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ORDINARY AND ENHANCED RATIONAL BASIS REVIEW IN THE MASSACHUSETTS SUPREME JUDICIAL COURT: A PRELIMINARY INVESTIGATION

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I. INTRODUCTION

In its 2003 decision in *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court held that the denial of marriage licenses to same-sex couples violates the state constitutional commitment to equality.[1] The ruling engendered no end of criticism, much of which focused on the court's conclusion that the civil marriage prohibition could not survive rational basis review, a standard of judicial scrutiny that encourages judicial deference toward the policy choices of the political branches of government.[2] Critics charged that the court was not applying rational basis review at all, but rather an undefined standard a good deal stricter.[3] Justice Sosman, writing in dissent, stated that the *Goodridge* majority had "tortured the rational basis test beyond recognition," and she expressed the hope that in the future the court would "return to the rational basis test as it has always been

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[1] 798 N.E.2d 941, 948 (Mass. 2003).

[2] *See* Lawrence Friedman, *Public Opinion and Strict Scrutiny Equal Protection Review: Higher Education Affirmative Action and the Future of the Equal Protection Framework*, 24 B.C. THIRD WORLD L.J. 267, 271–73 (2004) (describing rational basis review).

[3] *See*, *e.g.*, William C. Duncan, Goodridge *and the Rule of Law Same-Sex Marriage in Massachusetts: The Meaning and Implications of* Goodridge v. Department of Public Health, 14 B.U. PUB. INT. L.J. 42, 47–48 (2004) ("It is difficult to discern any legal rules [in *Goodridge*] which would provide guidance for future litigants."); Lynn D. Wardle, Goodridge *and "The Justiciary" of Massachusetts*, 14 B.U. PUB. INT. L.J. 57, 58 (2004) (contending that the court's constitutional analysis fails to set forth a "clear legal standard").

understood and applied."[4]

A review of equal protection cases from the past century suggests that Justice Sosman's hope is premised upon a mistaken impression of the nature of rational basis scrutiny under the Massachusetts Constitution. In fact, the Massachusetts Supreme Judicial Court has long applied at least two kinds of rational basis scrutiny to government action: ordinary, deferential rational basis scrutiny in the mine run of cases, and an enhanced rational basis scrutiny when the government action in question implicates or restricts certain important personal interests. This Article examines the cases in which the Massachusetts Supreme Judicial Court has applied enhanced rational basis scrutiny, as well as those cases in which the court has limited the circumstances in which such scrutiny is available. The goal is descriptive, to trace the origins of the *Goodridge* court's analytical framework in an effort to determine whether the decision should be regarded as an eccentric application of rational basis review or, as seems to be the case, merely the latest in a long line of cases in which the court has examined regulation more critically within the context of what we today call rational basis scrutiny.[5]

II. RATIONAL BASIS SCRUTINY: ORDINARY VERSUS ENHANCED

Rational basis scrutiny is ordinarily understood as exceedingly deferential to the political branches of government. Though the provisions of the Massachusetts Declaration of Rights express the commitment to equality differently than the Equal Protection Clause of the Fourteenth Amendment,[6] the Massachusetts courts

[4] *Goodridge*, 798 N.E.2d at 982 (Sosman, J., dissenting).

[5] A brief note on methodology: To determine whether the Massachusetts Supreme Judicial Court employed a wholly novel rational basis analysis in *Goodridge*, or whether that analysis had a pedigree, I reviewed each of the cases to which the *Goodridge* court cited in support of its rational basis analysis. Next, I reviewed all of the cases cited in each of those opinions. This process continued until I was no longer finding relevant cases or until I was being led back to cases I had already reviewed. It is likely that there are still more cases illustrating the court's use of enhanced rational basis scrutiny, but the cases discussed in this Article present at least a preliminary picture of the way in which the court has applied enhanced rational basis scrutiny over the past century.

[6] *Compare* MASS. CONST. pt. I, art. I ("All men are born free and equal . . . ."), MASS. CONST. pt. I, art. VI ("No man, nor corporation or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community . . . ."), MASS. CONST. pt. I, art. VII ("Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor or private interest of any one man, family or class of men . . . ."), MASS. CONST. pt. I, art. X ("Each individual of the society has a right to be protected by it in the enjoyment of his

have traditionally applied the federal equal protection framework when addressing claims raised under the state constitution.[7] Pursuant to that framework, government action that affects a fundamental interest or creates a suspect classification will receive the strictest scrutiny from the courts. Fundamental interests recognized under the Massachusetts Constitution include the right to decide for one's self whether to have a child,[8] how to raise children,[9] and whether to accept medical treatment.[10] Suspect classifications under the Massachusetts Constitution include those based upon race, alienage, nationality, religion,[11] and sex.[12]

In contrast, government action that does not affect a fundamental interest or a suspect classification will be analyzed under rational basis scrutiny. A legislative classification will survive rational basis review if it promotes a legitimate state interest through means that are not wholly irrational or arbitrary.[13] Applying this standard—the ordinary form of rational basis review—the court will uphold a regulation that "'rationally furthers some legitimate, articulated state purpose,'"[14] and a plaintiff will prevail only upon a demonstration that the regulation at issue is arbitrary, irrational, or capricious.[15]

In certain cases, however, the Massachusetts courts have applied enhanced rational basis scrutiny when entertaining an equal protection challenge to a regulation, notwithstanding that the law does not implicate either a fundamental interest or a suspect

life, liberty and property, according to standing laws."), *and* MASS. CONST. pt. I, art. XII ("And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land."), *with* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[7] *See, e.g.*, Dickerson v. Att'y Gen., 488 N.E.2d 757, 759 (Mass. 1986) ("For the purpose of equal protection analysis, [the] standard of review under the cognate provisions of the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment to the Federal Constitution.").

[8] *See In re* Moe, 432 N.E.2d 712, 719–20 (Mass. 1982).

[9] *See* Care and Protection of Robert, 556 N.E.2d 993, 997 (Mass. 1990).

[10] *See* Brophy v. New Eng. Sinai Hosp., Inc., 497 N.E.2d 626, 633–34 (Mass. 1986); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977).

[11] *See* Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977) (race, ethnicity, religion).

[12] *See id.*; Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980).

[13] Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340, 344 (Mass. 1992); Marshfield Family Skateland, Inc. v. Town of Marshfield, 450 N.E.2d 605, 611 (Mass. 1983).

[14] Murphy v. Dep't of Corr., 711 N.E.2d 149, 153 (Mass. 1999) (quoting McGinnis v. Royster, 410 U.S. 263, 270 (1973)).

[15] *See* Murphy v. Comm'r of the Dep't of Indus. Accidents, 612 N.E.2d 1149, 1155 (Mass. 1993).

classification.[16] Enhanced rational basis scrutiny is concerned with the question of whether there is an actual, as opposed to conceivable, rational basis for government regulation. Specifically, a court applying this standard will uphold the classification if (1) the government has a legitimate regulatory interest at stake, and (2) there is a real and demonstrable connection between the means chosen to advance that interest and the ends of the legislation, as opposed to a connection that is merely conceivable.[17] Unlike ordinary rational basis review, a court applying enhanced rational basis review typically will require some evidentiary showing from the Commonwealth that the connection between ends and means is reasonable, though in some cases, the court also questioned the evidentiary basis for the legitimate end that the legislation purported to address.[18] Enhanced rational basis review is stricter than ordinary rational basis review, but it is not strict scrutiny: Under enhanced rational basis review, the Commonwealth need not demonstrate a compelling interest; rather, it need only demonstrate that a factually supportable basis exists to conclude that a particular means—that is, a particular discrimination—will promote legitimate ends.

What are the conditions that will trigger enhanced rational basis scrutiny? From the cases, it appears the government action must implicate or restrict an interest that the courts deem important but that does not rise to the level of a fundamental personal interest. In *Howes Brothers Co. v. Massachusetts Unemployment Compensation*

[16] Other state courts have also applied a less deferential form of rational basis scrutiny in a variety of cases. *See, e.g.*, Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 467 (Wis. 2005) (holding that no rational basis exists for statutory cap on damages in medical malpractice actions); Dep't of Ins. v. Dade County Consumer Advocate's Office, 492 So. 2d 1032, 1033, 1035 (Fla. 1986) (concluding that there is no rational basis for a provision "prohibit[ing] insurance agents from accepting from their customers a commission lower than the commission set by the insurer"). *See generally* Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457, 461, 509–533 (2005) (cataloging state constitutional substantive due process cases where courts have invalidated economic regulations).

[17] *See generally* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972) (describing enhanced rational basis review under the Federal Constitution as "assess[ing] the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture").

[18] *See, e.g.*, Mansfield Beauty Acad., Inc. v. Bd. of Registration of Hairdressers, 96 N.E.2d 145, 147 (Mass. 1951) (holding regulation of hairdressing schools invalid because no specific rationale for the law had been advanced).

Commission,[19] for example, the plaintiffs, all employers, challenged the constitutionality under the Federal Constitution of a state unemployment compensation law that exempted certain industries and employers from its requirements.[20] The court presumed the law a valid exercise of the police power[21] and was unconcerned with the wisdom of the legislature's policy decision or the accuracy of its fact-finding.[22] The challenged law concerned economic policy—that is, the law could be characterized as a regulation of general application, and not one that targeted for special treatment individuals engaged in a particular kind of business, vocation, or profession. The regulation at issue did not directly undermine a personal interest, such as the interest in pursuing a particular business, vocation, or profession, or an interest of equivalent weight.[23] The court accordingly applied ordinary rational basis review and did not require an evidentiary demonstration of the legitimacy of the legislature's goals or the fit between ends and means.[24]

This is in contrast to government action that implicates a personal interest of greater weight than that implicated by the effect of general economic regulation. Consider *Goodridge v. Department of Public Health*.[25] In that case, the plaintiffs challenged the constitutionality of the civil marriage licensing statute, pursuant to which they had been denied marriage licenses.[26] They argued the law violated equal protection and due process under the Massachusetts Constitution.[27]

The court concluded that the plaintiffs' claim involved a significant personal interest—namely, the freedom to marry a person of one's own choosing, which the court characterized as "among the most basic of every individual's liberty and due process rights."[28] That interest is different than the interest in avoiding the natural discriminatory effects of a generalized economic regulation,

[19] 5 N.E.2d 720 (Mass. 1936).
[20] *See id.* at 722–23.
[21] The police power includes the authority "to enact laws in the interests of the public health, the public safety, the public morals and the general welfare." *Id.* at 725.
[22] *Id.* at 726.
[23] *See id.* at 727.
[24] *Id.* at 728.
[25] 798 N.E.2d 941 (Mass. 2003).
[26] *Id.* at 949–50.
[27] *Id.* at 950 & n.7.
[28] *Id.* at 959.

the injury claimed by the plaintiff in *Howes*.[29] The *Goodridge* court did not elaborate on its conclusion that the interest at stake in respect to civil marriage was important, but not fundamental,[30] notwithstanding the support in federal law for the view that it qualifies as a fundamental right.[31]

Because the regulation at issue—the civil marriage exclusion—implicated a significant, though not a fundamental, personal interest, the court subjected the law to enhanced rational basis review. The Commonwealth argued that limiting civil marriage to opposite-sex couples: "(1) provid[ed] a 'favorable setting for procreation'; (2) ensur[ed] the optimal setting for child rearing . . . and (3) preserv[ed] scarce State and private financial resources."[32] The court examined each of these rationales separately, focusing not on the legitimacy of the Commonwealth's ends but rather on the rationality of the means chosen to further those ends—namely, excluding same-sex couples from civil marriage.[33]

The court concluded that the exclusion did not promote a favorable setting for procreation: the law did not prohibit opposite-sex couples who were infertile or had no intention of having children, from marrying.[34] Indeed, the court noted that a couple's ability and desire to bear children had never been a condition for opposite-sex marriage.[35] The court also concluded that limiting civil marriage to opposite-sex couples did not further the Commonwealth's legitimate interest in protecting the welfare of children.[36] In fact, the Commonwealth conceded that many "same-

[29] *See Howes Bros. Co.*, 5 N.E.2d at 727–28 (stating that the exclusion of employers of fewer than eight employees from the Unemployment Compensation Law affected only an economic right, therefore only rational basis review was required).

[30] *Goodridge*, 798 N.E.2d at 957 n.14 (noting that civil marriage is a state-conferred benefit and a multi-faceted personal interest different from "rights deemed 'fundamental' . . . because the State could, in theory, abolish all civil marriage"). The court could have had in mind practical considerations about the limits of its holding, for the conclusion that the interest in marriage choice is not fundamental would continue to allow the Commonwealth great latitude in regulating civil marriage. As noted by Justice Cordy in his *Goodridge* dissent, when "a right is found to be 'fundamental,'" it is effectively "removed from 'the arena of public debate and legislative action.'" *Id.* at 989 (Cordy, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

[31] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to choose whom one will marry is "fundamental to our very existence and survival").

[32] *Goodridge*, 798 N.E.2d at 961.

[33] *Id.* at 961–64.

[34] *Id.* at 961.

[35] *Id.*

[36] *Id.* at 962.

sex couples may be 'excellent' parents."[37] In addition, the record revealed no evidence to suggest that prohibiting same-sex marriage would result in more people "choosing to enter into opposite-sex marriages in order to have and raise children."[38] Finally, the court concluded that "[a]n absolute statutory ban on same-sex marriage [bore] no rational relationship to the goal of economy."[39] Financial assistance for opposite-sex married couples did not hang upon a showing of "financial dependence" on a spouse; rather, the Commonwealth made assistance "available to married couples regardless of whether they mingle their finances or actually depend on each other for support."[40] The Commonwealth could not prohibit same-sex couples from marrying because they were not thought to be financially dependant on one another.[41]

The evidence in the record did not support a link between the ban on same-sex marriage and the Commonwealth's legitimate aims; the court accordingly held the marriage exclusion invalid.[42] Consistent with the cases in which the Massachusetts Supreme Judicial Court has applied enhanced rational basis review to government action, the court in *Goodridge* did not require that the Commonwealth articulate a compelling interest in prohibiting same-sex couples from participating in civil marriage, or point to means narrowly tailored to accomplish its legitimate ends. Rather, the court required only that the Commonwealth show a genuinely rational basis for concluding that discrimination against same-sex couples would serve the legislature's goals in respect to civil marriage. Nothing in *Goodridge* suggested that the legislature could not later justify the exclusion by producing evidence that the prohibition, in fact, advanced the legitimate aims of the law; indeed, the court stayed execution of its mandate for 180 days to afford the legislature time to react to the decision and its reasoning.[43] The Senate eventually requested an advisory opinion regarding the constitutionality of a bill that proposed to create civil unions for same-sex couples, but still the Commonwealth presented no

[37] *Id.* at 963.
[38] *Id.*
[39] *Id.* at 964.
[40] *Id.*
[41] *See id.* Further, the record did not show that same-sex couples were in fact less dependent upon one another than opposite-sex couples. *See id.* (noting the dependants of the plaintiffs were just as dependent to the plaintiffs as the dependents of opposite-sex couples are to opposite-sex couples).
[42] *Id.* at 968.
[43] *Id.* at 970.

evidence supporting the rationality of excluding same-sex couples from civil marriage as a means of promoting the Commonwealth's legitimate ends.[44]

The remainder of this article identifies and discusses the enhanced rational basis cases that preceded the court's decision in *Goodridge*. Part III explores a few representative cases from the early period of enhanced rational basis review, from roughly 1903–1974, when the triggering conditions for enhanced review included an individual interest in pursuing a business, vocation, or profession. Part IV turns to the cases that illuminate the later understanding of enhanced rational basis review, from the period 1974–1989, when the court abandoned the pursuit of a business, vocation, or profession as an interest triggering enhanced rational basis review. Part V covers the period 1989–2004; here, the court narrowed the kinds of cases eligible for enhanced rational basis review to those involving government action that implicates a specifically identifiable or traditionally protected personal interest, even if it does not rise to the level of a fundamental interest. Part VI examines the outlier decisions—those cases in which the court has not adhered to the established ordinary/enhanced rational basis framework. Part VII suggests preliminary conclusions that may be drawn from this body of cases.

III. THE EARLY ENHANCED RATIONAL BASIS CASES

The Massachusetts Supreme Judicial Court decided a number of cases that can reasonably be considered enhanced rational basis cases,[45] beginning in 1903 and continuing through 2004.[46] The court ruled on thirteen of those cases in the early period, from 1903 to 1974. The triggering interests in the cases during this period included, primarily, a personal interest in pursuing a business, vocation, or profession (ten cases),[47] but also the right to refuse

[44] *See In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

[45] For a list of these decisions, see Appendix A.

[46] On methodology, see *supra* note 5.

[47] Hutcheson v. Dir. of Civil Serv., 281 N.E.2d 53 (Mass. 1972); Coffee-Rich, Inc. v. Comm'r of Pub. Health, 204 N.E.2d 281 (Mass. 1965); Hall-Omar Baking Co. v. Comm'r of Labor & Indus., 184 N.E.2d 344 (Mass. 1962); Mansfield Beauty Acad. v. Bd. of Registration of Hairdressers, 96 N.E.2d 145 (Mass. 1951); Opinion of the Justices, 79 N.E.2d 883 (Mass. 1948); Sperry & Hutchinson Co. v. McBride, 30 N.E.2d 269 (Mass. 1940); *In re* Opinion of the Justices, 22 N.E.2d 49 (Mass. 1939); *In re* Opinions of the Justices, 14 N.E.2d 953 (Mass. 1938); Commonwealth v. S.S. Kresge Co., 166 N.E. 558 (Mass. 1929); Wyeth v. Thomas, 86 N.E. 925 (Mass. 1909).

medical treatment (one case),[48] the right of association (one case),[49] and an interest in real property (one case).[50] In the intervening years, these latter interests have been subsumed within other areas of constitutional law: the right to refuse medical treatment under the rubric of substantive due process;[51] the right of association under the First Amendment and its Massachusetts constitutional equivalent;[52] and private property rights under the Fifth Amendment and its state constitutional equivalent.[53]

Accordingly, this section focuses on a representative set of the cases involving an interest in pursuing a business, vocation, or profession—an interest the supreme judicial court recognized until the 1970s. In none of the cases did the court seek to define with any specificity the dimensions of such an interest in pursuing a livelihood. But, in reviewing the cases that spread over almost seventy years, during which time the court saw that interest as sufficient to trigger enhanced rational basis scrutiny, we can hypothesize that the court's concern was to protect individuals, or the companies for whom they were employed, to pursue a business, vocation, or profession when their ability to do so would have been stymied by regulatory requirements not generally applicable to the workforce or to similarly situated individuals in the workforce.[54]

A. Wyeth v. Thomas

In *Wyeth v. Thomas*, the plaintiff challenged the constitutionality of a regulation requiring undertakers to be trained and licensed in

[48] Commonwealth v. Pear, 66 N.E. 719 (Mass. 1903).

[49] *In re* Opinion of the Justices, 94 N.E. 558 (Mass. 1911).

[50] Durgin v. Minot, 89 N.E. 144, 147 (Mass. 1909).

[51] *See* Brophy v. New Eng. Sinai Hosp., Inc., 497 N.E.2d 626, 633 (Mass. 1986) (finding the right to refuse treatment within the constitutional right to privacy); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426, 435 (Mass. 1977).

[52] *See* MASS. CONST. pt. I, art. XIX; Caswell v. Licensing Comm'n, 444 N.E.2d 922, 927 & n.5 (Mass. 1983) (stating that the right to assemble also includes the right of association, which guarantees "an opportunity for people to express their ideas and beliefs through membership or affiliation with a group").

[53] *See* MASS. CONST. pt. I, art. X; Moskow v. Comm'r of the Dep't of Envtl. Mgmt., 427 N.E.2d 750, 753 (Mass. 1981). In *Moskow*, the court noted that restrictions need only be "'reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property.'" *Moskow*, 427 N.E.2d at 753 (quoting Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 134 n.30 (1978)).

[54] One commentator has suggested that state constitutional protection of individuals' economic liberties occurred most often in cases involving state fair trade acts, advertising regulations, price controls, occupational licensing, and Sunday closing laws. Sanders, *supra* note 16, at 480.

the art of embalming.[55] The plaintiff had been an undertaker for forty-six years, but he was not a trained embalmer.[56] He challenged the constitutionality of the regulation on the ground that it was not necessary that undertakers know how to embalm bodies for burial preparation, and, therefore, the law interfered with his right to pursue a livelihood.[57]

The court held the regulation unconstitutional because it lacked a connection to the protection of public health.[58] The record did not support the proposition that the plaintiff, and others like him, had to be trained in embalming to protect the public health: the Commonwealth adduced no evidence suggesting that it was necessary to embalm all bodies, and the court noted that, in cases in which embalming was requested, someone trained in the art could be employed.[59] Indeed, the court reasoned that even "if there may be some slight increase of knowledge, from this source, to one preparing a human body for burial, its relation to the public health, if any, is too remote to be made a foundation for legislation or regulation."[60] Here the court, while ostensibly applying rational basis review, examined the evidence presented to determine whether there existed a genuine rational reason for the discrimination in question, which abridged the plaintiff's interest in pursuing the profession of his choice, and whether the reason in fact promoted the Commonwealth's legitimate interest in health and safety. As a result of the Commonwealth's failure to show that the discrimination was necessary to protect health and safety, the court struck down the training requirement.[61]

B. Sperry & Hutchinson Co. v. McBride

In *Sperry & Hutchinson Co. v. McBride*, the plaintiffs challenged the constitutionality of a law that placed restrictions only on gasoline-filling station owners.[62] The law prohibited the issuance of trading stamps to customers in connection with the purchase of gasoline, and also required station owners to post the price of

[55] 86 N.E. 925, 926 (Mass. 1909).
[56] *Id.*
[57] *Id.* at 926–27.
[58] *Id.* at 927–28.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 928.
[62] 30 N.E.2d 269, 272 (Mass. 1940).

gasoline and not change the price before twenty-four hours had passed.[63] The law accordingly interfered with the ability of the plaintiffs to pursue a business—in this instance, filling station ownership.[64]

The Commonwealth argued that the legislature intended to protect consumers against the fraud associated with the sale of gasoline,[65] because consumers were being misled by the price signs at gasoline stations.[66] Although the court did not dispute the legislature's intent to protect consumers from fraud, still it sought to determine whether the law actually accomplished the legislature's legitimate ends.[67] The record did not support the existence of a substantial relationship between prohibiting gasoline stations from using trading stamps and protecting consumers from fraud: the trading stamp business was legal, and the record contained no evidence of the stamps as being a source of fraud.[68] The court therefore could not see how preventing gasoline stations from issuing trading stamps would protect consumers from the fraud associated with gasoline sales.[69]

The Commonwealth also argued that requiring the price of gasoline to remain unchanged for a period of twenty-four hours would deter another kind of fraud: the dilution of gasoline at the pump.[70] On the record, however, the court could not agree that regulating price setting would actually protect consumers from such fraud. Indeed, the court observed that the law might actually *promote* the adulteration of gasoline: because the price of gasoline in the market fluctuated, the law would prevent station owners from passing the savings on to customers when the price of fuel dropped, and it then put them at risk of losing revenue when the price increased.[71]

In *Sperry & Hutchinson*, the court took seriously the notion that, when the interest in pursuing a business, vocation, or profession is implicated, not by a generalized regulation applicable to all market

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[63] *Id.* at 272–73.

[64] The court viewed the interest at stake as the right to pursue a "'private business'" which cannot have imposed on it "'unreasonable and unnecessary restrictions.'" *See id.* at 275 (quoting Commonwealth v. S.S. Kresge Co., 166 N.E. 558, 560 (Mass. 1929)).

[65] *Id.* at 274.

[66] *Id.* at 271.

[67] *Id.* at 275.

[68] *See id.* at 276.

[69] *See id.*

[70] *Id.* at 277.

[71] *See id.*

participants, but by a regulation applicable only to a segment of the market, the law's rational basis must be genuine—it must be such that the discrimination in practice furthers the legislature's legitimate goals, such as consumer protection.[72] The means selected by the legislature to pursue that goal—in this case, discriminatory treatment of filling station owners, as compared to other vendors—must possess a connection to the fraud the legislature sought to prevent; absent a showing of that connection, the regulation will not be upheld.[73]

C. Hall-Omar Baking Co. v. Commissioner of Labor & Industries

In *Hall-Omar Baking Co. v. Commissioner of Labor & Industries*, the plaintiff challenged the constitutionality of a licensing law pertaining to "hawkers" and "pedlers."[74] The plaintiff, a baking company, delivered its goods to customers in trucks driven by its salesmen.[75] The law required that the plaintiff's drivers be individually licensed, but that requirement did not apply to truck drivers for dairy companies.[76] Thus, the law affected the ability of hawkers and pedlers of baked goods to pursue their business.[77]

The Commonwealth sought to justify the licensing law as a measure to prevent fraud and to ensure the safety of its citizens.[78] It explained that the discrimination between the bakery companies and the dairy companies resulted from the "possible differences in the way the businesses are conducted" and from "the differences in the products sold."[79] The Commonwealth also argued that stricter licensing laws should apply to bakery companies because of the lack of regulations imposed on the bakery industry.[80] Municipalities employed inspectors specially charged with policing the quality of milk and cream but not baked goods.[81] Thus, the Commonwealth

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[72] *See id.* at 275–78.

[73] *See id.* at 277–78.

[74] 184 N.E.2d 344, 345 (Mass. 1962).

[75] *Id.* at 345–46.

[76] *Id.* at 345 n.1, 346.

[77] *See id.* at 347. "'[S]tatutes in regard to the transaction of business must operate equally upon all citizens who desire to engage in the business.'" *Id.* at 348 (quoting Commonwealth v. Hana, 81 N.E. 149, 151 (Mass. 1907)).

[78] *See id.* at 348 (noting the "underlying purpose of the regulation" was the protection of citizens in light of the lack of control that bakeries have over their drivers).

[79] *Id.* at 350.

[80] *Id.*

[81] *Id.* at 350–51.

argued that it was necessary for the legislature to take action.[82]

Though the Commonwealth could present no evidence justifying the basis for the discriminatory treatment, the plaintiff argued that there was no significant difference between its operation and the way dairy companies operated.[83] The bakery items, like the dairy items, were sold from trucks at fixed prices.[84] Because the bakery truck drivers could not set prices or negotiate with customers, it was unlikely that customers would be victims of fraud.[85]

In its review, the court determined that, though protecting citizens from fraud was a legitimate legislative goal, the licensing requirements imposed upon bakery companies, like the plaintiff's company, would not accomplish that goal.[86] The court concluded that the lack of municipal regulation of the baking industry, as opposed to the dairy industry, "suggest[ed] less public concern in respect thereof rather than a basis for requiring a pedler's license for sales from trucks."[87] The court also pointed out that bakery goods sold in fixed stores were not subject to licensing requirements and that if the legislature believed bakery goods needed regulation, it would have imposed similar requirements on them.[88] The court, failing to find any evidence that explained the need for discrimination to advance the Commonwealth's legitimate goals at the expense of a vocational or professional interest, deemed the licensing scheme irrational.[89]

D. Hutcheson v. Director of Civil Service

In *Hutcheson v. Director of Civil Service*, the plaintiff challenged the constitutionality of a law requiring that disabled veterans be given preference for civil service positions regardless of the existence of more qualified applicants.[90] The plaintiff argued that preferring disabled veterans to other non-disabled veterans did not accomplish any legitimate state goal.[91] He also contended that the

[82] *See id.* at 350.
[83] *Id.* at 350.
[84] *Id.* at 349.
[85] *See id.* at 350.
[86] *Id.* at 351.
[87] *Id.*
[88] *Id.* (noting the statutory controls for milk products wherever sold).
[89] *Id.* at 351–52.
[90] Hutcheson v. Dir. of Civil Serv., 281 N.E.2d 53, 54 (Mass. 1972). At issue in *Hutcheson* was employment in the office of the "assistant commissioner for children's services." *Id.*
[91] *See id.* at 56–57.

law violated equal protection because it drew an irrational distinction between non-disabled veterans and disabled veterans, giving disabled veterans a favored status.[92] As in the other cases during the early period of enhanced rational basis review, the regulation questioned in *Hutcheson* affected an individual's interest in pursuing particular employment on the same terms as others[93]—in this case, civil service positions.[94]

The Commonwealth argued that, because it had the power to determine that veterans could receive more favorable treatment than civilians, it could also determine that disabled veterans could receive more favorable treatment than other veterans.[95] The plaintiff challenged the legislature's possible determinations that preference to disabled veterans would result in the most qualified persons being hired and would encourage others to follow their example.[96] The record, however, revealed no evidence suggesting that a permanently injured veteran had acquired some additional experience that made him more qualified for public service than a non-disabled veteran.[97] Further, a person did not join the military with the intention of becoming a disabled veteran; therefore, it was unlikely that the public would be encouraged to follow the example of disabled veterans.[98] Absent evidence that the preferential treatment of certain veterans actually accomplished the goal of ensuring that the best candidate was hired, that treatment could not be valid.[99]

IV. THE RATIONAL BASIS CASES THAT MODIFY ENHANCED RATIONAL BASIS SCRUTINY

The Massachusetts Supreme Judicial Court decided the cases discussed in this section between 1974 and 1989. The cases involve regulatory requirements that arguably implicate the personal interest in pursuing a particular business, vocation, or profession; yet the court did not regard them as eligible for enhanced rational basis scrutiny. Indeed, these cases evidence both the court's

[92] *Id.* at 54.
[93] *Id.*
[94] *Id.* at 54 & n.1.
[95] *See id.* at 57.
[96] *See id.* at 56–57.
[97] *Id.* at 58–59.
[98] *See id.* at 57–58.
[99] *See id.* at 58.

abandonment of that interest as a factor sufficient to trigger enhanced rational basis review, and its expansion of ordinary rational basis scrutiny to encompass nearly all regulation that does not implicate a fundamental right or a suspect class—what has come to be categorized, generally, as economic regulation.

In the first of these cases, *Commonwealth v. Henry's Drywall Co.*,[100] decided in 1974, the defendant challenged the constitutionality of a statute prohibiting construction companies from requiring or allowing their employees to use stilts in their work.[101] The defendant based his equal protection challenge on the fact that the statute prohibited the use of stilts in the construction industry, but not in any other industry, and that, while employers in the construction industry could not allow their employees to use stilts, those who were self-employed could.[102]

The *Henry's Drywall* court did not apply enhanced rational basis scrutiny even though the regulation in question affected the interest of construction employees—and only construction employees—in pursuing a vocation.[103] Indeed, the court took pains to point out that restrictions on "the right to work or to pursue one's business" ought to be viewed deferentially by the courts.[104] Accordingly, the court presumed the legislature intended to address conditions specific to the construction industry that increased the risk of injury while using stilts,[105] and concluded that, notwithstanding the lack of evidence on the record, the ban was appropriate to the construction industry.[106]

Three years later, in *Zayre Corp. v. Attorney General*,[107] the plaintiff, a discount department store, challenged a law prohibiting the operation of businesses on Sundays.[108] The plaintiff argued that the statute "operate[d] in an arbitrary or irrational manner," because it contained exceptions allowing certain businesses to remain in operation on Sundays while others were forced to close.[109] As in *Henry's Drywall*, though the regulated activity undermined the ability of the plaintiff and its employees to pursue a vocation,

[100] 320 N.E.2d 911 (Mass. 1974).
[101] *Id.* at 912 & n.1.
[102] *Id.* at 915.
[103] *See id.* at 914.
[104] *Id.*
[105] *Id.* at 916.
[106] *See id.* at 916–17.
[107] 362 N.E.2d 878 (Mass. 1977).
[108] *Id.* at 880.
[109] *Id.* at 881.

the court applied ordinary rational basis review to determine whether the means chosen by the legislature to advance the legitimate goal of providing "a uniform day of rest and relaxation"[110] could be justified "by any conceivable set of facts or findings."[111]

The court reasoned that the legislature could rationally conclude that gasoline stations should remain open on Sundays so that weekend travelers could get to their relaxing destinations, and that businesses selling perishable items or items needing to be replaced everyday, like newspapers and milk, should remain open as well.[112] Further, the legislature could rationally conclude that the economic loss associated with closing some businesses and restarting them might outweigh the benefits of a day of rest.[113] The court declined to second guess the legislature's policy decisions and accordingly declared the law constitutional.[114]

Though the regulation at issue patently treated some businesses and individuals differently than others with respect to the ability to pursue a livelihood, the court did not require the Commonwealth to adduce evidence that the discrimination would actually serve to further the legislature's goal.[115] In the court's view, every economic regulation of this sort is arbitrary in some way, and it is for the legislature, and not the courts, to determine where that line should be drawn.[116] As stated by the court, "[s]ubstantial distinctions between classes may be made with less than mathematical exactitude as long as there is some basis for the classification in the first place."[117]

Paro v. Longwood Hospital,[118] decided shortly after *Zayre*, continued the trend begun in *Henry's Drywall* of treating all economic legislation as subject only to ordinary rational basis

[110] *Id.* at 886.

[111] *Id.* at 884, 886. The court noted that when it is asked to evaluate economic regulations, it uses a high degree of judicial restraint to avoid "substituting its notions of correct policy for that of a popularly elected Legislature." *Id.* at 884. The court cautioned, moreover, that it ought "not invalidate a classification merely because the Legislature has not chosen to address an entire problem in defining a classification or because the classifications, be they slightly over or under inclusive, could have been drawn to more precise standards." *Id.* (citations omitted).

[112] *Id.* at 888.

[113] *Id.* at 885.

[114] *Id.* at 887, 890.

[115] *See id.* at 889–90 (stating that the record does not support any contention of "invidious discrimination").

[116] *Id.* at 884, 890.

[117] *Id.* at 889.

[118] 369 N.E.2d 985, 988 (Mass. 1977).

review. The plaintiffs in *Paro* challenged the review process for medical malpractice claims, which required that all actions be presented to "a tribunal consisting of a Superior Court judge, an attorney, and a representative of the health care industry" to determine whether there was a legitimate basis for the claim.[119] The plaintiffs argued that the tribunal statute essentially created a distinction between victims of medical malpractice and victims of other torts, thus making it more difficult for victims of medical malpractice to pursue their claims in court.[120]

This case did not involve an individual's personal interest in pursing a vocation or profession, but rather the status the court would accord an interest derived from an explicit provision of the state constitution, Article XI, which has been understood to guarantee citizens access to the courts of the Commonwealth.[121] The question in *Paro* was whether the Commonwealth could validly create the tribunal review process in an effort to further a legitimate interest in controlling the cost of medical malpractice insurance for practicing physicians.[122]

The court determined that, despite the statute's plain implication of a significant personal interest, which was expressly protected from government abridgement by the state constitution, the legislature could have reasonably believed the tribunal process would reduce the number of frivolous malpractice suits and in turn curtail the cost of medical malpractice insurance, absent any proof that such benefits were likely to occur.[123] *Paro* thus heralds the extent to which the court was continuing to retreat from the application of enhanced rational basis scrutiny; the case reveals another step on the part of the court toward maximizing the deference that courts afford the legislature and its policy-making

[119] *Id.* at 987. If the tribunal decided that no legitimate basis existed, the case could not proceed unless the plaintiff posted a bond payable to the defendant should the defendant ultimately prevail. *Id.*

[120] *Id.* at 987, 989.

[121] Daniel W. Halston, *The Meaning of the Massachusetts "Open Courts" Clause and its Relevance to the Current Court Crisis*, 88 MASS. L. REV. 122, 122–26 (2004) (discussing the history and meaning of the right to access the courts). Article XI provides:

> Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

MASS. CONST. pt. I, art. XI.

[122] *Paro*, 369 N.E.2d at 989.

[123] *Id.*

authority on equal protection review.

Two years later, in *Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing*,[124] the court made more explicit its focus in rational basis equal protection cases. In *Blue Hills Cemetery*, the plaintiffs challenged the constitutionality of a statute providing that a corporation may be licensed to engage in funeral directing only if it engaged in no other type of business activity.[125] The plaintiffs argued that the business prohibition did not advance the goals of protecting the citizenry from the spread of disease and of ensuring that funeral directors and embalmers possessed necessary skills.[126]

The court defined the business activity regulated as merely economic,[127] though in view of the 1948 *Opinion of the Justices* on a similar subject,[128] that activity plausibly could have been characterized as concerning the pursuit of a vocation by the plaintiff and similarly situated individuals. The *Blue Hills Cemetery* court believed it feasible that the legislature could determine that having "large, diversified corporation[s]" involved with funeral directing would lessen the personal attention needed in that service.[129] Though the record revealed no evidence in support of that conclusion, the court upheld the statute.[130]

In a footnote, the court discussed the two standards of rational basis review: one for economic issues and one for cases involving important personal interests.[131] The court acknowledged that there is a difference between rational basis scrutiny under the Massachusetts and United States Constitutions when a court is evaluating the constitutionality of a non-economic regulation.[132] The Massachusetts Constitution, the court noted, will in some instances "guard more jealously against the exercise of the State's police power" than the U.S. Constitution, and in those instances Massachusetts courts have been less willing to find a rational

[124] 398 N.E.2d 471 (Mass. 1979).

[125] *Id.* at 473.

[126] *Id.* at 474. Further, the plaintiffs argued that the distinction made between corporations engaged only in funeral directing and those engaged in other types of business was irrational. *Id.* at 474, 477.

[127] *Id.* at 474.

[128] Opinion of the Justices, 79 N.E.2d 883, 887–88 (Mass. 1948) (holding unconstitutional an effort to prohibit those involved in the operation of cemeteries from also selling monuments for cemetery plots).

[129] *Blue Hills Cemetery, Inc.*, 398 N.E.2d at 476.

[130] *Id.* at 477.

[131] *See id.* at 475 n.8.

[132] *Id.*

relationship between legislative means and ends.[133] Nonetheless, when faced with a regulation that may be characterized as economic, broadly understood, the rational basis review in Massachusetts will be the same as that used by the federal courts,[134] for deference to the legislature is required when "the values at issue" do not "demand[] heightened judicial scrutiny."[135]

The court explicitly distinguished between the two strains of rational basis review in Massachusetts two years later in *Shell Oil Co. v. City of Revere*.[136] In that case, the plaintiff challenged the constitutionality of a municipal ordinance prohibiting the operation of self-service gasoline stations.[137] The plaintiff argued that the law bore "no rational relationship to the promotion of public safety, health or general welfare" because there was no evidence that self-service gas stations were more dangerous than full-service stations.[138]

The record showed that the city council had enacted the regulation "to protect the public from hazards which exist in operating self-service [gasoline] stations"[139] and that the council "had the authority to determine that hazards such as customer disregard of the rules regarding smoking, turning off engines and placing gasoline in dangerous containers [were] likely to occur with more frequency at self-service stations than at full-service stations."[140] Though the record contained no evidence supporting these findings, the court entertained the presumption that the law was valid and deferred to the city council's discretion to anticipate hazards, which had not yet been felt, and to pass regulations to prevent those hazards from being realized.[141]

The ordinance in question in *Shell Oil* operated to undermine the ability of self-service gasoline owners to pursue their business interests, but the court regarded it as one which fell within the realm of generalized economic regulation. The court stated, moreover, that when faced with a challenge to an economic regulation, it would only look to see that there was a connection

[133] *Id.* (quoting Coffee-Rich, Inc. v. Comm'r of Pub. Health, 204 N.E.2d 281, 286 (Mass. 1965)).
[134] *See id.*
[135] *Id.* at 475.
[136] 421 N.E.2d 1181 (Mass. 1981).
[137] *Id.* at 1182.
[138] *Id.* at 1184.
[139] *Id.* at 1182.
[140] *Id.* at 1185.
[141] *Id.* at 1186.

between the regulation and a plausible legislative goal, because "[t]he success of the Legislature's choice [of means] need not be guaranteed."[142] As in *Blue Hills Cemetery*, the court noted that there is a difference in the intensity of the judicial review that it will apply to regulations that implicate non-economic interests.[143]

In 1989, the court decided the final case in this series, *English v. New England Medical Center, Inc.*[144] In *English*, the plaintiff challenged a law limiting the liability of charitable institutions in tort claims to $20,000, if the tort was committed while carrying out the institution's purpose.[145] The plaintiff alleged that the statute created a distinction between victims of torts by charitable institutions and victims of torts by non-charitable institutions, and argued that protecting the funds of charitable institutions was not a legitimate state objective because of the availability of insurance.[146] In addition, the plaintiff contended that if the Commonwealth did, in fact, have a legitimate interest, the means employed did not rationally relate to the achievement of that objective.[147]

Because the law did not involve a suspect class or a fundamental right, the court applied rational basis review in upholding the law.[148] The court concluded that the Commonwealth had a legitimate interest in protecting the funds of charitable institutions so that they could be used for their intended purposes.[149] Further, because the legislature could have believed that a statute limiting liability of charitable institutions would protect charitable funds, the law was constitutional.[150] The evidence presented by the plaintiff that charitable institutions were properly protected through insurance could not overcome the presumption that there was a rational relationship between the means employed by the legislature and the protection of charitable funds. The court apparently did not regard the plaintiff's interest as anything other than an undifferentiated economic one, yet it did confirm that some personal interests would receive more intense rational basis scrutiny—that is, certain interests would require "the court to look

[142] *Id.* at 1184–85.
[143] *See id.* at 1184, 1186 n.13.
[144] 541 N.E.2d 329 (Mass. 1989).
[145] *Id.* at 331.
[146] *Id.* at 333.
[147] *Id.*
[148] *See id.* at 332–33.
[149] *Id.* at 333.
[150] *Id.* at 333–34.

carefully at the purpose to be served by the statute in question and at the degree of harm to the affected class."[151]

The question remains: Why did the supreme judicial court effectively abandon pursuit of a business, vocation, or profession as a factor triggering enhanced rational basis scrutiny? It may be that the court began to see an individual's pursuit of a livelihood on equal terms with those who are similarly situated as an interest too readily implicated by the economic restrictions common to the modern regulatory state. It is the rare government regulation, after all, that does not discriminate in some way against an identifiable class of citizens.[152] In other words, perhaps the Massachusetts Supreme Judicial Court came to understand that the protection of such an interest could prove unwieldy, placing the court too often in the uncomfortable position of having to draw fine lines around the economic policymaking of the political branches of government.

Of course, the U.S. Supreme Court had reached this conclusion more than seventy years earlier, when it definitively forsook the skepticism toward economic regulation epitomized by the 1905 decision in *Lochner v. New York*,[153] and its review of state health, safety, and welfare regulation began to resemble the scrutiny that federal courts employ to this day.[154] In *Lochner*, the Court struck down a state law prohibiting the employment of bakery workers for more than a certain number of days or hours.[155] The Court concluded that the law unreasonably interfered with "the right of free contract" between employer and employee.[156] Though the Court also upheld many health, safety, and welfare laws in the early decades of the twentieth century, "the extent of judicial intervention during the Lochner era was clearly substantial; and the modern

[151] *Id.* at 333. The court did not deny that the standard of equal protection review applied under the Massachusetts Constitution has been used as "'shorthand for referring to the opposite ends of a continuum of constitutional vulnerability determined at every point by the competing values involved.'" *Id.* (quoting Marcoux v. Att'y Gen., 375 N.E.2d 688, 689 n.4 (Mass. 1978)).

[152] *See, e.g.*, Choquette v. Perrault, 569 A.2d 455, 460 (Vt. 1989) (observing that "virtually all regulatory statutes have disparate effects on various sectors of the public").

[153] 198 U.S. 45 (1905).

[154] *See generally* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 213–36 (1995) (discussing the conventional understanding of "The Constitutional Revolution of 1937"); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 190–93 (1993) (arguing that the U.S. Supreme Court's 1937 decision in *West Coast Hotel v. Parrish* "ushered in a revolution in constitutional law").

[155] *See Lochner*, 198 U.S. at 57–58.

[156] *Id.* at 57, 59, 64.

Court has repeatedly insisted that it has turned its back on the evils of the Lochner philosophy."[157]

The perceived problems with *Lochner* might shed light on the jurisprudential reasons for the Massachusetts Supreme Judicial Court's move away from enhanced rational basis scrutiny in cases involving pursuit of a business, vocation, or profession. As an initial matter, it is difficult today to define the freedom to contract or the interest in pursuing a livelihood with the degree of specificity necessary to ensure the consistent application of principle without undermining the authority of the legislature to pass a wide array of health, safety, and welfare regulations.[158] The supreme judicial court might well, in the early years of the twentieth century, have subscribed to the view that markets existed apart from the law and, therefore, from the influence the people's elected representatives might seek to exert to safeguard the welfare of the community.[159] But, given the modern understanding that "[m]arket wages and market hours [are] . . . a creation of law, not of nature, and not of laissez-faire,"[160] it is not clear that the freedom to contract or an interest in pursuing employment as, say, a seller of baked goods, should be regarded as an aspect of liberty entitled to special consideration by the courts when they review the constitutionality of duly enacted economic regulation.[161]

Neither is it clear that the judiciary should be regarded as possessing the institutional competence to determine whether an economic regulation, such as a law prescribing the limits on the sale of baked goods from trucks, would in fact serve adequately to

[157] GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 466 (13th ed. 1997); *see also* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 17 (2002) (stating that *Lochner* "has come to stand as a symbol of the work of a court that said no, defiantly, to what many people at the time defined as progress"); JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS 157–58 (1994) (arguing that in renouncing the authority of *Lochner*, the U.S. Supreme Court underscored that it, and like judgments, "represented an inappropriate form of judicial legislation"); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 131 (1987) (asserting that *Lochner* has "come to symbolize an era of conservative judicial intervention under the Due Process Clause, seeking to stem the flow of social and economic reform").

[158] *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 110–11 (new ed. 2001) (discussing the different outcomes in *Lochner* and factually similar cases decided only a few years later).

[159] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 46–50 (1993) (discussing judicial intrusion into the democratic process in the *Lochner* era).

[160] *Id.* at 50.

[161] *See* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003) (declaring that the problem with *Lochner* was that it "treated freedom of contract as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right").

safeguard the health and welfare of the baked good-consuming public.[162] That is the kind of determination that benefits from the attention that the people's representatives in the legislature can bring to bear: legislators have a greater ability than judges to gather evidence about the effects of government regulation, and to consider both the tensions that arise between competing interest groups and the compromises that may be possible.[163] Further, legislative policy choices regarding economic matters must suffer the scrutiny of an electorate that must live with the consequences of those policy choices.[164] This political check is likely to be most effective in cases in which the consequences of regulation will be widely felt, as opposed to those instances in which discrimination reflects an effort to target a political minority for differential treatment.[165]

V. THE MODERN ENHANCED RATIONAL BASIS CASES

In only a handful of cases since the 1970s has the Massachusetts Supreme Judicial Court applied enhanced rational basis review. The most recent, *Goodridge v. Department of Public Health*, was discussed above.[166] The others are *Commonwealth v. Arment* and *Murphy v. Commissioner of the Department of Industrial Accidents*.

In *Commonwealth v. Arment*,[167] the defendant challenged a law that allowed an inmate to be classified as a "sexually dangerous person"[168] without having "engaged in sexually assaultive behavior in prison."[169] The law permitted the Commissioner of Mental Health to initiate sexually dangerous person proceedings, which could result in the inmate being committed to a treatment center.[170] The legislature amended the law to require that an inmate "engage[] in sexually assaultive behavior in prison" before such proceedings could be initiated.[171] The amendment took effect on

[162] *See id.* at 386 (criticizing the *Lochner* majority's inability to understand that "matters were more complicated than they thought").

[163] *See* Charles H. Baron, *Pleading for Physician-Assisted Suicide in the Courts*, 19 W. NEW ENG. L. REV. 371, 372–73 (1997).

[164] *See id.*

[165] *Cf.* Friedman, *supra* note 2, at 271–73 (noting that equal protection review is sometimes required when a political minority "may suffer at the will of a political majority").

[166] *See supra* notes 1–5 and accompanying text.

[167] 587 N.E.2d 223 (Mass. 1992).

[168] *Id.* at 225.

[169] *Id.* at 226.

[170] *Id.*

[171] *Id.*

April 6, 1986, but it only applied to inmates who were convicted of crimes committed after that date; the defendant maintained that the law violated equal protection because the law made it easier for inmates convicted of crimes committed before April 6, 1986, to be classified as sexually dangerous persons.[172]

The Commonwealth argued that although the law created a distinction between prisoners who committed crimes prior to April 6, 1986, and those who committed crimes after that date, neither class would be burdened more than the other.[173] It contended that the amended statute made it more difficult for the Commissioner to initiate proceedings against inmates convicted post-amendment; therefore, judges would be more inclined to initiate proceedings against them at sentencing.[174] As a result, individuals from either group would have essentially the same chances of being declared a sexually dangerous person and suffer placement in a treatment facility.[175]

The court ruled that the law in fact created two classes of inmates,[176] and it found no evidence in the record indicating that such a distinction actually accomplished the legislature's legitimate rehabilitation aims.[177] The Commonwealth offered only speculation as to what effect the law would have on criminal groups; the court accordingly declared the law unconstitutional.[178] The court concluded that the discriminatory treatment could not be upheld in light of the defendant's interest in receiving the greater protections available to post-amendment inmates in circumstances where the defendant risked additional loss of his already-reduced liberty.[179]

In *Murphy v. Commissioner of the Department of Industrial Accidents*,[180] the plaintiff challenged the statutory fee imposed upon individuals appealing a workers' compensation claim with assistance of counsel, which did not apply to individuals proceeding without counsel.[181] The Commonwealth argued that the filing fee was rationally related to the interest in deterring frivolous appeals and in reducing the costs of medical examinations required in these

[172] *See id.*
[173] *Id.* at 227.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 226.
[177] *See id.* at 227–28.
[178] *Id.* at 228.
[179] *See id.* at 228.
[180] 612 N.E.2d 1149 (Mass. 1993).
[181] *Id.* at 1150.

cases.[182]

The court concluded that requiring only litigants represented by counsel to pay for the mandatory medical examination had no rational basis.[183] This classification would have had merit if those proceeding with counsel were in better financial situations than those proceeding without counsel, but there was no evidence that this was the case.[184] Indeed, the record revealed no evidence that the filing fee would limit the number of frivolous appeals, and it might have the opposite effect: the court reasoned that pro se litigants were more likely to bring frivolous appeals because they were not being guided by someone trained to evaluate the merits of a case.[185] The *Murphy* court's evaluation of the evidentiary support for the legislative classification indicates that the interest in access to the courts cannot be abridged absent at least a demonstrable basis for doing so, notwithstanding the court's reliance in *Paro* on ordinary rational basis review of Article XI claims.[186]

Arment, *Murphy*, and *Goodridge* provide scant guidance as to what personal interests will qualify to trigger the protection of enhanced rational basis review. These cases suggest at least two ways in which such interests may be identified, one narrow, one more broad. On the narrow view, the triggering interests are limited to those specifically protected in *Arment*, *Murphy*, and *Goodridge*—respectively, an interest in being free from the threat of additional restraint on liberty following a valid incarceration;[187] an interest in being free from an unreasonable constraint on access to the court system;[188] and an interest in being free to choose whom one may marry.[189]

On the broader view, the interests at stake in *Arment*, *Murphy*, and *Goodridge* might each be regarded as representative of a *class* of interests that will trigger the protections of enhanced rational basis scrutiny under the Massachusetts Constitution. *Arment* may represent the traditionally-defined liberty interest in freedom of movement without fear of government detention.[190] *Murphy* may

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[182] *Id.* at 1154.

[183] *Id.* at 1156.

[184] *Id.* at 1157. The workers' compensation act itself stated that the worker's ability to retain counsel bore no relation to the worker's financial situation. *Id.*

[185] *See id.* at 1156.

[186] *See supra* notes 118–23 and accompanying text.

[187] Commonwealth v. Arment, 587 N.E.2d 223, 228 (Mass. 1992).

[188] Murphy v. Comm'r of the Dep't of Indus. Accidents, 612 N.E.2d 1149, 1158 (Mass. 1993).

[189] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959, 969 (Mass. 2003).

[190] *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (characterizing the

represent those interests that are fairly traceable to the constitutional text itself. *Murphy* further suggests that *Paro* may have undermined too much the importance of respecting an interest the framers saw fit to explicitly protect in the Massachusetts Constitution—the right to unfettered access to the courts of the Commonwealth.[191] Finally, *Goodridge* may represent the liberty/privacy interest in making decisions associated with basic human dignity—the concern of autonomous individuals to be free to make personal choices regarding their associations.[192]

VI. THE OUTLIER CASES

There are two cases, one decided in 1970 and the other in 2004, which do not fit neatly into the Massachusetts Supreme Judicial Court's dual-approach to rational basis review. In the first of these cases, *Aetna Casualty & Surety Co. v. Commissioner of Insurance*,[193] the plaintiffs, seventy insurance companies in the Commonwealth, challenged the constitutionality of a law providing that automobile insurance rates in 1971 had to be 15% lower than they were in 1970.[194] The plaintiff companies claimed that the law was confiscatory and presented evidence—in the form of projections based on past insurance activity and claims increases over past years—that the rates mandated by the statute would cause them to operate at a loss for the year of 1971.[195]

Using rational basis review, the court held the statute unconstitutional.[196] The court relied on the evidence presented by the plaintiffs to conclude that the insurance rates set for 1971 were irrational; the legislature, in the court's view, could not force companies in a particular business to operate at a loss, or not operate at all.[197] The regulation at issue here was purely economic; there was no personal interest at stake, and even assuming the interest in pursuing a business—in this case, insurance—was at

right to move about freely as one of the fundamental "amenities of life"); Williams v. Fears, 179 U.S. 270, 274 (1900) (defining "right to remove from one place to another according to inclination" under the Federal Constitution as "an attribute of personal liberty").

[191] *See* MASS. CONST. pt. I, art XI.

[192] *Cf.* Lawrence v. Texas, 539 U.S. 558, 562 (2003) (opining that, under the Federal Constitution, "[f]reedom extends beyond spatial bounds" and "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct").

[193] 263 N.E.2d 698 (Mass. 1970).

[194] *Id.* at 699.

[195] *Id.* at 700.

[196] *See id.* at 703.

[197] *Id.*

issue, the law did not single out one or more insurers for special treatment. Nonetheless, the court applied a form of rational basis review that involved little deference to the legislature's policymaking determination.[198]

Similarly, in the 2004 case *Zuckerman v. Town of Hadley*,[199] the plaintiff, a landowner, challenged a town zoning regulation that controlled, for an unlimited period of time, the number of building permits issued each year for the construction of single family homes.[200] The plaintiff argued that the regulation was unconstitutional because it prevented her from developing her land.[201] In response, the town argued that the regulation served to protect the town's agricultural land and to allow time for the expansion of public service to accommodate the increasing population; because the population expansion would occur over an indefinite period of time, the town maintained it would have to make adjustments for an unlimited period of time.[202]

The court faced the question of whether the town's zoning regulation was rationally related to a legitimate zoning purpose—a slight variation on ordinary rational basis review under equal protection.[203] The court did not deny that the regulation had a legitimate health, safety, or welfare purpose; the problem was that the town could not take an infinite amount of time to reach that end.[204] The court observed that the zoning regulation would have been constitutional had it been for a definite period of time.[205] But population growth and the protection of agriculture were concerns of every town in the Commonwealth, and because every town faced these issues, a regulation like this one would simply force the problem into neighboring towns: "Through zoning bylaws," the court stated, "a town may allow itself breathing room to plan for the channeling of normal growth; it may not turn that breathing room

[198] The court followed the reasoning of *Aetna Casualty* without additional clarification in *Travelers Indemnity Co. v. Commissioner of Insurance*. 265 N.E.2d 90, 92 (Mass. 1970).

[199] 813 N.E.2d 843 (Mass. 2004).

[200] *Id.* at 845.

[201] *Id.* at 847.

[202] *Id.* at 848–49.

[203] *See id.* at 848 (stating that "due process requires that a zoning bylaw bear a rational relation to a legitimate zoning purpose").

[204] *Id.* at 849, 851. "Neither the desire for better fiscal management nor the revenue-raising limitations imposed by [the regulation, was] a proper basis on which to adopt a zoning ordinance intended to limit growth or the rate of growth in a particular town for the indefinite future." *Id.* at 851.

[205] *Id.* at 849.

into a choke hold against further growth."[206]

As in *Aetna*, the *Zuckerman* court seems to have applied enhanced rational basis review to strike down a regulation with a legitimate purpose, absent the kind of personal interest at stake that typically would trigger enhanced rational basis review. The protection of an individual's private property might qualify as such an interest,[207] yet in this case the regulation affected all similarly-situated property owners—just as the law at issue in *Aetna* affected all Commonwealth-based insurers—rather than singling out one individual or one segment of the property-owning population for special treatment. In this way the zoning ordinance looked more like general economic regulation of the kind that the court regards with great deference.[208] Nonetheless, the court declared it invalid because the town could adduce no clear evidence that the prohibition needed to be in place for an indefinite amount of time—a requirement associated with enhanced rational basis review.

VII. CONCLUSIONS

Based upon a review of the enhanced rational basis cases, as well as the cases that mark the Massachusetts Supreme Judicial Court's abandonment of the pursuit of a business, vocation, or profession as an interest triggering enhanced rational basis review, we may draw some preliminary conclusions. First, contrary to the assertions of the critics of *Goodridge*, the rational basis analysis employed in that case is not a novelty: throughout the past century the supreme judicial court has applied enhanced rational basis scrutiny to government action that implicates or restricts certain personal interests. In a majority of these cases, the interest in question was one involving the pursuit of a particular livelihood.

Second, the court has curtailed its use of enhanced rational basis scrutiny in recent years. In a series of cases in the 1970s, the court narrowed the understanding of the kind of personal interests that would trigger enhanced rational basis scrutiny. The court has since

[206] *Id.* at 850.

[207] *See* Durgin v. Minot, 89 N.E. 144, 147 (Mass. 1909) (holding that it is unconstitutional to compel a land owner to pave a private right of way when it poses no threat to health and safety).

[208] *See* Grace v. Town of Brookline, 399 N.E.2d 1038, 1042 (Mass. 1979). In *Grace*, the court maintained that "in the judicial review of municipal by-laws and ordinances 'every presumption is to be made in favor of their validity.'" *Id.* (quoting Crall v. City of Leominster, 284 N.E.2d 610, 615 (Mass. 1972)). Indeed, the court upheld essentially similar regulation on rational basis review in *Sturges v. Town of Chilmark*. 402 N.E.2d 1346 (Mass. 1980).

struck down legislation applying enhanced rational basis review in just a few cases, each of which implicated such decidedly non-economic personal interests as access to the courts, personal liberty, or the freedom to choose whom one may marry. In two cases, *Aetna* and *Zuckerman*, the court struck down a law setting insurance rates and a municipal ordinance, respectively, absent the abridgement of an important personal interest. It is those cases, and not the more recent decision in *Goodridge* on same-sex marriage, that appear to deviate from the way in which the court has applied its two-track approach to rational basis review.

In this Article, I have advanced possible reasons for the supreme judicial court's effort to narrow the cases to which enhanced rational basis scrutiny will apply,[209] but the doctrinal shift warrants further inquiry. At this point, we can say with some certainty that enhanced rational basis review is likely to be employed only rarely under the Massachusetts Constitution. The more limited use of such scrutiny accords with a view of equal protection that allows the political branches a wide plane on which to make policy choices related to the health, safety, and welfare of the public. As a result, enhanced rational basis review in the Massachusetts courts would appear to be reserved for those laws that implicate identifiable personal interests that are important to individuals as autonomous beings and political actors, rather than those interests that are important to individuals due to a contingency, such as the decision to pursue a particular business, vocation, or profession.

[209] *See supra* notes 152–65 and accompanying text (discussing possible reasons for the supreme judicial court's narrowing of enhanced rational basis review).

APPENDIX A

Case	**Triggering Interest**	**Outcome**
Commonwealth v. Pear, 66 N.E. 719 (Mass. 1903).	Right to Refuse Medical Treatment	State can compel vaccination against diseases posing serious health risks to the public.
Wyeth v. Thomas, 86 N.E. 925 (Mass. 1909).	Pursuit of Livelihood	Unconstitutional to require undertakers be trained in embalming.
Durgin v. Minot, 89 N.E. 144 (Mass. 1909).	Private Property	Unconstitutional to compel land owner to pave private right of way when it poses no danger to health or safety.
In re Opinion of the Justices, 94 N.E. 558 (Mass. 1911).	Right of Association	Unconstitutional to prohibit certain women from entering and being served in a restaurant or hotel owned by a Chinese person.
Commonwealth v. S.S. Kresge Co., 166 N.E. 558 (Mass. 1929).	Pursuit of Livelihood	State may allow only trained professionals to sell corrective eyeglasses.
In re Opinions of the Justices, 14 N.E.2d 953 (Mass. 1938).	Pursuit of Livelihood	Unconstitutional to limit the hours that a barbershop could operate.
In re Opinion of the Justices, 22 N.E.2d 49 (Mass. 1939).	Pursuit of Livelihood	Unconstitutional to prohibit married women from employment in public service.

Case	**Triggering Interest**	**Outcome**
Sperry & Hutchinson Co. v. McBride, 30 N.E.2d 269 (Mass. 1940).	Pursuit of Livelihood	Unconstitutional to require gasoline filling stations to fix the price of fuel for a period of twenty-four hours after price is first posted.
Opinion of the Justices, 79 N.E.2d 883 (Mass. 1948).	Pursuit of Livelihood	Unconstitutional to prohibit those involved in the operation of a cemetery from selling monuments for cemetery plots.
Mansfield Beauty Acad. v. Bd. of Registration of Hairdressers, 96 N.E.2d 145 (Mass. 1951).	Pursuit of Livelihood	Unconstitutional to prohibit beauty schools from charging models for the materials used on them.
Hall-Omar Baking Co. v. Comm'r of Labor & Indus., 184 N.E.2d 344 (Mass. 1962).	Pursuit of Livelihood	Unconstitutional to require that drivers of bakery trucks be individually licensed.
Coffee-Rich, Inc. v. Comm'r of Pub. Health, 204 N.E.2d 281 (Mass. 1965).	Pursuit of Livelihood	Unconstitutional to prohibit sale of a non-dairy cream substitute.
Aetna Cas. & Sur. Co. v. Comm'r of Ins., 263 N.E.2d 698 (Mass. 1970). & Travelers Indem. Co. v. Comm'r of Ins., 265 N.E.2d 90 (Mass. 1970).	Economic Policy	Unconstitutional to require automobile insurance rates to be a set percentage lower.
Hutcheson v. Dir. Of Civil Serv., 281 N.E.2d 53 (Mass. 1972).	Pursuit of Livelihood	Unconstitutional to prefer disabled veterans over non-disabled veterans for civil service positions.

Case	**Triggering Interest**	**Outcome**
Hutcheson v. Dir. Of Civil Serv., 281 N.E.2d 53 (Mass. 1972).	Pursuit of Livelihood	Unconstitutional to prefer disabled veterans over non-disabled veterans for civil service positions.
Commonwealth v. Henry's Drywall Co., 320 N.E.2d 911 (Mass. 1974).	Economic Policy	Law prohibiting construction companies from allowing or requiring employees to use stilts is constitutional—abandonment of pursuit of livelihood as personal interest triggering enhanced review.
Zayre Corp. v. Att'y Gen., 362 N.E.2d 878 (Mass. 1977).	Economic Policy	Law prohibiting the operation of businesses on Sundays is constitutional—abandonment of pursuit of livelihood as personal interest triggering enhanced review.
Paro v. Longwood Hosp., 369 N.E.2d 985 (Mass. 1977).	Economic Policy	Tribunal approval process for medical malpractice lawsuits is constitutional.
Blue Hills Cemetery, Inc. v. Bd. Of Registration in Embalming & Funeral Directing, 398 N.E.2d 471 (Mass. 1979).	Economic Policy	Law prohibiting any corporation involved in funeral directing from engaging in any other business activity is constitutional—abandonment of pursuit of livelihood as personal interest triggering enhanced review.

Case	**Triggering Interest**	**Outcome**
Shell Oil Co. v. City of Revere, 421 N.E.2d 1181 (Mass. 1981).	Economic Policy	Law prohibiting the operation of self-service gasoline stations is constitutional—abandonment of pursuit of livelihood as personal interest triggering enhanced review.
English v. New Eng. Med. Ctr., Inc., 541 N.E.2d 329 (Mass. 1989).	Economic Policy	Law limiting the liability of charitable institutions in tort claims to $20,000 is constitutional.
Commonwealth v. Arment, 587 N.E.2d 223 (Mass. 1992).	Liberty Interest	Law allowing a prisoner to be classified as a "sexually dangerous person," without engaging in sexually assaultive behavior in prison is unconstitutional.
Murphy v. Comm'r of the Dep't of Indus. Accidents, 612 N.E.2d 1149 (Mass. 1993).	Right to Access the Courts	Requiring fee be paid when appealing a workers' compensation claim with the assistance of counsel, but not when proceeding without counsel, is unconstitutional.
Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).	Right to Choose Whom to Marry	Law prohibiting same-sex couples from marrying is unconstitutional.

Case	**Triggering Interest**	**Outcome**
Zuckerman v. Town of Hadley, 813 N.E.2d 843 (Mass. 2004).	Economic Policy	Law limiting the amount of building permits issued per year for an unlimited amount of time is unconstitutional.