May 25, 1976

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

Dear Lewis:

Since it is getting late in the year, and since the present status of this case seems so uncertain, I thought I would set forth in rough form my reaction to your current memorandum. If your memorandum should acquire the necessary votes for a Court opinion my letter could be used as a basis for my concurrence in the result; if your memorandum does not acquire that number of votes, my letter might provide the basis for an opinion in support of the result upon which we all agree.

(1) Absence of fundamental right. I agree entirely with your treatment of this question on page 6 of your memorandum opinion.
(2) Suspect classification. Since appellee in his brief seems to me to all but abandon any claim that the Massachusetts statute creates a "suspect classification", I would not as an original proposition think this were an appropriate case to discourse at length upon the criteria for determining a suspect classification. It seems to me that in one sentence of your memorandum on page 9, you say virtually all that need be said in the way of substantive analysis on this point:

"But even old age does not define a 'discrete and insular' group . . . Instead it marks a stage that each of us will reach if we live out our normal span."

634, 642, would be adequate. Neither the Chief nor I, of course, agree that aliens are a "suspect classification", but obviously we are not in a position to insist that the conclusion previously reached by the majority of the Court be repudiated.

I would be somewhat concerned if all of your discussion of the relative success of the aged in obtaining their wishes legislatively remained in your opinion the way it is now written. The more general reference to the same sort of test contained in Rodriguez seems to me to be more satisfactory here, where appellees really are not plumping very hard for a "suspect classification" analysis.

I add a word here in a somewhat broader context. I agree with you that there is a need for clarification of equal protection doctrine, but I basically disagree with your expansion of the "rational basis" test which I discuss infra. It seems to me what has most troubled the lower courts and the commentators are cases such as those involving sex discrimination, where although the Court has stated the test in terms of minimum scrutiny they believe that it is applying some higher level of scrutiny. As I read
Professor Gunther's article in 86 Harv. Law Rev. 1, which I take you to task for relying on so heavily in your memorandum, see infra, the genesis of the article was at least in part a felt need to explain cases such as these and your opinion in Weber v. Aetna Casualty Co., 406 U.S. 164.

If there is to be some sort of doctrinal expansion in the area of equal protection -- and I am by no means sold on the necessity or desirability for it -- it seems to me that it should come in some area other than that of the minimum scrutiny -- rational basis test. I think that your expansion of this test in the latter part of your memorandum will simply permit lower courts to make more erroneous decisions striking down social and economic legislation, such as the District Court did in this case, without in any principled way accommodating cases such as those dealing with sex discrimination. In other words, if we expand the rational basis test in this opinion, we will still be confronted further down the pike with a demand to expand "suspect classifications" or else adopt a "middle tier" level of scrutiny in order to accommodate those cases.
While my own personal view of the matter is that the standard of review in both areas should be left pretty much the way it is, if I had to choose between some doctrine explaining cases such as the sex discrimination cases, on the one hand, and the across-the-board expansion of the minimum scrutiny test which you propose, on the other, I should unhesitatingly choose the former. This seems to me to be another reason why it is undesirable to say anything more than is necessary to decide this case about "suspect classification". For this reason I think Potter's very brief opinion concurring in the result has much to commend it, although it would obviously have to be expanded if it were to be an opinion for the Court.

(3) "Purpose": Its Legitimacy v. Its Significance. As I now understand it, I quite agree with your observations that there inheres in the Constitution some "requirement that a State's purpose be 'legitimate'". For although I do have some difficulty seeing any difference between deciding whether a "purpose falls within the very broad range of powers entrusted the state legislatures" and deciding whether it does not "independently violate other constitutional requirements", it
seems indisputable that a state legislative enactment which fails to pass these tests must be held invalid.

But I draw back from some of the precepts of constitutional litigation which you seem to draw from this requirement of "legitimacy."

As I read your memorandum, you create in equal protection cases several express limitations upon the normal function of courts in ascertaining legislative intent so as to reduce the chances of their being somehow fooled by clever assertions of purpose which may actually mask the existence of an illegitimate objective in the challenged law. I don't see how such a priori limitations on what arguments courts may accept are likely to advance the cause in which you seek to enlist them. Instead, I fear that these limitations may obscure, and must thereby eventually confuse, constitutional adjudication under the Equal Protection Clause.

I don't think that a plaintiff, even when he assumes the burden traditionally imposed on one challenging a statute as being unconstitutional, will necessarily derive much benefit from these limitations. The burden on the plaintiff is to demonstrate that the statute is unconstitutional; one of the methods by which he may do this, in
the terms of your memo, is to show that the statute implements an illegitimate objective. If he can do this, i.e., if as you suggest in note 17, he can demonstrate that the statute implements a racially discriminatory objective, then the litigation is at an end. If he cannot do so, then ex hypothesi there is no "illegitimate objective" behind the statute which could be obscured by an assertion of "illusory purpose" put forth by counsel.

While these limitations, in my view, will not appreciably benefit one whose challenge to a statute deserves to succeed, I think that they will have more than one undesirable side effect as courts come to apply them. One such side effect could be to divert the attention of a court from the question of whether a statute directly contravenes the Constitution by invidiously discriminating against a suspect class to a focus upon discovering the "purpose" of the statute. I must also confess I do not understand your use of "hypothesizing" as the antithesis of proper judicial review. Initially, I am not at all sure I grasp what you mean by that term. You suggest that the only acceptable methods of determining a statute's purpose is either to draw upon a preamble or some other form of legislative history or to ascertain some
"clearly implicit" message on the face of the statutory scheme. As to the former, however, many if not most equal protection claims today are challenges to state legislation for which there may exist no legislative history, preamble, etc. Surely this heretofore unquestioned practice cannot, as a noncombatant casualty in the course of this Court's quest for a uniformly agreed-upon standard for minimal scrutiny challenges under the Equal Protection Clause, suddenly have become constitutionally suspect. And if your observations in note 13 that the Constitution does not require state legislatures to articulate the purpose of every legislative enactment, is meant to suggest that it may do so with respect to some enactments, they seem to me difficult to support in law or logic. Moreover, the basis for the suggestion with which you close note 13 escapes me entirely. I would have thought that the interpretation of a state administrative or executive agency regarding the meaning and purpose of the statute it was charged to enforce was a determination of state law which would be fairly binding upon any federal court before which the issue might be properly raised. I can't imagine how a conclusion that there was "hypothesizing by a lawyer" somehow involved, would entitle a court to disregard the State's interpretation of its own law.
Your alternative suggestion for divining the "purpose" of a statute, that it will usually be "clearly apparent from the face of the enactment," may be true as to most statutes which are passed. But when considered against those statutes which have led to litigation, I would have thought that the volumes written on statutory interpretation, as well as a very sizeable portion of this Court's case law, demonstrate that the "purpose" of a disputed statute is seldom so easily discernible. Indeed, the lesson of these authorities seems to be that it is a mistake of some dimension to assume that there exists a single "purpose" which may be ascribed to the legislature with regard to any particular statute, or that courts can adequately undertake to examine the subjective "motive" or "intent" of the legislators in performing their review function.

All this leads me to conclude that the test which you propose is really a very significant departure from constitutional adjudication as developed in the decisions of this Court. I'm not sure that the focus upon the "purpose" of the statute, assuming that we could agree upon that aspect of a statute's meaning, has much relevance to traditional judicial review; at least not where there is no dispute
that only minimum scrutiny is appropriate. I am thus much more comfortable with Potter's suggestion that we adhere to the test announced in cases such as McGowan: that a statutory legislative choice will not be invalidated unless no set of facts can be conceived to justify it. That formulation, while perhaps not embodying what political scientists might want in a model of judicial review, seems to me the proper role for a court enforcing the Constitution which we have.

(4) Professor Gunther's "Ends-Means" Analysis.

I have the most serious reservations about that portion of your memorandum which seems to contemplate the bodily assumption into the Equal Protection Clause of Professor Gunther's article in 86 Harv. L. Rev. 1 (1972); you refer to it approvingly once in your text, and once again in a footnote, at pages 10-17 of your memorandum. Professor Gunther, as I read his article, advances what he calls a "model of modest interventionism", id., 24, which he says was suggested to him by developments in the October 1971 Term. More than one passage in the article seems to me to be in the area of political science, rather than of constitutional
law -- a choice which a law review commentator is certainly free to make, but which I am not sure ought to be carried over into this Court's opinion. For example, Professor Gunther says:

"It does indeed follow from the political process theme that legislative value choices warrant judicial deference so long as the people can have their say in the public forum and at the ballot box. It does not follow, however, that the Court should eschew all concern with the relationship of the means adopted to the legislatively chosen ends. Means scrutiny, to the contrary, can improve the quality of the political process -- without second-guessing the substantive validity of its results -- by encouraging a fuller airing in the political arena of the grounds for legislative action."
Examination of means in light of asserted state purposes would directly promote public consideration of the benefits assertedly sought by the proposed legislation; indirectly, it would stimulate fuller political examination, in relation to those benefits, of the costs that would be incurred if the proposed means were adopted." *Ibid.*, at 44.

While I support popular government and open debate as much as the next person, the quoted statement is pure political science, not constitutional law; it is surely miles removed from what this Court's decisions have ever intimated to be the purpose or meaning of the Equal Protection Clause of the Fourteenth Amendment.

Professor Gunther's article has not gone unchallenged even among his academic brethren. In the "Foreword" to the Harvard Law Review issue on the Supreme Court in the following year, Professor Tribe said of Professor Gunther's approach:
"[His] aim of a 'relatively vigorous' judicial scrutiny . . . evaporates in a verbal mist which invites manipulation that conceals the substantive judgments underlying judicial choice."

Even Professor Gunther later expressed doubts about his proposed Equal Protection analysis when he participated in a forum for the Hastings Constitutional Law Quarterly last year:

"I recognize more difficulties now than I spoke about in the Foreword, as to both purposes and means, and in application. I would hate to be trying to decide some of the cases which would be thrown at me to decide." 2 Hastings Const. L. Q., at 660.

Nor has Professor Gunther's doctrine fared particularly well in the one case that I know of which came here after a Court of Appeals adopted his theory. The Court of Appeals for the Second Circuit in Boraas v. Village of Belle Terre, 476 F.2d 806, cited Professor Gunther's article, and said it
was focusing "on the actual rationality of the legislative means under attack. . . .", 476 F.2d 806, 815. It held that the Belle Terre ordinance violated the Equal Protection Clause of the Fourteenth Amendment. The rest is history. That judgment was reversed by this Court by a vote of seven to two in an opinion written by Bill Douglas. 416 U.S. 1.

I think that a principal shortcoming, at least in my opinion, of Professor Gunther's article; of some of the intimations in your memorandum; and, of some of the language in some of our equal protection cases, is the idea that any single legislative "purpose" can be divined with respect to a statute containing a number of different sections.

Let us suppose, for example, that the state in which I presently reside, and the one in which you formerly resided -- Virginia -- enacts a law entitled the "Truck Safety Act of 1976". It has a short preamble reciting a history of accidents resulting from the difficulties of safely stopping heavily laden vehicles and stating explicitly

\*\* This is not entirely suppositious, since it resembles the federal statute I dealt with in a stay application in Coleman v. Paccar, No. A-651.
that the purpose of the Act is to improve highway safety in
the state. The principal operative provision requires that
all trucks commercially licensed in Virginia having an
unladen weight in excess of five tons shall have antiskid
devices on their hydraulic braking systems, and describes with
some particularity the type of devices which will satisfy
the statutory requirement.

The statute contains the following additional
provisions:

(1) The Act shall apply only on the
occasion of the sale or resale of a truck
which is covered by its terms.

(2) Trucks otherwise covered by the
Act which are used in connection with an
agricultural enterprise may obtain exemptions
from the provisions of the Act if their
owners make a showing of economic hardship.

One year later the Act is amended so as to provide that
it applies only to new vehicles at the time they are sold.
It seems to me that it is impossible to say that single there is any 'purpose' to this Act, notwithstanding the preamble which would indicate the contrary. The basic provision is indeed designed to foster highway safety, but the original exception would in effect grandfather in existing trucks until they are resold, and thus avoid immediate imposition of financial burden on those who are currently operating trucks which would otherwise be subject to the Act. The amendment passed the following year still further restricts the operation of the Act, and in effect grandfathers in all existing trucks, even after resale. The agricultural exception cuts directly against the purpose of highway safety, and would have to be justified in terms of legislative recognition that the typical agricultural entrepreneur may be in shakier financial condition than most other truck operators, that the business of agriculture was one which the legislature wished especially to encourage, and that therefore less stringent requirements would be applied to trucks used in that business.
As I read pages 10-17 of your memorandum, one or more provisions of this hypothetical statute would run into some difficulty if challenged on Equal Protection grounds. Yet if the analysis in *McGowan v. Maryland*, which Potter adopts in his separate concurrence, were followed, I think there would be no difficulty in sustaining any one of the provisions.

As a final wrinkle, suppose that West Virginia, long known to be less enlightened than Virginia, adopted the same statute but fails to enact any preamble. Does the West Virginia statute, under your approach, fare better or worse than the Virginia statute?

If this hypothetical poses problems, as I think it does, it nonetheless avoids what seems to me to be one of the most difficult problems of all under your analysis: the situation which arises when there is genuine disagreement about the legislative purpose behind any particular statute or subsection of a statute.

*Peroration.* This letter is too long already, but in the process of writing it I have gotten myself sufficiently worked up so that I shall indulge myself in a bit of a peroration. I think the basic shortcoming of the "end-means" analysis, of focusing on whether "the distinctions
made by a classification [are] genuinely related to the State's purpose" (your memorandum, p. 14) are twofold. If the approach means what it says, it sets up this Court, which claims no legislative competence, to evaluate a legislative decision to implement a particular purpose by enacting some provision of a given statute. It seems to me almost inconceivable that we could correctly conclude that a group of legislators, all devoting a good part of their time to the art of legislation, chose a means which was not "genuinely" related to their purpose.

If we reach that conclusion, it seems to me far more likely that we have misconceived the legislative purpose, or are deliberately refusing to acknowledge it, and are therefore masking the actual operation of the Equal Protection Clause behind a surface doctrine which set this Court up as a tutor for legislators in order that they may be taught how to enact statutes which carry out the purpose that they have in mind.

Sincerely,

Mr. Justice Powell

Copies to the Conference
Identification of the state purpose normally presents little difficulty. Although the purpose may not be imagined, it usually is apparent from the face of the statute and its legislative history.

13. Ascertainment of purpose by a state court, of course, should be respected, and substantial weight also should be given to contemporaneous interpretation by the administrative or executive agency charged with a statute's enforcement.

We do note that the proper functioning of the political process usually is best served where the policies or objectives of the legislature are identified at the time of enactment. When legislation is enacted against such a background, there is greater assurance that the legislature has focused on the problem.

, and ascertainment of purpose by the appropriate state court or agency charged with a statute's enforcement, of course, should be respected.
To: Justice Powell  
Date: May 30, 1976  

From: Chris Whitman  

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

Now that I have toesed the death penalty cases into your lap, I will take the time to write down some of my reactions to Justice Rhenquist's memo in this case. Much of his disagreement with our opinion is just that -- a difference in point of view. But I do think that he does misread what we said in one important respect -- which I shall explain below.

P. 2 -- I do not think that the contention that the statute creates a "suspect classification" is quite as frivolous as WHR paints it. I am sure that it does not appear to be so to those outside the Court, who do not know that the Court has decided to close the door on further expansion on suspect classes -- or even to cut back on them, as WHR and the Chief would in the case of aliens. The only substantive point that WHR makes, however, has to do with the discussion of the relative success of the aged in obtaining their wishes legislatively. I agree with WHR that that is much longer than necessary. As I recall, it was residue from WJB's first version which he included when he combined our two drafts. It was my impression that we accepted it in the spirit of compromise, for it does no real damage, even though we may not have included it in an opinion that we wrote from scratch.

P. 3 -- It seems to me that WHR's comment that the sex discrimination cases are the most troubling to those trying to understand our equal protection cases is entirely correct. But, clearly, the Court is not prepared to reach a consensus on those. Other cases applying the rational basis test have also created a great deal of confusion -- the very split in the Court on this issue -- and there is some hope of at least getting a four-Justice consensus on the approach to be used in these non-sex cases. WHR is correct that the sex cases will continue to be a problem -- pushing towards expanding the category of suspect classifications or creating a middle tier.

P. 7 -- I am not as convinced as WHR that we can assume that there is no illegitimate objective where the challenger cannot demonstrate one. Implicit in our approach, it seems to me, is that the absence of any discernible purpose is one indication that the legislature's purpose has been illegitimate. It seems to me that it would be almost impossible to prove by affirmative evidence that a legislature's purpose is illegitimate. Few bodies are naive enough to be so explicit.
In asking you to discard the requirement that the state's purpose be articulated, WHR is asking you to depart from the views you have indicated in your past opinions. There are cases -- the New Orleans hotdog case appears to be one -- when this difference of opinion will make the difference in the result one reaches. And, to that extent, your view does put the Court in a more active role. The problem with WHR's view is that it seems to deprive the Court of any role, except for the devising of conceivable justifications -- a purely theoretical and meaningless exercise.

P. 14 and following -- The hypothesis WHR presents here reflects a fundamental misunderstanding of our opinion -- and indicates that we should clarify the point. We do not look at the relation of the means to the end of the statute as a whole. Nor do we insist that there only be a single end. Rather, we require that the means be related to the purpose (or one of the several purposes) of the particular classification under attack. Thus, in WHR's example, the statute would pass constitutional muster. The grandfather exception clause can be justified by a desire to avoid immediate imposition of the financial burden on those currently operating trucks. The exception for agricultural equipment is rationally related to the purpose of encouraging agriculture. The court need not be concerned with how these provisions serve the overall purpose of the Act -- unless they create exceptions so large that the Act does not serve its overall purpose at all and becomes simply a means of imposing a meaningless burden on those not excepted.

Chris