May 7, 1976

No. 74-1044 MURGIA

Dear Potter:

Here is a memorandum in which I suggest an opinion for the Court in the above case.

As you will recall, after Bill Brennan's first circulation several months ago, several Justices expressed differing views in dissenting and concurring opinions. Others have not yet spoken. On April 7th I circulated a concurring opinion, much of which was adopted by Bill Brennan and circulated as a combination of his views and mine.

As no court developed, Bill thereafter generously suggested that I make such revisions as I thought appropriate and circulate a fresh memorandum. Bill's concern, and one we all share, is to agree at least on a formulation of the rational basis equal protection test. Our cases reflect a rather wide variety of formulations.

The enclosed memorandum, which I developed with considerable help from Bill Brennan, is satisfactory to him and to me. I believe it also will be satisfactory to Byron. At this time, no one else has seen it.

I would be happy to discuss any part of it with you.

Sincerely,

Mr. Justice Stewart
CC: Mr. Justice Brennan

LFP/gg
May 7, 1976

No. 74-1044 MURGIA

Dear Potter:

Here is a memorandum in which I suggest an opinion for the Court in the above case.

As you will recall, after Bill Brennan's first circulation several months ago, several Justices expressed differing views in dissenting and concurring opinions. Others have not yet spoken. On April 7th I circulated a concurring opinion, much of which was adopted by Bill Brennan and circulated as a combination of his views and mine.

As no court developed, Bill thereafter generously suggested that I make such revisions as I thought appropriate and circulate a fresh memorandum. Bill's concern, and one we all share, is the present disparity in the way in which we state the basic test for analysis of equal protection claims. Although we will continue, in a good many cases, to differ as to the results, it would be constructive at least to have a court formulation of the test itself.

I have tried to distill from relatively recent precedents the essence of rational basis equal protection analysis. I have not tried to write a new standard.

The enclosed memorandum, which I developed with considerable help from Bill Brennan, is satisfactory to him and to me. I believe it also
will be satisfactory to Byron. At this time, no one else has seen it.

I would be happy to discuss any part of it with you.

Sincerely,

Mr. Justice Stewart
CC: Mr. Justice Brennan
LFP/gg
May 12, 1976

No. 74-1044 Massachusetts Board v. Murgia

Dear Harry:

Draft opinions in this case have now been in circulation since January. In an effort to find common ground for at least four of us, and possibly five, Bill Brennan suggested - as you know from what he said at one of our Conferences - that I prepare a memorandum embodying what might be called a compromise version of his views and mine.

I deliver to you herewith two copies of my memorandum. Although designated a "third draft", it has not yet been circulated to the Conference. This memorandum was developed in cooperation with Bill Brennan, and it has his approval. Copies also were recently reviewed by Byron and Potter, and it now has Byron's approval. Potter is willing to join if the full paragraph beginning at the top of page 11 is omitted. Bill and I both would very much prefer to leave the paragraph in the opinion for its relevance to the ascertainment of state purpose.

As with Byron and Potter, I am anxious to have your views before making a general circulation of the memorandum. I have not tried to do a "restatement" of equal protection analysis, as this would require the unsettling of too many prior precedents. Rather, the purpose has been to articulate a framework of analysis for the rational basis test that a majority of us can accept.

Bill Brennan and I tried to reach you on Monday when each of us spoke to Potter. I know how pressed you are, and hesitate to intrude even by a letter. If you should wish to discuss this, Bill and I will be happy to come to your Chambers.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: Mr. Justice Brennan
Re: No. 74-1044 - Massachusetts Board v. Murgia

Dear Lewis:

I have read your letter of May 12 and the draft of your memorandum for this case with great care. It strikes me as a reasonable and thoughtful resolution of the views that have been expressed in the respective circulations.

As you know from some of my comments at the conference table, I have been attracted by the middle tier concept of equal protection. This was perceived initially, I believe, by Gerald Gunther in his 1972 Harvard Law Review article. I had hoped that the Court would arrive at a conclusion along that line, perhaps this Term. There is, however, much to be said for your approach to the rational basis test for this case and for others like it. I therefore am content to go along with it for now.

The paragraph on page 11 is all right with me. My preference is that it be retained rather than omitted.

In sum, I would join you.

Sincerely,

[Signature]

Mr. Justice Powell

cc: Mr. Justice Brennan
May 19, 1976

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

MEMORANDUM TO THE CONFERENCE:

Draft opinions and memoranda in the case have been in circulation since January. Bill Brennan made the initial circulation, and differing views were expressed thereafter by several members of the Court. On April 7 I circulated a concurring opinion, most of which was adopted subsequently by Bill and circulated as a combination of his views and mine.

As no Court developed, Bill thereafter generously suggested - as he stated at one of our Conferences - that I make such revisions as I thought appropriate and circulate a fresh memorandum. Bill's objective, and one we all share, is to attain as much unanimity as possible on a general formulation of the rational basis equal protection test. I do not think we have been far apart in substance, but the terminology employed in our cases has varied rather widely.

The enclosed memorandum has been seen by several of you, as - in view of past differences - it seemed best to seek some common ground before making any further circulation.

I would be happy to discuss any part of this with any of you.

L.F.P., Jr.
May 19, 1976

Re: No. 74-1044 - Massachusetts v. Murgia

Dear Lewis:

I think my views on the questions that your new circulation covers are pretty much unchanged from the memorandum which I earlier circulated, with respect to which the Chief, Potter, and Harry expressed greater or lesser degrees of agreement. I will try to revise my earlier memorandum to address points covered by your memorandum which my earlier circulation did not cover, and get it out in the reasonably near future.

Sincerely,

Mr. Justice Powell

Copies to the Conference
RE: No. 74-1044 Massachusetts Bd. of Retirement v. Murgia

Dear Lewis:

I am happy to join your Memorandum and hope it becomes the opinion for the Court. I therefore withdraw my circulated opinion.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference
The Court says that a state law challenged under the Equal Protection Clause may be judicially nullified if its "purpose" is not "capable of discernment by some means short of hypothesizing by a court or a lawyer in the course of litigation concerning [its] constitutionality." Ante, p. 11. This extraordinary pronouncement strikes me as contrary to the first principle of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law. See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893). The Court's pronouncement is also specifically contrary to the teaching of Chief Justice Warren's opinion for the Court in McGowan v. Maryland, 366 U. S. 420, 426: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (Emphasis added.)

Three years ago I tried to set down in a few words my considered understanding of the Equal Protection Clause of the Fourteenth Amendment. See San Antonio School District v. Rodriguez, 411 U. S. 1, at 59 (concurring opinion). It is on the basis of that understanding that I concur in the judgment in this case. The
classification made by this Massachusetts law is not constitutionally suspect; does not impinge upon a constitutionally protected right or liberty; and does not rest on grounds wholly irrelevant to the achievement of the State's objective. Since, therefore, the law is not invidiously discriminatory, it does not violate the Equal Protection Clause.

1 Cf. McLaughlin v. Florida, 379 U. S. 184, 198 (concurring opinion).
2 Cf. Shapiro v. Thompson, 394 U. S. 618, 642 (concurring opinion).
Dear Lewis:

Although it might be wise for me to reflect on the problem, perhaps there is some virtue in giving you my immediate reaction to the memorandum which you gave me yesterday afternoon.

The "assumption that the political process is most sensitive to the wishes of the people in a majoritarian democracy" is certainly an important predicate for the rule that legislative decisions are entitled to great deference, but I would not agree that it is the only, or indeed, the principal basis for the rule. I would add at least these additional justifications:

First, under any program involving a division of labor, whether of menial tasks or of the high responsibility of government, the effective delegation of responsibility must carry with it the right to make some mistakes. Error is an inescapable characteristic of human endeavor, and the judiciary has neither the power nor the ability to correct all the errors made by a co-equal branch of government. This is perhaps the same thought that Justice Holmes has described as the need for some "play in the joints," or words to that effect.

Second, we have no special skills in making policy judgments. Even though we phrase the test in terms of "rational basis," we are merely saying that a law must reflect a policy judgment which we find acceptable. Since the legislature is the policy making branch of the government,
and since we have an overriding obligation to be neutral on questions of policy, it inevitably must follow that we accord great deference to legislative judgment.

Third, perhaps of greatest importance, the strength of the judiciary is largely the consequence of its tradition of self-restraint. The more often we substitute our judgment for the product of the majoritarian process the greater is the risk that our moral authority will diminish and our mountain of work will increase.

I am sure that much more is involved, but I surely am not persuaded that the basis for the rule of great deference is as narrow or as easily stated as page 11 of your memorandum implies.

Since you invited me to study the draft, perhaps you will forgive me if I add a comment that goes somewhat beyond the specific problem of this case. It has been my impression that the disputes within an appellate court that are the most difficult to resolve are frequently over matters that do not affect the outcome of the particular case before the court. I had that impression (and it may well have been incorrect because I did not understand the case as well as those who had studied the briefs) about the dispute between you and Bill Brennan in Franks v. Bowman. I have that impression about this case. For that reason, were I the author of the opinion, I would be inclined simply to omit the material beginning in the middle of page 10 and including the first three lines of page 12, or to say something along the line: "No matter what problems may be associated with the identification of the relevant state interest in other cases, in this case we have no such problem . . . ."

If this type of approach is followed, sooner or later a case will come along in which the differing statements of the applicable rule will actually affect the outcome of the case. It is in that kind of context, rather than in a law review type of hypothetical analysis, that we do the best job of hammering out rules that we will follow in future cases. In short, I firmly believe the virtues of the common law tradition apply to constitutional adjudication. If we accept that premise, we should also minimize the amount of our obiter dicta. I am well aware of, and thoroughly respect, the view that our rule-making responsibility in the field of constitutional law justifies a different approach, but I happen to feel otherwise.
As I said at the outset, I am responding quite frankly and without a great deal of reflection, but I think that is really what you want me to do even though my conclusion differs from your proposal. I greatly appreciate your asking for my reactions.

Sincerely,

Mr. Justice Powell
Re: 74-1044 - Massachusetts Bd. of Retirement v. Murgia

Dear Lewis:

I have not come to rest on your memo but with June rushing at us I feel bound to tell you it is very doubtful that I could join.

Regards,

Mr. Justice Powell

Copies to the Conference
May 24, 1976

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

Dear Lewis:

Although in chatting with Bill Brennan I indicated my agreement in general with the third draft of your memorandum, I still have some difficulties. On page 11, you indicate that the legitimate purpose required must be "capable of discernment by some means short of hypothesizing by a court or a lawyer in the course of litigation . . . " I wonder, however, if the Constitution permits or requires us to disregard a state court's considered holding as to the purpose of a state statute where insofar as we are advised, the purpose attributed to a statute by the state court is accepted by the State in applying the State's own constitutional provisions. Arguably, under our prior cases, we should view a state court's interpretation as having been expressly written into the statute.

Also, on page 14, you require that the means chosen not only be rational but also bear a fair and substantial relation to the discerned purpose. On pages 15 and 16, however, you refer to the test as one of "rationality" and on page 15 indicate that the test is satisfied if the classification is not "wholly unrelated to the objective of the statute." I would prefer not to indicate that the "fair and substantial relationship" requirement adds anything to the "rationality" standard.

Perhaps we could chat about this.

Sincerely,

Mr. Justice Powell

cc: Mr. Justice Brennan