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"Newer" Equal Protection: The Impact of the Means-Focused Model

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COMMENTS

"NEWER" EQUAL PROTECTION: THE IMPACT OF THE MEANS-FOCUSED MODEL

INTRODUCTION

The concepts of "old" and "new" equal protection are familiar to observers of constitutional law. Old equal protection connotes "minimal rationality," while new equal protection stands for "strict scrutiny." In most instances a legislative classification is subjected to the old criterion. Under this doctrine a classification will not be invalidated if any reasonable state of facts may be conceived to justify it.[1] However, where a "suspect classification"[2] or a "fundamental interest"[3] is involved the new test is applied, and the statutory discrimination will be voided unless the state can demonstrate the existence of a "compelling interest." Invariably, selection of the standard dictates the result which follows: minimal rationality sustains the classification; strict scrutiny nullifies the classification. Thus, the important question in any equal protection decision is which test should the court invoke.

In his 1972 article in the *Harvard Law Review,* Gerald Gunther described the emergence of a third standard.[4] He noted that this doctrine, called "newer" equal protection, derives from several cases decided by the Supreme Court during its 1971 term.[5] According to

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

2. The following have been identified as suspect classifications: alienage, illegitimacy, indigency, and national origin. San Antonio Independent School Dist. v. Rodriquez, 93 S. Ct. 1278, 1311 & nn.4-7 (1973) (Stewart, J., concurring).

3. The following have been identified as fundamental interests: the right to vote, the right to procreate, rights with respect to criminal procedure, first amendment rights, and the right to travel interstate. *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1127-28 (1969). *See also* San Antonio Independent School Dist. v. Rodriquez, 93 S. Ct. 1278, 1311 n.8 (1973) (Stewart, J., concurring).

4. Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].

5. James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

Reed v. Reed,[6] the most important of those opinions, this standard is satisfied when a statutory classification is "reasonable, not arbitrary, and [rests] upon some ground of difference having a fair and substantial relation to the object of the legislation."[7] Although this language seems to suggest the application of old equal protection,[8] it produces results more consistent with new equal protection whereby statutes are often declared unconstitutional.[9] Gunther characterizes this criterion of review as the "means-focused" model[10] since it is concerned solely with the means by which the legislature furthers its goals, not the goals themselves.[11] Unlike old equal protection, the Court evaluates the means in terms of stated legislative objectives rather than imagining various hypothetical justifications.[12] Unlike new equal protection, the gauge for the acceptability of the means is the legislative purpose, not constitutional interests which are unavoidably related to the value systems of judges.[13] This model, in fact, bridges the gap between new equal protection and old equal protection not by abandoning the new but by raising the level of the old from virtual abdication to genuine judicial inquiry.[14]

Gunther's model is summarized by the following propositions: the model is applicable to a wide range of statutes, including most social and economic legislation;[15] it is most likely to be utilized in "avoidance" situations[16] where the court wishes to avoid discussion of difficult issues associated with strict scrutiny;[17] to sustain a classification under newer equal protection the means must substantially further legislative ends;[18] significant over- or under-inclusiveness in the classification will not be tolerated;[19] the means are measured against

6. 404 U.S. 71 (1971).
7. *Id.* at 76, *citing* F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
8. *See* F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (decided under old equal protection).
9. In all but one of the cases under discussion here the classification was invalidated.
10. Gunther 20.
11. *Id* at 21.
12. *Id.*
13. *Id.*
14. *Id.* at 24.
15. *Id.* at 23.
16. *Id.* at 26.
17. *See id.* at 29.
18. *Id.* at 20.
19. *Id.* at 20, 33.

state purposes as set forth by an authoritative state source,[20] and all purposes are considered whether of a primary or ancillary nature.[21] As mentioned earlier, when a court employs the model it must not hypothesize legislative rationales for the classification; the reasonableness of a statute is to be judged solely on the basis of materials offered to the court.[22] When the model is applied, the greatest difficulty is determining the line of demarcation between value judgments involved in assessing legislative goals and those judgments involved in evaluating the ways in which these goals are to be furthered.[23]

The purpose of this comment is to evaluate how this model has been enlisted in subsequent court opinions. Numerous cases have relied upon the rulings of the 1971 term, but because the facts were so similar to these rulings the appropriate standard of review is obfuscated.[24] Similarly, many decisions cite the *Reed* test quoted previously,[25] but proceed to declare that if there is any reasonable basis for the classification the alleged statutory discrimination must be upheld.[26] Several recent suits have recognized the emergence of the means-focused model, but have refused to use it to resolve equal protection issues.[27] A few opinions have, however, actually acknowledged and applied the model: *Boraas v. Village of Belle Terre*,[28] *Brown v. Merlo*,[29]

20. *Id.* at 46-47. These include the preamble to the statute, the legislative history of the statute, and a pronouncement by a state official. *Id.* at 47.

21. *Id.* at 20, 33.

22. *Id.* at 21.

23. *Id.* at 48. *See, e.g.*, text accompanying notes 58-59 *infra.*

24. *See, e.g.*, People v. Byrnes, 7 Ill. App. 3d 735, 288 N.E.2d 690 (2d Dist. 1972); Commonwealth v. Wolenski, 449 Pa. 173, 296 A.2d 31 (1972).

25. *See* text accompanying note 7 *supra.*

26. *See, e.g.*, Friedrich v. Katz, 73 Misc. 2d 663, 341 N.Y.S.2d 932 (Sup. Ct. 1973); Archer v. Mayes, 194 S.E.2d 707, 710 (Va. 1973), *citing* McGowan v. Maryland, 366 U.S. 420, 426 (1961).

27. *See, e.g.*, City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973); Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973). Both of these cases recognized a test stronger than old equal protection but weaker than new equal protection. Yet, each refused to apply the model, opting instead for the traditional standard of review. *See also* Demiragh v. Devos, 476 F.2d 403 (2d Cir. 1973) where the court acknowledges the model, but states that the statute would fail under new, newer, or old equal protection. *Id.* at 405.

28. 476 F.2d 806 (2d Cir. 1973) (suit contesting the constitutionality of a village zoning ordinance which restricted occupancy of one-family residences to traditional families or groups of not more than two unrelated individuals). The dissent in this case also discusses the means-focused model.

29. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (suit was brought challenging the constitutionality of California's "guest statute" which prohibited an automobile guest from recovering for injuries inflicted by his negligent host without a showing of willful misconduct or intoxication).

Green v. Board of Education,[30] *Schwartz v. Talmo,*[31] *Aguayo v. Richardson,*[32] and *Eslinger v. Thomas.*[33] These are the cases with which this comment will be concerned.

HAVE THESE CASES CONFORMED TO THE MODEL?

A. *The Model Is Applicable to a Wide Range of Statutes—Including Most Social and Economic Legislation*

Gunther's observation that the model can be administered to a melange of statutes is substantiated by the six cases under consideration.[34] The decisions deal with enactments relating to zoning,[35] negligence,[36] workmen's compensation,[37] welfare,[38] maternity leaves,[39] and criteria for working as a page in a state legislature.[40] In each opinion invocation of the model invalidated the statute,[41] with the exception of *Aguayo.* However, this anomaly is to be expected. In *Aguayo* the New York State Commissioner of Social Services and the State Department of Social Services initiated two experimental back-to-work projects for employable members of families receiving assistance under the Aid to Families with Dependent Children (AFDC) program. One of them, the Public Service Work Opportunities Project (PSWOP), included approximately 25 percent of the state's AFDC cases; while

30. 473 F.2d 629 (2d Cir. 1973) (suit against a resolution of the board of education which required every teacher who became pregnant to take a maternity leave beginning at the sixth month of pregnancy).

31. 295 Minn. 356, 364, 205 N.W.2d 318, 324 (1973) (MacLaughlin, J., dissenting) (challenge to an amendment to Minnesota's workmen's compensation statute which denied compensation for suicide even though causally related to employment).

32. 473 F.2d 1090 (2d Cir. 1973) (action filed contesting the constitutionality of requiring only a small percentage of the state's AFDC recipients to participate in back-to-work programs).

33. 476 F.2d 225 (4th Cir. 1973) (challenge of a resolution of the South Carolina Senate which prohibited the employment of women as pages).

34. While all of these opinions deal with so-called "social and economic" legislation, none of them represents a return to the discarded notions of substantive due process. That is, they do not seriously interfere with the states' power to legislate against injurious business and commercial practices. *See* Gunther 24. *See generally* Lincoln Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535-37 (1949).

35. Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973).

36. Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

37. Schwartz v. Talmo, 295 Minn. 356, 205 N.W.2d 318 (1973).

38. Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973).

39. Green v. Board of Educ., 473 F.2d 629 (2d Cir. 1973).

40. Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973).

41. In the *Schwartz* case the statute was sustained, but the dissenting judge, who applied the model, voted to void the statute.

the other, the Incentives for Independence (IFI), covered about 2.5 percent of AFDC and Home Relief cases. Gunther would assert that the model should not be applied to this type of legislation, since determining the rationality of the means here is not a judicially manageable question: the legislature could have responded to the problem of a rising welfare caseload in a number of ways, with any allocation decision as reasonable as any other.[42] As a matter of fact, the *Aguayo* court was uncertain as to whether newer equal protection or old equal protection was applicable, and held that the program was constitutional regardless of which standard governed.[43]

B. *The Model Will Most Likely Be Employed in "Avoidance" Situations*

As cited above, a court should opt for the means-focused model to avoid discussion of perplexing issues associated with strict scrutiny.[44] Pressures for avoidance arise wherever employment of the new equal protection standard requires the court to make choices in an uncharted area of the law.[45] Gunther states that, of the cases decided during the 1971 term, *Eisenstadt v. Baird*[46] and *Reed v. Reed*[47] are the best examples of the avoidance technique.[48] In *Eisenstadt* there was an attempt to "expand the boundaries of the amorphous right of privacy"[49] of *Griswold v. Connecticut*,[50] while in *Reed* the Court was urged to declare sex a suspect classification for purposes of invoking new equal protection.[51] Neither of these questions was reached, however, since resort to the model nullified each statute.[52] The influence of avoidance predominated in these two decisions because the issues shunned were complex, value-laden, and would have pushed the Court into new areas of the law.[53]

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42. Gunther 24. The only other situation where the model should not be applied to social and economic legislation arises when the data are exceedingly technical and complex. *Id.*
43. 473 F.2d at 1109-10.
44. *See* text accompanying notes 16-17 *supra.*
45. *See* Gunther 26.
46. 405 U.S. 438 (1972).
47. 404 U.S. 71 (1972).
48. Gunther 29-30.
49. *Id.* at 29 & n.139.
50. 381 U.S. 479 (1965).
51. Gunther 29 & n.138.
52. *See id.* at 30.
53. *Id.* at 29.

Turning now to the *Boraas* case, it is apparent that the model was employed to avoid discussion of the constitutionality of the zoning ordinance which denied occupancy of one-family dwellings to more than two unrelated persons:

> Fortunately we do not have to decide whether there has been an infringement of the right of privacy or travel because we believe that we are no longer limited to the either-or choice between the compelling state interest test and the minimum scrutiny [test] . . . .[54]

Similarly, avoidance pressures are evident in *Brown,* where there was a challenge to California's guest statute. Here the use of strict scrutiny would have demanded a holding that a discrimination against automobile guests is a suspect classification or the right to sue for negligently inflicted injuries is a fundamental right. Making either of these judgments would have constituted a considerable departure from prevailing doctrine,[55] but application of the model avoids these difficult questions.

In the *Green* and *Eslinger* cases utilization of strict scrutiny would have required a declaration that sex is a suspect classification. Since the Supreme Court failed to do this in *Reed,* lower courts may not rely on a new equal protection argument to condemn a classification based upon sex. Hence the courts in these cases were practically compelled to shun discussion of the strict scrutiny standard.

It should be mentioned that in *Green* the other branch of strict scrutiny could easily have been invoked based on a prior Supreme Court ruling which regarded the right to work at one's chosen occupation as fundamental.[56] One might wonder, then, why the court would prefer the model to new equal protection. Perhaps, being aware of the *Reed* decision, it felt obligated to employ the means test. In any event, since use of strict scrutiny would not have presented a problem, avoidance played no part in this aspect of the opinion.

Avoidance pressures were much stronger in the *Schwartz* dissenting opinion. The statute denied compensation for suicide resulting from employment injuries, therefore resort to new equal protection would have required the identification of a right to recover under workmen's compensation as fundamental or the treatment of injured

54. 476 F.2d at 814.

55. For an indication of how the two categories would have to be expanded, see notes 2-3 *supra.*

56. Truax v. Raich, 239 U.S. 33 (1915).

employees who commit suicide as a suspect classification. There are no precedents for either conclusion, so Judge MacLaughlin would have been forced to construct a difficult and controversial argument. Instead, he employed Gunther's model and voted to invalidate the statute.

Finally, one must ask whether newer equal protection was applied to the welfare situation in *Aguayo* due to the appeal of avoidance. Since minimal rationality was the alternative review standard here, it is clear that the model was not invoked to avoid consideration of the issues associated with strict scrutiny. Apparently, the court discussed application of the newer equal protection because it feared that means-scrutiny might have *replaced* old equal protection.[57] Regardless of which standard governed, the court stated that the result would be the same.[58] Hence *Aguayo,* and perhaps *Green,* are the only decisions where "avoidance" pressures were not at work.

C. *Legislative Means Must Substantially Further Legislative Ends*

This is the basic requirement of the model. Unlike old equal protection, a mere rational relationship between means and ends will not suffice. But contrary to new equal protection, the court is not concerned with the nature of the ends. The sole inquiry is whether the means substantially further these ends.

In *Boraas* the court of appeals questioned the legitimacy of the zoning ordinance's purpose as articulated by the district court—protection and maintenance of the "traditional family pattern."[59] However, it later assumed arguendo that this constituted a valid purpose and stated that it could not find a "shred of rational support" for the means which were employed to accomplish this objective.[60] Such strong language, coupled with the court's suspicion of the zoning ordinance, indicates that the analysis was not confined to a discussion of means. The court failed to distinguish between narrow value judgments involved in evaluating means and broad value judgments involved in choosing among ends—a difficulty which Gunther foresaw.[61]

57. 473 F.2d at 1109.
58. *Id.*
59. 476 F.2d at 815.
60. *Id.* at 816.
61. *See* note 23 *supra.*

Similarly, although the court in *Brown* demonstrated that, in 1973, the state purpose of protecting hospitality has little merit,[62] it accepted the validity of this interest and of the interest in preventing collusive lawsuits.[63] The court then proceeded to determine whether or not the classification (barring recovery for injuries inflicted by a negligent driver-host) substantially furthers these objectives. Hence, it can be said that its inquiry was restricted to the narrow value judgments involved in a means-oriented test, and thus conformed extremely well to the basic requirement of the model.

The resolution in *Green* requiring a teacher to take a maternity leave beginning at the fifth month of pregnancy was examined in relation to the state purposes articulated in the lower court opinion.[64] There was a hint of value judgment by the court when it stated that only two of the purposes (continuity of classroom education and administrative convenience) were "substantial."[65] Nevertheless, as in *Brown,* the means test in this case parallels the model quite closely.

In *Schwartz* the dissenting judge argued that the legislative goal of easing administrative burdens did not warrant denial of recovery for employment-caused suicide.[66] The administrative responsibilities of obtaining adequate proof of suicide and of holding a hearing should have been dealt with directly, not by flatly barring recovery.[67] However, he went on to suggest that if another legislative justification could be found, the classification would be sustained.[68] From this remark one can conclude that the judge was more concerned with legislative ends (the state's purposes) than with legislative means. He too encountered difficulty in restricting the relevant scrutiny to a narrow evaluation of means.

In the remaining two cases, *Eslinger* and *Aguayo,* there was close conformity with the model. In applying the *Reed* test, the court in *Eslinger* found no "fair and substantial" relation between the object of the resolution (combatting the appearance of impropriety which

62. 8 Cal. 3d at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397. Formerly, an injured guest's lawsuit against his host might have been characterized as an act of "ingratitude" and thus detrimental to hospitality. However, in an era in which nearly all automobile drivers have liability insurance, there is no "ingratitude" in suing your host's *insurer. Id.*

63. *Id.* at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.

64. 473 F.2d at 634. *See* text accompanying notes 76 & 83 *infra.*

65. *Id.* at 635.

66. 295 Minn. at 365-66, 205 N.W.2d at 325-26 (MacLaughlin, J., dissenting).

67. *Id.* at 366, 205 N.W.2d at 326.

68. *Id.*

might flow from the employment of female pages) and the ground of difference (sex) upon which the classification rested.[69] The court demonstrated the fallacy of basing this classification upon sex, and made no attempt to question the merit of the legislature's concern with its public image. Thus, it focused entirely on the appropriateness of the chosen means. Similarly, in *Aguayo* the court decided that the state's goal (making improvements in the welfare system) was "suitably furthered"[70] by the experimental back-to-work program. There was a brief hint of value judgment on the part of the court when it stated that this purpose is as legitimate as any other possible state purpose.[71] Thus *Aguayo,* like every other case but *Eslinger,* demonstrates that the model is seldom employed in its "pure" form. Courts have considerable trouble in limiting their analysis solely to a discussion of means.

D. *The Court Is Unwilling To Imagine Legislative Justifications: Means are Measured Against All Purposes Asserted by the State*

The court in *Boraas* examined all of the purposes asserted by the village in support of the zoning ordinance:[72] (1) protection and maintenance of the prevailing family pattern, (2) control of population density, (3) escalation of rental rates, (4) control of congestion and noise, and (5) stability of the community. Since the majority believed that a court is required to determine whether the legislative classification *in fact* has a substantial relationship to a lawful objective,[73] it did not imagine any justification whatsoever.

In *Brown* California alleged that the guest statute promoted two state interests: the protection of hospitality and the elimination of collusive law suits.[74] The California Supreme Court dealt with both of these aims,[75] but explicitly refused to hypothesize any legislative rationales of its own:

> Although by straining our imagination we could possibly derive a theoretically "conceivable," but totally unrealistic, state purpose that

69. 476 F.2d at 232.
70. 473 F.2d at 1109, *citing* Chicago Police Dept. v. Mosley, 408 U.S. 92, 95 (1972).
71. *Id.*
72. 476 F.2d at 815-17.
73. *Id.* at 815 n.8.
74. 8 Cal. 3d at 859, 506 P.2d at 214, 106 Cal. Rptr. at 390.
75. *Id.*

> might support this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to statutory purpose. . . . [W]e believe that it would be inappropriate to rely on a totally unrealistic "conceivable" purpose to sustain the present statute in the face of our state constitutional guarantees.[76]

In *Green* the court was uncertain as to whether the board of education had identified or articulated any legitimate state purpose in support of the maternity leave rule.[77] It did discuss the justifications offered by the district court judge—continuity of education, administrative convenience, and health and safety of the teacher and her unborn child[78]—but refused to offer any of its own. In *Schwartz* the dissent considered only the legislative purpose of easing administrative burdens.[79] Judge MacLaughlin made no reasonable attempt to ascertain or imagine alternative justifications; in one sentence he stated that he could find no other rationale to support the classification.[80] Similarly, in *Eslinger* the court made no effort to look beyond the single state interest in protecting its public image. In *Aguayo* there was no need to examine alternatives because the legislative purpose of improving the state's welfare system was regarded as "suitable."[81] In virtually every opinion, then, the court examined all the purposes which were laid before it, but refused to conjecture about any additional possibilities.

E. *Significant Over- or Under-Inclusiveness in the Classification Will Not Be Tolerated*

An under-inclusive classification has been described as one in which all those who possess a specific trait have the mischief at which the classification is directed, but some of those who have the mischief do not possess the trait.[82] The classification is under-inclusive because it does not include many whom it should include. Conversely, an

76. *Id.* at 865-66 n.7, 506 P.2d at 219-20 n.7, 106 Cal. Rptr. at 395-96 n.7 (citation omitted).
77. 473 F.2d at 634.
78. *Id. See* text accompanying note 83 *infra.*
79. 295 Minn. at 365-66, 205 N.W.2d at 325-26 (MacLaughlin, J., dissenting).
80. *Id.* at 366, 205 N.W.2d at 326.
81. 473 F.2d at 1109.
82. Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 347-48 (1949).

over-inclusive classification is one in which all those who have the mischief possess the trait, but some of those who possess the trait do not have the mischief.[83] The classification is over-inclusive because it contains many whom it should not contain.

Strict scrutiny and means-scrutiny are both equally harsh on under- and over-inclusive classifications; they differ only in the absolute number of statutes invalidated (since newer equal protection is a less rigorous standard of review). As a result, the inquiry here is the extent to which the model is less tolerant of under- and over-inclusiveness than is old equal protection. Since newer equal protection subjects the classification to a more careful scrutiny, and since old equal protection defers to under-inclusive classifications,[84] one would expect under-inclusive classifications to encounter increased resistance under the model. Over-inclusive classifications may also be more difficult to sustain, but on balance the model should have a greater effect on under-inclusive classifications. This prediction is substantiated by the six opinions.

The *Boraas* case involves aspects of both over- and under-inclusiveness. With respect to controlling population density, the zoning ordinance is under-inclusive since the size of *families* is not limited. Many of those who have the mischief (potential for increasing population within a household) do not possess the trait (of being one of three or more unrelated persons living together under the same roof). If, however, one accepts the proposition that families are "self-limiting" in size, then the classification is over-inclusive. Some of those who possess the trait do not possess the mischief—because there is no mischief as long as the average size of an unrelated household is less than or equal to the average size of a traditional family. Assuming that the median family size is near four persons, this same number of unrelated individuals should be permitted to live together; otherwise the classification is over-inclusive. With respect to the escalation of rent prices, the statute is under-inclusive because it does not embrace families with high incomes. Many of those who have the mischief (of exerting a greater demand on rents) do not have the trait of being among three or more unrelated individuals. On the other hand, some of those who possess the trait do not have the ability to place upward pressure on rents, so the classification is over-inclusive as to them.

83. *Id.* at 347, 351.
84. *Id.* at 351. *See* note 87 *infra* & accompanying text.

Finally, regarding possible congestion and noise problems, the classification is again both under- and over-inclusive. It is under-inclusive because it makes no attempt to limit the number of cars owned or the amount of noise produced by a *family*. It is over-inclusive because not all unrelated individuals living in groups of three or more will own an automobile or generate additional noise.

The *Brown* decision also has aspects of over- and under-inclusiveness. The classification is over-inclusive since auto guests are prevented from recovering for negligently inflicted injuries by their host simply because a small number of such guests may file collusive lawsuits. In other words, many of those who possess the trait (automobile guest) do not have the mischief (potential for collusion). At the same time, the classification is under-inclusive because non-guests are not prohibited from colluding even though the likelihood of fraud is equally great. Some of those who have the mischief (potential for collusion) do not possess the trait (of being an automobile guest). Under-inclusiveness is evident in another connection: guests who are not injured in a car driven by the host (*i.e.*, a guest who is injured when he trips on a broken tile bordering his host's swimming pool) are not denied recovery. Here, some of those who have the mischief (insult to hospitality) do not, however, possess the trait (of being an automobile guest).

In *Eslinger* there are also elements of over- and under-inclusiveness. The classification is over-inclusive because most females who work as pages will not harm the public image of the state legislature. To use the familiar terms, many members of the class who possess the trait (female sex) do not have the mischief (improper behavior). Conversely, members who might be guilty of impropriety are not included in the classification because they are not members of the female sex. As a result, the classification is both over- and under-inclusive.

The remaining cases apply the test of newer equal protection solely to under-inclusive classifications. In *Green* the court dealt with three such classifications, based upon the alternative interests suggested by the district court judge.[85] First, a teacher who becomes seriously ill, unlike the teacher who becomes pregnant, is not required to take a mandatory leave of absence. Secondly, a pregnant instructor creates no more administrative problems than any other sick instructor. Finally,

85. 473 F.2d 629, 634 (2d Cir. 1973).

there is no reason why a school should be concerned only with the safety of its pregnant teachers; all instructors deserve to be protected from classroom violence. In each of these situations it is apparent that many members of the class who have the mischief are omitted because they do not possess the trait of pregnancy.

The *Schwartz* and *Aguayo* opinions yield similar results. The under-inclusiveness in *Schwartz* is manifested by the fact that other workers who have similar problems of proof, with the concomitant need for a hearing, are not totally barred from recovery. For example, an employee who contracts an infectious disease from a work-related injury must demonstrate that the injury *caused* the disease, just as the plaintiff in *Aguayo* would have been required to show that the employment accident *caused* the suicide. Thus, if the purpose of the prohibition against recovery is the elimination of a hearing on questions of proof, there is no reason to discriminate against only those employees who commit suicide. And, the classification in *Aguayo* is under-inclusive because many persons who have the mischief of "welfare cheating" are not included in the group chosen to participate in the back-to-work program.

Although three of the decisions involved over-inclusive categories, *every* decision contained aspects of under-inclusiveness. Moreover, the classifications in *Green, Schwartz* and *Aguayo* were solely under-inclusive. As a result, the model has had its greatest effect on under-inclusive classifications.

CONCLUSIONS

Few opinions have actually adopted newer equal protection as the relevant standard of review. This may be due to the fact that courts have been reluctant to recognize the emergence of the model as a new test, or that they simply have not had many cases in which to apply the test. Nevertheless, the six decisions illustrate that newer equal protection *can* be applied to nearly all types of legislation,[86] and will probably be employed to avoid discussion of difficult issues associated with strict scrutiny. The cases also indicate that, unlike old equal protection, the model has a propensity to void under-inclusive classifications. Additionally, there is the likelihood that in every opinion ex-

86. For situations where the model should not be applied, see note 41 *supra* & accompanying text.

cept *Green* invocation of strict scrutiny apparently would have failed because its requirements would not have been satisfied.[87] These two characteristics indicate that the model served to nullify more statutes than would have formerly been the case.

Finally, the decisions demonstrate that newer equal protection is seldom applied in its "pure" form. Courts find it difficult, if not impossible, to engage in a narrow means-scrutiny. As a result, a "sliding standard" of review may emerge. The inquiry in any particular case would involve consideration of the nature of the classification (degree of suspectness), the nature of the rights adversely affected (degree of fundamentalness) and the nature of the state interest which is urged in support of the classification.[88] Minimal rationality would lie at one end of the continuum: this standard recognizes administrative and political limitations, and permits the legislature to adopt a "piecemeal" approach[89] to those problems where the classification is not aimed at a particular group and the right affected is not significant. As the right affected approaches constitutional status or the classification becomes more suspect the state interest would have to increase commensurately in order to sustain the classification. At this point under-inclusive classifications encounter much difficulty: the significance of the right and/or the suspectness of the classification should take precedence over the state's interest in the "piecemeal" approach. According to the court in *Boraas,* it is this kind of scrutiny which is appropriate where individual human rights of groups as opposed to business regulations are involved.[90] Strict scrutiny would lie at the other end of the continuum: where the classification is highly suspect (one based upon an unalterable trait which stigmatizes the class)[91] or the right affected is guaranteed by the Constitution. Here, of course, the state must demonstrate that a compelling interest supports the classification.

87. This is because of the degree to which the test would have to be extended. *See* text accompanying notes 51-54 *supra.*

88. *See* Boraas v. Village of Belle Terre, 476 F.2d 806, 815 n.8 (2d Cir. 1973).

89. These are the classic reasons for the courts' traditional deference to under-inclusive classifications. On account of limited resources or on account of pressures exerted by special interest groups, the legislature is allowed to attack a general problem in an imperfect way. Tussman & tenBroek, *supra* note 82, at 349-51. The legislature is not required to postpone action until it is prepared to deal with the problem in a comprehensive fashion.

90. 476 F.2d at 815.

91. *Developments of the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1127 (1969). *See also* note 2 *supra. But cf.* Reed v. Reed, 404 U.S. 71 (1971).

Whether the means-focused model serves to replace, supplement, or obscure prior equal protection doctrines, it seems certain to provide the courts with a flexibility which heretofore has been non-existent. This increased adaptability on the part of the judiciary is not without its costs: legislative freedom will suffer. But, this is a welcome development since legislatures possessed far too much latitude under old equal protection. With the aid of Gunther's model the courts, in a meaningful sense, can serve as guarantors of the integrity of the political process.

POSTSCRIPT

The Supreme Court decided the *Boraas* case on April 1, 1974.[92] The Court rejected the argument that any fundamental right was involved.[93] Instead, it characterized the case as one in which the Court has historically respected the classification drawn by the legislature as long as the law is reasonable, not arbitrary,[94] and bears a rational relationship to a permissible state objective.[95] The majority was not in the least bothered by the over- and under-inclusiveness of the zoning ordinance, indicating that every line drawn by a legislature excludes some who might well have been included.[96]

It is clear that, even though the Court cited the *Reed* case, it applied the test of old equal protection. A reading of the opinion indicates that this almost total deference stems from the fact that the statute is a zoning ordinance enacted by the local community. Since the model would subject the ordinance to much closer scrutiny, the Court may have regarded it as inappropriate in the context of this case. Nevertheless, since this represents the first time that the Supreme Court has had an opportunity to review the use of the means-focused model by a lower court, it is disappointing that the test of newer equal protection was mentioned nowhere in the opinion.

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92. Village of Belle Terre v. Boraas, 42 U.S.L.W. 4475 (U.S. Apr. 1, 1974).
93. *Id.* at 4477.
94. *Id., citing* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
95. *Id., citing* Reed v. Reed, 404 U.S. 71, 76 (1971).
96. *Id.*