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INTRODUCTION

In *Massachusetts Board of Retirement v. Murgia*[1] the United States Supreme Court reviewed the decision of the United States District Court for the District of Massachusetts, which held a mandatory retirement statute unconstitutional because it violated the equal protection clause.[2]

Lt. Colonel Robert D. Murgia was retired from the Uniformed Branch of the Massachusetts State Police pursuant to a Massachusetts statute which requires state police officers with twenty years of service to be retired upon reaching the age of fifty.[3] Officer Murgia was in excellent physical and mental health and had recently passed the rigorous annual physical examination required of all officers beyond forty years of age. There is no dispute that when he was retired his excellent health still rendered him capable of performing the duties of a uniformed officer.[4]

1. 427 U.S. 307 (1976).

2. Murgia v. Commonwealth of Massachusetts, 376 F. Supp. 753 (D. Mass. 1974).

3. MASS. GEN. LAWS ANN. Ch. 32, 1, 32 (g), 26 (3) (a) (1932); provides in pertinent part:

"a) . . . Any . . . officer appointed under section nine A of chapter twenty-two . . . who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs."

4. 427 U.S. 307, 311 (1976).

Murgia in the District Court

In the District Court officer Murgia presented an equal protection argument against the validity of the statute. Under traditional analysis two levels of judicial review are utilized. One level of review is extremely deferential to the legislature and its perceived intent in enacting the statute. The other is quite stringent and requires a high degree of congruence between the statutory classification and the purpose to be achieved.[5]

Murgia initially argued that a classification based solely on age was entitled to the higher level of review. Alternatively, he argued that even if the lesser standard of analysis was appropriate the statute was not rationally related to the purpose it was intended to serve. Thus, it did not afford officer Murgia the equal protection of the law.[6]

Because the statute interferred with important aspects of life (Murgia claimed a fundamental right to work) the complaint asserted that the statute should be upheld only upon a showing by the state that it had a compelling interest in maintaining the effecting law. A claim that the statute created an irrebuttable presumption and took away Murgia's employment without due process of law was raised in the lower court but abandoned on appeal to the Supreme Court.

The District Court reached only one issue: whether a classification based on age fifty alone is devoid of a rational basis in the furtherance of any substantial state interest. Relying upon *Reed v. Reed*[7] and *Royster Guano Co. v. Virginia*[8] the court declared that the statute was unconstitutional. The court stated:

> On this record we find that mandatory retirement at age 50, where individualized medical screening is not only available, but already required, is no more rational, and no more related to a protectable state interest, . . . Recognizing the public interest in protecting the individual's right to work, and against discrimination on account of

5. The traditional "two-tier" system of equal protection analysis applies a test of mere rationality to those classifications which are not deemed to be "suspect" or those rights which are not "fundamental." A statutory classification is justifiable so long as it bears some rational relationship to the intended purpose of the legislation.

If a suspect classification or a fundamental interest is involved a much more intense level of judicial review, known as "strict scrutiny," is afforded. A "compelling state interest" must be served by the statutory classification if the statute is to be upheld. *See*, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

For those classifications which have been deemed suspect and rights which have been considered fundamental, *see* note 12, *infra*.

6. *See* note 5, *supra*.

7. 404 U.S. 71 (1971).

8. 253 U.S. 412 (1920).

> age . . . we are compelled to strike down the present age distinction where plaintiff has established the absence of any factual basis therefor.[9]

The statute was declared void and the court was willing to award appropriate mandatory relief after a hearing was had regarding officer Murgia's capabilities.[10]

Murgia in the United States Supreme Court

In reversing the District Court, the United States Supreme Court agreed that rationality was the proper standard by which to test whether compulsory retirement at age fifty violates equal protection requirements.[11] The Court did not agree, however, that the classification based upon age fifty was not rationally related to furthering a legitimate state interest.

The Supreme Court did not subject the statute to a strict scrutiny analysis in determining its validity for, according to the Court, equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.[12]

The Court summarily dismissed the notion that the right to work is fundamental (and thus entitled to strict scrutiny) by simply stating that its decisions have given no support to this proposition: ". . . we have expressed that a standard less than strict scrutiny has consistently been applied to state legislation restricting the availability of employment opportunities."[13]

The classification of uniformed state police officers by age was not found to be suspect. *San Antonio Independent School District v. Rodriguez* defined a suspect class as one "saddled

9. 376 F. Supp. 753, 756 (1974).
10. *Id.*
11. 427 U.S. at 312.
12. *Id. Cf.* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).
Fundamental rights include the rights to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to vote, Bullock v. Carter, 405 U.S. 134 (1972); to travel interstate, Shapiro v. Thompson, 394 U.S. 618 (1969); and to rights guaranteed by First Amendment, Williams v. Rhodes, 393 U.S. 23 (1968).
Suspect classifications include race, McLaughlin v. Florida, 379 U.S. 184 (1964); alienage, Graham v. Richardson, 403 U.S. 365 (1971); and ancestry, Oyama v. California, 332 U.S. 633 (1948). *See* note 5, *supra*.
13. 427 U.S. at 312.

with such disabilities, or subjected to such a history of purposeful unequal treatment as to command extraordinary protection from the majoritarian political process."[14] The *Murgia* court stated:

> While the treatment of the aged in this Nation has not wholly been free of discrimination, such persons, unlike say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. The class . . . cannot be said to discriminate against the elderly. Rather it draws a line at a certain age in middle life.[15]

Old age was described as merely a stage in life that everyone who lives out his normal span of years will reach.[16] Because of this the classification based upon age was held not to be entitled to strict scrutiny even if the statute could be construed as penalizing those officers over fifty. The classification did not impose a distinction sufficiently similar to those which had been found suspect in the past.[17]

Because neither a suspect classification nor a fundamental right was involved the traditional rational basis test, the test which exhibits extreme deference to the legislature and requires only that a statute be reasonably related to a legitimate state purpose,[18] was deemed appropriate.

Referring to the examination of the statutory classification under the rational basis test the Court stated that

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task . . . Perfection in making the necessary classifications is neither possible nor necessary. Such action by a legislature is presumed to be valid.[19]

Because the stated purpose of the statute was to provide vigorous, youthful policemen, the Court readily accepted it as a

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14. 411 U.S. at 28.
15. 427 U.S. at 313.
16. *Id.*
17. *Id.*
18. McGowan v. Maryland, 366 U.S. 420 (1961) contains an excellent passage which describes the passive nature of this "lower-level" test:

> Although no precise formula has been developed, the court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *Id.* at 425, 426.

19. 427 U.S. at 314.

legitimate exercise of the legislature's power. The fact that the State did not choose to determine fitness more precisely through individualized testing did not affect the legislative objective of assuring physical fitness; it only suggested that the State might not have chosen the best method of determining fitness.[20] Because the statute was not wholly irrelevant to the objective the classification did not constitute an equal protection violation. Accordingly, the Supreme Court reversed.[21]

The Significance of Murgia: Immediate and Prospective

The immediate effect of *Murgia* was to dispel the hopes of those who thought the Supreme Court would strike down a mandatory retirement statute if one was considered on its merits.[22]

The Court's refusal to recognize age as a suspect classification or the right to work as fundamental precludes the strict scrutiny analysis of mandatory retirement statutes.[23] The most reasonable approach would have been that applied by the District Court. It is a middle level test which is referred to as "minimal scrutiny with bite" test by Professor Gunther.[24] The rejection of

20. *Id.* at 316. *Cf.* Dandridge v. Williams, 397 U.S. 471, 485 (1970). When rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."

21. 427 U.S. at 317.

22. The question presented in *Murgia* had been summarily treated in previous cases. *See e.g.*, Weisbrod v. Lynn, 420 U.S. 940 (1975) *aff'g* 383 F. Supp. 933 (D C 1974); McIlvaine v. Pennsylvania, 415 U.S. 986 (1974), *dismissing appeal from* 454 Pa. 129, 309 A. 2d 801 (1973); Airline Pilots Ass'n v. Quesada, 276 F. 2d 892 (2d Cir. 1960); *cert. denied*, 366 U.S. 962 (1961).

At least one federal court, Gault v. Garrison, 523 F. 2d 205 (1975), indicated its willingness to hold a mandatory retirement statute unconstitutional but that court felt bound by the Supreme Court's dismissal of *McIlvaine v. Pennsylvania*, *supra*:

> Our conclusion must be that if we were to decide this appeal today, we would be constrained to honor the aforementioned Supreme Court summary judgment dispositions as being persuasive precedents if not binding . . . . In view of the foregoing, we believe that the only just course is to stay a final decision until the Supreme Court decides Murgia.

523 F. 2d 205, 209 (1975).

For an excellent discussion of possible challenges to a mandatory retirement statute *see* Larkin, *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 U.C.L.A. L. Rev. 549 (1975). [hereinafter cited as *Mandatory Retirement*].

23. *See* note 5, *supra*.

24. Gunther, *The Supreme Court 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Following the nomenclature of Gunther, the two

this approach by the *Murgia* Court reflects the erratic behavior of the Court in its analyses of equal protection problems involving less than previously recognized fundamental rights or suspect classifications.

This Note will examine the various approaches to less than high level equal protection analysis which have been employed by the Court in recent years.

A Middle Level of Equal Protection Analysis: Pick a test, any test

Justice Marshall, dissenting in *Murgia*, expressed his belief that the two-tier system of review should be abandoned and a "sliding-scale" model be utilized whereby a level of review commensurate with the interest involved would be afforded.[25] Although other members of the Court have not embraced his model,[26] it's appropriate to examine the discontent which the Court has sporadically manifested with regard to the rigid two-tiered method of review.

Two similar methods of analysis have been periodically embraced by a majority of the Court in an effort to utilize a middle-level test. These are the "irrebuttable presumption" doctrine and the aforementioned "minimal scrutiny with bite" approach.

The Irrebuttable Presumption Doctrine: Equal Protection in Due Process Clothing

One mode of statutory analysis which has been utilized by the Court to protect individuals against imprecise statutory classifications is the irrebuttable presumption doctrine.[27] The doctrine

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standards of analysis will be denominated "minimum scrutiny" and "strict scrutiny." *Id.* at 1-8. "Rational basis" will be used interchangeably with "minimum scrutiny."

25. 427 U.S. at 318.

26. Justice Marshall's position was stated most elaborately in his dissenting opinion in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 70 (1973):

> In summary it seems . . . inescapably clear that this Court has consistently adjusted the care with which it will review a state discrimination in light of the Constitutional significance and the invidiousness of the particular classification. In the context of economic interests, we find the discriminatory state action is almost always sustained, for such interests are generally far removed from Constitutional guarantees . . . . But the situation differs markedly when discrimination against important individual interests with constitutional implications and against a particularly disadvantaged or powerless class is involved. *Id.* at 109.

27. Legislation creates an irrebuttable presumption when it provides that fact A (the basic fact) is conclusive evidence of the existence of fact B (the presumed fact). *See* 4 *J. Wigmore, Evidence*: 1353 (Chadbourn Rev. 1972); Note,

was introduced in the 1920's and 1930's and was used by the Court to strike down offending tax law classifications.[28] As the doctrine was based upon due process concepts it fell into disfavor in the post-1937 period which marked the decline of substantive due process and did not reappear until 1965.

Several recent cases have utilized the irrebuttable presumption doctrine to reach an issue which might just as easily (and more appropriately) have been reached on equal protection grounds.[29] In these cases the Court has held that, if it is not "necessarily or universally true in fact" that the basic fact implies the presumed fact, then the statute's irrebuttable presumption denies due process of law.[30] The usual remedy in such a case is an individualized hearing to determine whether the statutory classification accurately reflects the legislative purpose when applied to the particular factual situation with which the Court is confronted.[31]

The requirement of a classification which is "universally true in fact" marks a significant and beneficial difference between a statutory attack based upon irrebuttable presumption grounds and one advancing an equal protection argument. The traditional rational basis test requires only that a legislative classification be rationally related to the furtherance of a legitimate state objective.[32] If the classification does not touch upon one of the criteria necessary to invoke strict scrutiny analysis, the ex-

The Irrebuttable Presumption Doctrine in the Supreme Court, 87 HARV. L. REV. 1534 (1974). [hereinafter cited as *Presumptions*].

> The effect of a statutory classification based upon an irrebuttable presumption is to make fact B irrelevant in the determination of the propriety of a persons being included in the class. Once a person is found to be includable within the prerequisites of fact A, proof of the non-applicability of presumed fact B is inadmissible. 9 *J. Wigmore, Evidence*: 2492 (3d Ed. 1940).

28. Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Commission, 284 U.S. 206 (1931); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). In *Schlesinger* the Court found unconstitutional a Wisconsin tax statute which deemed that any gift made within six (6) years of death was made for the purpose of avoiding estate taxation. An irrebuttable presumption was created because evidence was inadmissible to prove that the gift was not made for tax purposes.

29. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Clandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971); Carrington v. Rash, 380 U.S. 89 (1965).

30. Vlandis v. Kline, 412 U.S. 441, 452 (1973). See *Presumptions*, note 27, *supra*.

31. *Id.* at 445-46; Bell v. Burson, 402 U.S. 535, 542 (1971).

32. McGowan v. Maryland, 366 U.S. 420 (1961). *See* note 18, *supra*.

tremely deferrential nature of the traditional rational basis test will almost certainly result in a denial of relief.[33]

If the argument is framed as an irrebuttable presumption-denial of due process argument, an inability to rebut the presumed incompetency of the individual will, under the *Cleveland Board of Education v. LaFleur*[34] line of cases, cause the Court to reverse and remand with instructions to provide an individualized hearing to determine the individual capabilities of the contestant.

In *LaFleur* the Court invalidated a regulation of the Cleveland Board of Education which required pregnant teachers to take a mandatory pregnancy leave of absence after the fifth month of pregnancy. The Board attempted to justify the requirement as a means of promoting both the assurance of physically capable instructors and administrative efficiency. The Court found that the refusal to hear medical testimony with regard to petitioner's physical condition created an irrebuttable presumption and ordered a hearing. Administrative convenience was determined to be an inadequate justification for the requirement as it interfered with important personal rights of the petitioner.[35]

It is obvious that the factual situation in *LaFleur* is quite similar to that in *Murgia*. The classification of officer Murgia as an officer fifty years old raised the irrebuttable presumption that he was incompetent to perform his duties. The issue did not reach the Supreme Court in *Murgia* because it was abandoned on appeal,[36] perhaps because it was perceived that the Court was unwilling to entertain such an argument.

The availability of individualized hearings (the result of successful irrebuttable presumption arguments) is both the blessing and the curse of the doctrine. Although the hearings are advantageous to individual contestants, the doctrine nevertheless allows for the convenient circumvention of true equal pro-

33. Morey v. Doud, 354 U.S. 457 (1957), is a rare exception to this general rule. In *Morey* a statute was struck down due to the absence of any rational relationship between the classification and the statute's purpose.

34. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). *See* note 29, *supra*.

35. *Id.* at 640, 643.

36. Brief for Appellee at 41-45, Massachusetts Board of Retriement v. Murgia, 427 U.S. 307 (1976).

It is interesting that Ms. Larkin anticipated the irrebuttable presumption challenged and predicted its failure due to the Court's rejection of the doctrine in *Salfi*. *See, Mandatory Retirement*, note 22, *supra* at 568. Unfortunately, Murgia's abandonment precluded the awaited confrontation.

tection issues. The concurring opinion of Justice Powell[37] and the dissent of Justice Rehnquist[38] in *LaFleur* emphasize this point.[39] Justice Powell stated:

> It seems to me that equal protection analysis is the appropriate frame of reference . . . As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner 'irrebuttable presumption' . . . If the Court nevertheless used 'irrebuttable presumption' reasoning selectively, the concept at root often will be something else masquerading as a due process doctrine. That something else is the Equal Protection Clause.[40]

Justice Rehnquist stated that nearly all statutory classifications may be restated as irrebuttable presumptions.

The use of the doctrine to circumvent equal protection issues was recognized by the majority opinion in *Weinberger v. Salfi*.[41] In *Salfi* the Court refused to apply the irrebuttable presumption doctrine to a nine-month duration of marriage requirement of the Social Security Act.[42] The opinion indicated that the statutes in *Vlandis*, *LaFleur* and *Stanley* would have been unconstitutional on equal protection grounds:[43]

> We think that the District Court's extension of the holdings of *Stanley*, *Vlandis*, and *LaFleur*, to the eligibility issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution. The benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as a test of eligibility.[44]

Perhaps *Salfi* rejected the doctrine because of the unwillingness of the Court to order a rehearing at the lower court which would have had to attempt to discern the intention of the welfare claimant.[45]

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37. 414, U.S. 632, 651 (1974).
38. *Id.* at 654.
39. Chief Justice Burger and Juctice Rehnquist dissented in *LaFleur* and in Vlandis v. Kline, 412 U.S. 441 (1973). Justice Powell concurred only in the result in *LaFleur*.
40. 414 U.S. at 651.
41. 422 U.S. 749 (1975).
42. 42 U.S.C. 416(c)(5) and (E)(2) (1970 ed. and Supp. III).
43. 422 U.S. at 771-72.
44. *Id. Salfi* has been followed in Matthews, Secretary of Heath, Education, and Welfare v. Cintron, 423 U.S. 809 (1975), which summarily reversed and remanded an unreported district court class action decision.
45. 422 U.S. 749 (1975). The purpose of the nine month duration of marriage

In comparison, the factual situations in the other irrebuttable presumption cases were susceptible to objective evaluations.[46] The Court may still accept the doctrine in a case whose facts are susceptible to an evaluation upon rehearing. However, the irrebuttable presumption doctrine is nothing more than a means of avoiding that which should be confronted.

Minimal Scrutiny With Bite

Accompanying changes in the membership of the Supreme Court during the late 1960's and early 1970's have been certain instances of substantial change in the lower level method of traditional equal protection analysis.[47] The "newer" rational basis test, which has been utilized most consistently in gender-based discrimination cases, has been labeled "minimal scrutiny with bite" because it requires a "fair and substantial relationship between the means chosen to effectuate the legislative purpose and the objective itself.[48]

There are two significant advantages available to the contestant who is able to persuade the Court to invoke this level of review. First, the Court will restrict itself to the object of the legislation.[49] This curbs the ability of the Court to speculate as to an acceptable reason for the classification.

The second significant advantage of the middle level test is that the Court will then be unwilling to recognize "administrative convenience" as a legitimate objective of the statute:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of a hearing on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.[50]

When the Court's unwillingness to hypothesize a legitimate purpose is combined with the state's inability to assert administrative convenience as a valid reason for the discriminatory classification it is obvious that a statute may fail the test. This is

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requirement was stated to be to deter fraudulent claims of marriage made to obtain widow's benefits.

46. In Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), for example, the purpose of the mandatory pregnancy leave was to insure physically fit teachers. Physical fitness may be readily ascertained by medical reports.

47. *See* Gunther, p. 18-20, note 24, *supra*.

48. Reed v. Reed, 404 U.S. 71, 76 (1971), *Cf.* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *Reed* states: "A classification must be reasonable not arbitrary, and must rest upon some ground of difference . . . so that all persons similarly situated shall be treated alike."

49. McGowan v. Maryland, 366 U.S. 420 (1961). The Court's willingness to uphold a statute on hypothetical grounds is a permissible part of traditional lower-level review.

50. Reed v. Reed, 404 U.S. 71, 76 (1971).

especially true in a case such as *Murgia* in which the statute was designed to ensure the availability of physically fit policemen. The existence of a rigorous physical examination as a readily available means of providing individual evaluation would add to the weight against the statute which classified solely on the basis of age.

The District Court invalidated the statute in *Murgia* by applying the middle level "minimal scrutiny with bite" test.[51] However, the Supreme Court did not accept this approach and used a less stringent level of review. Although both Courts claimed to be using the rational basis or "minimal scrutiny" test, the results were diametrically opposed. Different conclusions were reached because the district court, which purportedly applied the rational basis test, actually employed a higher level of review.

It is very difficult to speculate when the Court will utilize the middle level test in its more stringent form. The majority of cases in which it has been used have been gender-based classifications or those containing interferences with rights which were "close" to being fundamental.[52]

The confusion created by the Court's inconsistent use of this test is manifest in the *Murgia* decision. Classifications based upon age, although they have never been held to be suspect, may be analogized to classifications based upon sex (those have most consistently received "minimal scrutiny with bite" review). Both age and sex may be characterized as "immutable traits often unrelated to one's ability to perform a given task."[53] Officer Robert Murgia was as physically and mentally capable as a younger man. This was verified by his physical examination. Yet, because of his age, he was classified as unfit and was forced to retire. The classification based upon age was thus wholly unrelated to his ability to perform.

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51. Murgia v. Massachusetts Board of Retirement, 376 F. Supp. 753 (1974).

52. Stantion v. Stanton, 421 U.S. 7 (1975), Frontiero v. Richardson, 411 U.S. 677 (1973), and Reed v. Reed, 404 U.S. 71 (1971) are examples of the use of the "minimal scrutiny with bite" mode of analysis to strike down classification. In *Frontiero* a plurality of the Justices elevated sex to a suspect class.

In James v. Stranges, 407 U.S. 128 (1972), the test was used to invalidated a Kansas recoupment law which denied indigent criminal defendants rights afforded civil judgment debtors, *i.e.*, exemption of personal necessities. The most probable explanation is that this right was sufficiently "fundamental" to justify the use of the rational basis test "with bite."

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

Even if one acquiesces in the Court's rejection of the age-based contention, the right to work is certainly one which is "sufficiently close" to being a fundamental right and any statute interfering with such an interest should invoke a higher standard of review.

The right to work has been declared to be fundamental by the Supreme Court in two early cases[54] and is protected by the "liberty" and "property" concepts of due process.[55] It has also been deemed fundamental by the California Supreme Court[56] which held that interferences with or limitations upon this right may be countenanced only after the most careful judicial scrutiny.[57]

California's position that one's interest in employment is fundamental was reiterated in *Townsend v. City of Los Angeles*.[58] In *Townsend* a mandatory retirement statute was upheld against a "right to work" challenge. The essential holding was that, although the right to work is fundamental, a person's right to work for a particular employer is not. As long as the statute in question is not arbitrary, discriminatory or unreasonable it will be upheld.[59]

Although *Townsend* may appear to mark a retreat from the position established by *Sail'er Inn, Inc. v. Kirby*,[60] the significance of the former decision lies in the weight accorded the right to work by the California court. The requirement of "reasonableness" is similarly emphasized and is applicable regardless of whether the traditional or the "newer" equal protection analysis is employed. The difference between the analyses is in the lengths to which the court will go to determine whether a classification is "reasonable."

Because of the quasi-fundamental nature of the right to work and the similarity of age and sex classifications as being "close" to suspect, one would have expected the *Murgia* Court to subject the statute to "minimal scrutiny with bite" as was done in

54. Truax v. Raich, 239 U.S. 33 (1915); Smith v. Lewis, 233 U.S. 630 (1914). Truax states: "It requires no argument that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (14th) Amendment to secure." *Id.* at 41. *See Mandatory Retirement*, note 22, *supra*, at 558.

55. Green v. McElroy, 360 U.S. 474, 492 (1958).

56. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P. 2d 529, 95 Cal. Rptr. 329 (1971).

57. *Id.*

58. 49 Cal. App. 3d 263, 122 Cal. Rptr. 500 (1975).

59. *Id.*

60. 5 Cal. 3d 1, 485 P. 2d 529, 95 Cal. Rptr. 329 (1971).

the district court. However, recent decisions indicate that the use of this test is not assured even in gender-based cases.

In *Kahn v. Shevin*[61] and in *Geduldig v. Aiello*[62] the Court upheld statutes which involved sex classifications. *Kahn* may perhaps be distinguished as a benign classification established to redress prior discriminations.[63] The *Kahn* Court at least quoted the "fair and substantial relationship" language of the middle level test.[64] *Geduldig*, however, upheld a California statute which provided disability benefits for victims of prostectomies, sickle-cell anemia and other male and race-related disorders but excluded coverage for normal pregnancy.[65] In doing so the Court reverted to the deferential language of traditional rational basis analysis.[66]

Stanton v. Stanton marked the return of minimal scrutiny with bite.[67] In this case (which followed *Reed v. Reed*[68]) the Court struck down a statute which provided for the support of female children until their eighteenth birthday but which continued support for males until the age of twenty-one.[69] The opinion acknowledged the existence of a middle level of scrutiny by stating: "We therefore conclude that under any test, compelling state interest, or rational basis, or something in between . . . [the statute] does not survive an equal protection attack."[70]

61. 416 U.S. 351 (1974).
62. 417 U.S. 484 (1974).
63. 416 U.S. at 355. *Kahn* involved a challenge by a widower who claimed entitlement to the five hundred dollar property tax exemption which was customarily granted to widows. Justice Douglas, writing for the majority, recognized that a widow generally encounters more substantial financial barriers than a widower. He also observed that the statute sought to compensate or rectify past discriminations against women. *Id.*
64. *Id.* at 76.
65. 417 U.S. at 500. *See* CAL. UNEMP. INS. CODE 2626, 2626.2 (West 1974).
66. *Id.* at 496 *Cf.* Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Jefferson v. Hackney, 406 U.S. 535 (1972).
67. 421 U.S. 7 (1975).
68. 404 U.S. 71 (1971).
69. UTAH CODE ANN. 15-2-1 (1953). As in previous cases the Court did not find the required fair and substantial relationship between the statute and its stated purpose (to provide additional support for the male child's education and training to assume his role as head of the household).
70. 421 U.S. at 17.

The Articulated Purpose Test

An examination of several recent decisions which purportedly applied the traditional rational basis test reveals that the Court has accorded three levels of review to similar statutes. These statutes pertain to other than gender-based classifications which, of course, are most likely to receive middle level analysis in the form of "minimal scrutiny with bite." The cases are of the variety long associated with the lower level of review. Although one line of cases adheres to the traditional form of analysis, the other two reveal a marked narrowing of the Court's willingness to go beyond the legislative history in search of support for the classification. These two modes of analysis differ in degree: one accepts the reasons advanced by the legislative history at "face value" while the other proceeds to test the reasonableness of the classification in relation to its legislative history.

In the line of cases represented by *Dandridge v. Williams*[71] the traditional rational basis test is manifested in its classical form of extreme deference to the legislature. *Dandridge* involved a challenge to a Maryland welfare provision which placed a ceiling on the amount of benefits receivable by any one family. The contention was that this provision invidiously discriminated against later-born children of large families and denied them the equal protection of the laws.[72] The scheme of distribution was upheld because there was a rational relationship between the statute and the objective of encouraging employment which it was designed to advance. As the regulation could be clearly justified on the grounds advanced in Maryland's argument[73] the maximum grant regulation was upheld.

The significance of the *Dandridge* cases is that the validity of the statute's purpose was never really considered. These cases suggest that the legislation will be accepted as valid if *any* reason is or can be advanced to support the challenged classification. Perhaps the best example of traditional analysis language and application in this context is found in *Usery v. Turner Elkhorn Mining Co.*[74]:

71. 397 U.S. 471 (1970). For convenience the following cases will be referred to as the "*Dandridge line*": Usery v. Turner Elkhorn Mining Co., 96 S. Ct. 2882 (1976); United States v. Kras, 409 U.S. 434 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970). *Usery*, *supra*, is a Fifth Amendment Due Process case. However, the two-tier mode of analysis is the same as that employed in Fourteenth Amendment cases.

72. *Id.* at 476-77.

73. *Id.* at 483. "The regulation can be clearly justified, Maryland argues, in terms of legitimate state interest in encouraging gainful employment."

74. 96 S. Ct. 2882 (1976).

> We are unwilling to assess the wisdom of Congress' chosen scheme . . . it is enough to say that the Act approaches the problem . . . rationally; whether a broader . . . scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.[75]

A variation of the traditional test is represented by *Massachusetts Board of Retirement v. Murgia* and by other recent decisions.[76] These decisions test the validity of statutes by looking to their legislative histories. If it is determined that Congress could have rationally concluded that a legitimate state interest would be served by a particular classification, the statute will be upheld. In upholding the statute in *Murgia* the Court set forth excerpts of state legislative commission reports which stressed the desirability of youthful, vigorous policemen.[77] The age classification was held to be "clearly rationally related to the State's objective."[78]

Although the Court remains passive in this line of cases it does not appear as willing to hypothesize legitimate purposes for the statutes. The sole requirement for validation seems to be some legislative history upon which the Court may rely. In *Weinberger v. Salfi*[79] the legislative history was reviewed and the Court concluded that

> While it is possible to debate the wisdom of excluding legitimate claimants . . . and of relying on a rule which may not exclude some obviously sham arrangements, we think it clear that Congress could rationally choose to adopt such a course.[80]

Hypothesizing is thus left to Congress. These cases are a step away from the extreme deference of *Dandridge* but they still do not provide any real judicial review of the challenged legislation. They merely represent a convenient means of "rubber-stamping" legislative intent. Perhaps this approach is best characterized as an "articulated purpose acceptance."

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75. *Id.* at 2894.

76. 427 U.S. 307 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974). These cases shall be referred to as the *Murgia* line of cases.

77. *Id.* at 314-16.

78. *Id.*

79. 422 U.S. 749 (1975). *Salfi*, which rejected the irrebuttable presumption doctrine, dealt with a social security requirement that a marriage last nine months or more before the survivor (widow) could claim widow's benefits. *See* note 45, *supra*.

80. *Id.* at 781.

However, a third line of cases represented by *U.S. Dept. of Agriculture v. Moreno*[81] reveals a strengthened form of the traditional rational basis test. In *Moreno* the Court refused to accept the legislative history of the enactment as a legitimate purpose. Further, an alternate reason for justifying the classification was rejected by the Court; it instead chose to evaluate the legislation solely on the reasonableness of its articulated purpose. The level of review found in *Moreno* is not of the rubber-stamp variety typical of *Murgia*-like decisions nor does it approximate the passive deference of *Dandridge*.[82] The legislative history was carefully evaluated and was, in fact, responsible for the invalidation of the legislation. The Court stated:

> The challenged statutory classification is clearly irrelevant to the stated purpose of the Act . . . . Thus, if it is to be sustained, the challenged classification must rationally further some legitimate governmental interest . . . . [R]egrettably . . . the legislative history that does exist, indicates that . . . the challenged classification clearly cannot be sustained by reference to this Congressional purpose.[83]

This "articulated purpose test" has also been used by the Court to uphold legislation. In *Johnson v. Robison* the Court held that a classification which excluded those who had performed alternative civilian service in lieu of military duty was not violative of equal protection requirements.[84] The legislative history was thoroughly scrutinized and the classification was found to bear a reasonable relationship to the stated purpose of providing educational benefits to those who had been subjected to the hardships of military service.[85]

But the fact that Congress could conclude that a reasonable relationship did exist between a particular classification and that statute's purposes is not decisive. In the *Murgia* line of cases this would be a sufficient reason to uphold the classification. However, the *Moreno* cases, which employ an articulated purpose analysis, reflect the Court's assumption of an affirmative role in the judicial review process in which the stated purpose of the legislation is evaluated in light of the surrounding circumstances. The test is not whether Congress could have concluded that a statute is reasonable. The articulated purpose test requires that a statutory classification be reasonable in fact.

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81. 413 U.S. 528 (1973). *See also* Johnson v. Robison, 415 U.S. 361 (1974); Marshall v. United States, 414 U.S. 417 (1974); McGinnis v. Royster, 410 U.S. 176 (1974).

82. 397 U.S. at 486. In *Dandridge* the Court states: "We need not explore all the reasons that the State advances in justification of the regulation."

83. 413 U.S. at 534.

84. 415 U.S. 361 (1974).

85. *Id.* at 378-82.

It is difficult to advance more than a guess as to what motivates the Court to apply the intensified, *Moreno*-type analysis. Perhaps the nature of petitioner's claim spurs this actual test of legislative history. For example, in *Dandridge*, the purpose advanced in support of the classification was "the state's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor."[86] Subjectively, the state's desire to place welfare recipients and workers on an equal plane "makes sense." It is possible that the Court, for this reason, deemed it unnecessary to go further in determining the propriety of the classification.

In *Murgia*, the classification which forced the retirement of officers beyond age fifty was plausible, yet Murgia's fitness was indicative of the statute's imperfection. Although a statutory classification need not be perfect[87] the fact that some officers would be wrongfully retired was, perhaps, responsible for the Court's limited review of the legislative history. The Court may have wished to convince itself that most officers over fifty are incapable of performing their required duties. Physicians' testimony to that effect contained in the legislative history did satisfy the Court and it upheld the statute.

By comparison, *Dandridge* involved a classification which could be deemed reasonable (or not) through a subjective determination of the classification's rationality. The limitation on welfare receipts designed to place the recipient and the working poor on the same level is in accord with a "rough justice" sense of equality and basic fairness. *Murgia*, however, involved a classification and stated a purpose amenable to statistical analysis. Why was age fifty chosen? Wasn't forty-five equally appropriate? Reasonableness in *Murgia* could best be determined by examining the history of the act and by reviewing the physicians' testimony. The fact situation in *Murgia* called upon the Court to assume a more active role in the analysis.

In *Moreno*, the Court's active analysis may again be explained by the reason advanced in support of the classification. The legislative history of the statute (which refused foodstamps to "unrelated houses") indicated a desire on the part of the state to

86. 397 U.S. 471, 486 (1970).
87. Dandridge v. Williams, 397 U.S. 471 (1970).

keep "hippies" from receiving foodstamps. In *Murgia* and in *Dandridge* the legislation was proposed to effectuate purposes which were "acceptable" to the normal man. The purpose in *Moreno*, however, may have been patently offensive to the Court. No reason for the classification, other than "anti-hippie" animus, was revealed by the legislative history. Perhaps this so offended or seemed so unreasonable and discriminatory to the Court that it refused to accept the purpose subsequently advanced (*i.e.*, to prevent fraud).

In *Johnson v. Robison*[88] the Court reviewed a classification which denied government insurance benefits to conscientious objectors who chose to perform alternate service. Although the statute was upheld, the purposes revealed by the legislative history and offered in support of the classification were stringently tested. Again, this may have been due to the fact that both military draftees and those choosing alternate service were required to sacrifice the same amount of time and make similar changes in their lifestyles. Thus, no plausible reason for the denial of benefits could be deemed rational solely on the basis of "common sense."

An awareness of the Court's three different approaches in this area may be beneficial in determining how one should present arguments of this nature to the Court. If the legislative history in support of a classification is strong and seems conducive to a "legitimate" purpose, the petitioner may be secure in framing an argument based upon that history. However, if the legislative history is sparse, or if the reason for the classification is not readily apparent or is unacceptable without explanation, the petitioner may be well advised to advance several reasons in support of the statute and allow the Court to choose an appropriate purpose by way of a *Dandridge*-type analysis. The more specific one's supporting reasons are, the more assertive the Court will become in its analysis.

CONCLUSION

The irrebuttable presumption doctrine, minimal scrutiny with bite and the three levels of rational basis analysis (in other than gender-related cases) would represent an ideal continum of the emerging strength in lower level equal protection analysis. Unfortunately, all of these approaches have been utilized contemporaneously. All have been used, have been rejected and have somehow re-emerged. Contrasting the various approaches reveals the fragmented nature of the lower level test.

88. 415 U.S. 361 (1974).

If the Court continues to pay lip service to the two-tier system of review, and *Murgia* indicates that it will, the situation will remain the same. However, it is likely that the irrebuttable presumption doctrine will fall into disuse. It has been recognized as a "back-door" approach to equal protection analysis, and its use should not be advocated. It is preferable instead to force the Court to resolve the chaotic state of lower level analysis. Hopefully, the line of cases represented by *Murgia* foreshadow the Court's permanent departure from the extreme deference associated with the traditional test.

The most interesting development is revealed by comparing *Moreno*[89] and *Robison*[90] with the gender-based cases which have invoked the enhanced level of analysis.[91] Although the non-gender-based cases purport to be utilizing the traditional rational basis method of review, they seem to be extending the "minimal scrutiny with bite" test to the area of economic and social benefits. Perhaps the relatively settled application of the rational basis test "with bite" in gender-based cases, combined with the sporadic elevation of review levels in other areas and with the Court's reluctance to go outside the stated purposes of the statute in yet other cases (*i.e. Murgia*) indicates a permanent strengthening of the traditional basis tests' application, if not in form.

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89. U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973).
90. Johnson v. Robison, 415 U.S. 361 (1974).
91. *See* note 49, *supra*. *Compare* the language and analysis in Johnson v. Robison, 415 U.S. 361 (1974) *with* Weinberger v. Weisenfeld, 420 U.S. 636 (1975), a gender-based case in which the Court states:

> "A statute reasonably designed to further the state policy . . . can survive an equal protection attack . . . . [B]ut the mere recitation of a benign compensatory purpose is not an automatic shield which protects any inquiry into the actual purpose underlying a statutory scheme." *Id.* at 648.