

The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective

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TABLE OF CONTENTS

I. INTRODUCTION: THE RATIONAL BASIS TEST 751

II. THE DISTINCTION BETWEEN THE RATIONAL BASIS TEST AND THE REASONABLE BASIS TEST 758

III. THE RELATIONSHIP OF REASONABLE AND RATIONAL 771

IV. THE BABY AND THE BATHWATER: HOW THE REASONABLE BASIS TEST BECAME THE RATIONAL BASIS TEST 775

V. WHY THE RATIONAL BASIS TEST HAS SURVIVED FOR EIGHTY YEARS 780

VI. THE IRRATIONALITY IN DECIDING WHAT CASES GET THE RATIONAL BASIS TEST 792

VII. LAW HAPPENS: HOW THE RATIONAL BASIS TEST CAN RETURN TO THE REASONABLE BASIS TEST 799

I. INTRODUCTION: THE RATIONAL BASIS TEST

One of the most commonly used constitutional law tests by the United States Supreme Court is the “rational basis test.”¹ The test may be framed as

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1. This Article focuses on the United States Supreme Court’s application of the rational basis test. There are notable examples of the rational basis test being used successfully at the lower court level, which were not subject to review by the Supreme Court. *See generally*, e.g., *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (striking down, on rational basis grounds, Tennessee’s law that allowed only state licensed funeral directors and embalmers to sell caskets). Given that few cases are actually subject to Supreme Court review, the level of success of the rational basis test at the lower court level is arguably a better measure of the

either a due process or an equal protection issue. Under the due process clause, many laws limiting substantive interests must rationally relate to some legitimate state interest.² Under the equal protection clause, the classifications within the law usually must rationally relate to some legitimate state interest.³ The rational basis test as applied by the Supreme Court is such a permissive level of review that it is effectively not judicial review

importance of the test. Professor Katie Eyer makes a persuasive argument that Supreme Court cases are only part of the story:

The story the canon tells us is an all or nothing tale, in which social movements either succeed in securing a Supreme Court victory—the canon would further suggest by persuading the Court to apply heightened scrutiny—or they lose. But in reality, the process of constitutional change is a much more amorphous, complicated, and iterative one. And amidst this more fluid and complicated process, rational basis review—as deployed in the lower and state courts, as well as within the political branches—has often afforded one of the most plausible openings for social movements to create space for constitutional change.

Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1355 (2018) (footnotes omitted). Professor Eyer also argues that the successful application of the rational basis test is often the crossroads to a higher level of judicial scrutiny, such as with gender classifications and gay rights. *See id.* at 1333, 1333 n.76. She says law professors do their students a disservice by emphasizing the futility of the rational basis test as opposed to encouraging them to use it with success for social gains at the lower court and political levels. *See id.* at 1367–68, 1369 n.252.

2. *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). In *Washington v. Glucksberg*, the Court found no fundamental right to assisted suicide. *Id.* (finding the due process clause required “that Washington’s assisted-suicide ban be rationally related to legitimate government interests”).

3. *See, e.g.,* *Heller v. Doe*, 509 U.S. 312, 319–20 (1993). A good framing of the rule is found in *Heller v. Doe* where the law gave a lower level of protection to the intellectually challenged than the mentally ill: “[s]uch a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Id.*

at all.⁴ It permits the most irrational of legislation⁵ to become the law of the land, no matter how needless, wasteful, unwise, or improvident it

4. This is not an original concept. According to Thomas Nachbar, [rational] basis review is the poor stepchild of judicial review. Requiring only that regulations (as a matter of due process) and classifications (as a matter of equal protection) be rationally related to a legitimate governmental interest, it is widely regarded as virtually “no review at all.” It is reserved for those equal protection and substantive due process cases least likely to implicate important issues of equal protection and substantive due process. But rational basis is the one form of review that completely pervades the legal system by virtue of its combination of substantive review and general applicability.

Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016) (footnotes omitted) (first citing *Glucksberg*, 521 U.S. At 728; then citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973); and then citing *FCC v. Beach Commc’ns*, 50 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring)). Clark Neily frames it in universal terms:

Most of us have a drawer or a closet in our home where we put things that are not important enough to have their own place but are not quite worthless enough to throw away either. That is what the rational basis test is for the Supreme Court—a junk drawer for disfavored constitutional rights the Court has not explicitly repudiated, but that it prefers not to enforce in any meaningful way. Like any other junk receptacle, the rational basis test has become a real mess.

Clark Neily, *One Test, Two Standards: The On-and-Off Role of “Plausibility” in Rational Basis Review*, 4 GEO. J.L. & PUB. POL’Y 199, 199 (2016); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 899 (2005) [hereinafter Neily, *No Such Thing*] (“The purpose of this essay is to help expose the rational basis test for the sham that it is and to show how application of the test in actual litigation perverts our system of justice.”); see also Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 493 (2011) (“The rational basis test as it currently stands is too weak. By allowing any plausible reason for the legislation to suffice, whether or not it was a true reason for the legislation, and by asking only whether lawmakers could have thought that it was reasonably related to the subject it purported to advance, the Court has essentially made the rational basis test the equivalent to no test at all.”). Somewhat extreme is *Ferguson v. Skrupa*, where the Court upheld a Kansas law limiting debt adjusting to attorneys without as much as a bow in the direction of the rational basis test:

We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us.

372 U.S. 726, 731 (1963). Only Justice Harlan, in the briefest of concurring opinions, concluded without discussion that the law “bears a rational relation to a constitutionally permissible objective.” *Id.* at 733 (Harlan, J., concurring) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)). There are those who seem to support the majority approach in *Ferguson*:

might be.⁶ In 1976, the Court in *City of New Orleans v. Dukes* said that in the last half century it had struck down only one case using the permissive rational basis test, and *Dukes* reversed it.⁷ *Dukes* limits its claim to “wholly economic regulation[s],”⁸ but the claim does apply, for the most part, to all uses of the rational basis test.⁹ Up to the present, other

To reject rational basis review is not to hold that the government may pass irrational laws. Rather, it is to hold that laws passed by the people’s representatives, according to the constitutional prescriptions for enacting laws, are per se reasonable. Our protection against irrationality is institutional and democratic, not theoretical and judicial. The Constitution does not authorize courts to interfere with validly enacted laws that do not violate a stated limit on the government.

Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1801 (2012).

5. See Neily, *No Such Thing*, *supra* note 4, at 898 (“The original legal definition of insanity is the inability to tell right from wrong. So it is the first irony of the ‘rational’ basis test that it is, according to that definition, insane. . . . [T]he rational basis test is nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens to be shaking it and with what level of vigor.” (footnotes omitted) (citing M’Naghten’s Case (1843) 8 Eng. Rep. 718, 722)).

6. In *Lee Optical*, the Court said an Oklahoma law effectively prevented opticians from cheaply replacing broken eyeglass lenses or frames: “[t]he Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.” 348 U.S. at 487.

7. 427 U.S. 297, 306 (1976), *rev’g* *Morey v. Doud*, 354 U.S. 457 (1957) (“*Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous.”). The Court found that because *Morey* involved a closed class, the law was subject to a somewhat stricter application of the rational basis test. See *Dukes*, 427 U.S. at 306.

Although statutory discriminators creating a closed class have been upheld, a statute which established a closed class was held to violate the Equal Protection Clause where, on its face, it was “an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date.”

Morey, 427 U.S. at 468 (footnote omitted) (quoting *Mayflower Farms, Inc., v. Ten Eyck*, 297 U.S. 266, 274 (1936)). In *Dukes*, New Orleans expelled all pushcarts from the French Quarter except for Lucky Dogs, a hotdog bun shaped purveyor of delicious hotdogs. *Dukes v. City of New Orleans*, 501 F.2d 706, 709 (1976), *rev’d*, 427 U.S. 297. The Court upheld the law exempting Lucky Dogs from the ban of pushcarts in the French Quarter because, unlike other pushcarts, Lucky Dogs contributed to the charm of the French Quarter. See *Dukes*, 427 U.S. at 306. The lower court relied on the closed class rationale of *Morey*. See *id.* The Court reversed *Morey*, saying it “was a needlessly intrusive judicial infringement on the State’s legislative powers [and that it] should no longer be followed.” *Id.*

8. *Dukes*, 427 U.S. at 306.

9. What counts as a successful Supreme Court rational basis challenge is somewhat subjective. Professor Nachbar could find only one successful challenge: *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*. Nachbar, *supra* note 4, at 1657–58. For the holding of *Allegheny Pittsburgh*, see *infra* note 14. Professor Gerald Gunther found seven successful uses of the rational basis test in the 1927 term of the Court alone. See Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 25 (1972) (“If there is reality to

cases have struck down laws on rational basis grounds, but all seem to involve something different than permissive review.¹⁰ Beginning in 1973,

the model, the best evidence is likely to lie in the seven decisions sustaining or remanding equal protection claims without invoking the strict scrutiny formula.” (footnote omitted)). All seven cases involved elements other than those found in the traditional rational basis case and none would modernly be viewed as primarily rational basis cases. In *James v. Strange*, the lower court had found that Kansas’s recoupment plan for attorney fees for the indigent violated the 6th Amendment right to counsel. 407 U.S. 128, 134 (1972) (citing *Strange v. James*, 323 F. Supp. 1230, 1233 (1971)). Although the Supreme Court relied on the irrationality of the unfair treatment of the debts owed by an indigent person for provided attorney fees, the case is primarily a 6th Amendment case. See *id.* at 131. It is even harder to accept *Jackson v. Indiana* as a rational basis case. See generally 406 U.S. 715 (1972). The Court framed its conclusion in terms of a reasonable basis test: “At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Id.* at 738. However, the case clearly fails to comply with procedural due process rights. See generally *id.* One of the early applications of what would now be views as an intermediate test for classifications based upon illegitimacy of one’s birth is *Weber v. Aetna Casualty & Surety Co.*, where a Louisiana law denied worker’s compensation benefits to illegitimate children. See generally 406 U.S. 164 (1972). *Stanley v. Illinois*, where an Illinois law presumed—prior to a hearing—that fathers of illegitimate children were unfit, as even Professor Gunther acknowledges, is primarily a procedural due process case. See 405 U.S. 645, 647 (1972). *Eisenstadt v. Baird*, where Massachusetts provided for up to a five-year in prison sentence for a non-doctor to give contraceptives to single persons, was framed as a rational basis issue; however, it would be more properly viewed as a fundamental right to privacy case. 405 U.S. 438, 447 (1972) (“The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons . . .”). The forerunner to the current intermediate test given to gender-based classifications is *Reed v. Reed*, where Idaho law preferred males over females in administering the estates of non-testate minors. See generally 404 U.S. 71 (1971). Although framed as an equal protection issue, *Humphrey v. Cady*, where Wisconsin made it easier to commit civilly person under the state’s Sex Crimes Act than under its general Mental Health Act, is either a 6th Amendment right to jury case or a procedural due process case. See generally 405 U.S. 504 (1972).

10. Only in *Metropolitan Life Insurance Co. v. Ward*, does the Court strike a law down on what would be arguably permissive review. See 470 U.S. 869, 883 (1985). But even *Ward* is usually explained as a case involving residency and is thus somewhat related to the fundamental right to travel cases. See, e.g., *Armour v. City of Indianapolis*, 566 U.S. 673, 686 (2012); *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 177 (1985). After giving a boilerplate statement of the rational basis test, the Court in *Ward* held that “promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.” *Id.* at 882. In *Armour v. City of Indianapolis*, the Court refers to *Ward* as one of the cases involving “discrimination based upon residence or length of residence.” 566 U.S. at 686 (citing *Ward*, 470 U.S. 869). In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, a case involving regional discrimination against out of state banks as allowed by federal law, the Court distinguished *Ward*. 472 U.S. at 177. As Justice O’Connor, who dissented in

using a more searching rational basis test,¹¹ the Court has struck down some laws on equal protection grounds,¹² but extreme deferential review remains the rational basis test's most common permutation.¹³

Perhaps no modern case illustrates the irrationality of the rational basis test better than the 1992 case, *Nordlinger v. Hahn*.¹⁴ California law imposed a vastly higher property tax on new property owners than preexisting property owners.¹⁵ Ms. Nordlinger paid five times in property taxes what

Ward, said in a concurring opinion, "I write separately to note that I see no meaningful distinction for Equal Protection Clause purposes between the Massachusetts and Connecticut statutes we uphold today and the Alabama statute at issue in [*Ward*]." *Id.* at 178 (O'Connor, J., concurring) (citing *Ward*, 470 U.S. 869).

11. "Heightened rational basis review is also sometimes referred to as 'rational basis with teeth' or 'rational basis with bite.'" Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1072 n.43 (2013). The concept of rational basis with "bite" refers to a successful equal protection challenge not involving strict scrutiny and comes from Professor Gunther's influential article about the 1972 term of the Supreme Court. Gunther, *supra* note 9, at 12.

12. Justice O'Connor summarized the more searching rational basis test, argued that it should be applied to due process cases as well as equal protection cases, and gave it its name in her concurring opinion in *Lawrence v. Texas*: "When a law exhibits such a desire to harm a politically unpopular group, we have applied a *more searching form of rational basis* review to strike down such laws under the Equal Protection Clause." 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (emphasis added).

13. The Court's use of the rational basis test in its Commerce Clause cases is beyond the scope of this paper.

14. 505 U.S. 1 (1992). Compounding the irrationality of *Nordlinger* is that just three years before, the Court found a similar scheme invalid: "The relative undervaluation of comparable property in Webster County [West Virginia] over time . . . denies petitioners the equal protection of the law." *Allegheny Pittsburgh*, 488 U.S. at 346. The difference, the Court said in *Nordlinger*, was based on the fact that West Virginia law mandated market value be used while California law mandated acquisition value. 505 U.S. at 14–15. However, the economics were essentially the same. *Id.* at 1 (Thomas, J., concurring).

15. *Nordlinger*, 505 U.S. at 1, 3–5. In a taxpayer revolt over rapidly increasing property taxes on California property because of rampant inflation in the value of private homes—and the failure of the state legislature to mitigate the property tax rate—California voters in 1978 approved an initiative called Proposition 13. *Id.* at 3–4; see *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 209 (1978). Homeowners were thrilled their homes were increasing in value in record fashion but were outraged that their property taxes were increasing at a like rate. See *id.* at 4–6. In its simplest form, Proposition 13 fixed property taxes at 1% of the assessed value, but for current owners it froze with modest increases the value of property for purposes of property taxes as of 1975. *Id.* at 5 (quoting CAL. CONST. art. XIII A, §§ 1(a), 2(a)). For future purchasers, the value of property for property tax purposes was the purchase price. See CAL. CONST. art. XIII A, § 2(a). The California Supreme Court upheld the legality of Proposition 13 in *Amador Valley*. 22 Cal. 3d at 248.

"A state tax law is not arbitrary although it 'discriminates in favor of a certain class if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution. . . . This principle has weathered nearly a century of Supreme Court adjudication." *Id.* at 234 (citation omitted) (quoting *Kahn v. Shevin*, 416 U.S. 351, 355 (1974)).

a neighbor a block away paid for essentially the same value home; in fact, she paid almost the same in property taxes for her \$170,000 home in Central Los Angeles as another owner paid for a \$2,100,000 Malibu beachfront property.¹⁶ Although the Supreme Court easily found rational justifications for the vastly unequal property taxes,¹⁷ the Court's honesty about the irrationality of the rational basis test is interesting:

Time and again . . . this Court has made clear in the rational-basis context that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted" Certainly, California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society, and, as the Court of Appeal surmised, ordinary democratic processes may be unlikely to prompt its reconsideration or repeal. . . . Yet many wise and well-intentioned laws suffer from the same malady.¹⁸

It is worth emphasizing that in *Nordlinger* the Court said the rational basis test presumes that an "improvident" law passed "unwisely" will be politically self-correcting no matter how improbable that "a broad, powerful, and entrenched segment of society" is going to ever let the law be

16. *Nordlinger*, 505 U.S. at 6–7. As inflation in the California housing market has continued, the discrepancies in *Nordlinger* have only grown more egregious. In 2017, the median sales price of a Baldwin Hills home sold for nearly \$800,000—4.5 times what Ms. Nordlinger paid for her home in 1989. See *Median Home Prices – Single Family Residences: By Los Angeles County Zip Codes Years 2012–2017*, L.A. ALMANAC, www.laalmanac.com/economy/ec37b.php [<https://perma.cc/XW23-NW84>]. The purchaser of an \$800,000 home would pay \$667 *per month* in property taxes—1% of the purchase price. Comparing that amount with the \$358 *per year* paid by Ms. Nordlinger's neighbors at the time of her lawsuit, it is of little surprise that some sarcastically referred to this property tax discrimination as a "welcome stranger." *Nordlinger*, 505 U.S. at 6, 7.

17. See *Nordlinger*, 505 U.S. at 12 ("We have no difficulty in ascertaining at least two rational or reasonable considerations of difference or policy that justify denying petitioner the benefits of her neighbors' lower assessments. First, the State has a legitimate interest in local neighborhood preservation, continuity, and stability. . . . The State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses Second, the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." (citation omitted) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926))). However, neither justification is likely to be the actual reason the law was passed. The intent of the law was to protect existing homeowners, but also to protect tax revenues in California to some degree by imposing higher property taxes on new homeowners, many from out of state.

18. *Id.* at 17–18 (citations omitted) (first quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979); and then citing *Nordlinger v. Lynch*, 225 Cal. App. 3d 1259, 1282 n.11 (1990)).

reconsidered or repealed.¹⁹ The rational basis test builds irrationality into its application, and the Court knows it.

II. THE DISTINCTION BETWEEN THE RATIONAL BASIS TEST AND THE REASONABLE BASIS TEST

The modern rational basis test began with the Court's rejection of Lochnerism²⁰ in 1937,²¹ but more directly eighty years ago in 1938 with

19. *Id.*

20. *Lochnerism* refers to the high-level of due process protection given by the Court to certain substantive economic interest, especially the freedom to contract. *See Lochner v. New York*, 198 U.S. 45, 64 (1905) (“[T]he freedom of master and employé to contract with each other . . . cannot be prohibited or interfered with, without violating the Federal Constitution.”). Professor David Strauss offers a limited defense of *Lochner*'s protection of the freedom to contract:

Freedom of contract, judged by the standards that developed in the last half of the twentieth century, is a plausible constitutional right. It might merit careful, case-by-case enforcement, undertaken with sensitivity to the limitations of the right as well as its value. The *Lochner*-era Court went far beyond that. It treated freedom of contract as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right.

David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003).

21. The rejection of Lochnerism is often dated from 1937, when *West Coast Hotel Co. v. Parrish* overruled *Adkins v. Children's Hospital* and upheld the state of Washington's minimum wage for women and minors. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937), *overruled by Adkins v. Children's Hosp.* 261 U.S. 525 (1923). *West Coast Hotel* itself did not use the rational basis test. *See generally id.* The court in *West Coast Hotel* said, “regulation which is *reasonable in relation* to its subject and is adopted in the interests of the community is due process.” *Id.* at 391 (emphasis added). The Court concluded that “[e]ven if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.” *Id.* at 399. Lochnerism is a term not actually used by the United States Supreme Court; however, Justice Souter in a concurring opinion in *Glucksberg* did refer to “the so-called *Lochner* Era.” 521 U.S. 702, 760 (1997) (Souter, J., concurring). *But see* *Malmed v. Thornburgh*, 621 F.2d 565, 575–76 (3d Cir. 1980) (“As with any aspect of substantive due process, a court using the irrebuttable presumption doctrine must apply the rational basis test, or in appropriate cases, strict scrutiny. Otherwise, the courts would be resorting to blatant ‘Lochnerism,’ . . . a concept that has been administered suitable last rites and mercifully interred.” (citing *Lochner*, 198 U.S. 45)). However, some date its origin as much earlier. *See* Neily, *No Such Thing*, *supra* note 4, at 899 (“The rational basis test was invented in the Supreme Court more than 100 years ago . . .”). Some date the origin of the rational basis test even earlier. *See, e.g., Nachbar, supra* note 4, 1635 (“Today’s rational basis test has developed over the course of 200 years, weathering some of the greatest upheavals in U.S. constitutional law, while providing a touchstone for those on both sides of the debates that gave rise to our understanding of equal protection and substantive due process.”). But even Professor Nachbar only cites to the Court’s 1819 analysis of the Necessary and Proper Clause in *McCulloch v. Maryland*. *Id.* at 1633–34 (“Indeed, the case that serves as the foundation for modern rational basis review, *United States v. Carolene Products*, cites *McCulloch v. Maryland* in its illustrious Footnote 4, and citations to *McCulloch* for the means-ends structure of rational basis review are common.” (footnote omitted) (first citing

United States v. Carolene Products.²² *Carolene Products* is not the first

U.S. v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (plurality opinion); and then citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819)). While Professor Nachbar does note the common means-ends element of *McCulloch* with *Carolene Products*, he also points out there is little similarity between the two approaches:

One should quickly note an important distinction between the enumerated-powers and equal-protection/due-process flavors of rational basis scrutiny, though. Although *McCulloch* is frequently cited in rationality review cases, the inquiry in enumerated powers cases like *McCulloch* is necessarily much more limited than full rationality review because the number of “legitimate governmental interests” is confined to the universe of those enumerated in Article I, Section 8 of the Constitution.

McCulloch requires all federal laws bear an appropriate relationship to the finite list in the Constitution of Congress’s enumerated powers. *See id.* *Carolene Products* requires only that any limit on substantive rights must bear some conceivable relationship to the universe of legitimate ends. 304 U.S. at 147. It is not clear *McCulloch*’s use of the term “appropriate” for the means test, 17 U.S. at 1, and *Carolene Product*’s use of the term “reasonably conceive,” 304 U.S. at 147, is even the same means test, but there is no doubt that the constitutional list of enumerated federal powers has little to do with the inexhaustible list of conceivable ends. As Dean Erwin Chemerinsky summarized, “[a]s to what is a legitimate interest, the Court has appropriately said that it is anything that the government permissibly can do. Virtually any goal that is not forbidden by the Constitution has been deemed sufficient to meet the rational basis test.” Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 410 (2016). Or as Professor Nachbar put it, “[i]n the modern era of rational basis review, the Court has neither enumerated a list of legitimate governmental interests nor provided a rule for evaluating whether a purported end is legitimate for the purposes of rationality review. Rather, the Court has generally evaluated particular ends on a case-by-case basis.” Nachbar, *supra* note 4, at 1654–55 (footnote omitted) (citing Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 304 (2011)).

22. 304 U.S. 144. Professor J.M. Belkin frames it this way:

Carolene Products is the post-1937 Court’s first extended discussion and elaboration of a theory of judicial review proclaimed in a very famous opinion: *West Coast Hotel Co. v. Parrish*. *West Coast Hotel*, and its companion in the Commerce Clause area, *NLRB v. Jones & Laughlin Steel Corporation*, announce the end of the *Lochner* period in Supreme Court jurisprudence; together they constitute the boundary that separates modern from premodern constitutional law. Yet if *West Coast Hotel* forms the boundary, *Carolene Products* is the first way station in this hitherto uncharted territory.

J.M. Balkin, *The Footnote*, 83 NW. U.L. REV. 275, 293–94 (1989) (footnotes omitted) (first citing *West Coast Hotel*, 300 U.S. 379; and then citing *NLRB*, 301 U.S. 1). The district court likely misapplied the rational basis test when over thirty years later it found that a ban on Milnot—“a blend of fat free milk and vegetable soya oil” with added vitamins A and D—violated the equal protection component of the 5th Amendment due process clause:

From the undisputed facts in the record here, it appears crystal clear that certain imitation milk and dairy products are so similar to Milnot in composition,

Supreme Court case to use the rational basis test,²³ but it is the first to use the test after 1937, and it is still a widely cited rational basis case.²⁴

In *Carolene Products*, the Court upheld a federal law that banned the interstate shipment of milk-filled products—products made from adding fat other than milk fat to skim milk to replicate whole milk or evaporated milk used in cooking.²⁵ *Carolene Products*—which marketed a product called Milnut, made from skim milk and coconut oil—challenged the law.²⁶ Milnut was a useful product, especially for lower income persons, because it was cheap²⁷—skim milk at the time was largely a waste product from butter and cheese processing—and because it did not require

appearance, and use that different treatment as to interstate shipment caused by application of the Filled Milk Act to Milnot violates the due process of law to which Milnot Company is constitutionally entitled.

Milnot Co. v. Richardson, 350 F. Supp. 221, 222, 224 (S.D. Ill. 1972).

23. One of the earliest cases using the rational basis phrase—it was hardly a test at the time—was in 1914 in *Singer Sewing Machine Co. v. Brickell*. See 233 U.S. 304, 316 (1914) (“The State has a wide range of discretion with respect to establishing classes for the purpose of imposing revenue taxes, and its laws upon the subject are not to be set aside as discriminatory unless it clearly appears that there is no *rational basis* for the classification.”) Five years later, the Court used rational basis language again in upholding (emphasis added). an early workers’ compensation law: “There could be no more *rational basis* for a discrimination; and it is clear that in this there is no denial of the ‘equal protection of the laws.’” *Ariz. Emp’rs’ Liab. Cases*, 250 U.S. 400, 423 (1919) (emphasis added). A high point for the rational basis test was in 1927, when the Court applied it twice, first in *Fort Smith Light & Traction Co. v. Board of Improvement of Paving Dist. No. 16*, stating it did not need to “cite authority for the proposition that the Fourteenth Amendment does not require the uniform application of legislation to objects that are different, where those differences may be made the *rational basis* of legislative discrimination.” 274 U.S. 387, 391 (1927) (emphasis added). *Fort Smith* was then cited the same day in *Ohio v. Deckerbach*:

It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a *rational basis* for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong.

274 U.S. 392, 397 (1927) (emphasis added) (citing *Fort Smith*, 274 U.S. at 387).

24. A Westlaw search revealed over 700 federal court cases—including almost 100 U.S. Supreme Court cases—and over 5,000 secondary articles citing to *Carolene Products*.

25. 304 U.S. at 145, 145 n.1, 154 (quoting Filled Milk Act, 21 U.S.C. §§ 61–63 (1934)). In addition to the federal law at issue, *Carolene Products* said that “thirty-five states [had] adopted laws which in terms, or by their operation, prohibit the sale of filled milk.” *Id.* at 150, n.3 (citations omitted). Professor Cushman’s account is slightly different: “As the agricultural depression of the 1920s deepened, most of the states in the Union passed laws prohibiting the manufacture and/or sale of filled milk. By 1938, thirty-four of the forty-eight states had enacted such statutes, while an additional three subjected the sale to strict regulations.” Barry Cushman, *Carolene Products and Constitutional Structure*, 2012 Sup. Ct. Rev. 321, 361 (2013) (citing *Carolene Products*, 304 U.S. at 150 n.3).

26. *Carolene Products*, 304 U.S. at 146.

27. *Carolene Products Co. v. Evaporated Milk Ass’n*, 93 F.2d 202, 205 (7th Cir. 1938).

refrigeration.²⁸ Except for vitamin A, it had all of the nutrients and usefulness of whole milk.²⁹ Nonetheless, a congressional committee found—and the statute itself declared—“the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public.”³⁰ Alternatives—such as stricter labeling requirements—were, as the Court said, “a matter for the legislative judgment and not that of courts.”³¹ The Court concluded the law did not violate the 5th Amendment due process clause because

the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some *rational basis* within the knowledge and experience of the legislators.³²

Although *Carolene Products* was not the first case to use the rational basis phrase and did not necessarily break new ground,³³ it became the face of

28. KENDRA SMITH-HOWARD, *PURE AND MODERN MILK: AN ENVIRONMENTAL HISTORY SINCE 1900*, at 75–77 (2014).

29. See *United States v. Carolene Products Co.*, 7 F. Supp. 500, 505 (S.D. Ill. 1934). A congressional committee justified its ban in part “because it did not contain a suitable amount of vitamin A to make it especially desirable for feeding infants and nursing mothers.” *Id.* However, Milnut was never intended to be used for nursing infants and vitamin A was readily available from other sources. See *id.*

30. *Carolene Products*, 304 U.S. at 149; see also 21 U.S.C. § 62.

31. *Id.* at 151 (citing *Hebe Co. v. Shaw*, 248 U.S. 297, 303 (1919)).

32. *Id.* at 152 (citing *Metro. Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 583 (1935)).

33. *Carolene Products* cited and tracked closely the 1935 case, *Metropolitan Casualty Insurance Co v. Brownell*. See generally *Brownell*, 294 U.S. 580. There, the Court upheld an Indiana law that prevented out of state insurance companies by contract from limiting the time to sue to less than three years. *Id.* at 581–82, 586. There was no similar limit on in state insurance companies. *Id.* The Court in upholding the classification held the following

the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some *rational basis* within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.

Id. at 584 (emphasis added) (footnote omitted) (first citing *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916); and then citing *State Bd. of Tax Comm’rs of Ind. v. Jackson*, 283 U.S. 527 (1931)).

the modern rational basis test.³⁴

Prior to *Carolene Products*, the more commonly used test was the “reasonable basis test.” In the pre-1937 cases, the Court used the terms reasonable basis and rational basis somewhat interchangeably.³⁵ Although the Court is now far more likely to use the rational basis test, there are many examples of the Court referring to a reasonable basis test or using some form of the word *reasonable* to define the rational basis test.³⁶ Despite the similarity in language, the post-1937 test is a rational basis test, and it is not the same as the pre-1937 reasonable basis test.³⁷

34. Admittedly, to say *Carolene Products* is the face of the rational basis test may just be the distorted perspective of this law professor who has taught Constitutional Law for forty-seven years, using many different casebooks, each *always* including *Carolene Products*.

35. See, e.g., *Brownell*, 294 U.S. at 584. The Court in *Brownell* used the rational basis test and, in support, cited fourteen Supreme Court cases. *Id.* at 584, 584 n.2 (citations omitted). Seven of the cases used only the term reasonable, one used only the term rational, three used both reasonable and rational, and three did not use either term. See *id.*

36. See, e.g., *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (“We have made clear in analogous contexts that, where ‘ordinary commercial transactions’ are at issue, *rational basis review* requires deference to *reasonable* underlying legislative judgments.” (emphasis added) (citing *Carolene Products*, 304 U.S. at 152)). *Armour* also quoted *Beach Communications*: “[I]t falls within the scope of our precedents holding that there is such a plausible reason if ‘there is any *reasonably conceivable state of facts* that could provide a *rational basis* for the classification.’” *Id.* at 681 (emphasis added) (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)). In the two quotes, *reasonable* is used to describe both the legitimate end and the rational relationship. Both *Beach Communications* and *Armour* are quintessential rational basis cases.

37. Modernly, the reasonable basis test is only specifically used in three kinds of limited situations, but there are likely other uses of it. First, in cases involving the fundamental rights of prisoners—rights that outside of a prison context would have received strict scrutiny—the Court’s inquiry is “whether a prison regulation that burdens fundamental rights is ‘reasonably related’ to legitimate penological objectives.” *Turner v. Safley*, 482 U.S. 78, 87 (1987). *Turner* involved both the fundamental right to marry and the fundamental right to free speech—rights that in anywhere other than a prison setting would have received some form of a strict scrutiny test. See *id.* at 82, 85. Second, for free speech purposes, content neutral regulations of nonpublic forums must only be reasonable. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (“The Government’s decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.”). The reasonable basis test for nonpublic forums is the lowest level of protection given to free speech. See generally, e.g., *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Assn’*, 460 U.S. 37, 45 (1983)). Content-based regulations of public forums receive strict scrutiny and content neutral regulations of public forums receive an intermediate balancing test. See generally Lee Rudy, Note, *A Procedural Approach to Limited Public Forum Cases*, 22 FORDHAM URB. L.J. 1255 (1995). Third, “a search of a student by a teacher or other school official will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (footnote omitted). Though not called a reasonable basis test, a similar test is used in cases involving classifications

An early example of a successful use of the reasonable basis test is found in the 1897 case, *Gulf, Colorado and Santa Fé Railway Co. v. Ellis*.³⁸ In *Gulf*, the state of Texas provided attorney fees for successful small claim suits against the railroad but not for other types of suits.³⁹ The Court said that, although the 14th Amendment's equal protection clause allowed classifications, they "must always rest upon some difference which bears a *reasonable* and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."⁴⁰

based upon illegitimacy. See *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) ("[C]lassifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests." (citing *Mathews v. Lucas*, 427 U.S. 495, 506 (1976))). It is possible that another example of a modern reasonable basis approach is a more searching rational basis test, which is used when some politically powerless group is being harmed out of animus, but the Court specifically calls it a rational basis test. See Jeremy B. Smith, *The Flaws or Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2774 (2005) (citing *Bowen v. Gilliard*, 483 U.S. 587 (1987)). The other possible example is found in the Court's no taking cases, where the Court requires that exactions for approval of some change in use of property bear some "rough proportionality" to the harm caused by the change of use. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The Court equated "rough proportionality" to the reasonable basis test—which it said was used "by a majority of state courts"—but did not adopt the reasonable basis test "partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny." *Id.* As one student note observed, "while the reasonable relationship test may not be the precise standard mandated by *Dolan*, for now it affords a good approximation of the required level of scrutiny on regulatory exactions in the wake of that decision." Daniel A. Crane, *A Poor Relation? Regulatory Takings After Dolan v. City of Tigard*, 63 *U. CHI. L. REV.* 199, 223 (1996).

38. 165 U.S. 150 (1897). An even earlier use of the word "reasonable" in relationship to the Fourteenth Amendment is found in an 1890 case upholding a method of assessing property for tax purposes. See *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890) ("The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and *reasonable* ways." (emphasis added)).

39. 165 U.S. at 150–51. Successful suits under \$50 of damage were awarded \$10 in attorney fees. *Id.*

40. *Id.* at 155 (emphasis added). The Court hypothesized that attorney fees could not be imposed on all white men—but not black men—or based on age or wealth and concluded the law was unreasonable. *Id.*

Two of the most prominent reasonable basis cases were *Lindsley v. Natural Carbonic Gas Co.* in 1911⁴¹ and *F.S. Royster Guano Co. v. Virginia* in 1920.⁴² These cases are prominent in part because the Court took extra pains to describe the reasonable basis test, not just to mention it, and in part because both cases were cited in 1971 by *Reed v. Reed*—the seminal case leading to elevating the level of review for gender based classifications.⁴³ *Reed* was not a reasonable basis or rational basis case, but a forerunner to an intermediate level of review.⁴⁴

41. 220 U.S. 61 (1911). The Court in *Lindsley* stated that “repeated decisions” by the Supreme Court had established the following:

The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws . . . and avoids what is done only when it is *without any reasonable basis*, and therefore is purely arbitrary. . . . A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. . . . [I]f any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Id. at 78–79 (citations omitted).

42. 253 U.S. 412 (1920). *Royster Guano* framed the law similarly to *Lindsley*:

It is unnecessary to say that the “equal protection of the laws” required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be *reasonable*, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Id. at 415 (emphasis added). The Virginia tax law in *Royster Guano* taxed the company on income earned in both Virginia and other states while Virginia companies with only income in other states did not have to pay Virginia taxes. *Id.* at 412, 415–16. The Court concluded that there had been “arbitrary discrimination.” *Id.* at 417.

43. 404 U.S. 71, 77 (1971). In *Reed*, the Court struck down an Idaho law as to persons otherwise equal—parents, for example, were given priority over siblings—that preferred males over females as administrators of the estate of an intestate deceased minor. *Id.* at 72–73 (citing IDAHO CODE §§ 15-312, 15-314 (1971)).

44. See generally *id.* A four-person plurality opinion in *Frontiero v. Richardson*, called *Reed* a “departure from ‘traditional’ rational-basis analysis” and used this departure to conclude that “sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.” 411 U.S. 677, 684, 688 (1973) (plurality opinion). Four justices argued that the rational basis test should still be applied, but only Justice Rehnquist thought the law passed the rational basis test. See *id.* at 691 (Rehnquist, J., dissenting) (citing *Frontiero v. Laird*, 341 F. Supp. 201, 209 (1972)) (agreeing with the lower court that there was a rational basis for treating men and women differently in this case). Justice Stewart, the crucial fifth vote, concurred but punted the test, not committing himself to any approach, just concluding that the law worked “an invidious discrimination.” *Id.* at 691 (Stewart, J., concurring) (citing *Reed*, 404 U.S. 71). The Court in *Craig v. Boren* observed that *Reed* was “the underpinning for decisions that have invalidated statutes employing gender” supporting *Craig*’s holding that

Perhaps the best illustration of the difference between the rational basis test and the reasonable basis test is *Weaver v. Palmer Bros.*⁴⁵ In that case, Palmer Brothers Co. had been producing comforters in Connecticut for over fifty years and in the manufacturing process often used “shoddy”—either clippings from garments being made, such as woolen underwear, which was then in widespread use, or shredded materials from used fabrics for the stuffing.⁴⁶ In 1924, Pennsylvania banned the use of shoddy in the manufacturing of items such as mattresses, pillows, or comforters but allowed the use of secondhand materials if “thoroughly sterilized and disinfected.”⁴⁷

Two purposes for the ban on shoddy were considered: health and fraud.⁴⁸ As for health, the Court disturbingly acknowledged that shoddy

gender-based classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.” 429 U.S. 190, 197–98 (1976). This intermediate test was alternatively framed in *United States v. Virginia*. See 518 U.S. 515, 524 (1996) (“[A] party seeking to uphold government action based on sex must establish an ‘exceedingly persuasive justification’ for the classification.” (quoting *Miss. Univ. for Women v. Hogan*, 485 U.S. 718, 724 (1982))). *Reed* mixed reasonable basis and rational basis language:

[T]he Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. . . . The Equal Protection Clause . . . does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification “must be *reasonable*, not arbitrary, and must rest upon some ground of difference *having a fair and substantial relation* to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” . . . The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a *rational relationship* to a state objective that is sought to be advanced by the operation of [the law].

404 U.S. at 75–76 (emphasis added) (citations omitted) (quoting *Royster Guano*, 253 U.S. at 415).

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

46. *Id.* at 408–11. Palmer Brothers sold 3,00,000 comforters annually—some 750,000 were stuffed with shoddy and sold at a lower price—with over \$500,000 worth in Pennsylvania alone. *Id.* at 410–11. At the time, they were called “comfortables.” *Id.* at 408. Discussing shoddy, the trial record found

that annually many million pounds of fabric, new and secondhand, are made into shoddy . . . It is rewoven into fabric, made into pads to be used as filling material for bedding, and is used in the manufacture of blankets, clothing, underwear, hosiery, gloves, sweaters and other garments. . . . [P]ractically all the woolen cloth woven in this country contains some shoddy.

Id. at 411.

47. *Id.* at 409.

48. *Id.* at 414–15.

“is sometimes made from filthy rags, and from other materials that have been exposed to infection [but that] it [was] undisputed that all dangers to health” could be eliminated at low cost and that, at the trial court level, all parties “conceded . . . that shoddy may be rendered perfectly harmless by sterilization.”⁴⁹ Further, the law itself seemed to recognize efficacy of production by allowing the use of secondhand materials if properly sterilized.⁵⁰ As for the concern for fraud, the Court thought label tags, such as that already allowed for used secondhand materials, “may be effectively applied to shoddy-filled articles.”⁵¹ As for secondhand materials, in addition to regular inspections, “[e]very article of bedding is required to bear a tag” with substantial information, including that it was secondhand and the methods of shoddy sterilization.⁵² The Court saw no reason why a label tag would not effectively address any legitimate concerns about deception in the use of shoddy and concluded the business was “legitimate and useful; and, while it [wa]s subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables [wa]s purely arbitrary and violate[d] the due process clause of the Fourteenth Amendment.”⁵³

49. *Id.* at 411.

50. *Id.* at 411–12.

51. *Id.* at 415.

52. *Id.* at 414.

53. *Id.* at 415 (citations omitted). *Meyer* itself has one of the most complete—and admittedly aspirational—statements as to the kind of substantive interests that might be protected by the Fourteenth Amendment’s due process clause:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

262 U.S. at 399–400 (citations omitted). The Court cited *Meyer* favorably in *Troxel v. Granville*, in support of its holding that a Washington State law granting grandparents liberal visitation rights violated the mother’s fundamental rights:

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska* . . . we held that the “liberty” protected by the Due Process Clause includes

Comparing the rational basis test with the reasonable basis test, the statements of the two are similar.⁵⁴ Under the rational basis test,

- (1) laws must rationally relate to some legitimate interest;
- (2) “the existence of facts supporting the legislative judgment is to be presumed”—the law must rest upon “some rational basis within the knowledge and experience of the legislators”; and
- (3) the law will be upheld if “any state of facts either known or which could reasonably be assumed affords support for it.”⁵⁵

Under the reasonable basis test,

- (1) laws must reasonable relate to some legitimate interest;
- (2) “if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed”; and
- (3) [o]ne who assails the . . . law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.”⁵⁶

Both tests have an *end* component and a *relationship* or *means* component. The *end* component for both is the same word: *legitimate*. Just in terms of language, there is no obvious difference in the relationship component between the adjectives *rational* and *reasonable*.

In actual application of the two tests, both the end component and the relationship component are distinct. In rational basis cases, the key word

the right of parents to “establish a home and bring up children” and “to control the education of their own.”

530 U.S. 57, 57, 65, 75 (2000) (citation omitted) (citing *Meyer*, 262 U.S. at 399). More recently, the Court—in a case where the petitioner cited the *Meyer* language in asserting the right to a reason for the denial of a visa—rejected dismissively the broad language of *Meyer*. *Kerry v. Din*, 135 S. Ct. 2128, 2134 (2015) (“[T]his Court is not bound by dicta, especially dicta that have been repudiated by the holdings of our subsequent cases.”).

54. Both tests are framed here as due process issues, laws limiting some substantive interest. Equal protection rational basis cases, such as *Lindsley*, focus more on the classifications within in the law, but the analysis is essentially the same. *See* 220 U.S. 61 (1911).

55. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–54 (1938) (plurality opinion).

56. *Lindsley*, 220 U.S. at 78 (citations omitted). *Weaver* did not attempt to restate the test, saying only “[t]he business here involved is legitimate and useful; and . . . is subject to all *reasonable* regulation.” 270 U.S. at 415 (emphasis added) (citations omitted).

is *conceivable* both as to end component and the relationship component.⁵⁷ In the pre-1937 reasonable basis cases, the key word is *substantial*—as in *fair and substantial*—at least as to the relationship component.⁵⁸

In determining whether an end is legitimate in rational basis cases, the Court will pick a conceivable end that best matches with the law; it will not feel bound to consider the actual end of the law.⁵⁹ In *Carolene Products*, the Court accepted the claimed *end* that milk-filled products were dangerous to health.⁶⁰ Unlike other cases, the Court did not have to invent some other more acceptable end and, given the Congressional support, cannot be blamed for not knowing the claimed ends were likely in error.⁶¹ Whether true or not, it was certainly conceivable that replacing natural milk fat displaced all the key nutrients in milk. And under the rational basis test, facts in support of the law were to be presumed, even

57. A better and more recent example of the Court's use of some form of the word "conceivable" in a rational basis case is in *FCC v. Beach Communications, Inc.*, where it used some form of the word "conceivable" ten times in an eleven page opinion—four times in reference to the appellate court findings, three finding no conceivable basis, one finding a conceivable basis. 508 U.S. 307, 312–15, 318–20 (1993).

58. There is no key word for the reasonable basis test as obvious as *conceivable* for the rational basis test, but *substantial* comes close. The most commonly cited case for the "fair and substantial" language is *Royster Guano*, where the court used both the terms "reasonable" and "substantial." 253 U.S. 412, 415 (1920). The Court in *Reed* used this language from *Royster Guano* and combined it with the rational basis test. See 404 U.S. 71, 76 (1971).

59. See e.g., *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948). However, given the now elevated level of review for gender classifications, it is a little unfair to mention the obvious example of *Goesaert* in this context. In *Goesaert*, Michigan allowed only males to be bartenders except for the bartender's wife or daughter in cities with over 50,000 people. *Id.* at 465. Women could also be waitresses in places that served alcohol "over which a man's ownership provides control." *Id.* at 467. The Court said Michigan might believe that barring unrelated women in bars "reduce[s] the moral and social problems," but rejected the obvious reason for the law. *Id.* at 466–67 ("[W]e cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.").

60. *Carolene Products*, 304 U.S. at 150 n.3.

61. The concern that milk-filled products were dangerous to the health was well supported by outside authorities. See *id.* The Court summarized this academic support in Footnote 3: "There is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet." *Id.* (citations omitted). As the wide spread modern use of low-fat milk products would indicate, there is likely no health hazard—most of the nutrient benefits of milk are found in skim as well as whole with none of the bad health effects of milk fat. See Laura Newcomer, *Skim Milk vs. Whole Milk: Which Is Healthier?*, DAILY BURN (June 1, 2016), <https://dailyburn.com/life/health/skim-milk-whole-milk-benefits/> [https://perma.cc/SD7K-MLCF]. It does not take a leap of imagination to believe that Congress—not counting some thirty-five states—was simply protecting the dairy industry from competition by alternatives that were—if not healthier—not unhealthier.

if only in the legislature's mind.⁶² In *Carolene Products*, there seemed to be considerable support for the legitimacy of the end. It is hard to know if the Court believed the health claims or just ignored that the law more than likely represented the dairy industry's desire to eliminate competition.⁶³ In terms of the rational basis test, it would hardly matter.

In *Daniel v. Family Security Life Insurance Co.*, the plaintiff company argued that a ban on a mortuary's selling life insurance was the result of the life insurance business' desire to eliminate any competition, not because of any valid concerns.⁶⁴ The Supreme Court questioned the relevancy of the assertion: "[i]t is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors that may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality."⁶⁵ In *Williamson v. Lee Optical of Oklahoma, Inc.*, it could hardly have been

62. "Apparently, it also no longer even matters under the rational basis test whether the facts supporting the legislation are true. To overcome the presumption of constitutionality, the challenger must show that no rational legislator could have thought that the law was reasonably related to its purpose." Jackson, *supra* note 4, at 525 (footnotes omitted) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991)).

In *Gregory*, the Court held in an Equal Protection Clause case that a mandatory retirement age for judges had a rational basis even though, "it is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all."

Id. (quoting *Gregory*, 501 U.S. at 473).

63. Professor Neil Komesar states it bluntly:

It does not take much scrutiny to see the dairy lobby at work behind the passage and enforcement of the "filled milk" act. Indeed, the dairy industry's efforts to employ legislation to keep "adulterated" products from grocery shelves and vending booths have a long history, extending from before *Lochner v. New York* to the present. It is not too uncharitable, perhaps, to suggest that concern for the dairies' pocketbooks rather than for the consumer's health best explains the dairy lobby's efforts.

Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 416 (1984) (footnotes omitted) (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

64. 336 U.S. 220, 223–25 (1949). The trial court had concluded, that "it seem[ed] obvious from the record that th[e] legislation had its genesis in the desire of the existing insurance companies to eliminate the plaintiff company as a competitor." *Family Sec. Life Ins. Co. v. Daniel*, 79 F. Supp. 62, 68 (E.D.S.C. 1948), *rev'd*, 336 U.S. 220.

65. *Daniel*, 336 U.S. at 224 (citing *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941)). "In other words, as long as the health and safety argument is 'conceivable,' the fact that it is also perfectly fraudulent has no bearing on the outcome of a legal challenge." Neily, *No Such Thing*, *supra* note 4, at 908–09.

clearer that existing optometrists and ophthalmologists were trying to eliminate the competition by efficient combined businesses—with opticians, optometrists, and sales persons together in a convenient location.⁶⁶ The Court did not even try to disguise that a law that “may exact a needless, wasteful requirement” was being upheld for the most specious of speculative reasons.⁶⁷ There was likely little connection between what the Court said the legislature might have thought and the real reason for the law. Using the rational basis test, the Court seems to accept any conceivable claimed end as legitimate, despite its obvious breach with reality.

Under the pre-1937, reasonable basis test cases, the Court focused more on the actual end for which the law was passed.⁶⁸ In *Lindsley*, the Court found that the ban on drilling into rock to take carbonic gas from mineral waters advanced the claimed purpose of the law.⁶⁹ The Court carefully considered every aspect of the law finding “that the case as presented, instead of plainly disclosing that the classification is arbitrary, tends to produce the belief that it rests upon a reasonable basis.”⁷⁰ This approach is far from strict scrutiny in that the burden was on the person challenging the law—their evidence did not *plainly disclose* that the law was arbitrary—and concluded only with modest conviction that the law *tends to* make it seem that there is some reasonable basis. While “tends to” is hardly a ringing affirmation, the careful consideration of the competing arguments appear to be related to the actual end of the law, not some fanciful hypothetical end.⁷¹ In *Royster Guano*, the Court felt there was no purpose to taxing the out-of-state income of Virginia companies with income in Virginia but not to tax the out-of-state income of Virginia companies with *only* income out-of-state, and found that it was probable

66. 348 U.S. 483, 487 (1955). In a similar, more recent, case, the Court argued what was unstated in *Lee Optical*, but with no more success: “LensCrafters tries to distinguish the instant case from *Lee Optical* by claiming that unlike the law upheld in *Lee Optical*, the challenged provision here was passed for a protectionist purpose and is therefore distinguishable.” *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 806 (6th Cir. 2005). The Court held that the law rationally related to the “legitimate government objective—protecting healthcare professionals from commercial influences.” *Id.* at 807.

67. *Lee Optical*, 348 U.S. at 487.

68. The historical reasonable basis test is not the same as the Court’s modern more searching rational basis test; the Court only applies the “more searching” rational basis test when it believes that a law was passed out of a purpose to hurt some politically unpopular group. *See Smith, supra* note 37. In reasonable basis cases the Court is more sharply focused on the particular reason for the law being passed, but not on some impermissible purpose. *See Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

69. *Lindsley*, 220 U.S. at 72. The claimed purpose is found in the title to the act: “An Act for the Protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters.” *Id.* at 62.

70. *Id.* at 81.

71. *Id.*

that the classification was “due to inadvertence rather than design.”⁷² The dissent, on the other hand, had little trouble conceiving of possible legitimate purposes for the law, but even the dissent found that the other possible purposes were “substantial”—not just conceivable.⁷³

III. THE RELATIONSHIP OF REASONABLE AND RATIONAL

The relationship aspect of the rational basis test is different from the relationship aspect of the reasonable basis test in two ways. First, with the rational basis test, the Court appears to invent ways the law might advance the legitimate end—whether realistic or not. With the reasonable basis test, the Court appears to determine if the law actually advanced the claimed purpose—or at least a plausible purpose. Second, the Court is clear that the rational basis test does not require any consideration as to whether other alternatives might better address the problem. As to the reasonable basis test, the Court will consider whether there are better alternative ways to advance the claimed interest.

In applying the rational basis test, the Court’s approach is to invent reasons supporting the law that when combined with cherry picking possible legitimate ends virtually assures that the law will advance the end.⁷⁴ There is little surprise in this approach because that is announced as being at the very core of the rational basis test: “it is for the legislature, not the courts,

72. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 412–14, 416 (1920).

73. *Id.* at 418 (Brandeis, J., dissenting) (“The following reason is, in my opinion, substantial, and shows that the classification is not illusory, nor the state’s action necessarily arbitrary or invidious.”). In other ways, the dissent’s findings are reminiscent of the Court’s conceivable approach in *Lee Optical*. Justice Holmes was among the early opponents of the strict scrutiny approach of *Lochnerism*. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

74. Professor Cass Sustein put it this way:

Modern rationality review is also characterized by extremely deferential means-ends scrutiny. The Supreme Court demands only the weakest link between a public value and the measure in question, and it is sometimes willing to hypothesize legitimate ends not realistically attributable to the enacting legislature. As a result, few statutes fail rationality review.

Cass R. Sustein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697–98 (1984). Professor Gunther was unduly optimistic after what he viewed as the successful use of the rational basis test in the 1972 term of the Supreme Court: “The time may be ripe, in short, for the serious exercise of a Court function long abandoned in fact though never scuttled in verbiage: a modest but real inquiry to determine whether ‘the means selected have a real and substantial relation to the object sought to be attained.’” Gunther, *supra* note 9, at 41–42 (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)).

to balance the advantages and disadvantages of the new requirement.”⁷⁵ Still, it is bit jarring to see the level of disingenuousness in the process.

In *Lee Optical*, the law would not allow opticians to cheaply and easily replace broken frames or lenses unless an optometrist prescription was on file with the optician.⁷⁶ This did not make sense because, as the Court said, “the optician can easily supply the new frames or new lenses without reference to the old written prescription.”⁷⁷ It was also unlikely that the prescription said anything about how to fit the glasses to the face, but the Court said the legislature may have thought “the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses.”⁷⁸ It was entirely speculative whether a prescription would ever be needed, but maybe the legislature thought it “was needed often enough to require one in every case.”⁷⁹ In case this level of invention was insufficient, the Court said that—irrespective of any evidence suggesting that an eye exam was needed—the legislature could have concluded that the most routine of acts, such as “every duplication of a lens should [require] a prescription from a medical expert,” despite the fact the law did no such thing.⁸⁰ In some instances, an old prescription might be on file with the optician, and, in the case of non-prescription ready to wear glasses, the customer could just pick out their own at the drug store.⁸¹ The fact that the law was not “in every respect logically consistent with its aims” was not constitutional significant because there was “an evil at hand for correction” and the law may be “a rational way to correct it.”⁸²

Regarding the rational basis test, the Court says time and time again that it is the legislature’s job to pick the correct approach and that the Court will uphold it however unwise it might seem. The Court in *Heller v. Doe* upheld a law making it easier to commit to an institution those who were intellectually challenged as compared with the mentally ill.⁸³ In *Heller*, the Court acknowledged that the state may have taken a less intrusive approach but said this was “irrelevant in rational-basis review” and that

75. *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 487 (1955).

76. *Id.* at 486. Professor Nachbar, without citation, claims that *Lee Optical* is “frequently cited for the birth of the modern rational basis test.” Nachbar, *supra* note 4, at 1648. Whether representing the birth of the modern test or not, it is one of its more egregious examples. It is also more widely cited than *Carolene Products*. Westlaw lists 1,212 cites to federal cases for *Lee Optical* versus just more than 700 for *Carolene Products*.

77. *Lee Optical*, 348 U.S. at 487.

78. *Id.*

79. *Id.*

80. *Id.*

81. They are sold at Costco in bulk—three for \$12.49. Readers, COSTCO, <https://www.costco.com/reading-glasses.html?sortBy=BestMatch> [<https://perma.cc/BM9Q-RPDZ>].

82. *Lee Optical*, 348 U.S. at 487–88.

83. *Heller v. Doe*, 509 U.S. 312, 314–15, 333 (1993).

the Court did not “require Kentucky to have chosen the least restrictive means of achieving its legislative end.”⁸⁴

In applying the reasonable basis test, the Court in *Weaver* was far more careful in considering whether the law actually advanced some legitimate end, and, even if it did, the Court also considered whether there were better alternatives.⁸⁵ The reasonable basis test as stated in *Weaver* is a more open inquiry than the *Carolene Products* rational basis test some twelve years later.⁸⁶ The *Weaver* Court said that whether the law banning shoddy violated “the due process or equal protection clause [depended] on the facts of the case” and that although legislative findings were “entitled to great weight . . . it is always open to interested parties to show that the Legislature has transgressed the limits of its power.”⁸⁷ It said that the burden was on the party attacking the law, but that contrary evidence “will be judicially noticed [or] established by evidence.”⁸⁸ In *Carolene Products*, the Court said it would deny due process for a law to preclude proof that the law had no rational basis, but in every other way the Court made it difficult to prove that point.⁸⁹ The *Carolene* Court said “the existence of facts supporting the legislative judgment is to be presumed” and was not to be found unconstitutional “unless in the light of the facts made known or generally assumed it is of such a character as to preclude

84. *Id.* at 329–30 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973)). The Court in *Heller* cited to similar language in *San Antonio Independent School District v. Rodriguez*:

Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State’s interest, which occasion “less drastic” disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.

411 U.S. at 51. Admittedly, rejecting the “less drastic” approach is not entirely the point. *Id.* Under the rational basis test, the Court will not consider any alternative, let alone requiring that it be “less drastic” or “least restrictive.” *Id.*

85. See generally 270 U.S. 402 (1926).

86. Compare *id.* at 410 (“Invalidity may be shown by things which will be judicially noticed . . . or by facts established by evidence.” (citation omitted)), with *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (“[T]he existence of facts supporting the legislative judgment is to be presumed.”).

87. *Weaver*, 270 U.S. at 410 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922)). *Weaver* framed it as either a due process or equal protection issue. See *id.* Because the law banned the use of shoddy, it is better viewed as a due process issue, but because it allowed the use of other types of used fabrics it could also be stated as an equal protection issue.

88. *Id.* (citing *Quong Wing v. Kirkendall*, 223 U.S. 59, 64 (1912)).

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

the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”⁹⁰ The *Weaver* Court had said great weight would be given to legislative findings, but that they could be disproved and that contrary evidence could be proven by facts or judicially noticed.⁹¹ *Carolene Products* also recognized that it was proper for the Court to consider evidence showing that the law was “without support in reason,” but the Court placed an almost impossible burden on the challenger, that it “must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.”⁹² In the end, *Carolene Products* said that the law was at least “debatable” and that was enough to uphold it.⁹³

In *Weaver*, the Court did not believe the ban on shoddy advanced any legitimate health concerns but seemed to accept that the ban did address a legitimate concern for the queasiness someone might have from their comforters being made from used products.⁹⁴ As for that concern, the Court felt a label tag, such as those used for products with secondhand fabrics, would address whatever legitimate concerns the public might have.⁹⁵ To this day, we have labels on our pillows and related items that warn us they are not to be removed prior to sale under penalty of the law.⁹⁶ The finding that a label tax would address any legitimate concern is the consideration of a reasonable alternative, something the Court does not do in applying the rational basis test.

The Court in *Carolene Products* broadly assumed the power “to protect the public from fraudulent substitutions, was not doubted,” that banning Milnut was “an appropriate means of preventing injury to the public,” and that it “might rest decision wholly on the presumption of constitutionality.”⁹⁷

90. *Id.* Professor G. Edward White lists *Carolene Products* as a famous Supreme Court mistake and accurately notes that

[w]hen one looks closely at Justice Stone’s opinion in *Carolene Products*, it becomes clear how much work was being done by his presumption of constitutionality and his endorsement of a rational basis standard of review for “regulatory legislation affecting ordinary commercial transactions.” Those devices enabled him to avoid the critical question in the case, whether Congress could prohibit shipments of Milnut in interstate commerce without a specific finding that Milnut was injurious to public health.

G. Edward White, *Determining Notoriety in Supreme Court Decisions*, 39 PEPP. L. REV. 197, 217 (2011) (footnote omitted) (quoting *Carolene Products*, 304 U.S. at 152).

91. *Weaver*, 270 U.S. at 410.

92. *Carolene Products*, 304 U.S. at 153–54.

93. *Id.* at 154.

94. *Weaver*, 270 U.S. at 412.

95. *Id.* at 414–15.

96. *See, e.g.*, Textile Products Identification Act, 15 U.S.C. § 70(c) (2018).

97. *Carolene Products*, 304 U.S. at 148.

The Court did not give even the slightest nod toward better labeling to protect those who thought Milnut was actually the same as milk.⁹⁸

IV. THE BABY AND THE BATHWATER: HOW THE REASONABLE BASIS TEST BECAME THE RATIONAL BASIS TEST

At no point has the Supreme Court specifically rejected the reasonable basis test in favor of the rational basis test. Nonetheless, without any acknowledgment, the Court's rejection of the reasonable basis test could not be more obvious.

In the pre-1937 Supreme Court cases, the reasonable basis test placed the burden on the challenging party, but the Court's evaluation of the facts was—if not exactly balanced—certainly not a foregone conclusion. *Weaver* is illustrative of this point, as it turned no fantastic jurisprudence; the Court simply found that the ban on shoddy was an unnecessary restriction on a widely used and useful product.⁹⁹ In the post-1937 cases, the rational basis test, by whatever name, is nothing but a foregone conclusion. *Carolene Products* and *Lee Optical* demonstrate this assertion with precision.

In *Carolene Products*, the Court attempted no independent examination of the ban on a cheap and useful alternative to milk.¹⁰⁰ It accepted congressional committee testimony as to the health consequences—of which there were in fact few, if any.¹⁰¹ It did not even attempt to consider labeling alternatives to the questionable concerns for fraud.¹⁰² *Lee Optical* is even worse: the Court was aware of just how wasteful the limits on opticians were, but it nonetheless chose to imagine the legislature might have conceived of some inconceivable reasons for the law—other than the obvious goal of limiting useful competition to entrenched businesses.¹⁰³ Like *Weaver*, no great philosophical point controlled either *Carolene Products* or *Lee Optical*, but Court chose to assume one did.

98. See generally *id.* A 1919 case cited by *Carolene Products* for its holding involved a milk-filled product—called Hebe, an even more unattractive name than Milnut—where the Court rejected, but at least acknowledged, labeling as an alternative. See *Hebe Co. v. Shaw*, 248 U.S. 297, 303 (1919) (“It is true that so far as the question of fraud is concerned the label on the plaintiffs’ cans tells the truth—but the consumer in many cases never sees it.”).

99. *Weaver*, 270 U.S. at 415.

100. See generally *Carolene Products*, 304 U.S. 144.

101. *Id.* at 149–51.

102. See generally *id.*

103. See generally 348 U.S. 483 (1955).

It takes no brilliant deduction to see what happened. In rejecting Lochnerism and its attempt to impose an out of fashion economic theory on legislation, the Court also rejected a reasonable basis approach in favor of a rational basis approach. Thus, in my trite analogy, the baby—the reasonable basis test—went out with the bath water—Lochnerism.¹⁰⁴ The Court’s rejection in *Lee Optical* of any responsibility for reviewing “regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought” is far more than just a rejection of Lochnerism.¹⁰⁵ First of all, the rational basis cases are not limited to regulatory of business and industrial conditions. Perhaps the most candid—and the most oblivious—recognition of this is found in *Dandridge v. Williams* where the Court upheld a state law that capped child welfare increases at families of six:

To be sure, the cases cited . . . have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.¹⁰⁶

This disregard of the difference between business regulatory rules and feeding needy children is jaw dropping in its obtuseness and contrary to very theory of the rational basis test: that the political processes will lead to corrections. Even disregarding the inherent racism implicit in so much social welfare legislation,¹⁰⁷ there is a vast difference between business

104. See Gary Martin, *The Meaning and Origin of the Expression: Don’t Throw the Baby Out with the Bathwater*, PHRASE FINDER (2018), <https://www.phrases.org.uk/meanings/dont-throw-the-baby-out-with-the-bathwater.html> [<https://perma.cc/J7ZK-TCHP>] (“‘Throw the baby out with the bathwater’ is a German proverb and the earliest printed reference to it, in Thomas Murner’s satirical work *Narrenbeschwörung* . . . dates from 1512.”). The proverb was illustrated with a woodcut showing a plump baby being tossed out with water from a wooden tub. See *id.*

105. 348 U.S. at 488 (citations omitted). This widely cited quote from *Lee Optical* probably best reflects Justice Holmes’ dissenting opinion in *Lochner*—although *Lee Optical* does not cite to it. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” (citations omitted)). The Court in *Lee Optical* does extensively cite to several past cases to support its statement, but none capture the breadth of the Court’s language. See 348 U.S. at 488.

106. 397 U.S. 471, 485 (1970).

107. See generally *Jefferson v. Hackney*, 406 U.S. 535 (1972). In *Jefferson* the Court upheld Texas reduced welfare payments to those with dependent children as compared with the elderly—75% of need versus 100% of need—despite a clear statistical racial disproportionality. *Id.* at 545–46. As Justice Douglas said in dissent:

I would read the Act more generously than does the Court. It is stipulated that 87% of those receiving AFDC aid are blacks or Chicanos. I would therefore read the Act against the background of rank discrimination against the blacks

and industry influencing political decisions and the poor attempting to do such influencing.¹⁰⁸

The second problem with *Lee Optical*'s summary is that "unwise, improvident, or out of harmony with a particular school of thought" are not comparable concepts.¹⁰⁹ Lochnerism involves only the latter, "out of harmony with a particular school of thought."¹¹⁰ This is what Justice Holmes specifically rejected in his dissent in *Lochner*: "[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."¹¹¹ The fact that a law is *unwise or improvident* has nothing to do with any particular school of thought. In the heyday of Lochnerism, the Court—in cases such as *Weaver*—used the reasonable basis test to strike down laws, not out of any *laissez faire* view of the proper role of government, but because the laws made no sense. Although the Court's job might not be to claim any particular economic theory, it is unclear why its job is not to protect the public from the failure of the political process to prefer the public good over the entreaties of powerful moneyed interests—such as the insurance lobby—or indeed to preserve the use of humble shoddy from an overbroad and wasteful regulation.¹¹²

and the Chicanos and in light of the fact that Chicanos in Texas fare even more poorly than the blacks.

Id. at 551–52 (Douglas, J., dissenting) (citations omitted). Racial disproportionality alone does not change the level of review from the rational basis test. As the Court said in *Washington v. Davis*, "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." 426 U.S. 229, 242 (1976).

108. See generally, e.g., *Daniel*, 336 U.S. 220. In *Daniel*, the Court rejected the relevancy of the fact that a law was passed not because of any underlying good but pursuant to the insurance lobby. *Id.* at 224 ("It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality." (citing *Hammer v. Dagenhart*, 247 U.S. 251 (1918))). Even in *Carolene Products*, there is little chance a product beneficial to the poor would stand much of a competitive chance in a challenge to the dairy lobby; however, this is probably an oversimplification because there were likely other business interests—not just the poor—challenging the entrenched dairy industry. See 304 U.S. 144, 149–50 (1938).

109. *Lee Optical*, 348 U.S. at 488.

110. See *id.*

111. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

112. As for the consequences of these laws being upheld,

It is well enough for the Court to say in tax cases, for instance, that the law must only rationally relate to some conceivable legislative concern,¹¹³ but rational basis cases involve some of the most important practical and personal concerns in one's daily life. Housing,¹¹⁴ support for needy children,¹¹⁵

[o]bnoxious laws affecting economic liberties tend to stay on the books for exactly the same reason they get on the books in the first place: they provide concentrated benefits to powerful interest groups that care passionately about maintaining their government-protected status, while the costs are borne by a diffuse class of people most of whom will never know how they are being exploited.

Neily, *No Such Thing*, *supra* note 4, at 914.

113. The 2012 case of *Armour*, is not atypical. *See generally* 566 U.S. 673 (2012). Indianapolis imposed sewage improvement fees on local property owners that could be paid in a lump sum or for a period of up to thirty years. *Id.* at 677–78. To encourage more rapid transition from septic tanks, Indianapolis abandoned the improvement fees, forgiving any installment amounts still owed but not reimbursing those homeowners who had paid in full. *Id.* at 675–76. Though more personal in its impact than many tax classifications or fee assessments, the Court applied their traditional approach:

“[A] classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” . . . We have made clear in analogous contexts that, where “ordinary commercial transactions” are at issue, rational basis review requires deference to reasonable underlying legislative judgments. . . . And we have repeatedly pointed out that “legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.”

Id. at 680 (citations omitted) (first quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993); then quoting *Carolene Products*, 304 U.S. at 152; and then quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983)). Perhaps because of the patent unfairness of the law, the Court pulled out many of its favorite rational basis tropes. It said that only “a plausible policy reason,” or “any reasonably conceivable state of facts,” which might be “within the knowledge and experience of the legislators” was sufficient and that the “burden is on the one attacking the legislative arrangement to negative every conceivable basis” for the law. *Id.* at 681 (first quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); then quoting *FCC v. Beach Commc’ns Comm’n, Inc.*, 508 U.S. 307, 313 (1993); then quoting *Carolene Products*, 304 U.S. at 152; and then quoting *Heller*, 509 U.S. at 320). The *Armour* Court then concluded unconvincingly that “administrative convenience” was enough to justify the law. *Id.* at 682 (quoting *Carmichael v. S. Coal & Coke Co*, 301 U.S. 495, 511 (1937)).

114. *See generally, e.g., Nordlinger*, 505 U.S. 1.

115. *See generally, e.g., Dandridge v. Williams*, 397 U.S. 471 (1970). The Court in *Dandridge* upheld Maryland’s decision to cap child welfare payments to families of more than six although admitting. *Id.* at 472, 487 (“We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised.”).

protection from disproportionate racial impact,¹¹⁶ medical coverage for everything from pregnancies¹¹⁷ to abortions,¹¹⁸ decisions as to life and death,¹¹⁹

116. See generally, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). In *Washington*, the Court held that the rational basis test applied as to otherwise neutral laws despite their disproportionate racial impact. *Id.* at 242; see also *Jefferson v. Hackney*, 406 U.S. 535, 545–46 (1972) (“[T]he State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.”).

117. See generally, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974) (“Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. ‘The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.’” (quoting *Dandridge*, 397 U.S. at 486–87)).

118. See generally, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (“Where . . . Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. . . . It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in [the law] is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so.”).

119. See generally, e.g., *Vacco v. Quill*, 521 U.S. 793 (1997). In *Vacco v. Quill*, the Court upheld New York’s distinction between a doctor’s administering pain medications that might hasten death and a doctor’s assistance in a suicide. *Id.* at 808–09. The Court determined that

New York’s reasons for recognizing and acting on this distinction—including prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians’ role as their patients’ healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia—[were all] valid and important public interests [that] easily satisf[ied] the constitutional requirement that a legislative classification bear a rational relation to some legitimate end.

Id.

job security,¹²⁰ equality of education,¹²¹ and virtually every concern crucial in day to day living have been given the short sheet approach of the rational basis level of review by the Supreme Court.¹²²

V. WHY THE RATIONAL BASIS TEST HAS SURVIVED FOR EIGHTY YEARS

Carolene Products was decided eighty years ago on April 25, 1938.¹²³ While other legal theories have come and gone, the rational basis test that

120. See generally, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976). In *Massachusetts Board of Retirement v. Murgia*, the Court upheld a Massachusetts law that required police officers retire at age fifty because of concern for their physical fitness. *Id.* at 308. Prior to that age, officers were subject to yearly fitness test for that purpose. *Id.* at 316. The Court acknowledged that “the State perhaps has not chosen the best means to accomplish this purpose” but “[t]hat the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation.” *Id.* 316. The Court continued:

We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. . . . But “we do not decide today that the [law] is wise, that it best fulfills the relevant social and economic objectives that [the state] might ideally espouse, or that a more just and humane system could not be revised.” . . . We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws.

Id. at 314–17 (footnote omitted) (citation omitted) (quoting *Dandridge*, 397 U.S. at 487). For a summary of the fascinating internal battle in the Supreme Court over the statement of the level of review in *Murgia*, see generally Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 544–54 (2014).

121. See generally, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

122. This is not to say that there was no justifiable reason for any of these decisions, only that the permissive scrutiny of the rational basis test is at odds with the importance of the underlying interest at stake. In an unusually long review of the Court’s substantive due process history, Justice Souter—in a concurring opinion in *Glucksberg*—concluded that the due process rightfully includes a substantive aspect: the clause “imposes nothing less than an obligation to give substantive content to the words ‘liberty’ and ‘due process of law.’” 521 U.S. 702, 764 (1997) (Souter, J., concurring). In his history lesson, Souter improbably equates Lochnerism with the odious *Dred Scott* decision that elevated ownership of slaves above constitutional limits. *Id.* at 761 (Souter, J., concurring). In his extensive summary of substantive due process—from what he says was its beginning in a dissenting opinion in the *Slaughter-House Cases*, to modern times—he does not once cite a pure rational basis case. See generally *id.* at 756–62 (Souter, J., concurring).

123. See *United States v. Carolene Products Co.*, 304 U.S. 144, 144 (1938). To the best of my knowledge, there are no parties planned. Other relevant inventions and occurrences that took place in 1938 include the first nylon products and toothbrushes; Teflon was invented; the first patents for TV were issued; instant coffee was invented; the first seeing eye dogs were used; Buick installed the first electronic turn signal; and San Quentin replaced its gallows with a gas chamber. *Timeline 1938*, TIMELINES HIST., <https://timelines.ws/20thcent/1938.HTML> [<https://perma.cc/2Y5X-3FXW>]. Hitler seized control of the German army

Carolene Products personifies has at its core remained virtually unchanged.¹²⁴ Its staying power is, in part, because *Carolene Products* built into its test a loophole found in its famous Footnote 4¹²⁵ and, in part, because the rational basis test makes Supreme Court decisions easy.

and later that year received a stiff scolding from President Herbert Hoover. *Id.* Clarence Darrow, of the famed Scopes Monkey trial died at eighty. *Id.* Crystal Bird Fauset of Pennsylvania was the first black woman elected to a state legislature and current congresswoman Maxine Waters was born. *Id.* Also born were Jerry Brown, Jr., Kenny Rodgers, Duane Eddy, and Alan Dershowitz. *Id.* The federal government made it a crime for a felon to possess a gun. *Id.* And last, the Salvation Army started National Doughnut Day in honor of the female volunteers who served coffee and pastry items to the troops during World War I. *Id.*

124. Just three years before *Carolene Products*—to prevent inherited criminal traits from being passed on—Oklahoma passed a law permitting the sterilization of persons convicted of two or more felonies involving moral turpitude. See OKLA. STAT. ANN. tit. 57 §§ 171, 176–177 (1935). In *Skinner v. Oklahoma*, the Court found the 1935 statute, Oklahoma’s Habitual Criminal Sterilization Act, to violate equal protection rights. 316 U.S. 535, 536, 541–43 (1942) (citing OKLA. §§ 171, 173–174, 176–181). In 1927 in *Buck v. Bell*—one of the stains on Supreme Court history—Justice Holmes for the Court upheld the sterilization of Carrie Buck, who the Court described as “a feeble minded white woman[,] the daughter of a feeble minded mother[,] and the mother of an illegitimate feeble minded child.” 274 U.S. 200, 205 (1927). The Court dismissively concluded that “[t]hree generations of imbeciles are enough.” *Id.* at 207. It is unlikely that any of the three—grandmother, mother, or daughter—were feeble minded, let alone imbeciles.

125. Footnote 4 reads in part:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Carolene Products, 304 U.S. at 153 n.4 (citations omitted). Professor Bruce Akerman, perhaps unfairly, finds *Carolene Products* insignificant but for this footnote. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 713–14 (1985) (“T[hese] famous words, appearing in the otherwise unimportant *Carolene Products* case, came at a moment of extraordinary vulnerability for the Supreme Court. They were written in 1938. The Court was just beginning to dig itself out of the constitutional debris left by its wholesale capitulation to the New Deal a year before.”). Justice Powell was almost equally dismissive. See Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982) (“From today’s perspective, *United States v. Carolene Products* seems an unremarkable, even an easy, case. [It] retains its fascination solely because of Footnote 4—the most celebrated footnote in constitutional law.”). Professor Balkin simply calls it “the footnote.” Balkin, *supra* note 22, at 275 (emphasis added). According to Professor Balkin, although footnotes are generally “of minor importance. . . . relegated to the bottom of the page [and living] a life of

In Footnote 4, one of the most famous footnotes in Supreme Court history,¹²⁶ the Court qualified its holding in *Carolene Products* that “legislation affecting ordinary commercial transactions” was to be upheld as constitutional unless there were no state of facts indicating it might “rest[] upon some rational basis within the knowledge and experience of the legislators.”¹²⁷ Footnote 4 speculated that legislation that impacted the political processes might be subject to “more exacting judicial scrutiny,” and that in some instances mild mannered Clark Kent might become Superman.¹²⁸ The Court mentioned as examples of what may subvert the normal political process: “a specific prohibition of the Constitution,” such as free speech;¹²⁹ “legislation which restricts those political processes,” such as the right to vote;¹³⁰ and “statutes directed at particular religious . . . or racial minorities.”¹³¹

exclusion and marginalization,” Footnote 4 “has enjoyed fame and fortune. Indeed, [Footnote 4] has for so long escaped marginalization that the opposite has tended to happen—the footnote has become much more important than the body of the opinion it appears in, an opinion whose actual holding is often forgotten.” *Id.* at 276, 282.

126. Professor Owen Fiss, who taught this author Constitutional Remedies at the University of Chicago Law School, saw transcendental importance in the footnote. See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (“The great and modern charter for ordering the relation between judges and other agencies of government is footnote four of *Carolene Products*. The greatness derives not from its own internal coherence, or any theoretical insight, but from its historical position.” (footnote omitted) (citing *Carolene Products*, 304 U.S. at 152 n.4)). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Professor Akerman claims Dean John Ely’s book, *Democracy and Distrust*, “is the most important effort to develop footnote four’s larger implications for the practice of judicial review.” Ackerman, *supra* note 125, at 716 n.6.

127. 304 U.S. at 152 (citing *Metro. Caus. Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1935)).

128. *Id.* at 152 n.4. Coincidentally, Superman first appeared in Action Comics in 1938. *Timeline 1938*, *supra* note 123.

129. *Carolene Products*, 304 U.S. at 152 n.4 (citing the free speech case, *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), which was decided just a month before).

130. *Id.* at 153 n.4 (expressing a concern for limits on the means for obtaining “repeal of undesirable legislation” such as “restrictions upon the right to vote”; “restraints upon the dissemination of information”; and “interferences with political organizations” (citations omitted)).

131. *Id.* (citations omitted). The Court was concerned about laws infringing on the political process as to those “which tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *Id.* The *Carolene Products* Court also referenced another 1938 case, *South Carolina State Highway Department v. Barnwell Bros.*, in which the Court expressed suspicion as to state restrictions on interstate commerce where the burden primarily fell out of state. See *id.* (citing *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 185 (1938)). The Court in *Barnwell* applied a rational basis test in upholding a state regulation of interstate trucking as to width and weight out of step with neighboring states. 303 U.S. at 191–92 (citations omitted).

In some ways, Footnote 4 became the cornerstone for the higher level of review for fundamental rights and suspect or quasi-suspect classifications.¹³² Justice Scalia referred to “the famous footnote” as “the genesis of heightened standards of judicial review.”¹³³ Justice Sotomayor recently summarized the importance of the footnote: “[W]hile ordinary social and economic legislation carries a presumption of constitutionality, the same may not be true of legislation that offends fundamental rights or targets minority groups.”¹³⁴ Chief Justice Roberts did not let Justice Sotomayor’s use of the footnote go unchallenged, chiding the dissent because it “trots out the old saw, derived from dictum in a footnote.”¹³⁵ In a still more recent case, Justice Thomas was scathing in his reference to the footnote: “Though the footnote was pure dicta, the Court seized upon it to justify its special treatment of certain personal liberties like the First Amendment

132. Using the due process clause, the Court has called some rights fundamental—including the right to privacy, to vote, and to bodily integrity—and applying strict scrutiny required that any laws limiting such rights must be narrowly tailored to advance some compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“[T]he Fourteenth Amendment ‘forbids the government to infringe “fundamental” liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

133. *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) (citing *Carolene Products*, 304 U.S. at 152 n.4).

134. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1668 (2014) (Sotomayor, J., dissenting).

135. *Id.* at 1644 (Roberts, J., concurring). Justice Roberts seemed to be challenging the appropriateness of the footnote to the case rather than its historic significance—but not entirely because he was dismissive of its precedential value. *Id.* at 1645 (Roberts, J., concurring) (“But the more important point is that we should not design our jurisprudence to conform to dictum in a footnote in a four-Justice opinion.”). Because there were only seven justices deciding *Carolene Products*, four was a majority. *See generally* 304 U.S. 144. In an article, Justice Powell also called the footnote dictum, “perhaps the most farsighted dictum in our modern judicial heritage. But, after all, it is *dictum* and was intended to be no more.” Powell, *supra* note 125, at 1092. Disdain for Footnote 4 is hardly new. In 1973, Justice Rehnquist quoted from a 1949 case—what he called Justice Frankfurter’s apt observation—arguing that Footnote 4 had no place in supporting strict scrutiny for classifications based upon alienage. *Sugarman v. Dougall*, 413 U.S. 634, 655–57 (1973) (Rehnquist, J., dissenting) (“A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine.” (quoting *Kovacs v. Cooper*, 336 U.S. 77, 90–91 (1949) (Frankfurter, J., concurring))).

and the right against discrimination on the basis of race—but also rights not enumerated in the Constitution.”¹³⁶

Despite all of this recognition, one should not make too much of the importance of Footnote 4 to the more scrupulous review; there were other grounds to use that standard.¹³⁷ The Court in *Strauder v. West Virginia* in 1890 recognized the special commitment of the equal protection clause in preventing discrimination based upon race.¹³⁸ The Court in the *Slaughter-House Cases* made similar comments.¹³⁹ As to free speech, just a month

136. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2329 (2016) (Thomas, J., dissenting). *Hellerstedt* struck down two Texas laws that had severely undermined the availability of abortion clinics. *Id.* at 2300. Among other things, Justice Thomas blamed Footnote 4 for *Roe v. Wade*. See *id.* at 2329 (Thomas, J., dissenting) (citing *Roe v. Wade*, 410 U.S. 113, 162–64 (1973)).

137. It is possible to overemphasize the importance of any footnote. Perhaps no article makes the point better than the assertion that *Carolene Products*’ Footnote 3 is evidence that, like the pyramids, *The Bluebook* citation guide is a product of “extraterrestrial origin”:

The fact that the Bluebook is “the *universally* accepted standard for citations” reveals its extraterrestrial origin. The Bluebook has yet to conquer the entire world of law, and its rules still leave uncertain the citation of particular sources. Only recognition of the special origins of the Bluebook and of footnote three will cause such a conquest and remedy such ambiguities. Only then can we live up to the imprecation of the ancient philosophers: *Verba tene, res sequitur*.

Aside, *Don’t Cry over Filled Milk: The Neglected Footnote Three to Carolene Products*, 136 U. PA. L. REV. 1553, 1566, 1566 n.78 (1988) (footnotes omitted) (quoting M. RAY & J. RUMSFELD, *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* 35 (1987)). “Loosely translated, [*Verba tene res sequitur* means] ‘Form over substance.’” *Id.* at 1566 n.8.

138. See 100 U.S. 303, 305–07 (1879) (involving a West Virginia law that limited service of juries to “white male persons who are twenty-one years of age and who are citizens of this State” (citation omitted)). The Court seemed fine with gender, age, and citizenship classifications, but as to race, the Fourteenth Amendment required a higher level of protection. *Id.* at 306–07 (“[The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.”).

139. See 83 U.S. (16 Wall.) 36, 71–72 (1872). The *Slaughter-House Cases*, much quoted in the *Strauder* case, involved a sweeping challenge to Louisiana law that limited being a butcher to members of a guild—a challenge to the law alleged violations of the Thirteenth Amendment and the privileges and immunities clause, the due process, and the equal protection clauses of the Fourteenth Amendment. *Id.* at 36–37, 44, 48–49, 53–55, 66. The Court gave a limiting construction of virtually every clause but did clearly acknowledge the importance of race as to the Thirteenth, Fourteenth, and Fifteenth Amendments:

[I]n the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without

before *Carolene Products*, the Court struck down a law on free speech grounds in *Lovell v. Griffin*.¹⁴⁰ While the fundamental right to vote and to travel interstate would both justify an elevated level of review under the footnote,¹⁴¹ there is nothing in the footnote that suggests the higher

which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

Id. at 71–72.

140. See 303 U.S. 444, 448, 450–52 (1938) (citations omitted). *Lovell* referred to free speech as “among the fundamental personal rights and liberties” protected “from invasion by state action,” which was more a reference to the Doctrine of Incorporation than an elevated level of review. *Id.* at 450 (citations omitted). The Court in *Lovell* struck down a city law that required permission from the city manager to distribute various types of leaflets on free speech grounds. *Id.* at 447–49, 452 (citations omitted). *Lovell* cited several prior free speech cases, starting with *Gitlow v. New York*, which rejected the application of the “clear and present danger test” to a law making it a felony as to one who “advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence.” 268 U.S. 652, 654 (1925) (first quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919); and then quoting N.Y. PENAL LAW § 161 (1909)). The *Gitlow* Court seemed to apply the lowest level of scrutiny. See *id.* at 670 (“We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.”). *Stromberg v. California*, another case cited by *Lovell*, found invalid a city law making it a felony to “display[] a red flag, banner or badge . . . as a sign, symbol or emblem of opposition to organized government.” 283 U.S. 359, 361 (1931) (quoting CAL. PEN. CODE § 403(a) (1921)). The Court held: “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” *Id.* at 369. *Stromberg* credited *Gitlow* as holding that the First Amendment applied to the states. See *id.* at 368 (citing *Gitlow*, 268 U.S. at 666). However, *Gitlow* did no such thing; it merely assumed without discussion that the First Amendment applied to the states as a preliminary step in holding that free speech rights were not violated. See *Gitlow*, 268 U.S. at 666. The *Lovell* Court also cited *Grosjean v. American Press Co.*, which too used the word “fundamental,” but only to mean free speech rights had been made applicable to the states. 297 U.S. 233, 244 (1936) (“That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has likewise been settled by a series of decisions of this court beginning with [*Gitlow*].” (citing *Gitlow*, 268 U.S. at 666)).

141. See *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other

level of review given to the right to privacy.¹⁴² The right to privacy is fundamental because the Court disapproves reliance on the political processes for such an important right, not because of a concern with any distortions in the ability to use the political process.¹⁴³

The main significance of the famous footnote is that it allowed the Court to avoid the systemic weaknesses of the rational basis test whenever it wanted. Aside from the aforementioned fundamental rights and suspect classifications, the high intermediate scrutiny is given to gender classifications¹⁴⁴ and the low intermediate scrutiny given to illegitimacy are other examples.¹⁴⁵

basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”). As *Carolene Product*’s Footnote 4 had intimated, the degree to which the burden of the law falls out of state makes it more or less likely that the law will be politically self-correcting. See 304 U.S. 144, 152 n.4 (1938).

142. See generally *Carolene Products*, 304 U.S. at 152 n.4. As *Griswold v. Connecticut* stated:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

Yet it is an association for as noble a purpose as any involved in our prior decisions. 381 U.S. 479, 486 (1965). *Griswold* found that the right to privacy, including in the case the right of married persons to use contraceptives, to be fundamental for a host of reasons, including penumbras of the First, Third, Fourth, and Fifth Amendment, none involving any distortion of the political processes. *Id.* at 484–86.

143. While not a reference to the legislative process itself, the *Griswold* Court did condemn the results of the law. See 381 U.S. at 485–86 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

144. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”). In dissent, Justice Rehnquist referred to this test as “an elevated or ‘intermediate’ level scrutiny.” *Id.* at 218 (Rehnquist, J., dissenting). Justice Ginsburg seemed to frame the test somewhat more strictly in *United States v. Virginia*: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” 518 U.S. 515, 531 (1996). Chief Justice Rehnquist just seemed to shake his head in bemusement at the emphasis on the recycled phrase: “It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.” *Id.* at 559 (Rehnquist, J., concurring). Justice Stewart first used the “exceedingly persuasive justification” phrase in *Personnel Administrator of Massachusetts v. Feeney*. 442 U.S. 256, 273 (1979).

145. The Court’s treatment of classifications based upon legitimacy of birth is far from a model of consistency, but the Court seems to have settled on a low-level intermediate scrutiny test to distinguish it from the Court’s more protective intermediate test for gender classifications. See *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (“Although . . . classifications based on illegitimacy are not subject to ‘strict scrutiny,’ they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests.” (citations omitted)).

Another example is evident in the Court's use of the irrebuttable presumption doctrine to strike down laws.¹⁴⁶ The rediscovery of the Contract Clause might be another example.¹⁴⁷ The examples of the Court using heightened scrutiny in avoiding the rational basis test likely include the Court's use of the rough proportionality test in its no taking cases to strike down unfair exactions.¹⁴⁸ Even its use of a full-out balancing test in procedural due

146. The irrebuttable presumption cases seem to have no point but to use procedural due process as a way of avoiding the unfairness that the rational basis test would have required. The Court in *Weinberger v. Salfi*, apparently brought a screeching halt to any expansion of the irrebuttable presumption line of cases. *See generally* 422 U.S. 749 (1975). Professor Jonathon Chase argues for use of an irrebuttable presumption test but agrees as to the approach's likely demise:

Whether, after *Weinberger v. Salfi*, the doctrine retains any vitality is doubtful. Analysis of the Court's opinion realistically compels the conclusion that it is dead. . . . Since the Court in *Salfi* refrained from explicitly overruling the recent decisions giving definition to this analysis, revival is not foreclosed although candor requires the concession that the likelihood is remote.

Jonathon B. Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 U. COLO. L. REV. 653, 705 (1976).

147. The current public purpose balancing test for the Contract Clause, at least in its most common modern statement in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, seems somewhat more protective than the rational basis test: "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." 459 U.S. 400, 403, 411–12 (1983) (citations omitted) (first citing *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977); and then citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978)). Professor Douglas Kmiec and John McGinnis nicely trace the "[e]visceration" in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), of the Contract Clause's original understanding to the clause's revival in *U.S. Trust Co.*, 431 U.S. 1, and *Allied Steel*, 438 U.S. 234, only to what Kmiec and McGinnis view as again a retreat in *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983). Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 541–51 (1987).

148. The Court treats exactions—conditions on the change of use of real property—as Fifth Amendment no taking issues. *See generally* *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). Exactions must satisfy both an "essential nexus" test and a rough proportionality test. *Id.* at 837. "Essential nexus" means that the conditions advance the purpose given for the conditions: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981)). This differs from rational basis, where the Court will accept other better purposes, even in the absence of any evidence that the law was passed for those purposes. "[R]ough proportionality" means that the conditions bear some reasonable relationship to the harm caused by any change of use. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise

process cases vitiates some of the irrationality of its rational basis test.¹⁴⁹ Certainly its more searching rational basis cases are an example of avoiding the irrationality of some of the more unfortunate consequences of permissive review.¹⁵⁰ Most recently, the Court found that although the Second Amendment's personal right to keep and bear arms was not absolute, it was also subject to some restrictions.¹⁵¹ Exactly what regulations might

mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”).

149. Procedural due process rights to a hearing protect substantive property and liberty interests when there is some type of adjudicatory taking. Though the underlying substantive interest may get only a rational basis level of protection, procedural due process rights may be very protective. See *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970) (“[T]he question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.”). Even though the recipient would not have a viable claim to any particular benefit, once the benefit was given it could not be taken by administrative action without procedural due process. See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Unlike the substantive due process rational basis test, procedural due process is “not a technical conception,” it is “flexible and calls for such procedural protections as the particular situation demands,” and whether any particular proceedings are constitutional “requires analysis of the governmental and private interests that are affected.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (first quoting *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 866, 895 (1961); then quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); then citing *Arnett v. Kennedy*, 416 U.S. 134, 167–68 (1974) (Powell, J., concurring in part); and then citing *Goldberg*, 397 U.S. at 263–66). Specifically, the Court requires a balancing of (1) “the private interest that will be affected,” (2) “the Government’s interest, including the [cost] additional or substitute procedural requirement would entail,” and (3) “the risk of an erroneous deprivation of such interest.” *Id.* at 335.

150. The Court uses a more searching rational basis test in equal protection cases when it believes a law was passed primarily out of animus towards a politically powerless or politically unpopular group. See *supra* notes 11–12 and accompanying text. The test focuses more on the actual purpose for which the law was passed, not as in a typical rational basis case on any conceivable purpose. See *supra* notes 11–12 and accompanying text. Even as to possible legitimate purposes, it is more careful in requiring a fit to the other purposes. See *supra* notes 11–12 and accompanying text. The first case seeming to use the more searching rational basis test was *Department of Agriculture v. Moreno*. See 413 U.S. 528, 534 (1973). After framing the traditional rational basis test, the Court said, “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* at 534. In a companion case, the Court struck down a different food stamp restriction on “rational” basis and “irrebuttable presumption” grounds. *U.S. Dep’t of Agric. v. Murry*, 413 U.S. 508, 514 (1973).

151. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“Like most rights, the right secured by the Second Amendment is not unlimited.”). Among the examples of ways that Second Amendment rights could be limited, the Court said,

the right [i]s not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [P]rohibitions on carrying concealed weapons [are] lawful [as are the] longstanding prohibitions on the possession of

be allowed is unclear, but almost certainly the standard for any law regulating gun ownership is a higher standard than the rational basis test.¹⁵²

The exceptions to the Court's use of the rational basis test remove enough cases from the rational basis test's orbit to lessen the forces that might call for its reevaluation. It is not unlike Justice Jackson's point in *Railway Express Agency, Inc. v. New York*, that discriminatory enforcement facilitates arbitrary actions:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.¹⁵³

Because the Court exempts so many cases from the rational basis test, its disregard for basic day-in, day-out needs is masked behind the appearance of a high level of protection for civil rights. To put it bluntly, the rational basis test continues to exist only because of the compelling state interest test and other types of higher scrutiny. The Court's elevation of certain rights facilitates its disregard of needs perhaps less intrinsically valuable to the workings of government, but arguably far more urgent in importance in day-to-day life.

There is much to admire in a Court that imposes strict scrutiny on some laws infringing free speech, on even a few laws impacting religious liberties, and on invasions of the fundamental right to privacy, to vote, and to travel interstate. But if put to the question, would Ms. Nordlinger have said that she valued her right to free speech more than her right to equal

firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. . . .

. . . [as well as] the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

Id. at 626–27 (citations omitted).

152. Justice Thomas wrote in dissent to a 2018 denial of certiorari: "Because the right to keep and bear arms is enumerated in the Constitution, courts cannot subject laws that burden it to mere rational-basis review." *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting) (citing *Heller*, 554 U.S. at 628 n.27).

153. 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

property taxes;¹⁵⁴ would Mr. Murgia have said that he valued Mrs. Murgia's right to an abortion over his right to keep his job;¹⁵⁵ or would Ms. Williams have said that she valued her ability to vote over the extra money that she needed to feed her many children?¹⁵⁶ Maybe no case illustrates the failure of the rational basis test more than *Maier v. Roe*.¹⁵⁷ Although those with resources—or at the very least medical insurance—were guaranteed the fundamental right to make procreation decisions, including access to abortions without undue burdens, indigent females in *Maier* had no right to equal treatment as to medical care, were abandoned by the courts, and were left in the hands of the political processes that would fail them time and again.¹⁵⁸

Of course, there is no reason why any of these people had to choose between a reasonable review of the fairness of their treatment and the elevation of other rights.¹⁵⁹ The Court could do both, but it does not. This is true even in cases involving the most important of personal interest. In *Dandridge*, the Court—despite acknowledging that prior cases “involved state regulation of business or industry” and *Dandridge* involved “the most basic economic needs of impoverished human beings”—still applied its most permissive review.¹⁶⁰ The Court upheld a state welfare law that provided no additional benefits to families larger than six:

154. See *supra* notes 14–18 and accompanying text.

155. See *supra* note 120.

156. See *supra* text accompanying note 106; *infra* text accompanying notes 160–161.

157. See 432 U.S. 464, 474 (1977) (“The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there.”).

158. See generally *id.* While *Maier* was limited to medically unnecessary abortions, the Court in *Harris v. McRae* extended *Maier*’s holding to some medically necessary abortions. See 448 U.S. 297, 321–22 (1980) (“[A]lthough federal reimbursement is available under Medicaid for medically necessary services generally, the [law in question] does not permit federal reimbursement of all medically necessary abortions.”).

159. Professor Gunther makes a similar point in his 1972 article:

That expanded reasonable means inquiry would not mean the end of strict scrutiny. In the context of fundamental interests or suspect classifications, the Court would continue to demand that the means be more than reasonable—*e.g.*, that they be “necessary,” or the “least restrictive” ones. . . . But when classifications such as race or interests such as speech are involved, tighter reins on the legislatures would remain appropriate. Under the means-focused model, however, there would be constraints in other legislative spheres as well. The intensified means scrutiny would, in short, close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry.

Gunther, *supra* note 9, at 24.

160. 397 U.S. 471, 485 (1970). The Court in *Dandridge* did not specifically mention the rational basis test. See generally *id.*

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some “reasonable basis,” it does not offend the Constitution simply because the classification “is not made with mathematical nicety or because in practice it results in some inequality.” . . . “The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.” . . . “A statutory discrimination will not be set aside if any state of facts *reasonably* may be conceived to justify it.”¹⁶¹

In *San Antonio Independent School District v. Rodriguez*, the Court upheld Texas’s grossly unequal funding of public schools: “[T]o the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so *irrational* as to be invidiously discriminatory.”¹⁶² The Court applied the rational basis test even in a case involving the failure to fund abortions in *Maher*: “The State unquestionably has a ‘strong and *legitimate interest* in encouraging normal childbirth,’ . . . an interest honored over the centuries. Nor can there be any question that the Connecticut regulation *rationaly furthers* that interest.”¹⁶³ It continued:

Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws “because they may be unwise, improvident, or out of harmony with a particular school of thought.” . . . Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that “legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”¹⁶⁴

The second reason for the continued existence of the rational basis test is that it makes the job easy for the U.S. Supreme Court. Once the Court decides the rational basis test applies, the case is over. There is no actual review of the reasons for the law, meaningful or otherwise. The Court has said as much so many times in so many ways, but the Court’s abdication

161. *Id.* at 485 (citations omitted) (first quoting *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); then quoting *Metropolis Theatre Co. v. City of Chi.*, 228 U.S. 61, 69–70 (1913); and then quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

162. 411 U.S. 1, 6, 15–16, 54–55 (1973) (emphasis added).

163. 432 U.S. 464, 478 (1977) (emphasis added) (footnote omitted) (citation omitted) (citing *Beal v. Doe*, 432 U.S. 438, 446 (1997)).

164. *Id.* at 479–78 (citations omitted) (first quoting *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955); and then quoting *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904)).

of the responsibilities of judicial review are heart-breakingly clear in its refusal to protect larger families from Maryland's politically expedient cap in *Dandridge*:

We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.¹⁶⁵

In dissent, Justice Marshall called this the “emasculat[i]on of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration.”¹⁶⁶

VI. THE IRRATIONALITY IN DECIDING WHAT CASES GET THE RATIONAL BASIS TEST

The line between the cases that get the permissive review of the rational basis test and the strict scrutiny of the compelling state interest is far from clear, yet the results of being on the rational basis side of the line is abandonment to what might have been in the mind of some long-lost legislature.¹⁶⁷ Victory and defeat are premised upon the unknowable. For

165. 397 U.S. 471, 487 (1970) (citation omitted) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)). Interestingly, the Court in *Dandridge* suggests that its blindness to the impact of the law on the neediest of the poor be compared to its holdings in *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 584–85 (1937), and *Helvering v. Davis*, 301 U.S. 619, 644 (1937), where it rejected limits on Congress' spending power to pass laws helping the unemployed and the elderly. *See id.* What a cruel turn for the Court itself to look the other way at state laws that discriminated against the neediest of the poor.

166. *Id.* at 508 (Marshall, J., dissenting). It is impossible to know why Maryland singled out families larger than six for disparate treatment. Hopefully, a commonly held belief that welfare families were profiting from a surfeit of wards was not the primary purpose. In this instance, as Justice Marshall pointed out, the fact that federal law reimbursed the state for the actual size of the family even allowed the state to “make a ‘profit’ in the sense that it would receive more from the Federal Government with respect to the family than the \$250 maximum that is actually paid to that family.” *Id.* at 513 (Marshall, J., dissenting). I am chagrined at the number of times I have defended in class Maryland's scheme based upon notions of *cheaper by the dozen*. My mom's meatloaf was so cut with days old bread that we four kids thought *meat* was intended satirically. A working family *making do* is not to be compared with the meanness of Maryland's classifications.

167. Or as Professor Gunther puts it, “[a] common defense of extreme judicial abdication is that the state has considered the contending considerations. Too often the only assurance

example, the right to marry and child rearing decisions,¹⁶⁸ turn on whether the law restricting those interests is serious enough to trigger strict scrutiny. It is hard to know whether any particular law will get permissive review or strict scrutiny, yet all depends on the seriousness of the issue.¹⁶⁹

that the state has thought about the issues is the judicial presumption that it has.” Gunther, *supra* note 9, at 44.

168. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 505 (1977).

169. The list of rights, only some involving the rational basis test, that are impacted by the uncertainty of different levels of review includes many fundamental rights. Free exercise of religion rights may get a low level of review or a high level of review depending on whether religion is singled out for disparate treatment—unless hybrid rights are involved, in which case they get automatically get the higher level of review. See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 881–83, 888 (1990). The fundamental right to travel interstate will get strict scrutiny if durational residency requirements penalize the right to travel interstate but not if state law adopts a property taxing scheme that makes it harder for new persons to move to the state. Compare *Shapiro v. Thompson*, 394 U.S. 618 (1969), with *Nordlinger v. Hahn*, 505 U.S. 1 (1992). Right to travel cases—based upon such things as length of residency or residency as of a fixed point of time—will divide the Court into almost incomprehensible camps. Compare *Zobel v. Williams*, 457 U.S. 55 (1982), with *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986). And can anyone figure out, with certainty, the line between content-based regulations of free speech that get strict scrutiny versus content neutral regulations that get an intermediate level of review? See generally *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994). The fundamental right to vote test in reapportionment cases will vary from as equal “as is practicable” for congressional districts, *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964), to “substantial equality” for state districts, *Gaffney v. Cummings*, 412 U.S. 735, 743–44 (1973). Unlike other differences in levels of review, it is at least easy to know in the reapportionment cases which test applies. Compare that with the morass of regulations on the fundamental right to vote access to the ballot cases. One federal district court recently summarized the Supreme Court’s approach as a sliding scale balancing test [including such things as] “the character and magnitude” of the burden on ballot access, . . . “the precise interests put forward by the State,” [and] “the character and severity of the burden imposed by the State” [with the test ranging from] “narrowly tailored and advance a compelling state interest” [to finding that] “a State’s important regulatory interests will usually be enough to justify . . . , nondiscriminatory restrictions.”

Breck v. Stapleton, 259 F. Supp. 3d 1126, 1131 (D. Mont. 2017) (citations omitted). And if access to the ballot cases are a morass, what will the Court’s possible attempt to civilize the world of political reapportionment be called? In oral argument to the Supreme Court’s review of Wisconsin’s baldly partisan political reapportionment scheme in *Gill v. Whitford*, the state solicitor general began: “This Court has never uncovered judicial and manageable standards for determining when politicians have acted too politically in drawing district lines.” Transcript of Oral Argument at 3, *Gill v. Whitford*, 138 S. Ct. 1916 (2017) (No. 16-1161). Perhaps it should have come as no surprise that the Court in the shorthand of the popular media decided to *punt* in the *Gill* case, putting off a decision on the merits on standing grounds. See *Gill*, 138 S. Ct. at 1923.

The Supreme Court has called the right to marry a fundamental right receiving strict scrutiny, perhaps most famously in *Loving v. Virginia*.¹⁷⁰ In *Zablocki v. Redhail*, the Court reaffirmed that marriage was a fundamental right, but it cautioned that not all regulations of marriage received strict scrutiny.¹⁷¹ “[R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”¹⁷² The Court in *Zablocki* found that Wisconsin law “interfere[d] directly and substantially with the right to marry,”¹⁷³ but there was nothing in the case that indicated what regulations of marriage might be “reasonable regulations” that do not significantly interfere with the right to marry versus those that do interfere directly and substantially with the right to marry. Certainly, the law in Wisconsin was uncommonly silly, tying the right to marry to child support obligations, but it is unclear what about the

170. 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))). *Loving*’s cite to *Skinner v. Oklahoma* for this proposition is not altogether convincing. See *id.* Regarding a law allowing for sterilization after two felonies, the Court in *Skinner* said, “[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.” 316 U.S. at 541. First, *Skinner* involved procreation, not marriage, and second, the quote seems more of an observation about life than a constitutional pronouncement. See *id.* In *Loving*, Virginia’s anti-miscegenation law was subject to strict scrutiny on race-based grounds alone, so little turned on the fact that marriage was also involved. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (“The Court’s opinion [in *Loving*] could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause.” (citing *Loving*, 388 U.S. at 11–12)). *Loving* also had an interesting “see also” citation to *Maynard v. Hill*, an 1888 case upholding the right of the Oregon territory to terminate a marriage. 388 U.S. at 12 (citing 125 U.S. 190 (1888)). While *Maynard* did refer to marriage “as creating the most important relation in life [and] as having more to do with the morals and civilization of a people than any other institution,” its actual holding was that marriage has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

125 U.S. at 205.

171. See generally *Zablocki*, 434 U.S. 374. The fundamental right to marry even applies as to incarcerated prisoners. *Turner v. Safley*, 482 U.S. 78, 96 (1987) (“Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context.”). But the level of review for prisoner’s fundamental rights is the reasonable basis test. *Id.* at 89.

172. *Zablocki*, 434 U.S. at 386 (citing *Califano v. Jobst*, 434 U.S. 47 (1977)).

173. *Id.* at 387.

law moved it from a normal regulation of marriage—warranting the rational basis test—to one reviewed by strict scrutiny.¹⁷⁴

When the Court extended the right to marry to gay couples in *Obergefell v. Hodges*, it acknowledged that marriage had traditionally been limited to heterosexual couples.¹⁷⁵ The Court then discussed the many reasons why gay marriages should be treated the same as traditional marriages: personal autonomy,¹⁷⁶ importance of marriage to any “two-person union,”¹⁷⁷ safeguard to children,¹⁷⁸ and keystone to the social order of the nation.¹⁷⁹ Once the Court made the leap that gay and traditional marriage were the same, it is easy enough to see why any restrictions would be unreasonable and substantial. But the leap in *Obergefell* is a once in a generation—maybe

174. See generally *id.* As precedent for the lower level of review as to some regulations of marriage, *Zablocki* cited to *Califano v. Jobst*. See *Zablocki*, 434 U.S. at 386–87 (citing *Califano*, 434 U.S. at 47 n.12). *Califano* upheld a provision of the Social Security Act that disqualified an otherwise eligible disabled dependent recipient upon his marriage, even if it was to another disabled person. *Califano*, 434 U.S. at 53–54 (“Since it was rational for Congress to assume that marital status is a relevant test of probable dependency, the general rule which obtained before 1958, terminating all child’s benefits when the beneficiary married, satisfied the constitutional test normally applied in cases like this.”).

175. See 135 S. Ct. 2584, 2590, 2598 (2015). In *Obergefell*, the Court concluded that gay couples had the fundamental right to marry: “These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” *Id.* at 2604.

It cannot be denied that this Court’s cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson* . . . a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Id. at 2598 (citation omitted) (citing *Baker v. Nelson*, 409 U.S. 810, 810 (1972)). Perhaps it is worth emphasizing the remarkable fact that gay marital rights moved from not being a substantial federal question in 1972 to a fundamental right in 2015. See generally *id.*

176. *Id.* at 2599 (“A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”).

177. *Id.* (“A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”).

178. *Id.* at 2600 (“A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”).

179. *Id.* at 2601 (“Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”).

once in a millennium—type of decision and provides little help in determining whether any other regulation of marriage gets permissive or strict scrutiny.

Although the choice between courts applying permissive and strict scrutiny is the difference between the law being held constitutional or unconstitutional, the line is more intuitive than knowable. We suspect that a law that prevents cousins from marrying—even as to every constitutional law professor’s hypothetical octogenarian cousins—would only be required to survive the rational basis test, but that is little more than a guess. We can see that the *ick* factor is not as strong as it is if the subjects were siblings; as to the found love of the octogenarian cousins, there is no reason to prevent the marriage, but the rational basis test does not require such a deep dive in determining that the law would be rational. It is doubtful that the Court will want to require strict scrutiny in drawing those lines. In *Zablocki*, the Court wanted to strike down a law that made questionable connections between past child support and future marriages, and the rational basis test did not allow that, so the Court elevated a narrow limitation on marriage to an unreasonable and substantial impact on a fundamental right.¹⁸⁰

The line between the fundamental right to make child-rearing decisions— as opposed to accepted run-of-the-mill restrictions on parental rights—is even less well established. Requirements that parents educate their kids¹⁸¹

180. See generally 434 U.S. 374 (1978). Many laws make questionable connections. Justice Stewart makes the point in a hypothetical in his concurring opinion in *Zablocki*:

If Wisconsin had said that no one could marry who had not paid all of the fines assessed against him for traffic violations, I suppose the constitutional invalidity of the law would be apparent. For while the state interest would certainly be legitimate, that interest would be both disproportionate and unrelated to the restriction of liberty imposed by the State.

Id. at 393 (Stewart, J., concurring). Justice Stewart thought the connection in *Zablocki* was perhaps justified because it “seem[ed] largely to be imposed only on those who ha[d] abused the same liberty in the past.” *Id.* In *Selective Service System v. Minnesota Public Interest Research Group*, the Court upheld against Bill of Attainder and Fifth Amendment self-incrimination claims a federal law that disqualified males from federal student educational loans who did not registration for the draft. 468 U.S. 841, 843, 856 (1984). Only the coincidence of age made it appropriate to combine draft registration with eligibility for student loans. See *id.* at 854. In another case the Court felt that the coincidence of being employed justified requiring the employer to give an employee four hours off to vote. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952). *Day-Bright Lighting* called the legislative judgment “a debatable one.” *Id.* at 425. Nonetheless, the Court stated: “[I]f our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases.” *Id.* Only Justice Jackson in dissent argued that such a state law was unconstitutional. See *id.* at 427 (Jackson, J., dissenting) (“[T]here must be some limit to the power to shift the whole voting burden from the voter to someone else who happens to stand in some economic relationship to him. Getting out the vote is not the business of employers . . .”).

181. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose

or obtain vaccines¹⁸² are subject only to a permissive level of review while limitations on a grandmother's right to have grandchildren from a different progeny live with her required an elevated level of review.¹⁸³ A law restricting single-family dwellings to related persons would rationally relate to the legitimate interest in preserving neighborhoods in all of their *Leave it to Beaver* splendor.¹⁸⁴ A law that restricted single-family dwellings for the same purpose to families in a single line of consanguinity impacted fundamental child rearing rights.¹⁸⁵ A California law—that irrefutably presumed a child born during the marriage was that of the husband and not that of an extra-marital lover—did not involve any fundamental rights of the biological father or the child and had to be only rational.¹⁸⁶

Grandparents in one case can have fundamental child rearing claims while grandparents in another case must sublimate the unconditional love

reasonable regulations for the control and duration of basic education.”). The Court in *Yoder* found that the power had to yield to the free exercise rights of the Amish as to kids sixteen and older. *Id.* at 234.

182. See *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905) (“[Because] vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best either for children or adults.”).

183. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 496–99 (1977) (“But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”).

184. *Leave it to Beaver* can be charmingly summarized by the dicta in *Village of Belle Terre v. Boraas*:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

416 U.S. 1, 9 (1974) (citation omitted).

185. See *Moore*, 431 U.S. at 504 (“The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).

186. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion). The Supreme Court has explained there is no special protection afforded to biological parents and children. *Id.* (“[T]he legal issue in the present case reduces to whether the relationship between persons in the situation of [the biological father and his biological daughter] has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has.”).

that only a grandparent can have to the preeminent interest and fundamental rights of the parent.¹⁸⁷ It is not that these decisions do not have a certain logic, it is that there is nothing that necessarily clues parents, lawyers, and judges into the internal thinking of the Court that justifies the difference between the automatic rejection of the rational basis test and the automatic victory of the strict scrutiny test.¹⁸⁸

The abdication of the judicial responsibility in the rational basis cases is compounded by the absence of any clarity as to why an interest in something like the fundamental right to travel interstate gets an elevated level of review or why one regulation of marriage or child rearing will get an elevated level of review and another will not. Although both the permissive review of the rational basis test and the strict scrutiny of the compelling state interest test have known quantities that even beginning law students understand—the one loses and the other wins—even the most experienced jurist will have uncertainty as to why any particular interest will get a higher level of review.¹⁸⁹ The Court's approach is very much like a broken volume knob on an old radio, either low background static or ear piercing intensity.

As to substantive rights,¹⁹⁰ there are two choices; most rights get the barely perceptible disregard of permissive scrutiny while fundamental rights get the full decibel approach of strict scrutiny. Except for intentional racial discrimination, the conclusory approach as to compelling state interest may be as little justified as the rational basis test, but, at least regarding strict scrutiny, individual rights are protected. As for the rational basis test, Mr. Murgia is out of his job, Ms. Nordlinger resents paying higher taxes, the Rodriguez children go to under-funded schools, and Ms. Williams aches over her inability to feed her children. Not only were rights not protected,

187. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 72 (2000) (“Considered together with the Superior Court’s reasons for awarding visitation to the [the grandparents], the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on [the mother’s] fundamental right to make decisions concerning the care, custody, and control of her two daughters.”).

188. One of the advantages of a more meaningful rational basis test or a reasonable basis test as this article calls for is that the wide gap between strict scrutiny and permissive scrutiny is at least perceptibly narrowed.

189. The Supreme Court in *Rodriguez* did not fully reject the District Court’s holding that “wealth [w]as a suspect classification,” or “that there is a fundamental right to education,” but found neither applicable to the wide wealth disparity and racial disproportionately of Texas’s method of funding its public schools. 411 U.S. 1, 18 (1973). The Supreme Court more easily rejected the Ninth Circuit’s en banc finding that the right to die was a fundamental right. See *Washington v. Glucksberg*, 521 U.S. 702, 709 (1997).

190. Equal protection classifications have many more variables—from strict scrutiny for race, to intermediate scrutiny for gender, to more searching rational basis for animus-based classifications.

the rational basis test gave no real possibility that such was ever going to happen.

VII. LAW HAPPENS: HOW THE RATIONAL BASIS TEST CAN RETURN TO THE REASONABLE BASIS TEST

Unlike the many legal conundrums that confront scholars worldwide, the solution to the irrationality of the rational basis test is an easy one. It should become a *reasonable* basis test.¹⁹¹ It should just *happen* like the reasonable basis test became the rational basis test. Law *happens*. The next time the Supreme Court decides a *Carolene Products* type of case, the Court should apply the reasonable basis test of *Weaver*.¹⁹² It is unlikely that many will notice. No great announcements would be required. No Costco bulk snack items need to be purchased for break times at law review symposiums. Such a change would be unlikely to even be worthy of an American Association of Law Schools' hot topic presentation, let alone make the evening news.

All that would be required is that the Supreme Court takes more seriously its judicial responsibility to see laws and classifications are reasonably sensible. This should be true for all laws, but especially for laws and classifications affecting things people care about in their daily lives.

191. Professor Gunther presciently anticipated this approach almost fifty years ago:

The model suggested by the recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends. The equal protection requirement that legislative classifications must have a substantial relationship to legislative purposes is, after all, essentially a more specific formulation of that general principle. The core of that principle survived the constitutional revolution of 1937. In reality, however, it has received little more than lip service: extreme deference to imaginable supporting facts and conceivable legislative purposes was characteristic of the "hands off" attitude of the old equal protection. Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.

Gunther, *supra* note 9, at 20–21.

192. See generally 404 U.S. 71 (1971).

Legislation would still be presumed to be constitutional. The legislature would still be entitled to that level of respect as to all but those subjects or classifications that subvert the political processes. The changes are minimal.

First, the Court should seriously consider whether there is in fact some legitimate purpose for a law. There is no need to seek some secret animus toward some politically desperate group; some calculated misbehavior on the part of the legislature before the legitimate ends requirement is in fact a thing. It does not have to be the actual purpose, but it does have to be a reasonably possible purpose, meaning a realistic event, not just hypothetically conceivable.¹⁹³

Second, the Court should then ensure the law or the classifications actually advances that end, that—in the language of the reasonable basis cases—there is some substantial fit between the law and its purposes.¹⁹⁴

193. Professor Gunther acknowledged that any serious inquiry into the end portion of the test was not easy:

The identification of state purposes illustrates the complex problems likely to be encountered in the task of elaborating techniques capable of disciplined and consistent application. The model asks that the Court assess the rationality of the means in terms of the *state's* purposes, rather than hypothesizing conceivable justifications on its own initiative. But identifying the purposes against which the means are to be measured is not a simple undertaking.

Gunther, *supra* note 9, at 46. He did not think that either the “actual legislative motivation” nor the “purpose . . . explicitly set forth in a statutory preamble or the legislative history” were controlling. *Id.* at 46–47. He generously called for only “an articulation of purpose from an authoritative state source, rather than hypothesizing one on its own,” such as by a “state court’s or attorney general office’s description of purpose.” *Id.* at 47. He argued that even such a modest requirement would put indirect pressure on the state legislature to better refine their purposes and improve the political processes. *Id.* Dean Chemerinsky calls for consideration of the actual purpose behind the law:

Although I support the deference of the rational basis review, discrimination or denial of liberty or property should be justified by some legitimate purpose. Those who object to a focus on the actual purpose of the government claim that it is too difficult to know and that it means that the same law might be upheld in one instance but not in another based on whether the legislature had the permissible actual purpose. But despite these objections, the focus under intermediate and strict scrutiny is on actual purpose, and there is no reason why there could not also be an inquiry as to actual purpose under rational basis review.

Chemerinsky, *supra* note 21, at 413.

194. Dean Chemerinsky calls for a closer fit as to rational basis equal protection issues:

Government discrimination—even when it is not on the basis of a suspect classification or government deprivations of liberty and property, and even when it does not entail the loss of fundamental rights—should have to meaningfully advance the government’s goal. The Court’s historic approach under rational basis review has not achieved this. Government laws, to meet a rational basis test, should have to be both less overinclusive and less underinclusive than the Court has traditionally tolerated.

Even though it is difficult to define what a substantial fit might be, as part of that fit, there should be some consideration of whether there are other, more responsible alternatives: more responsible in reconciling the harm to people in their daily lives with any legitimate governmental needs. The reasonable basis test would require no more.¹⁹⁵ The dignity of a job might be respected, fairness in calculating property taxes might be recognized, equality as to funding public schools might bring quiet dignity, and poor children might have another cup of soup. These are things that are far from mundane—monumental to those affected by these decisions.

Perhaps, Justice Marshall said it best in his *Dandridge* dissent:

[I]t cannot suffice merely to invoke the spectre of the past and to recite from *Lindsley v. Natural Carbonic Gas Co.* and *Williamson v. Lee Optical Co.* to decide the case. Appellees are not a gas company or an optical dispenser; they are needy dependent children and families who are discriminated against by the State. The basis of that discrimination—the classification of individuals into large and small families—is too arbitrary and too unconnected to the asserted rationale, the impact on those discriminated against—the denial of even a subsistence existence—too great, and the supposed interests served too contrived and attenuated to meet the requirements of the Constitution.¹⁹⁶

Chemerinsky, *supra* note 21, at 415–16. Dean Chemerinsky’s defense of the rational basis test is weak at best. *See id.* at 403 (“[T]he rational basis test is not only constitutional but also desirable. Nothing in the Constitution requires more exacting scrutiny than rational basis review, and deference to the government is often appropriate.”). Dean Chemerinsky’s defense has an *I come to bury Caesar, not to praise him quality*, because, although he agrees that a lower level of review is called for with “government economic regulations and social welfare legislation,” he disagrees with both the means and ends part of the traditional rational basis test. *Id.*

195. Professor Jackson has a similar suggestion:

A strengthened rational basis test, however, would require that the legislation at issue actually be reasonably related to its legislative purpose, and that the purpose be valid. Such a test would allow courts to better protect rights, while at the same time retain the benefits of tiered scrutiny as it currently exists. By allowing courts to inquire into the purpose behind the legislation and to look at the link between the ends and the means, courts will no longer have to try to find some way around the test in hard cases, and the doctrine will become more consistent and legitimate.

Jackson, *supra* note 4.

196. 397 U.S. 471, 529–30 (1970) (Marshall, J., dissenting).

