiny with bite, the Court instead adopted an intermediate level of scrutiny for certain classifications.[122] As for avoidance of difficult value judgments, the 1971 term turned out to be a brief lull after which the Court very soon confronted and decided the privacy implications of *Griswold*[123] and the need for heightened scrutiny of gender[124] and illegitimacy[125] classifications. Further, the Court did not focus on means rather than ends. In the years to come, when a rational basis argument prevailed, the Court was as likely to have found an impermissible purpose at work as it was to have found an inadequate connection between classification and purpose.[126]

In any case, Gunther's article on the 1971 Term set the stage for the next twenty-five years. Although his predictions were not uniformly correct, he had identified a method of analysis—heightened rationality review—that would recur from time to time in the Court's decisions. The next Part of this Article examines those cases in detail.

III. SUCCESSFUL MINIMAL SCRUTINY CLAIMS FROM 1972 TO 1996

Between the end of the Supreme Court's 1971 Term on which Gunther reported and the Court's 1996 decision in *Romer v. Evans*, the Court decided 110 cases in which it used minimal scrutiny.[127] Of these 110 cases, plaintiffs prevailed in only ten cases.[128] This Part examines these ten cases in detail. Before doing that, however, it begins with a brief excursus on rationality review of gender and illegitimacy classifications before the Court had formally adopted a heightened scrutiny for these classifications.

A. Early Rational Basis Review of Gender and Illegitimacy Classifications

The Supreme Court in 1976 in *Craig v. Boren*[129] formally adopted a standard of intermediate scrutiny for gender classifications—that the classification be substantially related to an important governmental interest.[130] Between the 1972

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121. *Id.* at 36.

122. *See supra* notes 25-56 and accompanying text.

123. *See supra* notes 57-63 and accompanying text.

124. *See supra* notes 35-44 and accompanying text.

125. *See supra* notes 45-56 and accompanying text.

126. *See infra* notes 513-16 and accompanying text.

127. *See* Appendix.

128. These ten cases are listed in the Appendix and are discussed individually, *infra*, in Parts III.B. through III.I.

129. 429 U.S. 190 (1976).

130. *Id.* at 197.

publication date of Gunther's article and the 1976 publication of *Craig v. Boren*, the Court decided two cases involving gender classifications in which rational basis arguments were successful. In the first of these, *Weinberger v. Wiesenfeld*,[131] decided in 1975, the Court invalidated a provision of the Social Security Act under which benefits were paid to the surviving widow of a covered worker but not to a surviving widower. In the other, *Stanton v. Stanton*,[132] the Court invalidated a Utah statute under which the age of majority of women was eighteen while for men it was twenty-one. In the first case, the Court found that the gender classification was "entirely irrational."[133] In the second, the Court did not believe that it needed to determine the proper standard, since the gender classification would not survive any test, "compelling state interest, or rational basis."[134]

It appears that in these two cases the Court was continuing to use the avoidance technique that Gunther had identified in his article. In both cases, the Court made no effort to announce a heightened level of scrutiny and concluded

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131. 420 U.S. 636 (1975).

132. 421 U.S. 7 (1975).

133. *Wiesenfeld*, 420 U.S. at 651. According to the Court, the gender classification was based on the generalization that "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Id.* at 643. The Court admitted that there was some empirical support for the view that men are more likely than women to be the primary supporters of their families. *Id*. at 645. Under a truly deferential standard, this concession would have been enough to save the statute, because it would have meant that, taken as a whole, the class of men was not similarly situated to the class of women in relation to the subject of providing support for families.

However, although the Court did not announce any heightened scrutiny, it did find enough fault with the law to invalidate it. The Court found that the purpose of the law was to allow the surviving parent the opportunity to stay at home to care for children. *Id.* at 648-49. Since surviving parents could be fathers as well as mothers, "the gender-based distinction . . . is entirely irrational." *Id.* at 651. Citing both *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which a plurality of the Court had unsuccessfully attempted to make gender a suspect classification, the Court found that men and women were in fact similarly situated under the survivors' provisions of the Social Security Act, and thus the statute violated the equal protection component of the Fifth Amendment. *Id.* at 653.

134. *Stanton*, 421 U.S. at 17. Although the parties to the case had argued over the appropriate level of scrutiny to be given to the gender classification with regard to the age of majority, the Court found it "unnecessary in this case to decide whether a classification based on sex is inherently suspect." *Id.* at 13. According to the Court, its decision in *Reed* controlled in this case. *Id.* Since *Reed* had used a rationality standard to invalidate a provision of the Idaho probate code, *id.*, the Court could use the same technique here. Despite the "old notions" about the proper roles for men and women, the Court perceived "nothing rational" in the statutory distinction by which a parent was liable for the support of a daughter only until she was eighteen but for a son until he was twenty-one. *Id.* at 14. According to the Court: "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* at 14-15.

that neither of the two challenged statutes was "rational." Of course, something more than traditional deference was at work here and the Court clearly had a heightened sensitivity to gender classifications. The Court finally formalized this standard one year later in *Craig v. Boren*. Looking back at *Wiesenfeld* and *Stanton*, they are better read as part of the pathway to intermediate scrutiny than they are as examples of successful minimal scrutiny claims. Therefore, they will not be considered.

The Court's journey to a formal declaration of intermediate scrutiny for illegitimacy classifications took longer and had more detours. Gunther's article itself discussed the Court's invalidation of an illegitimacy classification in *Weber* and indicated that the standard of review was unclear.[135] For most of the next sixteen years, the Court never adequately clarified the standard. As a result, during that period, there were seven cases[136] before the Supreme Court that involved illegitimacy classifications in which the claim was successful but in which the standard of review was unclear. In these cases, the Court's analysis often contained language of deferential rationality review, but sometimes also contained language that suggested a more demanding test, some kind of hybrid scrutiny. However, it was not until 1988 that the Court made it absolutely clear, in *Clark v. Jeter*,[137] that intermediate scrutiny was the standard.[138] Since in retrospect the seven cases are more properly viewed as way stations on the road to intermediate scrutiny, they will not be considered. The next sections of the paper consider each of the successful rationality cases.

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135. Gunther, *supra* note 8, at 31.

136. Reed v. Campbell, 476 U.S. 852 (1986) (invalidating a Texas statute under which an illegitimate child could not inherit from his or her father, on the ground that the statutory distinction did not have an evident and substantial relation to the state's interest in providing for the orderly and just estate administration); Picket v. Brown, 462 U.S. 1 (1983) (invalidating Tennessee's two year statute of limitations on paternity suits by illegitimates because the limitation was not substantially related to a legitimate state interest); Mills v. Habluetzel, 456 U.S. 91 (1982) (invalidating Texas' one year statute of limitations on paternity suits brought by illegitimates because the limitation was not substantially related to a legitimate state interest); Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating an Illinois statute under which illegitimate children could inherit only from their mothers, by means of a standard of review that requires, as a minimum, that the statutory classification bear some rational relationship to a legitimate state purpose, and sometimes requires more); Jiminez v. Weinberger, 417 U.S. 628 (1974) (invalidating a provision of the Social Security Act under which illegitimate children of a disabled wage-earner were not treated as well as legitimate children, on the grounds that the statutory distinction was not reasonably related to the purpose and was both overinclusive and underinclusive); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (invalidating a New Jersey statute that limited welfare benefits to households in which the parents were adults of the opposite sex married to each other, without any discussion of the standard of review); Gomez v. Perez, 409 U.S. 535 (1973) (invalidating a Texas law that required fathers to support their legitimate, but not their illegitimate, children, on the grounds that a state may not invidiously discriminate against illegitimate children).

137. 486 U.S. 456 (1988).

138. *Id.* at 461.

B. The Most Basic Economic Needs of Impoverished Human Beings: Food Stamps, Welfare, and the Ascendancy of Dandridge *Over* Moreno

Notwithstanding Gunther's article and his suggestion that the Court might begin to apply rational basis with bite, the Court's 1973 decision in *United States Department of Agriculture v. Moreno*[139] must have been surprising. In *Moreno*, the Court invalidated a food stamp regulation.[140] When the case is viewed in relation to other food stamp and welfare cases that the Court decided both before and after it, *Moreno* appears to be quite unusual indeed. This section will examine *Moreno* and then put it into a context of factually related Supreme Court cases in which the Court's reasoning and results were quite different.

In 1971 Congress amended the Food Stamp Act to limit eligibility to households made up of related individuals.[141] Because households were the basic organizational unit of the food stamp program,[142] the effect of the amendment was that unrelated persons living together in a household would no longer be eligible for food stamps. Several households containing an unrelated individual challenged the amendment as a violation of equal protection. The Court identified the traditional, very deferential standard of review as appropriate, that "a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest."[143] The Court's analysis, however, was anything but deferential.

First, the Court looked at the relationship between the classification—households containing one or more unrelated persons—and the purposes of the Food Stamp Act as stated in the statute itself. The Food Stamp Act identified two purposes—the stimulation of the agricultural economy and the alleviation of hunger and malnutrition.[144] The Court found that one's status as related or unrelated to other members of one's household was "clearly irrelevant" to either of those two purposes.[145]

The Court then looked for evidence of other statutory purposes. There was little legislative history.[146] The only relevant evidence of purpose the Court did find was a reference in a Conference Report and a statement on the floor of the Senate to the effect that the purpose of the amendment was to exclude "hippies" and "hippie communes" from the program.[147] The Court seized on these brief references to invalidate the amendment because its purpose was impermissible: "[A] bare congressional desire to harm a politically unpopular group cannot

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139. 413 U.S. 528 (1973).

140. *Id.* at 538.

141. *See id.* at 530 (citing Act of Jan. 11, 1971, Pub. L. No. 91-671, 84 Stat. 2048).

142. *See id.* at 529 (citing 7 C.F.R. § 271.3(a) (1970)).

143. *Id.* at 533.

144. *See id.* at 533-34 (citing 7 U.S.C. § 2011 (1971)).

145. *Id.* at 534.

146. *See id.*

147. *Id.* (citing H.R. REP. NO. 91-1793, at 8 (1970)).

constitute a legitimate governmental interest."[148]

Surprisingly, the Court was unwilling to credit the government's argument that the true purpose of the amendment was to reduce fraud in the food stamp program. The anti-fraud argument was that the government "might rationally have thought" that households with unrelated individuals were more likely to contain individuals who would abuse the program either by not reporting income or by "voluntarily remaining poor."[149] As Justice Rehnquist explained in his dissent, the requirement that members of the household be related "provides a guarantee . . . that the household exists for some purpose other than to collect federal food stamps."[150]

The appeal to a purpose or set of facts that the government "might have considered" is a standard technique of rational basis review and the Court had just applied it two years earlier in *Dandridge v. Williams*.[151] Yet the Court refused to defer to the government defendant and instead conducted its own evidentiary search for the actual purpose of the amendment to the Food Stamp Act. The prevention of fraud could not have been the purpose of the law, according to the Court, for two reasons. First, other provisions of the Food Stamp Act were aimed specifically at the problems of fraud, and thus, according to the Court's reasoning, the new provision could not also have been an anti-fraud device.[152] Second, the unrelated person rule was sufficiently broad that it would exclude some persons who were not trying to perpetrate fraud and at the same time not exclude others who were attempting fraud.[153] This is, of course, a classic problem of overinclusion and underinclusion, a problem usually thought to be without significance under traditional rational basis deference. However, here the Court used the broad swathe of the rule as evidence that the classification did not rationally further the prevention of fraud.[154] Thus, the Court was left with its original finding of purpose—the desire to harm a politically unpopular group. Because this purpose was itself impermissible, the amendment denied equal protection without more. The classification was "wholly without any rational basis."[155]

What is most surprising about *Moreno* is that it is a singular case set against a large group of contrary holdings. It has been suggested that the Court's use of a heightened rational basis review in a case like *Moreno* results from the importance of the subject matter at issue—food for those who cannot afford it.[156]

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148. *Id.*

149. *Id.* at 535.

150. *Id.* at 546 (Rehnquist, J., dissenting).

151. 397 U.S. 471 (1970).

152. *See Moreno*, 413 U.S. at 536-37.

153. *See id.* at 537-38.

154. *Id.*

155. *Id.* at 538.

156. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-33, at 1611 (2d ed. 1988).

The Court has not always *referred* to the importance of the interest at stake when

The problem with this analysis is that it does not take into account the very substantial number of cases the Court has decided that involved "the most basic economic needs of impoverished human beings"[157] but in which the Court applied a highly deferential scrutiny that resulted in a rejection of the claim. The Court had decided one of these cases shortly before *Moreno* and would decide several more in the next twenty years, usually with no reference to *Moreno*.

The *Moreno* opinion in fact had cited *Dandridge* with apparent approval, both for the general statement of rationality review and for the proposition that classifications did not need to be "drawn with precise mathematical nicety."[158] The Court gave no sign that it was uncomfortable with *Dandridge* or that there was any need to distinguish it. This is a surprising treatment of *Dandridge* since it had adopted a completely different view of equal protection as it relates to the basic economic needs of the poor.

In *Dandridge*, decided less than three years before *Moreno*, the Court rejected an equal protection challenge to a welfare regulation and, in doing so, announced an extraordinarily deferential standard of review. The case involved a Maryland welfare rule that established maximum grant limits for families receiving welfare benefits. The effect of the limit was that smaller families received a benefit equal to their full standard of need while larger families received less than their standard of need as calculated by the state. As the Court explained the standard of review:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." . . . [T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.[159]

The Court indicated that "[t]he administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings."[160] However, the Equal Protection Clause did not give to federal courts the "power

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> heightening its level of scrutiny, but it is hard to believe that importance was not at least a factor in the closer look taken by the Court where governmental deprivations affected the interest of the individual in receiving such subsistence benefits as food stamps.

Id.

157. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

158. *Moreno*, 413 U.S. at 533, 538 (quoting *Dandridge*, 397 U.S. at 485).

159. *Dandridge*, 397 U.S. at 485, 487 (citations omitted).

160. *Id*. at 485.

to impose upon the States their views on . . . economic or social policy."[161] The Court then went on to uphold the regulation, finding it was related to the state's interests "in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor."[162] The Court admitted that, with regard to the employment goal, the statute was both overinclusive and underinclusive; however, the Court stated that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination."[163]

Dandridge and *Moreno* stand as the two archetypal cases on constitutional claims involving basic human sustenance.[164] Over the next twenty-five years, arguments before the Court on these issues would ultimately come down to one question—which precedent controls. The answer turned out to be *Dandridge*.

In the years since *Moreno*, the Court has decided three food stamp cases[165] and three cases concerning Aid to Families with Dependent Children ("AFDC")[166] in which the plaintiffs raised equal protection issues. In none of these cases did the Court use anything like the heightened rational basis review of *Moreno*, nor were any of the claims successful on the merits.[167]

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161. *Id.* at 486.

162. *Id.*

163. *Id.* at 486-87 (citation omitted).

164. Between *Dandridge* and *Moreno*, the Supreme Court had decided *Jefferson v. Hackney*, 406 U.S. 535 (1972), a case that resembled *Dandridge* far more than *Moreno*. In that case, the plaintiffs challenged the method by which Texas calculated welfare assistance grants. Having determined a standard of need for all those eligible for aid to the aged, the blind, the disabled, and families with dependent children, the state then applied a percentage reduction factor under which Aid to Families with Dependent Children ("AFDC") recipients received the lowest percentage of need. *Id.* at 537. The Court cited the language of *Dandridge* in concluding that the statute was constitutional. *Id.* at 551. The Court said that it could not find that the "somewhat lower welfare benefits for AFDC recipients is invidious or irrational." *Id.* at 549. The state "may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living." *Id.* The Court cited no evidence for what the state "may have concluded."

165. *See infra* notes 168-210 and accompanying text.

166. *See infra* notes 211-15 and accompanying text.

167. The one case in which the Court was at all persuaded by a plaintiff's argument involved a question of jurisdiction. In *Hagans v. Lavine*, 415 U.S. 528 (1974), AFDC recipients challenged a state regulation providing for recoupment from subsequent AFDC grants, monies that the state had paid as emergency rent payments. The plaintiffs presented both a statutory and a constitutional argument. In order to establish jurisdiction in federal court, they needed to demonstrate a "substantial constitutional claim." *Id.* at 536. Although the district court had found jurisdiction, heard the case, and decided the statutory issue, the court of appeals reversed on the grounds that the plaintiffs had failed to present a "substantial constitutional claim" and thus the district court lacked jurisdiction to decide either the equal protection or the statutory claim. *Id.* at 532-33. The Supreme Court reversed again on the grounds that the equal protection claim was not necessarily

In 1977 in *Knebel v. Hein*,[168] the first of three post-*Moreno* food stamp cases, the Court considered an equal protection challenge to the Department of Agriculture's definition of "income" for purposes of determining the amount of a subsidy that a household would receive in purchasing food stamps.[169] The plaintiff challenged the rule because it included as income a transportation allowance that she received from the state to cover her expenses in commuting to a nurses' training school. The district court, citing *Moreno* five times, decided the case for the plaintiff.[170] It "could identify no rational basis for treating as income a training allowance which is fully expended for its intended purpose."[171] Thus, according to the district court, the regulation was not related to the "statutory objective of providing adequate nutrition for low-income families," was "totally irrational," and "discriminated against recipients of transportation allowances."[172]

The Supreme Court reversed.[173] Its only citation to *Moreno* was a footnote that explained the mechanics of the Food Stamp program.[174] Most of the Court's opinion addressed the statutory question of the Secretary's broad authority to promulgate a regulation defining income. As to the equal protection issue that had been decided adversely to the Secretary in the district court, the Court's entire discussion was one sentence long: "Since there is no question about the constitutionality of the statute itself, the implementation of the statutory purpose [to formulate and administer a food stamp program] provides a sufficient justification for . . . the federal regulations . . . to avoid any violation of equal protection guarantees."[175]

The Court's only citations in support of its equal protection holding were *Weinberger v. Salfi*[176] and *Mathews v. de Castro*,[177] two Social Security cases in

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so "frivolous or so insubstantial as to be beyond the jurisdiction of the District Court." *Id.* at 539. The Court also stated that "*Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law." *Id.* *Hagans* was not a decision on the merits and no equal protection decision ever resulted from it. Upon remand, the Court of Appeals for the Second Circuit eventually held that the challenged rule did not violate the federal statute or regulations. Hagans v. Berger, 536 F.2d 525, 532-33 (2d Cir. 1976). The Court thus reversed the earlier judgment of the district court and also remanded for the convocation of a three-judge court to determine the constitutional issues. *Id.* at 533. There is no reported opinion of what happened on remand.

168. 429 U.S. 288 (1977).

169. *Id.* at 289.

170. Hein v. Burns, 402 F. Supp. 398, 406-07 (S.D. Iowa 1975), *rev'd*, Knebel v. Hein, 429 U.S. 288 (1977).

171. *Knebel*, 429 U.S. at 291.

172. *Id.*

173. *Id.* at 297.

174. *Id.* at 292 n.9.

175. *Id.* at 296-97.

176. 422 U.S. 749 (1975).

177. 429 U.S. 181 (1976).

which the Court announced an extremely deferential standard of rational basis review. The Court apparently felt no need to distinguish *Moreno*, either in terms of the result in the case or in the close examination it had given to the identification of statutory purpose. *Knebel* may well be distinguishable from *Moreno*,[178] but the Court did not consider it necessary to explain why.

In 1986, the Court decided its second post-*Moreno* food stamp case, *Lyng v. Castillo*.[179] Congress had further amended the Food Stamp Act by redefining the term "household." Previously, "household" had been defined, in part, as "a group of . . . individuals, who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common."[180] In response to abuses in the program,[181] Congress amended the definition to provide that "parents and children, or siblings, who live together shall be treated as a group of individuals who customarily purchase and prepare meals together for home consumption even if they do not do so."[182] Once again, the district court, relying primarily on *Moreno* as requiring a heightened scrutiny, invalidated the amendment on the grounds that traditional families living together should not receive less protection than a politically unpopular group.[183]

The Supreme Court again reversed, ruling that the district court erred in using heightened scrutiny.[184] The Court's only textual citation to *Moreno* was to establish the basic rational basis standard, that a classification need only be "rationally related to a legitimate governmental interest."[185] In a footnote,[186] the Court distinguished *Moreno* on its facts. In *Moreno*, according to the Court, the definition of "household" "completely disqualified all households" with an unrelated individual.[187] This disqualification "did not further the interest in

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178. For example, the Court could have contrasted *Moreno* and *Knebel* on the grounds that the exclusion in *Moreno* kept entire households out of the program while the definition of income in *Knebel* simply limited the amount of food stamps available to a household without excluding any otherwise eligible household from the program. Alternatively, the Court in *Knebel* could have explained that there was no evidence anywhere that the amended definition of income was the result of a mere desire to harm a politically unpopular group.

179. 477 U.S. 635 (1986).

180. The Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703.

181. This definition of "household" did not prevent persons living together from manipulating the rules in order to receive greater benefits. By claiming that they did not purchase food and prepare meals together, individuals could establish separate households and qualify for a higher level of benefits. *See Castillo*, 477 U.S. at 637.

182. *Id.* at 636 n.1 (quoting 7 U.S.C. § 2012(i) (1964), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 358; Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763, 772).

183. *See id.* at 637-38.

184. *Id.* at 638.

185. *Id.* at 639.

186. *Id.* at 639 n.3.

187. *Id.*

preventing fraud, or any other legitimate purpose."[188] By contrast, according to the Court, the definition of "household" in *Castillo* would not necessarily disqualify an entire household and it might result only in a reduction in benefits.[189] The relevance of the Court's distinction is not clear. Why does the lesser effect on households in *Castillo* demonstrate the required connection with purpose? The implicit suggestion in *Castillo* is that, if in *Moreno* the government had reduced benefits to hippies rather than eliminating those benefits entirely, that lesser effect would somehow have saved the statute. But nothing in *Moreno* would support such a suggestion.

The Court in *Castillo* found that Congress' appropriate concerns with mistake, fraud, and the cost-ineffectiveness of case-by-case analysis justified "the use of general definitions."[190] One of the cases cited to support this point was *Dandridge*.[191] The Court found that "the justification for the statutory classification is obvious."[192] Congress had a rational basis for treating relatives who live together differently from others. Congress "could reasonably determine" that close relatives sharing a home were more likely to purchase and prepare meals together than were others.[193] That close relatives made up a large percentage of food stamp recipients "might well have convinced" Congress that different treatment was justified.[194] Furthermore, Congress "might have reasoned" that it would be easier for close relatives than for others to accommodate themselves to a rule that required them to prepare meals together.[195] Nowhere did the Court insist on any evidence to support these assumptions.

For Justice Marshall, who dissented, *Moreno* could not be distinguished and thus was controlling: "[T]he critical fact in both cases is that the statute drew a distinction that bears no necessary relation to the prevention of fraud."[196] Marshall pointed out that the legislative history made it clear that the amendment was an anti-fraud measure, yet "the Committee Reports cite[d] no hard evidence that related persons living together were in fact significant sources of fraud."[197] To the extent that the majority had agreed with Justice Marshall that *Moreno* was controlling, the demand for evidence of possible fraud would have been appropriate. However, the majority had ignored *Moreno*; traditional deference does not demand evidence to support legislative assumptions. Justice Marshall's attempt to use *Moreno* as the controlling precedent failed.

In 1988, the Court decided its third post-*Moreno* food stamp case, *Lyng v.*

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188. *Id.*
189. *Id.*
190. *Id.* at 640-41.
191. *See id.* at 641 n.7.
192. *Id.* at 642.
193. *Id.*
194. *Id.*
195. *Id.* at 643.
196. *Id.* at 646 (Marshall, J., dissenting).
197. *Id.*

International Union.[198] Congress in 1981 had amended the Food Stamp Act to provide that households would not be eligible for food stamps while any member of the household was on strike.[199] Once again, relying in part on *Moreno*, the district court found that the amendment violated the Equal Protection Clause because, inter alia, it was based on an animus against an unpopular political minority—strikers.[200] The Supreme Court once again reversed. The Court's citation to *Moreno* was surprising. *Moreno* was used to support the proposition that rationality was the appropriate standard of review and that this standard was "typically quite deferential."[201] The Court then had "little trouble in concluding that [the amendment] is rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes."[202] The Court accepted the argument that making strikers eligible for food stamps was a subsidy to strikers and would thus serve as a weapon for one side in labor disputes.[203]

Significantly, the Court cited *Dandridge* for the proposition that it was not empowered to reject the views of Congress on economic or social policy.[204] The Court minimized the effect of *Moreno* in a footnote. *Moreno* was not support for the proposition that "strikers as a class are entitled to special treatment."[205] The Court explained that what had appeared to be the holding in *Moreno*—that a bare desire to harm a politically unpopular group is not a legitimate purpose—was "merely an application of the usual rational-basis test," a test that the Court insisted had in fact been applied in *Moreno*.[206]

Justice Marshall's dissenting opinion would have relied on *Moreno* to invalidate the striker amendment. Just as the Court in *Moreno* had refused to credit the government's assertion that the purpose of the amendment was the prevention of fraud, so Justice Marshall refused to credit the government's assertion that the purpose of the amendment was to promote neutrality.[207] That claim ignored the fact that the federal government has become deeply involved in the lives of Americans, in both labor and management. While the amendment to the Food Stamp Act would cause workers to lose their food stamps during a strike, management would not be forced to give up a host of government

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198. 485 U.S. 360 (1988).

199. *See id.* at 363 n.2 (citing 7 U.S.C. § 2015(d)(3) (1986), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 361).

200. International Union v. Lyng, 648 F. Supp. 1234, 1239-40 (D.D.C. 1986), *rev'd*, Lyng v. International Union, 485 U.S. 360 (1988).

201. *International Union*, 485 U.S. at 370. The Court also cited *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and *Dandridge v. Williams*, 397 U.S. 471 (1970).

202. *International Union*, 485 U.S. at 371.

203. *Id.*

204. *Id.* at 372 (citing *Dandridge*, 397 U.S. at 486).

205. *See id.* at 370 n.8.

206. *Id.*

207. *Id.* at 380-81 (Marshall, J., dissenting).

subsidies, contracts, and other benefits that it was receiving.[208] For Justice Marshall, the amendment was not an instrument of neutrality but rather a one-sided penalty on strikers.[209] With the veneer of neutrality removed and along with it the claim that neutrality was the purpose of the law, Justice Marshall cited legislative history from precursors to the 1981 Amendment in order to demonstrate that the actual purpose of the amendment, arising out of public animus against strikers, was "to increase the power of management over workers, using food as a weapon in collective bargaining."[210]

The food stamp cases, particularly *Lyng v. International Union*, look strikingly like *Moreno* and yet the Court found *Moreno* to be of little significance. By contrast, all three of the District Courts considered *Moreno* to be controlling, both in terms of the kind of review and the result in the case. However, the Supreme Court's post-*Moreno* food stamp cases appear to have marginalized it, so that, although it has never been overruled, it is for the most part limited to its facts.

The Supreme Court's other welfare cases after *Moreno* confirm that the Court considers the Equal Protection Clause to have extremely little to say about how the government runs its food stamp and welfare programs. As the Court had explained in *Dandridge*, even though constitutional arguments about welfare involve "the most basic economic needs of impoverished human beings," the Court is not empowered to impose its views on the legislature.[211] Thus, the Court applied minimal scrutiny and (1) in 1980 rejected an equal protection challenge to the lower level of AFDC reimbursement that residents of Puerto Rico received in comparison to the levels received by residents of the states,[212] (2) in 1987 rejected an equal protection challenge to an AFDC rule that required a family seeking AFDC benefits to include as family income child support payments received from a noncustodial parent,[213] and (3) in 1990 rejected an equal protection challenge to an AFDC rule that a child's insurance benefits under the Social Security Act are not "child support" and thus there was no requirement to "disregard" the first fifty dollars of the benefit in calculating family income.[214]

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208. *See id.* at 382.

> [B]usinesses may be eligible to receive a myriad of tax subsidies through deductions, depreciation, and credits, or direct subsidies in the form of Government loans through the Small Business Administration (SBA). Businesses also may receive lucrative Government contracts and invoke the protections of the Bankruptcy Act against their creditors. None of these governmental subsidies to businesses is made contingent on the businesses' abstention from labor disputes, even if a labor dispute is a direct cause of the claim to a subsidy.

Id.

209. *Id.* at 382-83.

210. *Id.* at 383-84 (citing H.R. REP. NO. 95-464, at 129 (1977)).

211. Dandridge v. Williams, 397 U.S. 471, 485-86 (1970).

212. Harris v. Rosario, 446 U.S. 651 (1980).

213. Bowen v. Gilliard, 483 U.S. 587 (1987).

214. Sullivan v. Stroop, 496 U.S. 478, 485 (1990).

In these cases, the Court addressed what it considered to be the appropriate standard. A classification would not violate the Equal Protection Clause "if any state of facts reasonably may be conceived to justify it."[215] Decisions about spending money for the public welfare were not for the courts: "The discretion belongs to Congress unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."[216] *Dandridge* is triumphant.

C. Education and the Ascendancy of Rodriguez *Over* Plyler

After deciding *Moreno* for the plaintiffs in 1973, the Court retired from the business of heightened rationality review for nine years. It was not until 1982 that another rational basis claim was successful. In that year, the Court decided two such cases; the first, *Plyler v. Doe*,[217] involved education, and the second, *Zobel v. Williams*,[218] concerned newcomers.

In *Plyler*, the Court considered an equal protection challenge to a Texas law that denied free public education to undocumented school age children. The Court's opinion cited with apparent approval its earlier decision in *San Antonio School District v. Rodriguez* for the proposition that education is not a fundamental right under the Constitution.[219] However, the Court then went on to say that "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation," because of its importance in "maintaining our basic institutions" and "the lasting impact of its deprivation on the life of a child."[220] This special status of education meant that the traditional deference that the Court applied in *Rodriguez* was not appropriate either.[221] In determining the appropriate level of review, the Court adopted a hybrid standard. According to the Court, the test was "rationality," but in the context of a complete deprivation of public education to a particular group, such a deprivation could "hardly be considered rational unless it further[ed] some substantial goal of the State."[222] This statement of rationality review is not the traditional one. The Court required that the classification "further" the state interest, which suggests a more direct connection to purpose than the ordinary "rational relation;" and, in addition, the state interest had to be "substantial," which is clearly a more demanding test than that of "legitimacy."

In applying this hybrid standard, the Court was not deferential. It identified three "colorable" state interests at which the statute might be aimed.[223] The first

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215. *Id.* at 485 (quoting Bowen v. Gilliard, 483 U.S. 587, 601 (1987)).

216. *Bowen*, 483 U.S. at 598 (citations omitted).

217. 457 U.S. 202 (1982).

218. 457 U.S. 55 (1982).

219. *Plyler*, 457 U.S. at 221 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).

220. *Id.*

221. *See id.* at 223.

222. *Id.* at 224.

223. *Id.* at 227.

was protection from an influx of illegal immigrants.[224] Assuming that this was a substantial interest, a point the Court did not address, the exclusion of aliens from schools was "hardly . . . an effective method of dealing with [the problem]," and charging these children tuition was a "ludicrously ineffectual attempt to stem the tide of illegal immigration."[225] There was "no evidence in the record"[226] that illegal immigrants imposed a significant burden on the state's economy.[227] However, under traditional rational basis review, the Court usually does not search the record for evidence that the legislature was in fact correct in its judgment and the state ordinarily need not choose the most effective method of dealing with a problem.

Second, the Court considered the argument that undocumented school children could be treated differently "because of the special burdens they impose on the State's ability to provide high-quality public education."[228] Assuming that this is a substantial purpose, a point the Court once again did not address, the Court found no adequate connection between the classification and purpose. Again, the Court looked to "the record" but found no "credible supporting evidence" that the presence of alien children would affect the quality of education in the public schools.[229] In the course of examining the record, the Court transformed the state's concern about the special burdens imposed on the school system by students with special needs into something else. The state's financial argument seems to have been of the nature that extra money spent on alien children would mean less money for other students, not an illogical claim. However, the Court insisted that the state put into the record evidence that this transfer of resources would have a negative effect on the overall quality of the educational program that was being offered. This the state had not done.

Finally, the Court considered the state's claim that the exclusion of aliens was justified because they are less likely to remain in the state and use their education productively within the state.[230] However, according to the Court, the state has no assurance that any child, citizen or not, will remain in the state and the "record [was] clear" that many undocumented children would remain in this country.[231] Thus, the exclusion of aliens from schools did not further this interest either. Having found that none of the interests put forth by the state were furthered by the exclusion of aliens, the Court concluded that the denial did not further any substantial state interest and thus violated the Equal Protection Clause.[232]

Four dissenters in the case, in an opinion written by Chief Justice Burger,

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224. *See id.* at 228.

225. *Id.* (citation omitted).

226. *Id.*

227. *See id.*

228. *Id.* at 229.

229. *Id.* (quoting *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 583 (S.D. Tex. 1980)).

230. *Id.* at 229-30.

231. *Id.* at 230.

232. *Id.*

would have applied the traditional rational basis test the Court used nine years earlier in *Rodriguez*.[233] In that case, the Court had reviewed the system under which the public schools in Texas were financed largely on the basis of property taxes.[234] Because the value of property varied widely from one school district to another, both in absolute terms and per student, the amount of money spent per student also varied widely.[235] The plaintiffs in *Rodriguez* claimed that interdistrict variations in school spending violated the Equal Protection Clause. The Court rejected the claim. Although the Court cited *Brown v. Board of Education*[236] for the proposition that education is the most important function of local government,[237] the Court explained that education was not a fundamental right since it was not "explicitly or implicitly guaranteed by the Constitution."[238] Thus, the appropriate standard was whether the classifications created by the Texas system of funding local schools were rationally related to a legitimate state interest.[239] The Court found that the funding of schools from local property taxes was rationally related to the legitimate interest of maintaining local control of schools.[240] The result in *Rodriguez* seemed to send the message that the Court would take a hands-off attitude with regard to constitutional challenges to public schools.

As the dissenters in *Plyler* pointed out, the Court already announced in *Rodriguez* that the thing that made an interest "fundamental" was not how important the interest was to the people involved,[241] but whether that interest could be found in the Constitution. Why, then, had the majority in *Plyler* created a special status for education as something different from other governmental benefits? The Court in *Rodriguez* had held that no right to education could be found in the Constitution. The *Plyler* dissent called the majority's explanation of the special constitutional status for education "opaque" and claimed that the majority opinion "rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases."[242]

For the dissenters, since education was not a fundamental right, and since there is no "constitutional hierarchy"[243] for non-fundamental governmental services, the standard of review should have been deferential. The dissenters identified "prudent conservation of finite state revenues" as a permissible goal.[244] In terms of singling out illegal aliens, the dissent considered it not irrational for

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233. *Id.* at 247-48 (Burger, C.J., dissenting).
234. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 6-16 (1973).
235. *See id.* at 8-16.
236. 347 U.S. 483 (1954).
237. *Rodriguez*, 411 U.S. at 29 (quoting *Brown*, 347 U.S. at 493).
238. *Id.* at 34-35.
239. *See id.* at 44.
240. *Id.* at 47-55.
241. Plyler v. Doe, 457 U.S. 202, 247-48 (1982) (Burger, C.J., dissenting).
242. *Id.* at 243, 247.
243. *Id.* at 248.
244. *Id.* at 249.

the state to treat differently those legally in the country and those not here legally. In determining who is a bona fide resident for school attendance purposes, the state could reasonably make illegality of residence a relevant factor.[245] Nor should the state be forced to prove, as the majority demanded, that additional expenditures on illegal alien children would diminish the quality of education generally.[246] Under rational basis review, the state could use any savings that accrued in whatever manner it considered appropriate.[247]

It was not originally clear how much of *Rodriguez* survived *Plyler*. The cases can be distinguished on their facts. None of the plaintiffs in *Rodriguez* was completely denied public school education. Their claim was that the education they were receiving was not as good as that received by children in other public school systems. On the other hand, the undocumented school children in *Plyler* were completely denied a free public education. However, this narrow factual distinction accounts for only a small part of the contradiction within the cases. Although *Plyler* cited *Rodriguez* with apparent approval, the two cases are directly contrary with regard to the kind of review that the Equal Protection Clause demands of differences in educational opportunities. *Rodriguez* insisted that education is just like any other governmental benefit; *Plyler* found that education is different from other benefits and is entitled to closer scrutiny.

Is *Plyler* a rejection of *Rodriguez* and does it create a new standard of review for educational classifications? Apparently not. Since *Plyler*, the Court has been at pains to limit the case to its facts—a total denial of public education—and to interpret it as consistent with *Rodriguez*. For example, a year later in *Martinez v. Bynum*,[248] the Court found that a bona fide residence requirement with respect to attendance at public school did not violate the Equal Protection Clause. According to the Court, "the question is simply whether there is a rational basis for it."[249] The residence requirement was related to the school district's legitimate interests in limiting public services to residents, in planning and operating the schools, and in maintaining the quality of the schools.[250]

In *Kadrmas v. Dickinson Public Schools*[251] in 1988, the Court reviewed North Dakota's failure to provide free bus service for public school students in all of the state school districts. The Court cited both *Rodriguez* and *Plyler* for the propositions that ordinarily a classification need only be rationally related to a legitimate governmental purpose and that education is not a fundamental right.[252] The Court admitted that *Plyler* had applied a "heightened scrutiny" but also insisted that *Plyler* was "unique" in its circumstances, theories, and rationales.[253]

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245. *See id.* at 250 (citations omitted).
246. *See id.* at 252.
247. *See id.*
248. 461 U.S. 321 (1983).
249. *Id.* at 329 n.7.
250. *See id.* at 328-30.
251. 487 U.S. 450 (1988).
252. *Id.* at 457-58.
253. *Id.* at 459.

The Court in *Kadrmas* cited one of the most deferential versions of rational basis review, that a statute does not violate equal protection "'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'"[254] Significantly, the Court in *Kadrmas* did not insist on evidence in the record that the classification in fact advanced a legislative purpose. Quite the contrary. The Court explained that it was "not bound by explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'"[255] The Court then upheld the statute because, inter alia, "the legislature could conceivably have believed" that forbidding bus fees in reorganized districts protected reasonable expectations and "could just as rationally conclude," as to nonreorganized districts, that those districts should have the option of requiring bus users to pay the cost of service.[256]

In 1986, in *Papasan v. Allain*,[257] the Court issued an opinion that confirmed the limited reach of *Plyler*, but also suggested that equal protection claims in the education area were not completely hopeless. The case concerned school districts in northern Mississippi that, for historical reasons, did not receive as large a state educational grant as did school districts in other parts of the state.[258] At a glance, the case would appear to be about inequities in the way public schools are financed and thus controlled by *Rodriguez*. Yet, the Court determined that the issues in the case had not been properly presented and so the case was remanded without a decision on the merits.[259] Yet, the Court's opinion did make some comments on the relevance of *Rodriguez* and *Plyler*. The Court cited *Rodriguez* as setting forth the appropriate test—whether the school financing scheme bore a rational relationship to a legitimate state purpose.[260]

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254. *Id.* at 463 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

255. *Id.* (quoting *Vance*, 440 U.S. at 111).

256. *Id*. at 465.

257. 478 U.S. 265 (1986).

258. *Id.* at 269-73.

259. *Id.* at 289. The Court stated:

> [T]he question remains whether the variations in the benefits received by school districts from Sixteenth Section or Lieu Lands are, on the allegations in the complaint and as a matter of law, rationally related to a legitimate state interest. We believe, however, that we should not pursue this issue here but should instead remand the case for further proceedings. Neither the Court of Appeals nor the parties have addressed the equal protection issue as we think it is posed in this case: Given that the State has title to assets granted to it by the Federal Government for the use of the State's schools, does the Equal Protection Clause permit it to distribute the benefit of these assets unequally among the school districts as it now does?

Id.

260. *Id.* at 286.

The Court stated that *Plyler* "did not . . . measurably change the approach articulated in *Rodriguez*."[261] The Court explained further that: "As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[262]

The Court in *Papasan* did not resolve that issue, but it did conclude that *Rodriguez* was not controlling on its facts. *Rodriguez* involved a challenge to the entire system of funding public schools while *Papasan* was only concerned with one aspect of school financing.[263] As the Court explained, "*Rodriguez* did not . . . purport to validate all funding variations that might result from a State's public school funding decision."[264] Thus, *Papasan* slightly opened a door that had appeared to be shut. But not much has come from *Papasan*. The case was settled on remand and there was thus never a judicial determination of whether or not the funding differential violated the Equal Protection Clause.[265] *Rodriguez* still appears to be ascendant.

D. Preferences for Established Over Newer Residents

In 1982 and 1985, the Court decided two cases in which it used rational basis review to invalidate state laws that created preferences for established residents over newer residents.

The 1982 case was *Zobel v. Williams*,[266] in which the Court reviewed an Alaska statute that established a mechanism for distributing a portion of the state's newly acquired oil wealth. Under the statute as enacted, each resident of Alaska at least eighteen years of age would receive one dividend unit for each year of residency since statehood in 1959.[267] For 1979, the first year in which there was to be a distribution, the amount of the dividend unit was set at $50.00.[268]

The plaintiffs in the case had argued for heightened scrutiny on the grounds that the statute infringed on the implied fundamental right to travel.[269] The Court determined that it did not need to decide whether heightened scrutiny was

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261. *Id.* at 285.

262. *Id.*

263. *See id.* at 286-87.

264. *Id.* at 287.

265. *See* Papasan v. United States, No. DC 81-90-B-0, 1989 U.S. Dist. Lexis 17535 (N.D. Miss., Feb. 29, 1989) (stipulating, in consent judgment, that "[t]hese disparities [in funding school districts] are discriminatory, without a rational basis, and are in violation of the plaintiffs' equal protection rights secured by the Fourteenth Amendment of the United States Constitution").

266. 457 U.S. 55 (1982).

267. *See id.* at 57.

268. *See id.*

269. *Id.* at 60 n.6.

necessary if the statutory scheme could not even pass minimal scrutiny.[270] Thus the question before the Court was whether the distinctions created by the statute rationally furthered a legitimate state purpose.[271] The state identified three purposes that were advanced by the statutory scheme: (1) "creation of a financial incentive for individuals to establish and maintain residence in Alaska;" (2) "encouragement of prudent management of the [oil fund];" and (3) apportioning benefits for past contributions made by residents to the state.[272]

The Court found the statutory distinctions created by the statute were not rationally related to the first two purposes, which were assumed to be valid.[273] In both instances, the problem arose out of the retroactive application of the distribution scheme. Obviously, a statute enacted in 1980 could not possibly have created any incentives in 1959 to move to or to remain in Alaska.[274] With regard to incentives to move to or remain in Alaska after 1980, all residents in Alaska as of that date were similarly situated with respect to the incentives for maintaining residence and thus should be treated the same. There might also have been equal protection difficulties with a prospective application of the distribution scheme because it would have created different levels of incentives for residents with different years of past residence. However, the Court did not need to decide that issue because the Alaska legislature provided in the statute that invalidation of any part of the statute would result in invalidation of the whole.[275]

Retroactive application of the distribution scheme was also not rationally related to the second purpose—prudent management of the oil fund.[276] The argument advanced by the state was that, if current residents were not given a larger stake in the fund than future residents, then the current residents would demand that the fund make immediate, high-risk investments, which also would have the effect of encouraging "rapacious development."[277] Once again, even assuming this argument has some weight prospectively, still, a distribution scheme that awards substantial money for years of previous residence is not related to the concern about the consequences of the arrival of future residents.[278]

This left the state with only one purpose—to reward citizens for past contributions, which the Court determined was not legitimate.[279] The Court did not explain why the purpose was illegitimate, but pointed out that if that purpose were allowed, then other "rights, benefits, and services" could be apportioned according to length of residency with the result that state residents would be

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270. *Id.* at 60-61.
271. *See id.* at 60.
272. *Id.* at 61 (citing Williams v. Zobel, 619 P.2d 448, 458 (Alaska 1980)).
273. *Id.* at 61-62.
274. *See id*. at 62.
275. *Id.* at 64-65.
276. *See id.* at 62.
277. *Id*.
278. *See id*. at 63.
279. *Id*.

divided into "expanding numbers of permanent classes."[280] Justice Brennan's concurrence argued that the real problem with the past contributions argument was that, as a measuring device, it equated past contributions with years of residence; however, "length of residence has only the most tenuous relation to the *actual* service of individuals to the State."[281]

The Court in *Zobel* claimed to have invalidated the Alaska distribution scheme without applying heightened scrutiny, but this clearly was not the most deferential level of scrutiny. Lurking in the background throughout the case were the Court's previous cases on preferential treatment for established residents. Those cases had invalidated such preferences by using strict scrutiny because of the infringement on the implied fundamental right to travel.[282] Although the Court claimed not to be relying on those cases,[283] they appear to have influenced the Court.[284] It was hardly traditional deference when the Court found that the Alaska distribution scheme did not adequately advance the state's first two objectives—incentives for residence and prudent management of the fund. Traditionally, the state need not adopt the most efficient means for achieving its end, only a means that the legislature could reasonably believe had a rational relation with that end. Even if the retroactive application of the scheme was irrational, the possible rationality of the prospective application of the scheme might have been a sufficient connection with the achievement of statutory purpose to save the statute. The Court in *Zobel* also did not attempt to hypothesize additional purposes that might have saved the statute.

In 1985, in *Hooper v. Bernalillo County Assessor*, [285] the Court decided a second rationality case involving preferences for established over newer residents. The case arose out of a property tax exemption for certain Vietnam-era veterans who had been residents of New Mexico before May 8, 1976.[286] The plaintiff in the case was a Vietnam veteran who established residence in New Mexico in 1981 and was therefore denied the exemption. As the Court described the workings of the statute, it was similar to the distribution scheme in *Zobel* in that it created "'fixed, permanent distinctions between . . . classes of concededly bona fide residents' based on when they arrived in the State."[287] Also, as in

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280. *Id*. at 64.

281. *Id.* at 71 (Brennan, J., concurring).

282. *E.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 269 (1974) (invalidating one-year residence requirement for free medical care); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (invalidating one-year residence requirement for voting); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (invalidating one-year residence requirement for welfare benefits), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

283. *Zobel*, 457 U.S. at 58.

284. *See id.* at 82 (Rehnquist, J., dissenting). Justice Rehnquist insisted that the Court had invalidated preferences for established residents only when the Court was concerned about the infringement of the fundamental right to travel, an infringement that would trigger strict scrutiny.

285. 472 U.S. 612 (1985).

286. *Id*. at 614.

287. *Id*. at 616 (quoting *Zobel*, 457 U.S. at 59).

Zobel, the Court did not see the need to decide the question of heightened scrutiny since the tax exemption could not even pass the minimum rationality test.[288]

The state court had identified two purposes that the tax exemption served. The first was that it "encourage[d] veterans to settle in the State" and the second was that it "serve[d] as an expression of the State's appreciation to its own citizens for honorable military service."[289] The Court found that the exemption, limited to veterans who established residence before May 8, 1976, was not rationally related to the purpose of encouraging settlement in New Mexico.[290] The legislature had not established the eligibility date until long after the triggering event had occurred.[291] A veterans benefit not created until 1981 could not possibly have attracted veterans to New Mexico in 1976.[292] As in *Zobel*, the retroactive application of the statute was irrational in that it was not related to the supposed end.

The Court indicated that the second purpose—rewarding veterans for past service—was both legitimate and consistent with longstanding national policy.[293] Yet while the state was free to choose to reward all of its resident veterans or to reward no veterans at all, it could not make distinctions between established resident veterans and newer resident veterans.[294] The Court identified problems with both the means and ends. It was difficult for the Court to imagine that the New Mexico legislature could have believed that its residents suffered more than veterans from other states so that New Mexico could consider its residents differently situated.[295] Even if the state could grant benefits "on the basis of a coincidence between military service and past residence," the fixed date exemption provision was not rationally related to that goal.[296] The statute did not "require any connection between the veteran's prior residence and military service."[297] A person who resided in New Mexico for a short time as an infant, before 1976, would qualify as soon as he moved to New Mexico at any time in the future.[298]

More important than this technical argument was the Court's much stronger point—singling out previous residents to receive the benefit is "not a legitimate state purpose."[299] There could be no valid distinction between older and newer

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288. *Id.* at 618.

289. *Id.* at 618-19 (quoting Hooper v. Bernalillo County Assessor, 679 P.2d 840, 844 (N.M. Ct. App. 1984)).

290. *Id.* at 619.

291. *See id.*

292. *See id.* at 619-20.

293. *Id.* at 620.

294. *Id.* at 620-21.

295. *Id.* at 621.

296. *Id*. at 621-22 (footnote omitted).

297. *Id*. at 622 (footnote omitted).

298. *See id.*

299. *Id.* at 622-23 (quoting Zobel v. Williams, 457 U.S. 55, 63 (1982)).

residents. "Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival date in the State . . . ."[300]

Zobel and *Hooper* may appear to suggest that the Court has created a general prohibition of preferences for established residents over newer residents. Some of the Court's right to travel cases that applied strict scrutiny and invalidated durational residence requirements are consistent with this view. However, there are several precedents to the contrary. The Court has upheld durational residence requirements imposed by states (1) to qualify for the benefits of lower university tuition,[301] (2) to be eligible to bring a divorce action,[302] and (3) to run for state senator[303] or governor.[304] And seven years after *Hooper*, the Court in *Nordlinger v. Hahn* [305] approved a property tax scheme that gave a decided advantage to long-term homeowners over more recent purchasers of homes. In that case, the Court found that neighborhood preservation and stability along with the protection of homeowners' expectation interests were overarching values, and that a preference for longer-term homeowners was related to those goals.[306] However, as Justice Stevens pointed out in dissent,[307] protecting expectation interests was just a nice way of explaining that certain people are preferred because they have lived in a certain place for a long time. This seems inconsistent with *Zobel* and *Hooper*.

E. Preferences for State Residents Over Nonresidents

In 1985, the Court decided two unusual cases in which rational basis claims were successful.[308] Both involved state tax classifications that treated residents or resident corporations differently from nonresidents. Notwithstanding a long tradition of extreme deference to state tax classifications,[309] the Court invalidated both statutes as creating an impermissible preference for the "home team." The results in both cases are difficult to justify and they seem to be limited to their

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300. *Id.* at 623.

301. Vlandis v. Kline, 412 U.S. 441 (1973). While the Court's holding in *Vlandis* was somewhat narrower, it did acknowledge a state's ability to enforce such a requirement. *Id.* at 452-53 & n.9.

302. Sosna v. Iowa, 419 U.S. 393 (1975).

303. Sununu v. Stark, 420 U.S. 958 (1975) (mem.), *summarily aff'g*, 383 F. Supp. 1287 (D. N.H. 1974).

304. Chimento v. Stark, 414 U.S. 802 (1973) (mem.), *summarily aff'g*, 353 F. Supp. 1211 (D. N.H. 1973).

305. 505 U.S. 1 (1992). *See infra* notes 421-37 and accompanying text for further discussion of this case.

306. *Id.* at 12-13.

307. *Id.* at 39 (Stevens, J., dissenting).

308. Williams v. Vermont, 472 U.S. 14 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

309. *See Metropolitan Life*, 470 U.S. at 884 (O'Connor, J., dissenting).

facts.

In *Metropolitan Life Insurance Co. v. Ward*,[310] the Court reviewed an Alabama statute that taxed the gross premiums of out-of-state insurance companies at a higher rate than those of domestic insurance companies.[311] Foreign insurers could reduce the differential somewhat by investing a certain percentage of their worldwide assets in Alabama.[312] The purposes of the statute as identified by the state court were to encourage the formation of new domestic insurance companies in Alabama and to encourage capital investment in Alabama assets and securities by foreign insurance companies.[313]

The Supreme Court began its analysis by stating that the appropriate standard to review classifications that imposed more onerous taxes on foreign corporations than domestic corporations was that "the discrimination between foreign and domestic corporations [must bear] a rational relation[ship] to a legitimate state purpose."[314] The Court then went on to hold that both purposes advanced by the different treatment were impermissible.[315] However, what could possibly be the matter with the promotion of domestic industry as a state purpose?

The Court's answer was that Alabama was attempting to promote the business of domestic insurers "by penalizing foreign insurers who also want to do business in the State."[316] But this answer is a conclusion without analysis or explanation. Even the Court had to concede that "a State's goal of bringing in new business is legitimate and often admirable."[317] For a long time, state and local governments have promoted business through such devices as tax exemptions, tax abatements, subsidized loans, preparation of infrastructure such as roads and sewers, and the relaxation of zoning restrictions. Certainly, as argued by the State of Alabama, a favorable insurance tax rate would also promote the domestic insurance industry. Nevertheless, the problem seems to be that the State has provided the favorable rate *only* for domestic insurers while imposing a higher rate on foreign insurers. According to the Court, the State has to treat all insurers the same.

Yet, are not domestic and foreign insurers different from each other in ways that are relevant to the state? Justice O'Connor, writing for the four dissenters in *Metropolitan Life*, demonstrated that the two were in fact quite different for the state's purposes. Alabama's domestic insurance companies were typically quite different from their multistate competitors. The foreign insurers offered standardized national policies to "affluent, high volume, urban markets."[318] The

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310. 470 U.S. 869 (1985).

311. *Id*. at 871-72.

312. *See id.* at 872.

313. *Id.* at 873.

314. *Id.* at 875 (citing Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 667-68 (1981)).

315. *Id.* at 883.

316. *Id*. at 877.

317. *Id.* at 879.

318. *Id*. at 887 (O'Connor, J., dissenting).

domestic insurers were far more likely to write low-cost policies and to serve rural areas.[319] It was easier for Alabama to regulate and insure the solvency of domestic insurers than it was to do the same for out-of-state entities.[320] Thus, the two kinds of insurers were in fact quite different in relation to Alabama's attempt to "promote the public welfare."[321] As with any classification, the effect of Alabama's differing tax rates on insurance companies was that some were benefitted and some burdened. However, so long as the purpose of the law is to promote a public good, the incidental benefits and burdens are not ordinarily thought to create any equal protection difficulties.

A further problem with the majority's opinion, which Justice O'Connor noted, was its failure to explain adequately the effect of the McCarran-Ferguson Act[322] on its holding in *Metropolitan Life*. That Act had exempted the insurance industry from the Commerce Clause, in large measure because of the recognition that the insurance industry has a significant local component.[323] The exemption was due to the Congressional understanding both that local insurers are more responsive to local conditions and that state regulators are better able to respond to the different needs of particular states.[324] Although *Metropolitan Life* was not a Commerce Clause case, the majority did not adequately explain why the promotion of the domestic insurance industry, which Congress had approved as appropriate under the Commerce Clause, was now impermissible under the Equal Protection Clause.

Just four years earlier, in *Western & Southern Life Insurance Co. v. State Board of Equalization*,[325] the Court approved California's retaliatory tax on out-of-state insurance companies. Domestic insurers and some out-of-state insurers were charged one rate while out-of-state insurers incorporated in states that charged higher taxes on California insurers were charged a higher rate.[326] In upholding this tax, the Court stated that "[t]here can be no doubt that promotion of domestic industry by deterring barriers to interstate business is a legitimate state purpose."[327] Justice O'Connor, writing for the dissent in *Metropolitan Life*, did not think that there was a substantive difference between the taxes in the two cases. According to Justice O'Connor, the state can impose unequal burdens on foreign insurers "if the State's purpose is to foster its domestic insurers' activities in *other* States," but a similarly unequal burden is impermissible "when employed to further a policy that places a higher social value on the domestic insurer's *home State* than interstate activities."[328] For Justice O'Connor, the

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319. *See id.*
320. *See id.* at 888.
321. *Id.*
322. 15 U.S.C. § 1011-1015 (1994).
323. *See Metropolitan Life*, 470 U.S. at 889 (O'Connor, J., dissenting).
324. *See id.* (citations omitted).
325. 451 U.S. 648 (1981).
326. *See id*. at 649-50.
327. *Id*. at 671.
328. *Metropolitan Life*, 470 U.S. at 899-900 (O'Connor, J., dissenting).

majority had "engraft[ed] its own economic values on the Equal Protection Clause."[329]

Three months after *Metropolitan Life*, in June of 1985, the Court decided *Williams v. Vermont*,[330] another case involving a tax preference for residents over nonresidents. Vermont imposed a use tax on residents when cars were registered. The tax was not imposed if the car had been purchased in Vermont and a sales tax had been paid at that point nor if a sales or use tax had been paid in another state *if* the person registering the car had been a Vermont resident when paying the tax.[331] The plaintiffs purchased cars outside of Vermont and paid sales taxes to other states but had not been Vermont residents when paying the taxes and therefore were not allowed a credit for those payments.[332] The Vermont Supreme Court upheld the tax because it was "rationally related to the legitimate state interest in raising revenue to maintain and improve the highways, and rationally placed the burden on those who used them."[333] The U.S. Supreme Court's analysis began by announcing that States have "large leeway"[334] to make tax classifications which will be upheld "if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose."[335] Although this appeared to be a deferential standard, the Court concluded that the different treatment of residents and nonresidents did not further any legitimate purpose.[336] The Court made the surprising, and ultimately insupportable, claim that "[a] State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation."[337]

For the Court, the statutory classification that makes residence at time of purchase the relevant factor "is a wholly arbitrary basis on which to distinguish among present Vermont registrants."[338] All Vermont registrants are similarly situated with respect to the purpose of maintaining and improving the roads in Vermont and of having those who use the roads pay for them.[339] "The distinction

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329. *Id*. at 900.

330. 472 U.S. 14 (1985).

331. *See id.* at 15.

332. *See id.* at 16.

333. *Id.* at 17 (citing Williams v. State, 478 A.2d 993 (Vt. 1984)). *Williams* was a summary decision that cited as controlling *Leverson v. Conway*, 481 A.2d 1029 (Vt. 1984), *appeal dismissed*, 469 U.S., 926 (1984), a companion case to *Williams*. A decision in the *Leverson* case was handed down the same day.

334. *Metropolitan Life*, 472 U.S. at 22 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973)).

335. *Id.* at 22-23 (quoting Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983)).

336. *Id.* at 23.

337. *Id.* (citing WHYY v. Glassboro, 393 U.S. 117, 119 (1968); Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571-72 (1949)).

338. *Id.*

339. *See id.* at 23-24.

between [resident and nonresident] bears no relation to the statutory purpose."[340] With regard to the policy of paying for the use of roads, it might be appropriate to impose the use tax on those in plaintiffs' position, who would be using Vermont's roads. Yet, if that is true, there is no reason not to impose the tax on those who were Vermont residents at the time of their out-of-state purchase, who would also be using Vermont's roads.

According to Justice Blackmun, in his dissent joined by Justices Rehnquist and O'Connor, Vermont's use tax system "worked exactly as it was intended to work."[341] "Each [of the parties] used his or her car in two States, and each paid two States' use or sales taxes."[342] The majority had not accorded the tax statute the deference to which it was entitled under the Equal Protection Clause, but rather subjected it "to a kind of microscopic scrutiny that few enactments could survive."[343] Most surprising of all, the majority found unconstitutional the allegedly different treatment of the plaintiff and some "hypothetical Vermonter" who received better treatment.[344] That "phantom beneficiary" of the discrimination against Williams probably did not exist.[345]

Even if such a person as hypothesized did exist, according to Justice Blackmun, the differing treatment would be justified. It is not irrational to presume that "people will use their cars primarily in the States in which they reside."[346] This statutory presumption, which is surely correct in the vast majority of cases, establishes a classification that is closely correlated with the purpose of assessing road taxes on those who use the roads. The fact that the classification might not fit perfectly with the purpose—that Williams may not use his car primarily in the state in which he resided at the time of purchase—is not ordinarily considered to be a problem under rational basis review.

Metropolitan Life and *Williams* may appear to suggest that the Court has a new-found antagonism toward any state classification that disadvantages nonresidents in any way. This would be surprising in a federal system that recognizes the principle of state sovereignty.[347] State residence must mean something or the state would simply be an administrative department of the federal government. In fact, the Court has often recognized the legitimacy of a

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340. *Id.* at 24.

341. *Id.* at 30 (Blackmun, J., dissenting).

342. *Id*.

343. *Id.* at 31.

344. *Id*. at 32.

345. *See id.* at 31.

346. *Id.* at 34.

347. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 68 (1982) (Brennan, J., concurring).

> Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed necessarily—consistent with the Framers' further idea of joining these independent sovereigns into a single Nation.

Id.

state's preferences for its own residents over nonresidents. The state may reserve its public schools for state residents,[348] limit lower university tuition to residents,[349] establish a residency requirement for certain jobs,[350] impose a longer, more onerous statute of limitations on out-of-state corporations,[351] and impose more onerous requirements on nonresidents who want to obtain a hunting license.[352]

Even in the same term in which it was deciding *Metropolitan Life* and *Williams*, the Court also decided *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,[353] a case in which the Court was far more tolerant of a preference for the home team. In that case, Massachusetts and Connecticut, as authorized by federal banking law, enacted laws that permitted out-of-state banks to acquire in-state banks, but only if the out-of-state bank had its principal place of business in one of the other New England States.[354] This appeared to be discrimination against non-New England banks.

The Court distinguished its recent decision in *Metropolitan Life*. While the statue in that case favored in-state insurers by discriminating against out-of-state insurers, the statute in *Northeast Bancorp*, according to the Court, did not favor local corporations at the expense of out-of-state corporations.[355] Rather, the law favored "out-of-state corporations domiciled within the New England region over out-of-state corporations from other parts of the country."[356] Since banking has always been "of profound local concern,"[357] one state legislature considered "interstate banking on a regional basis to combine the beneficial effect of increasing the number of banking competitors with the need to preserve a close relationship between those in the community who need credit and those who provide credit."[358] Thus, the statute satisfied the traditional rational basis test. Justice O'Connor, concurring, was unable to see the difference between the forbidden preference for a "state 'home team'" in *Metropolitan Life* and the acceptable preference for a "regional 'home team'" in *Northeast Bancorp*.[359] Furthermore, like banking, insurance has been considered to be of particularly local concern.[360] *Metropolitan Life* was not so much distinguished as ignored.

Within the next few years, the Court would follow the lead of *Northeast*

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348. *See* Martinez v. Bynum, 461 U.S. 321 (1983).

349. *See* Vlandis v. Kline, 412 U.S. 441 (1973).

350. *See* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976).

351. *See* G. D. Searle & Co. v. Cohn, 455 U.S. 404 (1982).

352. *See* Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978).

353. 472 U.S. 159 (1985).

354. *Id.* at 164.

355. *Id.* at 177.

356. *Id.*

357. *Id.* (citing Lewis v. B.T. Inv. Managers, Inc., 447 U.S. 27, 38 (1980)).

358. *Id.* at 177-78 (citing Report to the General Assembly of the State of Connecticut (Jan. 5, 1983), 4 App. in No. 84-4074 (CA2) at 1239-41).

359. *Id.* at 179 (O'Connor, J., dissenting).

360. *See id.*

Bancorp rather than *Metropolitan Life* and *Williams*. In 1992, the Court rejected an equal protection challenge to a Montana venue statute that made it easier for plaintiffs to sue an out-of-state corporation than one incorporated in Montana.[361] In 1997, the Court rejected an equal protection challenge to an Ohio statute that effectively exempted domestic utility companies from the general sales and use taxes that were imposed on the sale of natural gas by other, frequently out-of-state, entities.[362] *Metropolitan Life* and *Williams* are still on the books, but they do not appear to have much influence on the business of the Court today.

F. Different Treatment for the Mentally Retarded

Also during 1985, a fourth rational basis claim was successful. In *City of Cleburne v. Cleburne Living Center*,[363] the city denied a special use permit for the operation of a group home for the mentally retarded. In the lawsuit that followed, the Court of Appeals for the Fifth Circuit held that mental retardation is a quasi-suspect class that would be subject to intermediate scrutiny.[364] Because the ordinance that authorized the permit refusal and the permit refusal itself did not satisfy that standard, the court of appeals held the ordinance was invalid on its face and as applied.[365]

On appeal, the Supreme Court concluded that the mentally retarded were not a quasi-suspect class,[366] thus, the proper standard of review was the traditional one, that the different treatment of the mentally retarded "must be rationally related to a legitimate governmental purpose."[367] However, as both members of the Court and commentators have pointed out, the Court then went on to apply a very demanding, non-traditional version of rationality review.[368]

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361. Burlington N. R.R. Co. v. Ford, 504 U.S. 648 (1992).

362. General Motors Corp. v. Tracy, 519 U.S. 278 (1997).

363. 473 U.S. 432 (1985).

364. Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984), *aff'd in part and vacated in part*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

365. *Id.* at 220.

366. *Cleburne*, 473 U.S. at 442-46.

367. *Id.* at 446.

368. *Id.* at 458 (Marshall, J., dissenting).

> [T]he Court's heightened scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny. To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called 'second order' rational basis review rather than 'heightened scrutiny.'

Id. One commentator noted:

> The most obvious case for heightened judicial scrutiny is governmental action which, on its face, distinguishes between the disabled and the nondisabled to the detriment of the former. Yet, in one case of facial discrimination against the disabled, the Supreme Court resisted the explicit application of heightened scrutiny, although the Court

The Court used several non-deferential techniques. Specifically, the Court's analysis moved back and forth between rejecting purposes as impermissible, and rejecting as inadequate or nonexistent the connection between the differing treatment of the mentally retarded and an alleged, permissible purpose. The Court first decided that it was impermissible to give effect to the negative attitudes and fears of the neighbors who did not want a group home for the mentally retarded in their neighborhood.[369] The Court explained that "'[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'"[370] Likewise, it was also impermissible to give effect to concern about harassment from junior high school students across the street as a reason to deny the permit.[371]

Concern about building a group home on a flood plain was clearly legitimate, but the classification of the mentally retarded was completely unrelated to that concern since the mentally retarded were similarly situated with everyone else who was living in the flood plain.[372] Concerns about legal responsibility for the actions of those living in the group home were also legitimate, but the classification was not related to that purpose because the mentally retarded were, once again, similarly situated with regard to this purpose with all other occupants of group homes in the area, including boarding houses and fraternities.[373] Concerns about the size of the home and the number of people living in it were appropriate, but since the facility would comply with existing zoning rules with regard to size and number, there was no rational relationship between one's status as mentally retarded and these concerns.[374] Concerns about the concentration of population, congestion in the streets, fires, neighborhood serenity, and avoidance of danger to other residents were all legitimate, but the mentally retarded once again were no different from anyone else with regard to these concerns.[375] Finally, the Court concluded that, because the classification was not at all related to any of the purported purposes, the permit refusal must have been based on "an irrational prejudice against the mentally retarded."[376]

The Court in its opinion indicated that "this record does not clarify how . . . the characteristics of the intended occupants of the [group] home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes."[377] Of course, traditional

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apparently applied heightened review in the guise of minimum rationality.

LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-31, at 1594-95 n.20 (2d ed. 1988) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).

369. *Cleburne*, 473 U.S. at 448.

370. *Id.* (quoting Palmore v. Sidoti, 446 U.S. 429, 433 (1984)).

371. *See id.* at 449.

372. *See id.*

373. *See id.*

374. *See id.* at 449-50.

375. *See id.* at 450.

376. *Id.*

377. *Id.*

rationality does not demand evidence in the record to support governmental judgments, and ordinarily the Court does not reject all of the proffered purposes only to conclude that the actual purpose is one the Court has identified on its own.

After *Cleburne*, it may have appeared that discrimination against the mentally retarded was a subject to which the Court would give heightened scrutiny. Subsequent case law, however, did not bear out this prediction. Eight years later, in the 1993 case, *Heller v. Doe*,[378] the Court upheld a classification that disadvantaged the mentally retarded; in doing so, the Court used an extremely deferential standard of review and virtually ignored *Cleburne*.

Heller involved the statutory procedures for involuntary civil commitment in Kentucky. Under the statute, it was easier to commit a mentally retarded person than it was to commit a person who was mentally ill. The proceedings for both kinds of commitment were substantially similar with two exceptions. The burden of proof for involuntary commitment based on mental retardation was "clear and convincing evidence" while the standard for commitment based on mental illness was "beyond a reasonable doubt."[379] Second, in commitment proceedings for mental retardation, but not for mental illness, guardians and immediate family members were allowed to participate as parties.[380] A group of mentally retarded persons who had been involuntarily committed challenged these rules as a violation of equal protection. The district court agreed with the plaintiffs, citing, inter alia, *Cleburne*, as mandating that "mentally retarded persons be afforded the same protections as are mentally ill persons when facing involuntary commitment."[381] The Supreme Court reversed.

Justice Kennedy's opinion for the majority began with a survey of Supreme Court cases on rationality review that set forth the most deferential version of the standard. Rational basis review was "'not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'"[382] Classifications not involving fundamental rights or suspect lines are "accorded a strong presumption of validity,"[383] and will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[384] The legislature "need not 'actually articulate at any time the purpose or rationale supporting its classification'" which "'must be upheld . . . if there is any reasonably conceivable set of facts that could provide a rational basis for the classification.'"[385] Furthermore, a state was under "no obligation to produce

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378. 509 U.S. 312 (1993).

379. *Id.* at 314-15.

380. *See id*. at 315.

381. Doe v. Cowherd, 770 F. Supp. 354, 358 (W.D. Ky. 1991), *rev'd sub nom.*, Heller v. Doe, 509 U.S. 312 (1993).

382. *Heller*, 509 U.S. at 319 (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)).

383. *Id.*

384. *Id.* at 320.

385. *Id.* (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992); *Beach Communications*, 508

evidence to sustain the rationality of a statutory classification," which "'may be based on rational speculation unsupported by evidence or empirical data.'"[386] Rather, "'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'"[387]

The claim of discrimination against the mentally retarded in *Heller* was, at least on its face, quite similar to the claim of discrimination in *Cleburne*. Yet the Court cited *Cleburne* only once and purported to find in *Cleburne* the same rational basis standard it was using in *Heller*.[388] That assumed similarity is obviously incorrect. The rational basis review in *Heller* bears very little similarity to the rational basis review in *Cleburne*. The Court in *Cleburne* looked for evidence in the record to support the assertions of purpose and to demonstrate the relationship between classification and purpose.[389] The Court in *Cleburne* independently evaluated the evidence of means and purpose and was quite willing to reject the asserted purposes because they were unsupported by the evidence.[390] Finally, the Court in *Cleburne* was willing to identify for itself the true purpose of the statute, a purpose that the state had never identified and which it undoubtedly would contest.[391]

Once the Court in *Heller* had identified the extremely deferential standard that it was going to use, the analysis came easily. The lower standard of proof for commitment of the mentally retarded was justified, according to the Court, first, because mental retardation is easier to diagnose than mental illness, and second, because a finding of danger to the community is easier to establish for the mentally retarded.[392] For the Court, this was sufficient because there was a "'reasonably conceivable set of facts'" from which the state could make these conclusions.[393] In addition, the Court also found a third justification for the distinction, that the treatment of the mentally retarded who are committed is much less invasive than is the treatment for those who are committed as mentally ill.[394] As for the involvement of guardian and family members as parties to the proceedings, the state "may have concluded" that family members have known the retarded person for many years and may have valuable insights that will help the commitment process.[395]

U.S. at 313).

386. *Id.* (quoting *Beach Communications*, 508 U.S. at 315).

387. *Id.* (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

388. *Id.* at 321 ("We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill. . . . In neither case did we purport to apply a different standard of rational-basis review from that just described.") (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).

389. *Cleburne*, 473 U.S. at 450.

390. *Id.* at 449-50.

391. *Id.* at 450.

392. *Heller*, 509 U.S. at 322-23.

393. *Id.* at 323 (quoting FCC v. Beach Communications, 508 U.S. 307, 313 (1993)).

394. *Id.* at 324.

395. *Id.* at 328-29.

In an opinion written by Justice Souter, four dissenting Justices strongly disagreed. They would have found *Cleburne* to be a far more controlling precedent. Justice Souter commented that although the majority had cited *Cleburne* only once, and did not purport to overrule it, neither did the majority apply it.[396] Thus, "at the end of the day *Cleburne's* status is left uncertain."[397] Justice Souter indicated that he would follow *Cleburne* in this case.[398]

Justice Souter began by conceding that there are differences between the mentally ill and the mentally retarded[399] but that concession did not resolve the equal protection issue. The question was whether those differences justified the different treatment in the Kentucky civil commitment statute.[400] The majority approved a lesser standard of proof for commitment of the mentally retarded because mental retardation was supposed to be easier to diagnose.[401] Justice Souter insisted that the majority thereby "misunder[stood] the principal object in setting burdens."[402] A higher standard of proof is generally imposed, "not to reflect the mere difficulty of avoiding error, but the importance of avoiding it."[403] By this measure, the differing standards of proof made no sense unless the state placed a higher value on the liberty of one group, the mentally ill, and a correspondingly lower value on the liberty of the mentally retarded. The state of course made no such claim and the Court clearly would have rejected it. For Justice Souter, the lesser standard was simply discrimination against the retarded.[404]

Justice Souter also took issue with the majority's conclusion that "it would have been plausible for the Kentucky Legislature to believe that most mentally retarded individuals who are committed receive treatment that is . . . less invasive tha[n] that to which the mentally ill are subjected."[405] The majority had cited nothing that would demonstrate that such a belief was plausible.[406] Justice Souter himself cited a substantial body of literature that indicated that the belief was false.[407] Since there was "nothing in the record" to indicate that Kentucky's institutions were any different from the common practices that he had cited, Justice Souter would have found no adequate basis for the legislature's

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396. *Id.* at 337 (Souter, J., dissenting).

397. *Id.*

398. *Id.*

399. *Id.*

400. *See id.* at 337-38.

401. *Id.* at 339.

402. *Id.*

403. *Id.*

404. *Id.* at 341 (noting that even if the asserted degrees of difficulty in proving mental retardation and mental illness were true, "it lends not a shred of rational support to the decision to discriminate against the retarded in allocating the risk of erroneous curtailment of liberty").

405. *Id.* at 341-42.

406. *Id.* at 342.

407. *Id.* at 342-43.

conclusions.[408] With regard to the involvement of family members and guardians in the proceedings for the mentally retarded, Justice Souter could find no justification for the distinction that created, only against the mentally retarded, a second advocate for institutionalization.[409]

Ultimately, as the Court did in *Cleburne*, Justice Souter was unable to credit the purported justifications advanced by the state. He considered them implausible. What was really at work in the statute was discrimination against the mentally retarded, a devaluing of their liberty and a lesser concern with its loss, and the validation of a stereotypical assumption that the retarded are "perpetual children."[410] For Justice Souter, *Cleburne* should have controlled, both in its result and in its analysis. The fact that the majority ignored it suggests that the case has been limited to its facts and that there is little left of it by way of precedent.

G. Disparity in Property Tax Assessments

After deciding *Cleburne* in 1985, the Court retired for four years from the business of heightened rationality. Then in 1989, the Court returned to that form of analysis in two cases, one invalidating a tax assessment scheme and the other invalidating a restriction on eligibility for public office. In the first of these, *Allegheny Pittsburgh Coal Co. v. County Commission*,[411] the Court reviewed differing tax assessments of real property in Webster County, West Virginia. The tax assessor had based assessments on the most recent purchase price of a given piece of property.[412] Because of the effects of inflation over time, properties that had been sold recently were assessed at much higher levels than properties that had remained with one owner for a long time. The plaintiff in the case, Allegheny Pittsburgh Coal, was assessed at a level thirty-five times the level applied to owners of comparable property.[413]

Writing for a unanimous Court, Justice Rehnquist identified the plaintiff's equal protection complaint as a comparative one: Even though Allegheny Pittsburgh did not have an independent substantive right to any particular level of taxation, it complained that, in comparison with its neighbors, its property was grossly overassessed.[414] The Court indicated that the state's powers to impose and collect taxes were broad; as long as the different treatment of taxpayers was "neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law."[415] The county argued that its assessment scheme was "rationally related to its purpose

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408. *Id.* at 344.
409. *Id.* at 346-47.
410. *Id.* at 348.
411. 488 U.S. 336 (1989).
412. *See id.* at 338.
413. *Id.* at 341.
414. *See id.* at 342.
415. *Id.* at 344 (quoting Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910)).

of assessing properties at true current value."[416] In the county's view, the use of acquisition value was reasonable evidence of market value. For properties recently purchased, acquisition cost was the best evidence of value. As this information grew old, it would be less accurate. However, because of the time and expense that would be required to conduct regular field assessments of every property in the county, the acquisition value scheme was reasonable, according to the county. The Court rejected this claim even though it "did not intend to cast doubt upon the theoretical basis of such a scheme."[417] Yet, according to the Court, the Webster County assessor on her own had adopted an assessment scheme inconsistent with the state requirement that all property in the state should be assessed at a uniform rate according to its estimated market value.[418]

The Court's opinion was brief, unanimous, and problematic. There was little analysis in the opinion, not much more than the conclusion that relative undervaluation of comparable property denies equal protection of the law.[419] The Court said that it would not cast doubt on the theoretical basis of the scheme that used past purchase price as evidence of current value, but then invalidated the scheme because of the manner in which it operated in Webster County. Ordinarily in rational basis cases the Court does not demand evidence to show that the classification is in fact rationally related to its purpose, only that the government could reasonably have believed it to be. Further, although the Court decided the case as one involving the Equal Protection Clause, the Court suggested at one point that the real problem in the case was that the county tax assessor's practice was "contrary to that of the guide published by the West Virginia Tax Commission."[420] Ordinarily, it is not the province of the Supreme Court to provide the definitive interpretation of the state tax assessor's guide.

Like the other successful rational basis cases discussed earlier, *Allegheny Pittsburgh Coal* could have been a harbinger of a much closer scrutiny of tax cases and a greater intolerance of the comparative inequities that result from arbitrary decisions. But it was not to be. Just three years later, in *Nordlinger v. Hahn*,[421] the Court reviewed a very similar set of facts and effectively distinguished *Allegheny Pittsburgh Coal* out of existence.

In *Nordlinger*, the Court considered California's Proposition 13, an amendment to the state constitution that sets limits on property taxes. Under the amendment, real property taxes must not exceed one percent of a property's market value, a value that was to be reappraised only when property changed hands.[422] Because real estate values were escalating rapidly in California,[423] the effect of this provision was that homeowners who had been living in their homes

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416. *Id.* at 343.
417. *Id.*
418. *Id.* at 345.
419. *Id.* at 346.
420. *Id.* at 345.
421. 505 U.S. 1 (1992).
422. *See id.* at 5.
423. *See id.* at 6.

for a long time had much lower property tax bills than their neighbors who had acquired their homes more recently. The plaintiff in *Nordlinger*, who had purchased her home recently, owed property taxes of $1701, while a long-established neighbor in a very similar house owed only $358 for the same year.[424] The facts looked a lot like those in *Allegheny Pittsburgh Coal*.

The Court announced a deferential standard of review, "whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest."[425] This standard would be satisfied "so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."[426]

Applying this deferential standard, the Court identified two purposes underlying the acquisition value assessment scheme of Proposition 13. These were, first, local neighborhood preservation, continuity, and stability, and second, the protection of the reliance and expectation interests of existing property owners.[427] Rapid turnover in ownership would be discouraged if long-term owners paid progressively less in property taxes than newer owners.[428] Also, existing owners had vested expectations about the level of property taxes that were more deserving of protection than the anticipatory expectations of those who had not yet purchased a home.[429]

The petitioners in the case, not surprisingly, argued that *Allegheny Pittsburgh Coal* required invalidation of Proposition 13. Both cases involved dramatic disparities in the taxation of properties of comparable value because property was assessed at its acquisition value. However, the Court purported to find "an obvious and critical factual difference"[430] between the two cases. In *Allegheny Pittsburgh Coal*, there was no indication "that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme."[431] Thus, for the Court, *Allegheny Pittsburgh Coal* "was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme."[432]

The Court in *Nordlinger* apparently thought that at least part of "the critical factual difference" between the two cases was that in *Nordlinger*, the acquisition

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424. *See id.* at 6-7.

425. *Id.* at 11.

426. *Id.* (citations omitted).

427. *See id.* at 12-13.

428. *See id.* at 12.

429. *Id.* at 12-13 ("In short, the State may decide that it is worse to have owned and lost, than never to have owned at all.").

430. *Id.* at 14.

431. *Id.* at 15.

432. *Id.* at 16.

value assessment scheme had been enacted in a state constitution, while in *Allegheny Pittsburgh Coal*, it was the local assessor who made use of acquisition value as evidence of current market value.[433] But this distinction does not stand up to close inspection. In California, Proposition 13 required that property taxes be based on "full cash value" of real property and then defined "full cash value" in most cases as the acquisition value.[434] Similarly, in West Virginia, the state constitution required that property be taxed "in proportion to its value,"[435] and the local assessor used acquisition value as an appropriate measure of "true and actual value."[436] It appears that for the Court, the de jure discrimination set out in the California Constitution is constitutionally different from the de facto discrimination perpetrated by a local assessor in West Virginia. Justice Stevens, dissenting, argued otherwise, that the Equal Protection Clause prohibits "'intentional and arbitrary discrimination whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"[437]

It is quite clear that, under traditional rational basis review, the use of acquisition value to measure market value is not wholly irrational. There is certainly some correlation between acquisition value and market value. The relationship is closer when properties are turned over frequently and inflation is low. It is less accurate when properties are held for a long time and there is substantial inflation in the real estate market. Although acquisition value may not be the best measure of current market value, rational basis review does not require the state to use the most efficient means of achieving its ends. In any case, the Court never adequately distinguished *Allegheny Pittsburgh Coal* from *Nordlinger*, nor could it have done so. The effect of *Nordlinger*, the later of the two cases, is to limit *Allegheny Pittsburgh Coal* to its very narrow set of facts. It is thus unlikely that *Allegheny* will be a significant precedent for the future.

H. Restrictive Qualifications For Public Office

Also in 1989, in *Quinn v. Millsap*,[438] the Court used rational basis review to invalidate a restrictive qualification for appointment to a county board. The restriction at issue was a provision of the Missouri state constitution under which a "board of freeholders" was empowered to propose a reorganization plan for the City of St. Louis and St. Louis County.[439] It was the makeup of this board that raised the equal protection issue because its membership was limited to those

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433. *Id.* at 14-15.

434. *See id.* at 5 (citing CAL. CONST. art. XIIIA, § 2(a)).

435. Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 338 (1989) (quoting W. VA. CONST. art. X, § 1).

436. *Id.* at 342 (quoting *In re* 1975 Tax Assessments Against Oneida Coal Co., 360 S.E.2d 560, 564 (W. Va. 1987), *rev'd*, *Allegheny Pittsburgh Coal*, 488 U.S. at 336).

437. *Nordlinger*, 505 U.S. at 31-32 (Stevens, J., dissenting) (quoting Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352-53 (1918)).

438. 491 U.S. 95 (1989).

439. *Id.* at 96 (citing MO. CONST. art. VI, § 30).

who owned real property.[440] The Court had previously considered similar challenges to property qualifications for voting and had invalidated them using strict scrutiny because the qualification infringed on the fundamental right to vote.[441] In *Quinn*, the Court determined that it did not need to consider the argument for heightened scrutiny because, according to the Court, the property qualification could not even satisfy rational basis review.[442]

The Court reviewed and rejected the two justifications advanced in support of the property qualification. The first was that owners of real estate had a "first-hand knowledge of the value of good schools, sewers systems, and the other problems and amenities of urban life."[443] The second justification was that real property owners had "a tangible stake in the long term future of [the] area."[444] The Court found that the property qualification did not have any adequate correlation with either of these justifications. With regard to the first claim, it is clear that some who do not own real property are knowledgeable about urban issues and have a long-term stake in the area, while, at the same time, some property owners are ignorant of local government issues.[445] With regard to the second justification, many long-term residents would have substantial attachments to the community even though they did not own property, while not all property owners had a long-term attachment to the community.[446]

These are obviously problems of overinclusion and underinclusion. If the Court were truly deferential, these problems would not have resulted in the invalidation of the "freeholding" requirement. There is surely some truth to the claim that property owners as a class are more likely than those without property to have been part of the community for a long time. But, for the most part, property qualifications are a relic of an earlier, more socially stratified age that has been left behind. The Court generally has been intolerant of them.[447] There have been a small number of cases involving property qualifications that the Court upheld using rational basis review,[448] but arguably they are distinguishable

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440. There was some dispute during the course of litigation as to whether the term "freeholder" meant a person who owned real property. *See id.* at 99-100. The Supreme Court's opinion assumed that "freeholder" meant "real property owner." *Id.* at 100-01.

441. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).

442. *Quinn*, 491 U.S. at 107. In determining the appropriate standard of review, the Court cited *Turner v. Fouche*, 396 U.S. 346 (1970), where the Court, using rational basis review, invalidated a requirement that school board members own real property. *Quinn*, 491 U.S. at 107 n.10.

443. *Quinn*, 491 U.S. at 107 (quoting Br. for Appellees at 41).

444. *Id.*

445. *See id.* at 108.

446. *See id.*

447. *See, e.g.*, Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969).

448. Ball v. James, 451 U.S. 355 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); Associated Enter. Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973).

from *Quinn*. Those cases involved property qualifications to vote in elections for governmental entities with very limited functions, all of which were related to the distribution of water. Significantly, all the water delivered was distributed according to land ownership. The board in *Quinn*, on the other hand, could exercise the very broad authority to draft a plan to reorganize the entire governmental structure of the city and the county. Such a plan would affect all citizens, not just property owners, and thus the property qualification did not have an adequate connection to the purpose.

Quinn was and continues to be a little-noted opinion. It has had little influence on the Court,[449] and it appears that it will have little influence on future opinions.

I. Romer v. Evans *and the Irrationality of Amendment 2*

After 1989, the Court retired once again from the business of heightened rationality for seven years. During that time, its rational basis opinions took on a tone of deference that was so extreme that it seemed quite certain that heightened rationality was henceforth of historical interest only. In two decisions from June, 1993,[450] the Court announced a standard of review that was so deferential, so willing to hypothesize facts, purposes, and connections, that no statute could ever fail the announced standard. One of these cases, *Heller v. Doe*[451] is discussed above. In the other, *FCC v. Beach Communications, Inc.*[452] the Court considered an equal protection challenge to an FCC regulation of the cable industry.

In *Beach Communications*, the FCC had exempted from regulation certain cable facilities that served only a building or buildings under common ownership or management.[453] It was, of course, quite clear that this equal protection claim would not be successful. It has been more than forty years since the Court has invalidated on equal protection grounds a purely business regulation, and that one case was later overruled.[454] What was surprising was the breadth of the Court's opinion, its expansive discussion of how difficult it is to mount a successful rational basis challenge, and the fact that eight of the nine Justices joined in the opinion.

According to *Beach Communications*, a statutory classification in social and economic policy areas "must be upheld against equal protection challenge if

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449. The Court's only subsequent reference to *Quinn* was with reference to an issue of standing. *See* Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, Fla., 508 U.S. 656, 664 (1993).

450. Heller v. Doe, 509 U.S. 312 (1993); FCC v. Beach Communications, Inc., 508 U.S. 307 (1993).

451. 509 U.S. at 312.

452. 508 U.S. at 307.

453. *Id.* at 310 (citing 47 U.S.C. § 522(7)(B) (1994)).

454. *See* Morey v. Doud, 354 U.S. 457 (1957), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297 (1976).

there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[455] "[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'"[456] Since the legislature need not articulate its reasons for enacting a statute, "it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature."[457] The lack of "'legislative facts' explaining the distinction '[o]n the record' has no significance."[458] Rather, "[a] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[459]

Notwithstanding the extraordinarily deferential language of the Court in *Beach Communications*, just three years later, the Court decided *Romer v. Evans*[460] and used a very different version of rational basis review to invalidate an amendment to the Colorado Constitution. That amendment provided that neither the state nor any of its departments or subdivisions could prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices, or relationships."[461] The Colorado Supreme Court invalidated the amendment using strict scrutiny because the amendment infringed on a fundamental right to participate in the political process.[462] The U.S. Supreme Court affirmed the state court judgment, but based "on a rationale different from that adopted by the State Supreme Court."[463]

The Court cited *Heller* as support for the proposition that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[464] Amendment 2 failed this standard for two reasons—because it imposed a "broad and undifferentiated disability on a single named group" and because it seemed "inexplicable by anything but animus toward the class that it affect[ed]."[465]

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455. *Beach Communications*, 508 U.S. at 313.

456. *Id.* at 315 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

457. *Id.* (citing United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

458. *Id.* (citing Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) (further citation omitted)).

459. *Beach Communications*, 508 U.S. at 315. Justice Stevens, the only Justice not to join in the majority opinion in *Beach Communications*, was of the view that the standard as stated by the majority swept too broadly, "for it is difficult to imagine a legislative classification that could not be supported by a 'reasonably conceivable state of facts.' Judicial review under the 'conceivable set of facts' test is tantamount to no review at all." *Id.* at 323 n.3 (Stevens, J., concurring).

460. 517 U.S. 620 (1996).

461. *Id.* at 624 (quoting COLO. CONST. art. II, § 30b).

462. *See* Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (determining that strict scrutiny was the appropriate standard); Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (affirming trial court ruling that the amendment did not serve a compelling interest).

463. *Romer*, 517 U.S. at 626.

464. *Id.* at 631 (citing Heller v. Doe, 509 U.S. 312, 320 (1993)).

465. *Id.* at 632.

On the first point, the Court insisted that, even under the most deferential version of equal protection, "we insist on knowing the relation between the classification adopted and the object to be attained."[466] The Court made no mention of "any conceivable set of facts." The Court explained further that, ordinarily, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[467] The Court then explained that it is important to require that a classification have a rational relationship to an "independent and legitimate legislative end," because this "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[468] Amendment 2 "identif[ied] persons by a single trait and then den[ied] them protection across the board."[469] It imposed a broad disability on gays and lesbians who were denied the right to seek aid from the government on equal terms with everyone else. This was a "denial of equal protection . . . in the most literal sense."[470]

The second problem with Amendment 2 that the Court identified was that it appeared that the disadvantage was imposed, not to advance some general public good, but "out of animosity toward the class of persons affected."[471] Such a purpose, under *Moreno*, is impermissible. That this was in fact the purpose was determined, in part, because the Court could not credit the two purposes that the state had offered in support of Amendment 2. These two alleged purposes were respect for freedom of association for those who have personal or religious objections to homosexuality and the state's interest in conserving resources in order to fight discrimination against other groups.[472] According to the Court, "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."[473] Thus, the Court concluded that Amendment 2 "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else."[474]

The majority opinion in *Romer* did not cite many cases in support of its analysis.[475] The result in the case is clearly consistent with, and follows directly from, the Court's earlier decision in *Moreno*, which the Court cited,[476] and

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466. *Id.*

467. *Id.* (citing City of New Orleans v. Dukes, 427 U.S. 297 (1976)).

468. *Id.* at 633.

469. *Id.*

470. *Id.*

471. *Id.* at 634.

472. *See id.* at 635.

473. *Id.*

474. *Id.*

475. *See id.* at 636 (Scalia, J., dissenting) (noting the majority opinion's "heavy reliance upon principles of righteousness rather than judicial holdings").

476. *Id.* at 634-35 (citing *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), for the proposition that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest").

Cleburne, which the Court curiously omitted. *Cleburne* would have been a particularly appropriate case to cite because it also used the technique of rejecting the state's proffered purposes as implausible and then finding itself left with the conclusion that the only remaining explanation for the classification was prejudice. Also significant are the cases on the other side of the issue that the Court did not cite. The Court made no mention of "any reasonably conceivable state of facts"[477] that would support the amendment, no mention that it was "entirely irrelevant" whether the purposes that the state advanced and which the Court refused to credit actually motivated the legislature, and no mention that those attacking the amendment had the burden "to negative every conceivable basis which might support it."[478]

The Court did not mention *Beach Communications* at all and its only reference to *Heller* was for the noncontroversial proposition that a legislative classification will be upheld so long as it bears a rational relation to some legitimate end.[479] The Court also made no effort to hypothesize any legitimate purposes that amendment might serve. Justice Scalia, in dissent, suggested an obvious possibility, the preservation of traditional sexual mores.[480] This, of course, calls to mind the Court's decision in *Bowers v. Hardwick*,[481] in which the Court found that the promotion of morality, traditionally defined, was an adequate state purpose to support Georgia's criminalization of sodomy. The majority opinion in *Romer* made no reference to *Bowers* either. It could be argued persuasively that *Bowers* is distinguishable, in that it involved a due process rather than an equal protection claim and it was concerned with conduct rather than with orientation. However, the "any conceivable state of facts" standard from *Beach Communications* should have been enough to make the Court address the claim that the Colorado amendment was designed to promote a traditional view of morality.

The reach of *Romer* is uncertain. In months and years to come, the Court will have to decide whether the rationale of *Romer* requires it to review and invalidate rules excluding gays from the military. This issue implicates *Romer* since one of the traditional justifications that the military has given for the exclusion of gays has been that some members of the military despise and detest gays.[482] According to *Romer*, a classification that is drawn for the purpose of

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477. *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

478. *Id.* at 315 (citations omitted).

479. *See supra* note 464 and accompanying text.

480. *Romer*, 517 U.S. at 651 (Scalia, J., dissenting) (characterizing the majority opinion as "frustrat[ing] Colorado's reasonable effort to preserve traditional American moral values").

481. 478 U.S. 186 (1986).

482. *See, e.g.*, Beller v. Middendorf, 632 F.2d 788, 811 n.22 (9th Cir. 1980) (citing affidavit of Assistant Chief of Naval Personnel that justifies exclusion of gays from the military, in part, because: "Tensions and hostilities would certainly exist between known homosexuals and the great majority of naval personnel who despise/detest homosexuality, especially in the unique close living conditions aboard ships"). Since the decision in *Beller*, the military has a new policy on gays, *see* 10 U.S.C. § 654 (1994), and a different set of justifications. *See* 10 U.S.C. §§ 654(a)(8), (9), (10),

disadvantaging the group burdened by the law is not legitimate.[483] But, if previous heightened rationality cases are an indication, in the next case that comes before the Court concerning discrimination on the basis of sexual orientation, the Court will ignore *Romer*.

IV. IN SEARCH OF A PREDICTABLE PATTERN

Since the Court is ordinarily so deferential in rationality cases, what is it about the ten cases discussed in this Article that required a different kind of scrutiny and a different result? This Part considers four different attempts to answer that question. The first of these explanations examines the nature of the class disadvantaged, the second examines the nature of the government benefit that is being denied, the third looks at the political background of the Justice writing the majority opinion, and the fourth examines the method of analysis used in the case. None of these explanations turns out to be satisfactory.

Because the Equal Protection Clause is a limitation on governmental classifications, and because the Court has adopted heightened scrutiny for certain specific classifications, the obvious place to begin our inquiry is to examine the nature of the classifications affected in these ten cases. It would be plausible to assume that the groups disadvantaged would be similar to the "discrete and insular minorities" excluded from the majoritarian political process to whom the Court has already accorded a special status.[484] Initially, this approach is appealing. The groups disadvantaged in these ten cases were newcomers,[485] out-of-staters,[486] hippies,[487] undocumented aliens,[488] the mentally retarded,[489] non-freeholders,[490] and gays.[491] One could identify these groups as similar in certain ways to African-Americans, legal aliens, women, and illegitimates, groups to which the Court does accord a special status. But there are problems with this analysis.

First, we have to deal with the language of the Court itself, language that apparently rejects the notion that the nature of the class affected is a significant

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(12), (13), (15) (1994).

483. *Romer*, 517 U.S. at 633.

484. *See* United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938) (suggesting for the first time that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

485. *See* Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Zobel v. Williams, 457 U.S. 55 (1982).

486. *See* Williams v. Vermont, 472 U.S. 14 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

487. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

488. *See* Plyler v. Doe, 457 U.S. 202 (1982).

489. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

490. *See* Quinn v. Millsap, 491 U.S. 95 (1989).

491. *See* Romer v. Evans, 517 U.S. 620 (1996).

factor in these cases. In *Cleburne*, for example, the Court explicitly rejected the notion that the mentally retarded were a quasi-suspect class and thus entitled to heightened scrutiny.[492] In several other cases, the Court insisted that it did not need to decide the issue of heightened scrutiny, because the classification did not even survive rational basis review.[493] And in *Romer*, the Court completely ignored the question of heightened scrutiny. The first problem is thus that the Court opinions give no indication that the nature of the class affected is relevant to the decision in the case.

But perhaps we should pay more attention to what the Court does, and less attention to what is says it is doing. By this standard, are not the groups involved in the ten cases similar to the existing suspect and quasi-suspect classifications? Even if one were to answer this question affirmatively, it still would not explain why the Court used heightened rationality in these ten cases but not others. Specifically, why were the mentally retarded treated as a quasi-suspect class in *Cleburne* but not in *Heller*? Why were out-of-staters in need of special protection in *Metropolitan Life* and *Williams* but not in *Northeast Bancorp*? What was special about newcomers in *Zobel*, *Hooper*, and *Allegheny Pittsburgh Coal* that was no longer special in *Nordlinger*? Why was animus against gays an impermissible purpose in *Romer* but only part of a valid attempt to promote morality in *Bowers v. Hardwick*? Certainly, the Court has never attempted to answer these questions and it is doubtful that any reasoned set of distinctions would explain the different results. Therefore, the Court's selection of these ten cases for heightened rationality review cannot be explained by reference to the nature of the class disadvantaged.

The second attempt to explain these ten cases would be by reference to the nature of the government interest involved. In terms of the government interest at issue, these ten cases involved taxes,[494] food stamps,[495] education,[496] monetary benefits from the government,[497] housing,[498] eligibility for public office,[499] and access to the political process.[500] Once again, in search of a pattern that could explain heightened scrutiny, one could identify some similarities between the government benefits denied in these cases and fundamental rights that the Court has explicitly recognized. This would help explain why the Court used heightened rationality to review cases that limited access to the political process or eligibility for public office since these two claims are closely related to the

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492. *Cleburne*, 473 U.S. at 446.

493. *E.g.*, *Quinn*, 491 U.S. at 107 n.10; Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985); Zobel v. Williams, 457 U.S. 55, 60-61 (1982).

494. *See Allegheny Pittsburgh Coal*, 488 U.S. at 336; Williams v. Vermont, 472 U.S. 14 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); *Hooper*, 472 U.S. at 612.

495. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

496. *See* Plyler v. Doe, 457 U.S. 202 (1982).

497. *See Zobel*, 457 U.S. at 55.

498. *See* City of Cleburne v. Cleburne Living Ctr., 437 U.S. 432 (1985).

499. *See* Quinn v. Millsap, 491 U.S. 95 (1989).

500. *See* Romer v. Evans, 517 U.S. 620 (1996).

existing fundamental right to vote.[501] Further, at least an argument could be made, notwithstanding the Court's protestations to the contrary, that there is some fundamental claim to a minimum level of food, housing, and education that would require denials of those benefits to be more highly scrutinized.

Once again, though, the attempt to identify a consistent principle by reference to the nature of the government interest fails. First, what about the five other cases that concerned the state's taxing power and the state's decision on how to allocate limited state monetary resources? These are two areas which lack precedent for identifying the interest as quasi-fundamental. As to the other five cases, where there is a stronger argument about the interests being quasi-fundamental, there is the same problem of consistency. Why were food stamps quasi-fundamental in *Moreno* but not so in *Knebel*, *Castillo*, and *International Union*? Why was housing quasi-fundamental in *Cleburne* but not so in *Lindsey v. Normet*?[502] Why was education quasi-fundamental in *Plyler* but not in *Rodriguez*, *Martinez*, or *Kadrmas*? Why would eligibility for public office be quasi-fundamental in *Millsap*, but not so in *Clements v. Fashing*?[503] And finally, why would some equal access to the political process be fundamental in *Romer*, but not so in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*?[504] Ultimately, the attempt to identify a consistent principle by reference to the nature of the government interest affected is unsuccessful.

A third possible explanation for the results in these ten cases would be the law-as-politics school of thought. In this view, the results of legal decisions are best explained by the political leanings of the judges who decided them. If this is so, then one would expect to see that the active, heightened rational basis decisions were written by judges who would be characterized as liberal, that is, judges willing to invalidate the results of democratic government on the grounds that such legislation violates a command that they perceive in the Constitution. Of course, the utility of categorizing Justices as liberal or conservative has always been in question,[505] and the attempt to do so here sheds no additional light on the reasons for these ten cases.

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501. *See* Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

502. 405 U.S. 56 (1972).

503. 457 U.S. 957 (1982) (plurality opinion) (upholding, under rational basis standard, provisions of the Texas Constitution that restricted access of current public officials to other elective office).

504. 410 U.S. 719 (1973).

505. *See, e.g.*, Rex E. Lee & Richard G. Wilkins, *On Greatness and Constitutional Vision: Justice Byron R. White*, 1994 BYU L. REV. 291, 299 n.45 (1994) (quoting FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 201 (1980)) ("All that I think can be justly said about the utility of applying overworked labels to judges is that they are appropriate to some judges on some issues some of the time.").

If the heightened rationality cases are an example of liberal judging, then one would expect to see a substantial percentage of the opinions written by Justices Brennan or Marshall, the two widely acknowledged liberals on the Court.[506] Two of the opinions[507] were in fact written by Justice Brennan, but that is all. The other eight opinions were written by Justices who either are uniformly identified as conservative or who at least have a substantial record of conservatism in their judicial opinions. It turns out that Chief Justices Burger and Rehnquist, no champions of the liberal paradigm, wrote three of the ten opinions.[508] Justice White, appointed by a Democrat, but usually considered to be a Justice aligned with the conservative side of the Court,[509] wrote two of the opinions.[510] Justices Powell, Blackmun, and Kennedy, all nominated by Republican presidents, each wrote one of the ten opinions.[511] It is also interesting to note that the opinions in the two heightened rationality cases that the Court decided in 1989[512] were written for a unanimous Court. All of this suggests that the successful rational basis claims are not well explained by the politics of judicial appointment and judicial decision-making.

Finally, what about explaining the cases by reference to a harmonizing principle obtainable from within the internal logic of the cases themselves? Gerald Gunther suggested that the Court would look less to government ends and look more at the means the state had chosen to accomplish those ends.[513] Once again, this organizing principle does not hold up to scrutiny. In four of the cases,[514] the Court did in fact use means analysis only, that is, the Court assumed that the governmental purpose was valid but found an inadequate connection

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506. *E.g.*, Earl M. Maltz, *The Prospects For a Rival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 666 (1990) (describing Justices Brennan and Marshall as "the two most liberal members of the Court").

507. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973); Plyler v. Doe, 457 U.S. 202, 205 (1982).

508. Zobel v. Williams, 457 U.S. 55, 56 (1982) (Burger, C.J.); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 614 (1985) (Burger, C.J.); Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 338 (1989) (Rehnquist, C.J.). It should be noted that Chief Justice Rehnquist dissented in *Zobel* and *Hooper*.

509. *See, e.g.*, Lee & Wilkins, *supra* note 505, at 299 n.45 (quoting description by David O. Stewart, *White to the Right*, A.B.A. J., July 1990, at 40, of Justice White as "[o]rdinarily conservative").

510. Williams v. Vermont, 472 U.S. 14, 15 (1985); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985).

511. Romer v. Evans, 517 U.S. 620, 621 (1996) (Kennedy, J.); Quinn v. Millsap, 491 U.S. 95, 96 (1989) (Blackmun, J.); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 871 (1985) (Powell, J.).

512. *Allegheny Pittsburgh Coal*, 488 U.S. at 337; *Quinn*, 491 U.S. at 95.

513. *See supra* notes 115-20 and accompanying text.

514. *Quinn*, 41 U.S. at 95; *Allegheny Pittsburgh Coal*, 488 U.S. at 336; *Williams*, 472 U.S. at 14; Plyler v. Doe, 457 U.S. 202 (1982).

between the classification and that purpose. But in four other cases,[515] the Court used a *means* and *ends* analysis, finding both that some of the statutory purposes were impermissible and also that the classification was not sufficiently related to a permissible purpose. Finally, in two cases,[516] the Court used an ends analysis only, finding that the statute at issue was designed to achieve impermissible purposes.

This search for an underlying principle that would explain the results in the heightened rationality cases appears to be unsuccessful. Rather, it appears that the Court, without explanation, decided in a particular case to use heightened rationality and thus the claim succeeded. The Court then proceeded to ignore that case in the future. Federal judges and future litigants, who use Supreme Court precedents to predict future results, engage in a very difficult task. Is it too much to ask that the Court decide cases consistently and predictably? Apparently the answer to this question is yes. Of course, equal protection analysis, like other constitutional analysis, has a political component. But, even with this political dimension, the Court still writes opinions that purport to explain its decisions as the result of a careful analysis of legal precedents, not as a display of raw political power. If reasoned analysis were not the point of judicial opinions, all the Court would have to do in deciding a case would be to count the votes, without explaining the result. The Court continues to write opinions as if they matter, but the Court's jurisprudence of heightened rationality is difficult to understand.

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515. *Cleburne*, 473 U.S. at 432; Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Zobel v. Williams, 457 U.S. 55 (1982); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

516. *Romer*, 517 U.S. at 620; *Metropolitan Life*, 470 U.S. at 869.

APPENDIX

Equal Protection Rational Basis Cases Decided 1973-May 1996

This Appendix is intended to be a reasonably complete listing of all equal protection rational basis cases decided by the U.S. Supreme Court from 1973 until May, 1996. Its purpose is twofold. The first is to quantify the evidence, that is, show the relatively small number of cases that have been decided for plaintiffs during that period (only ten), while giving some indication of the relatively large number of cases that were decided for defendants in that period (100). The second purpose is to provide a convenient listing of rational basis cases.

Although the intent here is to make this Appendix comprehensive, a few words of caution are appropriate. The U.S. Supreme Court does not feel bound to issue all of its equal protection opinions with explicit reference to one of the three identified standards of review. Nor does it feel the need to use the word "rational" or "rationality" in deciding a case on the basis of minimal scrutiny. What this means is that it is sometimes unclear whether a particular case is, in fact, an example of rationality review. Thus, for example, in cases that involve voting or access to the criminal process, the Court sometimes makes no mention of strict scrutiny or rationality, but does cite as support earlier cases that did speak of fundamental rights or heightened scrutiny. Although it is not clear what standard of review the Court is using in such cases, the level of scrutiny is probably something higher than traditional rationality, so those cases are not included here.

Another issue of inclusion on this list is the gender and illegitimacy cases that used language of rationality at a period of time before the Court had formally adopted a heightened standard of review for these classifications. Once again, since there is probably something more than traditional rationality going on here, those cases are not included here.

Finally, there are two cases in which the Court clearly used the language of rationality but did not actually decide the issue on the merits. In one of these cases, *Hagans v. Lavine*, 415 U.S. 528 (1974), the equal protection issue was raised as part of a jurisdictional claim, and in the other, *Papasan v. Allain*, 478 U.S. 265 (1986), the Court's equal protection discussion was in the nature of advice to the court of appeals on remand of an issue that the Court said it would not decide. Those two cases are not included here.

What follows, then, is a reasonably thorough listing of rational basis cases from 1973 through May 1996.

Plaintiff Cases

Romer v. Evans, 517 U.S. 620 (1996).
Quinn v. Millsap, 491 U.S. 95 (1989).
Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989).
City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985).

Williams v. Vermont, 472 U.S. 14 (1985).
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).
Plyler v. Doe, 457 U.S. 202 (1982).
Zobel v. Williams, 457 U.S. 55 (1982).
United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

Defendant Cases

Heller v. Doe, 509 U.S. 312 (1993).
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993).
Reno v. Flores, 507 U.S. 292 (1993).
Nordlinger v. Hahn, 505 U.S. 1 (1992).
Burlington N. R.R. Co. v. Ford, 504 U.S. 648 (1992).
Gregory v. Ashcroft, 501 U.S. 452 (1991).
Chapman v. United States, 500 U.S. 453 (1991).
Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).
Sullivan v. Stroop, 496 U.S. 478 (1990).
United States v. Sperry Corp., 493 U.S. 952 (1989).
Michael H. v. Gerald D., 491 U.S. 110 (1989).
City of Dallas v. Stanglin, 490 U.S. 19 (1989).
Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. 66 (1989).
Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988).
New York State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1 (1988).
Immigration & Naturalization Serv. v. Pangilinan, 486 U.S. 875 (1988).
Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71 (1988).
Lyng v. International Union, 485 U.S. 360 (1988).
Pennell v. City of San Jose, 485 U.S. 1 (1988).
Bowen v. Gilliard, 483 U.S. 587 (1987).
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).
Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).
Lyng v. Castillo, 477 U.S. 635 (1986).
Bowen v. Owens, 476 U.S. 340 (1986).
Northeast Bancorp v. Board of Governors of Fed. Reserve Sys., 472 U.S. 159 (1985).
Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985).
Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984).
Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984).
Lehr v. Robertson, 463 U.S. 248 (1983).
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983).
Regan v. Taxation With Representation, 461 U.S. 540 (1983).
Martinez v. Bynum, 461 U.S. 321 (1983).
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
Rice v. Norman Williams Co., 458 U.S. 654 (1982).
Clements v. Fashing, 457 U.S. 957 (1982).

Schweiker v. Hogan, 457 U.S. 569 (1982).
Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982).
G. D. Searle & Co. v. Cohn, 455 U.S. 404 (1982).
Texaco, Inc. v. Short, 454 U.S. 516 (1982).
Hodel v. Indiana, 452 U.S. 314 (1981).
Jones v. Helms, 452 U.S. 412 (1981).
Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981).
Ball v. James, 451 U.S. 355 (1981).
Schweiker v. Wilson, 450 U.S. 221 (1981).
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).
United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).
Harris v. McRae, 448 U.S. 297 (1980).
Washington v. Confederated Tribes, 447 U.S. 134 (1980).
Harris v. Rosario, 446 U.S. 651 (1980).
Lewis v. United States, 445 U.S. 55 (1980).
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).
Califano v. Boles, 443 U.S. 282 (1979).
Barry v. Barchi, 443 U.S. 55 (1979).
Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).
Ambach v. Norwick, 441 U.S. 68 (1979).
New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).
Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194 (1979).
Vance v. Bradley, 440 U.S. 93 (1979).
Friedman v. Rogers, 440 U.S. 1 (1979).
Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463 (1979).
Califano v. Aznavorian, 439 U.S. 170 (1978).
Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).
Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59 (1978).
Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978).
Foley v. Connelie, 435 U.S. 291 (1978).
Cleland v. National College of Bus., 435 U.S. 213 (1978).
Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1977).
Califano v. Jobst, 434 U.S. 47 (1977).
County Bd. v. Richards, 434 U.S. 5 (1977).
Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).
Maher v. Roe, 432 U.S. 464 (1977).
Poelker v. Doe, 432 U.S. 519 (1977).
Dobbert v. Florida, 432 U.S. 282 (1977).
Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471 (1977).
Alexander v. Fioto, 430 U.S. 634 (1977).
Swain v. Pressley, 430 U.S. 372 (1977).
Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).
Knebel v. Hein, 429 U.S. 288 (1977).
Mathews v. de Castro, 429 U.S. 181 (1976).
City of New Orleans v. Dukes, 427 U.S. 297 (1976).

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).
City of Charlotte v. Local 660, Intern. Ass'n of Firefighters, 426 U.S. 283 (1976).
Mathews v. Diaz, 426 U.S. 67 (1976).
Weinberger v. Salfi, 422 U.S. 749 (1975).
Estelle v. Dorrough, 420 U.S. 534 (1975).
Geduldig v. Aiello, 417 U.S. 484 (1974).
Fuller v. Oregon, 417 U.S. 40 (1974).
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).
Johnson v. Robison, 415 U.S. 361 (1974).
Marshall v. United States, 414 U.S. 417 (1974).
Broadrick v. Oklahoma, 413 U.S. 601 (1973).
San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).
Associated Enter., Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973).
Ortwein v. Schwab, 410 U.S. 656 (1973).
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).
McGinnis v. Royster, 410 U.S. 263 (1973).
United States v. Kras, 409 U.S. 434 (1973).