April 14, 1976

Re: No. 74-1044 - Massachusetts Board of Retirement v. Murgia

Dear Bill:

I, for one, appreciate your efforts, as well as Lewis', to produce something that five of us could agree upon. Your revision accompanying your April 14 letter I could probably join, although I would much prefer a somewhat more relaxed standard with respect to identifying the state interest or purpose where it is not expressed in or plainly obvious from the statute itself. I would give substantial weight--perhaps more than Lewis would--to the representations of those who enforce a statute as to the purposes the legislation serves. Your identification and acceptance of the ultimate aim of the ordinance in Dukes seems to me quite proper even though the provision itself appears impenetrable on its face.

Again, thanks for all the effort.

Sincerely,

Mr. Justice Brennan

Copy to Mr. Justice Powell
RE: No. 74-1044 Massachusetts Board of Retirement v. Murgia

Dear Lewis:

I've cribbed unashamedly from your circulation and the attached represents my end product. But I strongly feel that the opinion should be in your name and not in mine. This is not only because much of the attached is in your words it's also because, quite frankly, our joint hope of a Court agreement on an equal protection standard in this area has a better chance of realization if you rather than I author the opinion.

I am sending this rather than bringing it to you with the thought you might want to ponder it before we sit down to talk about it.

I am sending a copy to Byron to keep him abreast of what's happening since he's the only one who joined my circulation.

Sincerely,

Mr. Justice Powell

cc: Mr. Justice White
I have made some changes along the lines suggested by Justice White on page 12. The only drawback I can see with making this modification is that allowing post-enactment interpretations by administrative bodies does not serve the purposes described in the paragraph on pgs. 12 and 13 as neatly as interpretations contemporaneous with enactment do. That is, if one of the reasons an articulated purpose is required is to ensure that the democratic processes are properly operating/during the enactment of the statute. A post-enactment interpretation does not provide the same guarantee that the legislature's decision has received a public airing. The other reason why an articulated purpose is required -- to ensure that the judiciary has conducted a genuine inquiry -- is served even if the interpretation is made after enactment. I suppose you could argue that the legislature has made its purpose sufficiently clear by delegating certain authority to an administrative body that operates within defined limits. Anyway, I wouldn't add this unless it is necessary to get Justice White's agreement.

I read through the draft for possible problems and found nothing major. Reed v. Reed is cited (pgs. 5 and 14) as an example of the "mere rationality" test -- something I think we should avoid. And some of the text (especially where the two drafts have been spliced together, such as on pg. 9)
is a little too choppy for my taste. I also don't think the long quote in n. 14 on pg. 13 fits in at that place. On page 12, the opinions says "we need not decide whether a clearly identifiable purpose is always required." That seems a little coy, given since the rest of the paragraph goes on to say that it is indeed required, but the problem is not a major one.

I would add one thing that I should have put into my original draft. In the discussion of suspect classifications (ppg. 8-9) I would make it clear that "special disabilities" does not refer to biological disabilities (e.g., mental illness) but to societally imposed disabilities that do not accurately reflect the real capacities of the persons involved.

Chris
This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3) (a), that a uniformed State Police Officer “shall be retired ... upon his attaining age fifty,” denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.¹

¹ Uniformed State Police Officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A, which provides:

“Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualification shall not apply in the case of the enlistment of any woman as such an officer.”

In pertinent part § 26 (3) provides:

“(a) . . . Any . . . officer appointed under section nine A of chapter . . .
Appellee Robert Murgia was an officer in the Uniformed Branch of the Massachusetts State Police. The Massachusetts Board of Retirement retired him upon his 50th birthday. Thereafter, appellee brought this civil action in the United States District Court for the District of Massachusetts, alleging that the operation of § 26 (3) (a) denied him equal protection of the laws and requesting the convening of a three-judge court under 28 U. S. C. §§ 2281, 2284. The District Judge dis-
missed appellee's complaint on the ground that the complaint did not allege a substantial constitutional question. 345 F. Supp. 1140 (1972). On appeal, the United States Court of Appeals for the First Circuit, in an unreported memorandum, set aside the District Court judgment and remanded the case with direction to convene a three-judge court. Upon a record consisting of depositions, affidavits and other documentary material submitted by the parties, the three-judge court filed an opinion that declared § 26 (3) (a) unconstitutional on the ground that "a classification based on age 50 alone lacks rational basis in furthering any substantial state interest," and enjoined enforcement of the statute. Murgia v. Massachusetts Board of Retirement, 376 F. Supp. 753, 754 (Mass. 1974). We noted probable jurisdiction of the Retirement Board's appeal. 421 U. S. 974 (1975). We reverse.

The primary function of the Uniformed Branch of the Massachusetts State Police is to protect persons and property and maintain law and order. Specifically, uniformed officers participate in controlling prison and civil disorders, respond to emergencies and natural disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide back-up support for local law enforcement personnel. As the District Court observed, "service in this branch is, or can be, arduous." 376 F. Supp., at 754. "[H]igh versatility is required, with few, if any, backwaters available for the partially superannuated." Ibid. Thus, "even [appellee's] experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." Ibid., at 755.

These considerations prompt the requirement that uniformed state officers pass a comprehensive physical examination biennially until age 40. After that, until mandatory retirement at age 50, uniformed officers must annually pass a more rigorous examination, including an electrocardiogram and tests for gastro-intestinal bleeding. Appellee Murgia had passed such an examination four months before he was retired, and there is no dispute that, when he retired, his excellent physical and mental health rendered him still capable of performing the duties of a uniformed officer.

The record includes the testimony of three physicians: that of the State Police Surgeon, who testified to the physiological and psychological demands involved in the performance of uniformed police functions; that of an associate professor of medicine, who testified generally to the relationship between aging and the ability to perform under stress; and that of a surgeon, who also testified to aging and the ability safely to perform police functions. The testimony clearly established that the risk of physical failure, particularly in the cardiovascular system, increases with age, and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group. Appendix, at 77–78, 174–176. The testimony also recognized that particular individuals over 50 could be capable of safely performing the functions of uniformed officers. The associate professor of medicine, who was a witness for the appellee, further testified that evaluating the risk of cardiovascular failure in a given individual would require a detailed number of studies. Id., at 77–78.

In assessing appellee's equal protection claim, the District Court found it unnecessary to apply a strict scrutiny test, see San Antonio Independent School District v. Rodriguez, 411 U. S. 1 (1973); Shapiro v. Thompson,
394 U.S. 618 (1969), for it determined that the age classification established by the Massachusetts statutory scheme could not in any event withstand a test of rationality, see Reed v. Reed, 404 U.S. 71 (1971). Since there had been no showing that reaching age 50 forecast "imminent change" in an officer's physical condition, the District Court held that compulsory retirement at age 50 was irrational under a scheme that assessed the capabilities of officers individually by means of comprehensive annual physical examinations. We agree that rationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection. We disagree, however, with the District Court's determination that the age 50 classification is not rationally related to furthering a legitimate state interest.

I

We need only briefly state our reasons for agreeing that strict scrutiny is not the proper test for determining whether the mandatory retirement provision denied appellee equal protection. San Antonio Independent School District v. Rodriguez, supra, reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Mandatory retirement at age 50 under the Massachusetts statute involves neither situation.

The requirement implicates no fundamental right of appellee. Whether a right is fundamental under the Constitution "lies in assessing whether there is a right ... explicitly or implicitly guaranteed by the Constitution." Id., at 33-34. Although the "right to work for a living in the common occupations of the community is of the very

Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal protection analysis. *Rodriguez* observed that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 411 U. S., at 28. The influence of the aged in the political process has brought them a high degree of success in making that process responsive to their needs. See, e. g., *Pension Reform Act of 1970*, 29 U. S. C. § 1001 et seq.; *Age Discrimination in Employment Act of 1967*, 29 U. S. C. § 621 et seq.; *Older Americans Act of 1965*, 42 U. S. C. Several States have legislation forbidding age discrimina-

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1 Appellee makes no claim of denial of procedural due process in the action of the Retirement Board.
tion, including Massachusetts. The participation of the aged in the functions of decisionmaking institutions at all levels and the continuing legislative concern at all levels for the problems of age discrimination and the elderly demonstrate that the traditional political proc-


5 Mass. Gen. Laws Ann. c. 149, § 24A. Indeed, appellee asserts that the provisions of Mass. Gen. Laws Ann. c. 32, § 26 (3) (a), do not comport with the State's statutory provisions against discrimination, ibid., cc. 149, 151B, and urges that "the Court must give weight to these legislative determinations" against discrimination. As to determinations under § 26 (3) (a), however, he makes no such contention. Brief for Appellee, at 60-61.


As appellee recognizes, the actual attitude of legislatures, including Massachusetts, toward the problem of age discrimination in employment is one of favorable concern:

"The thrust of the legislative policy as expressed in Congress and the state legislatures is to strike down classifications based upon generalized misconceptions as to age, and to institute in their stead procedures to measure the individual's qualifications, abilities and needs, regardless of age." Brief for Appellee, at 60.
asses have not foundered where interests of the aged are at stake.\footnote{Johnson v. Robison, 415 U. S. 361 (1974), which sustained a federal legislative classification denying Veterans' educational benefits to conscientious objectors against a claim of denial of equal protection, stated: "Given the solicitous regard that Congress has manifested for conscientious objectors, it would seem presumptuous of a court to subject the educational benefits legislation to strict scrutiny on the basis of the 'suspect classification' theory, whose underlying rationale is that, where legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down." Id., at 375 n. 14.}

There is no indication in any of our cases, however, that evidence of high numerical representation in the state legislatures or the existence of a body of remedial legislation is alone sufficient to remove a group that demonstrates the other indicia—of special disabilities or a history of discriminatory treatment—from the category of suspect classes. An exemption from categorization as a suspect class based on the existence of remedial legislation, for example, could penalize those who properly seek legislative rather than judicial solutions to problems of discrimination. It also ignores the fact that state, as well as federal, legislatures have been responsive to the needs of Negroes, a class that few would contend is no longer in need of the special protection envisioned for them by the drafters of the Fourteenth Amendment. See \textit{Strauder v. West Virginia}, 100 U. S. 303 (1880). While the treatment of the aged in this Nation has not been wholly free of discrimination,\footnote{Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (1965); Comment, 41 N. Y. U. L. Rev. 383, 383-388 (1966). See also C. Townsend, Old Age: The Last Segregation (1970); Symposium: Law and the Aged, 17 Aria. L. Rev. 267 (1975).} such persons, unlike, say, those who have been discriminated against on the
basis of race or national origin, have not experienced a
"history of purposeful unequal treatment" or been sub­
jected to unique disabilities on the basis of stereotyped
characteristics not truly indicative of the group's abili­
ties. When those factors are present, there is reason to
scrutinize state classifications carefully to ensure that
they are not influenced by unfounded assumptions about
group characteristics that have no place in our consi­
tutional system.

The class subject to the compulsory retirement feature
of the Massachusetts statute consists of uniformed state
police officers over the age of 50. Therefore, it cannot be
said to discriminate only against the elderly. Rather, it
draws the line at a certain age in middle life. Even old
age does not define a "discrete and insular" group, see
United States v. Carolene Products Co., 304 U. S. 144,
152-153, n. 4 (1938), in need of "extraordinary protec­
tion from the majoritarian political process." Instead, it
marks a stage that each of us will reach if we live out
our normal span. Even if the statute could be said to
impose a penalty upon a class defined as the aged, it
would not impose a distinction sufficiently akin to those
classifications that we have found suspect to call for strict
judicial scrutiny. There is no basis upon which to assume
that state and federal legislatures will not deal fairly
with persons as they age and be responsive to their needs.

Under the circumstances, it is unnecessary to subject
the State's resolution of competing interests in this case
to strict judicial scrutiny in order to ensure that it is
consistent with the requirements of the Equal Protection
Clause.

II

We turn then to the inquiry appropriate in the absence
of a need for strict scrutiny. In such cases, it is neces­
sary to determine whether the Massachusetts scheme
“rationally furthers some legitimate, articulated state purpose.” *San Antonio School District v. Rodriguez*, 411 U. S., at 17. The statute is presumed to be valid.9 Perfection in the way in which the means are adapted to serve the State’s purpose is not required.10 But judicial review, even under this relatively relaxed standard, must have substance if the Equal Protection Clause is to have meaning.

The term “legitimate” state purpose does not suggest, as Mr. Justice BURROUGHS fears, post, at —, that the Court is required to engage in a substantive review of the permissibility of a State’s objectives. Indeed, an inquiry of this sort is one of the factors that distinguishes traditional scrutiny under the Equal Protection Clause from the most searching review appropriate when a suspect classification is involved. See, e. g., *In re Griffiths*, 413 U. S. 717, 721-722 (1973). The requirement that a State’s purpose be “legitimate” indicates only that the purpose must fall within the very broad range of powers entrusted the state legislatures and that it must not independently infringe upon other constitutional restrictions. The State’s purpose justifying the classification must not be illusory, a mere facade concealing the existence of an objective that is illegitimate in this very narrow sense. See *U. S. D. A. v. Moreno*, 413 U. S. 528 (1973); *McGinnis v. Royster*, 410 U. S. 293, 276 (1973).  


The Massachusetts Legislature has clearly identified a state interest to be promoted by the age 50 classification. Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring the physical preparedness of its uniformed police. The legitimacy of this objective may not be questioned. See Shelton v. Tucker, 364 U. S. 479 (1960); Schwarcz v. Board of Bar Examiners, 353 U. S. 252 (1957). Appellee

A special legislative commission’s report preceding the enactment of the age 50 maximum for uniformed police stated: “The Division of State Police, by virtue of the work demanded of its members, undoubtedly requires comparatively young men of vigorous physique. The nature of the duties to be performed in all weathers is arduous in the extreme. . . . No argument is needed to demonstrate that men above middle life are not usually physically able to perform such duties.” Mass. Leg. Doc., House No. 1582, at 8 (1938). With these considerations in mind, the State’s Commissioner of Public Safety argued before the commission for provisions permitting retirement of State Police at 45. The commission observed in response that it was “not prepared to say that the contention of the Commissioner of Public Safety, that [State Police] over age forty-five should be eligible to retirement, is unsound as a matter of public policy.” Id., at 8. The commission, however, deferred the problem of setting retirement ages for the State Police to special study, their sole reason for not recommending age 45 being the anticipated pension costs to the State, not the reasonableness of the age with respect to job qualification. Id., at 7-9. Though the age 50 limitation was not specifically proposed by the commission, but was ultimately enacted by the legislature after further study, Act of Aug. 12, 1939, c. 503, § 3 (1939), Mass. Acts & Resolves 737-738, it is apparent that the purpose of the limitation was to protect the public by assuring the ability of State Police to respond to the demands of their jobs. See also Mass. Leg. Doc., House No. 8316, at 16, 17 (1967); Mass. Leg. Doc., House No. 2500, at 21, 23-25 (1955). This purpose is also clearly implied by the State’s maximum age scheme which sets higher mandatory retirement ages for less demanding jobs. See Mass. Gen. Laws Ann. c. 32, §§ 1, 2 (2) (g), 20 (3) (a) (1968), as amended (Supp. 1976).
neither denies that this was the interest intended to be served nor disputes legitimacy. Since the purpose of the Massachusetts retirement scheme has been clearly identified in the legislative history, we need not decide whether a clearly identifiable purpose is always required. We think it clear, however, that our decisions increasingly have departed from the extremely relaxed standard of McGowan v. Maryland, 366 U.S. 420, 426 (1961), which indicated that the constitutional requirements are met "if any state of facts reasonably may be conceived to justify" a statutory discrimination. Rather, we have required that the state purposes to be served by the classification be capable of being discerned by some means short of hypothesization by a judge. See, e. g., McGinnis v. Royster, supra, at 270. That is, they must be either expressly articulated by the legislature or clearly implicit in the statutory scheme. Ingenious judges almost always will be able to devise some basis for a state law. But the judicial function calls for a more genuine inquiry if the constitutional requirement of rationality is not to be meaningless.

The legislative purpose also may be derived from the contemporary interpretation thereof by the agencies of government entrusted with its enforcement of administration.
74-1044—MEMO

MASSACHUSETTS BD. OF RETIREMENT v. MURGIA 13

a majoritarian democracy. It does not follow from this assumption, however, that it is appropriate for a court to devise or imagine policy where none has been indicated by the legislature or is clearly implicit from the action taken. The proper functioning of the political process is best served where the State bears the responsibility of enacting legislation that is designed to serve identifiable policies or objectives. When legislation is enacted against such a background, the Court has some guarantee that the legislature has focused on the problem and also that its decision has received a public airing. 14 In such circumstances, deference to the decision of the State is not only appropriate, but required by the demands of our democratic system.

14 See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 44 (1972); The principle that the Equal Protection Clause should be applied so as to facilitate the functioning of our democratic processes is not novel. See Railway Express Agency v. New York, 336 U. S. 106, 112-113 (1949) (Jackson, J., concurring):

"Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. 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."
Even though the State's purpose is clearly identifiable, it is still necessary, of course, that the challenged classification bear a rational relationship to that purpose. The relationship may not be trivial or illogical. A trivial or illogical relationship would not only fail to comport with the requirement of rationality, but may indicate that the defined purpose actually masks an improper (for example, racially discriminatory) purpose. Given that physical ability generally declines with age, mandatory retirement at 50 does serve to remove from police service those whose fitness for uniformed police work has diminished with age and is, therefore, rationally related to the State's objective. There is no indication that § 26 (3)(a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion "wholly unrelated to the objective of that statute." Appellee seems to have suggested in oral argument that Mass. Gen. Laws Ann. c. 32, §§ 1, 3 (2) (g), 26 (3) (a), also deny equal protection through the job classification established by them. Any such argument, however, is unpersuasive. The sections do set a maximum retirement age for uniformed state officers which is less than that set for other law enforcement personnel. It has never been seriously disputed, if at all, however, that the work of state uniformed officers is more demanding than that of other state, or even municipal, law enforcement personnel. It is this difference in work demands that underlies the job classification. Mass. Leg. Doc., House No. 2500, at 21-22 (1955). And it is this difference that renders the different employment requirements reasonable and hence constitutional.

16 Review of Massachusetts' maximum age limitations by state legislative commissions has proceeded on the principle that "maximum retirement age for any group of employees should be that age at which the efficiency of a large majority of the employees in the group is such that it is in the public interest that they retire." Final Report of the Special Commission to Study and Revise the Laws Relating to Retirement Systems and Pensions, Mass. Leg. Doc., House No. 2500, at 7 (1955).
(1971). That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the State's purpose is not rationally furthered by a maximum age limitation. It is only to say that with regard to the interests of all concerned, the State perhaps has not chosen the best means to accomplish its purpose.17 But where rationality is the test, a statute “does not violate the Equal Protection Clause merely because the classifications made by [it] are imperfect.” Dandridge v. Williams, supra, at 485.

We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual, or of the stifled ability of the aged to contribute to society. These problems have been well documented and are beyond serious dispute.18 But “[w]e do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and

17 Indeed, were it not for the existing annual individual examinations through age 50, appellee would concede the rationality of mandatory retirement at 50. Tr. of Oral Arg., at 22–23. The introduction of individual examinations, however, hardly defeats the rationality of the State's scheme. In fact, it augments rationality since the legislative judgment to avoid the risk posed by even the healthiest fifty-year-old officers would be implemented by annual individual examinations between ages 40 and 50 which serve to eliminate those younger officers who are not at least as healthy as the best fifty-year-old officers.

18 E.g., M. Barron, The Aging American (1961); Cameron, Neuroses of Later Maturity, in Mental Disorders in Later Life 201 (2d ed. O. Kaplan 1956); Senate Special Committee on Aging, Developments in Aging: 1971 and January-March 1972, 88th Cong., 2d Sess. 48-63 (1972); Hearings before the Senate Subcommittee on Retirement and the Individual of the Senate Special Committee on Aging, 90th Cong., 1st Sess., pts. 1 & 2, 46-46, 87-101, 121-127, 212-217, 464-471 (1967).
humane system could not be devised." Id., at 487. We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the law.

The judgment is reversed.

Mr. Justice Stevens took no part in the consideration or decision of this case.
MEMORANDUM

TO: Chris Whitman
FROM: Lewis F. Powell, Jr.

DATE: April 20, 1976

I reviewed last night Justice Brennan’s "marriage" of his opinion with ours, and for the most part I find it quite acceptable to me. I have indicated some changes for our further consideration. The only ones of substance are on page 12, where I tried redictating the first full paragraph with the view to making it more palatable to my Brothers who have continued to cite McGowan. This is a critical paragraph in the opinion, and requires your most delicate and artful touch.

In my opinion previously circulated, we cited only McGinnis as evidence that the Court over the past 15 years has required something more than McGowan. Now that we may possibly be writing for the Court, we should add additional citations. It would be especially helpful to have a case written by Justice Blackmun or perhaps one of the other "uncommitted" Justices.

You will note the one sentence added to footnote 13, hoping it - or something like it - will suffice to comment on Justice White’s views.

The revision of footnote 12 is largely cosmetic.
By the time I reached page 14, I was a bit too sleepy to tackle the full paragraph on that page. This also is quite important, although not as controversial as page 12. As presently written, the first three sentences address the second requirement of equal protection analysis: that, even when the state purpose is proper and identifiable, the means adopted to achieve the purpose must bear a rationale relationship to the purpose. I think Gunther has framed this second requirement rather well, and possibly you can identify a case or two that may be included. My suggestion is that these three sentences be expanded, and written a bit more carefully.

The fourth sentence [Given that physical ability, etc.] should begin a new paragraph, possibly with a transitional sentence. Here, we are moving from a general discussion of equal protection analysis to the specific facts of this case.

L.F.P., Jr.
MEMORANDUM

TO: Chris
FROM: Justice Powell

No. 74-1044 MURGIA

As you will see, I have substantially revised pages 9-14 of our second draft memorandum. I was prompted to do this for two reasons: (i) a further conversation with Justice Stewart (who reviewed the Brennan attempt at blending our opinions) persuades me that some changes in emphasis are necessary if there is any real chance of obtaining his concurrence; and (ii) I believe a rearrangement of Part II is desirable in any event.

You will observe that, for the most part, my revision is limited to a rearrangement and to some change in verbage. I also tried to identify somewhat more clearly the Gunther emphasis on a "means model". I have plagiarized Gunther somewhat more than our first draft.

You will observe that the paragraph on McGowan (p. 12) has been omitted. In a concurring opinion, I would not hesitate to deal directly with McGowan. But I fear our chances of winning a court would be diminished by even a tactful frontal
assault on McGowan. We can make clear, by the way
the opinion is written, that I describe a standard considerably
different from that of McGowan.

The revised draft, that will accompany this memorandum
to you, reflects unedited dictation - except where I have
asked Gail to copy or include portions of the printed memorandum.
Thus, I expect you to edit, polish and rewrite to whatever extent
you think desirable.

I am conscious of some things having been omitted that
should be included, which no doubt you will identify. For
example, I certainly do want to say that "judicial review even
under the relatively relaxed traditional standard must have
substance if the Equal Protection Clause is to have meaning".

Also, I did not attempt to include all citations, or
to relate the text to the footnotes. You are far better equipped
to do this than I. Incidentally, I omitted the textual citation
to Gunther, as I think you can find a more appropriate place
to put it.

If you have a chance to put this "humpty-dumpty" back
together again, during the early part of the week, I will give
it priority to the extent of a quick reading. We can then
have it printed for Bill Brennan's review.

LD.F.P., Jr.
MEMORANDUM

TO: Chris Whitman
FROM: Justice Powell

No. 74-1044 MURGIA

Some thoughts, dictated at random on Sunday:

I. Would it be helpful to add a footnote in Part I that merely lists, with a phrase describing the subject of each, the decisions of the Court applying two-tier equal protection? The merit, if any, of doing this would be (i) to remind my Brothers of the extent of the Court's commitment to the two-tier analysis, and (ii) to indicate the relatively narrow confines within which the two-tier analysis has been confined, especially since Rodriguez.

II. I would like to find a way to mention Jay Wilkinson's article, as I think it a scholarly, thoughtful contribution, even if we can't "buy it". Moreover, I want to promote the "product" of all former clerks. I will be looking out for Professor Whitman, I hope, for years to come. We might find a place to include a note similar to the one in the draft I initially circulated.

III. Justice Stewart is essential to our plurality. We have included Jefferson v. Hackney, but if you can think of any other opinions he has written or joined that arguably come within the broad contours of our analysis, they should be included.

L.F.P., Jr.