THE IRRATIONAL NATURE OF SO-CALLED RATIONAL BASIS SCRUTINY IS PREDICATED UPON THE JUDICIARY'S FEAR AND GANG MENTALITY

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> "Much as Caesar had his Brutus, Charles the First his Cromwell," Congress and the States have this Court to ensure that their legislative Acts do not run afoul of the limitations imposed by the United States Constitution. But this Court has neither a Brutus nor a Cromwell to impose a similar discipline on it." [92]
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> Orr v Orr, 440 U.S. 268 (1979)
> Justices Rehnquist and Burger, Dissenting

There are two types of people in the world. People who like to fight and those who don't. Within the former, there are two subcategories as follows. People who like to fight others weaker than they are and people who like to fight others who are stronger.

Those who like to fight stronger people possess this affinity because they perceive the outside chance of winning as an achievement and personal advancement. The concept of conquering someone stronger is internally perceived as an act of courage and bravery. More often than not, the courage inspiring a person to challenge those stronger can rationally be classified as a foolish and reckless act. Notwithstanding, I concede that for someone small and weak to take on a stronger person who can pummel them with certainty, while undoubtedly a foolish act, does in fact require a certain degree of courage. It's stupid courage, but courage nevertheless.

In contrast, those who like to fight weaker people lack any degree of courage. They are typified by the character trait of cowardliness. As a society, most people do not admire others who fight weaker individuals. They're considered bullies. However, we do tend to admire people who fight stronger individuals even if we believe they are stupid for doing so. Hence, the phrase so often used in Country Bars late on a Friday night after an argument over a game of Pool, "Man, he was an moron to do that, but I gotta admit it took a lot of guts. That guy could have kicked the crap out of him."

People who like to fight weaker individuals have a personal belief that they can validate their strength and power by subjugating those who are weaker.

They will avoid fights with people who are stronger, because the inner essence of such cowards is an insecurity of their own strength and power. They fear those who are stronger. They seek to conquer that fear by subjugating those who are weaker. Thus, it is precisely their fear of stronger individuals that causes them to bully weaker people. This is because a fight against someone stronger entails a risk, perhaps a certainty, they will be even more insecure when the fight is lost. Instead, these individuals attempt to eradicate their insecurity by fighting weaker people. The concept is that victory against a weaker person is a certainty and will function as a validation of their sense of self-worth. A prime example of people who like to fight weaker individuals are criminal gangs. It obviously requires no courage for three men to rob an elderly couple or for five high school students to beat up one.

Turning now to the manner of effectuating a fight, there are many alternatives available. Fighting can be physical, but does not have to be. Fighting can manifest itself in verbal conflict, writing letters, sending e-mails, litigation or a wide variety of other options. The conflict giving rise to fighting in any instance is at its most rudimentary level, a competition for Energy. A person seeks to maximize their own Energy by taking Energy from other people. They do so by physical force, strategy or manipulation.

The competition for Energy is related in the best-selling novels by James Redfield, "The Celestine Prophecy," "The Tenth Insight" and "The Secret of Shambhala." [93] Redfield's novels provide the best depiction of how the world and universe function that I have ever read. In "The Celestine Prophecy" he writes as follows (emphasis added):

> ". . . How humans compete for energy is the Fourth Insight.
> . . .
> **. . .** eventually humans would see the universe as comprised of one dynamic energy, an energy that can sustain us and respond to our expectations. Yet we would see that we have been disconnected from the larger source of this energy, that we have cut ourselves off and so have felt weak and insecure and lacking.
>
> In the face of this deficit, we humans have always sought to increase our personal energy in the only manner we have known: by seeking to psychologically steal it from others - an unconscious competition that underlies all human conflict in the world.
> . . .
> **. . . When we control another human being we receive their energy. We fill up at the other's expense and the filling up is what motivates us. . . .**
> . . .
> **. . . We want to win the energy that exists between people. It builds us up somehow, makes us feel better**." [94]

These basic principles of human nature now bring us back the Judiciary branch of government. The Judiciary is comprised primarily of people who like to fight weaker individuals. The Judiciary tends to avoid battles against those who are stronger. As I have emphasized repeatedly, there are some courageous Judges who render rulings against those politically stronger. These brave Judges often issue dissenting opinions against the powerful Judicial cabals comprising the majority. The rulings, opinions and actions of such dissenting Justices, while undoubtedly brave, courageous and righteous may also be characterized by some as reckless and foolish acts in light of the associated personal professional risk they inure.

Lamentably however, most Judges only have an affinity for fighting those who are immensely weaker. Prime examples are how so-called "No-Nonsense" Trial court Judges (i.e. Assholes) are quick to punish Pro Se litigants when they attempt to exercise constitutional rights. They know the Pro Se litigant is helpless, prone and vulnerable in their courtroom. That's what these Judges like. Yet, the exact same Judge who will viciously trounce a Pro Se litigant's due process rights, will be wholly reluctant to punish a State Bar official or high-powered local attorney who attempts to exercise constitutional rights. In such instances, they're not quite so "No Nonsense," but in fact thrive on Nonsense.

Trial court Judges tend to tread lightly and fearfully when dealing with litigants represented by high-powered, well-connected attorneys. But, they do not hesitate to swing what may fairly be characterized as a "Due Process Baseball Bat" at Pro Se litigants seeking due process. This pathetically sad state of judicial affairs is largely a by-product of the Judge's own emotional insecurity, lack of self-worth and cognitive infirmities. It is rooted in the Judge's self-realization that he has an immoral character.

One of the most damaging developments in American jurisprudence, demonstrating the fear inherent within the insecure persona of the Judiciary is the application of modern day Rational Basis constitutional scrutiny. The reason it is a damaging development is because the phrase is falsely labeled as "Rational," when in fact it is precisely the opposite. It is Irrational. It is a legalist concept rooted in the desire of Judges to validate their sense of self-worth by subjugating those who are weak. They adopt this political posture because they are afraid of challenging those who are stronger. More specifically, Judges are terrified of legislators.

Since Judges are afraid of legislators, they pacify them by applying so-called Rational Basis scrutiny to constitutional analysis of enacted laws. The fear of legislators causes Judges to be insecure in their authority. It gives rise to a feeling of internal resentment founded upon an inferiority complex attributable to the Judiciary's subservience to the legislative branch. Judges then seek to

conquer their inferiority and validate their sense of self-worth by directing their conflicts against those who are weaker. Namely, they punish indigent or Pro Se litigants who attempt to exercise their rights. It's really all founded upon the same psychological deficiency that causes street thugs to pick their fights against weaker people.

The crux of Rational Basis scrutiny is the element of "Deference" to legislative power. Since Judges fear legislators they "Defer" their judicial duty to carefully scrutinize legislation, no matter how irrational enacted laws may be. The historical development of modern-day Rational Basis scrutiny proves its foundation is built upon judicial fear.

In 1905, the U.S. Supreme Court in Lochner v New York, 198 U.S. 45 (1906) determined that the "liberty" interest of the 14th amendment included a right to contract and that right was infringed by a New York statute. Thus, Lochner took an aggressive substantive due process approach to judicial review of a legislative enactment. It did so in order to justify striking down a statute. The aggressive approach adopted by the Lochner Court can fairly be regarded as the absolute antithesis of modern-day Rational Basis scrutiny. Lochner became the leading substantive due process case providing justification for invalidating numerous economic statutes until the 1930s. It represented an attempt by the Judiciary to assert its legitimate power of reviewing legislation. However, it did so for the purpose of protecting wealthy corporate interests, rather than economically disadvantaged citizens, who were basically thrown to the dogs by the Court's opinion.

In response to Lochner, opponents of the Judiciary charged that the opinion effectively made the U.S. Supreme Court a Superlegislature. This was because under Lochner, statutes were subjected to a close and piercing review. Minimal deference was given to legislators who enacted statutes. Lochner's approach towards substantive due process would last for about 32 years, until its collapse in 1937. During its' now defunct heyday, Lochner was criticized sharply by many Justices of the Court including Holmes, Brandeis, Stone, Cardozo and the so-called "tenth" Justice " Learned Hand (Hand was a Federal Court of Appeals Judge, but his opinions were given almost as much respect as those of a U.S. Supreme Court Justice). [95]

It is important to distinguish between "Modern-Day" Rational Basis scrutiny and the original formulation of "Rational Basis" scrutiny. As originally formulated, Rational Basis scrutiny is a very sound methodology for reviewing legislative enactments. The problem is that the element of judicial fear since 1937 has resulted in a perversion of its original formulation that results in judicial review today being tantamount to no review at all. This is because "Modern Day" Rational Basis scrutiny is predicated upon an overly extreme

deference to the inferior intellect of legislators. This fear came into existence as a result of FDR's Court Packing Plan of 1937. However, before addressing the specifics of the Court Packing Plan, the manner in which Rational Basis scrutiny was formulated after Lochner needs to be further explained.

The original formulation of Rational Basis scrutiny was set forth in 1920 after Lochner in the case of F.S. Royster Guano v Virginia, 253 U.S. 412 (1920). Royster Guano was in conformity with the approach Lochner adopted to review the legitimacy of legislation. In Royster Guano, the Court held that **a legislative 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 must be treated alike**. Furthermore, under Royster Guano, a legislative classification could not be sustained if the classification itself was illusory. Thus, Royster Guano presented a very sensible approach to review of legislative enactments that subjected them to a close and piercing review. Under Royster Guano's approach to Rational Basis scrutiny, legislators could not simply do as they please.

However, as will be demonstrated herein, in today's judicial world, the requirement of Royster Guano that legislative classifications have a "substantial relation" to the object of the legislation has essentially been thrown into the trash bin. Today, the immoral judicial practice of sustaining illusory legislative classifications is the norm rather than an aberration. The Court's transition from the sensible Rational Basis scrutiny of the Royster Guano approach, to its posture of fear and timidity under "Modern Day" Rational Basis scrutiny occurred primarily as the result of one event. That event was the 1937 Court Packing Plan. Some of the background is as follows.

The Lochner theory and its corollary Royster Guano approach to scrutinizing legislation had provided the Court with the means to declare economic reforms of Franklin D. Roosevelt unconstitutional. By taking on FDR, the Justices of the Court at that time could fairly be classified within the category of those who exhibit bravery by fighting with others who are stronger. FDR was extremely popular and much stronger than the Court.

As a sidenote, I point out that I favor many of the programs proposed by FDR and enacted by Congress. However, the issue is not whether one supports or opposes FDR's programs. The point is that by taking on FDR the Justices were exhibiting courageous conduct. But, when the Court caved into FDR like a bunch of chickens it was never really able to regain its self-esteem. It was humiliated under FDR and cowered before him. It is irrefutable FDR put the Court to shame. He gave the Justices a lesson in humility they have never forgotten or recovered from. Stated bluntly, he politically kicked the crap out

of them. The political beating they took caused the Judiciary to become intensely fearful of other government officials. This fear over the years caused the U.S. Supreme Court to abandon its duty of properly reviewing legislative enactments as "Modern Day" Rational Basis Scrutiny continued to develop.

Here is what happened. Legislation FDR supported, that was validly enacted by Congress was being struck down by the Court using the Lochner and Royster Guano basis for review. As a result, FDR's entire economic reform program in the 1930s was in danger of being invalidated by the Court. To combat this, FDR came up with the 1937 Court Packing Plan to neutralize the U.S. Supreme Court. His plan was driven by the fact that six of the nine U.S. Supreme Court Justices were in their seventies.

The Court Packing Plan began when FDR shocked the entire country on February 5, 1937 with his proposal to reorganize the Judiciary. His plan included a provision that for every Supreme Court Justice who did not retire after age 70, the President would be empowered to appoint a new Justice, up to a total of six. The transparent effect of the plan would be to dilute the voting power of the Justices by expanding the number of Justices on the Court, up to a potential total of 15. The fight to gain approval of the Court-packing plan was bitter. [96]

Almost as soon as the political battle started, the Justices of the US Supreme Court (Justice Owen Roberts particularly) caved into the pressure. They compromised the honor, integrity and conscience of the Court in favor of their own self-preservation and self-interest. They did so by holding that the National Labor Relations Act, which was strongly supported by Roosevelt was constitutional. While I personally support the NLRA myself, the concept of the Supreme Court diametrically reversing course on a vast economic program simply for purposes of self-preservation makes the process of judicial review a mockery. The U.S. Supreme Court came out of the mess looking like nothing more than a bunch of impotent political chickens.

More specifically, it was one particular Justice who caused the Court's humiliation. It was Justice Owen Roberts. Until the NLRA case, Roberts had been consistently voting against FDR's legislation along with the conservative block of the Court. Yet, in March, 1937 immediately after Senator Wheeler began public hearings on the Court Packing Plan, Justice Roberts switched his vote in favor of FDR's programs. This betrayal of his personal conscience gave the liberal wing of the Court a 5-4 majority in favor of FDR. Since the Court handed down its NLRA opinion on March 29, 1937 precisely after the Senate hearings began, Justice Roberts vote switch must be interpreted as a switch attributable to fear. In fact, Justice Hughes told Justice Roberts that by switching his vote, he had "saved the Court" [97]

The Justices came to the realization that if they didn't start upholding FDR's legislation, they were going to lose the Court packing plan battle. This would have the concomitant effect of individual Justices losing personal political power. So the fear of FDR caused the Court to start validating the programs he proposed. The impact of Justice Roberts vote switch was that from that point forward legislative enactments proposed by FDR were for the most part upheld. The Court packing plan was defeated as part of the unwritten deal.

After suffering this humiliating defeat, the U.S. Supreme Court ceased to engage in a close and piercing review of legislative enactments. Instead, the Court just started presuming statutes were constitutional. And that is how the modern day version of so-called "Rational Basis" scrutiny came into being. It is what caused the more sensible test of Royster Guano to be substantively abandoned. As a matter of form, Royster Guano continued to be recognized and still received "lip-service" even decades later. But, the Lochner doctrine was wholly discredited and abandoned. Royster Guano was continuously modified and its application today is a skeleton of its original formulation.

To this point, I have addressed the development of "Modern Day" Rational Basis scrutiny, focusing on its typical application to legislative enactments. However, the Judiciary also applies the test to determine the constitutionality of regulations affecting the legal profession. By doing so, the Judiciary is engaging in a very underhanded and sneaky course of immoral conduct. The reason is as follows. "Modern Day" Rational Basis scrutiny is totally predicated upon the concept of the Judiciary giving "Deference" to the power of the legislature. But that element is completely absent when the Judiciary reviews its own rules and regulations. Stated simply, the Judiciary can not "Defer" to itself. Additionally, although opponents of the Lochner approach may have been correct that it caused the Judiciary to fail to give sufficient deference to legislative judgments, it did positively result in a close and piercing examination of legislation.

Since the element of "Deference" is markedly absent when the Judiciary reviews its own rules and regulations, by adopting Modern Day Rational Basis scrutiny as the review approach, the Judiciary has effectively insulated itself from any meaningful review. Put simply, regarding the issues most affecting its own self-interest the Judiciary gets to do as it pleases without regard to constitutional limitations. The Judiciary gets to engage in illegal conduct. It transgresses beyond the proper boundaries of its power because Judicial rules and regulations are subjected to a lower degree of scrutiny than any legislation. The reason this occurs is as follows.

Any proposed legislative enactment is considered by elected legislative officials. In contrast, Judicial regulations are typically enacted by officials who are not elected. Additionally, legislation is typically enacted after an open public debate and a vote on the issue by legislators. In contrast, Judicial rules and regulations are just adopted by Judges. The public doesn't get to see any part of the process. The rules just suddenly "appear" one day. Most importantly, the legal legitimacy of any legislative enactment is potentially subjected to review by a different branch of government (i.e. the Judiciary). In contrast, the Judiciary is the only branch that gets to review the legitimacy of the rules that it enacts for its own benefit.

Thus, as indicated above, legislative enactments are subjected to at least three levels of review. Two are openly exposed to the general public (i.e. the debate and the vote), and the third is performed by a different branch of government. In contrast, by subjecting Judicial enactments to toothless "Modern Day" Rational Basis scrutiny, there is only one level of review. And it is a worthless review. It is flaccid scrutiny by the same Judiciary that enacted the regulation in the first place. In technical legal terms, this is known as what is called a "Crock of Shit."

By allowing judicial rules, policies and regulations to be subject to mere Rational Basis scrutiny, where the element of Deference is markedly absent, and when that element is the precise justification for Rational Basis scrutiny of legislative enactments, the Judiciary jeopardizes its legitimacy. It is engaging in blatant hypocrisy by allowing its own enactments to be subjected to less review than legislative enactments. The Judiciary does so in a transparent and amateurish self-serving quest to allocate power to itself. It wants its own rules and regulations to be subjected to less scrutiny than statutes. This is notwithstanding the fact that with respect to both, the final level of review (judicial review) uses the phraseology "Rational Basis scrutiny." It is anything but, Rational. The concept correlates wholly with the theory that due to the fear of challenging legislators (the stronger), the Judiciary shifts to subjugating those who it can more easily control with its own rules and regulations (the weaker).

History irrefutably demonstrates that the primary justification for Rational Basis scrutiny is to give deference to the powers exercised by another branch of government. That was the focus of the conflict involving the 1937 Court Packing Plan. Where the element of deference does not exist, Rational Basis scrutiny should not be applied, since "deference" is the definitive characteristic. It is logistically impossible to "defer" to one's self. The Judiciary cannot defer to itself and therefore so-called Rational Basis scrutiny is entirely inappropriate with respect to regulations pertaining to the legal profession, adopted by the Judiciary.

After the Court Packing Plan debacle, some of the developments of Rational Basis scrutiny into its "Modern Day" good for nothing version were as follows. In 1966, Justice Harlan, Dissented in Katzenbach v Morgan, 384 US 641 (1966) writing:

> "It is suggested that a different and broader equal protection standard applies in cases where "fundamental liberties and rights are threatened," . . . which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court. . . ." [98]

Four years later, after such a dual-level test was adopted by the Court, Justice Harlan Concurring in Williams v Illinois, 399 US 235 (1970) wrote:

> "The "equal protection" analysis of the Court is, I submit, a "wolf in sheep's clothing," for that rationale is no more than a masquerade of a supposedly objective standard for subjective judicial judgment as to what state legislation offends notions of "fundamental fairness." . . . .
> . . .
> The matrix of recent "equal protection" analysis is that the:
>
> > "rule that statutory classifications which are either based upon certain "suspect" criteria or affect "fundamental rights" will be held to deny equal protection unless justified by a "compelling governmental interest." Shapiro v Thompson at 658 [99]

Thus by 1970, there were basically two levels of scrutiny. There was Rational Basis scrutiny, which applied to everything other than suspect criteria or fundamental rights, and Strict Scrutiny that applied to suspect criteria and fundamental rights. The standard for Strict Scrutiny was that the classification had to be necessary to serve a compelling state interest. Shortly thereafter in Carey v Brown, 447 U.S. 455 (1980) it was held that to survive Strict Scrutiny the classification also had to be:

> "finely tailored to serve substantial state interests and the justification offered for any distinctions it draws must be carefully scrutinized." [100]

The Strict Scrutiny standard became that the classification had to be "necessary to serve a compelling state interest and narrowly drawn to achieve that end." Perry Education Assn. v Perry Local Educators Assn., 460 US 37, 45

(1983). All classifications other than those applied to suspect criteria such as race, or fundamental rights were subject to Rational Basis scrutiny. The impact of this was to immunize most legislation from judicial review. As Justice Marshall correctly pointed out:

> ". . . except in cases where the Court chooses to invoke strict scrutiny, the Equal Protection Clause has been all but emasculated." [101]
>
> Marshall v U.S., 414 YS 417 (1974)

Recognizing that the modern day version of Rational Basis Scrutiny rendered meaningful judicial review a virtual nullity, Justice Marshall began pushing hard for a third level of review in a series of Dissenting opinions. For example, he wrote in Massachusetts Bd. of Retirement v Murgia, 427 U.S. 307 (1976):

> "If a statute invades a "fundamental" right or discriminates against a suspect class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always . . . is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all. . . .
>
> But however understandable the Court's hesitancy to invoke strict scrutiny, all remaining legislation should not drop into the bottom tier, and be measured by the mere rationality test. For that test, too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld. See New Orleans v Dukes . . . (the only modern case in which this Court struck down an economic classification as irrational.) It cannot be gainsaid that there remain rights, not now classified as "fundamental," that remain vital to the flourishing of a free society, and classes, not now classified as "suspect," that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members. Whatever we call these rights and classes, we simply cannot forego all judicial protection against discriminatory legislation bearing upon them, but for the rare instances when the legislative choice can be termed "wholly irrelevant" to the legislative goal." [102]

Shortly after Marshall's Dissent in Mass. Board of Retirement, the Court in Craig v Boren, 429 US 190 (1976) set in place the groundwork for an "Intermediate" level of scrutiny that would apply to classifications based on gender. It did not formally become labeled as Intermediate Scrutiny until the early 1980s. Under Intermediate Scrutiny, a classification had to:

"serve important government objectives and be substantially related to achievement of those objectives." [103]

Thus, by the early 1980s, there were three levels of scrutiny, which were Rational, Intermediate, and Strict. Chaos then came to be when multiple levels of Rational Basis scrutiny developed. In 1981, Justice Powell wrote as follows:

"The Court has employed numerous formulations for the "rational basis" test. . . . Members of the Court continue to hold divergent views on the clarity with which a legislative purpose must appear . . . and about the degree of deference afforded the legislature in suiting means to ends." [104]

Schweiker v Wilson, 450 U.S. 221 (1981); Justice Powell - Dissenting - Footnote 4

The amusing fact is, that not only is so-called Rational Basis scrutiny Irrational, but the opinions clearly indicate the Justices of the U.S. Supreme Court do not even really know what it is. Kind of makes it hard to take their opinions seriously. This is because the Justices are wholly unable to agree on a uniform definition of Rational Basis Scrutiny. The following quotes demonstrate the haphazard, chaotic nature of the worthless and irrational standard of review called Rational Basis scrutiny. These quotes confirm the contemporary existence of a multitude of sub-levels of Rational Basis Scrutiny thereby rendering it unworkable. For ease of reference, I have labeled the various Sub-Levels to the best of my ability based on the following quotes from U.S. Supreme Court opinions (emphasis added):

1. LEVEL ONE - RATIONAL BASIS SCRUTINY

". . . 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." [105]

Eisenstadt v Baird, 405 U.S. 438 (1972); Justice Brennan - Lead Opinion - Citing Royster Guano Co. v Virginia, 253 U.S. 412, 415 (1920)

". . . . we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances, we have sought the assurance that the classification reflects a reasoned judgment . . . whether it may fairly be viewed as **furthering a substantial interest** of the State." [106]

Plyler v Doe, 457 U.S. 202 (1982); Justice Brennan - Lead Opinion

2. LEVEL TWO - RATIONAL BASIS SCRUTINY

"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**." [107]

City of Cleburne v Cleburne Living Center, Inc. 473 U.S. 432 (1985); Justice Stevens - Concurring

"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."** [108]

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

3. LEVEL THREE - RATIONAL BASIS SCRUTINY

"In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: 1) does the challenged legislation have a legitimate purpose? and 2) was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" [109]

Western and Southern Life Ins. Co. v Board of Equalization, 451 U.S. 648 (1981); Justice Brennan - Lead Opinion

"The State may not rely on a classification whose relationship to an asserted goal is so attentuated as to render the distinction arbitrary or irrational." [110]

City of Cleburne v Cleburne Living Center, Inc., 473 U.S. 432 (1985); Justice White - Lead Opinion

". . . . 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. . . ."** [111]

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

"The rationality of a statutory classification . . . 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."** [112]

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

"The central question in these cases, as in every equal protection case not involving truly fundamental rights . . . is **whether there is some legitimate basis for a legislative distinction** between different classes of persons." [113]

Plyer v Doe, 457 U.S. 202 (1982); Justice Burger - Dissenting

4. LEVEL FOUR - RATIONAL BASIS SCRUTINY

"The constitutional safeguard is offended only if the classification rests on **grounds wholly irrelevant to the achievement of the State's objective.** . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." [114]

Williams v Rhodes, 393 U.S. 23 (1968); Justice Stewart - Dissenting

"we will not overturn such a statute unless the varying treatment of different groups or persons is **so unrelated to the achievement of any combination of legitimate purposes** that we can only conclude that the legislature's actions were irrational." [115]

Vance v Bradley, 440 U.S. 93 (1979); Justice White - Lead Opinion

"In areas of social and economic policy, a statutory classification . . . must be upheld against equal protection challenge if there is **any reasonably conceivable state of facts** that could provide a rational basis for the classification." [116]

FCC v Beach Communications, 508 U.S. 307 (1993) Justice Thomas - Lead Opinion

The foregoing quotes demonstrate that at a minimum there are at least four different Sub-Levels of "Modern Day" Rational Basis Scrutiny, and each level has its own set of varied formulations. Level One Rational Basis Scrutiny is quite similar to Intermediate Scrutiny, and correlates well with the sensible time-honored case of Royster Guano. As stated previously, that case does still receive some "lip-service," by the Court if nothing else. Level One requires that the classification have a "substantial relation" to the object of the legislation. That is a valid and meaningful test, but regrettably it is not followed anymore.

At the other end of the spectrum, Level Four Rational Basis Scrutiny is tantamount to no scrutiny at all, or "toothless" scrutiny as properly referred to by Justice Marshall. The following quotes pertaining to Level Four Rational Basis Scrutiny are applicable (emphasis added):

"I suggest that the mode of analysis employed by the Court in this case virtually **immunizes** social and economic **legislative classifications from judicial review**." [117]

U.S. Railroad Retirement Baord v Fritz, 449 U.S. 166 (1980); Justice Brennan - Dissenting

"Although the Court professes to go beyond the direct inquiry regarding intent and to determine whether a particular imposition is rationally related to a nonpunitive purpose, this exercise is, at best, a formality. . . . Yet this **toothless standard** applies irrespective of the excessiveness of the restraint or the nature of the rights infringed." [118]

Bell v Wolfish, 441 U.S. 520 (1979); Justice Marshall -Dissenting

"The court states that a legislative classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,". . . . In my view, this formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could not be supported by a "reasonably conceivable state of facts." **Judicial review under the "conceivable set of facts" test is tantamount to no review at all."** [119]

FCC v Beach Communications, 508 U.S. 307 (1993);
Justice Stevens - Concurring - Footnote 3

"the Court stated in United States v Salerno, 481 U.S. 739 (1987), that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that **no set of circumstances** exists under which the Act would be valid. . . . **I do not believe the Court has ever actually applied such a strict standard**, even in Salerno itself. . . ." [120]

Washington v Glucksberg, 521 U.S. 702 (1997); Justice Stevens - Concurring

In 1995, in City of Cleburne, Texas v Cleburne Living Center, Inc., 473 U.S. 432 (1995) the Court arguably established yet another level of scrutiny that was between Rational Basis scrutiny and Intermediate Scrutiny, for classifications based on mental retardation. Justices Marshall, Brennan and Blackmun, Concurring and Dissenting wrote as follows (emphasis added):

"To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called **"second order" rational basis review**, rather than "heightened scrutiny." [121]

Then, in 1996 in U.S. v Virginia, 518 U.S. 515 (1996), the Court arguably established yet another additional level of scrutiny that was in between Intermediate Scrutiny and Strict Scrutiny, for classifications based on gender. Justice Scalia, Dissenting wrote as follows (emphasis added) :

> "I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests. . . . It is my position that the term "fundamental rights" should be limited to "interests traditionally protected by our society," . . . but the Court has not accepted that view, so that strict scrutiny will be applied to the deprivation of whatever sort of right we consider "fundamental." **We have no established criterion for "intermediate scrutiny" either, but essentially apply it when it seems like a good idea to load the dice."** [122]

In summary, it appears to me that as a matter of practicality there are now at least eight different levels of constitutional scrutiny in existence. It is an absolute, total categorical irrational mess. Four levels of so-called Rational Basis scrutiny, one level of "second-order" Rational Basis scrutiny, one level of Intermediate Scrutiny, an unnamed level of scrutiny that is above Intermediate and below Strict, and one level of Strict Scrutiny. The inability of the U.S. Supreme Court to rationally, clearly and understandably delineate appropriate standards for constitutional review creates a total blank check for State Supreme Court Justices and legislators to substantively ignore U.S. Supreme Court opinions. It immunizes an immense amount of unconstitutional legislation and unconstitutional conduct by State Supreme Courts from any meaningful judicial review. This occurs because it is impossible for any rational person to discern what the U.S. Supreme Court really is saying the law is, or what it requires.

Fundamental Rights are supposedly subjected to Strict Scrutiny. The letter of the law on this particular point seems quite clear as a matter of form, but once again as a matter of substance such really does not occur. The stated positive law of the U.S. Supreme Court is thus not in conformity with the law as applied by State Supreme Courts. Justice O'Connor wrote quite clearly for a Unanimous Court in Clark v Jeter, 486 US 456 (1988):

> "Classifications based on race or national origin . . . and **classifications affecting fundamental rights . . . are given the most exacting scrutiny**." [123]
>
> Clark v Jeter, 486 U.S. 456 (1988); Justice O'Connor - Lead Opinion for Unanimous Court

Notwithstanding the clarity of this statement, which is wholly unambiguous and written by a Unanimous Court, the law is simply not applied in conformity with the dictate. Classifications that "affect" fundamental rights

are consistently not given the "most exacting scrutiny" as the mandate clearly requires. Classifications pertaining to Bar admission standards, irrefutably "affect" fundamental rights at a minimum, but they are currently given virtually no meaningful scrutiny whatsoever. At a maximum, the right for a qualified individual to engage in the practice of law is itself considered a "fundamental right," as indicated by the U.S. Supreme Court in New Hampshire v Piper, rather than a privilege as State Supreme Courts continue to falsely assert. Yet, Bar admission standards and classifications are consistently subjected to Level Four "toothless" so-called Rational Basis scrutiny.

In conclusion on this issue, so-called Rational Basis scrutiny as a matter of truth is wholly Irrational. The modern day version of it came into existence as a result of the Judiciary's fear of FDR. In practice today, it immunizes most legislation from any meaningful review because Judges fear legislators. The result is that the Judges choose their fights with others, namely litigants who are weak and others, such as Bar Applicants, who they can more easily control. This effectively provides the fragile egos of insecure Judges with a false sense of self-worth. They would not be able to attain this image of self-importance if they possessed the courage to engage in a real fight with someone stronger than they are, namely the legislative branch of government.

The application of "Modern Day" so-called Rational Basis Scrutiny by Courts is nothing more than a form of Judicial Cowardliness. The Courts are too afraid of the legislators to properly scrutinize their statutes. It is characteristic of the moral character traits exemplified by Street Gang members who prey upon an elderly couple. The only difference is that the nature of the Street Gang's cowardly conduct is at least clear, apparent and easily defined. With all of its varying levels and divergent formulations, Rational Basis Scrutiny isn't even that.