PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 18 | Issue 1 Article 6

12-15-1990

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James M. McGoldrick Jr.

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James M. McGoldrick, Jr.*

I. INTRODUCTION

In the 1980's, the United States Supreme Court rediscovered the separation of powers doctrine.[2] Although it is easy enough to describe the immediate impact,[3] or lack thereof, of the glut of recent separation of powers cases, it is harder to see that the results have been worth the battle. And a gigantic battle it was. For example, in two cases where Justice Scalia argued in vain that legislation was in-

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1. I am grateful to my Research Assistant, Karen Eisenhauer, for her diligent efforts in helping me to discover the various ramifications of the topic, and for Justice Scalia's penetrating insights into the topic which he shared with a Pepperdine law school class during the 1990 summer term. It was my privilege to sit in on that class and watch a master teacher at work. I think that it is safe to say that Justice Scalia knows all there is to know about the subject, and as this paper will no doubt reveal, I have had to make do knowing the rest. I know that Justice Scalia will sleep better at night knowing that no right thinking person could possibly believe that he even remotely supports any of the views expressed herein.

* Professor of Law, Pepperdine University; J.D., University of Chicago 1969; B.A., Pepperdine University.

2. "Rediscovered" may be too strong a word, in that it is not clear that the doctrine has ever been a significant limitation on governmental power. The separation of powers doctrine should not be confused with the related doctrine of federalism, whereby power is divided between a central government of enumerated—and thus presumptively limited—powers and the various states, with reserved power to handle any general welfare or police power concern. At least since Katzenbach v. McClung, 379 U.S. 294 (1964), in which the Court held that Congress could regulate Ollie's exclusively intrastate barbecue restaurant because Congress could legislatively conclude—despite the absence of any evidence at all—that its racial discrimination adversely impacted interstate commerce in the interstate flow of mustard, etc., it has been clear that there is no area, however local, that would not be subject to federal regulation. Of course, that may have been a foregone conclusion from Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824), a century and a half before.

3. *See infra* text accompanying notes 24-43 for a brief summary of the impact of those recent cases in which legislation was struck down on separation of powers grounds.

valid on separation of powers grounds, he made the battle against the statutes seem like the battle for the fate of the country itself. In *United States v. Mistretta*,[4] he refered to the earlier majority decision in *Morrison v. Olson*[5] as being based upon a "concept illogical and destructive of the structure of the Constitution,"[6] but stated that *Mistretta* "makes *Morrison* seem, by comparison, rigorously logical."[7] His concluding comments in *Mistretta* fairly ring from the mountain tops, whether cursing the darkness or a prophetic call only time can tell: "And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous."[8]

Surely, Justice Scalia's point that the structure of our government has been as crucial in protecting our individual rights as the enumeration in the Bill of Rights itself is a valid one,[9] but whether it is the structure itself or the Court's protection of the structure seems more debatable.[10] For example, the political tension between both houses of Congress raises few separation of powers issues,[11] but it seems as significant in obtaining balanced legislation as does the separation of powers tension between the legislative and executive branches. Certainly, the framers thought so.[12] As long as each branch of the government is free to protect itself, it is less clear that the Court needs to be vigilant in refereeing the fight.

But there are too many areas where the vigilance of the Court is

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4. 488 U.S. 361 (1989).

5. 487 U.S. 654 (1988).

6. *Mistretta*, 488 U.S. at 424 (Scalia, J., dissenting).

7. *Id.*

8. *Id.* at 427.

9. *See, e.g.*, Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987).

> There are numerous instances in which the Constitution leaves open the theoretical possibility that the actions of one Branch may be brought to naught by the actions or inactions of another. Such dispersion of power was central to the scheme of forming a Government with enough power to serve the expansive purposes set forth in the preamble of the Constitution, yet one that would "secure the blessings of liberty" rather than use its power tyrannically.

Id. at 817 (Scalia, J., concurring).

10. Justice White made this same point in INS v. Chadha, 462 U.S. 919, 995-96 (1983) (White, J., dissenting).

11. *See* United States v. Munoz-Flores, 110 S. Ct. 1964 (1990), for one of the rare cases in which a separation of powers issue does arise in that regard, involving the requirement that revenue bills originate in the House. Justice Scalia's willingness to accept Congress' statement as presumptively determinative of the issue, expressed in his concurring opinion, *id.* at 1977-78 (Scalia, J., concurring), is interesting in view of his vigilance for structure in other areas, but probably justified given the confused state of the legislative process.

12. The record of the framing of the Constitution indicates that the make-up of the two houses of Congress was perhaps the single most divisive issue considered by the framers with the resulting non-proportional Senate and the population proportional House being the "great compromise." Only the compromises concerning slavery may have been more important in reaching agreement. *See*, for example, the standard political science text, D.G. STEPHENSON, R. BRESLER, R. FRIEDRICH & J. KORLESKY, AMERICAN GOVERNMENT 32-33 (1988).

needed and it has not even engaged in the battle. The battle for separation of powers principles is too much like buzzards battling over the bleached bones long after the real battles have been fought and lost, all too often without anyone having noticed that there was a battle at all. Or to pursue a different analogy, as Jesus said about the Pharisees of his time and their insistence on keeping to the letter of the Jewish law while having forgotten its spirit: "You strain out a gnat but swallow a camel."[13]

The real separation of powers issues have long since been resolved and many not even under the banner of separation of powers. For example, the Court's abandonment of the fight for federalism indicates that the Court is not exactly consistent in its battle to protect the structure.[14] Any serious attempt to raise such issues is almost

13. *Mathew* 23:24 (New International).

14. Justice Scalia's ambivalence towards this issue is especially interesting. In theory, to protect the balance of power between the states and the federal government and also indirectly to protect individual rights by limiting the concentration of power, Congress is limited to enumerated powers, including the selection of means with a necessary and proper relationship to such powers. Since 1937, few if any federal laws have been struck down on enumerated powers grounds. The modern approach is found in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), wherein the Court said that Congress could regulate the actual crossing of state lines and anything intrastate that had a close and substantial impact on interstate commerce. *Id.* at 37-38. The close and substantial test was to be determined by a pragmatic view of the actual facts of the case. In the factually sympathetic case of Katzenbach v. McClung, 379 U.S. 294 (1964), the Court found that federal laws reaching racial discrimination against exclusively intrastate customers eating at Ollie's Barbecue fell within Congress' power to protect interstate commerce despite absolutely no evidence at all of such an impact. *Id.* at 304-05. The Court said that Congress could rationally conclude that such discrimination affected interstate shipment of products whether it did in fact or not. *See id.* at 304. Initially, the Court utilized the rational basis test only in those cases in which Congress had determined legislatively that certain matters would always affect interstate commerce, but there is some indication that the rational basis test may have become the all purpose test. Just last term, a unanimous court found that Congress' creation of recreational trails out of long dormant railroad right of ways satisfied "the traditional rationality standard of review." Preseault v. Interstate Commerce Comm'n, 110 S. Ct. 914, 924 (1990). Why this is the standard of review as opposed to "close and substantial" is troubling enough, but the absence of any real effort to apply even the rationality standard is even stronger evidence of the Court's abdication of responsibility for this structure issue. The framers were of a mind that the enumerated powers doctrine was such a significant protector of individual rights that no bill of rights was even needed. While they were almost certainly wrong in that regard, it is not clear that the doctrine could not play some such role. In the recent challenge to the federal flag anti-desecration law, the law was struck down on free speech grounds, but there was no discussion whatsoever of the absence of any enumerated power for Congress to pass such a law. United States v. Eichman, 110 S. Ct. 2404 (1990). It is possible that Congress has the implied power to protect our national symbols, similar to its implied power to protect the "privileges and immunities of citizens," *see* Griffin v. Breckenridge, 403 U.S. 88 (1971), but some discussion of that issue would have been merited.

laughable.[15] The Court's use of the political question doctrine to avoid resolution of foreign affairs issues has left us without any clear line of authority as to ultimate responsibility for making life and death decisions about use of military force in addressing international conflict.[16] The Court's acquiescence in the substitution of nonelective, politically isolated, administrative agencies for politically reviewable legislative and judicial decisions is so entrenched that to complain would make cursing the darkness seem productive.[17]

The bulk of this paper will focus on the most egregious example of the Court's abandonment of its rightful role in our tripartite system of government. The rational basis test, used to analyze an increasingly wide variety of constitutional issues,[18] represents a far more

15. *See* Daniel v. Paul, 395 U.S. 298 (1969), for Justice Black's description of how local something must be to lie outside Congress' Commerce Clause power:

> While it is the duty of courts to enforce [the Civil Rights Act], we are not called on to hold nor should we hold subject to that Act this country people's recreation center, lying in what may be, so far as we know, a little "sleepy hollow" between Arkansas hills miles away from any interstate highway. This would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States.

Id. at 315 (Black, J., dissenting).

Nonetheless, the majority rejected even this minimal restriction on the reach of the Commerce Clause.

16. Even as this article is being written the papers are full of the conflict between the President and the Congress as to the appropriate role for Congress in deciding whether to let the current stand off over Iraq's take over of Kuwait to escalate into armed conflict. For example, the Los Angeles Times, October 18, 1990, began a front page article as follows: "Secretary of State James A. Baker III insisted Wednesday that the Bush Administration must be free to attack Iraq without getting specific approval from Capitol Hill, although he promised to consult frequently with congressional leaders over U.S. policy in the Persian Gulf." Los Angeles Times, Oct. 18, 1990, at 1, col. 6. See Mora v. McNamara, 389 U.S. 934 (1967) and Massachusetts v. Laird, 400 U.S. 886 (1970) for the Court's avoidance of this fundamental separation of powers issue as it related to the Vietnam War.

17. *See* Commodities and Futures Trading Comm'n v. Schor, 473 U.S. 568 (1985); Thomas v. Union Carbide Agric. Prods. Co., 478 U.S. 833 (1986) (judicial power exercised by administrative agencies). *See also* Skinner v. Mid-America Pipeline, 337 F. Supp. 737 (D.D.C. 1971); Amalgamated Meat Cutters v. Connally, 490 U.S. 212 (1989) (administrative agencies exercising "legislative" power).

18. Traditionally, the rational basis test has been used to determine the limits of the government to impact nonfundamental substantive rights under the due process clause and equal protection clauses or to use nonsuspect classifications under the equal protection clause. It is also one of the tests which the Court uses to determine whether a particular means chosen by Congress to accomplish an enumerated end bears a sufficiently close relationship to that end. More recently, Justice Scalia has advocated the test for inherent limitation issues not involving purposeful discrimination against interstate commerce in place of the Court's traditional balancing test for such issues. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 257-59 (1987) (Scalia, J., concurring). It is not clear but this also may be his proposed test for free exercise of religion issues not involving intentional discrimination against religion. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1604 n.3 (1990), wherein Justice Scalia rejected the compelling state interest test in free exercise cases in which the government indirectly impacts religion in pursuit of nonre-

significant abdication of judicial responsibility over the legislative process than do all of the separation of powers cases in our history lined end to end. And to risk pointing it out is almost as laughably pitiful as complaining about the abandonment of federalism. Although the rational basis test is used in other areas, unless stated otherwise, it will be examined here only as applied to due process and equal protection issues.[19]

Under the rational basis test, the courts will presume the constitutionality of legislation and not find it invalid unless there are no facts which could conceivably support the legislative conclusion that a par-

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ligiously based general welfare goals. In the footnote, he referred to alternatives to the compelling state interest test used in racial discrimination and free speech cases. In the race cases, the alternative for disproportionate racial impact was rational basis. In the free speech cases, the alternative for content neutral time place and manner laws was balancing. Scalia failed to indicate which of these two alternatives he was applying in *Employment Division*.

19. There is no particular need to distinguish between the application of the rational basis test to due process problems as opposed to equal protection issues. It is essentially the same test. Generally speaking, due process claims attack the unfairness of the overall law as it impacts substantive interest, while equal protection claims admit the overall wisdom of the law but challenge classifications within the law. Most issues can be framed as either. For example, laws limiting the rights of adult gays to engage in consenting sexual acts may be said to impact the liberty interest in choosing one's own life style, a due process issue. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

Alternatively, it can be asserted that allowing adult heterosexuals to engage in consenting sexual acts which the law denies to gays is a denial of equal protection. *See* Hatheway v. Secretary of the Army, 641 F.2d 1376, 1381-85 (1981). In both instances, it is not whether the law is framed as a due process or equal protection issue that is important, but rather, the level of review the Court gives to the issue. See Zablocki v. Redhail, 434 U.S. 374 (1978), for an example of the Court in dispute as to whether a restriction on the right to marry was a due process or an equal protection issue. "The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom." *Id.* at 391-92 (Stewart, J., concurring). Depending on the facts, the issue may be better framed as either due process or equal protection. For example, in Railway Express Agency v. N.Y., 336 U.S. 106 (1949), in order to address the traffic safety problem of distracting advertisements on the side of vehicles, New York law allowed such advertisements for one's own benefit, but not for others. The due process claim that the law did not rationally relate to any legitimate governmental interest was particularly weak since there was an obvious relationship to legitimate traffic safety concerns. The equal protection claim that all distracting ads ought to be treated alike was a much stronger legal argument—although also a loser in the case. Nonetheless, the equal protection claim was a more focused attack on the weakness of the law than the more general bombast of the due process claim. *See* Justice Jackson's concurring opinion, *id.* at 112 (Jackson, J., concurring), in which he points out the danger of selective enforcement which can flow from under inclusive classifications that would not be a problem with a due process issue. "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected." *Id.*

ticular law was rationally related to the accomplishment of any legitimate governmental purpose, although not necessarily the purpose for which it was actually passed.[20] The first thing that should be obvious about this common statement of the rational basis test is that it has very little to do with rationality and everything to do with judicial abdication. As the Court has said time and time again, it does not sit as a super legislature to substitute its judgment for the legislative judgment, but, of course, that is the very power which Chief Justice Marshall successfully claimed for the Court in *Marbury v. Madison*.[21] Thus, if as James Madison asserted,[22] checks and balances are as important to separation of powers as a clear delineation of responsibility, the Court's abdication of its role as a check on the legislature is a serious danger to the structure which Justice Scalia finds so important.

II. LIMITED IMPACT OF RECENT SEPARATION OF POWERS CASES

First, a brief review of the recent separation of power cases seems to be in order. Under the Separation of Powers Doctrine, the executive, legislative, and judicial branches can operate only according to their own constitutionally enumerated powers,[23] cannot delegate their power to some other branch or entity, and cannot invade the power delegated to one of the other branches.[24] The first major as-

20. Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949). A statute which prohibited undertakers from selling insurance was challenged on the basis that it was the direct result of the activities of the "insurance lobby." The Court found this irrelevant, stating, "a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality." *Id.* at 224.

21. 5 U.S. (1 Cranch) 137 (1803). "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

22. THE FEDERALIST NO. 48, at 308 (J. Madison) (New American Library 1961) "[U]nless these departments, [Executive, Legislative and Judicial] be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which [Montesquieu's] maxim requires, as essential to a free government, can never in practice be duly maintained." *Id.*

23. The foundation of separation of powers is expressed with remarkable economy of words by the framers in the first line of each of the first three articles of the Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1; "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1; "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III § 1.

24. There are various permutations of the doctrine. Perhaps, the most common is the nondelegation doctrine, the principle that Congress cannot delegate its legislative power unless it provides an "intelligible principle" to guide the executive branch in filling in the details of the congressional policy. For an excellent discussion see Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?* 83 MICH. L. REV. 1223, 1224-26 (1985). However, with the exception of two cases during its laissez

sertion of the doctrine in the eighties occurred in 1982, when the Court found that the Bankruptcy Courts, non-Article III legislative courts, had been improperly given judicial power to decide cases appropriate only for Article III courts.[25] Although the reasoning of the justices differed, the Court did find that such jurisdiction was a violation of separation of powers principles.[26] The blockbuster case came

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faire period when the Court grasped at anything to strike down New Deal or pro-labor legislation, the Supreme Court has never found the doctrine violated. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). The obvious suspicion is that the doctrine is as dead as the economic jurisprudence that gave birth to it. Numerous state courts have applied a similar state doctrine to reign in state administrative agencies, but there has been no continued use at the federal level. *See, e.g.*, Hialeah, Inc. v. Gulfstream Park Racing Ass'n, 428 So. 2d 312 (Fla. Dist. Ct. App. 1983) (unconstitutional delegation of power to allocate winter horse racing periods); Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984) (unconstitutional delegation of legislative power to research commission while legislature is in adjournment).

Another frequent separation of powers issue faced by the Court involves improper limitations on the President's power to appoint and/or remove executive officials. As recently as 1976, the Court found unconstitutional part of the Federal Election Campaign Act of 1971 on the ground that Congress had improperly invaded the President's appointment power. Buckley v. Valeo, 424 U.S. 1 (1976). But these cases appear to be little more than window dressing. When, in Humphrey's Executor v. United States, 295 U.S. 602 (1935), the Court allowed Congress to insulate administrative agency officials from executive dismissal without a finding of cause, the dye was cast.

The only truly common use of the separation of powers doctrine today is in the attempt to come to grips with the incomprehensible "cases or controversies" requirement for federal courts to exercise Article III power. The political question element of the cases or controversies requirement is, in its truest form, a separation of powers problem. The Court is said to be unable to decide cases reserved by the Constitution for one of the political branches of the government. More commonly, however, the "political question doctrine" is invoked to avoid difficult issues such as whether the advice and consent of the senate is required to cancel treaties as it is to enter into them. *See* Goldwater v. Carter, 444 U.S. 996 (1979).

25. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

26. Legislative courts, also commonly but sometimes inaccurately called Article I courts, are generally described in terms of what they are not. That is, they are not Article III courts. Article III courts are those empowered under Article III of the Constitution whereby the judges are appointed for life and guaranteed freedom from salary reduction, with resulting independence from the political fray. *See id.* at 59 (citing Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 (1979)). In contrast, judges for legislative courts are appointed pursuant to one of Congress' enumerated powers, generally found in article I, § 8 of the Constitution, for a period of time to address some special judicial need, but a judicial need felt to be inconsistent with creating additional Article III judges. The easiest illustration of this is the early territorial judges who brought justice to the federal territories before they became states. (The power to regulate the territories just happens to be in article IV, § 3, clause 2.) But once the territories became states, most of the cases which were previously heard by federal territorial judges fell under the jurisdiction of newly formed state courts. To require that federal territorial judges be appointed for life would be inconsistent

in 1983 with *INS v. Chadha*,[27] in which the Court found the "legislative veto" to be unconstitutional.[28] This procedure allowed one or both houses of Congress to reverse an executive agency decision by resolution, contrary to the proper process for passing legislation: approval by both houses of our bicameral Congress and presentment to the President for approval or veto. *Chadha* impacted over 200 different executive agencies.[29] In 1986, in *Bowsher v. Synar*,[30] the Court found that Congress had improperly given an employee of the legislative branch, the Comptroller General, executive power to determine when the automatic spending cuts of the Gramm-Rudman Act kicked in.[31]

In its next decisions, the Court seemed to recognize limits to which it would allow a formalistic approach to separation of powers to override practical concerns of efficient government. In 1988, with *Morri-*

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with the part time need for such judges. Few of the other legislative courts—tax courts and military courts being the most prominent of the legislative courts—serve such a short term need. However, most are courts with limited responsibilities in a specific area and thus believed not to require the high priced talent of creating hundreds of additional federal district court judges. And thus, Congress is faced with the tension, the conflict between the judicial independence guaranteed by the framers in Article III, and the desire to handle a number of judicial issues in a more flexible less expensive way. Prior to *Northern Pipeline*, there was no clear limit on Congress' ability to create legislative courts with limited functions. The cases after *Northern Pipeline* indicate that may still be the case. (The Court seems to have retreated even on what seemed to be *Northern Pipeline's* only clear point, albeit in a concurring opinion, that non-Article III courts could not decide state issues. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986), in which the Court upheld the Commission's ability to decide state law counterclaims related to disputes over which it was granted jurisdiction under the Commodity Exchange Act). Given the fact that administrative agencies have been performing judicial functions for years, it is hard to generate much interest in the ebb and flow of the Court's view of what legislative courts can or cannot do. *See, e.g.*, Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1855) (the "public rights doctrine"); Crowell v. Benson, 285 U.S. 22 (1932) (the adjudicatory powers of administrative agencies).

27. 462 U.S. 916 (1983).

28. *Id.* at 959.

29. 462 U.S. 919, 968 (1983) (White, J., dissenting). *See also*, Appendix of White, J., dissenting, *id.* at 1003-12. (An article on the subject, citing an appendix to Justice White's dissent opinion counts only 126 such statues. *See* Note, *The Fate of the Legislative Veto After Chadha*, 53 GEO. WASH. L. REV. 168, 170 n.12 (1984-85)). Of course, the sheer number of administrative programs impacted is a misleading indicator of the practical force of *Chadha*. Since Congress regularly reserved the power to review executive acts and just as regularly never did review such decisions, the actual impact of *Chadha* was far less than it might have appeared. *See* Strauss, *Was there a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789 (1983). Congressional Research Service figures, which count 230 such vetoes since 1930, reveal almost half involved reversal of immigration decisions. *Id.* at 790. Mr. Chadha appears to have been an obscure student overstaying his student visa who was granted permission to stay in the United States by the INS subject to Congress legislative disapproval. Why of all the INS decisions routinely ignored—even rubber stamped implies more review than was typical—Chadha was singled out is anyone's guess.

30. 478 U.S. 714 (1986).

31. *Id.* at 736.

son v. Olson,[32] over a vigorous dissent by Justice Scalia, the Court rejected a challenge to the independent counsel provision of the Ethics in Government Act of 1978.[33] The Court held that judicial and congressional appointment and oversight provisions were not inconsistent with the Attorney General's overall authority to execute the laws.[34] Finally, in *Mistretta v. United States*,[35] again over a strong dissent by Justice Scalia, the Court found that the United States Sentencing Commission created by the Sentencing Reform Act of 1984[36] did not pose any significant danger of encroaching on either judicial or executive power.[37] The Court recognized that the drafting of mandatory sentencing guidelines by the Commission, staffed by selected federal judges, did tend to mingle judicial officials into the non-Article III tasks of drafting rules and regulations, arguably a legislative function, but felt that some commingling of branches was inherent.[38]

The score in the significant cases for the 1980's was three for five in favor of separation of powers issues.[39] With what results? Bank-

32. 487 U.S. 654 (1988).
33. 28 U.S.C. §§ 591-599 (Supp. V 1982).
34. *Morrison*, 487 U.S. at 696-97.
35. 488 U.S. 361 (1989).
36. 18 U.S.C. §§ 3551-3742 (Supp. IV 1986); 28 U.S.C. §§ 991-98 (Supp. IV 1986).
37. *Mistretta*, 488 U.S. at 412.
38. *Id.* at 386-87. Some commingling is built into the constitutional process. It is part and parcel of the so called "checks and balances" of our constitutional system. For example, Congress, pursuant to its Article III powers, creates additional federal courts of appeal. The President appoints the new judges. The Senate confirms or disaffirms the presidential choice. Individual district court judges go about their way trying to be sufficiently noticed so as to be considered for this additional advancement in their judicial career.
39. There were other separation of powers issues raised in this period, but none of the magnitude of these. In Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558 (1989), it was claimed that the Federal Advisory Committee Act ("FACA") requirements that private groups advising the President on matters of public concern hold open meetings applied to the American Bar Association ("ABA") Standing Committee on Federal Judiciary. The committee evaluates judicial candidates and reports its findings to the President to assist him in making appointments. The Court managed to avoid any constitutional conflict with the President's power to appoint judges by construing the FACA as inapplicable to the advisory and necessarily confidential role of the ABA committee. Three Justices, however, (Kennedy, Rehnquist and O'Connor) felt that the FACA did apply and in so doing conflicted with the President's power to appoint federal judges.

In Skinner v. Mid-America Pipeline Co., 109 S. Ct. 1726 (1989), the Court found the delegation to the Secretary of Transportation of the power to set pipeline safety user fees was not an improper delegation of the power to tax. *Id.* at 1734. In United States v. Munoz-Florez, 110 S. Ct. 1964 (1990), the Court found that it had the authority to enforce the constitutional requirement that tax bills "originate" in the House, and that the issue was not left solely to the discretion of Congress. Issues which the Constitu-

ruptcy judges still are not appointed for life, but instead of the plenary power granted them in the 1978 act, there are complicated classifications of core and non-core matters with different levels of review for each.[40] The hundreds of thousands of administrative agency decisions each year are not subject to lottery-like chances of being "vetoed" by resolution of one or both houses of Congress. Instead, a number of administrative agencies now make only proposed regulations with the lottery-like chance that Congress will choose not to ratify them or change them beyond recognition.[41] Finally, the constitutional defects of Gramm-Rudman were cured by using a "fall back" provision[42] included in the original bill. In short, each of the "major" separation of powers decisions has had little practical effect.

III. THE ABANDONMENT OF JUDICIAL CONTROL THROUGH THE RATIONAL BASIS TEST

Unlike the marginal impact of the recent reassertion of separation of powers principles, the adoption of the rational basis test has had dramatic, if not disastrous, consequences on the relationship between the legislative and judicial branches. To understand the rational basis test requires a brief retreat into history.

Shortly after the fourteenth amendment was passed, the Court found that the provision stating that "[no state shall] deprive any person of life, liberty, or property, without due process of law,"[43] gave some protection to substantive interests.[44] The most common test used initially was that the government could not restrict a person's substantive interests unless such restrictions reasonably related to some legitimate governmental interest. A classic illustration of the "reasonable basis" test is found in *Weaver v. Palmer Bros. Co.*[45] There, the government banned the use of shoddy, a used fabric which had been shredded and sterilized for use as padding, because of its stated concern for health hazards and because of the danger that shoddy, filled products might be misrepresented as products stuffed with never used fillings. The Court held that the evidence did not

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tion commits exclusively to the discretion of one of the other two branches of the government are called political questions because they are reviewable only by the political process rather than judicial review.

40. 28 U.S.C. §§ 152-58, § 1334 (1982).

41. *See* Strauss, *supra* note 29, at 790 n.6 (describing the rush to adopt alternatives to the legislative veto).

42. *See* Bowsher v. Synar, 478 U.S. 714, 734-35 (discussing the alternative plan included in the legislation itself, at § 274(f), to be used in the event any of the acounting provisions in § 251 [(Reports of the Comptroller General)] were deemed unconstitutional).

43. U.S. CONST. amend. XIV, § 1.

44. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 56 (1872). *See also*, Morse, *The Hohfeldian Approach to Constitutional Cases*, 9 AKRON L. REV. 1 (1975).

45. 270 U.S. 402 (1926).

support the finding of any health hazards due to the use of sterilized shoddy, and that any concern for misrepresentation could be handled through labeling requirements without unnecessarily restricting a perfectly legitimate business.[46] This test was also applied to governmental restrictions implicating violations of the equal protection clause. In general, a law treating different classes of people differently could be upheld only if it reasonably related to some legitimate state interest.[47]

While the "reasonable basis" analysis was the most commonly used test until 1937, there was a parallel group of cases, illustrated by *Lochner v. New York*,[48] which were closer to a "compelling state interest" test, although that term was not used.[49] In *Lochner*, in order to protect the health and safety of bakery employees, New York law prevented bakery employees from working more than sixty hours per week.[50] The Court, although ostensibly applying the reasonable basis test, concluded that no absolute connection existed between hours worked and health and safety.[51] It then speculated that the law was actually passed for an improper purpose, not to protect health and safety, but to regulate the contract between employers and employees concerning hours that bakery employees worked.[52]

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46. The constitutional guaranties [sic] may not be made to yield to mere convenience. . . . The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment.

Weaver, 270 U.S. at 415.

47. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) ("A classification having some reasonable basis does not offend against [the equal protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.").

48. 198 U.S. 45 (1905).

49. For a discussion of the compelling state interest test see *infra* notes 98-113 and accompanying text. *See also* Mugler v. Kansas, 123 U.S. 623 (1887); Chicago, M. & St. P.R. Co. v. Minnesota, 134 U.S. 418 (1890); Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923) ("[F]reedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.")

50. *Lochner*, 198 U.S. at 52.

51. *Id.* at 58.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker.

Id.

52. *Id.*

Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome in-

Once it arrived at this Holmesian conclusion, it found that the latter purpose was an unconstitutional interference with the fundamental right to contract,[53] a right not specifically found in the constitution.[54]

Until 1937, the Court used the reasonable basis test to review and uphold most general welfare police power regulations; however, in cases like *Weaver*, the Court found unnecessary, or overly harsh, restrictions on individuals and their endeavors to be violative of substantive due process rights. The Court used the *Lochner* test and its view that certain kinds of economic interests fall within the umbrella of the fundamental right to contract, to strike down a relatively narrow range of laws impacting employer-employee relations and other types of business interests.[55] Using the equivalent of the present-day "compelling state interest" test, *Lochner* required strict judicial scrutiny in both the factual determination of the necessity for any law, as well as close vigilance against any impermissible purposes.

While the reasonable basis test generated no particular controversy, "Lochnerism" blunted the states' attempts to address a number of societal problems believed to be caused in part by an imbalance of power between labor and management.[56] Using a similar

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terferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with.

Id.

53. *Id.* at 64. "Under such circumstances the freedom of master and employe [sic] to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution." *Id.*

54. U.S. CONST. art. I, § 10, prevents states from impairing obligations of contract, but for its history, the provision has been limited to retroactive impairments and even then to retroactive impairments not outweighed by some governmental purpose. Although no precedent as such existed for the protection which *Lochner* gave to the right to contract, it parallels the Court's creation of fundamental rights in more recent cases. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (the right of privacy); Dunn v. Blumstein, 405 U.S. 330 (1972) (the right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to travel interstate). In *Lochner*, as in the rest of these cases, there is no explicit recognition of the right, but the constitutional concern expressed for related rights justified the Court's elevating their normal due process and equal protection analysis from the rational basis test to some stricter scrutiny, such as the compelling state interest test, in each of these cases. The Court in *Griswold* takes pains to reject the comparison with *Lochner*, but that of course is simply self serving.

55. *See* Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915) (striking down laws which forbade contracts requiring employees to agree not to become members of a labor union); Tyson & Bro. United Theatre Ticket Offices v. Banton, 273 U.S. 418 (1927) (striking down a law fixing theater ticket prices).

56. The Court's protection of business was not limited to due process issues. The Court similarly treated a number of cases involving Congress' enumerated powers. As stated above, Congress is limited to enumerated powers. *See supra* note 14. Using this doctrine, the Court found federal attempts to address various issues involving labor inequities as being exclusively within state power and beyond the scope of federal power. Hammer v. Dagenhart, 247 U.S. 251 (1918), is illustrative because of its parallel to *Lochner*. The Court in *Hammer* rejected a federal law banning the interstate ship-

analysis, the Court also struck down much of President Franklin Roosevelt's New Deal legislation as being beyond Congress' enumerated powers.[57] The end result was a political uproar with justifiable criticism of the Court for adopting a laissez faire view of government toward business, preventing both the states and the federal government from adopting a more activist role in addressing societal economic problems.[58]

Largely as the result of the appointment of new members of the Supreme Court by President Roosevelt,[59] the Court in 1937 and 1938 rejected both its restricted view of Congress' enumerated power and its expansive view of the due process limitations.[60] In rejecting a limited view of Congress' enumerated powers, the Court said that Congress could regulate any activity that had a close and substantial impact on interstate commerce; the court then undertook a practical factual evaluation to apply that test.[61] In rejecting the strict scrutiny of *Lochner*, the Court adopted the rational basis test, thus effectively eschewing not only Lochnerism but also the perfectly valid reason-

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ment of goods produced by child labor. First, the Court professed not to be able to see how interstate shipment of such goods could have any bearing on interstate commerce, and then second, using its Holmesian logic of *Lochner* fame, found that the real governmental purpose was actually not to regulate interstate shipping but the manufacturing of goods through use of child labor. *Id.* at 271-72. This purpose, the Court concluded, was outside the scope of federal power because, under the tenth amendment, it was within state power. *Id.* at 276. Cases dating back to Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), holding that Congress could regulate local activities *affecting* interstate commerce, were simply ignored as was the plain language of the tenth Amendment that federal power was to be defined first.

57. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Congress could not regulate commerce once it had stopped traveling interstate). Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Congress could not regulate commerce before it began traveling interstate).

58. E. BARRETT, JR., W. COHEN & J. VARAT, CONSTITUTIONAL LAW, CASES AND MATERIALS 220-22 (8th ed. 1989).

59. There is considerable scholarly debate about whether Roosevelt's attempt to pack the Court led to a fortuitous "switch which saved nine," but there is no question that the new appointees solidified the changed approach. *See* Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

60. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-37 (1937). "The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection or advancement.'" *Id.* (quoting The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1870)). *See also*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); United States v. Carolene Products Co., 304 U.S. 144 (1938) (allowed facts to be presumed to facilitate congressional restrictions of substantive due process).

61. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("[E]ven if appellee's activity be local . . . it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.").

able basis test.[62]

There is no question that the Court was justified in rejecting *Lochner*'s nontextual and artificial elevation of the right to contract, but there is no real justification for its rejection of the practical factual evaluation of the reasonable basis test. To say that a law is, from a factual point of view, wasteful, unwise, and improvident is not the same thing as automatically preferring one economic theory over another. Yet, the resulting rational basis test deprived the Court of both abilities. The list of cases is endless, but few are more blatant than *Williamson v. Lee Optical*.[63] In *Lee Optical*, the trial court found as a matter of fact that Oklahoma's attempt to keep discount optometrists out of Oklahoma was "not reasonably and rationally related to the health and welfare of the people."[64] The Supreme Court accepted that finding, but concluded that perhaps, maybe, conceivably, possibly, there were other facts which the legislature knew, or may have known, or perhaps could have imagined, which might support Oklahoma's expressed concern for eye health or any other undeclared purpose. Thus, the law was rationally related to some legitimate state end.[65] The Court concluded that it was a legislative rather than a judicial decision, the ultimate separation of powers "cop out" under the due process guise.[66]

Few cases illustrate the difference between the reasonable basis test and the rational basis test as well as the 1938 decision in *United States v. Carolene Products Co.* case.[67] Federal law banned the inter-

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62. *Carolene Products*, 304 U.S. at 152.

> [F]or regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some *rational basis* within the knowledge and experience of the legislators.

Id. (emphasis added).

63. 348 U.S. 483 (1955).

64. *Id.* at 486. The Court acknowledged that the law "may exact a needless, wasteful requirement in many cases." *Id.* at 487.

65. *Id.* at 487.

> "[T]he legislature might have concluded that [a prescription] was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, . . . that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert."

Id.

66. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [citations omitted] We emphasize again what Chief Justice Waite said in Munn v. Illinois, 94 U.S. 113, 134 . . . "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

Id. at 488 (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

67. United States v. Carolene Products Co., 304 U.S. 144 (1938).

state shipment of "filled milk." The ban included the plaintiff's coconut-milk-enriched skim milk product, called Milnut, for two reasons: first, the health and safety concern for the sale of milk products allegedly less nutritious than regular milk; and second, the concern that such products might be passed off as regular milk.[68] Like the ban on shoddy in the *Weaver*[69] case, the evidence indicated that Milnut was every bit as healthy—or in view of modern cholesterol concerns, as unhealthy—as regular milk and that labeling would handle any illegitimate uses of Milnut. Milnut had several significant advantages over regular milk, including price. Considering it was 1938, additional advantages were that it did not require refrigeration and was a convenient milk substitute for lower income persons. Despite the almost perfect factual fit with *Weaver* in that there was no evidence[70] that the law advanced the *public* interest in any way—as distinguished from the *dairy* interest—the Court nonetheless upheld the law as being rationally related to legitimate governmental interests.[71] This holding meant that the legislature was free to find a rational relationship to public welfare despite the total absence of such evidence.

What is most disturbing about the Court's rejection of the reasonable basis test in favor of the rational basis test is the Court's lack of reasoning for the substitution. All of the justifications for adopting the rational basis test go to the abuses of the *Lochner* strict scrutiny test, the Court's artificial elevation of non-textual rights beyond governmental regulation.[72] The reasonable basis test has none of these elements, yet it was rejected as well. *Carolene Products* explained

68. *Id.* at 145-47.

69. *See supra* text accompanying notes 45-47.

70. The Court does not cite any evidence introduced at trial as to the health and safety of Milnut as compared with regular milk. It finds all of its support in the testimony of witnesses—primarily spokespersons for dairy interest—before the Congressional committee that proposed the law. Such testimony is obviously not the same as evidence, and that is the point of the rational basis test. The Court does not deem it necessary to consider evidence in support of a particular law, thus the person challenging the law must show not only that there is no known evidentiary support for the law but also that there is no conceivable support in the minds of the legislature to support the law.

71. *Carolene Products*, 304 U.S. at 152. "[B]y their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *Id.* at 154.

72. The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not

that the rational basis test leaves correction of errors in the legislative process to the political process.[73] Thus, correction of errors is left to the same legislative process that led to the adoption of the needless, wasteful, unwise, improvident, unnecessary law to begin with.

There are several reasons why the political processes will not protect against abuse. The most obvious one is that organized groups like dairy interest are more effectively able to use—the more cynical might say "buy"[74]—the political process than the poor soul seeking an inexpensive alternative to refrigerated milk, or the small independent entrepreneur who tries to meet that market. *Carolene Products* itself seemed to recognize the inadequacies of the political process when, in one of the most famous footnotes in Supreme Court history, it set the stage for a multilevel approach to substantive due process and equal protection analysis.[75] The Court stated that there might be cases in which the limited judicial review of the rational basis test would not adequately protect individual interests, and then gave two primary examples of that type of case. The first would be regulations of free speech which restrict the free marketplace of ideas and thus taint the political process.[76] The second would be regulations affecting minority interests, defined broadly to include racial, religious, political and labor minorities, since such interests can rarely use the political process effectively.[77]

The Court apparently did not notice that the ban on Milnut had both of these qualities. Surely, "money, the mother's milk of politics"[78]—as former state speaker in California Jess Unruh described it in terms especially appropriate for the *Carolene Products* case—taints the political process every bit as much as free speech regulation. If not, why is there the rush to regulate the financing of elections?[79] As to the second concern for minority interests,

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substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). *See also*, Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1938).

73. *Carolene Products*, 304 U.S. at 152-54.

74. Of course, even an offer to prove that the legislature was bought will not have much impact on the rational basis test. *See* Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949).

75. *See Carolene Products*, 304 U.S. at 152 n.4 "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.*

76. *Id.* (citations omitted).

77. *Id.* (citations omitted).

78. *See* Velman, *In Politicizing the Courts, We're Buying and Selling Justice*, L.A. Times, Oct. 16, 1987, § 2, at 7, col.2.

79. *See, e.g.*, Federal Election Campaign Act, 2 U.S.C. §§ 431-56 (1982).

economically disadvantaged minorities are sometimes equally ineffective in using the political process. In fact, as the successful use of the political process by gay rights groups and racial minorities demonstrates, sufficient economic muscle tied to a single-minded message can effectively influence the political process.

Despite the questionable logic of *Carolene Products'* famous footnote, it has seldom been challenged; however, it leads to two different but equally pernicious results. First, it has led to sixty-three years of jurisprudential disregard for the breadbasket, gut level kinds of rights. Unless one's interest falls within one of the Court's "fundamental rights" or uses "suspect" classifications, the level of protection for one's interest has been virtually nil, no matter how important it is from a pragmatic point of view.[80] For example, the right to vote is one of the fundamental rights. Compare the Court's tortuous concern for durational residency and voting rights with its treatment of age discrimination and employment. As for durational residency and the regular election, one year is too much,[81] but fifty days is sufficient,[82] and the exact date is subject to case by case litigation. All in all, a very complex series of cases attempts to protect one's fundamental right to vote. On the other hand, a sixty-year-old policeman may be fired based upon the presumption of physical unfitness, even though the policeman was proven fit just one year earlier and willing to prove his fitness again.[83] A foreign service employee is required to retire at age sixty because it is presumed that

80. The number of successful challenges on rational basis grounds since 1937 is so small as to make one wonder why the Court even agrees to hear such cases. Even the one notable success, Morey v. Doud, 354 U.S. 457 (1957), which struck down a closed class that gave an advantage to American Express, was overruled in New Orleans v. Dukes, 427 U.S. 297 (1976). With the exception of Metropolitan Life Ins. v. Ward, 470 U.S. 869 (1985), the only successful recent cases have been those involving particularly sympathetic plaintiffs. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (the Court struck down a Texas law denying free public school education to children of illegal aliens); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (the Court found irrational a scheme that denied building permits for group homes for the mentally retarded but allowed them for fraternities and such). *Metropolitan Life Ins.* found the discriminatory treatment of out-of-state life insurance companies to be irrational. This seemed to be more of an inherent limitation of the Commerce Clause than an equal protection case, but it may be the shining light suggesting that the Court is more willing to carefully review all legislative classifications. The heavy money says that it is just a Commerce Clause case in odd garb.

81. Dunn v. Blumstein, 405 U.S. 330 (1972) (state law requiring one year residency held unconstitutional).

82. Marston v. Lewis, 410 U.S. 679, 681 (1973).

83. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (mandatory retirement age of 50 for uniformed police officers held constitutional).

only a younger person can handle the pressures of an overseas appointment when persons performing the same job, but under a Civil Service classification, are not subject to such a presumption.[84] Is it possible that anyone believes that advanced registration requirements and voting are in fact more important in the real world than one's livelihood?[85] Yet there are endless examples of the Court's disregard of real world interests under the guise of rationally reviewing legislation.

A second doubtful result of *Carolene Products*' two-tier approach to due process and equal protection analysis has been the elevation of some interests to a higher level of review.[86] It is intriguing that *Carolene Products*, one of the very early cases rejecting "Lochnerism," set the rationale for "new Lochnerism," whereby the Court on its own initiative elevated certain interests to an extra measure of due process and equal protection. The Court's actual list of categories justifying a level of judicial protection higher than the rational basis test includes some of the categories mentioned in *Carolene Products*' footnote, ignores others, and adds a few. Until recently, free speech and free exercise of religion rights have been accorded the highest level of review,[87] but there has been some retreat on free

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84. Vance v. Bradley, 440 U.S. 93 (1979).

85. Certainly, there is no constitutional language which would reveal the reason for the elevation of the one interest and the denigration of the other. The framers intentionally left the issue of who could vote up to the individual states. Moreover, the right to vote is not even the best illustration of the gap between "fundamental" and "important" interests. Unlike right to privacy cases, where the tendency is to practically ignore competing state interests, the Court's approach to many right to vote issues is closer to a balancing test with some reasonable consideration of competing interests common to the compelling state interest test.

86. The rational basis test left a power vacuum that the Court has tried to fill in a number of ways. For a while, it discovered unconstitutional "irrebuttable presumptions" before it finally decided that such issues were just rational basis equal protection claims. The high point of the irrebuttable presumption doctrine was probably Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), in which the Court disapproved of the way pregnant teachers were treated. Its demise was found in Weinberger v. Salfi, 422 U.S. 749 (1975), in which the Court found rational the presumption that for some social security purposes, marriages of less than six-months were fraudulent.

The resurrection of the impairment of obligations of contract clause may be another example of filling this void. *See, e.g.*, United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977) (state law impaired the obligation of a state's contract in violation of the contract clause); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). Its apparent subsequent demise is illustrated in Exxon Corp. v. Eagerton, 462 U.S. 176 (1983). The Courts elevation of procedural due process concerns, *see, e.g.*, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572-77 (1972) (giving a board definition of liberty and property interests) and more recently its no taking cases, *see, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (Commission could not grant a public easement without paying compensation), may be compensatory approaches as well.

87. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (a public figure must prove actual malice in a defamation action); Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance violated the free exercise rights of the Old Order Amish).

exercise rights.[88] Both rights are protected under the first amendment and are not necessarily a part of any due process jurisprudence. Racial minorities have received the highest level of protection,[89] but other than protection given by statute the same could not be said for labor minorities.[90] Political minorities are protected only to the degree that they can frame their claims in free speech terms.[91] The Court has also discovered that there are nonenumerated fundamental rights that deserve a higher level of scrutiny, such as the right to privacy,[92] the right to travel interstate,[93] and the right to vote.[94] In addition, state laws which classify based upon illegitimacy of birth,[95] gender,[96] and alienage[97] receive a higher than normal level of review.

The elevation of certain rights and interests raises a separation of powers issue every bit as real as that found in *Lochner*. As to fundamental rights or suspect classifications, the government must justify any regulations by showing that the law or any of its classifications are narrowly tailored to accomplish some compelling state interest. Even if the state interest is assumed to be compelling, the regulation

88. *See* Employment Div., Dep't. of Human Resources v. Smith, 110 S. Ct. 1595 (1990). For a discussion of the case, see *supra* note 18.

89. 29 U.S.C. § 158(a)(3) (1982) (prohibits discrimination based on union membership).

90. Bolling v. Sharpe, 347 U.S. 497 (1954), "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Id.* at 499.

91. *Compare* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (rejecting challenges to the constitutionality of the Hatch Act), *with* Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (noting that "[t]he power to regulate the time, place and manner of elections does not justify, without more, the abridgment of fundamental rights, such as . . . the freedom of political association.").

92. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (state law forbidding the use of contraceptives violates the right of marital privacy).

93. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (one year residency requirement for welfare recipients violates the right to travel).

94. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax violates the right to vote).

95. *See* Lalli v. Lalli, 439 U.S. 259 (1978) (determining the constitutionality of a statute barring inheritance based on illegitimacy).

96. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that female members of the armed forces should receive the same spousal benefits for their husbands as male members for their wives).

97. The Court's treatment of alienage is the most convoluted of the group. State laws denying equal benefits must pass the compelling state interest test. *See* Graham v. Richardson, 403 U.S. 365, 371-72 (1971). But state laws denying aliens equal access to government jobs which involve substantial discretion must be only rational. Foley v. Connelie, 435 U.S. 291, 296 (1978). All federal laws which classify based on alienage must pass only the rational basis test. *See, e.g.*, Matthews v. Diaz, 426 U.S. 67, 83 (1976) ("neither requirement [of the federal law] is wholly irrational" so the Court upheld its validity).

is never sufficiently tailored to withstand this strict scrutiny. Just as the rational basis test is the abdication of judicial responsibility, the compelling state interest test is the usurpation of total judicial control. There is no room left for legislative judgment.

As to due process and equal protection claims, the government almost always fails to satisfy the compelling state interest test.[98] Although the Court is at pains to deny it, the right to privacy is the judicial elevation of a non-enumerated right beyond legislative control, and the battle for any particular right is won or lost at the outset by the Court's designation of the right as being fundamental. The right to privacy is as fundamental as the right to free speech, its advocates assert. But before the Court came to that conclusion in *Griswold v. Connecticut*[99] just thirty years ago and expanded it in *Roe v. Wade*,[100] who could have found support for such a proposition in the Constitution or in our history?[101] If there is support to designate the right to privacy as fundamental, is there less support for the right to education? Yet lines that allow states to vary per capita funding of schools from $2000 to $12,000 per student need only be rational.[102] Whatever the right, is it consistent with separation of powers notions to effectively deny any meaningful consideration of legislative interests by the statement of the test? What is there about a fundamental

98. It is interesting that one of the few government successes in meeting this test, Korematsu v. United States, 323 U.S. 214 (1944) (which upheld the internment of Japanese-Americans during World War II), was almost certainly wrong. Some record keeping requirements impacting the right to choose an abortion have also passed the test, provided there exists a sufficient level of confidentiality. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 760 (1986) ("A requirement that the women give what is truly a voluntary and informed consent, as a general proposition, is, of course, proper and is surely not unconstitutional."). The interest of the government in protecting the life of the viable fetus during the third trimester is one of the few examples in which the Court has found a compelling state interest, but even so, it is subject to the female's greater interest in her own life. *See* Roe v. Wade, 410 U.S. 113, 164-65 (1973). Benign racial classifications have passed the compelling state interest test, see Sheet Metal Workers Int'l v. EEOC, 478 U.S. 421, 479-81 (1986) ("we conclude that the relief ordered in this case passes even the most rigorous test . . . ."), but any relationship between that test in benign racial cases and hostile racial cases is coincidental at best. The compelling state interest test has been easier to satisfy in the right to vote cases with the test being closer to balancing. *See* Bullock v. Carter, 405 U.S. 134, 144 (1972) (stating that the law must be "found reasonably necessary to the accomplishment of legitimate state objectives."), except in the reapportionment cases where exact accuracy is required. *See* Korcler v. Daggett, 462 U.S. 725 (1983). Compare the compelling state interest test that the Court claimed to use in the free exercise cases where it was obvious for a number of years that the actual test was far less than that. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding an air force regulation prohibiting an Orthodox Jew from wearing a yarmulke indoors).

99. 381 U.S. 479 (1956).

100. 410 U.S. 113 (1973).

101. *But cf.* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (arguing for protection of the right to privacy as tort relief but not as a constitutional right).

102. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

right, once it is announced, which denies the states any meaningful role in the shaping of that right?

Even if some laws should be presumed to be constitutional and others presumed to be unconstitutional, there is no justification for the legal gap between the compelling state interest test, or its gender mutation, the middle level test,[103] and the rational basis test. The difference between the Court's scrutiny of the interest under one test as opposed to the other is obscure at best and possibly nonexistent. Yet classification of an interest as fundamental dictates the results without any meaningful consideration of the private-versus-public interest factors that might usefully be developed. For example, laws which intentionally work a racial classification are subject to strict scrutiny,[104] however innocent the classification might be, while neutral laws which merely have a disproportionate racial impact are constitutional if rational, despite questionable motives.[105]

Why are unreasonable restrictions on the right to marry scrutinized under a compelling state interest standard, while reasonable restrictions receive the rational basis treatment?[106] Why does a statement of the difference make it seem as if the test is already a reasonable basis test? When are child-rearing decisions fundamental and when are they not?[107] Why is a choice to abort absolutely pro-

103. A majority of the Court in Craig v. Boren, 429 U.S. 190 (1976), finally agreed that gender classifications must substantially relate to important governmental interests and that such a test might be called a middle level test, although the court itself did not like that term. The fact is that, at least when the interests of women have been adversely impacted, the test is essentially the same as the compelling state interest test. *See, e.g.*, Los Angeles Dep't. of Water and Power v. Manhart, 435 U.S. 702 (1978) (a private pension plan requiring women to pay more than men because they lived longer than men was contrary to federal law, which imposed a standard similar to the constitutional standard). On the other hand, when the Court perceives that women are being treated more benevolently, whether they wish to be or not, the test is little more than a rational one. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding the exemption of women from federal draft registration requirements); Michael M. v. Superior Court, 450 U.S. 464 (1981) (treating underage males differently from underage females for purposes of statutory rape).

104. *See* Palmore v. Sidoti, 466 U.S. 429 (1984) (the effects of racial prejudice cannot justify removing custody of a child from its mother because of her subsequent marriage to someone of a different race).

105. *See* Jefferson v. Hackney, 406 U.S. 535 (1972) (the Court found the disproportionate racial impact of the state's welfare classifications insufficient to change the level of review, and although there was some evidence of improper racist motive, it was not sufficient to find the law per se invalid).

106. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (a statute prohibiting schools from offering curriculum other than English held unconstitutional).

107. *Cf.* Meyer v. Nebraska, 262 U.S. 390 (1923) (statute prohibiting the teaching of German at a private school held unconstitutional); Pierce v. Societies of Sisters, 268

tected,[108] yet the right of a poor person to equal treatment in funding that choice receives almost no protection?[109] Why are state laws which regulate benefits of legal aliens subject to the compelling state interest test,[110] while regulation of illegal alien benefits receives only the rational basis test?[111] Laws that work a gender classification, particularly those that harm women, are analyzed under a form of strict scrutiny,[112] while laws that classify based upon pregnancy,[113] impacting only women, are reviewed according to a rational basis test.

It is easy to understand the appeal of the rational basis/compelling state interest dichotomy. By fitting any particular case into its pigeon hole, the Court can easily decide the case without having to deal extensively with the heart and soul of the issues: funding choices for abortions get the rational basis test, the Court concludes. Then the cliches begin to roll off the Justices word processors—we are not a super-legislature; it is not for us to say whether wise or not; the legislature may decide to handle part of the problem today and the remainder another day; the legislature may conceivably have believed that this was necessary; etc., etc., etc. The same thing occurs when the right is a fundamental one. No serious consideration of competing state interest is part of the process: the woman's right to choose an abortion is fundamental. The state's interest may be important but it is not compelling. The female and her doctor are free to make their own decision. The state cannot substitute its judgment for that of the female; etc., etc., etc.

U.S. 510 (1925); (statute prohibiting attendance at private schools held unconstitutional); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding the conviction of a guardian who permitted a child to work in violation of child labor regulations).

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

109. *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977) (applying the rational basis test to government funding issues related to abortions). *See also* Webster v. Reproductive Health Serv., 109 S. Ct. 3040 (1989).

110. Graham v. Richardson, 403 U.S. 365 (1971) (state statute restricting welfare benefits based on term of alien's residency violates equal protection clause).

111. *See* Plyler v. Doe, 457 U.S. 202 (1982) (state law denying free public school education to children of illegal aliens found to be irrational punishment of children to deter the acts of their parents). At least *Plyer* is one of the hopeful cases in which the Court applied the rational basis test in a manner more consistent with the earlier reasonable basis test.

112. *See* Craig v. Boren, 429 U.S. 190 (1976). Significantly, the first case which treated gender classifications as a serious equal protection issue, Reed v. Reed, 404 U.S. 71 (1971), struck down an automatic preference for men as administrators of the estates of minors on *reasonable basis* grounds. *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

113. *See* Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that a state may distinguish between normal and abnormal pregnancies when establishing insurance benefit programs); General Elec. v. Gilbert, 429 U.S. 125 (1976) (holding that disability plan provided to employees may exclude pregnancy when providing coverage for non-work related disabilities). Both of the cases have been reversed by federal law. Compare the irrebuttable presumption approach discussed *supra* note 86.

The Court defends its presumptive handling of due process and equal protection issues as being necessary to conserve judicial resources and to more effectively protect the most important individual and civil rights. It is said that the political process will protect ordinary interests, but that the Court must be vigilant to protect fundamental interests.[114] But this approach assumes facts not in evidence. First, by whose measure is the right to a job, or housing, or welfare less important than the right to choose, to vote, or to travel interstate? Second, even if these latter rights are truly so important, it would seem that the political process would protect them in any event. Even the de minimis impact on the right to privacy allowed in *Webster v. Reproductive Health Services*[115] has brought pro-choice protestors to the streets in every major city.[116] Third, perhaps the rights are so obviously important that the Court may summarily protect them and spend its precious time weighing more difficult issues like how to balance reasonable concerns for police fitness against legitimate concerns for unfair age discrimination. Fourth, many state courts routinely give a meaningful level of protection to nonfundamental interests without appearing to waste judicial resources or unnecessarily weakening their resolve to protect fundamental rights.[117] Finally, the Supreme Court itself manages to give an infinite variety of interests individualized attention in the way it addresses procedural due process issues. With regard to procedural due process, the Court has rejected artificial labels attached to rights and privileges.[118] Previously, rights, when discovered, got full procedural due process. Privileges got nothing. The Court changed its approach so that all substantive property and liberty interests received procedural due process protection, with the level of process varying depending on the importance of the interest at stake. The importance is deter-

114. *See* Williamson v. Lee Optical of Okla., 304 U.S. 144, 487, 152 n.4 (1938); United States v. Carolene Products, 348 U.S. 483 (1955).

115. 109 S. Ct. 3040 (1989).

116. *Webster* is a good illustration of the strident nature of the abortion right to privacy dispute. While the law upheld in the case seemed to be only a fairly insignificant extension of the principle that a state may rationally refuse to fund abortions, see *supra* note 109, as well as require an additional medical test for near third term abortions, the rhetoric would make it appear to be a dramatic retreat in terms of rights of privacy. It was no such thing. Not one person can be denied an abortion after *Webster* that could have received one prior to *Webster*.

117. For a discussion of such cases, see Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13, 226 (1958); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

118. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972).

mined by the most practical and pragmatic considerations.[119] The Court rejected the claim based on the right-privilege dichotomy as determining the issue without any meaningful discussion of the policy issues underlying the case. The rational basis/compelling state interest dichatomy has exactly the same flaw.

The obvious appeal of the dichotomy makes the separation of powers issue all the more dangerous. Under the guise of protecting judicial resources for the battle to protect the really fundamental rights, the Court has virtually abdicated its role in purifying the political process. When the claim was made that the state legislature had been bribed into passing a bill preventing undertakers from selling burial insurance, the Court said that it would not consider motive.[120] When former railroad employees were denied benefits while less senior current railway employees were given such benefits, the Court said that Congress surely intended to do what it did although it was clear that Congress had not reviewed the bill written by the railroad unions carefully enough.[121] When Congress, in trying to exclude persons in state prisons, accidentally denied Supplemental Security Income to certain inmates in mental hospitals, the Court concluded that surely there must have been some reason for treating inmates in some mental hospitals in a different way than inmates in other mental hospitals, which were funded differently but contained the same types of inmates.[122]

But the major complaint about fundamental rights is that they have been so unnecessary. The Court elevated certain rights to avoid the unnecessarily stingy protection which the rational basis test gives to most substantive interests, as opposed to the reasonable basis test for all interests. And what has been gained by this elevation? In *Griswold v. Connecticut*,[123] the Court found that the right to use contraceptives was part of the fundamental right of privacy.[124] Then in *Roe v. Wade*,[125] it held that the right to privacy could not be re-

119. There has been some retreat from the Court's initial early enthusiasm for its procedural due process reforms. Now the Court focuses more on state law and less on overall assessments of the importance of a particular interest, especially as to property rights. *See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976) (a property right in a government job depends on whether the law provided for termination for cause or left it to the will of the supervisor). Liberty interests are less dependent on state law. *But see* Vitek v. Jones, 445 U.S. 480, 488 (1980) ("state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause.").

120. Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949) ("We cannot undertake a search for motive in testing constitutionality.").

121. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).

122. Schweiker v. Wilson, 450 U.S. 221, 235 (1981) ("We believe that the decision . . . must be considered Congress' deliberate, considered choice.").

123. 381 U.S. 479 (1965).

124. *Id.* at 485.

125. 410 U.S. 113, 155 (1973).

stricted without some compelling state interest.[126] Why did the court need to discover some fundamental right in order to strike down a ban on married persons using contraceptives? The *Weaver* reasonable basis test would have led to the same result without generating a national debate on what else is included in the right to privacy. The only reason the fundamental right/compelling state interest scenario was necessary in *Griswold* was because the Court abdicated its responsibility to give a reasonable level of review to legislative decisions. As a result, the legislature was then hamstrung to try to address more legitimate concerns like responsible access of minors to contraceptives.[127]

It is obvious that civil libertarians will be outraged at the suggestion that fundamental rights are somewhat less than fundamental, but the purpose of this paper is not to denigrate such rights. It is simply not clear that the elevation of certain rights has led to a higher level of protection overall than application of the reasonable basis test for all interests would have brought. For example, in *Bowers v. Hardwick*[128] the Court refused to accord fundamental rights status to sexual choices by adults.[129] Although it may be correct that such interests should not rise to the level of judicial concern for racial discrimination, is anyone exactly sure what the governmental interest is for limiting such choices? Without being put to the task of elevating such interests to fundamental, is it not apparent that the Court might have found such laws to have failed the reasonable basis test? What can be said of *Maher v. Roe*,[130] in which the Court subjected decisions to fund abortions to the rational basis test, and stated that governmental decisions not to fund abortions for indigent women passed that test?[131] It is not clear how the reasonable basis test would have come out, but at least there would have been a fairer consideration of the interest of indigent women. Similarly, in *Geduldig v. Aiello*,[132] the Court found that classifications based upon

126. *Id.*

127. *See, e.g.*, Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (a divided and confused Court could not agree on any single rationale for holding invalid a New York law limiting the access of minors under 16 to contraceptives).

128. 478 U.S. 186 (1986).

129. *Id.* at 191. "[R]espondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." *Id.*

130. 432 U.S. 464 (1977).

131. *Id.* at 478-80.

132. 417 U.S. 484 (1974).

pregnancies received and passed the rational basis test.[133] Might the reasonable basis test have made a difference?

Even as to harder issues like race classifications and the right to choice, is it that obvious that strict scrutiny has advanced individual and civil rights appreciably over a more balanced consideration of legislative choices? As to race classifications, the answer is easy. The strict scrutiny test has not advanced individual rights of minorities at all, and instead, may have even adversely impacted minority interests. No hostile racial classification can withstand even the reasonable basis test. To bring in the heavy guns of the compelling state interest test seems to be overkill. Yet to apply the compelling state interest test to benign racial classifications denies minorities the success they have gained from the use of the political process.[134] Also, the reasonable basis test may actually be more protective of majority interests against reverse discrimination than the Court's idiosyncratic application of the supposed compelling state interest test.[135]

As for the right to choice, it is not clear what the result of *Roe v. Wade*[136] might have been had the Court used the reasonable basis test. Almost certainly, a greater range of state regulations would have been permitted. Perhaps bans on second-term abortions not necessary to save the life of the mother would have been included. But the lines between permissible abortions which allow the affluent to find some loophole, and the ability of the law to impact only those lacking the funds to find a sympathetic doctor, might have fallen under a reasonable basis test. As mentioned above, the reasonable basis test would require that funding choices be fairer. Also, maybe some additional balancing in the abortion cases might have led to less heat on both sides. Whatever the outcome, why are legislative concerns for such things as unborn fetuses, the psychological impact of abortion on the female, the emotional impact of late-second-term aborted fetuses on doctors and nurses, or the biological interest of the

133. *Id.* at 495-96.

134. Justice Marshall has consistently called for a middle level test for benign racial classification. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 401 (1978) (Marshall, J., concurring in part, dissenting in part).

135. This is sheer speculation since it is far from clear as to exactly what the Court's approach to affirmative action is. It is known that a person cannot be fired in the name of affirmative action. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-80 (1986). But some preferences are acceptable; *see* Fullilove v. Klutznick, 448 U.S. 448 (1980) (Congressional spending power encompasses the ability to institute racial classifications to further constitutional goals), but not always, *see* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (state affirmative action measures may only remedy presents effects of past discrimination), unless Congress passes the law, and then it may be all right, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3008-09 (1990) ("we hold that benign race-conscious measures mandated by Congress-even if those measures are not 'remedial' . . . are constitutionally permissible").

136. 410 U.S. 113 (1973).

father entitled to virtually no weight in the judicial process given the bias of the compelling state interest test? On the other hand, do the regulations that prevent the sale of pharmaceutical drugs which could lessen the expense and emotional impact of early abortions pass the reasonable basis test? In any event, why shouldn't the Court undertake a more balanced consideration of the competing interests on both sides of this debate, instead of pretending that there is anything in the Constitution which conclusively determines this issue?

Any advantage the compelling state interest/rational basis dichotomy might have on such fundamental issues as race and the right to choice is soon lost when the full range of issues is explored. However important the right to vote is, does anyone actually believe that the interest in being free from arbitrary dismissal from a job is any less important? The fundamental right to travel shields one from penalties which otherwise would result from the impacting of life's necessities, whatever those are.[137] It means that durational residency requirements which are placed on the receipt of welfare are unconstitutional because somehow rights to travel are involved and the state interest is not compelling. But classifications which deny those with needy children a survival income, while allowing funds to go to the blind and elderly, are constitutional because they are rational.[138] Can it be that the right to travel across state lines, already protected by the commerce clause, deserves a higher level of due process and equal protection analysis than laws impacting a person's ability to feed the kids tomorrow?

IV. CONCLUSION

Although it seems that the abandonment of the reasonable basis test and the subsequent use of the rational basis test created a void which made the compelling state interest test necessary, it is not really necessary to abandon the dichotomy to undo much of the harm. The compelling state interest test and its litany of suspect classifications and fundamental rights can be maintained in order to protect settled expectations, but the Court can still play its appropriate role in protecting individuals against unreasonable abuse of legislative

137. *See* Shapiro v. Thompson, 394 U.S. 618 (1969). The Court noted that a one year residency requirement before one could receive welfare benefits created a classification which denied to one class "welfare aid upon which may depend the ability of the families to obtain the very means to subsist — food, shelter, and other necessities of life." *Id.* at 627.

138. *See* Jefferson v. Hackney, 406 U.S. 535 (1972).

power. Not every back room deal deserves the automatic approval that the rational basis test almost surely guarantees. The result of a more meaningful level of review would be to take the pressure off the ever more creative claims for strict scrutiny.[139] The Court could protect substantive interests without denying the legislature its rightful role in helping to shape the way American society balances competing interests.

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139. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) (the argument that illegal alienage is a suspect classification was dismissed by the Court); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442-47 (1985) (the Court dismissed the argument that classifications based on mental retardation are suspect); Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (the Court dismissed the argument that there is a fundamental right to engage in homosexual sodomy).