Equal Protection and Welfare Legislation: The Need for a Principled Approach

The Warren Court developed an equal protection legacy ripe for unprincipled judicial intervention1 and expansive notions of equality.2 By limiting the number of classifications found suspect and interests deemed fundamental, the Burger Court curtailed the most speculative aspects of equal protection and also restricted judicial use of strict scrutiny.3 The Burger Court, however, has applied inconsistent criteria for minimal rationality review of legislation not involving suspect classifications or fundamental rights. The Supreme Court decision in Maher v. Roe,4 denying an equal protection claim to Medicaid payments for elective abortions, illustrates the Court’s inconsistent application of minimal rationality standards to socioeconomic legislation. This comment analyzes Maher in light of recent irreconcilable Supreme Court decisions involving similar equal protection claims to welfare payments. It shows that the Court’s standard of review vacillates between deferential abdication to the legislature and unexplained judicial interventionism, and concludes that until the Court adheres to a consistent and principled approach to minimal rationality review, equal protection will remain an area for unrestrained imposition of judicial, rather than constitutional, values. The alternative offered is an articulated rationality test that would limit the Court to reviewing state-articulated, rather than Court-hypothesized, objectives.5

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2. As Justice Harlan noted:

This resurgence of the expansive view of equal protection carries the seeds of more judicial interference with the state and federal legislative process, much more indeed than does the judicial application of “due process” according to traditional concepts, . . . about which some members of the Court have expressed fears as to its potentialities for setting us judges “at large.”


3. See text accompanying notes 26-43 infra.


5. Purposes explicitly set forth in the statutory preamble would not be the only
Traditionally, the equal protection clause of the fourteenth amendment prohibited a state from discriminating between two similarly situated classes of people unless the disparate treatment rationally related to the legislative purpose. Recognizing the balance between the roles of the Court and the legislature, the Court presumed legislatures acted constitutionally, even though legislation often resulted in some inequality. Allowing legislatures considerable flexibility, the Court tolerated both overinclusive and underinclusive classifications. Under this minimal standard of review, the Warren Court gave deference to imaginable supporting rationales and conceivable legislative objectives when reviewing socioeconomic legislation. The Burger Court, however, has been less willing to hypothesize legitimate legislative objectives to justify a classification.

judicially cognizable purpose. The Court would still have an obligation to review any relevant legislative history. In elaborating upon the proper subjects of judicial inquiry into legislative intent or purpose, the Court has gone so far as to say that in extraordinary circumstances, the Court might call upon members of the decision making body to testify concerning the purpose of the official action. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267-88 (1977).


Although no precise formula has 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.

Id. at 425-26.

7. "In the determination of a statute's constitutionality, . . . the 'purpose' of a measure is generally only a legal abstraction attributed to the statute by the courts; it denotes the permissible objective which the legislature might have had in enacting the statute." Note, Developments in the Law—Equal Protection, 82 HARV. L. REV., 1065, 1091 (1969) [hereinafter cited as Developments].

8. A reasonable classification is one that includes all persons who are similarly situated with respect to the purpose of the law. An overinclusive classification imposes a burden upon a wider range of individuals than the legislature intended to be included in the class of those at whom the law is aimed; e.g., Korematsu v. United States, 323 U.S. 214 (1944) (Court upheld an overinclusive military order whose purpose was to restrict the activities of those who posed a threat of sabotage or espionage, but applied to all persons of Japanese lineage). An underinclusive classification includes all the individuals in the class intended, but leaves outside the classification others whom the law should have included, e.g., Railway Express Agency v. New York, 366 U.S. 106 (1949) (Court upheld an underinclusive ordinance that prohibited motor carriers from hiring out advertising space on their trucks while allowing firms owning trucks to advertise their own products).


10. See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977). Justice Powell's majority opinion scrutinized the law in terms of the highest state court's articulation of the state
Although retaining traditional minimal rationality standards in reviewing socioeconomic legislation, the Warren Court's expansion of a second, higher level of scrutiny revolutionized equal protection analysis. Under this two-tier scheme, the Court applies strict scrutiny if the legislation either infringes a fundamental right or involves a suspect classification. Strict scrutiny imposes two requirements that are absent from minimal rationality review. First, the means must substantially, not merely minimally, further the ends, because unlike minimal review, strict scrutiny tolerates neither overinclusive nor underinclusive classifications. To assure the necessary relationship between the means and the ends, the Court strikes down the statutory scheme if other reasonable, less discriminatory, alternatives exist for accomplishing the legislative objective. Second, the Court requires the state to advance a compelling, overriding justification for infringing a fundamental interest or using a suspect classification.

The post-Civil War case of Strauder v. West Virginia laid the framework for heightened judicial review of legislation based on suspect criteria. In Strauder, a black man convicted of murder contended the state had denied him equal protection because no black man was eligible for grand jury duty. Referring to the historical reasons for the amendment's adoption, the Court concluded that Congress had enacted the fourteenth amendment to prevent continued inferior treatment of blacks. According to Strauder, the blacks were a historically disfavored class that society had long regarded as an inferior race. Viewing the black race as uneducated and incapable of adequately protecting its interests, the Court held that blacks commanded extraordinary protection from the majoritarian process that had habitually en-

11. Gunther, supra note 1, at 8.
12. See, e.g., Shapiro v. Thompson, 394 U.S. at 634 (Court applied strict scrutiny where legislation infringed the fundamental right to interstate travel). See note 55 infra.
13. See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967) (Court struck down statutory scheme that prevented marriages between persons solely on basis of racial classifications).
14. See, e.g., Shapiro v. Thompson, 394 U.S. at 637. See also Developments, supra note 7, at 1101-04.
15. Developments, supra note 7, at 1087-91, 1124-32.
16. 100 U.S. 303 (1880).
17. Id. at 306.
18. Id.
gaged in racial discrimination. 19

Under the two-tier scheme, the Warren Court expanded the rationale of suspect classifications beyond politically impotent minorities. 20 Courts now strictly scrutinize classifications involving groups historically subjected to class hatred or to sociological badges of inferiority. 21 Normally, these classifications are based on immutable congenital traits over which the individual has no control. 22 Because such traits bear no relation to the individual's ability to contribute to society, he or she should not suffer adverse consequences. 23 Based on this rationale, the Court also strictly scrutinizes legislation affecting classes delineated by alienage 24 and lineage. 25

In addition to these well-established categories, the Warren Court implied that classifications based on wealth might also be suspect. 26 The decisions indicating the suspectness of wealth, however, involved access to the judicial or legislative processes that the state primarily, if not exclusively, controls. 27 Because the private sector, rather than the state, normally satisfies a person's economic needs, the Burger Court has refused to expand strict scrutiny of wealth classifications outside of the judicial and legislative contexts. 28 Moreover, indigency does not meet the tradi-

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19. Id.

20. The "protection from the majority process" or "political powerlessness" rationale is also based on the famous footnote in United States v. Carolene Products Co., 304 U.S. 144 (1938) where Justice Stone suggested that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry." Id. at 152-53 n.4.


25. Oyama v. California, 332 U.S. 633, 644-46 (1948) (Court held that state's right to formulate policy of landholding could not subordinate right of citizen to own land merely because citizen's father was of Japanese ancestry).


28. See San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 18 (1973); Orwin v. Schwab, 410 U.S. 656 (1973); James v. Valtierra, 402 U.S. 137 (1971). In essence, the Burger Court appears to be curtailing the use of the equal protection clause by denying claims of economic inequality when there is no significant denial of political equality or access to the judicial process. See Wilkinson, The Supreme Court, the Equal Protection
tional criteria for determining suspectness. The multitude of government assistance programs demonstrate the poor are not a politically impotent minority. Additionally, indigency is not based on immutable characteristics over which the individual has no control, nor does indigency carry an obvious badge of inferiority.\(^{29}\) Finally, discrimination against the poor has never been as severe or pervasive as the historical and political discrimination against racial minorities and aliens.\(^{30}\)

Besides suspect classifications, the Court also applies strict scrutiny to legislation infringing fundamental rights. \textit{Skinner v. Oklahoma},\(^{31}\) the progenitor of the fundamental rights strand of equal protection analysis, invalidated a law requiring compulsory sterilization for certain convicted felons. The Court held that the legislation affected procreation, one of man’s basic civil rights, and that any deprivation of an individual’s basic liberties demanded the Court’s strict scrutiny to assure the constitutional guarantee of equal protection of the laws.\(^{32}\) Although the Constitution does not identify fundamental rights explicitly, the Court has derived these rights from the concept of liberty embodied in the fourteenth amendment’s due process clause and the interests protected by the Bill of Rights.\(^{33}\) The Court deems these rights essential to a scheme of ordered liberty, based on “principle[s] of justice . . . rooted in the traditions and conscience of our people.”\(^{34}\)


\(^{30}\) See Justice Marshall’s discussion of wealth discrimination in his dissent in \textit{Rodriguez}:

That wealth classifications alone have not necessarily been considered to bear the same high degree of suspectness as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The “poor” may not be seen as politically powerless as certain discrete and insular minority groups. Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups. But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps, most importantly, though, personal wealth may not necessarily share the general irrelevance as basis for legislative action that race or nationality is recognized to have.

\textit{Id. at 121.}

\(^{31}\) 316 U.S. 535 (1942).

\(^{32}\) \textit{Id. at 541.}


\(^{34}\) See, e.g., Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). Both Palko v. Connecticut, 302 U.S. 319 (1937) and Snyder are due process cases. The Court has never endorsed the proposition that those rights fundamental under the due process clause are necessarily the same rights that the Court deems fundamental under the equal protection clause. Justice Harlan, in his famous dissent in \textit{Shapiro v. Thompson}, 394 U.S. at 661-
The Warren Court expanded the concept of fundamental rights into such areas as voting,\textsuperscript{35} criminal procedure,\textsuperscript{36} and the right to privacy,\textsuperscript{37} and implied that necessities such as welfare benefits and housing might also be fundamental.\textsuperscript{38} The Burger Court, however, has declined to find a citizen's interests in welfare\textsuperscript{39} and housing\textsuperscript{40} fundamental. These interests have less constitutional significance than the guarantee of effective equal access to the criminal or political process because such economic rights are not essential to the fourteenth amendment's concept of liberty and equality.\textsuperscript{41} Economic equality is not constitutionally mandated because it is not an interest protected by the Bill of Rights nor is it essential to a scheme of ordered liberty.\textsuperscript{42} Welfare and housing are in the area of social and economic legislation and their assurance is a legislative, not a judicial, function.\textsuperscript{43}

The Burger Court's foreclosure of the more speculative aspects of strict scrutiny is not the only adaptation the Court has made to the rigid two-tier scheme. Although retaining the two-tier scheme in form, the present Court has applied a spectrum of standards that has blurred the sharp distinctions separating the levels of scrutiny used by the Warren Court.\textsuperscript{44} Invocation of minimal rationality review no longer signifies deference to the legisla-
tive classification and automatic validation of the challenged statute. Instead, the Burger Court appears to vary the standard of review with which it scrutinizes classifications according to the Court's own opinion of the constitutional and societal importance of the interest adversely affected, and the suspectness with which the particular classification is drawn. Accordingly, various formulations of mere rationality standards exist without any consistent approach to their use. The Court's decision in \textit{Maher} illustrates not only the Court's reluctance to expand strict scrutiny analysis to welfare classifications, but also the Court's inconsistency in minimal rationality review.

The equal protection claim before the Court in \textit{Maher} involved a state's distribution of Medicaid payments. Two indigent women attacked the validity of a Connecticut welfare department regulation denying state Medicaid benefits for first trimester elective abortions. Under the state scheme, Medicaid paid for all medically necessary abortions and childbirth, but denied payments for elective abortions. The plaintiffs contended that because women have a constitutionally protected right to have an abortion, the government cannot restrict the ability of welfare recipients to obtain abortions by refusing to provide them with Medicaid funds. Finding no independent fundamental right to a state-financed abortion, the United States District Court for the District of Connecticut nevertheless held the equal protection clause forbids the exclusion of elective abortions from a state welfare scheme that subsidized the medical expenses incident to pregnancy and childbirth. Although the welfare scheme did not involve a suspect class, the court agreed with the plaintiffs that

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45. \textit{Id.} A majority of the Court has not formally acknowledged Justice Marshall's perception of the Court's equal protection analysis. See note 77 infra. Note also Justice Powell's concurring opinion in \textit{Craig v. Boren}:

\textit{[T]he Court has had difficulty in agreeing upon a standard of equal protection that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited "upper-tier"—now has substantial precedential support.}

47. \textit{Roe v. Wade}, 410 U.S. 113, 152-53 (1973) (right of personal privacy includes the abortion decision). The Court noted the privacy right has been extended to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.
49. Although the district court did not address the issue of a suspect classification,
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by denying funds for elective abortions, the state directly influ-
enced the indigent woman’s decision to exercise her constitution-
ally protected right to choose an abortion free from state interfer-
ence.50

Relying on Roe v. Wade,51 the district court applied strict
scrutiny to determine whether the state had a compelling reason
to justify the disparate treatment of elective abortions and child-
birth. In Wade, the United States Supreme Court held that a
woman’s decision to have an abortion is a fundamental interest
encompassed within the constitutionally protected right of pri-

vacy.52 Because of the health risks of the abortion procedure and
the potentiality for future life, the right to choose abortion is not
absolute, but qualified according to the stage of pregnancy.53
Wade, however, specifically held the state’s important and legiti-
mate interests in the health of the mother and in protecting poten-
tial life were not compelling during the first trimester of preg-
nancy.54 Moreover, the district court could find neither a fiscal
nor a moral interest compelling enough to justify the state’s re-

fusal to pay for first trimester elective abortions: fiscally, abortion
costs much less than prenatal care followed by delivery, and mor-
ally, states cannot discriminate against those seeking to exercise
a constitutional right on the basis that the state simply does not
approve of the exercise of that right.

The Supreme Court, however, declined to apply strict scrut-

ty to the socioeconomic legislation in Maher.55 Although recog-

the Supreme Court noted that “[a]n indigent woman desiring an abortion does not come
within the limited category of disadvantaged classes so recognized by our cases.” 432 U.S.
at 470-71. See text accompanying notes 28-30 supra.
50. 408 F. Supp. at 663-64.
52. Id. at 152-53.
53. Prior to the end of the first trimester, the state must leave the abortion decision
and its effectuation to the medical judgment of the woman’s physician. After the first
trimester, the state, in promoting its interest in the health of the mother, may regulate
the abortion procedure in ways reasonably related to maternal health. After viability, the
state in promoting its interest in the potentiality of human life, may regulate and even
proscribe abortion except where necessary to save the life or health of the mother. Id. at
164-65. The state may regulate the abortion procedure at various stages because as the
woman approaches term each state interest eventually becomes compelling. Id. at 162-
63.
54. Id. at 163.
55. In distinguishing previous cases where the Court had strictly scrutinized welfare
classifications the Court said:

In [Shapiro v. Thompson, 394 U.S. 618 (1969) and Memorial Hospital v.
Maricopa County, 415 U.S. 250 (1974)] . . . durational residence requirements
for the receipt of public benefits were found to be unconstitutional because they
“penalized” the exercise of the constitutional right to travel interstate.
nizing the existence of a fundamental right to choose to have an abortion, the Court refused to find an impermissible infringement. Justice Powell, writing for the majority, emphasized that the fundamental right in *Wade* was not an unqualified constitutional right to make a procreation decision. *Wade* protects a woman only from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. The denial of welfare payments, even for the effectuation of a fundamental interest, is not a burdensome interference. Although the state may have influenced the woman's decision by not providing welfare funding for an elective abortion, the state did not impose any additional burden on the access to abortions.\(^6\) The Court held the state regulation was merely a preference for one activity over an alternate activity by selective state funding.\(^7\) Analogizing to previous decisions,\(^8\) the Court determined that a state did not need a compelling interest for its policy choice to favor normal childbirth, any more than a state has to justify its preference to fund public, but not private education.\(^9\) Because an important function of the legislative process is deciding to whom to distribute

\(...\) Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of proscribed conduct. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.

If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate under \(\ldots\) the penalty analysis \(\ldots\). But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. We find no support in the right to travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions.


56. *Id.* at 474.
57. The Court stated:

There is a basic difference between direct state interference with a protected activity and state encouragement of an alternate activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

*Id.* at 475-76.

58. In *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), the Court explicitly rejected an argument that preferential funding of public education over private or parochial schools violated the equal protection clause. Although *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) held parents have a fundamental right to choose alternate educational methods and schools, no corollary right as yet extends requiring states to fund private schools.

59. 432 U.S. at 477.
tax revenues, the equal protection guarantee does not preclude a state from adopting laws that fund one group differently from another, nor is such a legislative decision a proper subject for strict judicial review. The Court’s only constitutional role in reviewing such socioeconomic legislation is to determine the rationality of the legislative classification.

Only when legislation prohibits or denies access to the means of effectuating a fundamental right does the Court require a compelling state interest. For example, the Court has found an absolute denial of an essential means to effectuate a fundamental right to privacy where a state prohibited distribution of nonmedical contraceptives except through licensed pharmacists. Criminal sanctions imposed on physicians performing abortions are also impermissible interferences with a pregnant woman’s decision to terminate her pregnancy. Similarly, the Court has held a state’s requirement of spousal consent to an abortion unconstitutional as an absolute and unilateral veto preventing the effectuation of a pregnant woman’s decision to have an abortion. The Court also has struck down state procedural requirements when used to deny elective abortions. To the Court, however, the regulation in *Maher* was inherently different from the above regulations, not because of the quantity or quality of the infringement imposed, but because of the source of the infringement. The woman’s indigency caused the infringement, not the state regulations. The state did not cause the woman’s poverty, nor did it erect any monetary hurdles not already present; it merely failed to remove them. By placing no obstacles, absolute or otherwise, in the pregnant woman’s path to an abortion, the regulation did not infringe the exercise of her fundamental right.

The Court did not apply strict scrutiny because the Constitution does not require states to pay for the implementation of

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62. 432 U.S. at 477.
63. See note 55 supra.
68. See Comment, *Abortion on Demand in a Post-Wade Context: Must the State Pay the Bills?*, 41 Fordham L. Rev. 921, 926 (1973). As the comment suggests, when an indigent pregnant woman seeks an abortion, the doctor, not the state, creates the monetary hurdle.
fundamental rights. Although a woman has a fundamental right to decide to abort her pregnancy, she does not have a fundamental right to make the state pay for the abortion. Although a fundamental right exists to enjoy marital privacy, including the right to use contraceptives, there is no fundamental right to have the state supply the contraceptives. Although the Court has declared a fundamental right to travel among the states, there is no requirement that the state pay transportation charges for indigents. Placing such affirmative obligations on government would misinterpret the fourteenth amendment which requires legal, not economic, equality.

Recognizing that the equal protection clause gives the Court no power to impose its views upon the states of what constitutes wise economic or social policy, the Burger Court indicated in its early decisions that the Court would continue traditional minimal rationality review of socioeconomic legislation. In most recent decisions where the Burger Court purports to apply minimal rationality review, however, the Court actually applies unexplained, intermediate levels of scrutiny requiring relatively thorough examination of both means and ends. Instead of adhering

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69. Griffin v. Illinois, 351 U.S. 12 (1956) and Boddie v. Connecticut, 401 U.S. 371 (1971) are narrow exceptions. In Griffin, a due process case, the Court required the state to furnish an indigent criminal defendant with trial transcripts. In an analogous situation, Boddie held an indigent could not be barred from securing a divorce because of inability to pay state-assessed filing fees. In the later cases of United States v. Kras, 409 U.S. 434 (1973) and Ortwein v. Schwab, 410 U.S. 556 (1973), the Court indicated it would not extend Boddie to cover such matters as bankruptcy and state appellate court filing fees in civil cases. The common element in this carefully limited category is the state "monopoly" on the effective forum, that is, the courts. Maher v. Roe, 432 U.S. at 469-71, nn. 5 & 6 (1977). Similarly, there may be a difference between cases arising under the due process clause and those arising under the equal protection clause.

It is crucial in Maher that the state has no monopoly on performing abortions and, in fact, is not in the business to any degree. It is only the money from the state which is at issue and the absence of state funds will not absolutely prevent the plaintiffs from obtaining the services which they desire. See generally Wilkinson, supra note 28, at 1001-10; Developments, supra note 7, at 1192. See also note 28 supra.

72. Shapiro v. Thompson, 394 U.S. 618 (1969); see note 55 supra.
76. For example, see the Court's articulation of the appropriate standard of scrutiny for gender-based classifications in Craig v. Boren, 429 U.S. 190 (1976). Justice Brennan's majority opinion stated that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Id. at 197. In a concurrence, Justice Powell noted that "our decision today will be viewed
to the all-or-none approach of the Warren Court, the Burger Court appears to be varying the standard of review according to the societal, as well as the constitutional, importance of the interest adversely affected. Unexplained use of varying standards of review can lead to result-oriented decisions based on judicial imposition of values not tied to acceptable sources. To justify judicial review of legislative classifications, the Court, as the ultimate interpreter of the Constitution, must derive values from constitutional text or history, rather than following its own predilections.

The Burger Court’s inconsistent approach to equal protection analysis is evident even within the narrow context of welfare regulations. Early decisions such as *Dandridge v. Williams* and its progeny indicated the Court’s refusal to scrutinize strictly welfare classifications. In *Dandridge*, the plaintiffs challenged Maryland’s Aid to Families with Dependent Children program that limited benefits received per month per family, regardless of the family’s size or computed standard of need. The plaintiffs attacked the limitation as discriminating among welfare recipients merely on the basis of family size. The United States District Court for the District of Maryland invalidated the Maryland scheme as overreaching because the program indiscriminately

by some as a ‘middle-tier approach.’" *Id.* at 211. Justice Rehnquist’s dissent characterized the majority’s approach as one applying an elevated or "intermediate" level of scrutiny. *Id.* at 217-22. See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (invalidating a Louisiana statute denning unacknowledged illegitimate children equal participation with other dependent children in workmen’s compensation death benefits); Reed v. Reed, 404 U.S. 71 (1971) (holding unconstitutional an Idaho law giving men preference over women in being appointed administrators of estates).

77. See text accompanying notes 44-45 supra. The majority in San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) specifically rejected Justice Marshall’s “sliding scale” approach. According to the majority, “the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.” *Id.* at 30. The Court also noted that: [v]irtually every state statute affects important rights. [citation . . . ] If the degree of judicial scrutiny of state legislation fluctuated depending on a majority’s view of the importance of the interest affected, we would have gone “far toward making this Court a ‘super-legislature.’” . . . We would, indeed then, be assuming a legislative role and one for which the Court lacks both authority and competence.

*Id.* at 31.


82. 397 U.S. at 473-75.
resulted in disparity of welfare payments to the largest AFDC families.\(^{83}\) On appeal, the Supreme Court determined the lower court had used too stringent a standard of review. In upholding the legislative scheme, the Court said the importance of welfare benefits was not an adequate foundation for requiring the state to justify its law by showing a compelling state interest.\(^{84}\) Instead, the Court used minimal rationality review because the welfare regulation concerned socioeconomic legislation not affecting freedoms guaranteed by the fourteenth amendment.

A year after Dandridge, the four-to-three decision in Richardson v. Belcher\(^{85}\) applied the minimal rationality standards of Dandridge to sustain provisions of the Social Security Act. The challenged regulation required a reduction in disability benefits to reflect state workmen’s compensation receipts.\(^{86}\) Requiring only legitimate goals and rationally related means, the Court found a rational basis justifying the offset in the award. The Court held that workmen’s compensation and social security programs served a common purpose, and, if overlapping, the workmen’s compensation programs should take precedence. By finding Congress could rationally conclude that a federal program duplicating the efforts of the states might gradually weaken state programs, the Court hypothesized a conceivable, rational congressional objective for the regulation. The Court then pointed

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84. In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some “reasonable basis,” it does not offend the Constitution . . . . To be sure, the cases . . . enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real and factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.
397 U.S. at 485 (footnote omitted).

Justice Marshall’s dissent in Dandridge, however, objected to the limitation on grounds that the class of individuals who actually received payments was grossly underinclusive because Congress had designed the AFDC program to assist all needy dependent children. Justice Marshall stated that such underinclusiveness manifested a prima facie violation of the equal protection requirement of a reasonable classification. Upon such a violation, the Court should require the state to come forward with a persuasive justification for the classification. The reasoning of the majority, however, was consistent with traditional minimal review standards which allow underinclusiveness, because the Court permitted the legislature to solve one problem at a time and act where the state believes the harm is most acute. Moreover, contrary to Justice Marshall’s reasoning, minimal review standards do not require the state to substantiate the justification.
85. 404 U.S. 78 (1971).
86. Id. at 79 n.1.
out that it is not for the judiciary to say whether Congress might have accomplished its purpose more reasonably by applying the same offset to recipients of private insurance.87

United States Department of Agriculture v. Moreno88 is the first case in which the Court applied an intermediate test to a classification limiting welfare disbursements.89 Although the Court purported to invoke the minimal rationality test, it actually applied an intermediate, unarticulated standard. The statute in Moreno excluded from participation in the food stamp program any household containing an individual who was unrelated to any other member in the household.90 The government argued that unrelated households are more likely than related ones to contain individuals who abuse the program and that the challenged classification was rationally related to the legitimate governmental interest in minimizing fraud in the administration of the program. The government contended that the relative instability of unrelated households increases the difficulty of detecting fraud. The Court, however, reasoned that the exclusion of unrelated households from the program did not rationally further prevention of spurious claims because unrelated persons can avoid the exclusion simply by changing their living arrangements. Moreover, the practical effect of the classification was to exclude those whom the Food Stamp Act was designed to assist. In addition, the Court found that familial relationship was unrelated to raising nutritional levels in low income households or stimulating the economy, and therefore the classification was also irrelevant to the stated purposes of the program.

The Court's analysis of the relationship between the exclusion of unrelated households and the prevention of abuse resembles strict scrutiny more closely than minimal scrutiny.91 Under

87. Id. at 84.
88. 413 U.S. 528 (1973).
89. See note 55 supra for discussion of Shapiro and Maricopa County, where the Court strictly scrutinized welfare classifications if the state used durational residency requirements as a penalty. Outside of this narrow context, the Court has always applied or purported to have applied minimal rationality scrutiny when reviewing welfare classifications.
90. 413 U.S. at 529.
91. In fact, Justice Douglas's concurrence rested on a strict scrutiny, rather than minimal rationality, analysis. Although the challenged provision had a rational relation to control of fraud, he said that standards higher than Dandridge should apply because the classification touched on "associational rights that lie in the penumbra of the First Amendment." Id. at 541-45. He viewed the case as involving desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance, and thus this banding together of the poor was an expression of the right of freedom of association.
minimal rationality review, the Court would have given the government a presumption of rationality and would have upheld the regulation given any rational argument the regulation would prevent fraudulent claims to food stamps. Rather than accepting the government's rational argument regarding administrative efficiency, the Court in 

Moreno required the government to substantiate its rationalization of the statute. 92 Welfare classifications again met with intermediate scrutiny in Jimenez v. Weinberger. 93 The regulation in Jimenez denied disability benefits under the Social Security Act to some illegitimate children born after the onset of their wage earner parent's disability. 94 The Court not only rejected the minimal rationality test used in Dandridge, but as in Moreno, the Court also rejected the state's articulated interpretation of the statute's purpose. In emphasizing the discrimination among classes of illegitimate children, the Court found no evidence supporting the state's contention that allowing benefits to illegitimates in the appellants' classification would necessitate reducing the scope of persons the Act benefited. Additionally, the Court found that the classification was both overinclusive and underinclusive. The Court determined that

even if children might rationally be classified on the basis of whether they are dependent upon their disabled parents, the Act's definition of these two subclasses of illegitimates is "overinclusive" in that it benefits some children who are legiti-

92. One writer has commented:

Justice Brennan's view that abusers will avoid the exclusion by changing their living arrangements [citation . . .] may be quite unrealistic. In deciding whether to avoid the exclusion, members of unrelated households are faced with precisely the same calculation whether they are abusers or persons truly in need. They must decide whether the costs of changing living arrangements are outweighed by the benefits of eligibility. Moreover, the typical abuser—a university student or a commune dweller—is likely to find the costs of changing relatively high. Most likely he is unrelated to anyone else in this present household, or for that matter to anyone with whom he would consider living. Even if he did consider living with his relatives desirable, they are by hypothesis likely to be too well off to form a household eligible for stamps. So the typical abuser will probably have to live alone to be eligible. Thus he must sacrifice the economy and possible psychological benefits of living with others in order to gain food stamps which, again by hypothesis, he does not desperately need. Thus while Justice Brennan may be correct in stating that abusers have the ability to avoid the exclusion, his analysis ignores the point that the exclusion can work by destroying the incentive to abuse.

The Supreme Court, 1972 Term, 87 Harv. L. Rev. 1, 132 n.40 (1973). See also note 108 infra.

94. Id. at 631 n.2.
mated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who were not dependent on their disabled parents. Conversely, the classification is "underinclusive" because it conclusively excludes some illegitimates in appellants' subclass who were, in fact, dependent upon their disabled parents.95

Having lost the presumption of constitutionality,96 the state could not establish the rationality of its classifications. Accordingly, under this unarticulated, intermediate standard of review, the Court held the legislation unconstitutional because the government could not substantiate the validity of its classifications.

Justice Rehnquist dissented, finding the majority's equal protection analysis "perplexing."97 Insisting that minimal rationality was appropriate, he stated that any rationale for giving some form of stricter scrutiny to classifications distinguishing legitimates from illegitimates vanished when the alleged discrimination distinguished classes of illegitimates.98 As he read the Court's opinion, the government would have to compile evidence to support any challenged legislation. Finding it "strange" that the government had to present evidence to justify each and every classification made, he said that courtrooms should not become forums for a second round of legislative hearings every time a legislatively determination is challenged.99 Moreover, Justice Rehnquist agreed with the lower court that the classifications rested upon a rational basis because any increase in the number of eligible recipients would obviously further deplete a fixed fund.

Although Moreno and Jimenez indicate the Court's intention to apply a more demanding standard than minimal rationality review, the Court's subsequent decision in Weinberger v. Salfi100 reiterated and applied the traditional deferential test. Salfi reversed a decision of the United States District Court for the Northern District of California invalidating duration-of-relationship requirements that determined the eligibility of surviving wives and stepchildren of deceased wage earners for social security payments.101 The district court concluded the nine-month requirements constituted irrebuttable presumptions102

95. Id. at 637.
96. For a discussion of the presumption of constitutionality, see note 7 supra.
97. 417 U.S. at 638.
98. Id. at 639.
99. Id. at 640-41.
100. 422 U.S. 749 (1975).
102. The Court's use of irrebuttable presumption analysis has evoked criticism, both
which were constitutionally invalid. On appeal, the Supreme Court refused to apply the irrebuttable presumptions approach and instead applied the traditional minimal rationality test. The Court held that although such a limitation will undoubtedly prove underinclusive or overinclusive in particular cases, the government may apply such limitations so long as the limitations comport with the standards of legislative reasonableness enunciated in cases such as *Dandridge* and *Richardson*. Comparing the social security plan with commercial insurance policies that traditionally rely upon fixed prophylactic rules to protect against abuses, the Court found the government program a widely accepted response to legitimate interests in administrative economy and certainty of coverage for those meeting the program's terms. The Court framed the question of constitutionality as whether Congress, legitimately desiring to avoid the possibility of abuse, rationally could have concluded both that a particular limitation would protect against abuse, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. Applying such a deferential test, the Court concluded that the duration-of-relationship requirements met this constitutional standard.

A comparison of *Sal£i* with *United States Department of Agriculture v. Murry*, an earlier irrebuttable presumption case, illustrates an inconsistency in the Court's analysis. *Murry* concerned a Food Stamp Act regulation denying stamp benefits to households containing at least one member claimed as a tax dependent by a member of another household in the preceding year. Finding this restriction designed to limit the class of food

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on and off the Court. See, e.g., Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974). In general, irrebuttable presumption analysis involves an inquiry into the relationship between legislative goals and the statutory classifications designed to promote them. Where a statute contains rules denying a benefit or imposing a burden on the basis of a particular characteristic, a court using irrebuttable presumption analysis will treat that classification as a means of identifying the statute's ultimate purpose. The court will then examine the relationship between the statutorily defined characteristic (the basic fact) and facts that the presumed purpose of the classification would make relevant (presumed facts). If it is not "universally true" that the basic fact implies the presumed facts, the statute will be deemed an impermissible irrebuttable presumption, violative of due process.


103. 422 U.S. at 768-74.
104. Id. at 777.
106. The exclusion contained in § 5(b) of the Food Stamp Act, 7 U.S.C. § 2014(b)
stamp beneficiaries to the needy, the Court held the government could not conclusively presume lack of need on the basis of tax dependence in a prior year. Salfi distinguished Murry on grounds that the statute in Murry involved an irrational classification. 107 The duration-of-relationship requirements in Salfi appear as overinclusive and underinclusive in terms of the legislative goal as the tax dependence classification involved in Murry. 108

Upon a closer examination of Murry, minimal rationality appears satisfied. Justice Rehnquist found a correlation between a household’s ineligibility for food stamps and the fact that the same household has a member claimed as a dependent by a member of another ineligible household. According to the tax laws, a dependent is one who receives over one-half his support from someone whose income is enough to disqualify his own household for food stamps. This indicated to Justice Rehnquist that the dependent is receiving significant support and thus it was rational to assume he is ineligible for food stamps. 109

Factually, Dandridge, Moreno, Jimenez, and Salfi seem indistinguishable, and in each case the Court explicitly articulated the traditional minimal rationality test. Yet in Moreno and Jimenez, the Court upheld the constitutional claim without mentioning the strict scrutiny formula. After an era during which minimal rationality symbolized judicial abdication, the Burger Court has intervened inconsistently under the traditional minimal rationality standard by rejecting articulated rational governmental objectives and requiring substantiated means.

Maher is the first case in which the Court actually articulates a stricter rationality test when reviewing a welfare classification. Although the Court applied traditional minimal rationality, it states an “articulated rationality” test:

(1970), was designed to eliminate from the program households containing individuals with alternative sources of support. Id. at 515.

107. 422 U.S. at 772.

108. An alternative explanation to Murry and Moreno, which were companion cases, may indicate why the Court chose to apply an intermediate level of scrutiny. In Moreno, Justice Brennan indicated the challenged statute was an attempt to discriminate against hippie communes and hippies, a politically unpopular group. 413 U.S. at 534. The intermediate level of scrutiny in Murry and Moreno, then, may represent an attempt by the Court to protect a discrete minority from discrimination on the basis of a quasi-suspect classification. However, the facts do not indicate an attack on hippies, but rather an attack on children of affluent families, who may or may not be hippies. United States Dep’t of Agric. v. Murry, 413 U.S. at 515 (Stewart, J., concurring).

109. United States Dep’t of Agric. v. Murry, 413 U.S. at 525 (Rehnquist, J., dissenting).
We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny . . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose . . . .110

Based on long-standing connotations of the old equal protection, the Court gave deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify the classification. Under the confines of the articulated rationality test, however, judicial conjecturing of state objectives would seem inappropriate, if not intolerable. Articulated rationality standards also require the Court to accept explicit governmental objectives supported by rational means.

The articulated rationality test differs fundamentally from the intermediate test applied in Moreno and Jimenez. The intermediate test primarily emphasizes a means-oriented scrutiny.111 Moreno and Jimenez required the legislative means substantially to further legislative ends; that is, the means must have substantial basis in actuality, not merely in conjecture. Because the government in those cases did not present a substantiated rationale, the Court refused to engage in judicial hypothesizing to find a conceivable basis. By contrast, the articulated rationality test emphasizes the constitutional permissibility of the ends and requires only rational, not substantial, means.

Admittedly, an ends-focused test has special problems in application. The Court must decide what data are relevant regarding purpose. Intermediate scrutiny, with its emphasis on means, does not delve into actual legislative motivation;112 but articulated rationality scrutiny, with its emphasis on ends, demands an inquiry into any available circumstantial and direct evidence of intent.113 An examination of a decision’s historical

111. Gunther, supra note 1, at 20-21.
112. Id. at 21.

For this appeal we find adequate the appellee’s representation of legislative purpose, leaving for another day consideration of whether the statement of the
background, including the specific sequence of events leading up to the challenged decision, may help explain the legislative purpose. Departures from the normal procedural or substantive sequence also might afford evidence of improper purposes, particularly if the legislature's consideration of important factors favors a contrary decision. Likewise, irrational means might implicitly indicate unconstitutional or politically unpopular objectives.

Maher purports to use an articulated rationality standard of review, but the Court applied the traditional test which allows the Court to hypothesize conceivable state purposes. Apparently disregarding the constraints of an articulated rationality test, the Court did not consider the proffered objective, but rather relied upon the language of Wade where the Court held the state has an important and legitimate interest in protecting fetal life. Maher held that this strong and legitimate interest, although not compelling until viability, nevertheless exists throughout the woman's entire term of pregnancy. Finding a strong and legitimate state interest in encouraging childbirth, the Court con-

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State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, post-hoc rationalization.

429 U.S. at 200 n.7. The Court also gave heightened inquiry into actual purpose in Califano v. Goldfarb, 430 U.S. 199 (1977). In Goldfarb the Court stated that the "mere recitation" of a legitimate purpose will not shield automatically the statute from judicial inquiry into the "actual purposes underlying a legislative scheme." Id. at 209 n.8. In examining the statute's background, the Court found the statute's legislative history refuted appellant's contention of a legitimate governmental objective. Although Arlington Heights, Craig, and Goldfarb are cases involving suspect or quasi-suspect classes, in several recent cases the Court gave heightened ends scrutiny to equal protection claims challenging purely economic regulations. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) which the Maher case cited as the appropriate equal protection standard applicable to cases involving neither a suspect classification nor a fundamental right and New Orleans v. Dukes, 427 U.S. 297 (1976) where the Court found the legislation rationally promoted the objective the government "identified." The above cases indicate not only the Court's willingness, but also the appropriateness of delving into actual purpose by examining articulated purposes and looking at relevant legislative history.


115. The call for testing the rationality of means on the basis of state-articulated purposes raises other complications as well. A legislature may legitimately have a multiplicity of purposes, especially in carving exceptions from the scope of a general statute. Court inquiry should not be limited to a primary purpose; subsidiary purposes may also support the rationality of a means. The model would call on the Court to be receptive to all purposes, few or many, articulated by the state. It would not, for example, have the Court disbelieve some asserted state purposes and artificially test the means in the context of a single purpose chosen by the Court, in the manner of Eisenstadt v. Baird, 405 U.S. 438 (1972).
cluded the state chose a rational means of furthering that objective by subsidizing costs incident to childbirth, and denying benefits for elective abortions.

Connecticut, however, did not argue that the regulation’s purpose was to protect potential life. The state contended the regulation was “to control the amount of its limited public funds which will be allocated to its welfare budget.”118 If *Maher* had limited its inquiry to the articulated state purpose, the majority likely would have found the legislative means of denying elective abortions did not rationally further the state’s articulated objective of controlling its public welfare budget. Abortion is far less costly than a course of prenatal care followed by delivery.117 Moreover, as noted by the district court:

[T]he birth of a child to a welfare mother increases the burden on the state’s welfare coffers because the newly-born indigent child will, in all likelihood, qualify for state welfare assistance. The state’s assertion that it saves money when it declines to pay the cost of a welfare mother’s abortion is simply contrary to undisputed facts.118

The decision in *Maher* illustrates why the Court should use an articulated rationality test in reviewing socioeconomic legislation. Especially within the context of public assistance programs, an articulated rationality test appears more appropriate than an intermediate standard that substantially reduces leeway for legislative experimentations. Articulated rationality review is also preferable to deferential minimal rationality scrutiny. Limiting judicially-cognizable purposes to those explicitly set forth in a statutory preamble or the legislative history, rather than allowing the Court to hypothesize a legitimate objective on its own, deters value-laden appraisal of the legitimacy of the ends.

Although this approach obviously will encourage imagination in the defenders of legislation to articulate a range of legitimating purposes, that need not imply that the [test] encourages futile judicial gestures. Articulation of legitimating purposes would avoid judicial invalidation, to be sure. But it would do so at the cost of greater explicitness as to the reasons justifying the legislative means; and it would encourage the airing and critique of those reasons in the state’s political process.119

118. *Id*.
119. Gunther, *supra* note 1, at 47.
If Connecticut had engaged in such a critique and determined that the underlying, implicit purpose of the anti-abortion regulation was the legislature’s moral objection to abortion, the Court could legitimately find that denying welfare payments for elective abortions was a rational means of effectuating the valid governmental interest in regulating public morals. If Connecticut refused to articulate such a controversial objective for fear of political reprisals, the Court should not hypothesize conceivable interests to validate means that are not rationally related to state-articulated objectives.

An examination of the Burger Court’s decisions from *Dandridge* to *Maher* illustrates this need for a principled, consistent approach to judicial review of welfare legislation. The Burger Court has acknowledged that strict scrutiny is not an appropriate standard of review for welfare legislation because welfare recipients are not a suspect class and a fundamental right to welfare does not exist. The Constitution, however, does impose certain procedural safeguards upon systems of welfare administration. Under the Warren Court, classifications met fourteenth amendment procedural safeguards if the legislative scheme rationally furthered some conceivable, legitimate legislative objective. Hypothesizing legitimate objectives, as the Burger Court did in *Maher*, is an inadequate and unprincipled approach to judicial review of socioeconomic legislation because it can lead to judicial, rather than constitutional, appraisal of the legitimacy of the ends. An articulated rationality test also emphasizes the legitimacy of the ends, but the scope of review is substantially narrowed and more principled than deferential minimal rationality review. Under an articulated rationality test, the Court must confine judicial review to explicit governmental objectives. Once the Court has determined the legislature acted within permissible constitutional objectives and the means are rationally related to the articulated objectives, judicial inquiry should end. The intermediate test’s requirement that the means substantially further the ends is unsuited to legislation concerning the economic, philosophical, and social problems presented by public assistance programs. Requiring legitimate, state-articulated objectives, implemented by rational means, provides not only the necessary con-

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120. *Wade* held that during the first trimester no state interest was compelling enough to justify interference with a woman’s fundamental right to abortion. *Maher* held that denial of welfare payments was not an impingement of a fundamental right, but rather state encouragement of an alternate activity which required only a rational relationship to a legitimate state objective, such as regulating the public morals.
stitutional safeguards, but also the flexibility required by the legislature to make innovative and hopefully better solutions to the problems presented by welfare administration.

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