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CONSTITUTIONAL LAW—THE RATIONAL BASIS TEST BECOMES LESS RATIONAL—United States Retirement Board v. Fritz, 449 U.S. 166 (1980) and Schweiker v. Wilson, 450 U.S. 221 (1981)

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NOTES

CONSTITUTIONAL LAW—THE RATIONAL BASIS TEST BECOMES LESS RATIONAL— *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980) AND *Schweiker v. Wilson*, 450 U.S. 221 (1981).

I. INTRODUCTION

The constitutional guarantee of equal protection of the laws[1] "does not deny to States the power to treat different classes of persons in different ways."[2] Equal protection, however, does limit the legislative power to classify. Depending upon the interest affected, the United States Supreme Court has developed different methods to decide whether the classification is constitutionally permissible.

If the classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution,"[3] the classification is subjected to the "most rigid scrutiny"[4] and will be sustained only if it is a necessary means of furthering a compelling state interest.[5]

When strict scrutiny is not appropriate, the Court will employ either the "rational basis" test, a minimal level of scrutiny requiring

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1. U.S. CONST. amend. XIV, § 1. The requirement of equal protection applies to the federal government through the due process clause of the fifth amendment. *See* Richardson v. Belcher, 404 U.S. 78, 81 (1971); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

2. Reed v. Reed, 404 U.S. 71, 75 (1971); *see also* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Barbier v. Connolly, 113 U.S. 27 (1885).

3. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). Classifications based upon race, national origin, and alienage have been identified as suspect. *See* Graham v. Richardson, 403 U.S. 365, 376 (1971) (alienage); Korematsu v. United States, 323 U.S. 214, 216 (1944) (race); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (national origin). Fundamental rights include voting, criminal appeals, and the right of interstate travel. *See* Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (voting); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (criminal appeals).

4. Korematsu v. United States, 323 U.S. 214, 216 (1944).

5. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

only that the classification be rational,[6] or an intermediate standard of review that falls between strict scrutiny and minimum scrutiny.[7] "Intermediate review"[8] has been applied to classifications based upon gender[9] and illegitimacy.[10] The rational basis test is employed when the classification is contained within social and economic legislation.[11] How this test works is a subject of disagreement within the Court: "Despite the narrowness of the issue, this Court in earlier cases has not been altogether consistent . . . in this area."[12]

This note examines the inconsistency in light of two decisions from the 1980 Supreme Court term: *United States Railroad Retirement Board v. Fritz*[13] and *Schweiker v. Wilson*.[14] An overview of the state of the rational basis test prior to these two cases first will be discussed. Parts III and IV provide a detailed analysis of the decisions. This note will demonstrate that *Fritz* and *Wilson* do not bring the Court any closer to a conclusive method of reviewing social and economic legislation against equal protection challenges. Part V will discuss Justice Powell's dissent in *Wilson* and his proposed solution to the problem.[15]

II. THE RATIONAL BASIS TEST: AN OVERVIEW

In the area of economic and social welfare legislation, a classifi-

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6. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 670-72 (10th ed. 1980).

7. *See* Craig v. Boren, 429 U.S. 190 (1976); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). Justice Marshall believes that the Court's equal protection decisions do not fall into two neat categories, but rather he has indicated that the Court applies a spectrum of standards to the challenged legislation. According to Justice Marshall's view, the degree of scrutiny applied depends upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting). Justice White also has endorsed this view. Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring); *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082-92 (1978) [hereinafter cited as L. TRIBE].

8. L. TRIBE, *supra* note 7, at 1082.

9. *See* Craig v. Boren, 429 U.S. 190 (1976).

10. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

11. Dandridge v. Williams, 397 U.S. 471, 485 (1970). "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution. . . ." *Id.* (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

12. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980).

13. 449 U.S. 166 (1980).

14. 450 U.S. 221 (1981).

15. *See* text accompanying notes 130-31 *infra*.

cation must be rationally related to a legitimate legislative purpose.[16] This is mandated by the equal protection clause and is not a matter of dispute within the Court.[17] For the Court to find this rational relation, the relation need not exist in fact: It is enough that the legislature "could rationally have decided" there was a connection between the purpose and the classification.[18] The disagreement over rationality review arises over the selection of the purpose against which the classification will be tested. It is a dispute which goes to the heart of judicial review; how closely the Court should scrutinize legislative enactments.

The Court sometimes uses an approach in which the requirement for rationality is satisfied "if any state of facts reasonably may be conceived to justify [the classification]."[19] This view, the conceivable basis[20] approach, affords great deference to the legislature. As it permits a purpose for the classification to be offered after the classification is established by the legislature, a hypothesized purpose can be tailored to fit the classification.[21] This approach constituted the

16. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533 (1973); Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961). The legitimacy aspect of the rational basis standard will not be covered in this article. For a discussion of that limitation, see Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1070-88 (1979).

17. The rational basis test has been employed since at least 1897, when the Court stated: "[T]o relieve a statute from the reach of the equality clause of the Fourteenth Amendment, . . . it must appear . . . that a classification . . . is one based upon some reasonable ground . . . and is not a mere arbitrary selection." Gulf Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 165-66 (1897). Despite this history, at least one commentator disagrees with the assumption that there is a constitutional requirement of rationality: "[T]he dogma that [due process] requires every law to be a rational means to a legislative end is itself not a rational premise for judicial review and . . . is even less plausible as a constitutional command to lawmakers . . . ." Linde, *Due Process of Law Making*, 55 NEB. L. REV. 197, 235-36 (1976).

18. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981). *Clover Leaf* involved an equal protection challenge to a statute that banned the retail sale of milk in plastic nonreturnable, nonrefillable containers. *Id.* at 458. Petitioners presented evidence that there was no actual link between the legislature's purpose, to promote energy savings, and the classification. *Id.* at 463-64. The Court held the empirical evidence to be irrelevant: "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *Id.* at 464 (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).

19. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

20. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); L. TRIBE, *supra* note 7, at 996.

21. There is some question as to whether a statute could ever be invalidated if this

only rational basis test from the 1940's through the 1960's.[22] Not suprisingly, it resulted in the invalidation of few statutes.[23]

In the 1970's, a new view of the rational basis test emerged, one which would not have the classification tested against any purpose, but against "some legitimate, *articulated* legislative purpose."[24] The articulated purpose approach obviously is more restrictive than the conceivable basis view because a classification cannot be justified by virtue of a *post hoc* purpose.

The articulated purpose approach has not displaced the conceivable basis approach.[25] Both views have been utilized by the Court.[26] Thus, the Court concurrently maintains two standards by which to evaluate social and economic legislation for equal protection violations. The standard that the Court chooses to employ

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test were honestly employed. *See* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128-32 (1972).

22. *See, e.g.*, McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947).

23. Only one statute was held to be unconstitutional. *See* Morey v. Doud, 354 U.S. 457 (1957). *Morey*, though subsequently overruled by City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976), saw the Court strike down a statute which exempted the American Express Company from requirements pertaining to the sale of money orders. Morey v. Doud, 354 U.S. 457, 458 (1957).

24. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) ("State's classification rationally furthers the purpose *identified* by the State") (emphasis added); *see* City of New Orleans v. Dukes, 427 U.S. 297, 304 (1976) ("classification rationally furthers the purpose which the . . . city had *identified* as its objective") (emphasis added); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) ("*articulated* state purpose") (emphasis added); McGinnis v. Royster, 410 U.S. 263, 270 (1973) ("*articulated* state purpose") (emphasis added). The Court uses the terms "articulated" and "identified" interchangeably; each indicates the express purpose of the legislature. If the legislature's purpose for a classification is not stated explicitly, but is implicit in either the legislative history or the legislation itself, the articulated purpose approach still would be proper. The key element of the articulated purpose approach is that it assesses legislation in light of the legislature's actual purpose and while this purpose is most easily recognized when explicitly articulated by the legislature, it can be found in other ways. *See, e.g.*, Schweiker v. Wilson, 450 U.S. at 235-36.

25. *See* note 20 *supra* and accompanying text.

26. *Compare* United States R.R. Retirement Bd. v. Fritz, 449 U.S. at 178; Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Dandridge v. Williams, 397 U.S. 471, 485 (1970); *and* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969), which employed the conceivable basis approach *with* Schweiker v. Wilson, 450 U.S. at 235; Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); City of New Orleans v. Dukes, 427 U.S. 297, 304 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); *and* McGinnis v. Royster, 410 U.S. 263, 270 (1973), which employed the articulated purpose approach.

could mean a difference in the Court's holding.[27]

III. *FRITZ*

A. *Facts*

In *Fritz*, the Supreme Court rejected an equal protection challenge to the Railroad Retirement Act of 1974.[28] The 1974 Act excluded certain workers from receiving benefits that they had earned under the 1974 Act's predecessor, the Railroad Retirement Act of 1937.[29] It was this exclusion that gave rise to the suit.[30] Prior to the 1974 Act, a worker became eligible for both Social Security and Railroad Retirement benefits by working the requisite number of years in nonrailroad and railroad employment.[31] If the worker also qualified for social security benefits by working for a sufficient period outside the railroad industry, he would be eligible for benefits under both the Social Security and Railroad Retirement systems.[32] Because of the way in which the benefits were computed, a worker who qualified for benefits under both systems received more money than one who had worked for the same amount of time but had not split his employment between railroad and nonrailroad employment.[33] The cost of this extra amount, the windfall benefit, was borne entirely by the Railroad Retirement Account[34] and had placed

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27. While the articulated purpose approach is the stricter form of review, it never has been used to invalidate a statute.

28. 45 U.S.C. §§ 231-231t (1976).

29. Pub. L. No. 75-162, ch. 382, 50 Stat. 307 (1937) (codified as amended at 45 U.S.C. §§ 231-231t (1976)).

30. *See* notes 43-51 *infra* and accompanying text.

31. Pub. L. No. 75-162, ch. 382, 50 Stat. 307 (1937) (codified as amended at 45 U.S.C. §§ 231-231t (1976)).

32. *Id.*

33. 449 U.S. at 168 n.1. The *Fritz* Court used the following example:

> [I]f 10 years of either railroad or nonrailroad employment would produce a monthly benefit of $300, an additional 10 years of the same employment at the same level of creditable compensation would not double that benefit, but would increase it by some lesser amount to say $500. If that 20 years of service had been divided equally between railroad and nonrailroad employment, however, the social security benefit would be $300 and the railroad retirement benefit would also be $300, for a total benefit of $600. The $100 difference in the example constitutes the 'windfall' benefit.

Id.; *see* S. REP. NO. 1163, 93d Cong., 2d Sess. 2-3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5703-04 [hereinafter cited as S. REP. NO. 1163].

34. *See* Pub. L. No. 82-234, ch. 632 § 22(b), 65 Stat. 683, 687 (1951) (codified as amended at 45 U.S.C. 231(f)(c)(2) (1976)); S. REP. NO. 1163, *supra* note 30, at 2-3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 5703-04; COMMISSION ON RAILROAD RETIREMENT, THE RAILROAD RETIREMENT SYSTEM: ITS COMING CRISIS, H.R. DOC.

the Railroad Retirement System in financial jeopardy.[35]

Congress received a study[36] of the problem by the Commission on Railroad Retirement[37] and, as a result, established the Joint Labor-Management Railroad Retirement Negotiating Committee[38] (Joint Committee), which was composed of representatives of railroad management and labor.[39] Congress directed the Joint Committee to prepare a bill that would ensure the solvency of the railroad retirement system.[40] The Joint Committee outlined its proposals for a bill,[41] and Congress, using the proposals, enacted the 1974 Act.[42]

The principal purpose of the bill, to place the Railroad Retirement System "on a sound financial basis,"[43] was to be accomplished through the 1974 Act by reducing the windfall benefit drain.[44] All future accruals of the windfall were eliminated; those who had not worked the requisite ten years by the date on which the 1974 Act went into effect[45] would not get the windfall.[46] Many of those employees who already had earned the right to the windfall would receive it. The workers excluded from receiving their vested windfall benefits were those who had left the railroad industry before 1974 without having completed twenty-five years of service, had not retained a "current connection"[47] with the industry at the close of 1974, and had not qualified for Social Security benefits as of the year

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No. 350, 92d Cong., 2d Sess. 8-9, 24, 73, 344, 355-56 (1972) [hereinafter cited as COMMISSION REPORT].

35. S. REP. No. 1163, *supra* note 33, at 1-2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 5702.

36. *See* COMMISSION REPORT, *supra* note 34.

37. In 1970, Congress established the Commission on Railroad Retirement to make a study of the railroad retirement system and to make recommendations to Congress as to how to alleviate the retirement system's financial difficulties. *See* Pub. L. No. 91-377, ch. 382, § 7, 84 Stat. 791, 792-94 (1970).

38. *See* Pub. L. No. 93-69, ch. 382, § 107, 87 Stat. 162, 165 (1973).

39. The district court felt that the lack of public representation on the Joint Committee led to the challenged classification. Jurisdictional Statement at 10a-13a, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) [hereinafter cited as Jurisdictional Statement].

40. Pub. L. No. 93-69, ch. 382, § 107, 87 Stat. at 165 (1973).

41. *See* 120 CONG. REC. 18391-412 (1974).

42. Pub. L. No. 93-445, 88 Stat. 1305 (1974) (codified at 45 U.S.C. §§ 231-231t (1976)).

43. *See* S. REP. No. 1163, *supra* note 33, at 1, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 5702.

44. *Id.* at 11, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 5711.

45. The 1974 Act went into effect on January 1, 1975.

46. 45 U.S.C. § 231(b)(h) (1976); *see* S. REP. No. 1163, *supra* note 33, at 7, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 5707.

47. The term "current connection" means being employed by the railroad during 12 of the preceeding 30 months. *See* 45 U.S.C. § 231(o) (1976).

they left railroad employment.[48]

Those harmed by this exclusion filed a class action in the United States District Court for the Southern District of Indiana.[49] Plaintiff class sought a judgment declaring that the provision of the 1974 Act that expressly preserves windfall benefits for some employees irrationally distinguishes between classes of annuitants.[50] The excluded class claimed it was irrational for Congress to distinguish between classes of beneficiaries "simply on the basis of whether they had a 'current connection' with the railroad industry as of the changeover date or as of the date of retirement."[51] The district court held the classification to be "arbitrary, capricious and irrational and [one which] denies Plaintiff Class equal protection under the law."[52] The Supreme Court, with two Justices dissenting,[53] reversed.[54]

The Court decided that minimum scrutiny was the proper standard of review[55] and found the classification not to be "patently arbitrary or irrational"[56] but, rather, logically related to the goal of achieving equity between current and former railroad employees.[57] The achievement of equity was not mentioned by Congress as a goal it wished to accomplish by denying appellants the windfall. Rather, this goal actually is inimical to an explicitly stated purpose of Congress: to preserve benefits for those who had a vested right to them.[58] Appellant Board did not attempt to show that equity between classes of railroad employees was Congress' articulated purpose for the classification. Rather, Appellant Board maintained, and the Court agreed, that this purpose rationally could have been sought by Congress.[59]

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48. The various benefit qualifying provisions of the 1974 Act are found at 45 U.S.C. § 231(b)(h) (1976).

49. 449 U.S. at 173.

50. *Id.*

51. *Id.* at 173-74.

52. Jurisdictional Statement at 36a, *supra* note 39.

53. 449 U.S. at 182 (Brennan, J., joined by Marshall, J., dissenting).

54. *Id.* at 174. *Fritz* was appealed to the Supreme Court in accordance with 28 U.S.C. § 1252 (1976) which allows a direct appeal to the Supreme Court when a lower court holds an act of Congress unconstitutional. The district court opinion is unpublished.

55. 449 U.S. at 174-75.

56. *Id.* at 177.

57. *Id.* at 177-78.

58. *See* note 65 *infra*.

59. 449 U.S. at 177-78; Brief for Appellant at 30-32, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) [hereinafter cited as Brief for Appellant].

B. *Legislative History*

When Congress directed the Joint Committee to prepare legislation to make the Railroad Retirement System actuarially sound, it did not give the Committee free reign. The Joint Committee was to "take into account the specific recommendations of the Commission on Railroad Retirement."[60] One of four recommendations[61] made by the Commission was that the windfall benefit should not be eliminated for those who had vested right to it.[62] At that time, Congress gave no indication that it intended to exclude appellees from receiving the windfall.

The Joint Committee did not follow the recommendation, and the proposed bill including the classification in question, was submitted to Congress.[63] The bill was passed with the exclusion intact,[64] yet Congress indicated that its original goals had not changed.[65]

Between the time the Joint Committee's proposal was submitted to Congress and the time the 1974 Act was enacted, Congress conducted hearings on the proposal.[66] As the legislation being discussed was complex and was drafted by outside parties, Congress was dependent upon those parties for an explanation of the proposed legislation. The Joint Committee members, however, were not straightforward when they testified regarding the impact that the legislation would have on appellees.[67]

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60. Pub. L. No. 93-69, ch. 382, § 107, 87 Stat. 162, 165 (1973).

61. *See* COMMISSION REPORT, *supra* note 34, at 368-69.

62. *Id.* at 367-69.

63. *See* 120 CONG. REC. 18391-412 (1974).

64. *See* 45 U.S.C. § 231(b)(h) (1976).

65. *See* S. REP. NO. 1163, *supra* note 33, at 1-2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 5702. One of the announced purposes of both the United States Senate and the House of Representatives in passing the Railroad Retirement Act of 1974 was to protect the persons in Fritz's class:

> The Bill provides for a complete restructuring of the Railroad Retirement Act of 1937 and will place it on a sound financial basis . . . .
>
> Persons in receipt of both Railroad Retirement and Social Security benefits as of December 31, 1974 will continue to receive benefits under both systems without any reduction in those benefits. Persons who already have vested rights under both the Railroad Retirement and the Social Security systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law.

Id.

66. *See Restructuring of the Railroad Retirement System: Hearings on H.R. 15301 Before the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. 214 (1974) [hereinafter cited as *Committee Hearings*].

67. Justice Brennan found that the misstatements were frequent and unrebutted and that "no Member of Congress [could] be found to have stated the effect of the classification correctly . . . ." 449 U.S. at 193 (Brennan, J., dissenting). William Dempsey,

An explanation for this testimony can be found in the decision of the district court. That court found that the Joint Committee, instead of protecting the interests of the *Fritz* class as directed by Congress,[68] "traded off the plaintiff class of beneficiaries to achieve added benefits for their current employees. . . ."[69] This reading of the testimony was rejected by appellant.[70]

The district court found, and Justices Brennan and Marshall agreed,[71] that because of this testimony and as the classification defeated a stated purpose of Congress,[72] the enactment of the classification was inadvertent.[73] This is not necessarily true; other reasons could explain the enactment.[74] The *Fritz* Court did not conclusively uphold an inadvertent classification. The Court's relaxed standard of review, however, allowed a purpose never mentioned by Congress to sustain a classification that defeated an articulated purpose of Congress.

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chairman of the management negotiators on the Joint Committee and principal witness at the hearings, told the Congressional Committee:

> [P]rotection [will] be accorded to people who are on the rolls now receiving dual benefits and those who are vested under both systems as of January 1, 1975, the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. They have relied upon the law. They . . . should be protected.

Committee Hearings, *supra* note 66, at 214. There was also the following exchange between Dempsey and Representative Dingell:

> Mr. DINGELL: Who is going to be adversely affected? Somebody has to get it in the neck on this. Who is going to be that lucky fellow?
>
> Mr. DEMPSEY: Well, I don't think so really. I think this is the situation in which everyone wins. Let me explain.
>
> . . . .
>
> Mr. DINGELL: Mr. Dempsey, I see some sleight of hand here but I don't see how it is happening. I applaud it but I would like to understand it. My problem is that you are going to go to a realistic system that is going to cost less but pay more in benefits. Now if you have accomplished this, I suggest we should put you in charge of the social security system.

Id. at 199, 201.

68. *See* notes 60-62 *supra* and accompanying text.

69. Jurisdictional Statement at 13, *supra* note 39.

70. *See* Brief for Appellant at 53-54, *supra* note 59.

71. 449 U.S. at 193 (Brennan, J., joined by Marshall, J., dissenting).

72. *See* note 65 *supra*.

73. Jurisdictional Statement at 33, *supra* note 39.

74. For political reasons, Congress may not have wanted to state explicitly that an effect of the Retirement Act would be to deprive annuitants of vested benefits. S. REP. No. 1163, *supra* note 33, at 1-2, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 5702.

C. *Analysis*

In upholding the windfall exclusion against the equal protection challenge, the Court applied the conceivable basis approach of the rational basis test.[75] The Court did not claim that Congress actually had the goal of creating equity among the annuitants, nor did it see this as important: "It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.' "[76] The goal of equity, although supplied by appellant and not by Congress, was enough to sustain the legislation because "Congress could properly conclude" there was a rational link between the exclusion and providing for equity among those who were to receive the windfall.[77]

The Court, acknowledging the confusion that surrounds the rational relationship test,[78] attempted to clarify the views of that test. The notion that legislation was to be tested against the purposes which accompanied it was emphatically rejected: "[T]his Court has never insisted that a legislative body articulate its reasons for enacting a statute."[79] The Court stated that *Dandridge v. Williams*[80] and *Jefferson v. Hackney*,[81] along with *Fritz*, established the proper application of the test.[82] *Dandridge* and *Jefferson*, like *Fritz*, were public benefit cases that employed the conceivable basis approach of rationality review.[83]

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75. *See* 449 U.S. at 174-78. Justice Brennan, while holding that the rational basis test called for testing classifications against the actual purposes of Congress, stated that the *Fritz* classification did not even rationally relate to the *post hoc* purpose of equity. *Id.* at 193-97 (Brennan, J., dissenting). It appears, however, that Justice Brennan tested the relationship between the offered purpose and the classification against a stricter standard than is proper for the rationality requirement. A social or economic statute does not violate equal protection strictures if the legislature rationally could have seen a link between purpose and classification. *See* note 18 *supra* and accompanying text. Justice Brennan tested the *Fritz* classification for an actual link. *See* 449 U.S. at 193-97 (Brennan, J., dissenting).

76. 449 U.S. at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).

77. *Id.* at 178.

78. "[T]his court . . . has not been altogether consistent in its pronouncements in this area." *Id.* at 174.

79. *Id.* at 179.

80. 397 U.S. 471 (1970).

81. 406 U.S. 535 (1972).

82. 449 U.S. at 176-77 n.10.

83. *Dandridge* dealt with a Maryland regulation that imposed a maximum limit on the total amount of Aid to Families with Dependent Children (AFDC) benefits any one family could receive. Beneficiaries with large families claimed that the regulation violated the equal protection clause. The Supreme Court held that the regulation was rationally related to the purpose of encouraging employment. 397 U.S. at 486-87. In *Jefferson*, the Court upheld a section of the Texas State Constitution that resulted in

As previously mentioned, the more deferential view of minimum scrutiny makes the task of the party attacking the legislation extremely burdensome.[84] The contestant will win only if no purposes are advanced which Congress could have seen as rationally related to the classification. While difficult, the challenger's task is not impossible. The Court will strike down legislation if it "manifests a patently arbitrary classification, utterly lacking in rational justification."[85] While the question of what constitutes arbitrariness has not been answered by the Court, *Fritz* went a long way in showing what is not arbitrary.

Justice Brennan, in his dissenting opinion, noted that strong evidence exists indicating that Congress did not deliberately create the windfall exclusion.[86] The exclusion not only is unsupported by legislative history, but it defeats an explicitly articulated goal of Congress: to protect those with vested interests.[87] The *Fritz* Court was unconvinced that Congress was unaware of what it accomplished because "[t]he language of the statute is clear, and we have historically assumed that Congress intended what it enacted."[88]

Relying on the assumption that Congress intends what it enacts, the Court did not abandon the proposition that irrational statutory classifications are unconstitutional.[89] The Court did not hold that classifications enacted by virtue of oversight invariably are rational. Rather, what the Court did was to set a standard by which legislation will be tested when an attempt is made to demonstrate congressional oversight.

If "[t]he language of the statute is clear,"[90] the Court will assume that the classification was intentional and not a product of oversight. Thus, the only chance a litigant has of showing inadvertence is if the statute is unclear. What would be considered unclear is not specified. Apparently, few statutes would qualify, as the windfall classification, a complex and confusing piece of legislation,[91] was

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lower payments for AFDC recipients than for recipients of other welfare programs. The Court, citing *Dandridge*, held that it was not irrational for the state to conclude that the young are more adaptable than the sick and elderly. 406 U.S. at 549-51.

84. *See* note 21 *supra* and accompanying text.

85. Flemming v. Nestor, 363 U.S. 603, 611 (1960).

86. *See* 449 U.S. at 189-93 (Brennan, J., dissenting).

87. *See* note 65 *supra*.

88. 449 U.S. at 179.

89. *See id.* at 177.

90. *Id.* at 179.

91. The legislative history demonstrates that the legislators found the statute confusing. *See* note 67 *supra*.

considered to be clear. Unless the statutory scheme is less clear than the windfall classification, evidence of congressional oversight is irrelevant in an attempt to show a lack of rational connection between classification and purpose. *Fritz* closed off an avenue through which irrationality might be demonstrated; as a result, rationality review, already deferential, becomes even more so. The Court essentially discarded what one commentator has considered the only legitimate function of minimum scrutiny: to guard against "inadvertent arbitrariness. . . ."[92]

Fritz did not explicitly alter the role of minimum scrutiny. The Court claimed that it will strike down all arbitrary classifications that come before it.[93] Because the Court found the *Fritz* classification rational, however, this assurance is without substance. *Fritz* virtually eliminated the possibility that a classification might be found to exist by virtue of congressional oversight. An oversight cannot be responsible for the classification; thus, the classification must have been enacted for a reason. Once the Court has decided that a classification has a purpose, the requirement of rationality is easily satisfied. A merely plausible purpose is all that need be supplied. As suggested by Justice Brennan, "the mode of analysis employed by the Court in this case virtually immunizes social and economic legislative classifications from judicial review."[94]

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92. *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1074 (1979).

93. "The . . . question is whether Congress achieved its purpose in a patently arbitrary or irrational way." 449 U.S. at 177. The implication is that if Congress had acted arbitrarily or irrationally, the legislation would have been invalidated.

94. *Id.* at 183 (Brennan, J., dissenting). Justice Brennan accused the *Fritz* majority of abandoning an essential step in applying the rational basis test: identifying the purpose of the statute. *Id.* at 186-87. It is only then, Justice Brennan continued, that the Court can determine whether the requirement for rationality is met. *Id.* Justice Brennan found the Court's reasoning to be tautologous: "It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose." *Id.* at 187.

While the *Fritz* rationale makes it nearly impossible to demonstrate irrationality, the holding did not go as far as Justice Brennan claimed. *Fritz* did identify a statutory purpose.

Under Justice Brennan's view of the Court's reasoning, the very existence of a classification implies a rational purpose. Thus, there always would be a rational link between the purpose and classification. Justice Brennan's view, however, is incorrect because the Court concluded only that a classification implies a purpose. *See id.* at 177. The Court did not state that the implied purpose necessarily would be rational, and thus, left itself the option to declare a classification irrational.

IV. *WILSON*

A. *Facts*

One week after *Fritz* was decided, the Court heard oral argument on *Schweiker v. Wilson*,[95] another equal protection case involving the rational basis test. The result in *Wilson* was the same as the result in *Fritz*, but the rationale employed was not. A remarkable element of *Fritz* was the care the Court took to define the proper role of minimum scrutiny: Classifications need not be tested against the legislature's articulated purpose.[96] An equally noteworthy element of *Wilson* is that this view, supported by a clear majority in *Fritz*, was not evidenced in *Wilson*.

In 1972, Congress amended the Social Security Act to create the Supplemental Security Income (SSI) program,[97] the stated purpose of which was to provide a subsistence allowance to the aged, blind, and disabled.[98] Inmates of public institutions were excluded from SSI coverage.[99] Congress assumed that "[f]or these people most subsistence needs are met by the institution and full benefits are not needed."[100] A partial exception was made to this exclusion: Residents of public medical institutions were entitled to $25 per month if those institutions were receiving Medicaid payments on their behalf.[101] This comfort allowance was intended to allow recipients to "purchase small comfort items not supplied by the institution."[102] Individuals who resided in institutions not receiving Medicaid benefits were excluded from SSI benefits.[103] The Medicaid program provides for most residents in public medical facilities. The program, however, excludes individuals between the ages of twenty-one and sixty-five who reside in public institutions for mental illness.[104]

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95. 450 U.S. 221 (1981).

96. 449 U.S. at 179.

97. 42 U.S.C. §§ 1381-1383c (1976). SSI largely replaced assistance programs for the aged, blind, and disabled contained in Titles I, X, XIV, and XVI of the Social Security Act. Old Age Assistance Act, Pub. L. No. 74-271, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-306 (1976)); Aid to the Blind, Pub. L. No. 74-271, ch. 531, 49 Stat. 645 (1935) (codified as amended at 42 U.S.C. §§ 1201-1206 (1976)); Aid to the Permanently and Totally Disabled, Pub. L. No. 81-734, ch. 809, 64 Stat. 555 (1950) (codified as amended at 42 U.S.C. §§ 1351-1355 (1976)); *see* 449 U.S. at 223 n.1.

98. *See* S. REP. No. 1230, 92d Cong., 2d Sess., 12 (1972) [hereinafter cited as S. REP. No. 1230].

99. *See* 42 U.S.C. § 1382(e)(1)(A) (1976).

100. S. REP. No. 1230, *supra* note 98, at 386.

101. *Id.*

102. *Id.*

103. 42 U.S.C. § 1382(e)(1)(B) (1976).

104. 42 U.S.C. § 1396d(a)(17)(A) (1976).

Members of this latter group challenged the legislation in the United States District Court for the Northern District of Illinois, claiming that the SSI exclusion "constitute[d] a violation of their rights to equal protection. . . ."[105] The district court found that the statute classified according to mental health[106] and, therefore, subjected the SSI exclusion to an intermediate level of scrutiny.[107] The court held that the exclusion did not withstand intermediate scutiny and invalidated the statute.[108] The Supreme Court, in a five-to-four decision, reversed.[109]

B. *Analysis*

The Supreme Court did not reach the question of the appropriate level of review for classifications based upon mental health because it found that the statute did not classify on that basis.[110] The Court found the classification to be based upon whether an individual resided in a public institution that received Medicaid benefits on behalf of the individual.[111] The Court then applied the rational basis test, inquiring whether "the classification . . . [advanced] legitimate legislative goals in a rational fashion."[112]

If *Wilson* had followed the rule of *Fritz*, and had disregarded the actual purpose of Congress, the rationality requirement easily would have been satisfied. This deferential approach, however, was not used: "[T]he classificatory scheme chosen by Congress [must] rationally [advance] a reasonable and *identifiable* governmental objective . . . ."[113] The Court then searched the legislative history of the statute for the goal Congress was attempting to achieve when it excluded individuals in facilities not receiving Medicaid benefits on their behalf.[114] While a goal was never identified explicitly by Congress, the Court found the actual purpose of the Medicaid exclusion to be the same as that identified by Congress when it originally ex-

105. Wilson v. Harris, 478 F. Supp. 1046, 1048 (N.D. Ill. 1979), *rev'd sub nom.* Schweiker v. Wilson, 450 U.S. 221 (1981).

106. *Id.* at 1050.

107. *Id.* at 1053. *See* notes 7-8 *supra* and accompanying text.

108. 478 F. Supp. at 1054. *Wilson* was appealed directly to the Supreme Court in accordance with 28 U.S.C. § 1252 (1976).

109. 450 U.S. at 239.

110. *Id.* at 231. *But see id.* at 241 n.2 (Powell, J., dissenting). While Justice Powell, like the majority, did not reach the issue, he thought it "inescapable that appellees are denied the benefit because they are patients in mental institutions." *Id.*

111. *Id.* at 232-33.

112. *Id.* at 234.

113. *Id.* at 235 (emphasis added).

114. *See id.* at 235-36.

cluded public mental institutions from Medicaid coverage: "Congress believed the States [had] a 'traditional' responsibility to care for those institutionalized in public mental institutions."[115] The Court found that Congress was aware of this limitation on Medicaid funding when it created the SSI exclusion, and thus "the decision to incorporate the Medicaid eligibility standards into the SSI scheme must be considered Congress' deliberate, considered choice."[116] The Court upheld the statute because it found that the actual purpose of the classification was not irrational.[117]

Wilson not only rejected the notion, advanced in *Fritz*, that Congress' actual goals are irrelevant,[118] but also differed from *Fritz* in that the Court took seriously the possibility of legislative oversight. As in *Fritz*,[119] there was evidence that the classification was not created deliberately, that Congress had inadvertently excluded appellees from partial SSI coverage.[120] Whereas *Fritz* readily dispatched this issue with the statement, "Congress intended what it enacted,"[121] the *Wilson* Court searched the legislative history for a "deliberate, considered choice."[122]

While it appears that the Court did not need much to find this deliberateness,[123] that the Court did look, coupled with the Court's emphasis on actual purposes, makes *Wilson* much less deferential than *Fritz*. These different approaches to the rationality require-

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115. *Id.* at 236-37.

116. *Id.* at 235.

117. *Id.* at 238-39.

118. 449 U.S. at 179.

119. *See* notes 60-69 *supra* and accompanying text.

120. The only articulated purpose for the exclusion was to prohibit prisoners from getting the stipend. *See* H.R. REP. NO. 231, 92d Cong., 1st Sess., 150, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 5136. Appellees claim that the exclusion of the *Wilson* class resulted from the bill's inordinate length and complexity. *See* Brief for Appellees at 37-39, Schweiker v. Wilson, 450 U.S. 221 (1981) [hereinafter cited as Brief for Appellees].

121. 449 U.S. at 179.

122. 450 U.S. at 235.

123. The Court determined that Congress deliberately created the classification because the "Committee hearings contained testimony advocating extension of both Medicaid and SSI benefits to all needy residents in public mental institutions." *Id.* at 236. The Court stated that this was evidence that Congress was aware of the Medicaid limitations when it placed those same limitations in the SSI program. *Id.*; *see Social Security Amendments of 1971; Hearings on H.R. 1 Before the Senate Comm. on Finance*, 92d Cong., 1st & 2d Sess. 2180, 2408-10, 2479-86, 3257, 3319 (1972). The Court apparently did not consider the absence of explicit recognition of the classification as significant. By refusing to view silence as evidence of inadvertence, the Court eliminated one of appellees' major arguments: that a classification which harms a politically powerless group is more likely to be evidence by silence than by explicit mention. *See* Brief for Appellees at 32-34, *supra* note 120.

ment, advanced in these two cases by some of the same Justices,[124] not only make it impossible to define what the rational basis test is, but also to predict which approach will be employed by the Court. Justice Powell sensed the need for a coherent and consistent equal protection test of social and economic legislation and attempted to fashion one in his *Wilson* dissent.[125]

V. A MIDDLE GROUND: *WILSON* AND THE FAIR AND SUBSTANTIAL TEST

The *Wilson* majority concluded that the reason SSI benefits were not granted to residents of public mental institutions was because Congress intended that the states be responsible for such institutions.[126] Justice Powell, joined by Justices Brennan, Marshall, and Stevens in the *Wilson* dissent, saw no purpose for the exclusion.[127] Justice Powell, by virtue of the Court's recent equal protection analyses,[128] had two approaches available to him. He could have employed the conceivable basis standard to determine whether Congress rationally could have seen a connection between a proffered purpose and the classification. This, almost assuredly, would have resulted in validation of the legislation.[129] Justice Powell also could have tested the classification against an articulated legislative purpose.[130] As he could not find such a purpose, this approach would have resulted in invalidation of the legislation.

Justice Powell found neither approach appropriate and tested the legislation against a third standard: that "the classification bear a fair and substantial relation to the asserted purpose."[131] Justice Powell proposed that this level of scrutiny be employed when the purpose of legislation has not been indicated by the legislature, but has been advanced, after the fact, by the defending litigant.[132]

The dissent did not define explicitly the fair and substantial test, except that it is "marginally more demanding" than the rational basis test.[133] What makes the test more demanding, however, is clear

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124. Chief Justice Burger and Justices Blackmun, Stewart, White, and Rehnquist voted to sustain both statutes.

125. 450 U.S. at 239 (Powell, J., dissenting).

126. *Id.* at 236-37.

127. *Id.* at 239-40 (Powell, J., dissenting).

128. *See* text accompanying notes 19-24 *supra*.

129. *See* text accompanying notes 19-21 *supra*.

130. *See* text accompanying note 24 *supra*.

131. 450 U.S. at 245 (Powell, J., dissenting).

132. *Id.* at 244-45.

133. *Id.* at 245.

from the dissent's analysis of classification and purpose. It is not enough that Congress rationally could have thought there was a connection between the two; there must be a connection in fact.[134] The articulated purpose test and the conceivable basis test, although different as to how a purpose is selected, are identical in one respect: A classification need not be rationally related to its purpose.[135] The fair and substantial test thus is a more restrictive test. When this test is employed, the evidence must demonstrate an actual link between purpose and classification.[136]

Justice Powell proposed the fair and substantial test in order to provide the Court with a more restrictive method of review than that provided by the conceivable basis test.[137] He stated that while a deferential approach to social and economic legislation is necessary,[138] a lack of substantive review is the opposite of deference: "When a legislative purpose can be suggested only by the ingenuity of a government lawyer . . . a reviewing court may be presented not so much with a legislative policy choice as its absence."[139]

The conceivable basis test provides virtually no check on irrational legislative enactments. Any purpose that the legislature rationally could have had will suffice;[140] it is irrelevant whether the legislature actually had that purpose.[141] While Justice Powell's test does not prevent the Court from testing classifications against any conceivable purpose, it does subject such purposes to a higher standard of review and thus provides protection against truly irrational classifications.[142]

While Justice Powell's apparent purpose in advancing the test was to modify the conceivable basis approach, the fair and substantial test also can be viewed as providing a compromise between the

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134. "[I]t is argued [that] Congress rationally could make the judgment that the States should bear the responsibility for any comfort allowance . . . . There is no logical link, however, between these two responsibilities." *Id.* at 246.

135. *See* note 18 *supra* and accompanying text.

136. *See* 450 U.S. at 246 (Powell, J., dissenting).

137. *See id.* at 244-45 (Powell, J., dissenting).

138. *See id.* at 243. "The Court must not substitute its view of wise or fair legislative policy for that of the duly elected representatives of the people." *Id.*

139. *Id.* at 244 (footnote omitted).

140. *See* note 18 *supra* and accompanying text.

141. 449 U.S. at 179.

142. Justice Powell's test, like the conceivable basis test, could result in the validation of a classification Congress inadvertently had created. The difference is that the fair and substantial test would not sustain a statute that is irrational, while the conceivable basis standard would uphold that same statute if the legislature rationally could have found a connection between the purpose and the classification.

conceivable basis and articulated purpose approaches. The latter approach, workable when a classification is accompanied by a legislative purpose, does not provide for the situation where there is no evidence of legislative purpose. If the Court invalidated statutes where no purpose was present, the invalidation would not be for lack of rationality but because the legislature neglected to make its purposes known.

The fair and substantial test provides for the situation in which no goal is stated. Unlike the articulated purpose approach, nonarticulated goals could be offered. Unlike the conceivable basis approach, however, the use of those goals would not make validation virtually automatic; the goals would have to be fairly and substantially related to the proffered purpose.

The fair and substantial test thus provides the Court with a remedy to the articulated purpose-conceivable basis conflict. While five Justices did not vote with Justice Powell,[143] they did not reject his approach. Justice Powell's test would be employed only when no indication of legislative purpose exists.[144] The *Wilson* majority, however, found a purpose in the legislative history,[145] and thus had no opportunity to decide whether the fair and substantial test was appropriate.

That five Justices have yet to decide on the issue could bode well for the Court's acceptance of Justice Powell's test. This, however, highlights the weakest aspect of the test: Even if the Court did adopt Justice Powell's approach, the Court still could remain deferential to the legislature simply by finding some indication of purpose. *Wilson* may be an example of how little is needed to find this indication.[146] Justice Powell's test could provide the Court with an effective method of review of social and economic legislation, but only if the Court does not strain to find legislative purpose where none is indicated.

If the Court can resolve the problem of when legislative purpose is indicated, Justice Powell's dissent provides an alternative to the conceivable basis and articulated purpose approaches. His alternative gives the Court an opportunity to state definitively how it will review social and economic legislation that is unaccompanied by legislative purpose.

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143. The five Justices were Chief Justice Burger and Justices Blackmun, Stewart, White, and Rehnquist.

144. 450 U.S. at 244-45.

145. *See id.* at 236-37.

146. *See* note 115 *supra*.

VI. CONCLUSION

In the area of social and economic legislation, the constitutional requirement of equal protection mandates that classifications be rationally related to a legitimate legislative purpose.[147] If the Supreme Court finds that the legislature could have seen a logical connection between the purpose and the classification, the requirement of rationality will be upheld.[148] Before the Court can discern whether a classification is rational, however, it first must identify a purpose against which the classification is to be judged.[149] The Court has developed two methods by which to identify legislative purposes. The first, the conceivable basis approach, allows the Court to postulate or accept any purpose.[150] The second, the articulated purpose approach, requires that the Court test the classification against a purpose articulated by Congress.[151] The method that the Court chooses to employ could mean the difference in whether the challenged legislation stands or falls. Despite the obvious difference in the approaches, the Court appears to employ arbitrarily either test in similar situations, leaving litigants to speculate what the Court might do.

This situation was evidenced in *United States Railroad Retirement Board v. Fritz*[152] and *Schweiker v. Wilson*.[153] While the statutes were upheld in both cases, the Court employed different rationales to achieve the results.[154] Both *Fritz* and *Wilson* concerned equal protection challenges to social welfare legislation. Evidence existed in both cases that indicated the disputed classifications were a result of congressional oversight,[155] and thus were irrational. Despite these similarities, the Court employed the conceivable basis test in *Fritz* and the articulated purpose approach in *Wilson*.

Another major difference between these cases is the way each handled the issue of the inadvertent creation of classifications. *Fritz* virtually eliminated any possibility of demonstrating irrationality

147. *See* notes 16-17 *supra* and accompanying text.

148. *See* note 18 *supra* and accompanying text.

149. *See* 449 U.S. at 184 (Brennan, J., dissenting). Justice Brennan goes on to say that the *Fritz* majority eliminates this step. *See also* note 94 *supra*.

150. *See* notes 19-21 *supra* and accompanying text.

151. *See* note 24 *supra* and accompanying text.

152. 449 U.S. 166 (1980).

153. 450 U.S. 221 (1981).

154. *Fritz* tested the legislation against a *post hoc* purpose, while *Wilson* looked to the actual congressional purposes. *See* notes 55-59 & 113-17 *supra* and accompanying text.

155. *See* notes 67 & 120 *supra* and accompanying text.

through evidence of legislative oversight by holding that Congress intends what it enacts.[156] As Congress acted with intention, there must be a purpose for the classification, and the Court then allows one to be offered.[157] *Wilson* treated the question of inadvertence more seriously. Although the Court did find the classification's enactment purposeful,[158] it did so by looking to the legislative history[159] and not by relying on the truism that Congress intends what it enacts.

In order to end the confusion over rational basis as evidenced by *Fritz* and *Wilson*, Justice Powell, in the *Wilson* dissent,[160] offered a third approach. Justice Powell's test liberalizes the articulated purpose approach by allowing legislation to be tested against a *post hoc* purpose. This asserted purpose, however, would not be tested by the rational basis formula of whether the legislature could have found a rational connection between the classification and the purpose. Justice Powell's test also modifies the conceivable basis test and requires a *post hoc* purpose to bear a fair and substantial relation to the classification.[161] This stricter test would mean that a logical connection between classifications would have to exist in fact.[162]

Justice Powell's fair and substantial test offers a way out of this seemingly arbitrary selection process. The advantages of Justice Powell's test are persuasive. The test allows the Court to be deferential while affording protection against arbitrary enactments, and it provides the Court with an opportunity to adopt a coherent, consistent approach to equal protection challenges to social and economic legislation. The Court, in order to benefit itself, potential litigants, and the public, should adopt Justice Powell's fair and substantial test.

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156. 449 U.S. at 179.
157. *Id.* at 177.
158. 450 U.S. at 236.
159. *Id.* at 235-36.
160. *Id.* at 239 (Powell, J., dissenting).
161. *Id.* at 244-45.
162. *Id.* at 246.