BALANCING THE "FIT" BETWEEN "MEANS" AND "ENDS" IN EQUAL PROTECTION JURISPRUDENCE

By Evan Gutman CPA, JD (2013)

Justice William Rehnquist has never been one of my favorite Judges. Typically, his opinions regarding the equal protection clause seek to trim constitutional protections by interpreting the EPC too narrowly. I have little doubt that given the choice, he would have preferred the equal protection clause was never enacted. Nevertheless, he did write one of the most thoughtful descriptions of Equal Protection Jurisprudence. In Trimble v Gordon, 430 U.S. 762 (1977), he wrote in dissent as follows:

> "Unfortunately, more than a century of decisions under this Clause of the Fourteenth Amendment have produced neither of these results. They have, instead, produced a syndrome wherein this Court seem to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass "arbitrary," "illogical" or "unreasonable" laws. . . .
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> The Equal Protection Clause is itself a classic paradox, and makes sense only in the context of a recently fought Civil War. **It creates a requirement of equal treatment to be applied in the process of legislation - legislation whose very purpose is to draw lines in such a way that different people are treated differently.** The problem presented is one of sorting the legislative distinctions which are acceptable from those which involve invidiously unequal treatment.
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> . . . **For equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly. . . . For the crux of the problem is whether persons are similarly situated for purposes of the state action in issue.** . . .
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> The **essential problem of the Equal Protection Clause is therefore the one of determining where the courts are to look for guidance in defining "equal,"** as that word is used in the Fourteenth Amendment. . . .
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> The appropriate "scrutiny," in the eyes of the Court, appears to involve some analysis of the relation of the "purpose" of the legislature to the "means" by which it chooses to carry out that purpose. . . .
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> . . . It should be apparent that litigants who wish to succeed in invalidating a law under the Equal Protection Clause must have a certain schizophrenia if they are to be successful in their advocacy; they must first convince the Court that the legislature had

a particular purpose in mind in enacting the law, and then convince it that the law was not at all suited to the accomplishment of that purpose.

. . . Even assuming that a court has properly accomplished the difficult task of identifying the "purpose" which a statute seeks to serve, it then sits in judgment to consider the so-called "fit" between that "purpose" and the statutory means adopted to achieve it. In most cases, . . . the "fit" will involve a greater or lesser degree of imperfection. Then the Court asks itself: how much "imperfection" between means and ends is permissible? In making this judgment, it must throw into the judicial hopper the whole range of factors which were first thrown into the legislative hopper. What alternatives were reasonably available? What reasons are there for the legislature to accomplish this "purpose" in the way it did? What obstacles stood in the way of other solutions?

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. . . I had thought that cases like McGowan v Maryland . . . (1961) in which the Court, . . . said that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," . . . would have put to rest the expansive notions of judicial review suggested in . . . Royster Guano."

Trimble v Gordon, 430 U.S. 762 (1977); Justice Rehnquist Dissenting

The key phrase regarding the EPC that Rehnquest writes above reads:

> **"**It creates **a requirement of equal treatment** to be applied in the process of legislation - **legislation whose very purpose** is to draw lines in such a way that **different people are treated differently.**"

The foregoing quote is quite remarkable and true. The very purpose of a law is to treat certain people differently. Yet, the requirement of the EPC is that they be treated equally. From a logical perspective, it appears at first glance to be a logical conundrum that could not possibly be accomplished. The question is, "how is possible to treat people differently and equally at the same time?" The manner in which the EPC attempts to accomplish this involves the application of fair classifications. The classification between categories of people or the nature of the right being infringed determines the Scrutiny level. The Scrutiny level determines the manner in which the differential treatment or statutory restriction must be tailored.

The "Fit" between Means and Ends determines the degree to which the Scrutiny level is adequately satisfied. Typically, the "Ends" is regarded as the legislative purpose aimed to, be attained by the law. The classification between two types of people is the Means by which the government objective (the "Ends") is achieved. The tough part of jurisprudence in assessing the legitimacy of a law is to ensure their is a proper "Fit" between the Means and the Ends. In addition, there is the difficulty of determining exactly what constitutes "equal" treatment.

The application of the Scrutiny level involves an analysis of the Purpose of the legislature to the Means by which the Purpose is carried out. According to the seminal case of Royster Guano, the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. The distinctions between two classes, which gives rise to the differential treatment between the two classes must have some relevance to the Purpose for which the classification is made. The following are some key U.S. Supreme Court holdings and quotes that highlight the difficulty the Court has in applying EPC principles.

> The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to legitimate government objectives. People may not be subject to "different" treatment when there is no substantial relation between an important state purpose and the different treatment. EPC denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute.
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> Reed v Reed, 404 U.S. 71 (1971)

> "Permissible discriminations between persons must be correlated to their relevant characteristics."
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> Atty. Genl. New York v Soto-Lopez, 476 U.S. 898 (1986)

> EPC denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, **so that all persons similarly circumstanced shall be treated alike**. Johnson v Robison 415 U.S. 361 and Royster Guano.
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> U.S. Railroad Retirement Board v Fritz (1980)

> When faced with a challenge to a legislative classification, the Court should ask, first, what the purposes of the statute are, and second whether the classification is rationally related to achievement of those purposes.
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> Western and Southern Life Ins. Co. v Bd. Equalization, 451 U.S. 648 (1981); Majority Opinion.

"The Constitution does not require things which are different, in fact, . . . to be treated in law as though they were the same," Tigner v Texas, 310 U.S. 141, 147. Hence legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." Baxstrom v Herold, 383 U.S. 107, 111; Carrington v Rash, 380 U.S. 89, 93; Louisville Gas Co. v Coleman, 2777 U.S. 32, 37; Royster Guano Co. v Virginia, 253 U.S. 412, 415."

Estelle v Dorrough, 420 U.S. 534 (1975), Per Curiam Opinion

"The rationality of a statutory classification for equal protection purposes does not depend upon the statistical "fit" between the class and the trait sought to be singled out. It turns on whether there may be a sufficiently higher incidence of the trait within the included class than in the excluded class to justify different treatment."

Craig v Boren, 429 U.S. 190 (1976), Justice Rehnquist Dissenting

"Under EPC, the means chosen by the State must bear a "fair and substantial relation" to the object of the legislation. Reed v Reed, 404 U.S. 71 (1971), quoting Royster Guano."

Zablocki v Redhail, 434 U.S. 374 (1978); Justice Powell Concurring

"Whether analyzed in terms of equal protection or due process the issue . . . requires a careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating the purpose."

Bearden v Georgia, 461 U.S. 660 (1983); Justice O'Connor Lead Opinion

"The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."

City of Cleburne, Texas v Cleburne Living Center Inc., 473 US. 432 (1985)
Justice White, Lead Opinion

". . . our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so-called "standards" adequately explain the decisional process. . . .

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. . . In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. **The term "rational" of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.** Thus, the word "rational" -- for me at least -- includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

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In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases, the answer to these questions will tell us whether the statute has a "rational basis." . . .

City of Cleburne, Texas v Cleburne Living Center Inc., 473 US. 432 (1985)
Justice Stevens and Chief Justice Burger, Concurring

"The rational basis test contains two substantive limitations on legislative choice: legislative enactments must implicate legislative goals, and the means chosen by the legislature must bear a rational relationship to those goals. In an alternative formulation, the Court has explained that these limitations amount to a prescription that "all persons similarly situated should be treated alike." Cleburne v Cleburne Living Center, Inc. 473 U.S. 432, 439 (1985); see Plyler v Doe, 457 U.S. 202, 216 (1982); Reed v Reed, 404 U.S. 71, 76 (1971).

In recent years, the Court has struck down a variety of legislative enactments using the rational basis test. In some cases, the Court found that the legislature's goal was not legitimate . . . . In other cases, the Court found that the classification employed by the legislature did not rationally further legislature's goal. . . . In addition, the Court on occasion has combined these two approaches, in essence concluding that the lack of a rational relationship between the legislative classification and the purported legislative goal suggests that the true goal is illegitimate. See Cleburne v Cleburne Living Center, supra, at 450; Department of Agriculture v Moreno, 413 U.S. 528, 534 (1973)."

Lyng v Intl. Untion, United Automobile, 485 U.S. 360 (1988); Justices Marshall, Brennan and Blackmun Dissenting

"Deference is not abdication. . . . the test of whether a classification is arbitrary is whether the difference in treatment between earlier and later purchasers rationally furthers a legitimate state interest. . . .

A legitimate state interest must encompass the interests of members of the disadvantaged class and the community at large, as well as the direct interests of the members of the favored class. It must have a purpose or goal independent of the direct effect of the legislation, and one "that we may reasonably presume to have motivated an impartial legislature." Cleburne v Cleburne Living Center Inc. . . .

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A classification rationally furthers a state interest when there is some fit between the disparate treatment and the legislative purpose.

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The Court conclusion is unsound not only because of the lack of numerical fit between the posited state interest and Proposition 13's inequities, but also because of the lack of logical fit between ends and means.

Nordlinger v Hahn, 505 U.S. 1 (1992); Justice Stevens Dissenting

"Although we have not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest), we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose."

Shaw v Hunt, 517 U.S. 899 (1996); Justice Rehnquist Lead Opinion

"Perhaps the clearest statement of this Court's present approach to "rational basis" scrutiny may be found in **Johnson v Robison, 415 U.S. 361 . . . (1974). . . . eight members of this Court agreed that:**

> ". . . although an individual's right to equal protection of the laws does not deny . . . the power to treat different classes of persons in different ways. . . . it denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification, "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. . . . "
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> U.S. Railroad Retirement Bd. v Fritz, 449 U.S. 166 (1980
> Justices Brennan and Marshall Dissenting (But Citing Eight Members in Agreement in Johnson v Robison (1974)

Regardless of whether one adopts an expansive interpretation of the EPC like the liberal wing of the Court, or a narrow interpretation like the conservative wing, it is clear that there must be some type of "Fit" between "Means" and "Ends." Stated alternatively, and concededly subject to a bit of semantic dispute between various members of the Court, a law should be adopted to achieve a purpose. The law should be written and tailored in a manner so that it has a fair and substantial relation to achievement of that goal.

Now, let us turn to application of balancing the "Fit" between "Means" and "Ends" to the bar admissions process. State Bar Applicants are required to answer a multitude of inquiries, which licensed attorneys are not required to regularly and periodically disclose. Ostensibly, the State Bar's goal in requiring disclosure of these inquiries by Applicants is to ensure that lawyers have "Good Moral Character." Thus, the "Ends" is lawyers with "Good Moral Character." The "Means" is the requirement of disclosure by Applicants, but not by licensed attorneys. Thus, the "Classification" is one between Bar Applicants and licensed attorneys. The determinative issue is whether there is an adequate "Fit" between the Means and Ends.

The exemption from having licensed attorneys subjected to regular and periodic review renders achievement of the "End" of having attorneys with "Good Moral Character" an impossibility. The reason is as follows. The "End" sought to be achieved is being wholly undermined by the selected "Means." The Means is Underinclusive because licensed attorneys are excluded from any type of regular and periodic meaningful review. The Means is also Overinclusive because Bar Applicants who have never engaged in conduct warranting ethical discipline may be denied admission for wholly lawful conduct, whereas attorneys engaging in the exact same type of conduct are allowed to continue practicing law. Put simply, the "Fit" between "Means" and "Ends" does not have a fair and substantial relation to the object of the classification between licensed attorneys and Bar Applicants.

The current "Fit" between Means and Ends in the State Bar moral character assessment process is atrocious. It is the equivalent of a man who is told to wear a tuxedo to a wedding and shows up wearing a bowtie and nothing else. The bowtie sticks out like the current moral character assessment for Bar Applicants, while the entire remaining portion of the legal profession is left wholly naked. Put simply, it's not just a bad "Fit," but it's no "Fit" whatsoever because the rest of the clothes aren't even being worn.