ARTICLES

ALASKA EQUAL PROTECTION: CONSTITUTIONAL LAW OR COMMON LAW?

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This Article compares the equal protection analysis of the United States Supreme Court with the equal protection analysis of the Alaska Supreme Court. It first looks at the federal equal protection doctrine and the various levels of scrutiny employed by the Supreme Court to determine the constitutionality of government action. The conclusion of the federal analysis is that, no matter which level of scrutiny the Court uses, its ultimate goal is always a means-end inquiry designed to test the government's asserted purpose in enacting the law. Next, the Article looks at Alaska's "sliding scale" approach to equal protection and contends that this approach results in an arbitrary amount of deference being given to the legislature in a common law fashion. The Article concludes by recommending future study of other state courts to determine if state constitutional law actually offers a worthwhile complement to federal constitutional law.

PROLOGUE

This Article is written in honor of Justice Jay A. Rabinowitz, who only recently has ended the longest tenure on any state bench in Alaska. During my year clerking for the Alaska Supreme Court, I am happy to say that Justice Rabinowitz not only served as a valued mentor, but became a trusted friend. Since leaving

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Thanks to Jim Musselman and Val Ricks for their helpful comments on an earlier draft of this Article, and to Lauri Andress for her research assistance.

Alaska, our friendship has grown, and I have often turned to him for advice as I navigate a life in the law. For these reasons, I am honored to participate in an issue of the *Alaska Law Review* that honors this great person and lawyer.

In many ways, the work that follows is a product of the time I spent with Justice Rabinowitz. In our discussions over cases, briefs, and arguments, he helped me see the subtle under-currents that run through the law. What was on the surface was not always what ultimately mattered. This Article builds on that insight by beginning a critical examination of state constitutional law, using Alaska equal protection doctrine as the springboard.

I. INTRODUCTION

Federalism is making a comeback.[1] Both case law and commentary pay increased attention to the federal-state relationship in our American system of government.[2] Much of the attention has

1. *See, e.g.*, Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14.

2. In a string of decisions, the Supreme Court has construed federal power narrowly, thereby leaving states free of certain federal regulation. *See, e.g.*, City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (holding unconstitutional the Religious Freedom Restoration Act because Congress's power to enforce the Fourteenth Amendment does not include the power to define the content of rights protected by that Amendment); Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (holding unconstitutional the provision of the Brady Act that required state law enforcement officials to perform background checks on gun purchasers); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 76 (1996) (holding that the Indian Gaming Regulatory Act, enacted under the Indian Commerce Clause of Article I, could not abrogate state Eleventh Amendment immunity); United States v. Lopez, 514 U.S. 549, 567-68 (1995) (holding unconstitutional the Gun Free School Zones Act of 1990, which criminalized possession of a gun within one thousand feet of a school zone); BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) (holding that the Bankruptcy Code's requirement of a "reasonably equivalent value" in foreclosure sales is satisfied as long as the sale complies with state law); New York v. United States, 505 U.S. 144, 188 (1992) (holding Congress cannot compel states to enact a federal scheme for regulating disposal of hazardous waste); Gregory v. Ashcroft, 501 U.S. 452, 457-70 (1991) (holding that the Age Discrimination in Employment Act does not apply to state judges). Federalism also has gained increasing attention in the nation's law reviews. *See, e.g.*, Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

focused on the constitutional limits of federal power, with the implicit assumption that such limits necessarily protect the states.[3]

The reasons we protect federalism are well rehearsed. First, by splitting power between levels of government, federalism dilutes power and protects individuals from government oppression.[4] In this regard, federalism shares goals with the principle of separation of powers, which divides power among branches of government, to prevent concentration of power.[5] Second, federalism preserves state and local governments as laboratories for policy experimentation.[6] Each state is free, within the confines of the

3. Professor H. Jefferson Powell of Duke University School of Law has explained that the Anti-Federalists who opposed the Constitution were troubled by the prospect of diminished state power:

> The Anti-Federalist concern was that the Constitution would ultimately reduce the states to the status of municipal corporations not by pre-empting their processes but by pre-empting their business. . . . [T]he effective extension of congressional authority to all areas of major legislative interest . . . is precisely the consequence of adopting the Constitution that the Anti-Federalists predicted . . . — the reduction of the states to autonomous governmental processes concerned with only those affairs left to them by Congress.

H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 658 (1993) (footnote omitted).

4. *See* THE FEDERALIST No. 51, at 338-39 (James Madison) (Robert B. Luce ed., 1976). Madison writes:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id; *see also* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 36 (1995); Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1504 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)).

5. *See generally* SHAPIRO, *supra* note 4.

6. This justification is associated closely with Justice Louis Brandeis. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also* Arizona v. Evans, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting) ("[T]his court should select a jurisdictional presumption that encourages states to explore different means to secure respect for individual rights in modern times."); DANIEL ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (3d ed. 1984); Maeva Mar-

federal constitution, to experiment with novel solutions to shared problems.[7] Thus, experimentation should hasten progress as the several states can learn from one another's experiences.[8]

This Article joins the debate over the second justification for federalism. The implicit assumption of that justification is that states will, if left to do so, experiment.[9] This Article begins an examination of that assumption in the area of state constitutional law, using Alaska equal protection doctrine as the initial focus. The last decade has seen an increased interest among commentators in the question of whether state constitutional law adds anything new to the discipline of constitutional law, or whether the whole enterprise merely reduces to individual state courts expressing their disagreement with particular decisions of the United States Supreme Court.[10] If interpretation of state constitutions is

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cus, *Louis D. Brandeis and the Laboratories of Democracy*, *in* FEDERALISM AND THE JUDICIAL MIND: ESSAYS ON AMERICAN CONSTITUTIONAL LAW AND POLITICS 75 (Harry N. Scheiber ed., 1992). Of course, this view has its critics. *See* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 614-16 (1980); Rubin & Feeley, *supra* note 2, at 923-35.

7. *See* MARCUS, *supra* note 6, at 75.

8. Other justifications for federalism have been offered. *See generally* SHAPIRO, *supra* note 4 (describing and critiquing various arguments for and against federalism).

9. *See supra* note 6.

10. Justice William Brennan is widely viewed as sparking the renewed interest in state constitutional law. For Brennan's two influential articles, *see* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986). For commentaries on Brennan's position, *see* Earl M. Maltz, *False Prophet — Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L. Q. 429, 429 (1988); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983) (referring to Brennan's 1977 Harvard Law Review article on state constitutional law as the "Magna Carta" of the subject). For a sampling of the current debate, *see* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583 (1986) (reviewing DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (B. McGraw ed. 1985)); David Schuman, *Correspondence, A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992); Hugh D. Spitzer, *Which Constitution? Eleven Years of* Gunwall *in Washington*, 21 SEATTLE U. L. REV. 1187 (1998); Donald C. Wintersheimer, *Relationship Between Federal and State Constitutional Law*, 25 N. KY. L. REV. 257 (1998); *State Constitutional Law Commentary: An Interdisciplinary Examination of State Courts, State Constitutional Law, and State Constitutional Adjudication*, 60 ALB. L. REV. 1509 (1997); *State Constitutional Law Commentary: An Interdisciplinary*

limited merely to rehashing the rationales of Supreme Court opinions, then state constitutional law adds little to the debate.[11] Regardless of one's view, state constitutional law is a growing body of law that commentators and practitioners neglect at their own peril.[12]

Examination of State Courts, State Constitutional Law, and State Constitutional Adjudication, 59 ALB. L. REV. 1539 (1996). For those interested in the breadth of the discussion, substantial bibliographies on the subject have been published. *See, e.g.,* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra*; TIM J. WATTS, STATE CONSTITUTIONAL LAW DEVELOPMENT: A BIBLIOGRAPHY (1991); Earl M. Maltz et al., *Selected Bibliography on State Constitutional Law, 1980. . .1989,* 20 RUTGERS L.J. 1093 (1989). Also, Greenwood Press is currently publishing single volume "reference guides" for the constitution of each state. The volume for the Alaska constitution is GERALD A. MCBEATH, THE ALASKA CONSTITUTION: A REFERENCE GUIDE (1997).

11. *See* Gardner, *supra* note 10, at 836-37 (arguing that state constitutions should and do play a marginal role in constitutional dialogue). However, Gardner's view is not shared by all. *See, e.g.,* Ronald K. L. Collins, *Reliance on State Constitutions — The Montana Disaster*, 63 TEX. L. REV. 1095 (1985); Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49, 50-51 (1992) ("State constitutional law protection can also be different in form and in kind—not simply degree—from that provided under the Federal Constitution."); Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 225-35 (1984); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 401-04 (1984).

12. *See* Cynthia Cumfer, *Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames the Dilemma for State Constitutionalism*, 76 OR. L. REV. 909 (1997); Jennifer DiGiovanni, *Justice Charles M. Leibson and the Revival of State Constitutional Law: A Microcosm of a Movement*, 86 KY. L.J. 1009 (1997-1998); James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219 (1998); Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1 (1997); Neil Colman McCabe, *Four Faces of State Constitutional Separation of Powers: Challenges to Speedy Trial and Speedy Disposition Provisions*, 62 TEMP. L. REV. 177, 178-85 (1989); Neil Colman McCabe, *Legislative Facts as Evidence in State Constitutional Search Analysis*, 65 TEMP. L. REV. 1229 (1992); Neil Colman McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179, 190-93 (1988); Neil Colman McCabe, *The Right to a Lawyer at a Lineup: Support From State Courts and Experimental Psychology*, 22 IND. L. REV. 905, 907 (1989); James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, and Utah Constitutional Law*, 60 ALB. L. REV. 1515, 1526-69 (1997); Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065 (1998); Jack Stark, *Enigmatic Grants of Law-Making Rights and Responsibilities in the Wisconsin Consti-*

Alaska equal protection doctrine offers a unique opportunity to study the independent development of state constitutional law. For the last twenty years, the Alaska Supreme Court has applied a different equal protection test from that applied under federal equal protection doctrine.[13] This Article examines Alaska case law to see if Alaska's experiment really offers anything new. Ultimately, we will see that the answer is both "yes" and "no." Alaska equal protection doctrine *is* different from federal equal protection doctrine, but is *not* significantly different from state court common law reasoning. This Article develops this thesis in three parts.

Part II of this Article surveys the federal constitutional doctrine of equal protection. The doctrine incorporates the method of means-end analysis, asking first whether the government is pursuing a permissible end, and then asking whether the law is an adequate means toward achieving the government's end.[14] The Supreme Court uses three levels of means-end scrutiny. The strictest level of scrutiny — known, appropriately enough, as "strict scrutiny" — applies to laws that discriminate based on race, alienage, and national origin.[15] Such laws are rarely upheld.[16] The next strictest level of scrutiny — known as "intermediate scrutiny" — applies to laws that discriminate based on gender.[17] Such laws gen-

tution, 81 MARQ. L. REV. 961 (1998); G. Alan Tarr & Mary Cornelia Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919, 950-52 (1982); *Celebrating Wisconsin's Constitution 150 Years Later*, 1998 WIS. L. REV. 661; *State Constitutional Law Symposium*, 28 N.M. L. REV. 191 (1998).

13. *See* Isakson v. Rickey, 550 P.2d 359, 361-63 (Alaska 1976) (beginning Alaska's departure from the federal equal protection analysis); *see also* Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 396-97 (Alaska 1997) (explaining that Alaska courts use a "sliding-scale" approach to determine the level of scrutiny for equal protection cases); Christine M. Motta, Comment, *The Supreme Court of Alaska: Unique and Independent Like the People of the Last Frontier*, 60 ALB. L. REV. 1727, 1734 (1997); Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1, 11-17 (1995); Michael B. Wise, *Northern Lights — Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1, 21-35 (1986).

14. *See infra* Part II.A.

15. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.3.2, at 550-52 (1997); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451-54 (2d ed. 1988).

16. *See* TRIBE, *supra* note 15, § 16-6, at 1451; Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

17. *See* United States v. Virginia, 518 U.S. 515, 532-33 (1996); Craig v. Boren, 429 U.S. 190, 197 (1976).

erally are struck down if the Court believes that they are based on a gender stereotype.[18] The most lenient level of scrutiny — known as "rational basis review" — applies to all other laws.[19] The Court generally upholds such laws unless it determines that the government acted based on a desire to harm a specific group.[20]

Part II also offers an original synthesis of the Supreme Court's equal protection cases. While some have criticized the Court's three levels of scrutiny as a rigid three-tiered hierarchy,[21] the cases really reduce to a single inquiry: Does the government have some neutral, independent reason for distinguishing between groups of people, or is the law motivated by a bare dislike of the burdened group?[22] The different equal protection tests are really the means adopted by the Court to answer this question. Without such a guiding rationale, the means-end scrutiny of equal protection would be largely an unguided inquiry. As discussed below, whether a particular law is an adequate means to achieve the government's end is a difficult policy judgment that courts are ill-suited to perform.[23] In questions of equal protection, however, the Supreme Court does not use a pure means-end analysis. Rather, means-end scrutiny is used to determine whether the government has acted out of prejudice or on a neutral basis.

An example should illustrate how means-end analysis can help evaluate an actor's purpose. Suppose a neighbor with whom you are on questionable terms offers to wash your car. Given the

18. *See infra* Part II.C.

19. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 313-15 (1993).

20. *See infra* Part II.D.

21. *See* Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109-10 (1973) (Marshall, J., dissenting).

22. This synthesis shares the view of Justice John Paul Stevens that the Court's three levels of scrutiny mask the true structure of the Court's analysis:

> I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.

Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring). Professor Jed Rubenfeld recently has defended a similar view of the Supreme Court's equal protection cases. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432-44 (1997). This Article offers my articulation of the Court's "single standard" and how the three tiers of scrutiny logically implement that standard.

23. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 235-55 (1976); Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979).

history of your relationship, you are suspicious that her offer might be less than genuine, but you nonetheless agree. Since you are suspicious of your neighbor's motives, however, you watch as she begins washing your car. You notice that she is using water from mud puddles on the ground. At this point, you probably think (as you run out the door to stop her), "Hmm. If she *really* wanted to wash my car, she probably wouldn't use muddy water. That scoundrel probably wants to damage my car." This is an instance where analyzing the means of accomplishing an objective has revealed a person's true end. Your neighbor *asserted* that her end was to wash your car. Yet, the means she chose (muddy water) were so ill-adapted to the task that you concluded that she must have had another purpose. This conclusion was bolstered by your suspicion of her motives given your prior history of ill will. The means-end analysis "smoked out" your neighbor's true purpose.

Equal protection means-end analysis performs a similar "smok[ing] out" function.[24] The government will enact a classification and will assert a purpose behind that classification. If the classification is a poor fit to the government's purpose, we might suspect that the government acted on another, unspoken purpose. This suspicion will be quite high with classifications that historically have resulted from prejudice, such as race and gender discrimination.[25] Whatever the classification, though, the Court uses means-end scrutiny to test the government's asserted purpose and determine whether a law really is enacted out of bias or prejudice. Part II develops this point in discussing the three tiers of the federal equal protection test.

Part III traces the development of Alaska's equal protection analysis. Like federal equal protection, Alaska courts use means-end scrutiny to address equal protection violations. Unlike federal equal protection, however, Alaska has rejected the three tiers of scrutiny in favor of a "sliding scale" comprised of multiple levels of scrutiny that are tailored to the specific law at issue.

The most important difference between federal and Alaska equal protection analysis is that the Alaska test does not use means-end scrutiny to "smoke out" prejudice. Rather, the Alaska Supreme Court engages in pure means-end scrutiny, making policy judgments about whether the challenged law adequately meets the government's purpose.[26] Whereas the Supreme Court has constrained the means-end analysis of equal protection by limiting it

24. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

25. *See infra* Part II.B.

26. *See infra* Part III.B., III.C.

to the invalidation of biased legislation, Alaska equal protection analysis leaves the inquiry unbounded. For this reason, Part III concludes that the Alaska Supreme Court's equal protection decisions often resemble common law decisions, with the court at times giving little (if any) deference to the legislature's judgment about the need or desirability of a given law. In equal protection cases, the Alaska Supreme Court appears to be doing common law, not constitutional law.

Based on the analysis in Parts II and III, Part IV proposes directions for future study of state constitutional law. Principally, Part IV proposes that scholarship examine state constitutional law *at work in the state courts*. For, if nothing more than common lawmaking is occurring under the guise of state constitutional law, state constitutional law may have little insight to offer us.

II. FEDERAL EQUAL PROTECTION ANALYSIS

A review and synthesis of the United States Supreme Court's equal protection analysis is a necessary preface to what follows. The doctrine sketched in this Part II will be used as a point of comparison in Part III of the Article.

A. An Overview of Equal Protection Methodology

The Equal Protection Clause of the United States Constitution[27] does not prohibit all legislation that distinguishes between things or people. Indeed, such a prohibition would be senseless because *all* laws draw distinctions and thus discriminate in some way.[28] Instead, the Court asks whether the discrimination is justified given both the government's purpose in enacting the law and the means chosen to achieve that purpose.[29] The Court often has treated this inquiry as a two step process: (1) has the state chosen a permissible *end*, and, if so, (2) are the *means* chosen sufficiently

27. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

28. *See* Romer v. Evans, 116 S. Ct. 1620, 1627 (1996) ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."); CHEMERINSKY, *supra* note 15, § 9.1.2, at 527 ("Many government laws draw a distinction among people and thus are potentially susceptible to an equal protection challenge.").

29. *See* CHEMERINSKY, *supra* note 15, § 9.1.2, at 527 ("All equal protection cases pose the same basic question: Is the government's classification justified by a sufficient purpose?").

related to achievement of the state's end?[30] In this analysis, the "means" will be the classification created by the government's action.

An example should illustrate how equal protection methodology works. Consider the law at issue in *New York City Transit Authority v. Beazer*.[31] In that case, the New York City Transit Authority decided that it would not hire methadone users.[32] The Transit Authority imposed this hiring exclusion to protect the public from unsafe subway workers.[33] The government's end and means are easily identifiable: the end is passenger safety, and the means is not hiring methadone users. In analyzing the Transit Authority's hiring policy under the federal equal protection test, a court would ask two questions: (1) is public safety a permissible government purpose, and, if so, (2) do methadone users threaten the government's purpose (*i.e.*, are methadone users unsafe transit workers)? The first question is normative, asking what ends we think government should be allowed to pursue.[34] The second question is empirical, asking for the factual relationship between the classification and the government's purpose (how well the classification "fits" the purpose).[35]

Federal equal protection analysis can vary in strength depending on how we define each step. The first question — is the

30. This second step has been referred to as assessing the "fit" between the state's end and the means chosen. Thus, this Article occasionally will refer to the second step as the "fit question." *See, e.g.*, TRIBE, *supra* note 15, § 16-32, at 1603-04.

31. 440 U.S. 568 (1979).

32. *See id.* at 570.

33. *See id.* at 570-71. A question not addressed at this point is how one determines the government's purpose. Another contentious question is whether courts should inquire about the government's actual purpose or motivation, or whether courts should limit themselves to the government's asserted purpose. Also, should the court hypothesize potential purposes for the government? The Court's answer to these questions varies depending on the type of classification involved. With race and gender classifications, the Court will make some effort to determine whether the government's asserted purpose is just a pretext for race or gender bias. For most other classifications, however, the Court will accept the government's asserted purpose and, in some cases, might even hypothesize a permissible government purpose in support of the law. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) (requiring only a reasonably conceivable state of facts that could provide a rational basis for a classification). *But see* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (refusing to find a rational basis for city government's actions).

34. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 565 (3d ed. 1996).

35. *See id.*

government's purpose permissible? — can be quite strict if the government is limited to a small number of purposes. For example, the government could be strictly limited to only "important" or "compelling" purposes, such as addressing a national emergency or remedying past oppression. Conversely, the first question can be quite lenient if the government is allowed to pursue a broad range of purposes. For example, the set of permissible purposes could be defined broadly, such as any reason other than a bare desire to harm the burdened group. So, to decide an equal protection case like *Beazer*, we must know what range of ends government may pursue and whether "public safety" falls within that range.

The second step of federal equal protection analysis also varies in the amount of scrutiny a court will apply. The fit question will be stricter if we require a tighter means-end fit than if we allow a looser fit. At one extreme, a perfect fit between means and end may be required. In *Beazer*, a "perfect fit" would mean that methadone use is a perfect proxy for worker safety because all methadone users are unsafe workers and all non-methadone users are safe workers. Rarely, though, is a classification a perfect proxy for the government's purpose. Indeed, the evidence in *Beazer* showed that not all methadone users were unsafe workers and that some people who did not use methadone were unsafe workers.[36] Thus, the Transit Authority policy was *over-inclusive* to the extent it applied to people who did not threaten the government's purpose (*i.e.*, methadone users who would be safe workers);[37] and it was *under-inclusive* to the extent it did not apply to people who did threaten the government's purpose (*i.e.*, non-methadone users who would be unsafe workers).[38] The main question under step two will be how much over- and under-inclusiveness should be tolerated before a law will be rejected because it does not fit the government's purpose.

A pure means-end analysis raises many difficult policy questions. First, any assessment of fit must consider whether the government had an alternative that could have reduced the over- or under-inclusiveness of the challenged law. Second, even if alternatives existed, one must consider the *relative cost* of such alternatives. For example, in *Beazer*, the government could have performed a detailed evaluation of each applicant's potential safety

36. *See Beazer*, 440 U.S. at 589-92.

37. *See* CHEMERINSKY, *supra* note 15, § 9.1.2, at 531-32; TRIBE, *supra* note 15, § 16-4, at 1449.

38. *See* CHEMERINSKY, *supra* note 15, § 9.1.2, at 531; TRIBE, *supra* note 15, § 16-4, at 1447.

record.[39] Yet such individual consideration would impose great costs on the government, and the Transit Authority believed that it was more efficient to use general categories as a proxy for safety.[40] Third, one must evaluate the cost of not achieving a better fit. For example, the Transit Authority policy in *Beazer* was both under- and over-inclusive, which means that the policy *both* allowed hiring of unsafe workers and prevented the hiring of safe workers.[41] Each of these errors are a cost of the program.

A pure means-end analysis requires careful identification, weighting, and balancing of costs and benefits.[42] In the abstract, a court is ill-equipped to quantify these costs and benefits or to balance their relative weight.[43] Courts do not have the investigative or fact-finding capacity to gather data on a law's costs and benefits.[44]

39. *See* STONE ET AL., *supra* note 34, at 568 (discussing the "administrative costs" of obtaining a greater fit).

40. *See Beazer*, 440 U.S. at 590-91.

41. *See id.* at 518.

42. *See id.* (noting that cost-benefit analysis "requires an assessment of both the importance of the state's goal and the degree to which the classification advances it").

43. *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28-29 (1975) (The legislature "has the ability to make either rough or finely tuned distinctions, justified by practical considerations though perhaps not by principle, in a manner not generally thought open to a court."); *see generally* Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337 (1984) (discussing relative strengths and weaknesses of courts and legislatures regarding empirical analysis).

44. *See, e.g.*, Monaghan, *supra* note 43, at 28 ("Congress has . . . a special ability to develop and consider the factual basis of a problem."). One commentator summarizes the main points as follows:

> [A court] may feel that evaluating statutes based on scientific factfinding is unwise, especially if it results in striking down legislation as unconstitutional. In *McKleskey v. Kemp*, the Court stated that legislatures were better qualified than the Court to evaluate statistical studies. Legislatures and agencies have ready access to scientific experts and do not face the immediate problems of deciding disputes. Furthermore, the Court's reliance on the adversary system may produce expert opinions that are highly polarized.

Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 129-30 (1997); *see also* McKleskey v. Kemp, 481 U.S. 279, 319 (1987); Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 679 (1988); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 12 (1998) ("The capability of the courts to conduct scientific or social scientific research is extremely limited, and perhaps nil."); Sheldon L. Trubatch, *Informed Judicial Decision-Making: A Suggestion for a Judicial Office for Understanding Science and Technology*, 10 COLUM. J. ENVTL. L. 255 (1985). The Supreme Court

Also, courts, at least in constitutional cases, are not charged with deciding the best trade-off between policy and efficiency.[45] Pure means-end analysis is the sort of decision-making that is urged on legislatures and administrative agencies, who are charged with finding the "best" solution to real world problems.[46]

Perhaps because pure means-end analysis has few, if any, justiciable standards, the Supreme Court's equal protection doctrine does not use such a method. Rather, means-end analysis is used as a tool for determining whether government has acted out of prejudice or bias.[47] The remainder of this Part analyzes how the Court has performed this analysis for three types of classifications: (1) race, ethnicity, and alienage, (2) gender, and (3) all other classifications.

B. Laws that Classify Based on Race, Ethnicity, or Alienage

When the government classifies people based on race, ethnicity, or alienage, the Court applies its most stringent version of the two-step equal protection test.[48] The specific test, known as "strict scrutiny," allows very few permissible purposes — only those that are "compelling" — and requires a tight fit between means and end. A racial classification must be "narrowly tailored" or "necessary" to achieve the government's compelling purpose.[49]

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has made the same point about economic analysis: "[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them." General Motors Corp. v. Tracy, 519 U.S. 278, 308 (1997).

45. *See* articles cited *supra* note 44.

46. *See id.*

47. *See* Rubenfeld, *supra* note 22, at 428, 436-37. Professor Rubenfeld calls this the "smoking out" approach to equal protection review because the means-end test is used to reveal any improper government motive. *See id.*

48. *See* CHEMERINSKY, *supra* note 15, § 9.3.2, at 550-52; TRIBE, *supra* note 15, § 16-6, at 1451-54; R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493, 497, 506-07 (1992).

49. *See* CHEMERINSKY, *supra* note 15, § 9.3.2, at 550-52; TRIBE, *supra* note 15, § 16-6, at 1451-54; Kelso, *supra* note 48, at 506-07. The Court also applies strict scrutiny to laws that discriminate in regulation of a fundamental right. *See* CHEMERINSKY, *supra* note 15, § 10.1, at 638-44. These fundamental rights are rights protected by some other provision of the Constitution, such as the Bill of Rights or the Due Process Clause. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."). For a good part of this century, however, the Court experimented with recognizing unenumerated fundamental rights under the Equal Protection Clause. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966)

The Court applies such searching scrutiny to racial classifications for three main reasons. First, a person's race rarely is relevant to government action.[50] With a few exceptions, such as remedying race discrimination, government can (and should) regulate without reference to race.[51] Second, and related to the first point, when government has used race in the past, it was often to oppress or harm a disfavored racial group.[52] Given our history, courts are automatically suspicious of any government use of race to distinguish among citizens.[53] It is for this reason that race is referred to as a "suspect class" for purposes of equal protection; government's use of race to classify people is inherently suspect.[54] Third, racial minorities may have difficulty redressing government wrongs through the political system.[55] The needs or views of a racial mi-

(protecting right to vote under the Equal Protection Clause); Skinner v. Oklahoma *ex. rel.* Williamson, 316 U.S. 535 (1942) (protecting right to procreate under the Equal Protection Clause). The fundamental rights prong of equal protection is not within the scope of this Article.

50. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (noting that race is a "classification long recognized as 'in most circumstances irrelevant and therefore prohibited.'") (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989).

51. *See Adarand*, 515 U.S. at 227-28.

52. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (state law prohibiting interracial marriages between whites and blacks); Brown v. Board of Education, 347 U.S. 483 (1954) (racially segregated public elementary schools); Strauder v. West Virginia, 100 U.S. 303 (1879) (state statute excluding blacks from jury service).

53. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) ("[R]ace, alienage, or national origin . . . are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others.").

54. *See Adarand*, 515 U.S. at 223-24 (expressing "skepticism" of all racial classifications); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

55. *See Cleburne*, 473 U.S. at 440 ("[Race] discrimination is unlikely to be soon rectified by legislative means."). The Court's most famous articulation of this point came in dicta in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). In his infamous footnote four, Justice Harlan F. Stone explained 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 n.4 (emphasis added); *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

nority group may be ignored by the political process due to the bias, prejudice, indifference, or ignorance of the majority.[56]

Only once in our constitutional history, in *Korematsu v. United States*,[57] has the Court upheld a racial classification under strict scrutiny. *Korematsu* addressed the constitutionality of the American internment of U.S. citizens of Japanese ancestry during World War II.[58] Based on factual contentions that since have been discredited,[59] the Court deferred to the military's judgment that internment of all Japanese-Americans was necessary to protect national security.[60] According to the military, many Japanese-Americans were loyal to Japan's war effort against the United States and, acting on that loyalty, might try to sabotage the United States' war effort from within the nation's borders.[61] Given the gravity of the threat and the urgency of the situation, the military argued that it was not feasible to hold hearings or perform inquiries into the loyalty of individual citizens.[62] Thus, it was necessary to intern all Japanese-Americans as a prophylactic measure.[63]

The Court upheld the military's internment policy, largely deferring to the military's judgment.[64] *Korematsu* both is and is not an aberration. For constitutional cases involving the military, *Korematsu* is not an aberration. The Court has deferred to the military in many areas, creating what might be called a military exception to the Constitution.[65] For equal protection cases, however, *Korematsu* is an aberration. Members of the Court have since heaped disparagement on that case, leaving it as the one instance in which a racial classification has survived strict scrutiny.[66] To un-

56. *See* ELY, *supra* note 55, at 135-79.

57. 323 U.S. 214 (1944).

58. *See generally id.*

59. *See* LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 229-41 (2d ed. 1996).

60. *See Korematsu*, 323 U.S. at 218 (1944).

61. *See id.* at 218-19.

62. *See id.*

63. *See id.*

64. *See id.* at 219.

65. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding military regulation that prohibited wearing headgear indoors against challenge by serviceman whose religious practices required that he wear a yarmulke indoors); Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding exclusion of women from the military draft).

66. *See Adarand*, 515 U.S. at 212-15, 275 ("A *Korematsu*-type classification, as I read the opinions in this case, will never again survive strict scrutiny: such a classification, history and precedent instruct, properly ranks as prohibited.") (Ginsburg, J., dissenting).

derstand why, consider how strict scrutiny applies to the facts of *Korematsu*. First, the military must have had a compelling reason to intern Japanese-Americans. There is little doubt that preventing internal sabotage of the nation's war effort was such a purpose.[67] Indeed, self-preservation could be characterized as the most basic, fundamental power of a nation. Second, the military had to show that interning Japanese-Americans was "necessary" or "narrowly tailored" to achieving that purpose. Here, the military should have foundered. Recall that this second step — the fit question — asks whether there is an empirical relationship between the government's purpose (detecting disloyal individuals who pose a threat of sabotage) and the government's classification (Japanese-Americans). In *Korematsu*, the military should have had to show that substantially all Japanese-American citizens are disloyal. If this was not so, then interning *all* Japanese-American citizens was not necessary to protect the war effort. Instead, the government should more narrowly have tailored its policy to identify those Japanese-American citizens (as well as American citizens of other ethnicities) that were likely to be disloyal. The definition of Japanese ancestry as an accurate proxy for disloyalty was, as some military and government officials who spoke at the time said, based on racial prejudice.[68]

Since *Korematsu*, the Court has been much more demanding under strict scrutiny. First, the Court has recognized one other compelling government purpose. In *Adarand Constructors, Inc. v. Pena*[69] and *City of Richmond v. J.A. Croson Co.*,[70] the Court held that government has a compelling reason to remedy identified past

67. *See Korematsu*, 323 U.S. at 218.

68. *See* FISHER & DEVINS, *supra* note 59, at 232-34; *see also* Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 195-97 (1945) (discussing the well-known history of West Coast prejudice against people of Japanese descent); Eugene V. Rostow, *The Japanese American Cases — A Disaster*, 54 Yale L.J. 489, 489 (1945) (suggesting that the Japanese internment "was calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind" (citations omitted)). The dissenters in *Korematsu* recognized that the military's internment policy "falls into the ugly abyss of racism." *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting). In addition, Congress has recognized the injustice of the internment policy by enacting a statute intended to make reparations to those harmed. *See* Civil Liberties Act of 1988, 50 U.S.C. § 1989a ("Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.").

69. 515 U.S. 200 (1995).

70. 488 U.S. 469 (1989).

discrimination.[71] To do so legitimately, however, the government must have some basis for concluding that either the government itself has discriminated in the past, or that specific private actors or groups of private actors have discriminated in the recent past.[72] For example, states have a compelling interest in remedying past racial discrimination in their school systems.[73] Also, governments have a compelling interest in remedying past discrimination in a local industry, such as construction contracting.[74] Government may not, however, use race to remedy unspecified societal discrimination.[75] Rather, government must have some evidence that specific discrimination has occurred.[76]

On the second step, the fit question, no racial classification has ever passed the strict "necessary" or "narrowly tailored" test. In applying the test, the Court has tolerated very little over- or under-inclusiveness in racial classifications. For example, if a city claims that a particular industry in the city has discriminated based on race, the city may not remedy this discrimination by merely setting aside a specified percentage of public contracts in that industry for members of the disadvantaged race.[77] Such a blanket racial set-aside is too over- and under-inclusive to survive strict scrutiny.[78] The set-aside is too over-inclusive because it may benefit firms that did not suffer from discrimination; it is under-inclusive because it

71. *See Adarand* 515 U.S. at 237; *Croson*, 488 U.S. at 509.

72. *See Adarand*, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."); *Croson*, 488 U.S. at 509 (holding that a state may "tak[e] action to rectify the effects of identified discrimination within its jurisdiction").

73. *See, e.g.*, Brown v. Board of Education, 349 U.S. 294 (1955) (mandating use of race-conscious means to remedy prior public school segregation).

74. *See Croson*, 488 U.S. at 509. In *Croson*, the Court states:

> If the City of Richmond had evidence before it that the nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. . . . In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Id.

75. *See id.* at 498-99.

76. *See id.* at 500 (holding that government must have a "strong basis in evidence" for concluding that a race-based remedy is necessary (quoting Wygnant v. Jackson Board of Education, 476 U.S. 267, 277 (1986) (plurality opinion))).

77. *See id.* at 507-08.

78. *See id.*

may not benefit firms that did suffer from discrimination.[79] To survive strict scrutiny, the government must try more carefully to identify minority firms that suffered from past discrimination.[80] As in *Korematsu*, where race should not have served as a proxy for disloyalty, in these later cases, race alone cannot serve as a proxy for past discrimination.

In short, strict scrutiny has two hallmarks: very few permissible government purposes and very tight fit between those purposes and the means used to achieve them. The stringency of this test has led some commentators and judges to complain that strict scrutiny is "strict in theory but fatal in fact."[81] While some Justices protest that characterization,[82] the cases bear out the observation. That fact is not surprising given the central mission of equal protection: to identify laws enacted out of bare dislike. Again, consider the reasons we are suspicious of racial classifications.

First, because of our nation's poor history with racial classifications, courts cast a suspicious eye on such laws. Strict scrutiny is designed to "smoke out" laws that claim to use race for benign reasons — such as to remedy past discrimination — but really serve another, more nefarious purpose.[83] Coming to the case with a healthy suspicion, judges should be alarmed when a racial classification is over- or under-inclusive. For example, poor fit should cause a judge to think

> If the government *really* intended to remedy past discrimination, this law would have been drafted to target those who have suffered past discrimination. Since the law is not so tailored, and I am already suspicious of racial classifications, I have good reason

79. *See id.* at 507-10.

80. *See generally* Akhil Reed Amar & Neal Kumar Katyal, Bakke*'s Fate*, 43 UCLA L. Rev. 1745 (1996) (distinguishing *Adarand*-like set-asides from *Bakke*-like affirmative action); Ian Ayres, *Narrow Tailoring*, 43 UCLA L. Rev. 1781 (1996) (discussing what types of affirmative action programs satisfy the narrow tailoring requirement, or are narrowly tailored to remedy past discrimination).

81. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment); *See also* TRIBE, *supra* note 15, at 1451; Gunther, *supra* note 16, at 8.

82. *See* Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove*, 448 U.S. at 519)).

83. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

> to fear that another reason — such as a naked racial preference — is the real reason for this law.[84]

The fit question serves to confirm or dispel the court's suspicion of racial bias.

Second, the Court sees good reason to act on even a suspicion that a racial classification rests on an impermissible purpose. Given our national history, racial classifications are a dangerous tool, much like a laser. When used precisely and thoughtfully, such tools can achieve great good. But, used haphazardly and thoughtlessly, such tools can cause unintended harm, and might cause more harm than good.[85] So, to prevent unintended harm and smoke out pretextual laws, the Court uses strict scrutiny.

In sum, strict scrutiny follows the general form of equal protection analysis suggested earlier. First, the Court brings a healthy suspicion to all laws that classify based on race. Second, the Court uses the two-step means-end equal protection test to either dispel or confirm that suspicion. The next section explains how the Court's gender cases follow the same method.

C. Laws that Classify Based on Gender

The Court's gender discrimination cases have followed a torturous path. For most of its history, the Court has interpreted the Equal Protection Clause to provide no special protection to women.[86] During that period, the Court upheld laws excluding women from jobs as varied as bartending and the practice of law.[87] Even Chief Justice Earl Warren, author and architect of *Brown v. Board of Education*,[88] voted to uphold a state law that excluded women from jury service unless they specifically requested to serve.[89] Throughout this era, the Court's decisions were based on the Justices' stereotypical view of women's roles. For example, in

84. *Id*. Of course, the Court has not always been suspicious of racial classifications; the justices' attitudes toward race evolved over time (as did society's attitudes). *See* Lawrence Lessig, *Fidelity as Constraint*, 65 FORDHAM L. REV. 1365, 1421-26 (1997).

85. *See Croson*, 488 U.S. at 493-94.

86. *See* WILLIAM M. WIECEK, LIBERTY UNDER LAW 163 (1988).

87. *See* Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding law that prevented women from acting as bartenders unless they were the spouse or daughter of the tavern owner); Bradwell v. Illinois, 83 U.S. 130, 141 (1873) ("The paramount destiny and mission of woman [sic] are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.") (Bradley, J., concurring).

88. 347 U.S. 483 (1954).

89. *See* Hoyt v. Florida, 368 U.S. 57, 69 (1961).

upholding the exclusion of women from the practice of law, the Court wrote:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.[90]

In upholding the exemption from jury service, the Court wrote:

> [W]oman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.[91]

All in all, the Court saw no problem with government enacting its vision of women's place in society.[92] The premise seemed to be that if some stereotype had a kernel of truth — *i.e.*, was descriptively accurate for some women — it was permissible to mandate that stereotype for all. Of course, that is the nature of stereotypes — the unjustified generalization of some instances are applied to an entire group. The Court never was suspicious of such laws because its members — all men — saw the government's view of women's role as natural, not biased or prejudiced.[93]

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90. *Bradwell*, 83 U.S. at 141.

91. *Hoyt*, 368 U.S. at 62.

92. *See id.*

93. Professor Lawrence Lessig calls such a consensus of viewpoints an "uncontested discourse." *See* Lessig, *supra* note 84, at 1393. An "uncontested discourse" is a discourse where:

> [P]eople don't, in the main, disagree about fundamentals. In the main, they don't think about fundamentals at all. People act, or argue, instead, taking these fundamentals for granted. . . . One could conceivably question fundamentals; one could legitimately express doubt. But if one insisted upon these doubts, or was relentless in these questions, then one would mark oneself as odd; somehow outside the discourse.

Id. The world view expressed in cases like *Bradwell* and *Goesaert* was uncontested at the time because those making the decisions held the same view. A contested discourse, on the other hand, is "a discourse where fundamentals in that discourse appear up for grabs; that participants in that discourse acknowledge the legitimacy of disagreement about these fundamentals; that disagreement is a sign of normalcy for a participant, not oddness." *Id.*

In its modern cases, the Court has been increasingly suspicious of gender classifications. Undoubtedly, this suspicion has resulted from the changing views of gender held by members of the Court. The views of gender quoted in the preceding paragraph no longer seem normal, but instead seem offensive. Professor Lawrence Lessig calls such a change in viewpoint a shift in the uncontested discourse on gender.[94] At the time of the earlier cases, the uncontested discourse on gender held that women's natural realm was the home.[95]

As time passed, people's view of gender slowly changed. For example, the Court in *Hoyt v. Florida* upheld the exclusion of women from juries, but noted that women's roles were changing.[96] The discourse on gender was in a state of change or, as Professor Lessig describes it, the discourse of gender now was contested.[97]

In the last two decades, the Court seems to have settled into a new uncontested discourse on gender — gender classifications are suspicious because they likely reflect gender bias or unthinking gender stereotypes. The remainder of this section explains how the Court's modern cases reflect this new uncontested discourse, and how the Court incorporates that discourse into the equal protection method outlined above.

The modern era of gender cases began with *Reed v. Reed*,[98] where the Court applied the lowest level of equal protection review — rational basis review — to a law that preferred men over women as the administrator of estates.[99] The Court struck down the law because it saw no permissible reason for the law's gender preference.[100] The state argued that the preference would save

94. *See id.*

95. *See id.* at 1416 (The justices "didn't even think it 'debatable' whether sex discrimination was justified. Indeed, for many, the discriminations of the time would not have appeared as 'discriminations,' just as for us, the discriminations in the minimum driving age don't appear to us as 'discrimination' against children.").

96. *See Hoyt*, 368 U.S. at 61-62 (noting "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life").

97. *See* Lessig, *supra* note 84, at 1426.

98. 404 U.S. 71 (1971).

99. *See Reed*, 404 U.S. at 75-76. The law designated categories of people who were eligible to administer an estate. *See id.* at 72-73. For example, one category was "mother or father" of the decedent. *Id.* at 73. Whenever a man and a woman were both in an eligible category, the statute instructed the courts to prefer the man. *Id.*

100. *See id.* at 76.

administrative costs because it would prevent a hearing to select an administrator when both a man and a woman were eligible.[101] The Court rejected this argument, holding that the government's purpose must have some relation to *gender*.[102] There was nothing about excluding women, as opposed to men, that advanced the state's purpose; excluding men would have equally achieved the government's purpose. Thus, the choice to prefer men over women was arbitrary, and the law was unconstitutional.[103]

While the Court applied only rational basis review in *Reed*, it identified what has become the central question in gender discrimination cases: To what extent must gender correlate with a government purpose before the government can use gender as a proxy for its purpose? In *Reed*, neither gender had any special correlation with cost savings.[104] In terms of the Court's equal protection analysis, both genders fit the government's purpose equally well. In future cases, the question would be whether a statistical correlation between one gender and a government's purpose would be enough to satisfy equal protection.

The Court began answering that question in *Frontiero v. Richardson*.[105] In *Frontiero*, a servicewoman challenged a federal law governing benefits for military personnel.[106] The law automatically granted male military personnel additional benefits on account of a spouse, but denied such benefits to female military personnel unless a servicewoman could prove that her spouse in fact was dependant upon her for more than half of his support.[107] As in *Reed*, the government's sole justification for the gender classification was administrative convenience.[108] The government argued that "Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of

101. *See id.*

102. *See id.*

103. *See id.* ("[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause .").

104. *See id.*

105. 411 U.S. 677 (1973).

106. *See id.* (challenging 10 U.S.C. §§ 1072, 1076 (1970); 37 U.S.C. §§ 101, 401, 403 (1970)).

107. *See* 37 U.S.C. § 401 (1970) (providing additional benefits if a serviceperson had "dependent" and defined "dependent" to include a spouse). The statute, however, also provided that "A person is not a dependent of a female member [of the military] unless he is in fact dependent on her for over one-half of his support." *See id.*

108. *See Frontiero*, 411 U.S. at 688.

male members are financially dependant upon their husbands, while burdening female members with the task of establishing dependency in fact."[109] Thus, *Frontiero* differed from *Reed* in an important respect: Whereas in *Reed* neither gender had greater correlation with the government's purpose, in *Frontiero*, gender *did* have some statistical correlation with the government's purpose. The question was whether *some statistical correlation* was enough to pass the fitness test.

The Court once again struck down the law.[110] All but one justice analogized the law to *Reed* and concluded that the gender classification was unconstitutional.[111] The Justices divided, however, on the proper version of the equal protection analysis to apply.[112] Four Justices held that strict scrutiny should apply to gender discrimination.[113] These Justices argued that gender and race discrimination shared similar histories and operated in similar ways and thus should receive the same level of scrutiny.[114] Three Justices believed that the question of the appropriate level of scrutiny did not need to be answered because the federal statute was unconstitutional even under the most lenient test.[115] The remaining Justice applied the most lenient test.[116]

Frontiero raises several important points that have recurred throughout the Court's treatment of gender discrimination. First, some alleged correlation between gender and the government's purpose may be purely a product of stereotype and have no statistical basis. These are easy cases — the gender classification cannot stand. Second, statistical correlation between gender and some state of facts — such as between gender and dependence on a spouse's income — may be the result of stereotypes and past discrimination. Societal stereotypes about women's proper roles may have led to gender discrimination in the workplace that led to the statistical correlation argued in *Frontiero*. Once again, these gender distinctions are socially constructed and have no necessary

109. *Id.* at 689.

110. *See id.* at 690-91.

111. *See id.* at 690-91; *see id.* at 691 (Stewart, J., concurring); *see id.* (Powell, J., concurring). Then-Justice William Rehnquist dissented on the ground that the government's statistics gave Congress a rational basis to distinguish between men and women. *See id.* at 691 (Rehnquist, J. dissenting) (citing Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972)).

112. *See id.* at 691.

113. *See id.* at 688.

114. *See id.* at 684-88.

115. *See id.* at 691-92 (Powell, J., concurring).

116. *See id.* at 691 (Stewart, J., concurring).

connection to gender. The issue is what action the government permissibly may base on such statistics. *Frontiero* suggests that the Court will invalidate laws based on such statistics if the Justices believe that government intended to either disadvantage women or reinforce existing gender stereotypes.[117]

The Court picked up the thread of *Frontiero* in its next gender case, *Craig v. Boren*.[118] *Craig* involved a state law prohibiting purchase of 3.2 percent beer by women under age eighteen and men under age twenty-one.[119] The state argued that the law was intended to protect the safety of public roadways by decreasing drunk driving.[120] According to the state, the different age limits were justified by statistics showing that men between the ages of eighteen and twenty-one were more than ten times as likely as women the same age to be arrested for drunk driving.[121] Once again, the question was whether statistical correlation between gender and the state's purpose was a sufficient fit for the equal protection analysis.[122]

In reviewing the state beer law, the Court finally settled on a definition of the two-step equal protection test for gender discrimination cases: (1) the government action must serve an "important" purpose, and (2) the gender classification must be "substantially related" to achieving the government's important purpose.[123] With little analysis, the Court quickly concluded that public safety was an important government purpose.[124] The more difficult question was whether the statistical correlation between gender and drunk driving showed that the gender classification was "substantially related" to public safety.[125]

If taken at face value, the fit question would be problematic. No vague label — whether it be "necessary," "narrowly tailored," "substantially related," or "rationally related" — can answer this question. Rather, those labels merely suggest relative degrees of fit — "necessary" is tighter than "substantially related," which is

117. *See* United States v. Virginia, 518 U.S. 515, 534 (1996) ("[Gender] classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.").

118. 429 U.S. 190 (1976).

119. *See id.* at 191-92.

120. *See id.* at 199-201.

121. *See id.* at 201.

122. *See id.* at 200.

123. *See id.* at 197.

124. *See id.* at 199-200 ("Clearly, the protection of public health and safety represents an important function of state and local governments.").

125. *See id.* at 200-04.

tighter than "rationally related." Yet, because fit is inherently a question of degree, no real dividing lines exist. Any attempt to set some sort of percentage would be arbitrary, and, without some sort of statistical cut-off, we are left with gestalt judgments — like those made by legislators — about the desirability of a law's over- and under-inclusiveness. Legislators presumably consider whether it is feasible to reduce the over- or under-inclusiveness when framing legislation. Standing alone, then, fit does not seem susceptible to justiciable standards.

As discussed above, however, the equal protection fit question does not operate as an independent test.[126] Rather, the fit question serves to confirm or dispel the Court's suspicion that something is wrong with the statute. Recall how fit worked in strict scrutiny of racial classifications. In those cases, the Court came to the case with a strong suspicion that any racial classification was meant to disadvantage a racial group. To uphold the law, the Court asks for some significant reason other than prejudice — a compelling government purpose — for the discriminatory law. If the racial classification does not sufficiently fit that purpose, then the Court has confirmed its suspicion that the law likely is based on racial prejudice and that the government's asserted purpose is a pretext.[127]

The fit question operates the same way in gender discrimination cases. The Court has noted on several occasions that the state and federal governments historically have discriminated based on gender.[128] Given this star-crossed past, the Court brings a healthy suspicion to laws that classify based on gender, though the suspicion may not be as pronounced as in race discrimination cases.[129] The fit question then confirms or dispels the Court's suspicion. Poor fit may indicate that the law is based on gender bias or on an unthinking endorsement of a gender stereotype.

The question remains whether and, if so, when a statistical correlation between gender and the government's purpose will dispel the Court's suspicion. *Craig* provides guidance on these questions. Recall that the Court accepted public safety as an important public purpose.[130] The question was whether statistics that showed that two percent of men aged eighteen to twenty-one were arrested for drunk driving while only .18% of women the same age

126. *See supra* notes 43-47 and accompanying text.

127. *See supra* notes 77-79 and accompanying text.

128. *See* United States v. Virginia, 518 U.S. 515, 529-32 (1996); Mississippi University for Women v. Hogan, 458 U.S. 718, 725 n.10 (1982); Frontiero v. Richardson, 411 U.S. 677, 684-88 (1973).

129. *See United States v. Virginia*, 518 U.S. at 532.

130. *See Craig*, 429 U.S. at 199-200.

were arrested for the same offense justified the statute's gender distinction.[131] The Court noted that these statistics clearly showed that eighteen to twenty-one year old men were arrested for drunk driving substantially more often than women of the same age.[132] But, for the Court, the relevant question was not whether the evidence showed some measurable difference between men and women relating to the government's purpose, but whether one gender (and not the other) had some necessary, inherent connection with the government's purpose.[133] The Court explained: "Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of two percent must be considered an unduly tenuous 'fit.'"[134] Thus, instead of asking whether men posed a greater drunk driving risk than women, the Court asked whether men aged eighteen to twenty-one as a class are necessarily predisposed to drive while drunk. A showing that two percent of men aged eighteen to twenty-one were arrested for drunk driving did not suffice.[135]

The lack of fit once again confirmed the Court's suspicion that gender stereotypes were at work.[136] The Court explained: "The very social stereotypes that find reflection in age-differential laws are likely substantially to distort the accuracy of [the government's] statistics. Hence 'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."[137] Given that the drunk driving was not associated closely with either gender,[138] the Court feared that gender stereotypes were driving the law.

Reed, *Frontiero*, and *Craig* illustrate how the Court uses the fit question to confirm or dispel its suspicion of gender bias. Later cases reveal, however, that, unlike race classifications, the Court is not suspicious of all gender classifications. Instead, the Court follows two different approaches. First, if the Court believes that government sincerely is trying to remedy the effects of past gender

131. *See id.* at 200-01.

132. *See id.*

133. *See id.* at 201 ("While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device.").

134. *Id.* at 201-02.

135. *See id.*

136. *See id.* at 202 n.14.

137. *Id.* (citations omitted).

138. *See id.* at 204 ("Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving.").

discrimination, the Court will allow government to act on a statistical correlation between gender and the government's purpose.[139] For example, in one case, the Court believed that the state was trying to remedy past employment discrimination by awarding widows (but not widowers) a special property tax exemption.[140] Thus, the Court allowed the government to rely on statistics that showed that on average women in similar occupations earned less than men.[141]

Second, if the Court believes that government is pursuing some other purpose, the Court will require a tight fit — perhaps tighter than strict scrutiny — between gender and the government's purpose. For example, in *Mississippi University for Women v. Hogan*,[142] the Court did not believe that the government was trying to help women.[143] In that case, the state's only nursing program limited enrollment to women.[144] The government argued that the admission policy was intended to compensate for past discrimination against women in the field of nursing.[145] Barely containing its incredulity, the Court rejected this purpose, noting that historically, in Mississippi alone, more than ninety percent of all registered nurses were women.[146] According to the Court, Mississippi's asserted purpose was a mask for its actual purpose — channeling women into traditionally female careers.[147] Since the Court believed that the state was acting based on stereotype, the Court could not rely on the statistical correlation between gender and nursing.[148]

139. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 320 (1977); Califano v. Goldfarb, 430 U.S. 199, 223-24 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975).

140. *See* Kahn v. Shevin, 416 U.S. 351 (1974).

141. *See id.* at 353 ("Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the women seeking any but the lowest paid job."); *see also* Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding federal statute that allowed servicewomen more time than servicemen to obtain promotion; statute was intended to compensate for past discrimination against women in the military).

142. 458 U.S. 718 (1982).

143. *See id.* at 727-31.

144. *See id.* at 720.

145. *See id.* at 727 ("The State's primary justification for maintaining the single sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action.").

146. *See id.* at 729. Nationally, the figure was 98.6%. *Id.*

147. *See id.* at 729-30.

148. *See id.*

Much rides on whether the Court believes that the government's use of gender genuinely is remedial. It is not always clear, however, on what basis the Court forms its belief. Regardless, whether the Court is suspicious of the government's motives will affect how the fit test applies. If the Court is suspicious, it will look for a tight fit to dispel that suspicion; if not, the Court will accept a loose fit.

The Court's most recent gender equal protection decision, *United States v. Virginia*,[149] is an excellent illustration of the methodology suggested by this Article. This case involved the Virginia Military Institute's policy of excluding women.[150] The Court began by noting that it may view all gender classifications with a suspicion borne of history:

> Today's *skeptical scrutiny* of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court recognized a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." Through a century plus three decades or more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for half a century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.[151]

Note the parallels to the race discrimination cases. First, the Court refers to the history of gender discrimination, just as it has relied on the history of race discrimination.[152] Second, the Court recounts the political exclusion of women throughout most of American history, similar to the experience of racial minorities.[153] Third, the Court states that this background makes it "skeptical" of state law; the Court has used exactly the same term to explain how it views race classifications.[154] The two-step equal protection analysis will either confirm or dispel the Court's skeptical suspicions.

The purpose and fit questions work together to test whether the government actually has an independent justification for its action. As the Court explained, "Our precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification

149. 518 U.S. 515 (1996).

150. *See id.* at 520.

151. *Id.* at 531 (emphasis added) (citations omitted).

152. *See id.* at 532-32.

153. *See id.*

154. *See* Adarand Constructors v. Pena, 515 U.S. 200, 223 (1995).

must describe actual state purposes, not rationalizations for actions in fact differently grounded."[155] If the purpose has a close fit with reality, then the government has dispelled the Court's strong suspicion; if not, the Court's suspicion is confirmed and the law is unconstitutional.

Virginia offered two justifications for the Virginia Military Institute ("VMI") admission policy: (1) single-sex education, as offered at VMI, is part of a larger effort to offer diverse public education opportunities, and (2) admitting women would necessarily require VMI to alter or abolish its unique method of training.[156] The Court held that a blanket gender classification fit neither purpose.[157] First, concerning educational diversity, VMI was the only single-sex public higher education facility in the state.[158] Indeed, while VMI decided to remain single-sex, there was a "movement of all other public colleges and universities in Virginia away from single-sex education."[159] If the state were sincere about providing diverse educational opportunities for *all* citizens, it would have done so evenhandedly, providing similar single-sex educational facilities for *both* men and women.[160] Thus, VMI's poor fit with the

155. *United States v. Virginia*, 518 U.S. at 535.

156. *Id.* VMI uses what it calls the "adversative method of training," which the Court described as follows:

> VMI produces its "citizen-soldiers" through "an adversative, or doubting, model of education" which features "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." As one Commandant of Cadets described it, the adversative method "dissects the young student," and makes him aware of his "limits and capabilities," so that he knows "how far he can go with his anger, . . . how much he can take under stress, . . . exactly what he can do when he is physically exhausted."
>
> VMI cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. Entering students are incessantly exposed to the rat line, "An extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors.
>
> VMI's "Adversative model" is further characterized by a hierarchical "class system" of privileges and responsibilities, a "dyke system" for assigning a senior class mentor to each entering class "rat," and a stringently enforced "honor code," which prescribes that a cadet "does not lie, cheat, steal nor tolerate those who do."

Id. at 522 (citations omitted).

157. *See id.* at 539, 546.

158. *See id.* at 539.

159. *Id.*

160. *See id.*

purpose of educational diversity could not dispel the Court's suspicion of gender discrimination.[161]

The state's second purpose — preserving VMI's unique educational method — also failed the fit analysis.[162] While the district court focused on the fact that women, on average, were less likely than men either to want VMI's training method or to be able to handle the method, the Court focused on the fact that *per se* exclusion of women was over-inclusive because *some women* would be willing and able to pursue VMI's training method.[163] And these women should not be denied opportunities on account of the average abilities or preferences of women as a whole: "State actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"[164] If willing and able women are excluded, that exclusion apparently is based on some stereotypical view of women's place in society.[165] Once again, the poor fit between gender and the government's purpose confirms the Court's suspicion of gender bias.

In sum, the Court's gender cases follow the same method as its race cases — the Court uses the two-step means-end analysis to confirm or dispel its suspicion of prejudice. The Court, however, is not automatically suspicious of gender classifications. In cases where the Court is less suspicious, it is more likely that the Court will find that the government genuinely wants to remedy past gender discrimination, and the statute will be upheld.

D. And the Rest: All Other Classifications

The Court reviews all other bases of classification (*i.e.*, other than race, ethnicity, alienage, and gender) under a single, weaker version of the two-step equal protection test known as "rational basis review." Under rational basis review, the government need only have a "legitimate" purpose, and the challenged classification need only be "rationally related" to achieving that purpose.[166] At first glance, the cases applying this test may seem different from race and gender cases because the rational basis cases are very deferential to the government, with none of the talk of suspicion or allegations of pretext we have seen above.[167] This deference,

161. *See id.* at 536.
162. *See id.* at 546.
163. *See id.* at 540-45.
164. *Id.* at 541 (citations omitted).
165. *See id.* at 542-43.
166. *See* TRIBE, *supra* note 15, § 16-2, at 1439-43.
167. *See id.* at 1442-43.

though, makes sense. Most lawmaking should not raise suspicion of prejudice or bias on its face — race and gender are special cases, each with a special history.

It would be a mistake, however, to see rational basis review as different in kind from strict and intermediate scrutiny. Strict scrutiny, intermediate scrutiny, and rational basis review are different points along the same spectrum. Examination of the rational basis review cases reveals that the Court still is looking for laws enacted out of bias or prejudice, and that the fit question still is used to confirm or dispel the Court's initial impression of the law. The key question will be how the Court forms the initial impression that will be tested by the two-step equal protection analysis.

1. *A Little History of Rational Basis Review*. As initially conceived and applied, rational basis review was a doctrine just begging for problems. The test arose in the wake of the substantive due process doctrine associated with *Lochner v. New York*.[168] The *Lochner* due process cases today are disparaged as typifying the worst in judicial activism.[169] During the so-called *Lochner* era, the Court subjected government economic regulations — such as minimum wage laws, maximum hour laws, and other labor laws[170] — to a heightened form of judicial scrutiny.

168. 198 U.S. 45 (1905).

169. *Lochner* was not the first case to apply substantive due process to economic interests; but it is the most infamous, earning that period of judicial decisions the derisive name of the *Lochner* era. For another example of a Lochner era decision, *see* Allgeyer v. Louisiana, 165 U.S. 578 (1897) (declaring unconstitutional a state law that prohibited payments on marine insurance policies issued by out-of-state companies that were not licensed to do business in the state). The ghost of *Lochner* has haunted the Court ever since, with justices invoking the case to accuse their opponents of unjustified judicial activism. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (declining to follow *Lochner*, stating "we do not sit as a super-legislature"); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 4 (1993) ("[U]ntil recently virtually all major discussions of *Lochner* . . . took for granted that the case vividly illustrates the potential harm when activist judges turn away from important institutional norms and become more interested in making law than in interpreting it."); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 45 (1993) (noting that the *Lochner* "period is often thought to symbolize an unjustified form of judicial 'activism'"); WIECEK, *supra* note 86, at 123-25.

170. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down minimum wage law for female workers); Coppage v. Kansas, 236 U.S. 1 (1915) (striking down a state law that prohibited employers from conditioning employment on employee's agreement not to join a union).

Under this heightened scrutiny, the judgment of the legislature was given little, if any, deference by the Court. The Court decided for itself such questions as (1) what the government's purpose was, and (2) whether the government's law fit its purpose.[171] The Court then greatly restricted the number of permissible purposes the government might achieve in regulating the economy.[172] *Lochner* era substantive due process analysis, then, closely resembled modern strict scrutiny analysis under the Equal Protection Clause.

The *Lochner* line of cases has been criticized as an era of illegitimate judicial activism in which the Supreme Court Justices imposed their own personal economic ideology on the democratic branches.[173] According to the standard criticism, the Justices' economic views had no basis in the Constitution.[174] Justice Oliver Wendell Holmes's dissent in *Lochner* captures the objection:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic

171. *See* CHEMERINSKY, *supra* note 15, § 8.2.2, at 480-82; TRIBE, *supra* note 15, § 8-3, at 568-70.

172. *See* CHEMERINSKY, *supra* note 15, § 8.2.2, at 480-82; TRIBE, *supra* note 15, § 8-4, at 570-74. In *Lochner*, the Supreme Court held that a New York law limiting bakers' working hours violated the Fourteenth Amendment's due process protection of "liberty." *Lochner*, 198 U.S. at 53 ("The right to purchase or to sell labor is part of the liberty protected by . . . [the Fourteenth A]mendment."). According to the Court, the then-existing common law rules of contract — which left the employer and the bakers free to set working hours — were a natural condition of liberty, free from government action. *See* GILLMAN, *supra* note 169, at 27; SUNSTEIN, *supra* note 169, at 45. Of course, this view seriously is flawed. The so-called "free market" was made possible by a complex web of common law rules — of tort, contract, *etc.* — that protected the expectations of the participants in the market. *See* GILLMAN, *supra* note 169, at 26 ("Of course, this 'natural society' itself was produced by a complex and politically charged system of legal rules and principles concerning property rights, contractual obligations, and tortious liabilities whose social effects were far from neutral."); SUNSTEIN, *supra* note 169, at 50.

173. *See* CHEMERINSKY, *supra* note 15, § 8.2.2, at 486. This is not the only assessment of the *Lochner* era. For kinder views, *see* GILLMAN, *supra* note 169; SUNSTEIN, *supra* note 169; Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1228-36 (1998).

174. *See* CHEMERINSKY, *supra* note 15, § 8.22, at 486.

> relation of the citizen to the State or of *laissez faire.* It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[175]

Under this stinging indictment, the Supreme Court was charged with lawless conduct — imposing its personal political beliefs on the nation without legal warrant.

When the *Lochner* line of cases finally was overruled,[176] the Court retreated to a much more deferential form of review — the predecessor to rational basis review. Stung by criticism of the *Lochner* era, the Court's application of the rational basis standard looked more like judicial abdication than judicial review.[177] For example, in *Railway Express Agency v. New York*,[178] the Court upheld a New York law that permitted motor vehicles to carry advertisements only for the business of the vehicle's owner. The state's purpose was traffic safety — to prevent distractions that would lead to traffic accidents.[179] The state did not explain, however, why its *distinction* between owner-advertising and other advertising fit this purpose. The Court also did not say why the distinction fit the purpose, and moreover it did not seem to care. In upholding the statute, the Court said: "The local authorities *may well have concluded* that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use."[180] The City "may" so have concluded, or the City "may not" so have concluded. It just did not seem to matter to the Court; either way, the traffic regulation was constitutional. The Court seemed very willing to concede the fit question in its early rational basis cases.[181]

The ghost of *Lochner* haunted the Court in *Railway Express Agency*. Before reaching the equal protection claim, the Court made clear that it was done with *Lochner* due process:

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175. *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

176. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding a law establishing a minimum wage for women, and overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923), the *Lochner* era case that held to the contrary).

177. *See* TRIBE, *supra* note 15, § 8-7, at 581-86.

178. 336 U.S. 106 (1949).

179. *See id.* at 109.

180. *Id.* at 110 (emphasis added).

181. *See* Linde, *supra* note 23, at 210 ("That is not judicial review but dismissal of a claim of review."); *see also* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488-89 (1955) (upholding a statute that prohibited opticians from adjusting eyeglasses, but allowed ophthalmologists and optometrists to do so).

> We do not sit to weigh evidence . . . in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem.[182]

This deference carried over to the Court's equal protection analysis.

In its post-*Lochner* cases, the Court also was very forgiving in applying the first step of equal protection analysis, and willing to hypothesize a "conceivable" purpose for the government.[183] If the government either failed to articulate a purpose or asserted an impermissible purpose, the Court stood ready to bail out the government.[184] And, since the Court found almost any purpose permissible, the Court's imagination almost certainly would conjure a permissible, hypothetical state purpose.[185] The result was that no law failed this early version of rational basis review.

In sum, early rational basis review held the government to little if any standard of review. This was understandable considering that the doctrine arose during a period in which the Court was recovering from attacks on prior judicial activism. Since truly *any* law could pass this version of rational basis review, something had to change if the Court was ever to strike down a law under rational basis review.

2. *The Threat of a Rational Basis Tautology*. The modern Court inherited a rational basis test without teeth. The Court's unflinching acceptance of any imaginable government purpose threatened to make the rational basis test a tautology. In that tautology, the government achieves perfect means-end fit by defining its purpose based on the result that the law ultimately achieves.[186] For example, recall *Beazer*, the case where the New

182. *Railway Express Agency*, 336 U.S. at 109 (citation omitted).

183. *See* TRIBE, *supra* note 15, § 16-3, at 1443. For an example, *see* Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 563 (1947) (upholding nepotism policy for hiring river pilots based on conceivable government purpose to gain "[t]he benefits to morale and *esprit de corps* which family and neighborly tradition might contribute").

184. *See, e.g.*, *Williamson*, 348 U.S. at 488-89; *Kotch*, 330 U.S. at 563-64.

185. *See* TRIBE, *supra* note 15, § 16-3, at 1443.

186. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring); *id.* at 186-88 (Brennan, J., dissenting); TRIBE, *supra* note 15, § 16-2, at 1440 ("Without . . . a requirement of legitimate public purpose, it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable — and indeed tautologi-

York Transit Authority refused to hire methadone users.[187] The Equal Protection argument would become a tautology if the Transit Authority could say that its hiring policy was implemented to harm methadone users. The policy fits this purpose perfectly. To avoid this tautology, the Court must enforce some limits on the purposes the government can achieve.

The Court almost fell into the tautology approach in *United States Railroad Retirement Board v. Fritz*, which involved an anomaly in federal law that allowed railroad workers who also held other employment to collect *both* a federal railroad pension and social security benefits.[188] To close this loophole, Congress amended the federal railroad law to eliminate prospectively the windfall of social security benefits.[189] For railroad workers who already had qualified for the windfall of dual benefits, the new federal law allowed some to retain the benefits but retroactively terminated the benefits of others.[190] The law did so based on factors such as length of service, a period of past separation from the railroad industry, and lack of current connection with the railroad industry.[191] Thus, the new federal railroad law discriminated between classes of railroad employees who had become eligible for windfall benefits.[192] The question was whether the dividing line served a permissible government purpose.[193]

Congress's purpose in cutting back on benefits was to salvage the financial viability of the federal railroad pension fund.[194] Congress, and the Court, never articulated why the distinction drawn by the statute, as opposed to any other distinction between benefit recipients (*e.g.*, age, service record, *etc.*), was in any way related to Congress's purpose. Rather, reminiscent of *Railway Express Agency*, the Court said it did not know and did not care: "Congress could properly conclude that persons who had actually acquired

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cal — fit: if the means chosen burdens one group and benefits another, then the means perfectly fits the end of burdening just those whom the law disadvantages and benefiting just those whom it assists."); Linde, *supra* note 23, at 208 ("[A]lthough it purports to leave policy choices to the political process, the [rational basis] test depends on holding the law to some objective other than the immediate effect of the law itself."); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128 (1972).

187. *See supra* notes 31-42 and accompanying text.

188. *See Fritz*, 449 U.S. at 168.

189. *See id.* at 169-73.

190. *See id.* at 168-73.

191. *See id.*

192. *See id.* at 172-73.

193. *See id.* at 177.

194. *See id.* at 169-70.

statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than . . . [those] who were no longer in railroad employment when they became eligible for dual benefits."[195] This passage raises two relevant points. First, the Court does not care — it is irrelevant — whether this "equity" rationale was the government's actual purpose. Indeed, as the Court later stated, "[i]t is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . . .'"[196]

Second, the "equity" purpose accepted by the Court makes equal protection rational basis review a tautology. According to the Court, Congress based the benefits determination on equitable grounds — who was more deserving — but any law could be so justified.[197] For example, in *Beazer*, one could argue that the Transit Authority could not hire everyone and, on balance, non-methadone users had a "greater equitable claim to" a Transit Authority job. It is a self-evident proposition! It is inherent in any classification that those *not burdened* by the classification are considered, by the government at least, to have greater equitable entitlement to a benefit or interest in avoiding a detriment. As Justice John Paul Stevens noted in *Fritz*:

> [I]f the analysis of legislative purpose requires only a reading of the statutory language in a disputed provision, and if any "conceivable basis" for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that *Congress did what it intended to do*.[198]

To avoid this tautology, we need to ask — as the *Fritz* Court did not — *why* one group has a greater equitable claim over another. In *Beazer*, non-methadone users had a greater equitable claim to Transit Authority jobs because they posed less of a safety threat to the passengers than did methadone users.[199] In *Fritz*, the Court and Congress were silent on this important question.

Fritz fits within the original, ultra-deferential approach to rational basis review. The Court will accept virtually any government purpose — asserted or hypothetical. The Court's ability to manufacture any conceivable government purpose ensures that the law will pass the fit analysis because, as the tautology criticism shows, any law can be defined as intended to accomplish what it

195. *Id.* at 178 (emphasis added).
196. *Id*. at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).
197. *See id.* at 178.
198. *Id*. at 180 (Stevens, J., concurring) (emphasis added).
199. *See Beazer*, 440 U.S. 568, 588-89 (1979).

actually accomplishes. If a law is to be struck down under rational basis review, something must give; some part of the analysis must not concede everything to the government. But which part?

3. *Signs of Life in Rational Basis Review.* Our answer lies in the general mission of the Court's equal protection doctrine. Recall that the Court uses equal protection analysis to make a single, crucial determination: Was the challenged law enacted out of bare dislike of the targeted group?[200] With gender and race, the Court suspects that those classifications are the product of prejudice and uses the two-step equal protection analysis to dispel or confirm their suspicion.[201] In rational basis cases, however, the Court has no general reason to suspect that prejudice or bias is behind the challenged law.[202] Thus, there is no suspicion for the two-step test to confirm or dispel, and we should not be surprised that the Court thus far had upheld practically every law it reviewed under the rational basis test. Further, it is not surprising that the only three cases where the Court has used equal protection rational basis review to strike down a law are also the three cases in which the Court strongly suspected that the law was based on bias or prejudice. This section examines those cases.

United States Department of Agriculture v. Moreno[203] involved a challenge to a federal statute that excluded from the Food Stamp program any household that contained a person who was not related to any other member of the household. The classification was intended to prevent fraud in the Food Stamp program because, the government argued, households with unrelated individuals were *more likely* to be constituted solely for the purpose of gaining Food Stamps.[204] After *Railway Express Agency*, one would expect the Court to uphold the federal law, reasoning that Congress "may have concluded" that unrelated households pose a greater risk of fraud than related households.[205] After all, Congress's actual purpose was irrelevant.[206]

200. *See* United States v. Moreno, 413 U.S. 528, 534 (1973) ("[A] bare congressional desire to harm politically unpopular groups cannot constitute a legitimate governmental interest.").

201. *See supra* notes 48-165 and accompanying text.

202. *See supra* notes 166-67 and accompanying text.

203. 413 U.S. 528 (1973).

204. *See id.* at 535.

205. Indeed, the Government made just this argument:

> In essence, the [g]overnment contends that, in adopting the 1971 amendment, Congress *might rationally have thought* (1) that households with one or more unrelated members are more likely than "fully related" households to contain individuals who abuse the program by

But *Moreno* signaled something new in rational basis review, engaging in a more searching review of the federal law. Doctrinally, the Court concluded that the law's classification (unrelated households) did not fit the law's purpose (preventing Food Stamp fraud).[207] Yet, this conclusion does not — indeed, cannot — fully explain the Court's decision. In the abstract, it does not seem illogical to suspect that *some* (because rational basis review does not require perfect fit) unrelated households will be constituted fraudulently. But the Court was not deciding the question in the abstract. Rather, the Court reached its decision in the context of legislative history that suggested that the unrelated-household exclusion was intended to target "hippies" and "hippie communes."[208] In other words, the Court had reason to suspect that Congress's stated purpose was a pretext for its actual purpose — to punish the hippies. And, the Court concluded, "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[209]

For the first time in a rational basis review case, the Court had reason to suspect that the challenged law was enacted out of bare dislike of a group of people. The Court had found a smoking gun — legislative history indicating that the law was targeting "hippies" and "hippie communes" because some legislators did not like "those people."[210] Given this suspicion, the Court could now use the two-step equal protection analysis to dispel or confirm their suspicions.[211] The Court concluded that while preventing fraud was a legitimate end, the classification of unrelated households did not fit that end particularly well.[212] In other words, the fit was poor enough to confirm that targeting hippies was the government's purpose, *not* preventing fraud.[213]

> fraudulently failing to report sources of income or by voluntarily remaining poor, and (2) that such households are "relatively unstable," thereby increasing the difficulty of detecting such abuses.

Id. (emphasis added).

206. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).

207. *See Moreno*, 413 U.S. at 538.

208. *See id.* at 534 ("The legislative history . . . indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program.").

209. *Id.*

210. *See id.*

211. *See id.* at 534-38.

212. *See id.*

213. *See id.* at 535-36.

Moreno is part of what some commentators call heightened rational basis review.[214] Compared to cases like *Railway Express Agency* and *Fritz*, *Moreno* undoubtedly applied closer scrutiny. The heightened scrutiny, though, makes sense in the context of the Court's larger equal protection jurisprudence. Recall that the fit analysis is one way of determining whether the government's asserted purpose is its actual purpose.[215] If the fit is poor, one questions whether the government actually intended that purpose.[216] Thus, to the extent legislative history *already* makes the Court suspicious that the asserted purpose is a pretext, the Court can use a heightened fit analysis to determine whether its suspicion is warranted.

After *Moreno*, the question was what would make the Court suspect that prejudice lies behind government discrimination. In *Moreno*, statements in legislative history aroused the Court's suspicion. *City of Cleburne v. Cleburne Living Center Inc.*,[217] the next case to strike down a law under rational basis review, shows that a social history of mistreatment also can trigger a closer rational basis scrutiny. In *Cleburne*, a city zoning ordinance required a special permit for operation of a group home for the mentally retarded, but not for operation of other facilities such as hospitals, homes for the aged, and fraternities.[218] The case arose out of the city's denial of a special permit for a group home for the mentally retarded.[219] In support of its decision, the city argued that it "was concerned with the *negative attitude* of the majority of property owners located within 200 feet" of the proposed facility.[220] The Court explained that the city's protection of private prejudice amounted to bare dislike of the mentally retarded: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[221]

The Court's suspicion colored its analysis of the government's remaining purposes.[222] The city argued that the special permit was

214. *See, e.g.*, CHEMERINSKY, *supra* note 15, § 9.2.3, at 544; TRIBE, *supra* note 15, § 16-3, at 1444-46; GUNTHER, *supra* note 16, at 18-19; R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1, 18-20 (1995).

215. *See supra* notes 34-35, 78-80, 126-127 and accompanying text.

216. *See id.*

217. 473 U.S. 432 (1985).

218. *See id.* at 436 n.3.

219. *See id.* at 437.

220. *Id.* at 448 (emphasis added).

221. *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

222. *See id.* at 449-50.

denied because the proposed facility would be located in a flood plain and raised concerns about liability for the actions of people who would live at the homes.[223] Under traditional rational basis review, as adopted in cases like *Railway Express Agency* (involving advertising on automobiles) and *Fritz* (involving railway worker pension benefits), the Court would have deferred to the city's judgment, holding that the city "may have concluded" that the mentally retarded posed greater liability risks or the risk of flooding was too great. The *Cleburne* Court was more skeptical. The Court explained that, for purposes of flood concerns and liability risks, it could see no relevant difference between, on the one hand, group homes for the mentally retarded and, on the other hand, hospitals, homes for the aged, and fraternities.[224] Thus, the city's choice to place a greater burden on homes for the mentally retarded was *under-inclusive* because it did not cover facilities that also threatened the government's purpose.[225]

The poor fit between the city ordinance's classification (homes for the mentally retarded) and its purpose (flood concerns and liability risk) confirmed the Court's suspicion that the city was acting out of bias against the mentally retarded.[226] The suspicion arose from two sources: Society's past discrimination against the mentally retarded[227] and the government's own argument that the ordinance reflected the prejudice of private landowners.[228] Once again, the Court used suspicion of prejudice and the two-step equal protection test to strike down a challenged law based on illegitimate considerations.[229]

223. *See id.* at 449.

224. *See id.*

225. *See id.*

226. *See id.* at 450 ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.").

227. *See Cleburne*, 473 U.S. at 446 ("Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms.").

228. *See id.* at 448.

229. *Cleburne* stands in contrast to Heller v. Doe, 509 U.S. 312 (1993), which upheld a law that discriminated against the mentally retarded. *Heller* involved a statute that allowed involuntary commitment of the mentally retarded on a showing of "clear and convincing evidence," but required a higher standard, showing "beyond a reasonable doubt," to involuntarily commit someone for mental illness. *Id.* at 315-18. Unlike *Cleburne*, the record in *Heller* did not reveal any bias in the statute's history. Thus, the Court did not approach the law with suspicion.

One might ask why the historical mistreatment identified in *Cleburne* was not enough to justify strict scrutiny. The reason is that the trait of mental retardation is different from suspect classifications like race in one important respect: It can be relevant to government action.[230] Legislation singling out the mentally retarded in the areas of employment and confinement, for instance, have been perceived to benefit the mentally retarded.[231] Thus, a history of mistreatment will not be enough to tighten strict scrutiny, but will be enough to heighten the fit analysis.

The Court's most recent use of rational basis review to strike down a statute occurred in *Romer v. Evans*.[232] *Romer* involved a state constitutional amendment that prohibited any state or local government body from enacting a law that prohibited discrimination based on homosexual, lesbian, or bisexual sexual orientation.[233] As Justice Antonin Scalia's dissent pointed out, review of any law that discriminates based on sexual orientation takes place against a historical background that includes laws that have disapproved of homosexuality and criminalized homosexual conduct.[234] This history was enough to arouse suspicion that the state's constitutional amendment was enacted out of "animosity" toward homosexuals.[235]

230. *See id.* at 442-43 ("[T]he States' interest in dealing with and providing for [the mentally retarded] is plainly a legitimate one.").

231. *See id* at 443-44.

232. 517 U.S. 620 (1996).

233. *See id.* The Colorado constitutional amendment read as follows:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST., art. III, § 30b.

234. *See Romer*, 517 U.S. at 636, 644-52.

235. The litigants in *Romer* did not argue on appeal for heightened scrutiny for classifications based on sexual orientation. *See id.* at 641 n.1 (Scalia, J., dissenting). That argument has been made in several federal courts of appeals, with only mixed success. *See* Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) (holding that sexual orientation is not a suspect classification); Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988) (holding that sexual orientation is a suspect classification), *vacated and aff'd on other grounds*, 875 F.2d 699 (1989) (en banc), *cert. denied sub nom.*, United States Army v. Watkins, 498 U.S. 957 (1990).

The Court next turned to the two-step equal protection analysis to either confirm or dispel its suspicion.[236] The Court made this point expressly: "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[237] Once again, the fit was poor. The state argued that the amendment was enacted out of "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[238] Yet, if that was the state's limited purpose, a law that applied to *all aspects of life* — instead of just employment or apartment rentals — was greatly overbroad.[239] The poor fit confirmed the Court's suspicion.[240]

In sum, *Moreno*, *Cleburne*, and *Romer* weave a consistent thread. In each case, the Court had some reason to suspect that the government was acting out of improper motives. And, in each case, poor fit between the classification and the government's purpose did not dispel that suspicion. As in the race and gender cases, the Court used the two step equal protection test to root out biased or prejudiced government action.

E. The Problem of Actual Purpose

A word on so-called *actual* purpose is appropriate at this point. This Article has argued throughout that the two-step equal protection analysis helps courts smoke out the true intent behind the government's stated purpose. But, as Justice Antonin Scalia and others accurately have pointed out, there are three main problems with any quest for the actual purpose of a collective body

236. *See Romer*, 517 U.S. at 633.

237. *Id.*

238. *Id.* at 635.

239. *See id.*

240. *See id.* The Court explained the point as follows:

> The breadth of the Amendment is so far removed from [the state's asserted] justifications that we find it impossible to credit them. We cannot say Amendment 2 is directed at any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment."

Id. (quoting Civil Rights Cases, 109 U.S. 3, 24).

such as a legislature.[241] First, it is pure fantasy to say that a multi-member body had a single intent or purpose in taking any given action.[242] Intent will vary from person to person, with no single, coherent view. Second, even if a single intent were possible to identify, where does one look?[243] The statements of the supporters of the government action? What if the supporters do not agree on the point? Should one turn to committee reports?[244] What about those who were silent yet supported the government's action? We have no way to decide among these sources. Third, how many of the supporters must hold the view for it to be considered the government's actual purpose?[245] All? More than half? Again, there is no principled answer.

We can concede Justice Scalia's point and still accept the Court's use of actual purpose in equal protection analysis. "Actual purpose" is used as a legal fiction when we *suspect* that government action is meant to harm a disfavored group. As noted above, social or legislative history of disfavor will arouse suspicion that the government's actual purpose was to harm the burdened class. If the fit analysis shows a poor fit between means and end, the Court confirms its suspicion that the government's asserted purpose was a pretext, and that the government's actual purpose was to harm the burdened class. Yet, this conclusion does *not necessarily* mean that the Court believes it has accurately determined the legislature's subjective motivation — a task that Justice Scalia finds futile. Rather, given all of the reasons (legislative history,

241. *See* Green v. Block Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (questioning reliance on the opinions of a "larger handful of Members of Congress" in determining the legislature's actual purpose); Bradley C. Karkkainen, *Plain Meaning: Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 415-17 (explaining the reasoning behind Justice Scalia's and others' skepticism of placing reliance on any actual purpose or intention of Congress).

242. *See* Karkkainen, *supra* note 241, at 415-16 ("A collective body made up of many members with diverse views cannot have a single intention."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The chances that several hundred men will each have exactly the same determinate situations in mind as possible reductions of a given [statutory text], are infinitesimally small."); Antonin Scalia, Speech on Use of Legislative History at Various Law Schools 15 (1985-86) (copy on file with author).

243. *See* Karkkainen, *supra* note 241, at 416; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 641 (1990); Scalia, *supra* note 242.

244. *See* Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 617 (1991) (Scalia, J., concurring in the judgment) (discussing why Committee Reports are unreliable indicators of congressional intent).

245. *See* Karkkainen, *supra* note 241, at 416; Scalia, *supra* note 242.

historical evidence, poor fit, *etc.*) the suspicion of impure motives is *so strong* that the Court considers it constitutionally prudent to *deem* the legislature's actual purpose as one to harm a disfavored group.

The phrase "constitutionally prudent" is a recognition of the reality that, short of concession in litigation, or affidavits or sworn testimony from all legislators who supported the government action at issue, we cannot discern the government's subjective motivation.[246] The Court always will have less than perfect information about the government's purpose. For this reason, the Court must identify circumstances under which it is *more likely* that the government action was improperly motivated. On this view, the Court's use of social history, legislative history, and poor fit are logical. First, a history of disfavor indicates that *any given law* burdening the disfavored class is more likely the product of bias than laws burdening other classes. Second, evidence of prejudice in legislative history indicates that *this law* is more likely the product of bias than other laws. If suspicion is aroused on either basis, the fit question will confirm whether *this law* is more likely to be improperly motivated than other laws. While any of these factors standing alone might not be enough to infer government bias, their presence in some combination should be enough to make that presumption. Under these circumstances, the Court feels confident that whatever the actual, subjective motivation of the legislature, there is an undue danger that the motivation was improper.

III. ALASKA EQUAL PROTECTION

The next section briefly traces the development of Alaska's equal protection test and reveals that the Alaska Supreme Court has adopted a pure means-end balancing approach similar to that described in Part II.A. above. As previously discussed, pure means-end balancing requires a court to weigh the importance of the government's end and then evaluate how well the government's means (the challenged government action) achieves its end. The Alaska Supreme Court varies the stringency of its means-end analysis depending on various factors, resulting in a "sliding scale" test. This pure means-end analysis differs from the federal equal protection test, which uses means-end analysis to smoke out illegitimate government purposes.

The next two sections of this Part analyze a handful of cases that apply the Alaska equal protection test. This section only

246. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1212-14 (1970).

briefly mentions the Alaska race, ethnicity, alienage, and gender cases, devoting most of its discussion to cases involving other types of classifications. The reason for this emphasis is simple. As the Alaska Supreme Court has suggested, analysis under Alaska equal protection will likely be the same as under federal equal protection when a law burdens a suspect class (race, ethnicity, or alienage) or a quasi-suspect class (gender).[247] Thus, if Alaska equal protection offers something different, it must be in cases that involve *other* classifications.

Review of the Alaska equal protection cases will show how the Alaska Supreme Court's application of a pure means-end analysis has led to inconsistent results. The fourth section of this Part criticizes the *ad hoc* nature of the pure means-end analysis. In some cases, where the Alaska Supreme Court disagrees with the policy choices behind a specific statute, the court aggressively applies the means-end test. In other cases, however, where the court presumably agrees with the legislature's policy choices, the court has applied the means-end analysis in a cursory fashion, deferring to the legislature's policy judgment. As the discussion shows, the court offers no reason why its means-end analysis is rigorous in some cases and non-existent in others. Absent any explanation, we are left to conclude that the court simply agreed with the policy judgments behind the laws that it upheld, and disagreed with the policy judgments behind those it struck down.

As the final section of Part III explains, it is not surprising that the pure means-end analysis of Alaska equal protection has not produced consistent, principled decision-making. Courts are not well situated to engage in pure means-end analysis. While courts often do so in making common law decisions, such decisions play to the judiciary's strengths. Common law is made on an incremental, case-by-case basis, as concrete disputes arise. Pure means-end analysis, on the other hand, asks a court to assess the wisdom of a rule as a whole and in the abstract. As discussed in the final section, this difference between common law and pure means-end analysis explains why courts are suited to the former but not the latter.

A. Development of Alaska's Sliding Scale

For almost the first twenty years after statehood, the Alaska Supreme Court merely followed the federal model of equal protec-

247. *See* State v. Ostrosky, 667 P.2d 1184, 1192-93 (Alaska 1983) (confirming that strict scrutiny applies to classifications based on race or ethnicity).

tion.[248] In the mid-1970's, however, the court began voicing discontent with what it saw as the rigid character of federal equal protection.[249] Spurred by an influential article in the *Harvard Law Review*,[250] the court criticized the seeming all-or-nothing nature of federal equal protection analysis. On the one hand, if a law was subject to strict scrutiny, the Supreme Court always would strike down the law.[251] On the other hand, if a law was subject to rational basis review, the Supreme Court invariably would uphold the law.[252] Members of the Alaska Supreme Court believed that this two-tiered approach gave little, if any, protection to non-suspect classes and that the commands of state equal protection required something more.

In a series of three cases, the Alaska Supreme Court finally began re-shaping state equal protection analysis to address the problems it saw in federal equal protection.[253] First, in *Isakson v. Rickey*,[254] the supreme court explained that it would tighten the fit requirement for all non-suspect classifications: "Judicial tolerance of over-inclusive and under-inclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed."[255] This first change did not reduce

248. *See* Nelson, *supra* note 13, at 13 ("In the early years following statehood, Alaska courts followed federal equal protection analysis when adjudicating the state's own constitutional guarantee of equal protection."); Wise, *supra* note 13, at 21-23; *see, e.g.*, Lynden Transp., Inc. v. State, 532 P.2d 700 (Alaska 1975) (upholding decision that the residency-nonresidency distinction in amendments to the Alaska Motor Freight Carrier Act violated the state's Equal Protection Clause); Leege v. Martin, 379 P.2d 447 (Alaska 1963) (holding statute prohibiting grant of stay pending appeal in fishing license revocation cases unconstitutional due to violation of equal protection). Alaska's equal protection provision reads as follows: "[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law." ALASKA CONST. art. I, § 1.

249. *See* Nelson, *supra* note 13, at 14-15; Wise, *supra* note 13, at 22-29; *see also, Lynden Transport*, 532 P.2d at 706 n.10; State v. Adams, 522 P.2d 1125, 1127 n.12 (Alaska 1974); State v. Wylie, 516 P.2d 142, 145 n.4 (Alaska 1973).

250. Gunther, *supra* note 16.

251. *See* Isakson v. Rickey, 550 P.2d 359, 361-62 (Alaska 1976).

252. *See Isakson*, 550 P.2d at 361-62; *Adams*, 522 P.2d at 1127 n.12 (citing *Wylie*, 516 P.2d at 145 n.4). The Alaska Supreme Court was reacting to a two-tiered federal equal protection test because, at that time, the Supreme Court had yet to create the intermediate level of scrutiny for gender cases. *See supra* notes 95-122 and accompanying text.

253. For a detailed review of the early development of Alaska equal protection doctrine, *see* Wise, *supra* note 13, at 24-34.

254. 550 P.2d 359 (Alaska 1976).

255. *Id.* at 362 (quoting Gunther, *supra* note 16, at 20).

the rigidity of the equal protection analysis; it only heightened the level of scrutiny applied in the bottom tier of the still rigid framework.[256] Second, in *State v. Erickson*,[257] the supreme court indicated that it would loosen the rigid tiers of equal protection analysis, applying instead multiple levels of review tailored to the law at issue.[258] The precise level of scrutiny would be based on the classification created and the individual interest burdened by the challenged law.[259] This test is what has become known as the Alaska sliding scale approach to equal protection.

In the third case, *State v. Ostrosky*,[260] Alaska equal protection took its current form. The court described its new doctrine as follows:

> In contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to strict scrutiny. The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by *the degree of suspicion with which we view the resulting classification scheme*.[261]

Note that the court's description of the sliding scale incorporates the notion of *suspicion of certain classifications*,[262] as I have argued the federal test does. In the next section, which reviews Alaska Supreme Court cases applying the sliding scale approach, we will see that the court never follows through with the suspicion-centered approach, instead embarking on an unbounded policy review of a statute's means-end fit.

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256. The Alaska Supreme Court seemed to recognize this point: "This new standard will, in short, close the wide gap between the two tiers of equal protection by raising the level of the lower tier from virtual abdication to genuine judicial inquiry." *Id.* at 363.

257. 574 P.2d 1 (Alaska 1978).

258. *See id.* at 11-12.

259. *See id.* The court states that:

> In applying the Alaska Constitution, . . . there is no reason why we cannot use a single test. Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, the results of the test will essentially be the same as requiring a "compelling state interest"; but, by avoiding outright categorization of fundamental and non-fundamental rights, a more flexible, less result-oriented analysis may be made.

Id.

260. 667 P.2d 1184 (Alaska 1983).

261. *Id.* at 1192-93 (emphasis added).

262. *See id.*

B. The Sliding Scale as Pure Means-End Analysis

The current formulation of the sliding scale test, and the one cited to and applied by the Alaska Supreme Court, appears in *Alaska Pacific Assurance Co. v. Brown*.[263] The case involved a challenge to a portion of the Alaska Workers' Compensation statute.[264] One section of the statute required adjustment of workers' compensation benefits for any recipient who moved out of state.[265] Specifically, the statute adjusted the compensation by multiplying the workers' current compensation rate "times the ratio of the average weekly wage of the state in which he resides and the average weekly wage of Alaska."[266] The statute assumed that a state's wage rate was a good indicator of the state's relative cost of living.[267] Thus, if a recipient moved to a state with a higher wage rate than Alaska, the recipient would presumably need increased compensation to keep pace with the cost of living, and vice versa.[268] The ratio would accomplish this adjustment.[269]

The plaintiff in *Brown* was a worker who began receiving workers' compensation benefits in Alaska, and subsequently moved to California.[270] Under the adjustment provision, his benefits were cut by more than fifty percent due to his move to California.[271] Brown brought suit claiming that the adjustment provision violated the state equal protection guarantee.[272] He argued that the statute unfairly discriminated between workers' compensation recipients who moved out of state and those who remained in Alaska.[273]

Drawing on precedent, the court restated the Alaska equal protection doctrine in its current form.[274] Because the *Brown* formulation is quoted consistently (often in full)[275] and applied by the court, it is worth setting forth verbatim:

263. 687 P.2d 264 (Alaska 1984).
264. *See id.* at 266 (citing ALASKA STAT. § 23.30.175(d) (Michie 1981)).
265. *See* ALASKA STAT. § 23.30.175(d) (Michie 1981).
266. *Id.*
267. *See Brown*, 687 P.2d at 272.
268. *See id.*
269. *See id.*
270. *See id.* at 268.
271. *See id.* (cutting the benefits from $551.86 to $211.91).
272. *See id.* at 271.
273. *See id.* at 269-71.
274. *See id.* at 269-70.
275. *See, e.g.*, Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 396-97 (Alaska 1997) (quoting the *Brown* equal protection test in full).

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review. Thus, the initial inquiry under article I, section 1 of Alaska's constitution goes to the level of scrutiny. Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by the challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.[276]

Once again, note the differences from federal equal protection analysis. First, under the Alaska test, the level of scrutiny will vary depending upon the *individual interest* that the law burdens, while the United States Supreme Court largely has abandoned the practice of recognizing preferred rights under the Equal Protection Clause.[277] Second, even at the lowest level of equal protection scrutiny, Alaska applies a heightened level of means-end scrutiny.[278] Whereas the federal courts require only a mere "rational relationship" between means and end, Alaska requires at least a "substantial relationship between means and ends."[279] Third, the court dropped any mention of suspicion of certain classifications.[280] This omission suggests that Alaska equal protection will not focus on a search for government bias or prejudice. The question will be whether some other standard will emerge to guide the court's means-end analysis, or whether the court will apply a pure means-end test.

276. *Brown*, 687 P.2d at 269-70.

277. *See supra* note 49.

278. *See Brown*, 687 P.2d at 269.

279. *Id.*

280. *See id.* at 269-74.

In *Brown*, the plaintiff argued that the worker's compensation statute should be subject to heightened scrutiny because it burdened two important rights: (1) "a right to receive the full measure of workers' compensation benefits which he would receive but for" the adjustment provision of the Alaska statute, and (2) a "constitutional right to travel."[281] The court dismissed Brown's first argument with relative ease.[282] The court explained that the first asserted right really reduces to a claim that workers who move out of state have a right to be paid the same as workers who remain in state.[283] Stated this way, the right is merely a more particular statement of the general equal protection analysis — that two groups are similarly situated and thus ought to be treated the same.[284] Thus, the first asserted right does not add anything to the equal protection analysis, but rather begs the question whether the different treatment is justified.

The court gave greater weight to Brown's second asserted interest — the right to travel.[285] According to the court, Alaska recognizes a "right of interstate migration,"[286] and the workers' compensation adjustment provision, by decreasing benefits for some recipients who leave the state, places a financial burden on that right.[287] Thus, the court applied a heightened level of equal protection review: "[T]he burden on the state to justify this legislation is a very high one."[288]

281. *Id.* at 270.

282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.* at 271.

286. *Id.* (citing Williams v. Zobel, 619 P.2d 448, 452 (Alaska 1980), *rev'd on other grounds*, 457 U.S. 55 (1982)).

287. *See id.*, 687 P.2d at 273 (stating that the adjustment provision "imposes a substantial penalty upon the exercise by Brown . . . of the right to travel out of Alaska"). The state had argued that the adjustment provision did not place any financial burden on the right to travel. According to the state, Alaska law merely adjusted the worker's benefits to reflect changes in the worker's cost of living. The court rightly noted, however, that the state used a state's "average wage" as an indicator of the state's cost of living. As the state conceded, "there is no necessary correlation between wages and cost of living." *Id.* at 274. Thus, the possibility existed that a benefit recipient could move to a state with a lower average wage but a higher (or similar) cost of living. This worker would receive reduced benefits even though her cost of living increased or remained unchanged. Thus, in some cases, the adjustment provision would place a financial burden on the recipient's ability to travel out of state.

288. *Id.* at 273.

Just how high the court raised the bar on the state is not entirely clear. Consider the court's discussion of the state's purposes. The state offered two purposes for the adjustment provision: Reduce the costs of the workers' compensation system, and "align benefit levels to the economic environment of the recipient."[289] The court's treatment of these two interests suggests that the court was applying a level of scrutiny similar to the intermediate scrutiny (for gender cases) of the federal equal protection test. First, the court outright rejected saving costs as a permissible government purpose.[290] The court explained that any discrimination among benefit recipients could have this effect, and thus some other reason must justify the discrimination among recipients.[291] The United States Supreme Court made a similar argument in *Reed v. Reed*,[292] the case in which a state statute preferred men over women as administrators of decedent's estates.[293] In *Reed*, the state had argued that the law was justified because it saved the cost of a hearing to appoint an administrator when a man and a woman applied.[294] The *Reed* Court struck down the statute, holding that mere cost savings could not justify discrimination based on gender.[295] *Reed* stands in stark contrast to *Fritz*, where the Court upheld a federal law that awarded different benefits to different classes of railroad employees.[296] In *Fritz*, the government argued that its purpose was to save costs on employee benefits, and the Court upheld the law under rational basis review.[297] Unlike *Reed*, the *Fritz* Court had no reason to suspect that the government was biased or prejudiced against one class of railroad workers or another. When the suspicion was present in *Reed*, cost savings could not support the law; when suspicion was absent in *Fritz*, cost savings was a permissible objective.

Reed and *Fritz* suggest that *Brown* was applying a level of scrutiny akin to the federal intermediate scrutiny. If so, the state would need an *important* interest to uphold its law.[298] This suggestion is supported by the court's analysis of the state's second purpose — adjusting benefits to meet the recipient's economic situa-

289. *Id.* at 272.
290. *See id.*
291. *See id.*
292. 404 U.S. 71 (1971).
293. *See id.*
294. *See id.* at 76.
295. *See id.* at 76-77.
296. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).
297. *See id.* at 169-80.
298. *See supra* notes 123-24 and accompanying text.

tion.[299] The state requires such adjustments to encourage workers to rehabilitate themselves and get back to work.[300] The Alaska workers' compensation scheme primarily does this by setting the worker's benefit at only eighty percent of her prior average weekly wage.[301] The worker then has an incentive to get back to work to increase her wages.[302] That incentive, however, will be diminished if the worker can simply take her benefits and move to a state with a lower cost of living.[303] If the worker could do so, she could increase her *real wages* above her average weekly wage in Alaska.[304] To prevent such a windfall, the state requires an adjustment of benefits when a recipient moves out of state.[305]

The court agreed "that the State has *important* interests in avoiding disincentives to rehabilitation and in creating incentives for injured workers to go back to work."[306] The court's word choice is significant. The court describes the state's interest as "important," the same standard used by intermediate scrutiny under federal equal protection analysis.[307] The court explained that this important interest was enough to survive the heightened level of equal protection scrutiny triggered by the right to travel.[308]

Having identified an acceptable state interest, the court turned to the means-end analysis. Once again, the court did not identify the precise level of scrutiny it applied, except to say that the state faced a "very heavy" burden.[309] The court essentially held that the adjustment provision is both under- and over-inclusive to an extent that violates the state equal protection guarantee. Again, however, the court failed to specify what standard it applied or what factors it considered.[310] To gain insights into the court's method of analysis, we again need to examine how the court argued its points.

In analyzing the means-end fit of the Alaska statute, the court first examined the use of a state's average wage as a measure of the

299. *See* Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 272 (Alaska 1984).
300. *See id.*
301. *See id.* at 267 n.1.
302. *See id.* at 272.
303. *See id.*
304. *See id.*
305. *See id.*
306. *Id.* at 273 (emphasis added).
307. *Id.*
308. *See id.* at 273-74.
309. *Id.* at 273.
310. *See id.*

state's cost of living.[311] Not surprisingly, the court found that average wage is an imperfect measure of cost of living.[312] The court examined wage and cost of living statistics from the legislative history and discovered that a benefit recipient who moved from Alaska would receive an average benefit reduction that would be 142 percent of her average decrease in cost of living.[313] The state responded that the court's statistical argument was flawed for two reasons, and, for these two reasons, the legislature chose to use average wage as the statutory variable.[314] First, the state determined that "no reliable" cost of living statistics existed.[315] Second, the federal cost of living statistics that exist would "[n]o longer be available after 1982."[316] For these reasons, the state chose average wages as a proxy for cost of living.[317] The state knew that average wage was not a perfect proxy for cost of living, but concluded that it was the best available option.[318]

The court rejected the state's use of average wages.[319] The court rested its decision on two main points. First, because "there is no necessary correlation between wages and cost of living," the possibility exists that some benefit recipients who leave Alaska will suffer a benefit decrease larger than the decrease in cost of living.[320] This is merely to say that the law does not have a perfect means-end fit. Second, a benefit recipient who faces a decrease in benefits larger than their decrease in cost of living will suffer a "significant penalty."[321] That is, the law is over-inclusive because it burdens some individuals to a greater extent than necessary to achieve the government's purpose. In short, the court faulted the adjustment provision because it did not have a perfect means-end fit. That the court applied such a heightened fit requirement is suggested by the following passage: "Accepting for purposes of argument the inadequacy of all available cost of living statistics, this fact does not justify the substitution of a different statistical base and the measure of a different economic variable."[322] If the state

311. *See id.* at 274.
312. *See id.*
313. *See id.*
314. *See id.*
315. *Id.*
316. *Id.*
317. *See id.*
318. *See id.*
319. *See id.*
320. *Id.*
321. *Id.*
322. *Id.*

wants to key benefits to cost of living, it must do so directly, not through a proxy.

Again, comparison of the court's analysis to federal case law will prove instructive. Recall that in *United States v. Virginia*, the United States Supreme Court held that VMI could not exclude any woman willing and able to undergo the adversative method.[323] In so doing, the Court required a virtually perfect fit.[324] Similarly, *Brown* seems to hold that a worker's benefits may not be reduced unless the state can show an *actual* decrease in cost of living — some other statistic cannot serve as a proxy.[325] Again, a near perfect fit is required. But recall that in *United States v. Virginia* the Court had good reason to require such a tight fit: The law's fit with its purpose would confirm or dispel suspicion of gender bias.[326] In *Brown*, the means-end analysis is not used in this limited way, but rather allows the Alaska Supreme Court to decide for itself whether it agrees with the legislature's policy choice. In other words, Alaska's aggressive equal protection analysis applies regardless of whether the law raises special equality concerns. And, the means-end analysis does not perform the limited function of confirming or dispelling suspicion. Rather, the Alaska Supreme Court is left to evaluate the wisdom of the law (via a means-end fit) as an absolute veto.

Brown's casual rejection of the adjustment statute masks several unanalyzed policy decisions that underlie the holding. To analyze adequately the statute, the court should have considered the state's regulatory alternatives. For example, were there statistics other than average wage that could serve as a proxy, for cost of living? If so, were those statistics a better proxy and if so, by how much? How does one value the increase in the accuracy of the statistical proxy? If no other statistical proxy exists, how can the state adjust for cost of living? Would the state have to *collect its own data* on cost of living? How much would such a survey cost? Would the additional cost be justified by the purpose of fairly adjusting personnel benefits?

This dizzying list of questions — none of which *Brown* raised, much less considered — illustrates how little of a pure means-end analysis the Alaska Supreme Court engages in or is prepared to engage in. As with any means-end analysis, three general types of questions must be answered. First, what regulatory alternatives does the government have? This question requires some imagina-

323. *See* United States v. Virginia, 518 U.S. 515, 539-47 (1996).

324. *See id.*

325. *See Brown*, 687 P.2d at 274.

326. *See United States v. Virginia*, 518 U.S. at 532-33.

tion and some factual information. Imagination will help the decisionmaker consider conceivable alternatives, and factual information will help determine whether the alternative is feasible.

Second, what are the costs of the alternatives? These costs come in two general types — administrative and regulatory. Administrative costs are the additional costs over and above the normal operating costs the government incurs in implementing a given alternative. For example, if the state was forced to undertake a survey of the cost of living in each state, the expenses incurred in conducting the survey (hiring staff, cost of information gathering and analysis) would be administrative costs. Regulatory costs are the costs attendant to the achievement of the government's purpose. Regulatory costs are reduced to the extent that an alternative has a better fit; conversely, such costs are increased if the fit is worse. For example, consider *Beazer*, where the New York Transit Authority refused to hire methadone users.[327] An alternate policy would be to examine each methadone user to determine who is safe and who is unsafe. The cost of performing such examinations would be an administrative cost. In performing such examinations, some unsafe methadone workers undoubtedly would slip through the cracks, posing a danger to the public. The increased danger to the public is a regulatory cost. But, conversely, some safe methadone users will be hired, making the fit somewhat better. This is a decrease in regulatory cost. While one might be able to quantify administrative costs, regulatory costs are hard to identify and nearly impossible to quantify. Yet, they must be part of a means-end analysis.

As the third step in a means-end analysis, once the above "data" has been collected and analyzed, the decisionmaker must weigh and then balance the various costs and benefits. Less discrimination is clearly a benefit (in that it achieves a constitutional value), but it will come with administrative and regulatory costs. How does one weigh the benefits and the costs? They are incommensurable,[328] and no more than contested judgments can be reached on these points.[329] Yet, this is the terrain upon which the

327. *See supra* notes 31-33 and accompanying text.

328. *See generally* Symposium*: Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998) (discussing different theories concerning the incomparability of governmental opinions).

329. *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 1 (1996); JOHN RAWLS, POLITICAL LIBERALISM 54-58 (1993); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35 (1996); Richard H. Fallon, Jr., *The Supreme Court 1996 Term — Foreword: Implementing the*

Alaska Supreme Court has embarked in its equal protection analysis. *Brown*, as well as the cases discussed in the next section, show that the Alaska Supreme Court does not make a credible attempt at means-end analysis. As is explained below, the court's inability to apply pure means-end analysis should not be a surprise; courts are not well-suited to the task.

C. Alaska Means-End Analysis in Practice

One might try to limit *Brown* by explaining that the case dealt with what the Alaska Supreme Court called the important right to travel. Yet, *City of Valdez v. 18.99 Acres*,[330] decided several months after *Brown*, confirms that the court may give minimal deference to the state even under the lowest level of Alaska equal protection review. In *City of Valdez*, the court addressed whether different pre- and post-judgment interest rates for different types of condemnation proceedings violated Alaska's equal protection guarantee.[331] Generally, Alaska law awards pre- and post-judgment interest to a prevailing party at the rate of 10.5 percent per year.[332] This provision applied to some condemnation proceedings; any just compensation owed the property owner accrued interest at a rate of 10.5 percent until the state made payment on the judgment.[333] Such condemnation proceedings generally take the form of a civil lawsuit, with no payment to the landowner until after judgment.[334]

In a special type of condemnation action known as a "quick take" condemnation proceeding, Alaska law prior to *City of Valdez* prescribed a pre-and post-judgment interest rate of only six percent.[335] Quick take proceedings occur when the state or a locality makes a "declaration of taking" that gives the state immediate title and right to possession of the property.[336] The court described the difference between quick take proceedings and other condemnation actions as follows: "Under a declaration of taking [*i.e.*, quick take proceeding], title and right to possession pass to the state immediately upon filing and depositing an amount for just

Constitution, 111 HARV. L. REV. 56, 57-58 (1997); Frank I. Michelman, *The 1996-97 Brennan Center Symposium Lecture*, 86 CAL. L. REV. 399 (1998).

330. 686 P.2d 682 (Alaska 1984).

331. *See id.* at 691-92.

332. *See* ALASKA STAT. §§ 09.30.070, 09.55.330 (Michie 1996).

333. *See City of Valdez*, 686 P.2d at 691.

334. *See* State v. Alaska Continental Developmental Corp., 630 P.2d 977, 995 n.31 (Alaska 1980).

335. *See id.*

336. *Id.*

compensation, while under a complaint for condemnation this 'taking' does not occur until judgment is entered by the court."[337] At the time of the declaration, the state must deposit an amount for just compensation with the court, and the affected property owner has immediate access to the deposited funds.[338] The six percent pre- and post-judgment interest rate applies to any amounts awarded the property owner (as just compensation) *in excess* of the amount deposited with the court.[339] The question in *City of Valdez* was whether applying different interest rates to quick take and other condemnation proceedings violated equal protection.[340]

The court held that the interest rate differential failed even the most deferential level of equal protection analysis, rational basis review.[341] The court said that "[a] rational explanation for assessing a lower rate of interest against the state . . . in cases where it gains control and use of the property at an earlier time does not occur to us."[342] This was the extent of the court's analysis — the court's bald assertion that *it* could not come up with a reason for encouraging use of the quick take procedure over other procedures.[343] Yet, it does not take much legal imagination to hypothesize such a reason. For example, the quick take procedure results in an earlier transfer of property rights, thereby reducing uncertainty about those rights. Under other condemnation procedures, a substantial period of uncertainty could result. And, as many cases and commentators have stated, certainty as to property rights is an important goal of any legal system because it promotes further exchange and development of property and creation of wealth within society.[344] Thus, one reason to encourage use of the quick take procedure could be to promote certainty in property rights.

337. *Id.* (citing Arco Pipeline Co. v. 3.60 Acres, 539 P.2d 64, 70 (Alaska 1975)).

338. *See id.* at 996 n.31

339. *See id.*

340. *See City of Valdez*, 686 P.2d at 691-92.

341. *See id.* at 692 n.20 ("Awarding different interest rates to property owners on the basis of the type of condemnation action a government brings against them has no rational basis.").

342. *Id.* at 692 (quoting *Alaska Continental Developmental Corp.*, 630 P.2d at 995 n.31).

343. *See id.*

344. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1, 22 (5th ed. 1998):

> [L]egal protection of property rights creates incentives to exploit resources efficiently. . . . The proper incentives are created by parceling out mutually exclusive rights to the use of particular resources among the members of society. If every piece of land is owned by someone – if there is always someone who can exclude all others from access to any

Consider another possible rationale for a lower pre- and post-judgment interest rate for quick take condemnation proceedings. Recall that in a quick take proceeding the state must deposit an amount of just compensation with the court, and the landowner has *immediate use of those funds.*[345] Unlike other condemnation proceedings, the quick take proceeding advances money to the landowner quickly, allowing the landowner to use the money as she pleases, including private investment for yields higher than either of the statutory rates. In other condemnation proceedings, however, the landowner is forced to make *one* use of her money during the pendency of the proceeding — accrue 10.5 percent interest. Thus, the legislature reasonably could have concluded that a lower interest rate on quick take proceedings would encourage the state to use those proceedings, thereby getting the landowner quicker access to the just compensation.

So, what does *City of Valdez* tell us about Alaska equal protection? Depending on how one chooses to read the case, one could take a cynical view or a more doctrinal view. From the cynical perspective, one could argue that the court simply struck down the law because it did not think it wise as a matter of policy. While the court never says this, it would be consistent with the analysis of *Brown* offered above.[346] Recall that federal equal protection, analysis is guided by a central concern — is the government acting out of bare dislike of the burdened group? *Brown* showed that Alaska equal protection has no such guiding principle. Rather, the Alaska Supreme Court engages in a full blown policy analysis of the state's purpose and the means used to achieve the purpose — including the relative cost of alternative regulatory schemes — and offers its own assessment of the legislature's choices. The analysis does not have so much to do with equality as with good public policy. Under this view, *City of Valdez* is a foreseeable consequence of *Brown* — an unexplained policy judgment by the supreme court that the legislature has not acted wisely.

From a doctrinal perspective, one could argue that the court did not exercise its legal imagination in support of the challenged law. Instead, the court relied on the fact that the state had not offered a reason for its law. But, this flies in the face of reality. The legislature must have had *some reason* for putting the six percent

given area – then individuals will endeavor by cultivation or other improvements to maximize the value of land. Of course, land is just an example. The principle applies to all valuable resources.

Id.

345. *Alaska Continental Developmental Corp.*, 630 P.2d at 995 n.31.

346. *See supra* notes 263-329 and accompanying text.

interest rate on quick take provisions.[347] Perhaps it was inadvertence that caused the rate change. Or, perhaps the state wanted to reduce the amount it paid in interest. Or, perhaps an interest group was able to influence the outcome of the legislative process.[348] Any of these would be reasons, but they might not be legitimate reasons. For the court to say that the statute exists without reasons behind its provisions is mistaken.

Turner Construction Co., Inc. v. Scales[349] suggests that the cynical perspective is correct because the court, as it did in *Brown*, engaged in pure means-end scrutiny of the legislature's *asserted* purposes. *Scales* involved an equal protection challenge to the six-year statute of repose[350] for negligence in the design and construction of structures on real property.[351] The six-year period began running upon substantial completion of the construction project, regardless of when the injury occurred.[352] Thus, the six-year period

347. *See* STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 82-85 (2d ed. 1995); Linde, *supra* note 23 at 212 ("It is a realistic postulate that laws do not get enacted for no reason at all, not in the American legislative process, but they may be and often are enacted for improper reasons.").

348. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-37 (1991); POSNER, *supra* note 344, § 19.3, at 524-28.

349. 752 P.2d 467 (Alaska 1988).

350. The court defined the difference between a statute of limitations and a statute of repose as follows:

> A statute of repose differs from a statute of limitation in that the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury. A cause of action thus precluded is . . . a loss without a remedy.
>
> In contrast, a statute of limitation begins to run when the plaintiff's cause of action accrues or is discovered. It operates to prevent a plaintiff from sleeping on his or her rights.

Id. at 469 n.2. The basic purpose of both types of statute is to provide some certainty to potential defendants regarding potential liability. In each case, the uncertainty comes from a different source. For the statute of repose, the nature of the undertaking may be such that some claims (though rare) will not accrue until a much later date. For the statute of limitations, while the action has accrued, the injured individual may be the cause of delay and thus uncertainty. Whatever the cause, each statute serves as a device to promote certainty and planning.

351. *See id.* at 469.

352. *See id.* (discussing the now-repealed version of ALASKA STAT. § 09.10.055(b) (enacted in 1967)). The statute also allowed an action if the plaintiff was injured in the sixth year after substantial completion and brought suit within two years of the injury. Thus, for some plaintiffs, the outside time period was eight years after the date of substantial completion of the construction project. *See id.*

could lapse *before* any injury has been discovered.[353] In such cases, a lawsuit is barred before it even accrues. The Alaska legislature adopted this rule to encourage construction in the state by putting some time limit on liability for design and construction.[354]

Scales was a lawsuit in which two plaintiffs' claims were barred by the six-year statute of repose.[355] The two plaintiffs argued that the statute of repose unconstitutionally discriminated between, on the one hand, design professionals (*i.e.*, architects, contractors, and engineers) who received the benefit of the statute and, on the other hand, all others involved in a construction project (*i.e.*, owners, materialmen, and tenants) who are not included in the statute.[356] Since the court found that neither a suspect class nor an important or fundamental right was involved, it concluded that the lowest level of Alaska equal protection scrutiny applied. Therefore the court examined whether the six-year statute of repose had a fair and substantial relation to a legitimate government purpose?[357] Once again, the court's analysis amounted to question begging.

The court easily identified a legitimate government purpose: "[T]o encourage construction and avoid stale claims by shielding certain defendants from potential future liability."[358] Once again, however, the court held that the state's means was not sufficiently tailored to its purpose.[359] The defendants offered several justifications for the state's choice to distinguish between design professionals and others involved in a construction project, each of which had been made in support of similar laws in other states and had been credited by the courts in those states.[360] Nonetheless, the

353. *See id.* at 470.

354. *See id.* at 471.

355. *See id* at 469.

356. *See id.* at 471.

357. *See id.* at 470-71.

358. *Id.* at 471.

359. *See id.* at 472.

360. For example, the government argued that those in ownership or possession rationally were treated differently from design professionals because they "have continuing control over access to and maintenance of the property" and because of "the different treatment of owners and tenants at common law, such as the larger class of potential plaintiffs which may sue design professionals, the legal theories available to those plaintiffs, and the common law defenses available only to landlords and tenants." *Id.* at 471 (citing Klein v. Catalano, 437 N.E.2d 514, 522-25 (Mass. 1982); Freezer Storage, Inc. v. Armstrong Cork Co., 382 A.2d 715, 718-20 (Pa. 1978)). The justification for excluding materialmen was that "because materialmen provide standard goods manufactured by standard processes, they may be held to higher quality control standards than the design professionals,

Alaska Supreme Court concluded: "We are not persuaded by any of these diverse rationales."[361] As in prior equal protection cases, the court never explained the basis for this conclusory policy judgment. But, careful parsing of what the court *did* say may offer some clues.

The court *never* offered any factual or logical argument to dispute the state's reasons for the statute of repose. Instead, the court's sole argument against the law was that the statute of repose *might* discourage some construction.[362] Upon analysis, however, we see that the court offers no facts in support of this argument, and the logic of the argument is flawed. The court focused on the combined effect of joint and several liability with the six-year statute of repose.[363] The court correctly noted that there may be some cases where the negligence of a design professional and the negligence of an owner (or some other non-design professional) might jointly cause an injury.[364] In such cases, the Alaska rules on joint and several liability would make each of the joint tortfeasors liable for the whole injury, and the rule on contribution among joint tortfeasors would allow either tortfeasor to obtain a proportional contribution from the other.[365] If the statute of repose makes one of the joint tortfeasors (the design professional) immune from liability, however, the remaining joint tortfeasor (the non-design professional) must bear one hundred percent of the liability.[366] Thus, the six-year statute of repose will increase the potential liability of non-design professionals by effectively eliminating the right of contribution from design professionals after the six-year period has run.[367]

While the court correctly identified a possible increase in liability of non-design professionals, the court drew the wrong conclusion from that fact. The court argued: "[T]he shift of liability to [non-design professionals] decreases their incentive to build *in corresponding measure* to the increased incentives of protected par-

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whose work is often unique and cannot be completely tested." *Id.* (citing *Klein*, 437 N.E.2d at 524; *Freezer Storage*, 382 A.2d at 719). Furthermore the state argued that "design professionals have special expertise; they should be encouraged to experiment and their creativity should not be stifled." *Id.* (citing *Klein*, 437 N.E.2d at 524; O'Brien v. Hazelet & Erdal, 299 N.W.2d 336, 342 (Mich. 1980)).

361. *Scales*, 752 P.2d at 471.

362. *See id.* at 472.

363. *See id.* at 471-72.

364. *See id.* at 471.

365. *See id.*

366. *See id.*

367. *See id.* at 471-72.

ties."[368] But, for this to be true, all (or virtually all) lawsuits against design professionals also must include non-design professionals as joint tortfeasors. Otherwise, there will be cases (perhaps significant in number) where the statute of repose can protect design professionals from liability *without* a threat of harm to non-design professionals. Yet, the court offers no reason to believe that this latter class of cases is small. The court cites no facts and offers no legal argument that liability of a design professional will necessarily entail liability of non-design professionals. Indeed, it may be that the statute of repose was enacted to protect design professionals *from* liability to owners and tenants of property. For example, the plaintiffs in *Scales* were a tenant in an apartment complex and a homeowner.[369] The court never takes account of such suits where non-design professionals such as tenants and owners are the plaintiffs (and thus face no threat of liability).

Scales is yet another example of the Alaska Supreme Court dismissing the government's proffered rationales in favor of its own.[370] The court offered no evidence to contradict the government's rationale or to support its own reasoning. Also, the court did not attack the logic of the government's rationale regarding the unique position of design professionals. Rather, the court merely offered a fatally flawed argument about the economic incentives created by the six-year statute of repose and the rules on joint and several liability.[371] Given the lack of factual evidence and the highly contestable legal arguments, we are left with a single basis for the result: As a matter of policy, the court did not believe that design professionals should be treated better than others in the

368. *Id.* at 472.

369. *See id.* at 469.

370. The court has done so in several subsequent equal protection cases. *See, e.g.*, Gilmore v. Alaska Workers' Compensation Bd., 882 P.2d 922, 927-29 (Alaska 1994) (holding that wage base on which an injured worker's disability benefits are calculated is not sufficiently related to the "legitimate purposes" of the statute to survive equal protection scrutiny); Principal Mut. Life Ins. Co. v. State, 780 P.2d 1023, 1026-28 (Alaska 1989) (invalidating statute imposing higher tax on out-of-state insurance companies than in-state insurance companies on the grounds that the differential rates did not advance the arguably legitimate purposes suggested by the state); Patrick v. Lynden Transp., Inc., 765 P.2d 1375, 1379-80 (Alaska 1988) (holding that requirement that nonresident plaintiff post a bond covering anticipated costs and fees that may be awarded against them is not "sufficiently well-tailored" to the legitimate goal of providing security). The court's equal protection analysis in each case is similar to the method used in *Brown*, *City of Valdez*, and *Scales*. In each case, the court questioned the means the state used to achieve its end, concluding that the statute at issue was not a good way to do so.

371. *See Scales*, 752 P.2d at 471-72.

construction process. Perhaps this policy judgment rested on the court's perception of the relative political power of design professionals as opposed to other groups.[372] Or, perhaps the court did not think that the six-year statute of repose was the fairest resolution of the problem addressed by the statute. Whatever the reason, the court acted as an extension of the legislature, registering its vote based on an off-hand judgment of how well the law balanced the many complex factors involved.

The unprincipled nature of *Scales* is further illustrated by the court's seemingly contradictory decision in a later case, *McConkey v. Hart*.[373] *McConkey* was a medical malpractice action in which the court addressed the date from which pre-judgment interest accrues.[374] Under Alaska law, pre-judgment interest in cases involving personal injury, death, and damage to property, accrues from the earlier of the date of service or the date that the defendant received written notice of the plaintiff's claim, whereas in other tort cases, such as legal and accountant malpractice cases, pre-judgment interest accrues from the date of injury.[375] Thus, some professionals (*i.e.*, lawyers and accountants) faced an earlier accrual date (date of injury) than other professionals (*i.e.*, doctors and architects).[376] The question was whether the different accrual dates for different professional malpractice cases violated equal protection.[377]

The court began its constitutional analysis by quoting the legislative findings in support of the pre-judgment interest statute:

> The legislature . . . finds . . . cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care.

372. This point could be gleaned from the court's inclusion of the following statement in its description of the statute: "[Alaska Statutes section] 09.10.055 is one of many state statutes enacted as a result of a concerted national lobbying effort by design professionals sparked by an increase in their potential liability for design and construction defects." *Id.* at 470 n.6 (citing Collins, *Limitation of Action Statutes for Architects and Builders — An Examination of Constitutionality*, 29 FED'N INS. COUNS. Q. 41, 44-45 (1978)).

373. 930 P.2d 402 (Alaska 1996).

374. *See id.*

375. *See id.* at 407. This was not the only reading of the statute; the court noted that the statute could be read not to make such a distinction. *See id.* The court, however, accepted the parties' stipulation as to the meaning of the statute and decided the constitutional issue on that basis. *See id.*

376. *See id.*

377. *See id.* at 407-08.

> Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public. . . .
>
> It is the intent of the legislature to reduce costs associated with the tort system, while ensuring that adequate and appropriate compensation for persons injured through the fault of others is available.[378]

The legislature's purpose was to reduce the cost of litigation thereby hopefully reducing the burden of professional malpractice insurance.[379] Note how the legislature speaks of "*professional* liability insurance," not limiting its purpose to any subset of professionals.[380] Also, doctors, architects, and engineers are set forth as examples of professionals ("such as"), not as an exhaustive list.[381] Given this material, there seems to be no good reason to distinguish between, on the one hand, doctors and architects and, on the other hand, lawyers and accountants.

Once again, the court's equal protection analysis left much to be desired. The court's entire analysis consisted of the following passage:

> The Senate findings directly address the rising costs of medical malpractice insurance and the disincentives those costs create for health care providers. In this medical malpractice case, then, the argument that there is no rational basis for the statute is unconvincing. Reducing health care costs and encouraging the provision of health care services are legitimate goals which can reasonably be thought to be furthered by lowering the amount of medical malpractice judgments. There is thus no merit to Hart's constitutional argument, even assuming her interpretation of the statute is correct.[382]

This analysis is a good counterpoint to *Scales* for two reasons. First, note how the court is now willing to *accept* the legislature's empirical judgment.[383] In *Scales*, the court — without any supporting data — disputed the legislature's empirical conclusion that the statute of repose would promote construction.[384] In *McConkey*, however, the court defers to the legislature's empirical judgment that a reduction in pre-judgment interest will "[r]educ[e] health

378. *Id.* at 408 (quoting Senate Findings and Purpose, C.C.S. S.B. 377, 14th Leg., 2d Sess. (1986)).

379. *See id.*

380. Senate Findings and Purpose, C.C.S. S.B. 377, 14th Leg., 2d Sess. (1986) (emphasis added).

381. *Id.*

382. *McConkey*, 930 P.2d at 408.

383. *See id.*

384. *See* Turner Constr. Co. v. Scales, 752 P.2d 467, 471-72 (Alaska 1988).

care costs and encourag[e] the provision of health care services."[385] Neither case offers a principled reason why deference to the legislature's empirical judgment was owed in one case but not the other. Once again, we see the court acting in the *ad hoc* manner of a legislator, agreeing with some policy judgments but not with others.

Second, the court does not even pretend to be doing an *equality* analysis. The court concludes that it is rational to think that reducing the cost of medical malpractice claims will reduce the cost of health care, *but that was not the equal protection issue!* The equal protection issue was whether the distinction between doctors and other professionals is rationally related to the state's purpose. Once again, the difference between *Scales* and *McConkey* is stark. In *Scales*, the legislature offered reasons why it distinguished between design professionals and non-design professionals.[386] In *McConkey*, however, the legislature offered no reason to distinguish between doctors and other professionals. Yet, the Alaska Supreme Court upheld the unexplained discrimination in *McConkey* and struck down the explained discrimination in *Scales*. Again, the court's opinions offer no principled reason for the different analysis in each case. We have no way of knowing when and why the Alaska Supreme Court will defer to the state legislature or aggressively question the legislature's policy judgments.

The court's equal protection cases have continued on an unpredictable course to the present, with the court deferring to the legislature in some cases and rejecting the legislature's policy judgments in others. For example, the court has struck down statutes that imposed different taxes on in-state and out-of-state insurers,[387] required a non-resident plaintiff to post a bond covering a potential award of costs and attorney fees,[388] established a hiring preference for workers in economically distressed zones,[389] and set the wage base for calculation of employee disability benefits.[390] In each of these cases, just as it did in *Scales*, the court rejected the government's argument that a particular public policy justified the differential treatment.[391] Yet, in other cases, the court upheld stat-

385. *McConkey*, 930 P.2d at 408.

386. *See Scales*, 752 P.2d at 471.

387. *See* Principal Mut. Life Ins. Co. v. State, 780 P.2d 1023 (Alaska 1989).

388. *See* Patrick v. Lynden Transp., Inc., 765 P.2d 1375 (Alaska 1988).

389. *See* State v. Enserch Alaska Constr., Inc., 787 P.2d 624 (Alaska 1989).

390. *See* Gilmore v. Alaska Workers' Compensation Bd., 882 P.2d 922 (Alaska 1994).

391. *See Gilmore*, 882 P.2d at 922; *Enserch*, 787 P.2d at 624; *Principal Mutual*, 780 P.2d at 1023; *Patrick*, 765 P.2d at 1375;

utes that preferred residential over recreational users for purchase of state land,[392] allowed unemployment compensation for a person pursuing vocational training but not a person attending law school,[393] and provided different workers' compensation benefits for employees who lived near their workplace and employees who worked at a remote site.[394] In each of these cases, just as it did in *McConkey*, the court merely accepted the government's argument that a particular public policy justified the differential treatment.[395] And, as with *Scales* and *McConkey*, the court never explained why it engaged in aggressive policy review of some statutes but not others. In short, the pure means-end analysis of Alaska equal protection cases has not yielded a consistent, principled method for deciding cases.

D. Implications of Alaska's Means-End Analysis

The preceding sections have reviewed the Alaska Supreme Court's application of its sliding scale equal protection test, and the outcome is not encouraging. The court appears to use a pure means-end analysis that is unguided by any constitutional principle related to equality (or any other constitutional value). Further, the means-end analyses are incomplete, conclusory, or contradictory. In sum, the court has not developed a principled approach to means-end analysis, and instead registered its agreement or disagreement with particular statutes. This section explains why we should find these observations troubling.

Institutional concerns suggest that the Alaska Supreme Court should give up its pure means-end analysis. While state courts engage in similar analysis in the common law,[396] the pure means-end analysis done in Alaska equal protection is different for two important reasons. First, it does not play to a court's strength. Admittedly, common law decisionmaking can entail a form of means-

392. *See* Reichmann v. State, 917 P.2d 1197 (Alaska 1996).

393. *See* Sonneman v. Knight, 790 P.2d 702 (Alaska 1990).

394. *See* Meek v. Unocal Corp., 914 P.2d 1276 (Alaska 1996).

395. *See Reichmann*, 917 P.2d at 1197; *Meek*, 914 P.2d at 1276; *Sonneman*, 790 P.2d at 702.

396. *See generally* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988). For example, the Alaska Supreme Court decides issues such as whether Alaska should adopt strict products liability, *see* Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969), and, within products liability, whether a consumer should be allowed to recover damages solely to the product itself, *see* Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173 (Alaska 1993).

end analysis.[397] Common law courts are, at least in part, concerned with whether their decisions serve the purposes that underlie legal doctrines.[398] And, these means-end decisions will necessarily require both normative and empirical judgments.[399] On the normative side, courts must often value and reconcile competing principles and values in the law. For example, they must decide whether it is more important to achieve deterrence or loss spreading in a particular context, and to what extent. On the empirical side, courts must often decide what effect their decisions will have in the real world.[400] For example, will a particular rule of liability *actually deter* future misconduct?[401]

When it comes to empirical questions, courts are not well situated.[402] Courts generally do not have the resources or the authority to commission studies on a particular subject (*e.g.*, deterrence in tort law) before making a decision.[403] And, common law decisionmaking occurs in a way that minimizes this problem. Common law courts supposedly make law accretionally, with each case a small step forward.[404] Any reasoning not necessary to the court's decision is *dicta* that does not bind the court. In this way, courts have the benefit of the experience brought to bear by each new case. Each case that arises can tell the courts something addi-

397. *See* BURTON, *supra* note 347, at 97-115 (explaining how legal rules are interpreted and applied to further the law's purposes); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-99 (6th ed. 1928) ("Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function, they are diseased. If they are diseased, they must not propagate their kind. Sometimes they are cut out and extirpated altogether. Sometimes they are left with the shadow of continued life, but sterilized, truncated, impotent for harm."); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 107 (1990) ("[M]eans-end rationality is closer to the center of the legal enterprise than logic, a term much bandied about by the profession.")

398. *See* BURTON, *supra* note 347, at 97-115; POSNER, *supra* note 397, at 105 ("The choice between alternative legal rules often depends on deciding which makes a closer fit with some underlying goal.").

399. *See* EISENBERG, *supra* note 396, at 14-42; Linde, *supra* note 23, at 222-23.

400. *See* EISENBERG, *supra* note 396, at 37-42; POSNER, *supra* note 397, at 251-52.

401. *See* POSNER, *supra* note 397, at 253-54 (discussing the empirical assumptions that underlie the fellow-servant rule).

402. *See* Monaghan, *supra* note 43, at 28-29; Pilchen, *supra* note 43.

403. *See* Monaghan, *supra* note 43, at 28.

404. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5 (1982) (describing "[t]he slow, unsystematic, and organic quality of common law change").

tional about what has gone before, and the courts can then decide what will come after.[405] Individual cases provide "the context of a concrete, detailed situation that may serve to clarify both the facts and the equities relevant to decision."[406] By deciding only the case before it, the court takes on a task for which it has better empirical information.

The accretional, incremental common law method of making law case by case based on experience stands in contrast to the legislative method of making law for a broadly defined class of cases.[407] But, Alaska equal protection asks Alaska courts to perform the latter function. In the cases discussed throughout Part III, the Alaska Supreme Court was not asking whether the statute was unconstitutional as applied to the party before it. Rather, the court spoke broadly, declaring a statute's constitutionality *across all cases*. In doing so, the court had before it the experience of one case — a sufficient basis for incremental common law, but hardly sufficient for the kind of legislative pronouncement the court has repeatedly undertaken.

The second reason Alaska equal protection is different from common law decisions has to do with the role of courts in constitutional cases. In a common law case, the court generally acts in the absence of lawmaking by the legislature.[408] The court is asked to

405. *See id.*

406. Antonin Scalia, *Back to Basics: Making Law without Making Rules*, REG. 25, July/Aug. 1981, at 26.

407. I do not mean to suggest that common law decisions have no effect outside the decided case. Precisely the contrary is true, given our commitment to some form of precedent. But the scope of the court's decisionmaking generally will be much narrower than that of the legislature. *See* Frank P. Grad, *The Ascendancy of Legislation: Legal Problem Solving in Our Time*, 9 DALHOUSIE L.J. 228, 233-34 (1985) ("The decision of a case may have significant and direct impact on the law, but it is not likely to have any such direct impact on the social order."). While the legislature may address a large chunk of contract law in a single statute (*e.g.*, Article 2 of the Uniform Commercial Code on sales of goods), courts are usually confined to the issue raised by a case and will resolve it *on the facts of that case*. *See* CALABRESI, *supra* note 404, at 4 ("The incremental nature of common law adjudication meant that no single judge could ultimately change the law, and a series of judges could only do so over time and in response to changed events or to changed attitudes in the people."); GRAD, *supra*, at 233 ("No judicial decision on a work place injury can have as far-reaching effects as the legislative establishment of a workers' compensation system.") How that decision applies to new, different facts will be the question on the table *in the next case*.

408. There are exceptions to this general characterization. For example, the Supreme Court has held that the federal antitrust laws effectively enact the common law of antitrust, and that the Court is empowered to evolve that doctrine.

determine the rule for decision given all of the legally relevant sources and experiences. In constitutional cases, however, the court has a statute duly enacted by the legislature.[409] For a court to disturb a legislature's decision, it should have some articulable basis in the constitution of the applicable jurisdiction.[410] In the federal equal protection cases discussed in Part II, we saw that the Court relied on the principle that laws must not be enacted out of bias or prejudice. Alaska equal protection has no such guiding principle. Instead, Alaska courts register their vote on a statute's means-end rationality, without deference to the legislature.

In sum, when making common law, judges are to make law *as judges do*.[411] Legislators can fail to consider all the arguments involved, use faulty reasoning, fail to muster the relevant facts, or merely follow the wishes of interest groups if they want to.[412] If they do so, legislators will be called to account in contested elections. Courts, however, are not supposed to function in that way. The court's sole claim to legitimacy is its ability to persuade through logic and legal argument. When these tools fail, judges

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See Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 732 (1988) (Congress "adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.") Also, some states have statutory provisions that allow their courts to treat part of the statutory law as common law that can be evolved. *See* CALABRESI, *supra* note 404, at 83-85.

409. Of course, this statement will not be accurate where the constitutional challenge is to the procedure of enactment of the law. *See, e.g.*, Raines v. Byrd, 117 S. Ct. 2312 (1997) (dismissing for lack of standing for a legal challenge to President's potential use of line-item veto).

410. *See* Gardner, *supra* note 10, at 814-16; Linde, *supra* note 23, at 206 ("[G]overnment must be shown to have failed in some respect to comply with the Constitution before a court can invalidate a law.").

411. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (noting that while "judges in a real sense 'make law,'" they do so "*as judges make it*, which is to say *as though* they were 'finding' it — discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be") (Scalia, J., concurring).

412. *See* Pilchen, *supra* note 43, at 363 ("Although legislators normally can vote for or against legislation merely upon their hunches, ideally they should study the facts underpinning their work."). A group of scholars has argued that the legislative process is best described as facilitating "unprincipled 'deals' among self-interested private actors." CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 6 (1990) (describing and criticizing this view of the legislative process); *see* POSNER, *supra* note 344, §§ 19.3-19.7, at 496-507; Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984). For a criticism of this view, *see* FARBER & FRICKEY, *supra* note 348.

are left with little more to justify their holdings than their personal political beliefs. While it would be naive to think that such beliefs play no role in judicial decisionmaking, it would be despairing to reduce the entire judicial process to that factor.

IV. CONCLUSION: A PROPOSAL FOR FUTURE STUDY

The preceding two parts have developed my main thesis: Unlike federal equal protection analysis, which is geared to answering a single question (has the government acted out of bias or prejudice), Alaska's state equal protection analysis does not have a doctrinal focus, leaving the Alaska Supreme Court free to register its independent opinion on the legislature's policy choices through a pure means-end analysis. Part III developed this point in reviewing Alaska Supreme Court low level scrutiny cases. Given the work in Parts II and III, this final Part offers suggestions for future study in state constitutional law. The suggestions focus on a possible explanation for the Alaska Supreme Court's willingness to engage in policy judgments under the guise of equal protection analysis.

Alaska equal protection doctrine does not have a guiding principle as does federal equal protection. Recall that the various parts of the federal equal protection doctrine — suspicion, ends, and means — all serve a single mission: To determine whether the government has acted out of prejudice or bias. When no guiding principle exists, the court is left with a pure means-end analysis, as we saw in the cases discussed at the end of Part III. As discussed earlier,[413] pure means-end analysis entails a complex balancing of facts and normative values to decide the "best" resolution of a policy question. For example, the decisionmaker must determine what policy alternatives exist, as well as the over- and under-inclusiveness of each alternative. Also, the decisionmaker must assess the relative costs of over- and under-inclusiveness. And, once the costs are identified, the decisionmaker must value the different normative goals that underlie the policy. Not only are these decisions largely unguided, but the outcomes will vary given the ideological orientation and experience of the decisionmaker.

As mentioned earlier, judges are not good candidates for pure means-end analysis. In terms of facts, judges generally are limited to the dispute before them and do not have the resources or expertise for independent fact gathering and analysis. In terms of normative judgments, most judges are unelected and thus the public

413. *See supra* notes 253-61 and accompanying text.

has little or no opportunity to register approval or disapproval of their choices.

So, why would the Alaska Supreme Court embrace pure means-end analysis as part of Alaska equal protection? Perhaps the court has merely defaulted into a familiar method of analysis. While not as unbounded as pure means-end analysis, state supreme courts engage in a similar type of analysis when making common law decisions and interpreting statutes.[414] In common law decisions, state high courts necessarily consider complex empirical and normative questions.[415] For example, when the Alaska Supreme Court recognized the doctrine of strict product liability it considered the empirical question of deterrence and the normative question of whether it is proper to hold a party liable without fault.[416] Or, in interpreting the state's statute of limitations, the court has considered the purposes that underlie those statutes and tried to determine which interpretation best served those purposes.[417] In each case, the supreme court undertook a form of means-end analysis.

If state high courts regularly engage in means-end analysis in common law and statutory cases, why should we care whether the courts also do so in constitutional cases? This last question raises specifically the general question I propose for further study: Is state constitutional law different from state common or statutory law and, if so, how? In the last section of Part III, I offered a preliminary argument that constitutional and common law argument are different. In suggesting this focus, this article proposes a direction for future study of state constitutional law similar to that of Professor James Gardner. In a recent article, Professor Gardner criticized state constitutional law for its inattention to method.[418] This Article confirms Professor Gardner's fears in the area of Alaska equal protection doctrine. Instead of developing a method of constitutional analysis — using constitutional text, history, structure, and precedent to interpret the state's unique constitution — the Alaska Supreme Court defaults to the familiar method of the common law. If state constitutional law amounts to nothing more than common law or statutory method, Professor Gardner is right — state constitutional law is an impoverished, failed discourse.[419]

414. *See supra* notes 397-406 and accompanying text.

415. *See id.*

416. *See* Clary v. Fifth Ave. Chrysler Ctr., Inc., 455 P.2d 244, 247-48 (Alaska 1969).

417. *See* Lee Houston & Assocs. v. Racine, 806 P.2d 848, 855 (Alaska 1991).

418. *See* Gardner, *supra* note 10.

419. *See id.* at 836-37.

In the future, study of state constitutional law should not stop simply at identifying the superficial test that state courts apply under different constitutional provisions; appearances can be deceiving. For example, on the surface, the Alaska Supreme Court seems to be doing something unique in equal protection; closer analysis proves otherwise. Future studies instead should scrutinize the tests *in action*, *as applied*, to unearth the courts' true method.[420] Only then can we decide whether state constitutional law offers a rich new discourse on government.

420. Professor David Schuman's response to Professor Gardner begins such a study of Oregon state constitutional law. *See* David Schuman, Correspondence, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992). Professor Schuman's article argues that Oregon's state equal protection analysis is grounded in a considered view of the role of *equality* in the state's constitutional system. *See id.* at 274-76. Professor Schuman, however, concedes that "Gardner is surely correct in his conclusion that state constitutional discourse in most jurisdictions . . . is impoverished." *Id.* at 276.

Professor Gardner also has joined the project, publishing a case study of constitutional arguments that appeal to the "unique" character of a state or a region. *See* Gardner, *supra* note 12.