The Burger Court Opinion Writing Database

Massachusetts Board of Retirement v. Murgia

427 U.S. 307 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 30, 1976

Re: 74-1044 - Massachusetts Board v. Murgia

Dear Bill:

I have reviewed the commentaries on your proposed draft in this case and I think we now need to "count heads."

In general, you can add "my head" to the position of Chief Justice Warren, as expressed in McGowan v. Maryland. I share the view that shrinks from any return to the substantive due process approach, which puts me near Bill Rehnquist but not entirely with him.

If you think this indicates a reassignment, as you intimated to me on the Bench, I will proceed. Perhaps at Conference this week we can clarify.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 24, 1976

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

Dear Lewis:

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

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1976

Re: 74-1044 - Massachusetts Board of Retirement v. Murgia

Dear Lewis:

I remain of the view that McGowan v. Maryland is the sound test. I agree with Byron's memo of June 9 that federal judges are much confused and we owe an obligation to clarify, not rewrite, the ground rules. A McGowan reaffirmance will do that.

Regards,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1976

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

Dear Lewis:

I join your per curiam of June 15.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia.

On Appeal from the United States District Court for the District of Massachusetts.

[February —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3)(a), that a uniformed State Police Officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

[1] Uniformed State Police Officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A, which provides:

"§ 9A. Division of state police; additional appointments; rules and regulations; removals; training; expenditures

"Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualifica-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 9, 1976

RE: No. 74-1044 Massachusetts Board, etc. v. Murgia

Dear Bill:

Your comments on my proposed Murgia opinion, and Potter's concurring opinion in the case suggest, I think, that in the absence of a "suspect classification" or involvement of a "fundamental right", the applicable test is necessarily one of "minimum scrutiny" as defined in Williamson v. Lee Optical and McGowan v. Maryland: "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." In my view, our opinions have developed a more flexible rule, and Murgia reflects, I suggest, not a rewriting of the law, but the more flexible test that has evolved.

Absent the need for strict scrutiny, have we not employed tests in a variety of cases, making it clear that minimum scrutiny in the Lee Optical definition is not always the result when suspect classes and fundamental rights are absent? See Schlesinger v. Ballard, 419 U.S. 498; Jiminez v. Weinberger, 417 U.S. 628; Johnson v. Robison, 415 U.S. 361; James v. Strange, 407 U.S. 128; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164; Eisenstadt v. Baird, 405 U.S. 438; Reed v. Reed, 404 U.S. 71. The proposed Murgia opinion summarizes the flexible test of these and all our cases where strict scrutiny has not been applied, for it leaves the determination of the requisite relationship between means and end to the nature of each case presented. In view of the political clout of the aged, only a rational relation between the classification and the State's purpose was required to sustain the classification in Murgia. The test as applied to the age 50 classification, therefore, doesn't differ from that employed in other cases of minimum scrutiny.

I do not think the Murgia opinion opts for a standard of review which will give the courts more leeway in striking down state legislation than we have already given them. After all, Murgia sustains

a classification based on a criterion (age) in many respects quite akin to sex. If Murgia is not a fair treatment of our equal protection analysis as our cases have evolved it, we are left with only the rigid two-tier approach which I had thought all of us found unacceptable. If only either mere rationality or strict scrutiny are the available tests, then we will have to acknowledge we can no longer defend the results of Jiminez, James, Weber, Eisenstadt and Reed. Also, since the doctrine of irrebuttable presumptions seems to have been permanently interred, we should, as well, be prepared to confess we were wrong in the results we reached in Cleveland Board of Education v. LaFleur, 414 U.S. 632; USDA v. Murry, 413 U.S. 508; Vlandis v. Kline, 412 U.S. 441; Stanley v. Illinois, 405 U.S. 635.

The following cases, I think, support my conviction that not only is Murgia no departure from prior law, but that the "line-up" in each of them is cogent evidence that eight of us (John was not involved in any way) have been party to opinions expressing that general view. Potter objects to describing the inquiry as "whether the classification is reasonably related to a legitimate state objective,"and you express concern with describing the inquiry as whether the classification is "reasonable, not arbitrary and . . . rests upon some ground of difference having a fair and substantial relation to the object of the legislation." Yet "fair and substantial" relation between classification and purpose is the test stated in the following cases: Stanton v. Stanton, 421 U.S. 7, 14 (HAB, WEB, WOD, WJB, PS, BRW, TM, LFP); Johnson v. Robison, 415 U.S. 361, 374 (WJB, unanimous); Kahn v. Shevin, 416 U.S. 351, 355 (WOD, WEB, PS, HAB, LFP, WHR); Eisenstadt v. Baird, 405 U.S. 438, 447 (WJB, WOD, PS, TM); Reed v. Reed, 404 U.S. 71, 76 (WEB, WOD, WJB, PS, BRW, TM, HAB, LFP,WHR); Royster Guano Co. v. Virginia, 253 U.S. 412, 415. Similarly, Weber v. Aetna Casualty & Surety Co., supra (LFP, WEB, WOD, WJB, PS, BRW, TM), stated that, at a minimum, equal protection requires a rational relationship to a legitimate state purpose, and recognized a range of inquiry between that minimum and strict scrutiny by further observing that a "stricter scrutiny" was required when sensitive rights were approached. Additionally, Weber held that the classification involved bore no "significant relationship" to the State's purposes and that the classification was "illogical and unjust." Id., at 175. Finally, in Jiminez v. Weinberger, supra, at 636 (WEB, WOD, WJB, PS, BRW, TM, HAB, LFP), we invalidated the classification challenged there as not "reasonably related" to the Government's interest.

To be sure, all these cases fall into the twilight zone of equal protection; they are, nevertheless, part of the warp and woof of equal protection law and must be dealt with if there's any disposition among

us to revise the contours of the appropriate inquiry where strict scrutiny is inappropriate. Indeed, even McGowan and its progeny support inquiries not really different from Murgia's. In McGowan, 366 U.S., at 428, the Court felt it appropriate to inquire into "reasonableness" and to conclude that there was "no indication of the unreasonableness" of, but rather a "reasonable basis" for, the classifications involved there. Similarly, in Dandridge v. Williams, 397 U.S. 471, 485 (PS, WEB, BRW, Black, Harlan), a majority of us held that "in the area of economics and social welfare," a classification does not offend the Constitution if it has some "reasonable basis." Finally, as recently as Weinberger v. Salfi, 422 U.S. 749, 776-777 (WHR, WEB, PS, BRW, HAB, LFP), a majority of us held that classifications would be upheld "so long as they comport with the standards of legislative reasonableness enunciated in cases like Dandridge v. Williams and Richardson v. Belcher." If it was permissible for "standards of legislative reasonableness" in Salfi to include the rationality of Dandridge and Belcher, how is Murgia's analysis different?

You also express concern with Murgia's statement that our inquiry "ceases with a determination that the age fifty classification rationally relates to the state's announced objective", questioning particularly whether this means that the state's purpose must be not only legitimate but that it must be articulated. I suspect you and I might answer that question differently but Murgia doesn't attempt to answer it. Rather the opinion merely observes that the state has articulated a purpose here, not that it was required to do so. By contrast, it is debatable whether the New Orleans City Council articulated a purpose for the "grandfather" clause in the ordinance involved in Dukes, and it may be that we should use that case as the vehicle for deciding the issue.

On the question of "legitimate" state purpose, of particular concern to Potter, I can only say that our prior equal protection decisions, virtually without exception, support the requirement of at least a legitimate state interest. "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." Weber v. Aetna Casualty & Surety Co., supra, at 172. "The essential inquiry in all the . . . cases is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" Id., at 173. Indeed, in USDA v. Moreno, 413 U.S. 528

(WJB, PS, BRW, TM, HAB, LFP), the Court went so far as to find that one of the Government interests advanced in support of the classification involved there was illegitimate, after first having held that "[u]nder traditional equal protection analysis, a legislative classification must be sustained if the classification is rationally related to a legitimate government interest." Id., at 533. The requirement was similarly recognized in Potter's Richardson v. Belcher, 404 U.S. 78, 84 (PS, WEB, BRW, HAB): "If the goals sought are legitimate and classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment." Likewise, in McGinnis v. Royster, 410 U.S. 263, 270 (LFP, WEB, WJB, PS, BRW, HAB, WHR), we held that the Court "[inquires] only whether the challenged distinction rationally furthers some legitimate articulated purpose."

A legitimate interest was also required in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40, 55 (LFP, WEB, PS, HAB, WHR), and was required as recently as your Weinberger v. Salfi, supra, at 772, 777, where you said that "Congress may not invidiously discriminate . . . on the basis of criteria which bear no rational relation to a legitimate legislative goal," and that the classification must solve a problem which the Government "legitimately desired to avoid." Finally, Potter's Geduldig v. Aiello, 417 U.S. 484, 496 (PS, WEB, BRW, HAB, LFP, WHR), and Jiminez v. Weinberger, supra, at 636, took care to emphasize that state interests involved were "legitimate."

In sum, I think equal protection analysis in our modern cases, where no "suspect classification" or "fundamental right" is involved, has adhered since 1920 when Royster Guano Co. v. Virginia was decided, to the test that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and reasonable relation to [a legitimate] object of the legislation . . . ."

Sincerely,

Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 12, 1976

MEMORANDUM TO THE CONFERENCE

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

Bill Rehnquist and I have been exchanging views about the equal protection test to be applied where the classification is neither "suspect" nor one involving a "fundamental right." The Murgia opinion relies upon language first used some fifty-six years ago in Royster Guano Co. v. Virginia, 253 U.S. 412, namely, whether the classification is "reasonable, not arbitrary, and . . . rests upon some ground of difference having a fair and substantial relation to the object of the legislation."

Bill wrote me a letter dated January 30 expressing his initial concern about the approach taken in my Murgia opinion. A copy of that letter is enclosed. I answered with the letter of February 9 addressed to him, a copy of which I also enclose. Bill has expanded his original letter into a memorandum to the conference dated February 11, also enclosed.

Potter has also circulated a concurring opinion in the case in which he says that he cannot subscribe to the view that the inquiry is "whether the classification is reasonably related to a legitimate state objective."

It seems to me that Bill and Potter's views are at odds with statements in a number of equal protection cases cited in my memorandum and decided over the past half century.

By agreement between Bill and me these exchanges are circulated with the thought that they might aid the Conference in coming to rest in this case.

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 16, 1976

RE: No. 74-1044 Massachusetts Board v. Murgia

Dear Harry:

I've delayed answering your note of March 11 in the above only because I thought I might have something from Lewis and Thurgood. You remember each said he was writing separately. I expect there's nothing for me to do pending clarification where I stand both on this opinion and the Dukes opinion. As I said at conference last Friday, I am not disposed to make any changes in either and that it's probably best if I withdraw both and let the Chief reassign the opinions.

Sincerely,

Bill

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 14, 1976

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

Dear Lewis:

I've cribbed unashamedly from your circulation and the attached represents my end product. But I strongly feel that the opinion should be in your name and not in mine. This is not only because much of the attached is in your words it's also because, quite frankly, our joint hope of a Court agreement on an equal protection standard in this area has a better chance of realization if you rather than I author the opinion.

I am sending this rather than bringing it to you with the thought you might want to ponder it before we sit down to talk about it.

I am sending a copy to Byron to keep him abreast of what's happening since he's the only one who joined my circulation.

Sincerely,

Bill

Mr. Justice Powell

cc: Mr. Justice White

L.F.P.
Reviewed 4/19
See editing & accompanying memo.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia.	On Appeal from the United States District Court for the District of Massachusetts.

[February —, 1976]

MR. JUSTICE BRENNAN, memorandum.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3)(a), that a uniformed State Police Officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

[1] Uniformed State Police Officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A, which provides:

"Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualification shall not apply in the case of the enlistment of any woman as such an officer. . . ."

In pertinent part § 26 (3) provides:

"(a) . . . Any . . . officer appointed under section nine A of chapter

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 19, 1976

RE: No. 74-1044 Massachusetts Bd. of Retirement v. Murgia

Dear Lewis:

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

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 28, 1976

No. 74-1044, Mass. Board v. Murgia

Dear Bill,

As I indicated to you orally, I contemplate writing a brief concurring opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: FEB 3 1976

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia. | On Appeal from the United States District Court for the District of Massachusetts.

[February —, 1976]

MR. JUSTICE STEWART, concurring in the result.

I cannot subscribe to the view that the inquiry in this case is "whether the classification is reasonably related to a legitimate state objective." *Ante,* p. —. Unless we are to return to the discredited era of substantive due process, that inquiry was the business of the Massachusetts Legislature and is not the business of this or any other Court. See *Ferguson* v. *Skrupa,* 372 U. S. 726. For the same reason, I cannot agree with the Court's conclusion that the legislation before us is constitutional because it is "reasonable." *Ante,* p. — n. 11.

Three years ago I tried to set down in a few words my considered understanding of the Equal Protection Clause of the Fourteenth Amendment. See *San Antonio School District* v. *Rodriguez,* 411 U. S. 1, at 59 (concurring opinion). It is on the basis of that understanding that I concur in the judgment in this case. The classification made by this Massachusetts law is not constitutionally suspect,[1] does not impinge upon a constitutionally protected right or liberty,[2] and does not rest

[1] Cf. *McLaughlin* v. *Florida,* 379 U. S. 184, 198 (concurring opinion).

[2] Cf. *Shapiro* v. *Thompson,* 394 U. S. 618, 642 (concurring opinion).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 12, 1976

74-1044 - Mass. Bd. v. Murgia

Dear Bill,

I have read with interest the copies of the letters exchanged between you and Bill Rehnquist and Bill's memorandum to the Conference, all enclosed with your memorandum to the Conference of this date. As you know, I am in substantial agreement with Bill Rehnquist's views.

There would be no point in my trying to deal in specific detail with the cases you cite and discuss in your thorough letter of February 9 to Bill. I cannot, however, allow one of the statements in that letter to go unchallenged. Specifically, I do not in the least believe "we were wrong in the results we reached" in LaFleur, Vlandis, etc. It was precisely because I thought the state laws in those cases should not and could not be invalidated under the Equal Protection Clause that I wrote or joined opinions dealing with them under the Due Process Clause. I do not at all think "we were wrong" in those cases, but firmly believe we would have been "wrong" if we had invalidated the state laws there involved under the Equal Protection Clause.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: MAY 24 1976

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia.	On Appeal from the United States District Court for the District of Massachusetts.

[February —, 1976]

MR. JUSTICE STEWART, concurring in the result.

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

Three years ago I tried to set down in a few words my considered understanding of the Equal Protection Clause of the Fourteenth Amendment. See *San Antonio School District* v. *Rodriguez,* 411 U. S. 1, at 59 (concurring opinion). It is on the basis of that understanding that I concur in the judgment in this case. The

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 16, 1976

No. 74-1044 - Massachusetts Board v. Murgia

Dear Lewis,

I agree with Bill Rehnquist's suggested minor verbal change and hope you will see fit to make it. I would ask you also to delete the last sentence of fn. 8, since I cannot agree that whether something is constitutional depends upon whether it is "reasonable" -- except perhaps in the Fourth Amendment area.

If these very minor, and I hope noncontroversial, changes are made, I shall gladly join your proposed Per Curiam with no separate writing.

Sincerely yours,

P.S.

Mr. Justice Powell

Copy to Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 17, 1976

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

Dear Lewis,

I am glad to join the per curiam you have circulated in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 28, 1976

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

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 14, 1976

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

Dear Bill:

I, for one, appreciate your efforts, as well as Lewis', to produce something that five of us could agree upon. Your revision accompanying your April 14 letter I could probably join, although I would much prefer a somewhat more relaxed standard with respect to identifying the state interest or purpose where it is not expressed in or plainly obvious from the statute itself. I would give substantial weight--perhaps more than Lewis would--to the representations of those who enforce a statute as to the purposes the legislation serves. Your identification and acceptance of the ultimate aim of the ordinance in Dukes seems to me quite proper even though the provision itself appears impenetrable on its face.

Again, thanks for all the effort.

Sincerely,

Byron

Mr. Justice Brennan

Copy to Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 24, 1976

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

Dear Lewis:

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

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

Perhaps we could chat about this.

Sincerely,

Byron

Mr. Justice Powell

cc: Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1976

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

Dear Lewis:

As you know, I have come full circle more than once in this case; and I apologize if I have wasted your and Bill Brennan's time, particularly since I now find that I much prefer to put aside any effort to pacify the law review critics or commentators and to attempt to clarify our equal protection standards for the benefit of the district judges and courts of appeals.

One reason, among others, driving me in this direction is the fact that you have joined Harry Blackmun's opinions in Lucas, No. 75-88, and Norton, No. 74-6212. I had thought that your Murgia draft intended to redefine and somewhat stiffen the rationality test by requiring a demonstration that the classification bears a fair and substantial relationship to the ascertained purpose or purposes of the statute. Yet in Lucas and Norton, equal protection cases in which you would apply the fair and substantial relationship test, the sole justification for the classification appears to be administrative convenience which is no more than a secondary purpose at best. If this consideration alone satisfies the test, then it is even less help than the unadorned rationality standard. Rather than confuse the law further, I would prefer that Murgia be decided in the name of rationality only, as it easily could be. I am of the same opinion with respect to Lucas and Norton.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1976

No. 75-1071 - Massachusetts Board of
Retirement v. Murgia

Dear Lewis:

Please join me.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: APR 1 1976

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia. | On Appeal from the United States District Court for the District of Massachusetts.

[April —, 1976]

MR. JUSTICE MARSHALL, dissenting.

Today the Court holds that it is permissible for the State of Massachusetts to declare that members of its state police force who have been proved medically fit for service are nonetheless legislatively unfit to be policemen and must be terminated—involuntarily "retired"—because they have reached the age of 50. Although the Court finds the right to work "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure," *ante,* at 5, quoting *Truax* v. *Raich,* 239 U. S. 33, 41 (1915), it holds that the right to work is not a fundamental right. And, while finding that "the history of the aged in this Nation is not wholly free of discrimination," *ante,* at 6 (footnote omitted), the Court holds that the elderly are not a suspect class. Accordingly, the Court undertakes the scrutiny mandated by the bottom tier of its two-tier equal protection framework, finds the challenged legislation to be "rationally related" to its objective, and holds, therefore, that it survives equal protection attack. I respectfully dissent.

I

Although there are signs that its grasp on the law is weakening, the rigid two-tier model still holds sway as

stylistic changes throughout see pp. 1, 2, 4, 7-9

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia. | On Appeal from the United States District Court for the District of Massachusetts.

[April —, 1976]

MR. JUSTICE MARSHALL, dissenting.

Today the Court holds that it is permissible for the Commonwealth of Massachusetts to declare that members of its state police force who have been proven medically fit for service are nonetheless legislatively unfit to be policemen and must be terminated—involuntarily "retired"—because they have reached the age of 50. Although we have called the right to work "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure," *Truax* v. *Raich,* 239 U. S. 33, 41 (1915), the Court finds that the right to work is not a fundamental right. And, while agreeing that "the treatment of the aged in this Nation has not been wholly free of discrimination," *ante,* at 6, the Court holds that the elderly are not a suspect class. Accordingly, the Court undertakes the scrutiny mandated by the bottom tier of its two-tier equal protection framework, finds the challenged legislation not to be "wholly unrelated" to its objective, and holds, therefore, that it survives equal protection attack. I respectfully dissent.

I

Although there are signs that its grasp on the law is weakening, the rigid two-tier model still holds sway as

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 11, 1976

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

Dear Bill:

This case seems to be making little progress at the moment. I therefore write to express my rather inconsequential views in the hope that my doing so may move us along towards resolution of this case.

I have read with interest your and Bill Rehnquist's exchange of letters and the three opinions that are in circulation. I have the following observations:

1. There is much to be said in support of your description of the language the Court has used in past cases and in justifying the analysis you propose in this case. There is also much to be said for the positions Potter and Bill Rehnquist respectively have taken. I am rather persuaded that we have reached a point where clarification and a taking of a precise position is indicated, despite the fact that there may well be a substantial semantic overlay in all this. In any event, your opinion represents one position. The other two present variants of another position. As between the two, I have concluded, after a good bit of thought, that I prefer Bill Rehnquist's approach and a return to Chief Justice Warren's pronouncements in McGowan.

2. Your opinion, of course, is a strong reaffirmation of the two-tier theory of equal protection. I am not yet ready to commit myself to a position that rejects a possible intermediate ground, as I think some of our cases have suggested. In any event, the present case may not require a commitment as to this one way or the other.

3. I share Bill Rehnquist's concern about the suggestion that political clout is to serve as a test of a suspect classification. It may be a factor to consider in a negative way, but I am hesitant to go beyond that.

Sincerely,

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 18, 1976

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

Dear Lewis:

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

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

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

In sum, I would join you.

Sincerely,

Harry

Mr. Justice Powell

cc: Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 17, 1976

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

Dear Lewis:

Please join me in the per curiam circulated June 15.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 11, 1976

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

Dear Bill:

I agree with the result and most of your analysis in the opinion you have circulated for the Court.

My difficulty relates to the comparison between "age-based classifications" and "sex-based classifications", addressed most specifically in the paragraph beginning on page 9. Although you conclude that older people as a group have not been "the subject of conspicuous discrimination" to the same extent as women, I would prefer not to make this comparison. As you will recall, I do not agree that the feminine sex is a "suspect class" for purposes of equal protection analysis, and doubt that I could be persuaded otherwise.

I do not think your opinion would be weakened if all of the paragraph mentioned were deleted except for the two sentences that follow the citation of Weber. If, however, you prefer to leave this in the opinion, I will write a brief concurrence.

I may add that I am not entirely happy with "two-tier" equal protection. In view of prior precedents, I followed it in my opinions for the Court in Rodriguez and Griffiths (among others). I fully endorse the concept of "strict scrutiny" in certain circumstances (e.g., where race discrimination or First Amendment rights are involved), and this level of care may be appropriate whenever any fundamental right guaranteed by the Constitution is at issue. But I shy away from the "compelling state interest" test, as this usually prejudges an issue.

As commentators and other federal judges have pointed out, the Court has spoken with "many voices" on equal protection analysis. I therefore would view with an open mind any broad reconsideration of a Court position.

But absent this ambitious undertaking, I am willing to join your opinion subject to the change above suggested.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: APR 7 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, v. Robert D. Murgia. | On Appeal from the United States District Court for the District of Massachusetts.

[April —, 1976]

MR. JUSTICE POWELL, concurring in the judgment.

I am in accord with the result reached by the Court and with much of the reasoning underlying that result. I think it appropriate, however, in light of the exchange of views among the Members of the Court, to express my thinking as to the proper analysis to be applied in determining whether the Massachusetts legislation comports with the requirements of the Equal Protection Clause of the Fourteenth Amendment. I agree that the proper inquiry is whether the State's classification "rationally relates to the furtherance of the State's announced objective." *Ante*, at 10.[1] I cannot, however,

[1] MR. JUSTICE MARSHALL makes an appealing case in his dissenting opinion for a new formulation of equal protection analysis. He proposes, as I understand it, a "middle-tier" type of test. When I came on the Court (January 1972) "two-tier" analysis was firmly established by prior decisions. See, *e. g.*, *Graham* v. *Richardson*, 403 U. S. 365 (1971), *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). See also Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1076–1132 (1969). *Rodriguez*, like similar cases involving the funding of education (see, *e. g.*, *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P 2d 1241 (1971); *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (Minn 1971)), had been decided below and was argued before us on the assumption that the Court was committed to this analytical approach. In writing for the Court in that case, I ac-

Keep in file

2nd DRAFT (3) 5/4/76

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, v. Robert D. Murgia.	On Appeal from the United States District Court for the District of Massachusetts.

[February —, 1976]

MR. JUSTICE POWELL, memorandum.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3)(a), that a uniformed State Police Officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

[1] Uniformed State Police Officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A, which provides:

"Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualification shall not apply in the case of the enlistment of any woman as such an officer. . . ."

In pertinent part § 26 (3) provides:

"(a) . . . Any . . . officer appointed under section nine A of chapter

May 7, 1976

No. 74-1044 MURGIA

Dear Potter:

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

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

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

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

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

Sincerely,

Mr. Justice Stewart
CC: Mr. Justice Brennan

LFP/gg

will be satisfactory to Byron. At this time, no one else has seen it.

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

Sincerely,

Mr. Justice Stewart

CC: Mr. Justice Brennan

LFP/gg

May 12, 1976

No. 74-1044 Massachusetts Board v. Murgia

Dear Harry:

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

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

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

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

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 19, 1976

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

MEMORANDUM TO THE CONFERENCE:

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

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

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

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

L.F.P., Jr.

ss

L.F.P.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 5/19/76

3rd DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, v. Robert D. Murgia.	On Appeal from the United States District Court for the District of Massachusetts.

[May —, 1976]

MR. JUSTICE POWELL, memorandum.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3)(a), that a uniformed State Police Officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

[1] Uniformed State Police Officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A, which provides:

"Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualification shall not apply in the case of the enlistment of any woman as such an officer. . . ."

In pertinent part § 26 (3) provides:

"(a) . . . Any . . . officer appointed under section nine A of chapter

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1976

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

Dear Bill:

Without addressing here some of our differing views as to how the standard of equal protection analysis should be framed, I write to clarify one point as to which there simply is a misunderstanding.

The hypothetical Virginia statute, posed in your letter (pp. 14-17), rests on an assumption that I would require a single legislative purpose and that the challenged classification be measured against the purpose of the statute as a whole. This is not my view. I would require that the means chosen by the legislature be rationally related to the purpose of the particular classification under attack. In addition a rational relationship to any one of several express or implicit purposes would be sufficient.

In my view, the statute you describe would contain no constitutional infirmities. The grandfather clause would be rationally related to the purpose of avoiding immediate imposition of a financial burden on those who already have acquired and begun operating trucks without contemplating the requirements of the new statute. And the exception for agricultural equipment would be rationally related to the objective of encouraging (or not destroying) the business of agriculture. Ordinarilly the Court would not consider whether these provisions serve or undercut the overall purpose of the Act.

I will clarify this point in any subsequent circulation of the memorandum.

Sincerely,

L. Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

74-1044

Murgia

Harry — 6/7/76

I hope the removal of the "purpose" paragraph will not concern you. I view what I've written in Murgia as wholly consistent with your Mathews v Lucas (even tho Bill Rehnquist seems to differ - with reservations).

I think you & I have the same objective: to frame E/P analysis ("rational basis") fairly broadly or flexibly without creating a third tier of analysis. I think Lucas + Murgia, as written, accomplish this. If you have suggestions, they would be welcomed.

Lewis

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 7, 1976

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

MEMORANDUM TO THE CONFERENCE:

Here is my revision of Murgia.

I have omitted the discussion of purpose (p. 11) that Bill Brennan and I liked, but that troubled several of you.

In my view, the memorandum reflects no change in Equal Protection doctrine.

Although Bill Brennan approves of my resubmitting this to the Conference, I understand that he will not join an opinion that omits - as this memorandum now does - the discussion of purpose referred to above.

Lewis

L.F.P, Jr.

ss

10, 11, 13, 14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: JUN 7 1976

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia.	On Appeal from the United States District Court for the District of Massachusetts.

[May —, 1976]

MR. JUSTICE POWELL, memorandum.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3)(a), that a uniformed State Police Officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

[1] Uniformed State Police Officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A, which provides:

"Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualification shall not apply in the case of the enlistment of any woman as such an officer. . . ."

In pertinent part § 26 (3) provides:

"(a) . . . Any . . . officer appointed under section nine A of chapter

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 15, 1976

No. 74-1044 Massachusetts Board v. Murgia

MEMORANDUM TO THE CONFERENCE:

Here is a suggested Per Curiam that would dispose of Murgia.

It is about as blandly written as one can write to dispose of the equal protection arguments advanced in this case. It leaves, I think, each of us free to "fight again another day" as to our respective perceptions of a proper formulation of equal protection analysis.

Bill Brennan has seen this "bare-bones" draft, and - subject to one relatively minor change - he thinks he could join it as a Per Curiam opinion. He does, however, have certain reservations that he will mention at Thursday's Conference. Bill is not disposed to join even this Per Curiam if other Justices still wish to write. I have assured Bill my zeal for writing has been so thoroughly dampened by this spring's experience, that it may be sometime before I venture forth again - although I suppose I will in due time.

Bill also has Dukes in mind, and will discuss its posture in light of what we decide to do about Murgia. A possibility that I suggested to him is that we might dispose of Dukes in very much the same way, by a Per Curiam that leaves all options open. After all, Dukes is a "peewee".

My own view is that there is much to be said for our disposing of these cases rather than carrying them over for futile reargument.

L.F.P.

L.F.P., Jr.

ss

substantially rewritten

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: JUN 15 1976

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia.	On Appeal from the United States District Court for the District of Massachusetts.

[May —, 1976]

PER CURIAM.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3)(a), that a uniformed State Police Officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

[1] Uniformed State Police Officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A, which provides:

"Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualification shall not apply in the case of the enlistment of any woman as such an officer. . . ."

In pertinent part § 26 (3) provides:

"(a) . . . Any . . . officer appointed under section nine A of chapter

6, 9

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated:

Recirculated: JUN 18 1976

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia.	On Appeal from the United States District Court for the District of Massachusetts.

[May —, 1976]

PER CURIAM.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3)(a), that a uniformed State Police Officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

[1] Uniformed State Police Officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A, which provides:

"Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualification shall not apply in the case of the enlistment of any woman as such an officer. . . ."

In pertinent part § 26 (3) provides:

"(a) . . . Any . . . officer appointed under section nine A of chapter

9

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

7th DRAFT

Circulated: JUN 23 1976

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 74-1044

Massachusetts Board of Retirement et al., Appellants, *v.* Robert D. Murgia. | On Appeal from the United States District Court for the District of Massachusetts.

[May —, 1976]

PER CURIAM.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3)(a), that a uniformed State Police Officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

[1] Uniformed State Police Officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A, which provides:

"Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his twenty-first birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualification shall not apply in the case of the enlistment of any woman as such an officer. . . ."

In pertinent part § 26 (3) provides:

"(*a*) . . . Any . . . officer appointed under section nine A of chapter

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 28, 1976

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

Dear Bill:

I anticipate circulating a separate opinion concurring only in the result in this case.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 30, 1976

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

Dear Bill:

Since I fear that I will not get my separate opinion in the above case circulated for a couple of weeks, I thought I would sketch for your benefit (?) what I have in mind addressing. I agree entirely with the result you reach, and I also fully agree that this is a case for "minimum scrutiny" in that it does not involve a "suspect classification" or "fundamental right". My difficulty, which is probably less with your opinion than with the language from other opinions which it quotes, is that it seems to state quite a different and more expansive test for this kind of review than was stated in Bill Douglas' opinion in Williamson v. Lee Optical Co., 348 U.S. 483.

I assume that, being the skilled craftsman you are, you have consciously opted for a standard of review which will give the courts more leeway in striking down state legislation of this sort, or at least that you feel that the Court has opted for it on previous occasions. If I am wrong, and am actually making a semantical mountain out of a molehill, let me know and it may be that I will write something quite different, or perhaps not write anything at all.

On page 8 of your draft, you said that the inquiry is whether the classification is "reasonable, not arbitrary, and . . . rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." After citing cases, you say that "the substance of such inquiry is essentially whether the classification is reasonably related to a legitimate state objective." On page 10, you say that our inquiry "ceases with a determination that the age fifty classification rationally relates to the furtherance of the state's announced objective."

Although one can argue about the meaning of each word, it seems to me by the time that you require the rational relationship to be to the state's "announced" objective, and that you require the classification to have not merely a relation, but "a fair and substantial relation" to the object, the courts are given much more authority than I would have thought the Fourteenth Amendment entitled them to in the area where concededly only "minimum scrutiny" applies. While it is difficult to articulate in general terms, I think the test your opinion enunciates is quite a different one than that of Williamson v. Lee Optical, or the McGowan v. Maryland language that "a statutory discrimination will not be set aside in any of any state of facts reasonably may be conceived to justify it." 366 U.S. 420, 426.

I presume there will always be differences among us as to what sort of a classification demands "strict scrutiny", and perhaps unresolved questions as to whether there may be an intermediate level of scrutiny between "strict" and "rational basis", a sort of scrutiny that some say was applied in the Chief's famous opinion in Reed v. Reed and in Lewis' opinion in Weber v. Aetna Casualty and Surety Co. I think what I will say in my separate opinion boils down to the idea that once it is conceded that none of these factors are

involved, the standard ought to be simply stated and ought to virtually foreclose judicial invalidation except in the rare, rare case where the legislature has all but run amok and acted in a patently arbitrary manner.

Sincerely,

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 11, 1976

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

MEMORANDUM TO THE CONFERENCE

MR. JUSTICE REHNQUIST, concurring in the judgment.

Although I completely agree with the result reached by the Court in this case, and with parts of its analysis in reaching that result, I have sufficient reservations about other parts that I concur only in the judgment. I think the test announced by the Court represents a significant departure from its previous equal protection decisions, and is one which could portend mischief throughout state and federal judicial systems.

It is important to place the Court's analysis in perspective. The Court convincingly demonstrates, and I entirely agree, that there is at issue here neither any fundamental right, slip op. at 5-6, nor any classification directed towards a "suspect class," Id., at 6-7.*/ I therefore agree with the Court that there is nothing in

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*/ I do not, however, agree with the intimations in the Court's proposed opinion that identification of such classes is somehow derived from judicial perceptions of their effectiveness in the political arena. Slip op. at 9-10. But as no one suggests that any such a "class" is implicated here, I leave my misgivings about such suggestions for some more appropriate occasion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 19, 1976

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

Dear Lewis:

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

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 25, 1976

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

Dear Lewis:

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

(1) Absence of fundamental right. I agree entirely with your treatment of this question on page 6 of your memorandum opinion.

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

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

That, plus a citation to your treatment of the subject in San Antonio Independent School District v. Rodriguez, and a citation to Harry's treatment of the subject in Sugarman v. Dougall, 413 U.S.

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

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

I add a word here in a somewhat broader context. I agree with you that there is a need for clarification of equal protection doctrine, but I basically disagree with your expansion of the "rational basis" test which I discuss infra. It seems to me what has most troubled the lower courts and the commentators are cases such as those involving sex discrimination, where although the Court has stated the test in terms of minimum scrutiny they believe that it is applying some higher level of scrutiny. As I read

Professor Gunther's article in 86 Harv. Law Rev. 1, which I take you to task for relying on so heavily in your memorandum, see infra, the genesis of the article was at least in part a felt need to explain cases such as these and your opinion in Weber v. Aetna Casualty Co., 406 U.S. 164.

If there is to be some sort of doctrinal expansion in the area of equal protection -- and I am by no means sold on the necessity or desirability for it -- it seems to me that it should come in some area other than that of the minimum scrutiny -- rational basis test. I think that your expansion of this test in the latter part of your memorandum will simply permit lower courts to make more erroneous decisions striking down social and economic legislation, such as the District Court did in this case, without in any principled way accommodating cases such as those dealing with sex discrimination. In other words, if we expand the rational basis test in this opinion, we will still be confronted further down the pike with a demand to expand "suspect classifications" or else adopt a "middle tier" level of scrutiny in order to accommodate those cases.

While my own personal view of the matter is that the standard of review in both areas should be left pretty much the way it is, if I had to choose between some doctrine explaining cases such as the sex discrimination cases, on the one hand, and the across-the-board expansion of the minimum scrutiny test which you propose, on the other, I should unhesitatingly choose the former. This seems to me to be another reason why it is undesirable to say anything more than is necessary to decide this case about "suspect classification". For this reason I think Potter's very brief opinion concurring in the result has much to commend it, although it would obviously have to be expanded if it were to be an opinion for the Court.

(3) "Purpose": Its Legitimacy v. Its Significance.

As I now understand it, I quite agree with your observations that there inheres in the Constitution some "requirement that a State's purpose be 'legitimate'". For although I do have some difficulty seeing any difference between deciding whether a "purpose falls within the very broad range of powers entrusted the state legislatures" and deciding whether it does not "independently violate other constitutional requirements", it

seems indisputable that a state legislative enactment which fails to pass these tests must be held invalid. But I draw back from some of the precepts of constitutional litigation which you seem to draw from this requirement of "legitimacy."

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

I don't think that a plaintiff, even when he assumes the burden traditionally imposed on one challenging a statute as being unconstitutional, will necessarily derive much benefit from these limitations. The burden on the plaintiff is to demonstrate that the statute is unconstitutional; one of the methods by which he may do this, in

the terms of your memo, is to show that the statute implements an illegitimate objective. If he can do this, i.e., if as you suggest in note 17, he can demonstrate that the statute implements a racially discriminatory objective, then the litigation is at an end. If he cannot do so, then ex hypothesi there is no "illegitimate objective" behind the statute which could be obscured by an assertion of "illusory purpose" put forth by counsel.

While these limitations, in my view, will not appreciably benefit one whose challenge to a statute deserves to succeed, I think that they will have more than one undesirable side effect as courts come to apply them. One such side effect could be to divert the attention of a court from the question of whether a statute directly contravenes the Constitution by invidiously discriminating against a suspect class to a focus upon discovering the "purpose" of the statute. I must also confess I do not understand your use of "hypothesizing" as the antithesis of proper judicial review. Initially, I am not at all sure I grasp what you mean by that term. You suggest that the only acceptable methods of determining a statute's purpose is either to draw upon a preamble or some other form of legislative history or to ascertain some

"clearly implicit" message on the face of the statutory scheme. As to the former, however, many if not most equal protection claims today are challenges to state legislation for which there may exist no legislative history, preamble, etc. Surely this heretofore unquestioned practice cannot, as a noncombatant casualty in the course of this Court's quest for a uniformly agreed-upon standard for minimal scrutiny challenges under the Equal Protection Clause, suddenly have become constitutionally suspect. And if your observations in note 13 that the Constitution does not require state legislatures to articulate the purpose of <u>every</u> legislative enactment, is meant to suggest that it may do so with respect to <u>some</u> enactments, they seem to me difficult to support in law or logic. Moreover, the basis for the suggestion with which you close note 13 escapes me entirely. I would have thought that the interpretation of a state administrative or executive agency regarding the meaning and purpose of the statute it was charged to enforce was a determination of state law which would be fairly binding upon any federal court before which the issue might be properly raised. I can't imagine how a conclusion that there was "hypothesizing by a lawyer" somehow involved, would entitle a court to disregard the State's interpretation of its own law.

Your alternative suggestion for divining the "purpose" of a statute, that it will usually be "clearly apparent from the face of the enactment," may be true as to most statutes which are passed. But when considered against those statutes which have led to litigation, I would have thought that the volumes written on statutory interpretation, as well as a very sizeable portion of this Court's case law, demonstrate that the "purpose" of a disputed statute is seldom so easily discernible. Indeed, the lesson of these authorities seems to be that it is a mistake of some dimension to assume that there exists a single "purpose" which may be ascribed to the legislature with regard to any particular statute, or that courts can adequately undertake to examine the subjective "motive" or "intent" of the legislators in performing their review function.

All this leads me to conclude that the test which you propose is really a very significant departure from constitutional adjudication as developed in the decisions of this Court. I'm not sure that the focus upon the "purpose" of the statute, assuming that we could agree upon that aspect of a statute's meaning, has much relevance to traditional judicial review; at least not where there is no dispute

that only minimum scrutiny is appropriate. I am thus much more comfortable with Potter's suggestion that we adhere to the test announced in cases such a McGowan: that a statutory legislative choice will not be invalidated unless no set of facts can be conceived to justify it. That formulation, while perhaps not embodying what political scientists might want in a model of judicial review, seems to me the proper role for a court enforcing the Constitution which we have.

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

I have the most serious reservations about that portion of your memorandum which seems to contemplate the bodily assumption into the Equal Protection Clause of Professor Gunther's article in 86 Harv. L. Rev. 1 (1972); you refer to it approvingly once in your text, and once again in a footnote, at pages 10-17 of your memorandum. Professor Gunther, as I read his article, advances what he calls a "model of modest interventionism", id., 24, which he says was suggested to him by developments in the October 1971 Term. More than one passage in the article seems to me to be in the area of political science, rather than of constitutional

law -- a choice which a law review commentator is certainly free to make, but which I am not sure ought to be carried over into this Court's opinion. For example, Professor Gunther says:

> "It does indeed follow from the political process theme that legislative value choices warrant judicial deference so long as the people can have their say in the public forum and at the ballot box. It does not follow, however, that the Court should eschew all concern with the relationship of the means adopted to the legislatively chosen ends. Means scrutiny, to the contrary, can improve the quality of the political process -- without second-guessing the substantive validity of its results -- by encouraging a fuller airing in the political arena of the grounds for legislative action.

> Examination of means in light of asserted state purposes would directly promote public consideration of the benefits assertedly sought by the proposed legislation; indirectly, it would stimulate fuller political examination, in relation to those benefits, of the costs that would be incurred if the proposed means were adopted." Id., at 44.

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

Professor Gunther's article has not gone unchallenged even among his academic brethern. In the "Foreword" to the Harvard Law Review issue on the Supreme Court in the following year, Professor Tribe said of Professor Gunther's approach:

> "[His] aim of a 'relatively vigorous' judicial scrutiny . . . evaporates in a verbal mist whicle inviting manipulation that conceals the substantive judgments underlying judicial choice."

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

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

Nor has Professor Gunther's doctrine faired particularly well in the one case that I know of which came here after a Court of Appeals adopted his theory. The Court of Appeals for the Second Circuit in Boraas v. Village of Belle Terre, 476 F.2d 806, cited Professor Gunther's article, and said it

was focusing "on the actual rationality of the legislative means under attack. . . .", 476 F.2d 806, 815. It held that the Belle Terre ordinance violated the Equal Protection Clause of the Fourteenth Amendment. The rest is history. That judgment was reversed by this Court by a vote of seven to two in an opinion written by Bill Douglas. 416 U.S. 1.

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

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

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*/ This is not entirely suppositious, since it resembles the federal statute I dealt with in a stay application in Coleman v. Paccar, No. A-651.

that the purpose of the Act is to improve highway safety in the state. The principal operative provision requires that all trucks commercially licensed in Virginia having an unladen weight in excess of five tons shall have antiskid devices on their hydraulic braking systems, and describes with some particularity the type of devices which will satisfy the statutory requirement.

The statute contains the following additional provisions:

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

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

One year later the Act is amended so as to provide that it applies only to new vehicles at the time they are sold.

It seems to me that it is impossible to say that there is any single 'purpose' to this Act, notwithstanding the preamble which would indicate the contrary. The basic provision is indeed designed to foster highway safety, but the original exception would in effect grandfather in existing trucks until they are resold, and thus avoid immediate imposition of financial burden on those who are currently operating trucks which would otherwise be subject to the Act. The amendment passed the following year still further restricts the operation of the Act, and in effect grandfathers in all existing trucks, even after resale. The agricultural exception cuts directly against the purpose of highway safety, and would have to be justified in terms of legislative recognition that the typical agricultural entrepreneur may be in shakier financial condition than most other truck operators, that the business of agriculture was one which the legislature wished especially to encourage, and that therefore less stringent requirements would be applied to trucks used in that business.

As I read pages 10-17 of your memorandum, one or more provisions of this hypothetical statute would run into some difficulty if challenged on Equal Protection grounds. Yet if the analysis in McGowan v. Maryland, which Potter adopts in his separate concurrence, were followed, I think there would be no difficulty in sustaining any one of the provisions.

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

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

Peroration. This letter is too long already, but in the process of writing it I have gotten myself sufficiently worked up so that I shall indulge myself in a bit of a perroation. I think the basic shortcoming of the "end-means" analysis, of focusing on whether "the distinctions

made by a classification [are] genuinely related to the State's purpose" (your memorandum, p. 14) are twofold. If the approach means what it says, it sets up this Court, which claims no legislative competence, to evaluate a legislative decision to implement a particular purpose by enacting some provision of a given statute. It seems to me almost inconceivable that we could correctly conclude that a group of legislators, all devoting a good part of their time to the art of legislation, chose a means which was not "genuinely" related to their purpose.

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

Sincerely,

WJB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 9, 1976

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

Dear Lewis:

Your most recent draft in this case has accommodated many of the concerns I expressed as to the earlier draft, and with the end of the Term hopefully in view, I will try to do some accommodating of my own. I joined Harry's Mathews v. Lucas opinion notwithstanding my disagreement with some of the language relating to the Equal Protection Clause test, and I am willing to join your opinion on pretty much the same basis. That basis is that neither of these cases be treated as a definitive reassessment of the proper standard of review where only minimum scrutiny is to be applied.

I fundamentally disagree with your stress on "purpose", as if this were an element which could be wholly isolated from the enacted statute itself, with some "ends-means" test then being applied to see how good a job the legislature did in working from its purpose to the enactment of the law. I recognize, however, that there is language in some of our cases which can be read to support that sort of test. I also disagree with the language in your opinion which seems to restrict the ability of courts to uphold statutes ("purpose may not be imagined," p. 11), and with other language which

seems to expand their authority to strike statutes down ("distinction must be genuinely related to the state's purpose," p. 13). I will swallow my objections, however, if the resolution of this battle is by agreement to be left for another day.

Because of all the internal exchanges that have taken place in this case, I think that if we are to agree on an opinion, and also to agree that the opinion is not to be a definitive restatement of the Equal Protection standard, that opinion ought to keep alive both sides of the doctrinal dispute. I can subscribe to an opinion containing your "purpose" analysis, even though I disagree with it, if you will include in some appropriate place in the opinion a quotation with approval of the standards set forth in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Admittedly this is inconsistent with your analysis, but it will not be the first time that an Equal Protection opinion has contained verbal inconsistencies.

If, on the other hand, you feel strongly that this is a case in whichthe definitive reassessment ought to be made, I cannot join your opinion as it now stands, and due to the lateness in the Term I would be inclined to vote for reargument.

Sincerely,

Mr. Justice Powell

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1976

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

Dear Lewis:

I think you have done an admirable job at rewriting this opinion to satisfy the maximum possible number of your colleagues, and if you are willing to make two minor changes which I think are completely consistent with your own previous expressions on the subject, I shall be delighted to climb aboard. On page 9, the first two sentences in the paragraph beginning on that page now read:

> "That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the State's ~~purpose~~ is not rationally furthered by a maximum age limitation. ~~It~~ This is only to say that with regard to the interests of all concerned, the State perhaps has not chosen the best means to accomplish its purpose."

Would you be willing to substitute for the phrase "State's purpose" in the first sentence, the phrase "objective of maximizing physical preparedness", and to substitute for the word "its" in the second sentence the word "this". I think the sentence as now written does not make adequate

assuring

~~the~~ objective of assuring physical fitness

allowance for the concept of secondary purposes which the legislature may have had in mind in enacting the statute, and I gather from your response to my hypothetical about the Virginia and West Virginia safety equipment statutes that you fully agree that secondary purposes are relevant in applying the standards you set forth.

Sincerely,

WWM

Mr. Justice Powell

Copy to Mr. Justice Stewart

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1976

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

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

PERSONAL

May 21, 1976

Re: 74-1044 - Massachusetts Board of Retirement
v. Murgia

Dear Lewis:

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

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

> First, under any program involving a division of labor, whether of menial tasks or of the high responsibility of government, the effective delegation of responsibility must carry with it the right to make some mistakes. Error is an inescapable characteristic of human endeavor, and the judiciary has neither the power nor the ability to correct all the errors made by a co-equal branch of government. This is perhaps the same thought that Justice Holmes has described as the need for some "play in the joints," or words to that effect.
>
> Second, we have no special skills in making policy judgments. Even though we phrase the test in terms of "rational basis," we are merely saying that a law must reflect a policy judgment which we find acceptable. Since the legislature is the policy making branch of the government,

> and since we have an overriding obligation to be neutral on questions of policy, it inevitably must follow that we accord great deference to legislative judgment.
>
> Third, perhaps of greatest importance, the strength of the judiciary is largely the consequence of its tradition of self-restraint. The more often we substitute our judgment for the product of the majoritarian process the greater is the risk that our moral authority will diminish and our mountain of work will increase.

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

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

If this type of approach is followed, sooner or later a case will come along in which the differing statements of the applicable rule will actually affect the outcome of the case. It is in that kind of context, rather than in a law review type of hypothetical analysis, that we do the best job of hammering out rules that we will follow in future cases. In short, I firmly believe the virtues of the common law tradition apply to constitutional adjudication. If we accept that premise, we should also minimize the amount of our obiter dicta. I am well aware of, and thoroughly respect, the view that our rule-making responsibility in the field of constitutional law justifies a different approach, but I happen to feel otherwise.

As I said at the outset, I am responding quite frankly and without a great deal of reflection, but I think that is really what you want me to do even though my conclusion differs from your proposal. I greatly appreciate your asking for my reactions.

Sincerely,

Mr. Justice Powell