RE: No. 74-1044 Massachusetts Board, etc. v. Murgia

Dear Bill:

Your comments on my proposed Murgia opinion, and Potter's concurring opinion in the case suggest, I think, that in the absence of a "suspect classification" or involvement of a "fundamental right", the applicable test is necessarily one of "minimum scrutiny" as defined in Williamson v. Lee Optical and McGowan v. Maryland: "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." In my view, our opinions have developed a more flexible rule, and Murgia reflects, I suggest, not a rewriting of the law, but the more flexible test that has evolved.

Absent the need for strict scrutiny, have we not employed tests in a variety of cases, making it clear that minimum scrutiny in the Lee Optical definition is not always the result when suspect classes and fundamental rights are absent? See Schlesinger v. Ballad, 419 U.S. 498; Jiminez v. Weinberger, 417 U.S. 628; Johnson v. Robison, 415 U.S. 361; James v. Strange, 407 U.S. 128; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164; Eisenstadt v. Baird, 405 U.S. 438; Reed v. Reed, 404 U.S. 71. The proposed Murgia opinion summarizes the flexible test of these and all our cases where strict scrutiny has not been applied, for it leaves the determination of the requisite relationship between means and end to the nature of each case presented. In view of the political clout of the aged, only a rational relation between the classification and the State's purpose was required to sustain the classification in Murgia. The test as applied to the age 50 classification, therefore, doesn't differ from that employed in other cases of minimum scrutiny.

I do not think the Murgia opinion opts for a standard of review which will give the courts more leeway in striking down state legislation than we have already given them. After all, Murgia sustains
a classification based on a criterion (age) in many respects quite akin to sex. If Murgia is not a fair treatment of our equal protection analysis as our cases have evolved it, we are left with only the rigid two-tier approach which I had thought all of us found unacceptable. If only either mere rationality or strict scrutiny are the available tests, then we will have to acknowledge we can no longer defend the results of Jiminez, James, Weber, Eisenstadt and Reed. Also, since the doctrine of irrebuttable presumptions seems to have been permanently interred, we should, as well, be prepared to confess we were wrong in the results we reached in Cleveland Board of Education v. LaFleur, 414 U.S. 632; USDA v. Murry, 413 U.S. 508; Vlandis v. Kline, 412 U.S. 441; Stanley v. Illinois, 405 U.S. 635.

The following cases, I think, support my conviction that not only is Murgia no departure from prior law, but that the "line-up" in each of them is cogent evidence that eight of us (John was not involved in any way) have been party to opinions expressing that general view. Potter objects to describing the inquiry as "whether the classification is reasonably related to a legitimate state objective," and you express concern with describing the inquiry as whether the classification is "reasonable, not arbitrary and . . . rests upon some ground of difference having a fair and substantial relation to the object of the legislation." Yet "fair and substantial" relation between classification and purpose is the test stated in the following cases: Stanton v. Stanton, 421 U.S. 7, 14 (HAB, WEB, WOD, WJB, PS, BRW, TM, LFP); Johnson v. Robison, 415 U.S. 361, 374 (WJB, unanimous); Kahn v. Shevin, 416 U.S. 357, 359 (WOD, WEB, PS, HAB, LFP, WHR); Eisenstadt v. Baird, 405 U.S. 438, 447 (WJB, WOD, PS, TM); Reed v. Reed, 404 U.S. 71, 76 (WEB, WOD, WJB, PS, BRW, TM, HAB, LFP, WHR); Royster Guano Co. v. Virginia, 253 U.S. 412, 415. Similarly, Weber v. Aetna Casualty & Surety Co., supra (LFP, WEB, WOD, WJB, PS, BRW, TM), stated that, at a minimum, equal protection requires a rational relationship to a legitimate state purpose, and recognized a range of inquiry between that minimum and strict scrutiny by further observing that a "stricter scrutiny" was required when sensitive rights were approached. Additionally, Weber held that the classification involved bore no "significant relationship" to the State's purposes and that the classification was "illogical and unjust." Id., at 175. Finally, in Jiminez v. Weinberger, supra, at 636 (WEB, WOD, WJB, PS, BRW, TM, HAB, LFP), we invalidated the classification challenged there as not "reasonably related" to the Government's interest.

To be sure, all these cases fall into the twilight zone of equal protection; they are, nevertheless, part of the warp and woof of equal protection law and must be dealt with if there's any disposition among
us to revise the contours of the appropriate inquiry where strict
scrutiny is inappropriate. Indeed, even McGowan and its progeny
support inquiries not really different from Murgia's. In McGowan,
366 U.S., at 428, the Court felt it appropriate to inquire into
"reasonableness" and to conclude that there was "no indication of
the unreasonableness" of, but rather a "reasonable basis" for, the
classifications involved there. Similarly, in Dandridge v. Williams,
397 U.S. 471, 485 (PS, WEB, BRW, Black, Harlan), a majority of us held
that "in the area of economics and social welfare," a classification
does not offend the Constitution if it has some "reasonable basis."
Finally, as recently as Weinberger v. Salfi, 422 U.S. 749, 776-777
(NHR, WEB, PS, BRW, HAB, LFP), a majority of us held that classifi­
cations would be upheld "so long as they comport with the standards
of legislative reasonableness enunciated in cases like Dandridge v.
Williams and Richardson v. Belcher." If it was permissible for
"standards of legislative reasonableness" in Salfi to include the
rationality of Dandridge and Belcher, how is Murgia's analysis dif­
ferent?

You also express concern with Murgia's statement that our inquiry
"ceases with a determination that the age fifty classification
rationally relates to the state's announced objective," questioning
particularly whether this means that the state's purpose must be not
only legitimate but that it must be articulated. I suspect you and
I might answer that question differently but Murgia doesn't attempt
to answer it. Rather the opinion merely observes that the state has
articulated a purpose here, not that it was required to do so. By
contrast, it is debatable whether the New Orleans City Council articu­
lated a purpose for the "grandfather" clause in the ordinance involved
in Dukes, and it may be that we should use that case as the vehicle
for deciding the issue.

On the question of "legitimate" state purpose, of particular con­
cern to Potter, I can only say that our prior equal protection de­
cisions, virtually without exception, support the requirement of at
least a legitimate state interest. "The tests to determine the
validity of state statutes under the Equal Protection Clause have
been variously expressed, but this Court requires, at a minimum, that
a statutory classification bear some rational relationship to a legiti­
mate state purpose." Weber v. Aetna Casualty & Surety Co., supra, at
172. "The essential inquiry in all the . . . cases is . . . inevitably
a dual one: What legitimate state interest does the classification
promote? What fundamental personal rights might the classification
endanger?" id., at 173. Indeed, in USDA v. Moreno, 413 U.S. 528
MEMORANDUM TO THE CONFERENCE

MR. JUSTICE REHNQUIST, concurring in the judgment.

Although I completely agree with the result reached by the Court in this case, and with parts of its analysis in reaching that result, I have sufficient reservations about other parts that I concur only in the judgment. I think the test announced by the Court represents a significant departure from its previous equal protection decisions, and is one which could portend mischief throughout state and federal judicial systems.

It is important to place the Court's analysis in perspective. The Court convincingly demonstrates, and I entirely agree, that there is at issue here neither any fundamental right, slip op. at 5-6, nor any classification directed towards a "suspect class," Id., at 6-7. I therefore agree with the Court that there is nothing in

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I do not, however, agree with the intimations in the Court's proposed opinion that identification of such classes is somehow derived from judicial perceptions of their effectiveness in the political arena. Slip op. at 9-10. But as no one suggests that any such a "class" is implicated here, I leave my misgivings about such suggestions for some more appropriate occasion.
this case justifying the use of what it describes as "strict scrutiny" to review the enactment of the Massachusetts legislature.

Nor is there anything in this case, so far as I can determine, that would suggest the use of any so-called "intermediate level of scrutiny." Whatever may be the merits of such a standard of constitutional inquiry in some cases, there is no suggestion that any such hybrid test is called for here.

This case, then, is agreed by all to be governed by the least exacting standard of judicial review. My difficulty is with the Court's formulation of that standard. It states, slip op., at 8, that the "inquiry appropriate" here is "whether the classification is 'reasonable, not arbitrary, and . . . rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.'" It immediately thereafter paraphrases this quotation to frame the inquiry as "essentially whether the classification is reasonably related to a legitimate objective."

When this formulation is compared with what the Court has previously approved as the test of "minimum rationality", there appear to be several significant differences. While to some these may seem to be a matter of semantics, I am troubled lest these signal, however inadvertently, a retreat from the hard-won battle.
for judicial deference to legislative enactment in this field of economic and social regulation.

I have always understood the standard of review appropriate under the Equal Protection Clause to be that set out in *McGowan v. Maryland*, 366 U.S. 420 (1961). In summarizing the standards under which equal protection challenges are examined by the Court, Mr. Chief Justice Warren recognized that although no precise formula had been developed

"the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S., at 425-426 (citations omitted).

When this formulation is compared to that advanced by the Court today, I become doubtful that the two are intended to be identical; more importantly, I doubt they will be understood as identical by those who read and interpret our opinions.

I am not sure that there is any meaningful difference between a "fair" relation to the State's objective and a "reasonable" one, both
of which phrases are used in the Court's opinion. And I could agree that either seems to echo McGowan's recognition, with which I fully agree, that a classification which is "wholly irrelevant" to that objective contravenes the Fourteenth Amendment. I am not so sure of the result, however, when the word "substantial" is added to the test, as the Court does here. "Substantial," for me at least, implies a requirement having some additional teeth in it beyond that of mere rationality, a situation which I think is strenuously to be avoided if we are to remain true to McGowan and the history of constitutional adjudication which it summarizes. I think it would be downright pernicious if we were to give the impression that in a case challenging a state statute where everyone agrees that the minimum standard of constitutional review is appropriate, courts are to apply their own view of whether the statute "substantially" promotes the State's interests; striking down the statute if they disagree with the State's assessment of the need for its statute.

The next portion of the Court's test which gives me pause is its repeated reference to the necessity of there being a "legitimate state interest" towards the achievement of which the statute in question must be either "reasonably" or "fairly and substantially" related.

Certainly more than one of our cases has described the standard in question in terms of whether the statutory scheme "rationally further[s] some legitimate, articulated state purpose . . .". See San Antonio
School District v. Rodriguez, 411 U.S. 1, 17. If the phrase "legitimate state interest" is merely a shorthand for an interest within the scope of the State's "police power", and it is understood that this reserved power is bounded only by constitutional guarantees, the phrase is unexceptionable. But if the Court means that entirely apart from a state statute's trenching upon constitutional guarantees, and entirely apart from such a statute's being directed at a "suspect class", the Court must determine by some apparently unknown calculus whether the State's goal in enacting the statute is "legitimate", I disagree and do not read our prior decisions using such phrasing to support such a result. Rodriguez, for example, cited with approval both McGowan and Dandridge v. Williams, 397 U.S. 471, 485 (1970).

In Rodriguez, the Court likewise stated:

"It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparison with the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." 411 U.S., at 33-34.

I joined the Court's opinion in Rodriguez, an opinion which expressly refused to expand the notion of "rights" requiring "strict
scrutiny" beyond interests derived from the Constitution itself. Surely that decision was not intended to embrace the identical twin of the expansive doctrine urged by the appellees in that case by according substantive constitutional meaning to the word "legitimate."

Yet as I read the Court's proposed opinion in this case, what was in Rodriguez merely a recognition that the State was presumed to act constitutionally has become a test having its own independent significance. The opinion suggests, slip op. pp. 8-9, that a State must demonstrate to the Court's satisfaction the "legitimacy" of its interest before the Court need even consider whether the means chosen by the State is "reasonably related" to that interest. While understood in one way, this approach may be valid, it seems to me to run the risk of confusing two concepts which are better kept separate.

No one doubts, for example, that a State statute which has as its purpose discrimination against blacks is violative of the Fourteenth Amendment. It might be said that the State's interest in such legislation is simply not "legitimate" in constitutional terms. If such a violation of the Constitution is demonstrated, that ends the matter and there is no occasion to consider whether the means which it chose to pursue that goal are either rationally related or wholly irrelevant to it.
But in a case such as ours, where it is conceded that no "suspect classification" is involved, and no substantive constitutional right infringed, I fear that the Court's treatment of the phrase "legitimate state interest" may confuse. Even if we do not do so, other courts may attempt to give content to each word and phrase of the test.

Insofar as those courts, or for that matter, this Court, write opinions fully disclosing their analysis and justifying the results they reach, any errors in interpretation of what is a "legitimate state interest" will be subject to review either by higher courts, or in the case of this Court to the customary elucidations between majority and minority opinions in this Court. But even if the adjective "legitimate" is not intended to have any added constitutional content or to possess independent force, I fear it may nonetheless have a mischievous tendency to obscure the decisional process in equal protection cases. If courts are obligated to hypothesize purposes which the legislature may have had in mind, as I believe McDonald and McGowan instruct, there may well be a tendency to shy away from advancing or carefully examining a purpose which the Court may upon casual reflection think is somewhat dubious, on the unstated assumption that such a purpose is not "legitimate". There will likewise be the same tendency on the part of advocates defending statutes challenged on equal protection
grounds. The result in such cases will not be a square holding, supported by principled reasoning, that particular state purposes are not legitimate. It will instead be an almost subconscious or subliminal refusal to hypothesize purposes thought "dubious", even though upon more mature examination such justifications for a statute would be found to be entirely "legitimate". The real decision-making will then be reflected, not in the written opinion of the Court, but in an often casual and intuitive rejection without discussion of some possible purpose, which may indeed have been the real purpose of the legislature, on the incorrect assumption that such purpose was not "legitimate" and therefore need not be hypothesized or discussed in the opinion.

This problem is greatly compounded in my view, by the portion of the Court's standard of review which seems to me to have the least support in our cases and to be the farthest from my understanding of the proper application of the Equal Protection Clause. At at least two points it is asserted that the question is whether the Massachusetts statute is satisfactorily related "to the State's announced purpose." Slip op. at 9, see id. at 10. I fail to see the source of this requirement. As can be seen from the quote from McGowan set out earlier, the scope of review only fifteen years ago was understood to require affirmation of a state legislative classification "if any state of facts
reasonably may be conceived to justify it."

This same view of the operation of the Equal Protection Clause was reiterated more expansively by Mr. Chief Justice Warren in *McDonald v. Board of Election*, 394 U.S. 802, 809 (1969):

"Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." (citing *McGowan*, et al.).

I have always thought the restrictions placed upon reviewing courts by our decisions and embodied in two excerpts above were the product not only of very salutary recognition of the extremely serious business of invalidating state statutes under the Constitution, but also had a great deal to do with the relationships between courts and legislatures in general, and federal courts and state legislatures in particular.

There is, of course, nothing in the Constitution which requires the States to set out a "purpose" or "objective" of any legislation, and in my experience few do so, at least as a matter of course. Like the Congress, some state legislatures do seem to have begun the practice of occasionally appending preambles to their bills which purport to announce the reasons why the bill was enacted and the "evils" which it was hoped to cure. But this is still very much the exception rather than the rule, and most reviewing courts have nothing to guide them.
as to the "purpose" of a challenged statute other than the words of
the statute itself. It is partly for this reason, as I have understood
it, that the clear mandate of this Court has consistently been that
reviewing judges are to assiduously apply themselves to hypothesizing
a statutory purpose consistent with both the statute's language and
with the Constitution. It is only if they cannot do so -- only "if [no]
set of facts can be conceived to justify [the statute]" -- that it is
permissible for them to interfere with the expressed will of the
electorate by invalidating the statute.

Instead of this requirement, the Court's opinion seems to
suggest that courts need look only to the State's announced "purpose"
in evaluating the rationality of a challenged statute. But how can this
be accomplished if the legislature has been "silent" regarding its
purpose, i.e. it has enacted only the words of the statute leaving it to
others to divine its purpose from those words?

The only other source of an "announced purpose" for legisla-
tion challenged under the Equal Protection Clause is the presentation
made in court by the advocate upon whom is thrust the responsibility
of defending the constitutionality of such legislation. Legislation
challenged under the Equal Protection Clause of the Fourteenth Amend-
ment may have been enacted by a State, by a county, or by one of
countless varieties of municipal corporations throughout the country.
Even in this Court, where one might expect to find only the most highly skilled attorneys practicing, the quality of advocacy in defense of enactments challenged on grounds of equal protection varies from the able and well prepared to the far less able and totally unprepared. And if this is true here, it must occur with even greater frequency in the lower courts. I am thus extremely chary of entrusting the constitutional validity of a state legislative enactment entirely to the quality of those who may be litigating on the State's behalf. Certainly those advocates may add substantially to a court's understanding of the problem and its perception of what is at stake from the State's point of view. But if they fail to do so, I cannot believe that it necessarily follows that the State's otherwise valid legislative classification must be declared unconstitutional. It seems to me the height of irresponsibility to permit a court to declare invalid a state statute because it does not seem relevant to the "purpose" discovered by the lawyer representing the state before it, although the court could with very little effort ascertain another purpose embodied in the legislation which fully supports its constitutionality.

The quotation around which the Court weaves much of its thesis of judicial review in this case is from Johnson v. Robison, 415 U.S. 361, an opinion of two Terms ago which I readily joined. But I did not understand that opinion to lay down any restriction of the State to
some "announced purpose", contrary to the language in McDonald quoted supra at 3. In Johnson, the Court simply said, in its discussion of legislative purpose:

"Unlike many state and federal statutes that come before us, Congress in this statute has responsibly revealed its express legislative objectives in § 1651 of the Act and no other objective is claimed..." 415 U.S. 361, 376.

Nor did I think at that time that the inclusion in Johnson of the "fair and substantial relation" language from Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), was intended as a subtle and wholly unannounced repudiation of McGowan.

Since the Court today, however, seems to ascribe so much significance to the particular manner in which the "test" was stated in Johnson, I cannot subscribe to any intimation in today's opinion that the settled rules of McDonald and McGowan have been or should be abandoned.

As noted earlier the quotation in Johnson is from Royster Guano, 253 U.S., at 415, as quoted in Reed v. Reed, 404 U.S. 71, 76 (1971). Reed, in turn, and Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), are repeatedly cited by the Court to support its discussion of the standard of constitutional review. Presumably then these decisions are indicative of what is intended by the language
"fair and substantial relationship" in the instant application of that phrase. My reading of those cases convinces me that none embodies a test of constitutional review which is appropriate on the facts now before us.

In *Royster Guano* the Court struck down a state statute which taxed all income of local corporations doing business within the State, whether derived from outside the State or from within it, while exempting entirely any income derived from outside the State by local corporations which did no business within the State. Stating that it could conceive of no justification for thus exempting the out-of-state income of one of these two classes of corporations, the Court held that it was "obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation." 253 U.S., at 416.

Justice Brandeis, joined by Justice Holmes, dissented. In that opinion Justice Brandeis persuasively demonstrates a perfectly rational explanation for the choice made by the Virginia legislature, and in doing so reveals *Royster Guano* for what it is -- an artifact from an era where unrestrained judicial interference with legislative decision-making was the rule, rather than the exception. I had thought that era well behind us, repudiated by a line of decisions in this Court culminating in *McGowan*. By its use of the language from *Royster Guano* in a
case where the least rigorous test of constitutional review is said to be applied I fear the Court's opinion portends the resurrection of an approach from days gone by. See Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

Reed seems to me similarly inapposite to this case. There the Court, relying on the Royster Guano formulation of the standard imposed by the Equal Protection Clause, struck down an Idaho statute which gave a preference to men over women in the selection of an administrator of a decedent's estate. In doing so, the Court rejected what four members who joined the decision were later to characterize as an "apparently rational explanation of the [Idaho] statutory scheme." Frontiero v. Richardson, 411 U.S. 677, 683 (1973) (opinion of Brennan, J.). The apparent reason for doing so, at least in the view of that plurality, was the fact that the classification in Reed was "sex-based," a factor thought to justify more rigorous judicial scrutiny. But as discussed earlier, everyone agrees that in this case there is nothing to call for such inquiry. The Court seems to recognize precisely this difference between Reed and the instant case in its discussion on pp. 9-10, and I am somewhat at a loss as to why it goes on to repeatedly cite Reed, and thereby to concomitantly rely upon Royster Guano, for the test to be applied herein.
The problem is compounded by the Court's citation of *Weber*. There the Court invalidated a Louisiana workmen's compensation scheme which denied equal recovery to dependent unacknowledged illegitimates. In its opinion the Court articulated a test somewhat more in keeping with my understanding of minimal judicial review. But its result has been generally understood to be derived from the Court's concern that illegitimates were deserving of some extra measure of judicial protection. See, e.g., Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945, 991 (1975), Note, Illegitimacy and Equal Protection, 49 N. Y. U. L. Rev. 479, 484-489 (1974), Note, Illegitimate Children and Constitutional Review, 1 Pepperdine L. Rev. 266, 279 (1974). And the Court today so characterizes the rationale of *Weber*, slip at 10. In doing so it also distinguishes the situation of appellee Murgia. To my mind it follows from this distinction, with which I fully agree, that the judicial scrutiny afforded the statute discriminating against illegitimates in *Weber* is inappropriate here.

I am at a loss to understand how the Court can conclude otherwise.

We read to little purpose the history of this Court's half century of adjudication ending in 1940 if we do not view with the gravest apprehension any broadening of the extent of judicial oversight in cases where concededly no more than minimum scrutiny is
required. The fact that the Court's proposed opinion concludes by sustaining the constitutionality of the Massachusetts law in question in this case does not diminish the cause for apprehension. As a supremely knowledgeable commentator said of the "old Court":

"... It approved or disapproved each law, grudgingly giving consent to any departure from laissez faire, or to any serious interference with the power of property and employers. I do not mean to say that it never did give consent... but this only emphasizes the fact that the Court, and not the legislature, became the final judge of what might be law...". Robert H. Jackson, "The Struggle for Judicial Supremacy", p. 70.

I cannot believe that the Court should wish to retreat, either consciously or inadvertently, a single step back towards doctrines which were once the law of this Court, but which have been so long discredited that it can now fairly be said that the judgment of history is solidly against them.
No. 74-1044 Massachusetts Board of Retirement v. Murgia

February 11, 1976

Dear Bill:

I agree with the result and most of your analysis in the opinion you have circulated for the Court.

My difficulty relates to the comparison between "age-based classifications" and "sex-based classifications," addressed most specifically in the paragraph beginning on page 9. Although you conclude that older people as a group have not been "the subject of conspicuous discrimination" to the same extent as women, I would prefer not to make this comparison. As you will recall, I do not agree that the feminine sex is a "suspect class" for purposes of equal protection analysis, and doubt that I could be persuaded otherwise.

I do not think your opinion would be weakened if all of the paragraph mentioned were deleted except for the two sentences that follow the citation of Weber. If, however, you prefer to leave this in the opinion, I will write a brief concurrence.

I may add that I am not entirely happy with "two-tier" equal protection. In view of prior precedents, I followed it in my opinions for the Court in Rodriguez and Griffiths (among others). I fully endorse the concept of "strict scrutiny" in certain circumstances (e.g., where race discrimination or First Amendment rights are involved), and this level of care may be appropriate whenever any fundamental right guaranteed by the Constitution is at issue. But I shy away from the "compelling state interest" test, as this usually prejudges an issue.
As commentators and other federal judges have pointed out, the Court has spoken with "many voices" on equal protection analysis. I therefore would view with an open mind any broad reconsideration of a Court position.

But absent this ambitious undertaking, I am willing to join your opinion subject to the change above suggested.

Sincerely,

Mr. Justice Brennan

lfp/ss
cc: The Conference
To: Justice Powell

Date: Feb. 12, 1976

From: Chris

No. 74-1044 Massachusetts Bd. of Retirement v. Murgia

These are my initial reactions to the WJB-WHR correspondence. I will take some more time to think the problems through, and may change my views, but I thought you might like a quick reaction. I do not see any reason (other than those we have already discussed) why you should not join WJB's opinion.

WHR makes three points:

(1) He takes issue with the requirement that the classification have a "substantial" relation to the object of the legislation. It is my understanding that this is no departure from previous opinions. WJB correctly points out that it has been frequently used -- indeed, in some opinions in which you have concurred, such as Stanton, Johnson, Kahn. "Substantial" need mean nothing more than "not frivolous or arbitrary," an interpretation which would give even WHR no pause.

(2) WHR fears that the reference to a "legitimate state interest" imparts too much substantive content into the court's evaluation of the goal sought to be furthered by the state. I think that this is just semantics. I see nothing in WJB's opinion that indicates he means anything more than that the state interest be "legitimate" in the sense that it falls within the state's police power and violates no constitutional bounds. Again, it is language frequently used in past opinions.
(3) WHR takes issue with WJB's reference to an "articulated" state purpose. He sees this as a departure from McGowan and he is correct. WJB responds that he is merely saying that in this case there is a rational relationship to an articulated state purpose, rather than that there must be an articulated state purpose in every case. But WJB's formulation of the test ("question" to be answered) on pages 9 and 10 does make "articulation" part of the test. Since you agree with WJB (and Gunther) that the state interest should be "articulated," however, there is no reason for you to reconsider your decision to join on this basis.

Addendum -- I have changed my mind regarding WJB's response to WHR's criticism of his reference to the state's "announced purpose." WJB responded that he was not making a requirement that the purpose be "announced" part of the test. (If he were, you may want to ask him to change it to "announced or readily discernable," as you note above, in order to ensure that the legislature itself is not always required to be absolutely explicit). Rather, WJB says, he is merely referring to the fact that in this case there is an announced purpose and our inquiry ends when we determine that the classification is rationally related to that purpose -- leaving open the question whether the court would look further for another (readily discernible or invented by the court) purpose if there were no such rational relationship. At first I thought that WJB was being disingenuous in denying that he included "announced purpose" as part of his test. But in context he is merely making a factual reference. First he says (on pg. 8) that the legislature here has clearly identified a purpose. Then he says we ask whether there is a rational relationship to that announced purpose. The whole thing is not as clear as it should be, perhaps. But I do not think the opinion requires that the state's purpose be clearly articulated by the legislature (rather than, say, by counsel in argument) in all future cases. Nor does it even require that the purpose be "announced" at all in future cases. WJB may be correct in saying that this battle, if it is to be fought, should be fought in Dukes.
MEMORANDUM TO THE CONFERENCE

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

Bill Rehnquist and I have been exchanging views about the equal protection test to be applied where the classification is neither "suspect" nor one involving a "fundamental right." The Murgia opinion relies upon language first used some fifty-six years ago in Royster Guano Co. v. Virginia, 253 U.S. 412, namely, whether the classification is "reasonable, not arbitrary, and ... rests upon some ground of difference having a fair and substantial relation to the object of the legislation."

Bill wrote me a letter dated January 30 expressing his initial concern about the approach taken in my Murgia opinion. A copy of that letter is enclosed. I answered with the letter of February 9 addressed to him, a copy of which I also enclose. Bill has expanded his original letter into a memorandum to the conference dated February 11, also enclosed.

Potter has also circulated a concurring opinion in the case in which he says that he cannot subscribe to the view that the inquiry is "Whether the classification is reasonably related to a legitimate state objective."

It seems to me that Bill and Potter's views are at odds with statements in a number of equal protection cases cited in my memorandum and decided over the past half century.

By agreement between Bill and me these exchanges are circulated with the thought that they might aid the Conference in coming to rest in this case.

W.J.B. Jr.
February 12, 1976

74-1044 - Mass. Bd. v. Murgia

Dear Bill,

I have read with interest the copies of the letters exchanged between you and Bill Rehnquist and Bill's memorandum to the Conference, all enclosed with your memorandum to the Conference of this date. As you know, I am in substantial agreement with Bill Rehnquist's views.

There would be no point in my trying to deal in specific detail with the cases you cite and discuss in your thorough letter of February 9 to Bill. I cannot, however, allow one of the statements in that letter to go unchallenged. Specifically, I do not in the least believe "we were wrong in the results we reached" in LaFleur, Vlandis, etc. It was precisely because I thought the state laws in those cases should not and could not be invalidated under the Equal Protection Clause that I wrote or joined opinions dealing with them under the Due Process Clause. I do not at all think "we were wrong" in those cases, but firmly believe we would have been "wrong" if we had invalidated the state laws there involved under the Equal Protection Clause.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference
Re: 74-1044 - Massachusetts Board v. Murgia

Dear Bill:

I have reviewed the commentaries on your proposed draft in this case and I think we now need to "count heads."

In general, you can add "my head" to the position of Chief Justice Warren, as expressed in McGowan v. Maryland. I share the view that shrinks from any return to the substantive due process approach, which puts me near Bill Rehnquist but not entirely with him.

If you think this indicates a reassignment, as you intimated to me on the Bench, I will proceed. Perhaps at Conference this week we can clarify.

Regards,

Mr. Justice Brennan

Copies to the Conference