Rational Basis With Bite: Intermediate Scrutiny by Any Other Name

INTRODUCTION

Four times during the 1985 term the Supreme Court used the equal protection clause[1] to invalidate, or permit a challenge to, state and local regulations, despite the absence of a suspect classification or fundamental right requiring heightened or strict scrutiny.[2] Under the guise of the rational basis test, the Court struck down a Texas city council decision preventing a group home for the mentally retarded,[3] an Alabama tax burdening foreign insurance companies,[4] and a New Mexico property tax exemption that applied only to Vietnam veterans who were New Mexico residents before a cut-off date.[5] The Court also reinstated an equal protection challenge to a Vermont use tax on automobiles purchased outside the state that burdened those who were non-residents at the time of purchase.[6] The Court found the Vermont statute unconstitutional on its face under rational basis review.[7]

The justices who dissented from these opinions contended that the Court departed from long-standing equal protection precedents and argued that these regulations would be valid under the traditional rational basis test.[8] A finding that these regulations are unconstitutional under rational basis review implies that the Court used a more searching scrutiny.[9] This signals a break from traditional equal protection analysis in which the Court applies only the most deferential standard of review when a party brings an equal protection challenge against economic or social legislation that neither implicates a suspect classification nor a fundamental right.[10] Many commentators have suggested that these opinions represent an effort by the Court to put more

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1. The equal protection clause of the fourteenth amendment states that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

2. This Note discusses the different forms of scrutiny employed in traditional equal protection analysis. *See infra* Part I.

3. City of Cleburne v. Cleburue Living Center, 105 S. Ct. 3249 (1985).

4. Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985).

5. Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985).

6. Williams v. Vermont, 105 S. Ct. 2465 (1985).

7. *Williams,* 105 S. Ct. at 2472, 2475.

8. *Cleburne,* 105 S. Ct. at 3263 (Marshall, J., concurring in part, dissenting in part); *Hooper,* 105 S. Ct. at 2870-74 (Stevens, J., dissenting); *Williams,* 105 S. Ct. at 2477 (Blackmun, J., dissenting); *Metropolitan Life,* 105 S. Ct. at 1684 (O'Connor, J., dissenting).

9. This Note discusses the differences between the rational basis test applied in these cases and the traditional rational basis test. *See infra* Part II. I shall refer to this more searching use of rational basis as "rational basis with bite." *See infra* note 11.

10. *See infra* Part I.

"teeth" in the rational basis test,[11] and they explain the expansion of the equal protection clause as an effort to "reach perceived injustices that otherwise lie beyond constitutional reach."[12] Others suggest, however, that these opinions simply represent a less-than-candid use of intermediate scrutiny.[13] If these cases do in fact represent a trend in equal protection analysis, this trend may have substantial implications for lower court judges who must decide which standard of review to employ, and for legislators who must contend with the enlarged parameters of judicial review.

This Note examines whether the Supreme Court has begun to employ a more searching type of scrutiny under rational basis review, and argues that heightened scrutiny under the label of rational basis review is undesirable. Part I outlines the evolution of traditional equal protection analysis, including the emergence of "rational basis with bite" in the right-to-travel context. Part II argues that the Court did employ a more exacting scrutiny than the traditional rational basis test in the four 1985-term cases. Finally, Part III concludes that rational basis with bite is simply intermediate scrutiny without an articulation of the factors that triggered it, and argues that such a use of intermediate scrutiny is indefensible because it obscures the triggering mechanism for heightened scrutiny, confusing legislatures and lower courts and leaving courts unaccountable for their decisions and free to engraft their own values onto the equal protection clause.

I. THE EVOLUTION OF EQUAL PROTECTION ANALYSIS

Today scholars understand the equal protection clause of the fourteenth amendment to require that the government treat all persons similarly situated in a similar manner.[14] During the first eighty years after its enactment, however, the Supreme Court believed that the fourteenth amendment protected only racial and ethnic[15] minorities from discrimination through overt

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11. Victor Rosenblum of Northwestern University Law School calls it "rational basis with teeth," and comments: "We've gotten used to the idea that if the test is rational basis, the legislation gets an automatic pass. Now rational basis is beginning to mean something." *Quoted in* Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112-14 (1985).

A recent article in the *Mental and Physical Disability Law Reporter* suggests that "the language of the majority, concurring, and dissenting opinions leaves room for cautious optimism that one can argue reasonably that the Court has heightened equal protection for every class of persons . . ." and also suggests that the Court "went considerably further than past cases in its application of the rational relationship test to social and economic legislation." *Summary, Analysis, and Commentary*, 9 MENTAL & PHYSICAL DISAB. L. RPTR. 242 (1985).

12. Stewart, *supra* note 11, at 112.

13. *See, e.g., Cleburne*, 105 S. Ct. at 3265 (Marshall, J., concurring in part, dissenting in part).

14. Plyler v. Doe, 457 U.S. 202, 216 (1982); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

15. Strauder v. West Virginia, 100 U.S. 303 (1880); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

or covert[16] classifications which clearly disadvantaged them.[17] Because the Court believed the scope of protection was so narrow, it interpreted the equal protection clause as scarcely limiting state power. State governments were essentially free to benefit or burden groups within their borders in any way they saw fit.[18] At this time, the equal protection clause hardly protected anyone: racial and ethnic minorities could rarely get relief from discrimination with an equal protection challenge, and other groups could never get relief at all.[19]

The Court's current equal protection analysis affords much more protection. This analysis, which includes strict scrutiny, was conceived in the 1940's and later took shape under the direction of the Warren Court. The primary source of strict scrutiny review was Justice Stone's famous footnote four[20] in the *Carolene Products*[21] case. Justice Stone suggested that the Court use a "more searching judicial inquiry" to protect groups that do not have the ordinary protection of democratic rule because they are unable to participate effectively in the political process.[22] For the Warren Court, Justice Stone's thinking in footnote four justified special protection for those groups who consistently lost in the democratic process.[23]

To protect these groups, the Warren Court developed the "suspect classification" doctrine. In *Korematsu v. United States,*[24] the Court first held that "all legal restrictions which curtail the civil rights of a single racial group are immediately *suspect*"[25] and that "courts must subject them to the most rigid scrutiny." [26] The suspect classification doctrine therefore presumes a law unconstitutional if it uses certain classifying traits.[27] In order to survive strict scrutiny, the suspect classification must be "necessary to the accomplishment"[28] of a "compelling state interest."[29] The Supreme Court

16. *Yick Wo,* 118 U.S. 356.

17. The use of overt racial classifications was permissible, absent a showing of unequal treatment. *See* Plessy v. Ferguson, 163 U.S. 537, 540 (1896) (upholding "separate but equal" railroad car accommodations for blacks and whites).

18. Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality,* 8 HASTINGS CONST. L.Q. 777, 780 (1981).

19. Even though the Court noted that the fourteenth amendment contained no language limiting its scope of protection to discrimination, the Court saw racial discrimination as the primary evil the fourteenth amendment was created to eliminate. Slaughterhouse Cases, 83 U.S. 36, 71-72 (1873). *See* Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 59-63 (1955).

20. Powell, Carolene Products *Revisited,* 82 COLUM. L. REV. 1087, 1088 (1982).

21. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

22. *Id.* at 152 n. 4.

23. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 713 (1985).

24. 323 U.S. 214 (1944).

25. *Id.* at 216 (emphasis added).

26. *Id.*

27. Tussman & tenBroek, *supra* note 14, at 356.

28. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

29. *Plyler,* 457 U.S. at 217.

to date recognizes two suspect classifications that trigger strict scrutiny: race or national origin[30] and alienage.[31]

The Court soon added the "fundamental rights" doctrine which expanded the clause to protect other groups, including those who were not necessarily consistent losers in the political process. *Skinner v. Oklahoma*[32] marked the beginning of this doctrine, which commands that classifications infringing upon fundamental interests also be subject to strict scrutiny.[33] In *Skinner*, the Warren Court struck down a statute requiring sterilization of habitual criminals because it found that "marriage and procreation are *fundamental* to the very existence and survival of the race."[34] In order to survive strict scrutiny, a classification that burdens the exercise of a fundamental right must be "necessary to promote a *compelling* governmental interest."[35] The list of fundamental rights today includes the rights of interstate travel,[36] equal access to voting and the ballot,[37] and equal access to the judiciary.[38]

Under the suspect classification and fundamental interest doctrines, the Warren Court still permitted the state whose legislation was under attack to show that the classification was necessary to achieve a compelling state interest. But, as Professor Gunther noted, "scrutiny that was 'strict' in theory was fatal in fact."[39] Even today, when the Court finds that a statute

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30. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984); Loving v. Virginia, 388 U.S. 1 (1967); *McLaughlin*, 379 U.S. 184; Cooper v. Aaron, 358 U.S. 1 (1958); Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ., 347 U.S. 483 (1954); Hernandez v. Texas, 347 U.S. 475 (1954); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944). Strict scrutiny, however, may not apply to compensatory racial classifications. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); University of California Regents v. Bakke, 438 U.S. 265 (1978).

31. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). Strict scrutiny is applied to state, but not federal, laws containing alienage classifications. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976). Moreover, even in cases involving state laws only, an alienage classification can receive rational basis review instead of strict scrutiny if the purpose of the regulation goes to the heart of self-government and does not foster economic parochialism. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

32. 316 U.S. 535 (1942).

33. Blattner, *supra* note 18, at 782.

34. *Skinner*, 316 U.S. at 541 (emphasis added).

35. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original).

36. *See, e.g., id.*

37. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780 (1983) (unconstitutional to require independents to file earlier than regular political parties); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (invalidating statute that one must own or lease property in district or have children in school to vote in district election); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (state poll tax violated the equal protection clause).

38. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963) (requiring that indigent defendents be provided counsel for appeals as of right); Griffin v. Illinois, 351 U.S. 12 (1956) (held state must provide free trial transcript to indigents).

39. Gunther, *The Supreme Court, 1971 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights: A Model for a Newer Equal Protection*, 15 HARV. C.R.-C.L. L. REV. 1, 8 (1972).

implicates a suspect class or burdens a fundamental right, the Court will almost always find the legislation unconstitutional.[40]

Outside the areas of suspect classifications or fundamental rights, the Supreme Court continued to apply a minimal scrutiny standard[41] —or the traditional rational basis test. The rational basis test generally presumes that legislation is constitutional, and the Court will uphold the law if the classification drawn by the statute is rationally related to a legitimate state interest.[42] Under this standard of review, the Court defers to legislative judgment if at all possible,[43] requiring only that some plausible set of facts exists that allows the Court to justify the challenged statute.[44] The Court condones "under-inclusiveness,"[45] stating that a legislature may achieve its goals "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[46] The Court also condones "over-inclusiveness,"[47] stating that "rational distinctions may be made with substantially less than mathematical exactitude."[48] When the state fails to present a sufficient factual basis to justify a statute, the Court supplies its own justification, even when the statute is both under- and over-inclusive.[49] Often the Court recharacterizes the purpose of the statute[50] so that it may render the classification "rational" in deference to the fact-finding ability of state legislatures. Although the Warren Court required the state to supply a factual basis rationally relating the statute to a legitimate state goal, scrutiny that was minimal in theory was virtually nonexistent.[51] Until recently, when

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40. *See Fullilove*, 448 U.S. 448; *Korematsu*, 323 U.S. 214.

41. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (age not a suspect classification, therefore rational basis test applied); Blattner, *supra* note 18, at 783.

42. *See* Schweiker v. Wilson, 450 U.S. 221, 230 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

43. During the Warren Era, the Court found only one statute unconstitutional under the rational basis test. Morey v. Doud, 354 U.S. 457 (1957), *overruled*, New Orleans v. Dukes, 427 U.S. 297 (1976).

44. Blattner, *supra* note 18, at 783; *see supra* notes 38-42.

45. An under-inclusive classification is one in which "[a]ll who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include; [that is,] the classification does not include all who are similarly situated." Tussman & tenBroek, *supra* note 14, at 348.

46. An over-inclusive classification is one which "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims." Tussman & tenBroek, *supra* note 14, at 351.

47. *Dukes*, 427 U.S. at 303.

48. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

49. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (legislative classification both over-and-under-inclusive, yet the Supreme Court does not invalidate economic legislation simply because "inartfully" drawn). *See also Dukes*, 427 U.S. at 303 (the Supreme Court upholds under-and-over-inclusive legislative classification).

50. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949) (Court upholds statute by condoning under-inclusive means and re-characterizing purpose from eliminating advertising to limiting advertising).

51. Gunther, *supra* note 39, at 8.

the Court applied the rational basis test, it almost always upheld the statute.[52] Because the level of scrutiny employed determined the outcome of the challenge, equal protection analysis for the Warren Court consisted primarily of choosing between strict scrutiny or rational basis review.[53]

With the development of intermediate scrutiny, the Burger Court further expanded the reach of the equal protection clause. Increasing dissatisfaction with the two-tiered equal protection system of strict scrutiny and the rational basis test[54] prompted the Court to add this third standard of review. Commentators cite three major factors as impetus for this change. First, many scholars severely criticized the fundamental rights doctrine. Second, rising public awareness of discrimination against groups other than racial groups had increased demands for judicial protection. Third, the advent of legal aid for the disadvantaged influenced the development of creative judicial intervention on behalf of indigents.[55] The Court developed intermediate scrutiny to protect other groups that, like racial minorities, lack power in the political process. For example, the Court primarily uses this scrutiny to review statutes involving the quasi-suspect classifications of gender[56] and illegitimacy.[57] Groups within these classifications, like racial minorities, are also disadvantaged by legislation classifying them on the basis of an "immutable characteristic." Unlike the legislative classification of racial minorities, however, the legislative classification of these quasi-suspect classes is occasionally relevant to a legitimate state goal.[58]

Under this standard of review, classifications must be "substantially related" to the achievement of "important governmental objectives."[59] This medium level scrutiny permits the Court to look more closely at the ends and means of the challenged statute, instead of merely pronouncing it valid or invalid under traditional analysis.[60] The Court does not accept every goal

52. *But see* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (statute classification found totally arbitrary and invalidated under rational basis test).

53. Blattner, *supra* note 18, at 784.

54. Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring).

55. Blattner, *supra* note 18, at 784-85.

56. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Ct., 450 U.S. 464 (1981); *Craig*, 429 U.S. 190.

57. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977).

58. The indicia for a suspect class are (1) an immutable characteristic (2) which is irrelevant to a legitimate legislative generalization (3) used to disadvantage a politically powerless group. Frontiero v. Richardson, 411 U.S. 677 (1973). The Court protects women and illegitimate children with a lower level of scrutiny than strict scrutiny for the following reasons: (1) women, though under-represented in political office, are not as politically powerless as racial minorities because they comprise fifty percent of the voting population; (2) illegitimate children do not remain politically-powerless because they grow into voting adults; (3) a gender classification is sometimes relevant because women are unable to perform some tasks that men perform, such as combat; and (4) an illegitimacy classification is sometimes relevant because it serves as a proxy in situations requiring proof of paternity.

59. *Craig*, 429 U.S. at 197.

60. *Plyler*, 457 U.S. at 218 n.16.

proffered by the state,[61] and if an alternative means exists which does not disadvantage the protected group, the Court can prompt the legislature to employ the alternative means by invalidating the legislation.[62]

In 1982, the Supreme Court, in its opinion in *Plyler v. Doe,* extended intermediate scrutiny protection beyond these quasi-suspect classes.[63] In this case, the Court struck down a law that denied illegal-alien children access to free education. Three important considerations justified the decision. First, because the children were politically powerless and unable to alter the classifying characteristic of "illegal-alien," they deserved some protection as at least approaching a quasi-suspect class.[64] Second, because the right to education, though not fundamental,[65] is extremely important, it deserved some protection as a quasi-fundamental right.[66] Third, the statute completely denied children access to free education.[67] Invoking intermediate scrutiny enabled the Court to consider these three factors and tailor justice to the situation.[68] The Court, however, did not decide whether this expansion should be limited to the unique circumstances of *Plyler* or whether other quasi-fundamental rights or groups approaching quasi-suspect status existed elsewhere, deserving the added protection of heightened scrutiny.[69]

The Burger Court added yet another twist to equal protection analysis in *Zobel v. Williams,*[70] a case which appeared to employ a rational basis test with bite. In *Zobel,* the Supreme Court held unconstitutional an Alaskan law that pro-rated benefits from state oil revenues among residents according to the length of time they had lived in the state.[71] Since 1969, the Court had closely scrutinized statutes that awarded benefits on the basis of durational residency requirements to determine whether they burdened the fundamental right-to-travel.[72] The majority opinion in *Zobel,* however, by-

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61. *See, e.g.,* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (administrative convenience is not an important governmental objective); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (same).

62. *See, e.g., Michael M.,* 450 U.S. 464.

63. 457 U.S. 202 (1982). "Quasi-suspect" is the term used to refer to classifications that, in themselves and without more, trigger intermediate scrutiny.

64. *Id.* at 219-20.

65. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), *reh'g denied,* 411 U.S. 959 (1973).

66. *Plyler,* 457 U.S. at 221-23.

67. *Id.* at 226.

68. As Chief Justice Burger stated in his dissent, "by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the court spins out a theory custom-tailored to the facts of these cases." *Id.* at 244 (Burger, C.J., dissenting).

69. *See* Note, *Constitutional Law—The Equal Protection Clause—The Effect of* Plyler v. Doe *on Intermediate Scrutiny,* 36 OKLA. L. REV. 321 (1983).

70. 457 U.S. 55 (1982).

71. *Id.* at 56.

72. Sosna v. Iowa, 419 U.S. 393 (1975); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dumi v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

passed the right-to-travel issue,[73] focusing instead on the unequal distribution of benefits between citizens.[74] The Court found the *Zobel* statute violated the equal protection clause because it created "fixed, permanent distinctions between . . . classes of concededly bona fide residents."[75]

The Court did not state whether right-to-travel cases still required heightened scrutiny. Instead, it claimed that it did not need to determine a standard of review for this statute because the statute could not "pass even the minimal test."[76] The ensuing review, however, appeared to be more exacting than the traditional rational basis test. First, the Court found the scheme not rationally related to Alaska's purposes of (1) creating a financial incentive to establish and maintain residence in Alaska and (2) encouraging prudent management of the fund.[77] One can argue, however, that the statute was rationally related to these purposes because a scheme which distributes benefits to residents quite plausibly might retain residents and promote migration to the state.[78] Moreover, the distinction between long-term and short-term residents might have been a political compromise to avoid immediate payment of all revenues to current residents. If so, the distinction enabled prudent management of the fund.

Second, the Court found Alaska's purpose of rewarding citizens for past contributions to be illegitimate.[79] But one can argue, as Justice O'Connor does in her concurrence, that compensating citizens for prior contributions is a legitimate purpose because it is "neither inherently invidious nor irrational."[80] Justice O'Connor contended that awarding benefits on the basis of durational residency requirements fails only if the Court views it in a right-to-travel context which requires strict scrutiny. Otherwise, under traditional rational basis review, this purpose must surely pass muster.[81]

Under the traditional rational basis test, the Court would not invalidate an economic statutory scheme, like the one in *Zobel,* unless it was completely

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73. Chief Justice Burger distinguishes *Zobel* from other cases involving "durational residency requirements," saying those cases involved a waiting period for the purpose of determining actual residency before distributing benefits, while the *Zobel* statute did not involve a waiting period. *Zobel,* 457 U.S. at 58. Yet Justice O'Connor argues quite reasonably in her concurrence that the Court's holding depends on the right-to-travel issue. *Id.* at 71-81 (O'Connor, J., concurring).

74. *Zobel,* 457 U.S. at 59-60. Under the challenged statute, the legislature paid every citizen over the age of eighteen fifty dollars ($50.00) for each year he had lived in Alaska since it became a state in 1959. For example, a citizen since 1959 received $1050 while one who had lived there only a year received $50. As a result, newer residents and younger residents received fewer benefits. *Id.* at 57.

75. *Id.* at 59.

76. *Id.* at 60-61.

77. *Id.* at 61-63.

78. *Id.* at 83 (Rehnquist, J., dissenting).

79. *Id.* at 63-64.

80. *Id.* at 72 (O'Connor, J., concurring).

81. *Id.* at 72-81 (O'Connor, J., concurring). Justice O'Connor relied on the privileges and immunities clause, not the equal protection clause, to decide this case.

arbitrary, and the Court would more than likely supply its own purpose to justify the statute.[82] Because the Court did not defer to the Alaskan legislature in this way,[83] it appears to have applied a more exacting review than traditional rational basis; that is, rational basis with bite. Until the 1985 term, however, *Zobel* was a deviant case: perhaps indicating the Court's intention to ground its decisions for cases involving durational residency requirements in the equal protection clause without regard to the right-to-travel,[84] and perhaps advocating the use of rational basis with bite in the right-to-travel context. And, until the 1985 term, even with the exception of its decision in *Zobel,* the Supreme Court appeared to have settled on three levels of scrutiny in equal protection analysis.

II. A Growing Jurisprudence of Rational Basis With Bite?

A. Zobel v. Williams *Reaffirmed: Rational Basis with Bite in the Right-To-Travel Context*

Twice during the 1985 term, the Supreme Court avoided using the strict scrutiny traditionally required in the right-to-travel context and instead employed rational basis with bite. The Court reviewed two cases that, like *Zobel,* involved statutory schemes that used durational residency requirements to create distinctions between bona fide residents, and therefore possibly penalized interstate migration. In the first case, *Williams v. Vermont,* the Court relied upon *Zobel* to reinstate an equal protection challenge to a residency-based statute. The Court held that, facially, this statute could not survive rational basis review. In the second case, *Hooper v. Bernalillo County Assessor,* the Court explicitly reaffirmed *Zobel* and struck down the challenged statute with review that was hardly deferential to the legislature. In both cases, the Court purported to ignore the right-to-travel issue. These decisions, coupled with *Zobel* itself, suggest a growing jurisprudence of rational basis with bite in the right-to-travel context.

1. *Williams v. Vermont*

In the *Williams* decision, handed down twenty days before the *Hooper* decision, the Court did not explicitly reaffirm *Zobel.* The Court did, however, rely on *Zobel* to find the statute facially unconstitutional, and the parallels between the two cases are obvious. In *Williams,* the Court reinstated an

82. *See supra* notes 43-51 and accompanying text; *Zobel,* 457 U.S. at 82-83 (Rehnquist, J., dissenting).

83. *Zobel,* 457 U.S. at 84.

84. Note, *Constitutional Law—Right to Travel—Equal Protection—Durational Residency Requirements,* 29 N.Y.L. Sch. L. Rev. 829, 849 (1985).

equal protection challenge to a Vermont tax scheme. This statute gave Vermont residents a credit against an automobile use tax for taxes paid to other states when an automobile was purchased out-of-state. This credit, however, was only available if the puchaser was a Vermont resident at the time the tax was paid to the other state.[85] The appellants had purchased and registered cars outside of Vermont before becoming Vermont residents, and they challenged the requirement that they pay the full use tax in order to register their cars in Vermont.[86] The appellants argued that a tax incurred due to change in residency infringed on the right-to-travel by penalizing interstate migration.[87] Again, as in *Zobel,* the Court bypassed the right-to-travel issue,[88] focusing instead on the state's unequal treatment of residents.[89]

The Court purported to apply the deferential scrutiny of rational basis review in *Williams* because the statute involved a state taxation scheme—an area in which the Court had "been reluctant to interfere with legislative policy decisions . . "[90] The Court stated that it would uphold the exemption if the legislature could have "reasonably concluded" that the distinction between residents would "promote a legitimate state purpose."[91] Even though the Court articulated the traditional rational basis test,[92] its analysis greatly resembled heightened scrutiny because it required the legislature to draw a "more precise and direct classification"[93] in order for the statute to survive review.[94]

The Court first found that distinguishing between present Vermont registrants on the basis of residence at the time of purchase was "wholly arbitrary" and bore no relation to the relevant statutory purposes.[95] The Court reasoned that, because all registrants were similarly situated for the relevant purposes of the statute—such as residency, using a car in Vermont, and duty to finance Vermont road maintenance—taxing each registrant would identically serve the statutory purposes.[96] The Court cited *Zobel* in support of this notion.[97]

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85. Williams v. Vermont, 105 S. Ct. 2465, 2468 (1985).
86. *Id.*
87. *Id.* at 2469.
88. Unlike *Zobel,* however, the Court merely argued that, due to its narrow holding in this case, it need not consider the appellants' arguments based on the fundamental right-to-travel. *Id.* at 2474.
89. *Id.* at 2472-74.
90. *Id.* at 2472 (citations omitted).
91. *Id.*
92. *See supra* notes 41-53 and accompanying text.
93. *Williams,* 105 S. Ct. at 2472 n.8.
94. The requirement in footnote 8 of a "more precise and direct classification" where one is "more easily drawn" resembles the use of heightened scrutiny in Michael M. v. Superior Court, 450 U.S. 464, (1981). *See supra* note 62 and accompanying text.
95. *Williams,* 105 S. Ct. at 2472.
96. *Id.*
97 *Id.*

Second, even though the Court conceded that Vermont's policy was legitimate and justified imposing a tax on those in the appellants' position,[98] the Court found "no rational reason to spare Vermont residents an equal burden."[99] The Court explained that the scheme was not rationally related to the purpose of raising revenues for road maintenance because the classification exempted other Vermont residents who use the roads and who, therefore, should contribute to their maintenance.[100] Because the statutory classification was under-inclusive in this manner, the Court found that the appellants had a legitimate claim of discrimination and held the statute unconstitutional on its face.[101]

Under the traditional rational basis test, in contrast, the Court would permit the Vermont legislature to "take one step at a time"[102] in order to raise revenue for road maintenance; that is, the classification need not contain all people who could be taxed, so long as it taxed people who used the roads and this tax raised revenue for road maintenance.[103] Under the traditional analysis, the Court might also have supplanted the legislature's "maintenance" justification with one that could pass scrutiny. The dissent in *Williams,* in fact, offers two such justifications for exempting those who are residents at the time they purchase their cars. First, the exemption facilitates interstate commerce by ensuring that residents and non-residents are not penalized for purchasing cars outside their state. Second, the exemption prevents someone who uses the roads primarily in one state from paying taxes in two states.[104] Therefore, as the dissent argued, residency is not an irrational classification to employ in achieving these purposes[105] —even if the classification is not precise,[106] and "the tax exemption would easily pass the minimal scrutiny . . . routinely applie[d] to tax statutes."[107]

In holding the statute unconstitutional, the Court must have employed a higher scrutiny than rational basis.[108] But the scrutiny employed was not strict scrutiny either. As Justice Blackmun noted in his dissent: "[t]he Court seems to have adopted a new level of scrutiny that is neither minimal nor

98. *Id.* at 2473.
99. *Id.*
100. *Id.*
101. *Id.* at 2475. Instead of invalidating the statute, however, the Court remanded the case because it believed that, with other facts, the statute might not operate in a discriminatory manner. *Id.* at 2474-75.
102. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).
103. *See supra* notes 41-51 and accompanying text. "A tax classifieation does not violate the demands of equal protection simply because it may not perfectly identify the class of people it wishes to single out." *Williams,* 105 S. Ct. at 2478 (Blackmun, J., dissenting).
104. *Williams,* 105 S. Ct. at 2475 (Blackmun, J., dissenting).
105. *Id.* at 2478.
106. *Id.*
107. *Id.* at 2476.
108. Justice Blackmun calls it a "microscopic scrutiny that few enactments could survive." *Id.*

strict, but strange unto itself;"[109] a remark suggesting that the Court had once again employed rational basis with bite. By employing a more probing form of scrutiny than traditional rational basis on a statute involving a durational residency requirement and by citing *Zobel* as precedent, the *Williams* case strengthens the idea that the Court intends to employ a rational-basis-with-bite test in the right-to-travel context.

2. *Hooper v. Bernalillo County Assessor*

In *Hooper v. Bernalillo County Assessor,*[110] the Court not only cited *Zobel* several times throughout its opinion,[111] it explicitly reaffirmed *Zobel.*[112] In *Hooper,* the Court invalidated a New Mexico statute that provided a limited property tax exemption to Vietnam veterans who were New Mexico residents prior to May 8, 1976.[113] The appellants, husband and wife, met every eligibility requirement except the cut-off date, becanse they did not establish residence in New Mexico until 1981.[114] The appellants argued that the statute violated their right to migrate to New Mexico.[115] Again, as in *Zobel,* the Court bypassed the right-to-travel issue,[116] focusing instead on New Mexico's unequal treatment of resident Vietnam veterans.[117] The Court found the New Mexico statute offensive for the same reason it found the *Zobel* statute offensive: it created "fixed, permanent distinctions between . . . classes of concededly bona fide residents"[118] based upon how long they lived in the state.[119]

The Court also cited *Zobel* as support for applying the rational basis test in the right-to-travel context of *Hooper.*[120] As in *Zobel,* the Court refused to consider using heightened scrutiny "if the statutory scheme cannot pass even the minimum rationality test."[121] The ensuing review of the statute, however, like the review in *Zobel,* appeared to be more exacting than traditional rational basis review.

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109. *Id.*
110. 105 S. Ct. 2862 (1985).
111. *Zobel v. Williams* is mentioned eight times in the *Hooper* opinion. *Hooper,* 105 S. Ct. at 2866, 2868, 2869.
112. *Id.* at 2869.
113. *Id.* at 2865.
114. *Id.* at 2864.
115. *Id.* at 2865.
116. As in *Zobel,* the Court reasoned that the New Mexico statute differed from other statutes involving durational residency requirements, which it reviewed under the fundamental rights doctrine, because it did not "impose any threshold waiting period" or "purport to establish a test of bona fides of state residence." *Id.*
117. *Id.* at 2866.
118. *Zobel,* 457 U.S. at 59, *quoted in Hooper,* 105 S. Ct. at 2866.
119. *Hooper,* 105 S. Ct. at 2866.
120. *Id.* at 2866.
121. *Id.*

The Court first found that the distinctions in this tax exemption scheme were not rationally related to New Mexico's purpose of encouraging veterans to settle in the state.[122] The Court reasoned that the retroactive nature of the legislation would actually discourage the migration of veterans who would not meet the cut-off date.[123] This time, the Court not only cited *Zobel* in support of this notion, but even quoted the actual text of the *Zobel* opinion, saying "[t]he separation of residents into classes hardly seems a likely way to persuade new [residents] that the state welcomes them and wants them to stay."[124]

The Court next held illegitimate New Mexico's purpose of rewarding veterans, who resided in the state before the cut-off date, for their military service.[125] The Court conceded that distinguishing between veterans and other residents in order to express gratitude for military service was a legitimate purpose.[126] But the Court did not believe this purpose was New Mexico's actual purpose. Instead, the Court reasoned that the statute singled out only previous residents for its benefits by distinguishing between "established" veterans and veterans who became residents after the cut-off date. Its true purpose, therefore, was to reward "citizens for their 'past contributions' toward our nation's military effort in Vietnam."[127] The Court then cited *Zobel,* saying "*Zobel* teaches that such an objective is 'not a legitimate state purpose.' "[128]

Under the traditional rational basis test, the Court would not re-characterize the state's purpose, as it re-characterized New Mexico's purpose in *Hooper,* in order to hold the statute *unconstitutional.*[129] Instead, like the dissent in *Hooper,*[130] it would accept the first legitimate purpose offered or, if no legitimate purpose were offered, it would supplant the state's purpose with a legitimate one. Then the Court would uphold the statute if it could have arguably furthered this purpose in any way.[131] For example, the dissent in *Hooper* applied the traditional test. It accepted as legitimate the purpose of rewarding veterans for past contributions.[132] It argued that the state was justified in limiting the benefits to some, but not all, resident veterans because "the [s]tate's resources [we]re not infinite."[133] Finally, it contended that,

122. *Id.* at 2866-67.
123. *Id.* at 2867.
124. *Id.* (quoting *Zobel,* 457 U.S. at 62 n.9).
125. *Id.* at 2869.
126. *Id.* at 2867.
127. *Id.* at 2869.
128. *Id.*
129. Under traditional rational basis review, the Court only re-characterizes purposes to uphold a statute. *See supra* notes 49-51 and accompanying text.
130. *See Hooper,* 105 S. Ct. at 2869-72 (Stevens, J., dissenting).
131. *See supra* notes 41-53 and accompanying text.
132. *Hooper,* 105 S. Ct. at 2870 (Stevens, J., dissenting).
133. *Id.* at 2871.

even though the cut-off date was not a perfect proxy for identifying Vietnam veterans seeking to become New Mexico residents, the rational basis test did not require "mathematical exactitude."[134] The dissent's analysis clearly illustrates that the New Mexico statute would have been upheld under traditional rational basis review.

In light of the *Williams* and *Hooper* decisions of the 1985 term, *Zobel* is no longer a deviant case. In both opinions, as in *Zobel,* the Court avoided the right-to-travel issue. In both opinions, as in *Zobel,* the Supreme Court avoided using heightened scrutiny to review statutes involving durational residence requirements, but employed a more probing scrutiny than traditional rational basis. In both opinions, the Court cited *Zobel* as precedent. In the *Hooper* opinion, the Court went so far as to explicitly reaffirm *Zobel.* Thus, the Court's recent opinions seem to confirm the suggestion in *Zobel* that the Court intends to apply rational basis with bite in the right-to-travel context.

The Court's decision to use a more exacting scrutiny than traditional rational basis in the right-to-travel context has merit. Cases like *Williams* and *Hooper,* in which the state rewards its residents on the basis of how long they have lived within its boundaries, contain the two elements that often trigger heightened scrutiny: a politically-disadvantaged group and an important right. First, new residents are arguably disadvantaged by the political process. It is true that residents as a class are not under-represented in political office, nor do they have a history of discrimination against them. It is also true that all residents over eighteen years of age can vote and are therefore able to influence the political system for protection. But newly-arrived residents might not have had any political power at all at the time the discriminatory legislation was enacted because they might not yet have moved to the state. Therefore, newly-arrived residents might need the special protection of heightened scrutiny in some cases. Second, the right to interstate migration is extremely important—too important to justify complete deferral to state legislatures. The framers implied by creating a national government that they created a national country, and such a country would not be possible if people are unable to move freely from state to state. Therefore, the Court is justified in looking more closely at legislation that arguably might penalize interstate migration. Because the legislation in the right-to-travel context affects both a group at least approaching quasi-suspect status and an important right, the Court is justified in employing something more probing than traditional rational basis review.

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134. *Id.*

B. City of Cleburne v. Cleburne Living Center: *Rational Basis with Bite in a "Plyler" Context*

The Supreme Court further surprised scholars when it invalidated a piece of legislation under the rational basis test in *City of Cleburne v. Cleburne Living Center.*[135] In *Zobel,* the Court had in no way indicated that rational basis with bite was appropriate for any cases other than those involving durational residency requirements. In fact, based on precedent, the Court should have chosen the intermediate scrutiny of *Plyler v. Doe* because *Cleburne* had the necessary ingredients of a quasi-fundamental right and a classification approaching quasi-suspect status: the challenged statute classified on the basis of the immutable characteristic of mental retardation, burdened a politically-powerless group, and burdened the right of the mentally retarded to live in a group home.[136] The Court, however, chose to bypass this opportunity to recognize another quasi-suspect classification or quasi-fundamental right deserving the protection of intermediate scrutiny. Instead the Court protected this group and its rights through rational basis with bite.

In *Cleburne,* the Court invalidated a Texas city's decision to deny a special use permit for the operation of a group home for the mentally retarded, under an ordinance requiring permits for such homes.[137] The Court of Appeals had invalidated the decision under heightened scrutiny, determining mental retardation to be a quasi-suspect classification.[138] While the Supreme Court affirmed the outcome, it concluded that the Court of Appeals had erred in finding a quasi-suspect classification.[139] The Supreme Court recognized that states have a legitimate interest in regulating the retarded because they have a "reduced ability to cope with and function in the everyday world."[140] The Court added that the legislature is better equipped than the judiciary for this task.[141] The Court also thought heightened scrutiny might chill legislative action designed to protect or favor the retarded.[142] The Court next argued that the mentally retarded were not actually politically powerless because they had the "ability to attract the attention of the lawmakers."[143] Finally, the Court reasoned that recognizing the retarded as quasi-suspect

135. 105 S. Ct. 3249 (1985); *See also* Stewart, *supra* note 9, at 110-15; *Summary, Analysis, and Commentary, supra* note 9, at 242-43.
136. *Cleburne,* 105 S. Ct. at 3252-53. *See also supra* notes 63-68 and accompanying text.
137. *Cleburne,* 105 S. Ct. at 3252.
138. Cleburne Living Center v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984).
139. *Cleburne,* 105 S. Ct. at 3255-56.
140. *Id.*
141. *Id.* at 3256.
142. *Id.* at 3257.
143. *Id.*

would require recognizing all groups as quasi-suspect if they have immutable disabilities, cannot mandate legislative outcomes, and can claim some degree of prejudice from the public.[144] Thus, the Court was reluctant to invoke heightened scrutiny by finding another suspect classification.

The Court instead purported to apply the rational basis test to the challenged ordinance. It articulated the rational basis test, but then, as if to signal what was to come, it cited *Zobel* as the basis for this test.[145] Once again, the ensuing review was more exacting than the traditional rational basis test.

First, the Court carefully examined the city's purported justifications for its decision: (1) the negative attitude of the neighbors; (2) the facility's location on a five hundred year flood plain and its nearness to a junior high school whose students might harass retarded persons; and (3) the city's concern over the size of the home and the number of proposed occupants.[146] The Court found concern over the negative attitudes of neighbors to be an illegitimate purpose for denying the permit.[147] The Court next found that denying the permit for the group home was not rationally-related to the justifications concerning location because retarded students attended the school and the city permitted other homes, such as convalescent homes, on the flood plain.[148] Finally, the Court found that the city never justified its view that the home would be over-crowded.[149] In the end, the Court not only refused to accept the city's purposes, it further claimed that the city's decision unfairly singled out the retarded to bear the burden of these concerns and therefore must have been motivated by "irrational prejudice against the mentally retarded."[150] For these reasons, the ordinance violated the equal protection clause.[151]

The *Cleburne* dissent is correct when it argues that the "ordinance surely would be valid under the traditional rational basis test."[152] Under the traditional test, the Court would let the city single out the group home before convalescent homes in meeting its concern about the flood plain, because the legislature may take "one step at a time."[153] Furthermore, the Court would not put the burden on the city to convince the Court that the home would be overcrowded because, under the traditional test, the legislation is

144. *Id.* at 3257-58.
145. *Id.* at 3258.
146. *Id.* at 3258-60.
147. *Id.* at 3259.
148. *Id.*
149. *Id.* at 3260.
150. *Id.*
151. *Id.*
152. *Id.* at 3263 (Marshall, J., concurring in part, dissenting in part).
153. *Id.* at 3264 (Marshall, J., concurring in part, dissenting in part). *See supra* notes 41-53 and accompanying text.

presumptively constitutional.[154] Finally, the Court would not subject the legislature's justifications to such detailed review.[155] Since the Court did not analyze the ordinance in the same manner that the dissent did, it must have employed a more exacting form of scrutiny than the rational basis test.

Justice Marshall suggests in his concurrence that the Court actually employed intermediate level scrutiny.[156] This claim is surprising since the majority opinion evidences a conscious desire to avoid heightened scrutiny and instead apply rational basis. For example, because the city's decision failed under the rational basis test, the Court arguably did not have to rule on whether mental retardation was a quasi-suspect classification.[157] Yet the Court went to great extremes to prove that mental retardation was not even quasi-suspect in order to avoid intermediate level scrutiny.[158] First, the Court rejected application of the *Plyler* rationale for this case, even though *Cleburne* is quite similar to *Plyler*,[159] even though the Court cited *Plyler* for its understanding of the fourteenth amendment,[160] and even though, as the dissent pointed out, mental retardation is a good candidate for quasi-suspect classification.[161] Second, the Court advanced an argument against heightened scrutiny in any context in which social or economic legislation is challenged by other groups like the retarded; such as, the mentally ill, disabled, elderly or infirm.[162] Third, the Court argued that the appropriate method of resolving cases of discrimination like that in *Cleburne* is not to create a new quasi-suspect classification.[163]

Even though the Court claimed that it could not apply intermediate level scrutiny, the Court strongly implied that something more than the rational basis test was needed to combat discrimination like that in *Cleburne*. First, the Court argued that it should look at whether governmental action premised on a particular classification is valid as a general matter;[164] meaning that the Court would take a closer look at the proffered justifications. Second,

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154. *Cleburne*, 105 S. Ct. at 3265 (Marshall, J., concurring in part, dissenting in part). *See also supra* note 42 and accompanying text.

155. Detailed review of justifications is more appropriate for intermediate level scrutiny. *Cleburne*, 105 S. Ct. at 3264 (Marshall, J., concurring in part, dissenting in part). *See also supra* notes 59-62 and accompanying text.

156. *Cleburne*, 105 S. Ct. at 3265 (Marshall, J., concurring in part, dissenting in part).

157. *Id.* at 3263-64.

158. *See supra* notes 141-44 and accompanying text.

159. *See supra* note 136 and accompanying text.

160. *Cleburne*, 105 S. Ct. at 3254.

161. The dissent argued that mental retardation is a good candidate for quasi-suspect classification because the retarded have a long history of purposeful unequal treatment and the increasing sensitivity of the legislature to their plight does not make them more politically powerful. *Id.* at 3268-69 (Marshall, J., concurring in part, dissenting in part).

162. *See id.* at 3257-58; *Summary, Analysis, and Commentary, supra* note 11, at 243; *supra* note 144 and accompanying text.

163. *Cleburne*, 105 S. Ct. at 3258.

164. *Id.*

the Court defined the rational basis test and expressed the need to defer to the legislature. Yet the Court went on to limit legislative power by stressing that the classification cannot be irrational and cited *Zobel*[165] —a case that involved more probing scrutiny than traditional rational basis review.[166] Finally, the Court held the ordinace invalid under less-than-deferential review. If the Court's opinion is viewed in light of what the Court actually did—not what it said it did—then Justice Marshall was correct in arguing that the Court had essentially employed intermediate scrutiny.

The Court's decision to use a more exacting scrutiny than traditional rational basis in the *Cleburne* case has merit for the same reasons as when the Court used intermediate level scrutiny in *Plyler.* In *Cleburne,* as in *Plyler,* the Court was faced with both a politically-disadvantaged group and an important right asserted by that group. As Justice Marshall argued in his concurrence, the mentally retarded have a long history of subjection to purposeful discrimination and the increasing sensitivity of the legislature to their plight does not make them more politically-powerful.[167] Therefore, the mentally-retarded might need the special protection of heightened scrutiny. Moreover, as Justice Marshall argued, the "right to 'establish a home' has long been cherished as one of the fundamental liberties . . . ."[168] Therefore, this right is too important to justify complete deferral to state legislatures. Because the *Cleburne* ordinance was within the *Plyler* context—that is, it affected both a group at least approaching quasi-suspect status and an important right—the Court is justified in employing something more probing than traditional rational basis.

C. Metropolitan Life Insurance Co. v. Ward: *Rational Basis with Bite in the Economic Context*

The Supreme Court's most questionable use of rational basis with bite, during the 1985 term, occurred in *Metropolitan Life Insurance Co. v. Ward*[169] in which the Court used the rational basis test to invalidate economic legislation. The Court concluded in a narrow 5-4 decision that an Alabama statute that taxed out-of-state (foreign) insurance companies on gross premiums more heavily than Alabama-based (domestic) insurers did not satisfy the rational basis test.[170] This case is unusual for two reasons. First, the Supreme Court normally deals with situations of this nature under the

165. *Id.*
166. *See supra* notes 70-84 and accompanying text.
167. *Cleburne,* 105 S. Ct. at 3268-69 (Marshall, J., concurring in part, dissenting in part). Even with increased legislative sensitivity, the mentally retarded are still disadvantaged in the political process because they do not vote or hold office.
168. *Id.* at 3266.
169. 105 S. Ct. 1676 (1985).
170. *Id.* at 1684.

commerce clause.[171] The commerce clause prevents states from burdening interstate commerce, unless Congress legislates that the states may freely regulate some aspect of interstate commerce.[172] The "dormant" commerce clause, therefore, generally protects businesses from state taxation schemes which discriminate against interstate commerce.[173] With the McCarren-Ferguson Act, Congress removed this protection from insurers by giving the states power to regulate and tax the insurance industry.[174] Because Congress had removed commerce clause protection from the insurance industry, the Court should have upheld the tax in *Metropolitan Life.*[175] Further, the Court rarely invalidates tax statutes of this nature under the equal protection clause. Until recently, the Court did not recognize foreign insurers as "persons" within the protection of the equal protection clause.[176] When the Court finally did invoke the equal protection clause for foreign insurers, it was completely deferential to the legislature.[177] Based on precedent, therefore, the Court should not have used the equal protection clause to invalidate the tax in *Metropolitan Life.* Yet the Court not only refused to uphold the tax with commerce clause theory, it invalidated the tax under the equal protection clause. This decision suggests the Court might intend to use rational basis with bite in the economic context.

In *Metropolitan Life,* the Court scarcely entertained the argument that Congressional legislation existed that gave the state the right to exclude foreign corporations from conducting business within its boundaries. Instead, it went directly to the equal protection clause argument, and it purported to apply the rational basis test to the Alabama tax scheme.[178] The Court argued that state authority to exclude foreign companies from doing business within its borders did not by itself justify imposing a greater tax burden on foreign companies, unless the discrimination between foreign and domestic companies had "a rational relation to a legitimate state purpose."[179] Once

171. The commerce clause provides that "Congress shall have power . . . to regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3.

172. Western & Southern Life Ins. v. Board of Equalization, 451 U.S. 648, 652-53 (1981).

173. Hellerstein & Leegstra, *Supreme Court in* Metropolitan Life *Strikes Down Discriminatory State Insurance Tax,* 63 J. TAX'N 108 (1985).

174. McCarren-Ferguson Act, 15 U.S.C. §§ 1011-15.

175. Hellerstein & Leegstra, *supra* note 173, at 108; *Metropolitan Life,* 105 S. Ct. at 1694 (O'Connor, J., dissenting).

176. Hellerstein & Leegstra, *supra* note 173, at 108; WHYY, Inc. v. Glassboro, 393 U.S. 117 (1968). Prior to *WHYY,* the Court avoided using the equal protection clause by holding that a corporation is not a person within a state's jurisdiction unless it complies with all conditions that the state places upon its entry in the state. *Western & Southern,* 451 U.S. at 660. In *WHYY,* the Court held that, even though the "State may impose conditions on the entry of foreign corporations to do business in the *State,* once it has permitted them to enter, 'the adopted corporations are entitled to equal potection' with the State's own corporate progeny . . . ." *WHYY,* 393 U.S. at 119-20 (emphasis in the original).

177. *See, e.g., Western & Southern,* 451 U.S. 648.

178. *Metropolitan Life,* 105 S. Ct. at 1680.

179. *Id.*

again, however, the ensuing review was much more exacting than traditional rational basis review.

The Court first rejected Alabama's purpose of encouraging the formation of Alabama-based insurance companies.[180] The Court reasoned that erecting barriers to foreign competition for the sole purpose of improving domestic insurers' ability to compete constituted "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent."[181] The Court also found that the purpose of encouraging capital investment in Alabama "in this plainly discriminatory manner serves no legitimate state purpose."[182] The Court thought that, because domestic insurers remained entitled to the favorable tax rate, and because foreign insurers could never make up the difference, the scheme would discourage foreign investment.[183] Because neither justification was legitimate, the Alabama statute failed under the rational basis test.

Justice O'Connor was correct, however, to argne in her dissent that "precedents demand" that the Court sustain the Alabama tax under the rational basis test.[184] First, as Justice O'Connor argued, the traditional rational basis test imposes "a heavy burden on those who challenge local economic regulation"[185] —not on the legislature—since the legislation is presumptively constitutional.[186] She accused the Court of "melding the proper two-step inquiry regarding the State's purpose into a single unarticulated judgment:"[187] she thought the Court found a perfectly legitimate goal to be improper simply because the Court disagreed with the discriminatory, yet rational, means of differential taxation.[188] Second, as is characteristic of traditional rational basis review, Justice O'Connor herself proffered several state interests justifying the legislation.[189] In particular, she insisted that encouraging the formation of Alabama-based insurance companies was legitimate because foreign insurance companies are likely to neglect rural and lower-income customers.[190]

The dissent correctly described the Court's analysis in *Metropolitan Life* as "miserly"[191] since the statute should have passed minimal scrutiny. Because the Court used rational basis with bite to review a statute involving differential taxation which is normally analyzed under the dormant commerce

180. *Id.* at 1684.
181. *Id.* at 1681-82.
182. *Id.* at 1684.
183. *Id.*
184. *Id.* at 1692 (O'Connor, J., dissenting).
185. *Id.* at 1685 (O'Connor, J., dissenting).
186. *See supra* note 42 and accompanying text.
187. *Metropolitan Life,* 105 S. Ct. at 1685 (O'Connor, J., dissenting).
188. *Id.*
189. *See supra* notes 49-52 and accompanying text.
190. *Metropolitan Life,* 105 S. Ct. at 1686-87 (O'Connor, J., dissenting).
191. *Id.* at 1686 (O'Connor, J., dissenting).

clause, the *Metropolitan Life* case may indicate the beginning of a jurisprudence of rational basis with bite in the economic context. Such a trend, however, seems unlikely.

On the one hand, the Supreme Court cannot justify reviewing statutes like the one in *Metropolitan Life* with scrutiny more exacting than traditional rational basis review. First, as the four dissenting justices in *Metropolitan Life* argued, the decision is a threat to the federal government because it usurps the power of Congress to invoke the commerce clause or let it lie dormant.[192] The dissent reasoned that the commerce clause should remain Congress' "flexible tool of economic policy," and that the judiciary should not interfere unless Congress is truly invidious and irrational in its use of this tool.[193] This criticism of the *Metropolitan Life* opinion is a good reason for the Court to refrain in the future from applying anything more searching than rational basis review in the economic context.

Second, *Metropolitan Life* does not contain the elements which justified rational basis with bite in the other cases. Unlike the right-to-travel cases and *Cleburne,* the statute in *Metropolitan Life* does not burden an important right.[194] Unlike the right-to-travel cases and *Cleburne,* the statute does not burden a class whose members are losers in the political process[195] within the meaning of the *Carolene Products* footnote.[196] Businesses have ample protection from government action. First, foreign businesses, or any business against which economic legislation might discriminate, can always look to the commerce clause for protection, unless Congress removes this protection in particular situations. Second, businesses do have political influence through businessmen's votes and especially through political lobby organizations. Because statutes like the one in *Metropolitan Life* affect neither a group at least approaching quasi-suspect status nor an important right, a higher scrutiny is difficult to justify. The wiser course for the Court to follow, therefore, is to continue use of only the traditional rational basis test for economic legislation.

The Supreme Court's recent actions indicate that it will most likely follow the wiser course. The Court decided *Metropolitan Life* by a narrow margin. Then, less than three months after the *Metropolitan Life* decision, the Court confronted a similar situation in another case, *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System,*[197] and unanimously refused to find an equal protection violation.[198] In *Northeast Bancorp,* two

192. *Id.* at 1693-94.
193. *Id.*
194. *See supra* Part II.A-B.
195. *See id.*
196. *See supra* notes 20-23.
197. 105 S. Ct. 2545 (1985).
198. *Id.* at 2556.

congressional acts specifically authorized regional protectionism in the banking industry.[199] The Court upheld Massachusetts and Connecticut statutes that permitted foreign banks to acquire in-state banks only if the foreign banks' home-states accorded reciprocal privileges to Massachusetts and Connecticut banking organizations.[200] Justice O'Connor argued in her concurrence that the *Northeast Bancorp* statute, like the *Metropolitan Life* statute, clearly favored domestic business over foreign business and therefore saw the Court's refusal to find an equal protection challenge in *Northeast Bancorp* as properly limiting the importance of *Metropolitan Life*.[201] The Court, therefore, will most likely continue to apply only traditional rational basis review in the economic context.

III. INTERMEDIATE SCRUTINY BY ANY OTHER NAME

The Supreme Court's decisions in *Zobel, Williams, Hooper, Cleburne* and *Metropolitan Life* suggest that the Court is now willing to employ a searching scrutiny under the guise of traditional rational basis review; that is, to employ rational basis with bite. In each of these cases, the Court purported to apply the rational basis test, and yet it invalidated legislation which it certainly would have upheld under traditional analysis. Whether this is an actual trend remains unclear because the Court has employed rational basis with bite but five times and failed to be candid about its actions each time. For instance, in the right-to-travel context, the Court has employed rational basis with bite three times. In a "*Plyler*" context, however, the Court has only employed it once. In the economic context, the Court has also employed rational basis with bite once. But when a second opportunity to employ rational basis with bite arose in the economic context, the Court employed traditional rational basis review.[202] In each of these cases, moreover, the Court neither expressly stated that it was using rational basis with bite nor delineated the situations justifying this higher level of scrutiny.

In substance, the Court's doctrine is justifiable in the right-to-travel and "*Plyler*" contexts. For example, both the right-to-travel cases and *Cleburne* involved legislation which burdened an important right of a group at least approaching quasi-suspect status.[203] Therefore, the same elements exist in these contexts which justified the added protection of higher scrutiny in *Plyler*.[204] As the *Metropolitan Life* case evidenced, however, rational basis with bite in a purely economic context is difficult to justify. The statutes in

199. Bank Holding Company Act of 1956, § 3(d), as amended, 12 U.S.C. § 1842(d) (1980).
200. *Northeast Bancorp,* 105 S. Ct. at 2548-49, 2556.
201. *Id.* at 2556-57 (O'Connor, J., concurring).
202. *See supra* Part II.
203. *See supra* note 135 and accompanying text; notes 167-69 and accompanying text.
204. *See supra* notes 59-69 and accompanying text.

this context do not burden an important right or a politically-powerless class. Instead, the burdened class can influence the political process or look to the commerce clause for protection.[205] Therefore, in an economic context, the Court cannot explain the need for a higher level of judicial suspicion.

In truth, the analysis applied under the guise of traditional rational basis review in *Zobel, Williams, Hooper, Cleburne* and *Metropolitan Life* is nothing more than a camouflaged version of "*Plyler*" intermediate scrutiny. In these opinions, the Court did not articulate the intermediate scrutiny test. The Court, however, seems to have actually required that the legislative classification be "substantially related" to the achievement of "important governmental objectives."[206] For example, the Court did not presume the legislation to be constitutional, as it would under traditional rational basis review: it refused to supplant the state's goal with goals it considered legitimate, and it would not permit under- and over-inclusiveness.[207] Instead, the Court looked more closely at the relationship of the classification to achieving the state's goal: it did not accept every goal proffered by the state; and if an alternative means existed which did not disadvantage the protected group, the Court invalidated the legislation.[208] This analysis is exactly the type of analysis which occurs under intermediate scrutiny.[209]

The triggering mechanism for both types of review is also arguably the same. Rational basis with bite, as argued earlier, is only justified in substance for the same reason that intermediate scrutiny is justified; that is, if it is used to review legislation that burdens an important right of a group at least approaching quasi-suspect status. It appears that the same two elements that often trigger intermediate scrutiny also trigger rational basis with bite. The only difference between the two tests, therefore, is that the Court candidly explains what triggered heightened scrutiny under the label "intermediate scrutiny" and it does not under the label "rational basis".

In *Zobel, Williams, Hooper, Cleburne* and *Metropolitan Life,* the Court has in effect applied intermediate scrutiny without articulating the factors that triggered it. Rational basis with bite, therefore, creates a limitless opportunity for the court to closely scrutinize legislation whenever it sees fit. This unbridled freedom has many potential negative effects. Among them, it fosters lower court confusion as to what version of the rational basis test to apply in any given case. On the one hand, the lower courts may simply employ deferential review in all cases, including those in which the legislation burdens the important right of a group at least approaching quasi-suspect status. This reaction, unfortunately, would leave unprotected some politi-

205. *See supra* notes 194-97 and accompanying text.
206. *See supra* notes 59-62 and accompanying text.
207. *See supra* notes 41-52 and accompanying text.
208. *See supra* Part II.
209. *See supra* notes 54-62 and accompanying text.

cally-disadvantaged groups and important rights which may justify judicial protection. On the other hand, lower courts may conduct searching scrutiny of all legislation, including economic legislation in which heightened scrutiny cannot be justified. This lower court action would be a "regrettable step back toward the days of *Lochner,*"[210] during which the courts conducted searching reviews of economic legislation. This "step backwards" would once again permit justices to engraft their own values onto the equal protection clause. Justices, including those on the Supreme Court, could sit as a Superlegislature, usurping legislative power at a great cost to the majoritarian process. Legislatures, as a result, will have little basis for determining when and how they may classify in order to achieve their objectives. In light of these ramifications, rational basis with bite is indefensible. In the future, the Supreme Court should candidly state when and why it is using intermediate scrutiny, instead of calling it by any other name.

CONCLUSION

The Supreme Court's recent decisions strongly suggest that it is willing to employ searching scrutiny under the label of rational basis review. In other words, it is willing to employ rational basis with bite. Rational basis with bite, however, is merely intermediate scrutiny by another name. Both standards of review require a probing scrutiny which is apparently triggered by the existence of legislation that burdens the important right of a group which at least approaches a quasi-suspect status. The two standards only differ because the Court does not explain which factors trigger heightened scrutiny under the label "rational basis" as it does under the label "intermediate scrutiny."

Rational basis with bite, therefore, creates an endless opportunity for the Court to closely scrutinize legislation whenever it sees fit. This unbridled freedom fosters confusion in lower courts as to what version of the rational basis test to apply in any given case. At one extreme, the lower courts may only apply deferential review, leaving unprotected some groups and rights

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210. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3265 (1985) (Marshall, J., concurring in part, dissenting in part); Lochner v. New York, 198 U.S. 45 (1905). Justice O'Connor also hearkens back to *Lochner* in *Metropolitan Life* by quoting Justice Holmes' dissent from that ruling. Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. at 1676, 1693 (1985) (O'Connor, J., dissenting). The case of *Lochner v. New York* began a period in which the Court reviewed economic legislation with probing scrutiny. Critics attacked these decisions as fostering the Court's own economic views of constitutional provisions instead of deferring to the state legislatures which better represent the views of the people. For example, Justice Holmes admonished courts "not to extend prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." Tyson & Brother v. Banton, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting). In *Williamson v. Lee Optical Co.,* the Court dealt the final blow to the *Lochner* era by adopting the deferential rational basis test for reviewing economic legislation. *Williamson,* 348 U.S. 483 (1955).

which may deserve judicial protection. At the other extreme, they may only apply searching review, usurping legislative power at a great cost to the the majoritarian process. At either extreme, legislatures cannot possibly know when and how they may classify to achieve their goals. In light of this effect, rational basis with bite is clearly an undesirable standard of review. The wiser course for the Court would be to candidly state when and why it is using intermediate scrutiny, instead of camouflaging it with another name.

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