THE BURGER COURT'S "NEWEST" EQUAL PROTECTION: IRREBUTTABLE PRESUMPTION DOCTRINE REJECTED—TWO-TIER REVIEW REINSTATED

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)

In *Massachusetts Board of Retirement v. Murgia*,[1] the Supreme Court signalled an end to the irrebuttable presumption doctrine[2] and demonstrated that it will not, even given a clear opportunity, expand the categories of fundamental interest or suspect classification.[3] Massachusetts has a mandatory retirement statute requiring state police officers to retire at age fifty.[4] Lieutenant Colonel Murgia, a fifty-year old officer with twenty-four years service in the Uniformed Branch of the Massa-

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1. 427 U.S. 307 (1976).

2. *See* Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam). In this case the Court nullified a Utah statute which made pregnant women ineligible for employment compensation benefits for a period extending from twelve weeks before the expected birth to six weeks after childbirth. The Court cited as controlling precedent Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), in which the fundamental interest of privacy in matters of marriage and procreation was involved. *See generally* Bezanson, *Some Thoughts on Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Note, *Irrebuttable Presumption: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); 1976 B.Y.U.L. REV. 565; 89 HARV. L. REV. 77 (1975); 58 MINN. L. REV. 965 (1974).

3. *See generally* Barrett, *Judicial Supervision of Legislative Classifications—A more Modest Role For Equal Protection*, 1976 B.Y.U.L. REV. 89; Canby, *Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism*, 1975 ARIZ. ST. L.J. 1; Dixon, *The Supreme Court and Equality: The Most Elusive Value, forthcoming in* CORNELL L. REV. (1977); Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); 27 U. FLA. L. REV. 839 (1975).

4. MASS. GEN. LAWS ANN. ch. 32, § 26(3)(a) (West 1966) provides:

> (a) Any . . . officer appointed under section nine A of chapter twenty-two . . . who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.
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> (b) Any . . . officer . . . who has performed service . . . for not less than twenty years and who has not attained . . . age fifty in the case of an officer appointed under the said section nine A, shall be retired by the state board of retirement in case the rating board, after an examination of such officer or inspector by a registered physician appointed by it, shall report in writing to the state board of retirement that he is physically or mentally incapacitated for the performance of duty and that such incapacity is likely to be permanent.

chusetts State Police brought suit to challenge the constitutionality of the statute, arguing that it violated the equal protection clause of the fourteenth amendment. A mandatory physical examination four months prior to his fiftieth birthday confirmed petitioner's excellent physical and mental health so that the state did not dispute his ability to perform the duties of a uniformed police officer. A three judge district court concluded that the statute was not rationally related to any substantial state interest and was therefore an unconstitutional violation of the equal protection clause.[5] The United States Supreme Court reversed, and *held*: The appropriate equal protection standard for determining the constitutionality of a statute that neither disadvantages any suspect class nor infringes upon any fundamental interest is the traditional mere rationality test. Accordingly, the Massachusetts retirement statute is constitutional since it is not wholly arbitrary or irrationally related to the legitimate state purpose of ensuring a vigorous police force.

The fourteenth amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[6] Originally, the Supreme Court held that this clause permitted statutory classification systems that were rationally related to the legislative purpose of the statute and treated equally everyone within the classification.[7] Courts would employ a more stringent test only when a statute used race as a classification factor.[8]

The Warren Court developed a two-tier analysis of challenged statutes, in which the strictness of review depended upon the classification created and the individual interest affected.[9] The Court would apply

5. Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753 (D. Mass. 1974), *rev'd*, 427 U.S. 307 (1976).

6. U.S. CONST. amend. XIV, § 1.

7. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

8. *See* Korematsu v. United States, 323 U.S. 214 (1944); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting stricter review might be required where statute infringes upon a right guaranteed by one of the first ten amendments); Strauder v. West Virginia, 100 U.S. 303 (1880).

9. *Compare* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969), *and* McGowan v. Maryland, 366 U.S. 420 (1961), *with* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), *and* Graham v. Richardson, 403 U.S. 365 (1971), *and* Shapiro v. Thompson, 394 U.S. 618 (1969), *and* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *See generally* Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural Law—Due Process Formula*, 16 U.C.L.A. L. REV. 716 (1969); Yackle, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protec-*

the traditional mere rationality test to most statutory classifications, inquiring whether "any state of facts reasonably may be conceived to justify"[10] the legislation. This test presumed the statute to be valid, and under it the Court upheld almost every classification scheme as not entirely arbitrary or irrational.[11] Statutory classifications that discriminated against classes the Court found to be peculiarly burdened, and therefore entitled to special protection,[12] and classifications that infringed upon the exercise of fundamental interests guaranteed by the Constitution[13] triggered a higher level of judicial review, known as strict

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tion Analysis in the Supreme Court, 9 U. RICH. L. REV. 181 (1975); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

10. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

11. *See* New Orleans v. Dukes, 427 U.S. 297 (1976) (overruling Morey v. Doud, 354 U.S. 457 (1957), the only decision in which the Court held a piece of economic legislation unconstitutional under the mere rationality test); Village of Belle Terre v. Boras, 416 U.S. 1 (1974); Dandridge v. Williams, 397 U.S. 471 (1970); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420 (1961).

12. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (characteristics of a suspect class include a history of prejudice and unequal treatment along with a position of political powerlessness requiring great protection by the majoritarian political process); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("discrete and insular" minorities require heightened judicial solicitude).

The Court has held classifications based on race, Loving v. Virginia, 388 U.S. 1 (1967); alienage, Sugarman v. Dougall, 413 U.S. 634 (1973); nationality, Korematsu v. United States, 323 U.S. 214 (1944); and arguably illegitimacy, Jimenez v. Weinberger, 417 U.S. 628 (1974), to be suspect and have closely scrutinized them. *See generally* Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974).

13. In Shapiro v. Thompson, 394 U.S. 618 (1969), the Warren Court introduced the idea that classifications that impinged upon the exercise of fundamental interests guaranteed by the Constitution were subject to strict scrutiny. *Id.* at 634-35. But, such an idea was not entirely new. During the first third of the twentieth century the Court had employed a substantive due process analysis in which it inquired whether the subject or purpose of the challenged legislation, not simply the classification chosen to accomplish the purpose, too greatly infringed upon the free exercise of an individual's fundamental interests. If the Court concluded that the infringement was too great, it struck down the statute, thereby precluding any further legislative action in that area. In Nebbia v. New York, 291 U.S. 502 (1934), the Court denounced this period of "Lochnerizing," a term derived from the first case explicitly employing this analysis, Lochner v. New York, 198 U.S. 45 (1905), on the grounds that the *Lochner* Court had used the slippery, elusive "fundamental interest" concept to strike down legislation it believed unwise or unjust. On a few occasions following *Nebbia*, the Court grounded its holding on substantive due process. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Skinner v. Oklahoma, 316 U.S. 535 (1942). By the mid-1960s the Court once again found certain social and economic legislation reprehensible as in Shapiro v. Thompson, 394 U.S. 618 (1969) (one year residency requirement for welfare payment eligibility), and sought a way to strike down the

scrutiny.[14] Absent a showing by the state of a compelling purpose requiring the classification, the Court would find the statute unconstitutional.[15] Rarely did a statute survive this higher level of review.[16] Consequently, the level of review employed by the Court was often determinative of the outcome of an equal protection case.

In several decisions beginning with *Shapiro v. Thompson*,[17] the Court attempted to find an intermediate level of review that would overcome the rigidity of the two-tier approach.[18] It expanded the definitions of fundamental interest and suspect class,[19] and gradually[20] employed the

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legislation. Because the Court had earlier repudiated substantive due process analysis, the Warren Court seized upon the equal protection clause and required strict scrutiny of statutory classifications which infringed upon fundamental interests. *See* sources cited note 9 *supra;* Barrett, *supra* note 3; Canby, *supra* note 3; Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure, and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

14. Interests which the Court has held to be fundamental include the right to procreate, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to vote, Dunn v. Blumstein, 405 U.S. 33 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); the right to travel, *Dunn;* Shapiro v. Thompson, 394 U.S. 618 (1969); and, possibly some aspects of personal privacy, Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967). *See* Goodpaster, *The Constitutional and Fundamental Rights*, 14 ARIZ. L. REV. 480 (1973).

15. *See* cases cited notes 12 & 14 *supra.*

16. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting): "To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." *But see* Korematsu v. United States, 323 U.S. 214 (1944) (race classification upheld because necessary for national security during World War II); Crane v. New York, 239 U.S. 195 (1915) (restriction on employment of aliens upheld as necessary for welfare of unemployed United States citizens). Recently, several cases involving minor inhibitions on fundamental interests, such as petition requirements, have survived the compelling state interest-strict scrutiny requirement. American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). *See* 53 N.C.L. REV. 430 (1974).

17. 394 U.S. 618 (1969).

18. *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Lindsey v. Normet, 405 U.S. 56 (1971) (Douglas, J., dissenting); Dandridge v. Williams, 397 U.S. 471 (1969).

19. *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Lindsey v. Normet, 405 U.S. 56 (1971) (In an action concerning Oregon's Forcible Entry and Wrongful Detainer Statute, the majority rejected appellant's argument that the "need for decent shelter" and "right to retain peaceful possession of one's home" are fundamental interests, but Justice Douglas in dissent readily accepted this argument.); Dandridge v. Williams, 397 U.S. 471, 529 (1970) (Marshall, J., dissenting):

> In any event, it cannot suffice merely to invoke the spectre of the past and to recite from Lindsley v. Natural Carbonic Gas Co. and Williamson v. Lee Optical Co. to decide the case. Appellees are not a gas company or an optical

flexible sliding-scale review advocated by Justice Marshall. This analysis meant that the degree of scrutiny would vary depending on four factors: (1) the nexus between the interest infringed by the statutory classification and a right guaranteed by the Constitution; (2) the degree of suspectness of the classification; (3) the state purpose to be accomplished by the statute; and, (4) the means employed by the statute to achieve its purpose.[21] If the interest were closely related to the exercise of a right expressly stated or implied in the Constitution, the Court would rigorously examine the legislation.[22] For example, the right to vote is not guaranteed by the Constitution, but is closely related to the exercise of the first amendment right to freedom of speech. Therefore,

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dispenser; they are needy dependent children and families who are discriminated against by the State.

See also Michelman, *Forward: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (suggests that the Court was utilizing the equal protection clause, perhaps without realizing it, as a means of guaranteeing acquisition of the basic necessities of life to all).

20. For a short time after Shapiro v. Thompson, 394 U.S. 618 (1969), the Court explained what interests and classes warranted greater protection and why. *See* Dandridge v. Williams, 397 U.S. 471 (1970); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

21. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 109, 124-25 (Marshall, J., dissenting):

> In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees . . . . But the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved . . . .
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> The nature of our inquiry into the justifications for state discrimination is essentially the same in all equal protection cases: we must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the state has sought to advance its interests. Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake and the invidiousness of the particular classification . . . .

See generally Barrett, *supra* note 3; Dixon, *supra* note 3; Gunther, *supra* note 3; Canby, *supra* note 3 (articles suggesting various terms to describe this new level of review by the Court, including middle level review, equal protection with bite, strong rational basis test, and active rational basis test).

22. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Justice Marshall in dissent noted that the equal protection clause was meaningless if it only protected rights explicitly or implicitly guaranteed by the Constitution from state impingement because these rights already required strict scrutiny against any state infringement. *Id.* at 100.

the Court would closely scrutinize legislation infringing on the right to vote to decide whether the state's interest in the classification scheme was sufficient to warrant the infringement.[23] Alternatively, if the classification were "almost" suspect,[24] the Court would require the state to show that its choice of means or its classification scheme was justified by a "pressing" need before upholding the statute.[25]

In *San Antonio Independent School District v. Rodriguez*,[26] the Court signalled an end to the sliding-scale analysis[27] it had liberally applied since 1971.[28] Plaintiff in *Rodriguez* asserted a right to an equal education for all, arguably as fundamental to the exercise of first amendment rights as voting.[29] The Court nonetheless rejected this theory,[30] finding no "really" fundamental interest or suspect class,[31] and

23. *See* Lubin v. Panish, 415 U.S. 709 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

24. That is, if the classification only had some of the characteristics of suspectness defined by the Court. For example, the classes of illegitimates, the female sex, and the aged have many of the indicia of suspectness but have not as yet been explicitly recognized as suspect by the Court.

25. *See* Eisenstadt v. Baird, 405 U.S. 438, 465-72 (1972) (dissent convincingly pointed out that although the Court claimed to be employing a mere rationality test, it in fact was requiring the state to show a strong interest similar to that in Griswold v. Connecticut, 381 U.S. 479 (1965), where an acknowledged fundamental interest was involved). *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Strange, 407 U.S. 128 (1972); Reed v. Reed, 404 U.S. 71 (1971). Both Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973), and Murgia v. Massachusetts Bd. of Retirement, 376 F. Supp. 753 (D. Mass. 1974), *rev'd*, 427 U.S. 307 (1976), cited *Reed*, which is perhaps the best example of a sliding-scale analysis requiring the state to show a substantial reason for employing the specific means at issue, and engaged in a similar analysis.

26. 411 U.S. 1 (1973).

27. Justice Powell, writing for the majority in *Rodriguez*, held that the right to an education was not a fundamental interest and wealth was not a suspect class. He refused to apply a varying level of review, noting that while "some identifiable quantum of education [may be] a Constitutionally protected prerequisite to the meaningful exercise" of the right to free speech or to vote, a state school financing statute which resulted in unequal expenditures between districts did not infringe upon any important interest, nor invidiously discriminate against a suspect class and was therefore subject only to a traditional mere rationality test. *Id.* at 36.

28. *See* cases cited notes 23 & 25 *supra*.

29. *Compare* Brown v. Board of Educ., 347 U.S. 483 (1954), *with* Kramer v. Union Free School Dist., 395 U.S. 621 (1969), *and* Carrington v. Rash, 380 U.S. 89 (1965).

30. *See* Justice Powell's majority opinion, 411 U.S. at 31 (quoting Shapiro v.

noting the delicate questions of local autonomy and federalism[32] involved in striking down these statutes. Consequently, it applied the mere rationality test to uphold the local property tax system of financing public education.[33]

Having noted the deficiencies of the sliding-scale analysis in *Rodriguez*, the Burger Court continued its search for an intermediate level of statutory review[34] by relying on earlier decisions[35] applying a doctrine of

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Thompson, 394 U.S. 618, 642 (1969): "The Court today does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.").

31. 411 U.S. at 28-29, 36-39.

32. Justice Powell noted:

> The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative new thinking as to public education, its methods and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. . . . But the ultimate solutions must come from the law-makers and from the democratic pressures of those who elect them. *Id.* at 58.

See Canby, *supra* note 3 (suggesting considérations of federalism represent a large factor in the Court's decision whether to apply a close scrutiny or a mere rationality test).

33. 411 U.S. at 56-59.

34. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973). *See generally* sources cited note 2 *supra.*

35. *See* Heiner v. Donnan, 285 U.S. 312 (1932). In the 1920s and 1930s the Court used the irrebuttable presumption doctrine to strike down classifications in the tax law. Because of its similarity to substantive due process analysis, however, it was sharply criticized for the same reasons that "Lochnerizing" was denounced. It lay almost unused until 1965 when it was employed to invalidate statutory classification schemes. Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971); Carrington v. Rash, 380 U.S. 89 (1965).

In *Bell*, the Court relied on procedural due process to strike down a statute that required suspension of the motor vehicle registration and driver's license of an uninsured motorist involved in an accident unless he posted security to cover the amount of damages claimed by the aggrieved party. While the Court could have employed the sliding-scale analysis under the equal protection clause to find that the removal of a license under these circumstances infringed upon the individual's right to a livelihood, it would have opened itself to attack for expanding the fundamental interest doctrine. Instead, the Court seized upon the irrebuttable presumption created by the statute and upon the license itself, calling it an entitlement or property interest, and held that the removal of such an "important interest of the licensee" by an irrebuttable presumption was forbidden without the procedural due process protection of a hearing to determine whether the motorist was at fault. 402 U.S. at 539. Thus, the Court was able to strike down a piece of legislation that infringed upon a person's ability to pursue a livelihood—an interest which the majority opinion indicated was fundamental—without having to

irrebuttable presumption.[36] Without specifying whether any fundamental interest or suspect class warranted close scrutiny,[37] the Court struck down several statutes containing presumptions that were "not necessarily or universally true in fact."[38] In practice, the Court applied this potentially limitless doctrine to invalidate only those statutes that infringed on a fairly fundamental interest[39] or discriminated against a fairly suspect class.[40]

Thus, irrebuttable presumption analysis became the equivalent of Justice Marshall's sliding scale[41] with less predictable results. Employing this method, the Court could decide that the state interest was insufficiently compelling to justify the use of an irrebuttable presumption in a statutory scheme and hold that due process required individual hearings to allow a person to rebut the presumption, as it did in *Vlandis*

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defend the expansion of the fundamental interest definition. *See generally* sources cited note 2 *supra*.

36. A statute which provides that if Fact A is present, Fact B is presumed to be present, contains an irrebuttable presumption.

37. *Compare* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (right to procreate), *and* Stanley v. Illinois, 405 U.S. 645 (1972) (right to raise one's children), *and* Bell v. Burson, 402 U.S. 535 (1971) (right to earn a living), *and* Carrington v. Rash, 380 U.S. 89 (1965) (right to vote), *with* the unstated interests involved in United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973), *and* Vlandis v. Kline, 412 U.S. 441 (1973). *See Vlandis*, 412 U.S. at 460 (Burger, C.J., dissenting): "Distressingly, the Court applies 'strict scrutiny' and invalidates Connecticut's statutory scheme without explaining why the statute impairs a genuine constitutional interest truly worthy of the standard of close judicial scrutiny."

38. The Court held in Vlandis v. Kline, 412 U.S. 441, 452 (1973), that if the presumed fact is "not necessarily or universally true in fact and . . . the State has reasonable alternative means of making the crucial determination," the statute unconstitutionally violates the due process clause.

39. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (right to procreate); Stanley v. Illinois, 405 U.S. 645 (1972) (right to rear one's children); Bell v. Burson, 402 U.S. 535 (1971) (right to earn a livelihood); Carrington v. Rash, 380 U.S. 89 (1965) (right to vote).

40. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (sex as a suspect class); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (wealth as a suspect class); Stanley v. Illinois, 405 U.S. 645 (1972) (sex as a suspect class).

41. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651-57 (1974) (Powell, J., concurring on equal protection grounds); United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 529-38 (1973) (Court held statute unconstitutional on equal protection grounds); United States Dep't of Agriculture v. Murry, 413 U.S. 508, 517-19 (1973) (Marshall, J., concurring on equal protection grounds). In Vlandis v. Kline, 412 U.S. 441 (1973), Justice White, concurring on equal protection grounds, stated:

> [While the Court maintains that it is applying either a mere rationality or strict scrutiny test, in fact] it must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest es-

v. Kline,[42] *Stanley v. Illinois*,[43] and *United States Department of Agriculture v. Murry*.[44] Alternatively, the Court could decide that the due process clause entitled all persons similarly situated to an individual hearing. If a statute containing an irrebuttable presumption denied a hearing to some, the Court could hold that it violated the equal protection clause and remand it to the legislature to draw the classification more narrowly, as it did in *Cleveland Board of Education v. LaFleur*[45] and *Carrington v. Rash*.[46] As these cases were decided, Chief Justice Burger and Justice Rehnquist noted with concern that the Court was again[47] creating unreasonable obstacles for state legislatures to regulate state matters.[48]

More recently, the Court has been reluctant to use the irrebuttable presumption doctrine or the sliding-scale analysis to create new fundamental interests[49] or suspect classes.[50] The Court has strictly scruti-

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calates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discrimination.

Id. at 458-59.

42. 412 U.S. 441 (1973).

43. 405 U.S. 645 (1972).

44. 413 U.S. 508 (1973).

45. 414 U.S. 632 (1974).

46. 380 U.S. 89 (1965).

47. *See* Vlandis v. Kline, 412 U.S. 441, 467-68 (1973) (Rehnquist, J., dissenting): "The majority's reliance on cases such as *Heiner v. Donnan*, 285 U.S. 312 . . . (1932), harks back to a day when the principles of substantive due process had reached their zenith in this Court." (parallel citations omitted).

48. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 657 (1974) (Rehnquist, J., dissenting); United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 545 (1973) (Rehnquist, J., dissenting); United States Dep't of Agriculture v. Murry, 413 U.S. 508, 523 (1973) (Rehnquist, J., dissenting); Vlandis v. Kline, 412 U.S. 441, 460 (1973) (Burger, C.J., dissenting); Stanley v. Illinois, 405 U.S. 645, 665 (1972) (Burger, C.J., dissenting); Carrington v. Rash, 380 U.S. 89, 99 (1965) (Harlan, J., dissenting). Note Justice Powell's concurring opinion in *LaFleur*, 414 U.S. at 652, in which he reevaluated his initial support of the irrebuttable presumption analysis:

> There is much to what MR. JUSTICE REHNQUIST [*sic*] says in his dissenting opinion . . . about the implications of the [irrebuttable presumption] doctrine for the traditional legislative power to operate by classification. As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner of "irrebuttable presumptions."

49. *See* Marshall v. United States, 414 U.S. 417 (1974). While Justice Marshall argued in dissent that the statute incorporated an irrebuttable presumption and infringed upon a fairly fundamental interest, requiring the Court to take a closer look at the statute, the majority applied the mere rationality test, supplying possible reasons why Congress might have enacted the challenged legislation. In Weinberger v. Salfi, 422 U.S. 749 (1975), the statute embodied a clear irrebuttable presumption that widows who

nized a statutory classification only when it infringed on a recognized fundamental right or discriminated against a recognized suspect class.[51] In cases involving social and economic legislation the Court has deferred to the legislature's will.[52]

Before 1976 courts gave only cursory attention to the constitutionality of mandatory retirement statutes.[53] In *Massachusetts Board of Retire-*

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married less than nine months before the wage earner's death were "investor" widows who married only to obtain death benefits. Justice Rehnquist, for the Court, ignored the irrebuttable presumption and applied the mere rationality test to this social legislation. *See also The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 77 (1975). *But see* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) in which Justice Marshall wrote a very confused opinion for the Court. He based the holding on many grounds: the fundamental right to travel; the "almost" fundamental basic necessities of life; the "almost" suspectness of a classification based on wealth. While Justices Douglas, Blackmun, and The Chief Justice concurred only in the result, and Justice Rehnquist dissented, it is arguable that those Justices who adhered to Justice Marshall's sliding-scale opinion did so only on the basis of the holding in Dandridge v. Williams, 397 U.S. 471 (1969), that the right to travel was fundamental.

50. The exception here is perhaps sex. In Frontiero v. Richardson, 411 U.S. 677 (1973), a plurality opinion, the Court held that sex was a suspect class. In subsequent cases the Court retreated from this explicit statement, but its analyses in Craig v. Boren, 97 S. Ct. 451 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); and Kahn v. Shevin, 416 U.S. 351 (1974), constitute a holding that sex is a suspect class. In Barrett, *supra* note 3; Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); and 89 HARV. L. REV. 95 (1975), the commentators argue that the female sex is a suspect class.

51. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (Court refused to recognize old age as a suspect class); Lavine v. Milne, 424 U.S. 577 (1976), (in ignoring rebuttable—in effect, irrebuttable—presumption that in the absence of evidence to the contrary a welfare applicant who voluntarily terminates employment 75 days or less before his application does so in order to obtain welfare benefits, the Court applied a mere rationality test); Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam) (pregnancy classification struck down on basis of right to procreation upheld in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)).

52. *See* Marshall v. United States, 414 U.S. 417 (1974). Note Justice Marshall's dissent:

> While the Court today neither expressly endorses nor rejects this approach [two-tier analysis], its analysis is so deferential as to confirm an earlier observation that, except in cases where the Court chooses to invoke strict scrutiny, the Equal Protection Clause has been all but emasculated.

Id. at 431. The reemergence of the two-tier analysis is also indicated by Weinberger v. Salfi, 422 U.S. 749, 777 (1975):

> The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.

53. *See* Air Line Pilots Ass'n Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960), *cert.*

ment v. Murgia,[54] however, the Supreme Court fully reviewed both the equal protection and due process arguments against such statutes. The Court reasoned that no one had a constitutional right to a government job; hence the classification impinged on no fundamental interest.[55] The aged were neither a "discrete and insular" minority, nor so politically powerless to warrant the extraordinary protection of strict judicial scrutiny; consequently, no suspect classification was involved.[56] Absent these prerequisites, the Court thought strict scrutiny inappropriate.[57] The Court then applied a mere rationality test without discussing either the irrebuttable presumption doctrine[58] or the prospect of any intermediate level of review.[59]

Under the mere rationality test, the statute was constitutional because it was not wholly arbitrary, nor an irrational means to achieve the legitimate legislative purpose of a vigorous police force. In its per curiam opinion,[60] the Court acknowledged that mandatory retirement

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denied, 366 U.S. 962 (1961) (Federal Aviation Agency regulation requiring retirement at age sixty for pilots of commercial air carriers not arbitrary, discriminatory, or without relation to any safety requirements); Weisbrod v. Lynn, 383 F. Supp. 933 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 940 (1975) (dismissed on basis of McIlvaine v. Pennsylvania, 415 U.S. 986 (1974)); McIlvaine v. Pennsylvania State Police, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed sub nom.*, McIlvaine v. Pennsylvania, 415 U.S. 986 (1974) (mandatory retirement at age sixty for state police attacked as arbitrary and irrational; Court summarily dismissed appeal for lack of substantial federal question). *See also* Allen v. Borough of West Mifflin, 419 Pa. 394, 214 A.2d 502 (1965); Boyle v. City of Philadelphia, 338 Pa. 129, 12 A.2d 43 (1940) (both applying mere rationality test to mandatory retirement city ordinances); Note, *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 U.C.L.A. L. REV. 549 (1976); 9 CLEARINGHOUSE REV. 311 (1975).

54. 427 U.S. 307 (1976).

55. *Id.* at 312 n.3.

56. *Id.* at 312 n.4.

57. *Id.* at 312.

58. The irrebuttable presumption is: given the existence of Fact A (age fifty), Fact B (physical unfitness) is presumed. The parties and amici curiae argued that the irrebuttable presumption provided an alternative ground for invalidating the statute. *See* Brief for Appellant at 33, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Brief for Appellee at 42; Brief for Legal Services for the Elderly Poor, American Civil Liberties Union, The National Council of Senior Citizens and the Massachusetts Civil Liberties Union as Amici Curiae at 16; Brief of State Police Ass'n of Mass. in Support of Appellants as Amicus Curiae at 17; Brief of Lt. Carter, Capt. McGuire and Capt. Ready in Support of Appellee as Amici Curiae at 8.

59. 427 U.S. at 314-16.

60. It is interesting to consider why this is a per curiam opinion in view of Chief Justice Burger's and Justice Rehnquist's strident denunciations of the sliding-scale and irrebuttable presumption doctrines and Justice Powell's concurring opinion in Cleveland

might substantially affect an individual's psychological and economic well-being. It also recognized that individual testing by the state might be a more precise way of determining fitness. The Court explained, however, that

> "[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 humane system could not be devised.". . . We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws.[61]

In dissent, Justice Marshall again pleaded for application of a sliding-scale analysis in equal protection cases. He urged that in balancing the right to earn a living and the degree of suspectness of the class discriminated against with the legitimate state purpose of maintaining a vigorous police force, the means employed were so over-inclusive that they were irrational.[62]

Murgia is a clear indication that the Court is abandoning the irrebuttable presumption analysis utilized in such cases as *Dunn v. Blumstein*,[63] *Department of Agriculture v. Murry*,[64] and *Vlandis v. Kline*.[65] The Massachusetts retirement scheme creates an irrebuttable presumption of incapacity at age fifty; in Murgia's case that presumption was acknowledged to be incorrect. Had the Court followed the reasoning of its prior cases, the statute should have been held unconstitutional. Indeed, Justice Rehnquist, dissenting in *Cleveland Board of Education v. LaFleur*,[66] had predicted that on the basis of the majority's holding, mandatory retirement statutes would be vulnerable to attack under an

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Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), indicating his general agreement with Justice Rehnquist. One may hypothesize that Justice Stewart, author of many of the irrebuttable presumption opinions, and Justices Brennan and White, frequent concurrers in Justice Marshall's sliding-scale concurring and dissenting opinions, have now concluded that the implications of these analyses are indeed worrisome for the whole political system and are belatedly joining the anonymous face-saving statement of the Court in *Murgia*. This hypothesis seems more likely in view of the lone dissent by Justice Marshall.

61. 427 U.S. at 317 (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)).
62. *Id.* at 327.
63. 405 U.S. 330 (1971).
64. 413 U.S. 508 (1973).
65. 412 U.S. 441 (1973).
66. 414 U.S. 632 (1974).

equal protection-irrebuttable presumption analysis.[67] He noted that opponents to such statutes could argue that the liberty or fundamental interest concepts of the due process and equal protection clauses included the liberty to pursue freely a chosen lawful occupation and earn a living.[68] The Court's decision rejects, albeit sub silentio, these logical implications of the prior cases. The inference is that the use of irrebuttable presumptions as a surrogate for intermediate equal protection review will not continue.

Murgia also reaffirms the Burger Court's rejection of the sliding scale and emphasizes its conservative view of what constitutes a fundamental right and a suspect classification. The mandatory retirement statute infringes on employment, a fairly fundamental right,[69] and discriminates on the basis of age, a fairly suspect classification.[70] The Court chose

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67. More closely in point is the jeopardy in which the Court's opinion places longstanding statutes providing for mandatory retirement of government employees. . . .

> It was pointed out by my Brother Stewart only last year in his concurring opinion in *Roe v. Wade* . . . that "the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights." . . . In *Truax v. Raich*, the Court said: "it requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." 239 U.S. 33, 41 (1915). Since this right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life, the Court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees. In that event, federal, state, and local governmental bodies will be remitted to the task, thankless both for them and for the employees involved, of individual determinations of physical impairment and senility.

Id. at 659.

68. *Id.* Cases supporting this position include Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972) (Marshall, J., dissenting); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Truax v. Raich, 239 U.S. 33 (1915); Smith v. Texas, 233 U.S. 630 (1914); Smith v. Alabama, 124 U.S. 465 (1888).

69. It is certainly arguable that the right to earn a living or to follow a lawful occupation is indistinguishable from the right to vote, Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); the right to an education, Vlandis v. Kline, 412 U.S. 441 (1973); Brown v. Board of Educ., 347 U.S. 483 (1954); the right to bear and raise one's children, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972); the right to the bare necessities of life, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973).

70. It is equally arguable that age is a suspect classification. Age, like those classifications considered suspect, is determined solely by the accident of birth; it is an immutable characteristic, bearing no relationship to the ability of the individual to perform or contribute to society. In addition, as the Brief for Legal Services for the

not to discuss the characteristics of fundamental interests at all, and dealt only briefly with suspectness, preferring to cite cases in which these factors clearly existed.[71] The use of the traditional mere rationality test in *Murgia* is a clear signal to lower courts that suspect classifications and fundamental interests are to be construed narrowly, and that the Court prefers the minimal scrutiny of mere rationality.[72]

Murgia thus suggests that the Court will defer to the legislature in matters of statutory classification. The result acknowledges that a sliding-scale or irrebuttable presumption analysis poses the same problems for the political system as did substantive due process in an earlier era and must be rejected for the same reasons.[73] When the Court

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Elderly Poor, the American Civil Liberties Union, the National Council of Senior Citizens and the Massachusetts Civil Liberties Union as Amici Curiae at 11, *Murgia*, points out, the class of aged people meet the second indicium of suspectness by being subjected to

> a history of purposeful unequal treatment. . . . That history is perhaps not a long time: in the 19th century and before, few people attained 65 years of age, and those did who were productive members of society. . . . But the history of the 20th century is one of increasing prejudice and prejudicial treatment, exemplified by the expansion of mandatory retirement policies and statutes. Presumably, it might be suggested that one must wait for 300 years of discrimination, such as Blacks have experienced, before the "history of purposeful unequal treatment" rises to constitutional significance. To offer the thought, however, is to reject it.

See Note, *Mandatory Retirement a Vehicle for Age Discrimination*, 51 CHI.-KENT L. REV. 116 (1974); Note, *Mandatory Retirement: The Law, the Courts, and the Broader Social Context*, 11 WILLAMETTE L.J. 398 (1975).

71. *See* notes 55 & 56 *supra*.

72. Although Justice Marshall noted in his dissent in *Murgia*, 427 U.S. at 327 n.8, that the holding in *Murgia* was not dispositive as to all mandatory retirement statutes, and that the validity of each statute would depend upon whether the age chosen for forced retirement was rationally related to the state's purpose, these reservations appear to be meaningless. *Id.* So long as old age and the right to work will not trigger strict scrutiny, and the sliding-scale/irrebuttable presumption analysis is no longer viable, mandatory retirement statutes will be judged by a mere rationality standard. With such a quick peek, it is reasonable to assume that the Court will not find these statutes wholly arbitrary and unreasonable.

73. Justice Powell, writing for the Court in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), pointed to the inherent flaw in the sliding-scale approach:

> Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of Dandridge v. Williams and Lindsey v. Normet.

Id. at 37. *See* discussion at note 13 *supra*; Yackle, *supra* note 9.

strikes a statutory classification on equal protection or irrebuttable presumption grounds, the legislature may circumvent this action by substituting a means or classification more narrowly suited to the legitimate state purpose. The task is difficult, however, and—like substantive due process—usually impossible. Judicial action thus often prevents the legislature from acting in the area.[74] In both instances the Court sits as a "superlegislature" requiring near perfection from a political system that acts in a piecemeal fashion as many interests are accommodated.[75]

The Court has hinted strongly in *Murgia* that it will no longer employ the equal protection and due process clauses of the fourteenth amendment to strike down legislation. Despite Justice Marshall's pleas, the Court will not adopt an intermediate level of review depending upon the interest or class infringed, the state interest involved, and the means chosen to carry out the legitimate state purposes. Nor will it employ the due process clause to strike down legislation on the basis of an irrebuttable presumption. Instead, the Court will employ the two-tier analysis with renewed dedication, and *Murgia* demonstrates that the interests and classifications triggering strict scrutiny will be severely limited.

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74. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *and* Griswold v. Connecticut, 381 U.S. 479 (1965), *with* Dunn v. Blumstein, 405 U.S. 330 (1972), *and* Shapiro v. Thompson, 394 U.S. 618 (1969).

75. *See* Posner, *The Defunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1.