

Rationality is dead! Long live rationality!

Saving rational basis review*

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[T]he word 'test' is inappropriate, at least insofar as it suggests some meaningful analytical framework to guide judicial decision-making, because the rational basis test is nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens to be shaking it and with what level of vigor.¹

1 Introduction

Rational basis review has been in trouble for a while.² For at least the past 35 years it has been constantly criticised for being 'empty',³ 'toothless',⁴ inconsistent⁵ and incoherent.⁶ Despite its doubtful pedigree, litigants continue to rely on it and

¹I would like to thank Alistair Price for agreeing to reply to this paper and for the many conversations which I can only hope were as enlightening for him as they were for me. This paper was originally written for a seminar on public law at Columbia Law School run by Prof Gillian Metzger and Prof Trevor Morrison. I would like to thank them both for giving me the opportunity to write the paper and for their helpful comments on the original draft. I would also like to thank Stu Woolman, James Fowkes, the anonymous referees and all the participants at the SAIFAC seminar for their comments. All errors, of course, remain my own.

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¹Neily 'No such thing: Litigating under the rational basis test' (2005) 1 *New York Journal of Law and Liberty* 898 at 898.

²See, eg, Linde 'Due process of lawmaking' (1975) 55 *Nebraska LR* 197; Gunther 'Foreword: In search of evolving doctrine on a changing court: A model for a newer equal protection' (1972) 86 *Harvard LR* 1; Note 'Legislative purpose, rationality, and equal protection' (1972) 82 *Yale LJ* 123; Bennett 'Mere' rationality in constitutional law: Judicial review and democratic theory' (1979) 67 *California LR* 1049.

³See, eg, Note (n 2) 128.

⁴See, eg, Gunther (n 2) 18-19; Bice 'Rationality analysis in constitutional law' (1980) 65 *Minnesota LR* 1 at 3-4; *In re Agnew* (7th Cir 1998) 144 F 3d 1013 at 1014.

⁵See, eg, Bennett (n 2) 1060; Farrell 'Legislative purpose and equal protection's rationality review' (1992) 37 *Villanova LR* 1 at 2.

⁶Meyers 'Impermissible purposes and the equal protection clause' (1986) 86 *Columbia LR* 1184 at 1184; Sunstein 'Public values, private interests and the equal protection clause' (1982) *Supreme Court Review* 127 at 144.

the courts refuse to alter the test to answer their critics. This essay is one more in a long lineage of attempts to figure out what is wrong with rational basis review and propose a way forward.

Although I rely extensively on earlier work in the area, I have taken a different tack. Firstly, I offer a comparative perspective that looks at the law in both the United States and South Africa. The formulation of the tests and judicial attitudes toward their enforcement are virtually identical in both countries. Yet the US has a much longer history of cases and scholarship that address the problem that can teach South African courts as much from its failures as its successes. South Africa also makes an interesting comparison from the US point of view, because it illustrates how even a system without signs of the extreme excesses of US jurisprudence is in need of saving and may offer some hints on what the route to salvation might be.⁷

Secondly, my goal is not to identify all the inconsistencies and absurdities of rational basis theory⁸ or practice.⁹ Instead I want to show how the test fails to do what it is meant to do and to suggest that a re-think of how we justify and conceptualise the test is required. I begin in Part 2 by specifying the form of the test and noting some of the major differences between US and South African jurisprudence. Part 3 examines the justifications for rational basis review and deduces what type of test those justifications envisage and what types of laws they require to be struck down. The heart of my analysis comes in Part 4 where I describe how the rational basis test is incapable of uniform or routine application; its outcomes cannot be neatly deduced from a formula but are almost entirely dependent on the discretion of litigants, lawyers and, most importantly, judges. Part 5 demonstrates how the analysis in Part 4 unmoors the rational basis test from its traditional justifications. Finally, in Part 6, I suggest an additional justification for the test that is compatible with the reality of rational basis review and suggest what an appropriate formulation of the test might look like.

⁷In his excellent reply, Price notes that there is an important difference between equality analysis in the two countries: many laws that are tested under rationality review in the US will be tested under the more exacting unfair discrimination standard in South Africa. Price 'The content and justification of rationality review' (2010) 25 *SAPL* 346 at 347. This is true and perhaps explains why rational basis review has attracted much more attention and criticism in the US than in South Africa. However, there is still a significant class of cases – differentiation on grounds not listed in s 9(3) or analogous grounds – that is subjected to rationality review in both nations. Those are the primary subject of this paper. Price also notes that the criticisms leveled at American courts' treatment of rationality review cannot be uncritically transposed to South Africa. Again he is correct. South African courts have, thus far, been far more circumspect in their application and explication of rationality review than their American counterparts. There are places in the paper where I unfairly lump all the sins of one on both. If I could rewrite it, I would change that. However, I would argue, and I would hope this paper demonstrates, that the way the test is structured and the justifications offered in favour of it are virtually identical on both sides of the Atlantic.

⁸See, eg, Note (n 2); Linde (n 2).

⁹See, eg, Neily (n 1).

Three small notes are in order before I begin. First, I am only concerned with the rational basis test in the context of equality claims. Much here might be applicable to the other contexts in which rationality review occurs, but I do not directly address those issues here.¹⁰ Second, Alistair Price has written a fantastic response to this essay in which he carefully tests my assertion that there is something wrong with the current groundwork of rationality review.¹¹ I agree with much of what Price says and believe his work deepens our understanding of the role rationality review can and should play in a constitutional democracy. I am deeply indebted to him for his careful and generous engagement with my ideas. However, there are areas – some more important, some less so – in which we differ. In order to maintain the call-and-response character of our conversation, I do not react to Price in the text, although it certainly would be greatly improved if I did! Avid readers will, however, find my thoughts on some of his claims in footnotes. Third, since writing this paper, the Constitutional Court handed down four important decisions on rationality as an element of legality.¹² I have not incorporated these cases into my discussion but refer to them because they will be of interest to readers of this article. However, both Price and I have discussed them and their relation to this paper's thesis in other forums.¹³ In short, I believe that the four decisions – especially when read together – confirm and support the analysis offered below. But this article should be read as stating the law at the end of 2009.

2 The test

The formulation of the basic test is remarkably similar in both South African and

¹⁰Price does tackle rationality in all its guises. I think much may be gained from considering all occurrences of rationality review together. However, I have two partially conflicting reasons for focusing on equality. One, I think that, ultimately, virtually any case in which rationality arises can be framed as a differentiation. There are technical reasons why the challenge will not be brought under s 9(1) – if, eg, it is a challenge to a constitutional amendment – but the substance of the test is the same. Two, although any challenge can be brought as a differentiation claim, something happens when we invoke the right to equality that subtly changes the nature of the complaint. Unequal treatment is the starting point. Rationality is the standard we use to determine whether the unequal treatment – which we intuitively think of as somewhat unjust – is acceptable. When rationality is applied without the allegation of differentiation the flaw is the irrationality alone, not any additional underlying wrong. That distinction will affect both the justifications for, and I think the nature of, the test we use. These reasons justify looking at rationality separately in the context of equality, even if the vast majority of insights are translatable to, and from, other contexts.

¹¹Price (n 7).

¹²*Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC), 2010 2 SACR 101 (CC), 2010 5 BCLR 391 (CC); *Poverty Alleviation Network v President of South Africa* [2010] ZACC 5, 2010 6 BCLR 520 (CC); *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC), 2011 2 BCLR 150 (CC); *Glenister v President of the Republic of South Africa* [2011] ZACC 6.

¹³See, Price 'Rationality review of legislation and executive decisions: *Poverty alleviation network and Albutt*' 2010 SALJ 580; Bishop and Brickhill 'Constitutional law' 2010 (1) *Juta's Quarterly Review* para 2.1-2.2; Bishop and Brickhill 'Constitutional law' 2010 (4) *Juta's Quarterly Review* para 2.1; Bishop and Brickhill 2011 (1) *Juta's Quarterly Review* para 2.1.

US jurisprudence. The relevant provision in the South African Constitution is section 9(1) which provides: 'Everyone is equal before the law and has the right to equal protection and benefit of the law'. The South African Constitutional Court has uniformly phrased the test as whether the 'the differentiation bear[s] a rational connection to a legitimate government purpose'.¹⁴ Under American law, rationality review is based on the equal protection clauses of the Fifth and Fourteenth Amendments.¹⁵ Although it has been phrased in many different ways,¹⁶ the basic test is the same: there must be 'a rational relationship between the disparity of treatment and some legitimate governmental purpose'.¹⁷

In addition to the virtually identical wording of the tests there are other similarities between the two systems. Both stress the need not to second-guess the wisdom of legislative choices.¹⁸ According to the South African Court: 'The question of whether the legislation could have been tailored in a different and more acceptable way is ... irrelevant to the question of whether there is a sufficient relationship between the means chosen and the end sought'.¹⁹ Likewise, Justice Thomas stated: 'equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices'.²⁰ Both courts also adhere to the line that only a very limited connection between means and ends is required²¹

¹⁴*Harksen v Lane* NO 1998 1 SA 300 (CC) para 53. See also, eg, *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 25; *Jooste v Score Supermarkets Trading (Pty) Ltd* 1999 2 SA 1 (CC) para 17; *Weare v Ndebele* NO 2009 1 SA 600 (CC) para 46; *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC) para 42.

¹⁵US Constitution amend. V ('No person shall be ... deprived of life, liberty or property without due process of law') and XIV, para 1 ('No State shall ... deny to any person within its jurisdiction the equal protection of the laws').

¹⁶*San Antonio Independent School District v Rodriguez* 411 US 1 at 40 (1973) (the differentiation must 'bear some rational relationship to legitimate state purposes'); *New Orleans v Dukes* 427 US 297 at 303 (1976) ('our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest'); *City of Cleburne v Cleburne Living Center Inc* 473 US 432 at 440 (1985) ('legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest'); *Massachusetts Board of Retirement v Murgia* 427 US 307 at 312 (1976) ('rationally related to furthering a legitimate state interest').

¹⁷*Heller v Doe* 509 US 312 at 320 (1993).

¹⁸*Jooste*, (n 14) para 17; *Weare* (n 14) para 60; *Prinsloo* (n 14) para 35. *United States Rail Road Retirement Board v Fritz* 449 US 166 at 197 (1980) (Brennan J dissenting); *Dukes* (n 16) 303; *Heller* (n 16) 319.

¹⁹*Prinsloo* (n 14) para 35.

²⁰*Federal Communications Commission v Beach Communications Inc* 508 US 307 at 313 (1993).

²¹*Prinsloo* (n 14) para 26 ('it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it.'). *Weare* (n 14) para 46 ('The question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious.'). *Dandridge v Williams* 397 US 471 at 485 (1970) ('If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some

and, as a result, both courts rarely invalidate laws on this basis.²²

However, despite the similar wording of the test, there are important differences between the two countries. Firstly, while the formal phrasing of the test remains untouched, there is constant debate within the US Supreme Court about the degree of connection between means and ends that rationality requires. One line of cases, beginning with *FS Royster Guano Co v Virginia*, requires a 'fair and substantial relation' between means and ends.²³ However, the dominant position seems to be that '[w]hen the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time that the law was enacted must be assumed'.²⁴ So far, there has been no such debate or controversy in South Africa where the Constitutional Court has uniformly adhered to the standard that the means need only be one possible way to achieve the end.

Secondly, US courts are not only permitted but also encouraged to imagine what purposes the law might serve.²⁵ The position is well summarised in *Federal Communications Commission v Beach Communications Inc*:

[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.] ... [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.'²⁶

In contrast, while the South African courts have not directly ruled on the issue, they seem to have taken the approach that the law must be tested only against the purposes that either appear from the face of the statute or that government advocates in the litigation.²⁷ They have not engaged in the sort of

inequality". *Lindsley v Natural Carbonic Gas Company* 220 US 61 at 78 (1911) The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific. *Metropolis Theatre Company v City of Chicago* 228 US 61 (1913) quoted with approval in *Heller* (n 17) at 321.)

²²For a summary of the success rate of rational basis claims in the US, see Farrell 'Successful rational basis claims in the supreme court from the 1971 term through *Romer v Evans*' (1999) 32 *Indiana LR* 357. The only times the Constitutional Court has invalidated statutes are *Van der Merwe* (n 14) and *S v Ntuli* 1996 1 SA 1207 (CC). There is also a line of cases where courts have used the test to ensure equality in the legal process. See Albertyn and Goldblatt 'Equality' in Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* (2007) (2nd ed) para 9.3(c).

²³253 US 412 at 415 (1920).

²⁴*Lindsley* (n 21) 78-79.

²⁵See *Nordlinger v Hahn* 505 US 1 at 11 (1992); *Fritz* n (17) 174-179; *Vance v Bradley* 440 US 9 at 111 (1979); *Dandridge* (n 21) 484-485.

²⁶(N 20) 315 quoting *Lehnhausen v Lake Shore Auto Parts Co* 410 US 356 at 364 (1973).

²⁷There is no case in which a law has been upheld on a basis not argued by the state. In *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) the Constitutional Court declined to adopt a rationale that would have provided a much stronger justification for the government's action than the one government relied on. The case concerned a law permitting only citizens and permanent residents to qualify as security guards. The government's

speculation often evident in the US courts.

A third difference lies in the use of empirical evidence. The US courts have taken the attitude that 'legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data',²⁸ although they do not always adhere to that standard.²⁹ A litigant bringing a rationality challenge cannot, therefore, rely on the fact that the law does not in fact achieve its alleged end if the legislature – or a court – could 'rationally speculate' that it might. South African courts have not yet taken a stand on this issue, although there are signs that they would consider empirical evidence.³⁰

Finally, US courts approach rational basis claims with a 'strong presumption of validity'.³¹ South African courts have not adopted any presumptions in this area. Although the plaintiff must prove the case, the burden is the same as any other constitutional claim.

Although the two jurisdictions have much in common, if one takes the courts at their word, the US courts apply a more lenient test. This will be important in what follows because, while there are certain specific problems with some of the positions taken in the US, most of the analysis that follows applies equally to both regimes.

3 Justification

Having established the basic outline of the test, the next step is to inquire what justifies its existence and what ends it is meant to serve. The test is a means for courts to strike down legislation enacted through ordinary democratic processes and such decisions therefore require a sturdy justification.

There are two basic evils that the rational basis requirement is meant to avert: arbitrariness and prejudice. Most obviously, it is designed to ensure that whatever government's goals might be its actions have a reasonable possibility of achieving those goals. According to the South African Constitutional Court, it is a 'fundamental premise[] of the constitutional state ... that the state is bound to function in a rational manner'.³² This goal focuses on the *achievement* of legislative ends, not their

asserted purpose was an interest in ensuring the safety of citizens, allegedly furthered by the law because it was more difficult to check refugees' previous criminal history. The more obvious purpose was simply to protect the job market for those who had a demonstrated commitment to the country. Yet the Court did not even mention that purpose because government had specifically disavowed any reliance on it.

²⁸*Beach Communications* (n 20) 315, quoted with approval in *Heller* (n 17) 320.

²⁹*New York Transit Authority v Beazer* 440 US 568 (1979).

³⁰*Matatiele Municipality v President of the Republic of South Africa (1)* 2006 5 BCLR 622 (CC) (Sachs J concurring).

³¹See, eg, *Murgia* (n 16) 314; *Heller* (n 17) 319; *Beach Communications* (n 20) 314-315.

³²*Prinsloo* (n 14) para 25. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 156 (Ackermann J concurring) ('The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.')

substantive legitimacy. While there are instrumental benefits to this requirement,³³ it is an end in itself: We expect our representatives not to differentiate between us arbitrarily. We want our lawmakers to debate the justifications for a law and to inform themselves about its probable effects before they act. The rational basis test is meant to ensure that they do so. Gerald Gunther, calling for courts to demand a closer connection between means and ends in rationality cases, put it this way:

A common defense of extreme judicial abdication is that the state has considered the contending considerations. Too often the only assurance that the state has thought about the issues is the judicial presumption that it has. Means scrutiny would provide greater safeguards that the presumed process corresponds to reality – and would thereby give greater content to the underlying premise for deferring to the state's resolution of the competing issues.³⁴

Secondly, the rational basis test is meant to prevent government from exercising 'naked preferences'.³⁵ Government may not act solely to privilege a politically favourable group over an unfavourable group. The rational basis test requires that all laws that disadvantage a group must serve a *public* purpose or value. Cass Sunstein explains:

As I read it, the function of the [Equal Protection] Clause is to prohibit unprincipled distributions of resources and opportunities. Distributions are unprincipled when they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another. Such an understanding as this focuses on the reasons or motives that underlie classifications.³⁶

This rationale has been explicitly endorsed in both the US³⁷ and South Africa.³⁸ In Justice Brennan's words: 'For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest'.³⁹

³³Gunther (n 2) 44 ('Means scrutiny, to the contrary, can improve the quality of the political process - without second-guessing the substantive validity of its results - by encouraging a fuller airing in the political arena of the grounds for legislative action. Examination of means in light of asserted state purposes would directly promote public consideration of the benefits assertedly sought by the proposed legislation; indirectly, it would stimulate fuller political examination, in relation to those benefits, of the costs that would be incurred if the proposed means were adopted').

³⁴*Id.*

³⁵See generally, Sunstein (n 6); Sunstein 'Naked preferences and the constitution' (1984) 84 *Columbia LR* 1689 at 1692; Sunstein 'Interest groups in American public law' (1985) 38 *Stanford LR* 29; Michelman 'Politics and values or what's really wrong with rationality review?' (1979) 13 *Creighton LR* 487; Tribe *American constitutional law* (1988) 1451.

³⁶Sunstein (n 6) 128.

³⁷*United States Department of Agriculture v Moreno* 413 US 528 at 534 (1973); *Romer v Evans* 517 US 620 at 633-634 (1996).

³⁸*Prinsloo* (n 14) para 25, citing Sunstein 'Naked preferences' (n 35).

³⁹*Moreno* (n 37) 534.

These bases for rationality review only make sense within a model of politics where 'politics is "not the reconciling but the transcending of the different interests of the society in the search for the single common good"'.⁴⁰ This understanding of politics – known as the 'public value' or 'social good' model – contrasts with the alternative 'public choice' model which

assumes that the legislature is simply a 'market-like arena' in which individuals and special interest groups trade with each other through representatives to further their own private ends. There is no 'public interest,' no identifiable 'social good'; there are only bargains struck between those helped by legislation and those who are harmed.⁴¹

Reviewing legislation for a rational basis only makes sense in the public value model. Under the public choice regime, legislative decisions are necessarily arational: 'the legislature simply does what it does – means and ends are merged'.⁴²

While the dual demand for rationality and impartiality clearly require some standard, why is the rational basis standard the right one? The same interests could be achieved, for example, by a balancing inquiry. The rational basis test is justified as much by ensuring rational and impartial action as it is by deference to the legislature. As the courts routinely note,⁴³ government regulation necessarily results in some groups receiving more benefits than others. If the courts required more than the most limited review of these run-of-the-mill differentiations, government would be brought to a standstill. In other words, 'the Court's perception of the evil at which the Equal Protection Clause is aimed is accompanied by a reluctance, rooted in separation of powers concerns, to conclude too readily that the evil is in fact taking place'.⁴⁴ The rational basis test is the means designed to invalidate only those laws that fall afoul of the first two rationales and no more. The rational basis test is meant to prevent excessive interference or obstruction of the legislative process and to prevent judges from taking substantive judgments outside the narrow confines of rooting out irrationality bias.

This leads to one of the central points of the argument: the rational basis test is often portrayed by courts as a mechanical test which will supply the same answers no matter who applies it. The very nature of the language – 'rationality'

⁴⁰Sunstein 'Naked preferences' (n 35) 1691 quoting Wood *The creation of the American republic* (1972) 58. See also Michelman 'Political markets and community self-determination: Competing judicial models of local government legitimacy' (1978) 53 *Indiana LJ* 145 at 148-57; Sunstein (n 6); Michelman (n 35).

⁴¹Bice (n 4) 19 (footnotes omitted).

⁴²*Id.* But see Michelman (n 35) 33 (argues that rationality is also supported by an economic conception of the Constitution).

⁴³In the US see, eg, *Romer* (n 37) 631; *Beach Communications* (n 20) 315; *Royster Guano* (n 23) 415. In South Africa, see *Prinsloo* (n 14) para 17 ('If each and every differentiation made in terms of the law amounted to unequal treatment ... the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct').

⁴⁴Sunstein (n 6) 142.

– implies that there is no room for disagreement; a person who reached a different outcome would not only be wrong, but irrational. But more importantly it rests on the requirement that judges not ‘second-guess’ legislative choices.⁴⁵ If the test permitted or required judges to use their own discretion in determining the rationality of a choice, that command would be undermined as judges’ attitudes would pollute the supposedly neutral inquiry. The traditional underpinnings of rational basis review therefore demand a test that forces predictable outcomes and removes personal discretion. Judges are therefore obliged to frame the rational basis as excluding their discretion.⁴⁶

With an understanding of the compound justificatory framework for rational basis review, we can ask the next important question: Taken together, what types of laws are prohibited by the rational basis test? There is a simple answer. There are two types of laws that are prohibited: Laws motivated by naked preferences, whether they have that effect or not, and laws that are motivated by an acceptable purpose but fail to achieve that purpose. The first type is prohibited by the ‘naked preference’ rationale, and the second by its ‘rationality’ partner.⁴⁷

These two classes of unacceptable laws seem to correspond directly to two distinct parts of the rational basis test. The test – the law must bear a rational connection to a legitimate government purpose – breaks down into: (a) a threshold requirement that the purpose asserted is ‘legitimate’; and (b) a check that the law is related to some purpose that crosses that threshold. Laws motivated by covert favouritism are prohibited by (a) and those with innocent motivations but that serve no public good are proscribed by (b).

While this may be the most obvious way of understanding the test, courts often apply the two stages of the test in a different manner. They use the means-end aspect of the test as a device to ‘flush out’ impermissible purposes.⁴⁸ In *Cleburne* the

⁴⁵See n 18.

⁴⁶Price criticises this passage for drawing conclusions that are too ‘stark’. He alleges that I have doomed rationality review to become ‘incoherent by sheer definitional stipulation’ and that the grant of limited discretion is compatible with the demands of institutional comity (n 7) 360. I agree with him on both counts. Excluding discretion completely is clearly both impossible and unnecessary to maintain appropriate judicial deference to the political branches of government. However, the thrust of my point remains: judges are pushed to (and do in fact) *downplay* – if not completely deny – the extent of their discretion, and that point about judicial rhetoric is compatible with Price’s position.

⁴⁷Price suggests that prejudice or naked preference is best understood as a ‘species of arbitrariness’ (n 7) 366. On the understanding that this is a purely semantic rather than a substantive point, I am happy with that alteration; the understanding is correct as Price does not challenge the idea that the rational basis test is aimed at preventing both arbitrary intentions (naked preferences) and arbitrary actions (actions that do not achieve their purpose).

⁴⁸See Sunstein (n 6) 131; Farrell (n 5) 37; Simon ‘Racially prejudiced governmental actions: A motivation theory of the constitutional ban against racial discrimination’ (1978) 15 *San Diego LR* 1041 at 1114; Herz ‘Nearest to legitimacy: Justice White and strict rational basis scrutiny’ (2003) 74 *Univ Colorado LR* 1329 at 1366; Swierenga ‘Still newer equal protection: Impermissible purpose review in the 1984 term’ (1986) 53 *Univ Chicago LR* 1454 at 1473.

Court rejected a string of justifications for a refusal to permit the establishment of a home for the mentally handicapped and concluded that the only possible motivation for the law was prejudice against the mentally handicapped.⁴⁹ As the law was motivated by an illegitimate purpose, it was invalid. There is nothing wrong with reversing the order in which the two part test is administered as both types of invidious laws will still be caught out. However, it is important not to confuse interpreting an action rationally with evaluating the rationality of an action:

[I]n any particular case, the interpretive and evaluative uses of rationality are mutually exclusive. If the observer seeks to evaluate an actor's cognitive function, the observer cannot identify the actor's ends and beliefs through interpretive rationality because the succeeding 'evaluation' would be an empty tautological exercise.⁵⁰

4 Balancing rationality⁵¹

In this section I contend that in order for the rational basis test to be meaningful and to achieve its purpose, the four parts of the test need to be carefully balanced. If an extreme position is taken in any of the four parts, then the whole test is in danger of becoming meaningless and of permitting the continued existence of any law no matter how silly or evil, or, the process becomes so arduous that the business of governing would be brought to a screeching halt. However, the effect of requiring this balance is that the test is necessarily influenced by judicial discretion and ceases to be a formal, logical exercise.

To repeat, the test is: the differentiation is rationally connected to a legitimate government purpose. The four parts of the test are:

- (a) what is the differentiation or law at issue?
- (b) what is the purpose it serves?
- (c) is that purpose legitimate?
- (d) if so, is the differentiation connected to the purpose?

For reasons that I trust will become clear, I will consider these steps in more or less reverse order.

⁴⁹*City of Cleburne* (n 16).

⁵⁰*Bice* (n 4) 8.

⁵¹I want to point out here what the coming examples are meant to demonstrate. They are not meant to show, upon a thorough consideration of all the case law, that either the US Supreme Court or the South African Constitutional Court has adopted a particular position. Rather, they indicate how the rationality test is *susceptible* to manipulation. It may well be that, on average, a court has performed admirably, yet there remain a few cases that illustrate where the temptation for judges to over-reach exists, even if they are usually able to resist. I make this point because Price provides a compelling defence of the Constitutional Court's record of applying the rationality test (n 7) 372-376. I am ready to concede much of what Price says, but I do not think it undermines my contention that the potential for manipulation exists.

4.1 Legitimacy⁵²

The first element of the test is to determine which purposes are 'legitimate'. In the traditional model of rational basis review this element operates as the door to the formal rationality check made up by the remaining three parts. However, as I explained earlier, that relationship can also be switched so that the rationality check becomes a mechanism to determine which purposes should be measured against the bar of legitimacy. Whether it functions as a threshold or a final arbiter, extreme approaches to the question of legitimacy pose perhaps the most blatant dangers to the validity of rational basis review.

The first extreme occurs when a court accepts virtually any purpose as legitimate. The decision of the Tenth Circuit in *Powers v Harris* offers a powerful illustration of this problem.⁵³ The law in question required any person who wished to sell caskets to meet a number of stringent criteria including: completing sixty credit hours of specified undergraduate training; an apprenticeship of one year; the embalming of twenty-five bodies; passing both a subject matter and an Oklahoma law exam; and having a fixed physical location where bodies could be embalmed, 'funeral service merchandise' sold and bodies viewed.⁵⁴ In short, it permitted only proper funeral homes run by trained undertakers to sell caskets. Chief Circuit Judge Tacha declined to consider whether these requirements were rationally related to the purpose advanced by government in support of the regime, namely, to protect consumers from unscrupulous casket sellers.⁵⁵ Instead, he found that the law really aimed at the protection of Oklahoma's established intrastate funeral home industry from external competition and that, based on existing Supreme Court precedent,⁵⁶ this was a legitimate government purpose.⁵⁷ Naturally, the law achieved that purpose.

⁵²Price suggests a neat formula for this step: 'a legal rule's purpose is legitimate, under the rationality principle, if and only if it is consistent with all *other* legal and constitutional constraints, including the Bill of Rights and the Constitution's "objective, normative value system"'. This position will 'constrain[] judges to deciding only questions of law' (n 7) 355. As elegant as this structure is, I do not think it deals with the difficulties I identify below. The purpose of a law can be framed at various levels of abstraction, some of which will be legal while others will not. The structure also has this effect: it incorporates into the rationality test the requirement that the state make not only laws with constitutional effects, but always act with a constitutional purpose. The extent to which purpose alone is a valid reason to invalidate a law is controversial in the US and is largely unexplored in South Africa. Adding it to rationality review probably causes more problems than it solves. In my view, starting from the point that rational basis review is meant to prohibit 'naked preferences' – keeping in mind the various ways purpose can be changed – is a better way to approach the problem of legitimacy. This is perhaps an example of where my focus on equality leads me to a different viewpoint to that observed through Price's wider lens.

⁵³379 F 3d 1208 (10th Cir 2004).

⁵⁴*Id* 1212-1213.

⁵⁵*Id* 1218.

⁵⁶*Id* 1220-1221 citing *Fitzgerald v Racing Association of Central Iowa* 539 US 103 (2003); *Dukes* (n 16); *Ferguson v Skrupa* 372 US 726 (1963); and *Williamson v Lee Optical of Oklahoma* 348 US 483 (1955).

⁵⁷*Powers* (n 53) 1218-1222.

The problem here is that the court required no additional public reason for the exercise of the naked preference for the sale of caskets by funeral homes over those who wish to sell caskets in ordinary shops, or on the web or from their garage. It may be argued that the state has an interest in ensuring that funeral homes are able to survive and that permitting unlimited competition in an important part of their business might force them to close down. The trouble with that argument is that reserving the casket business for funeral homes necessarily disadvantages those who would compete. The very essence of the rational basis test is that if the state wants to take sides in that competition it must have some purpose other than its preference for one side over the other.⁵⁸ That is exactly what the Supreme Court did in *Fitzgerald*.⁵⁹ The challenge was to a law that imposed a higher tax on slot machines at racetracks than it did on the same machines on riverboats. Justice Breyer did not hold that the law was driven by a mere desire to privilege riverboats over racetracks. He noted that the riverboat industry was in financial trouble and needed support, and that 'the legislators may have wanted to encourage the economic development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State, rather than relocate to other States.'⁶⁰ These are all purposes that go beyond naked preference.

If one extreme is to permit naked preferences to count as legitimate purposes, the other extreme occurs when the courts take it upon themselves to decide whether they approve of government's aims beyond the narrow confines of prohibiting blatant favouritism. A primary reason for adopting rationality as the appropriate level of scrutiny for the majority of classifications is to prevent courts from second-guessing every government decision. The temptation for courts to use the 'legitimate purpose' requirement to do just that is great, because it provides judges with a blank canvas

⁵⁸There may well be reasons that justify the decision, of which the consumer protection rationale avoided by the 10th Circuit is one. It may also be that undertakers would be unable to survive without the revenue generated from casket sales and that because it is in the public interest for undertakers to continue to operate they must keep a monopoly on casket sales. It is important to note the distinction between this purpose and the simple economic protectionism advanced by the Judge Tacha. The purpose offered here rests on the public benefit provided by undertakers; the court's rationale would hold even if undertakers served no public purpose.

⁵⁹(N 56).

⁶⁰*Id* 109. The same analysis can be conducted on all the other cases cited by the 10th Circuit in *Powers* (n 53). See *Duke* (n 16) 304 (The law only permitted vendors who had been operating in the French Quarter for eight years to continue to sell their wares. The Court noted that the purpose of the law was 'to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists.');

Ferguson (n 56) 732 (The law only permitted lawyers to conduct debt-adjusting. Justice Black for the Court had this to say about the purpose of the statute: 'The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him, remedies existing under state laws governing debtor-creditor relationships, or provisions of the Bankruptcy Act-advice which a nonlawyer cannot lawfully give him.');

and *Williamson* (n 56) 490 (The Court held that a law permitting only optometrists and ophthalmologists to fit and replace lenses was related to the purpose of promoting public health).

upon which to impose their own views of what the constitution should prohibit. At least under the rational basis test, courts in both the US and South Africa have been particularly sensitive to this risk. In *Eisenstadt v Baird* the Supreme Court specifically avoided the moral question of whether banning contraception for moral reasons was a legitimate government purpose.⁶¹

Despite these difficulties at the margins, it would seem that an easy solution exists: only naked preferences are impermissible. As attractive as that solution is, in theory, in practice it quickly fails because it is difficult to draw the line between favouritism and pursuit of the public good. Firstly, there may be disagreement about whether a purpose is really an exhibition of bias. In *Romer v Evans* a majority of the Court struck down a state constitutional amendment that prevented the passage of any law that prevented discrimination on the ground of sexual orientation.⁶² To them this appeared an obvious example of a naked preference. However, to Justice Scalia the amendment was 'a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws'.⁶³ While we may favour one side over the other, it is not possible to say that either side is absolutely wrong.

Secondly, even legislation that is in fact aimed at blatant favouritism can be re-couched as a law with a legitimate purpose: '[a] single set of social consequences will be related to a more remote set of consequences, and at some point along the range of causality there should be some permissible goal for any conceivable statute'.⁶⁴ Thus a statute aimed at protecting optometrists can be said to protect public health,⁶⁵ a law founded in xenophobia can be seen as a means to protect public safety,⁶⁶ and an exemption intended to put money in farmers' pockets can be seen as a device to promote the American economy.⁶⁷ Below I will again return to this difficulty about the level of abstraction at which a purpose is phrased, but for now the point is simply that it is not enough to say that 'legitimate' means: 'all those purposes that are not naked preferences'. Whether a law can be described as a naked preference depends on perspective and opinion, not logic or fact.

The solution to this may be to look at the actual motivation of legislation, that is, empirically determine why the legislators passed the law. If they passed it to protect optometrists it is invalid, but if they passed it out of concern for public health it is legitimate. Even if the test were phrased to permit this – which in the US it is not – it would seldom be useful, as determining actual purpose is virtually if not completely impossible. There is abundant literature on the problem of

⁶¹*Eisenstadt v Baird* 405 US 438 (1972).

⁶²*Romer* (n 37).

⁶³*Id* 636.

⁶⁴Note (n 2) 140.

⁶⁵*Williamson* (n 56).

⁶⁶*Union of Refugee Women* (n 27).

⁶⁷*Smith v Cahoon* 283 US 553 (1931).

determining legislative motive.⁶⁸ In addition to problems about the level of abstraction and multiple purposes, the biggest problem is assigning a single intent to a body with multiple members. When each of the legislators may have voted in favour of a law for a different reason, how can we possibly assign a single purpose to the law? Of course this problem exists only in the 'public choice' theory of politics; the 'social good' model on which rationality review is based avoids it and there are theories on how to deduce purposes in the value based model.⁶⁹ Whatever the validity of those theories, they are not based on logical deduction or empirical fact-finding, but on judicial judgment; they require judges to analyse an array of relevant factors to determine the 'actual' purpose behind the law.

4.2 Purpose

While the previous section focused on the difficulty of isolating illegitimate purposes, this section considers in more depth how a court can determine what the purpose of a law is because, as we will see, it has a serious impact on the means-end part of the rational basis test. I consider two main issues: the level of abstraction at which a purpose is phrased and laws that serve multiple purposes. In addition, the discussion above about the empirical difficulties of determining purpose applies equally at this stage.

4.2.1 Level of abstraction

Many scholars have noted that how generally or specifically the purpose of a law is determined will virtually predict the outcome of the rationality analysis.⁷⁰ As Hans

⁶⁸See, eg, Brest 'Palmer v Thompson: An approach to the problem of unconstitutional legislative motive' (1971) *Supreme Court Review* 95; Alexander 'Introduction: Motivation and constitutionality' (1977-1978) 15 *San Diego LR* 925; Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1962); Ely 'Legislative and administrative motivation in constitutional law' (1970) 79 *Yale LJ* 1205 (1970). See also *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) paras 73-74.

⁶⁹See Ely (n 68) 1226 (Ely argues for a 'consensus theory' which defines the purpose of a law as 'what such laws are generally concerned with, [and] what most legislators intend to accomplish by most such laws considered in their entirety.' As Bice notes, this theory can function either as an evidentiary aid which helps to determine which purposes are more likely, or a normative aid which prevents certain purposes from being accepted (n 4) 32. In this context it would function in the first fashion and would therefore be subject to judges' own interpretations of what purpose a law is generally meant to serve. The theory also seems to fall apart in describing new, unusual or multi-pronged legislation.); Farrell (n 5) 4 (Farrell attempts to avoid the problem through his definition of legislative purpose: 'purpose is not something that exists in the minds of the legislators, either individually or as a collective body. It exists, rather, as an objective concept, 'evident in the character of the law itself,' as an end to be achieved.' While this may avoid the empirical problem of ascertaining what individual legislators think, it presents a further problem: how to we determine the 'character of the law in itself'? This is what I suggest must necessarily remain an issue for judicial discretion).

⁷⁰See, eg, Note (n 2) 137-138; Farrell (n 5) 15-17; Bice (n 4) 28; Gunther (n 2) 47; Wadhvani 'Rational review, irrational results' (2006) 84 *Texas LR* 801.

Linde argues: ‘The outcome of an attack on the rationality of a law can be made to depend on whether the law is described as a means toward a somewhat remote end or as very close to an end in itself.’⁷¹ It is easiest to explain this phenomenon through an example. In *Weare v Ndebele NO* the applicant challenged a provincial law that limited gambling licenses to natural persons and partnerships.⁷² The province argued that the regulation was necessary because it was more difficult to manage juristic persons and to hold them responsible for violating regulations. We can restate that purpose at infinite levels of generality. Here are six possible purposes:

- (a) To promote the general welfare;
- (b) To prevent economic exploitation;
- (c) To regulate gambling;
- (d) To make the regulation of gambling manageable and efficient;
- (e) To hold all who violate gambling regulations responsible; and
- (f) To limit licenses to natural persons and partnerships.⁷³

The biggest problems are with (a) and (f). Let us start with (f). When the purpose of a law is stated so specifically, it effectively reduces the means to the end. In the words of Justice Brennan:

[P]resuming purpose from result ... reduces analysis to tautology. It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose.⁷⁴

The problem with (a) is more complicated and operates in two ways: ‘One could, with equal plausibility, conclude that there is no connection between the law and this purpose or that there is always a connection between them’.⁷⁵ Firstly, the end is so far removed from the means that it is either impossible to show a connection, or meaningless to try.⁷⁶ Secondly, one could argue that any conceivable law furthers some version of the general welfare and, unless courts want to get involved in defining ‘the general welfare’ – which they generally do not – they would have to accept that every law that claims this as its purpose is rational.

Although some argue that this critique only applies to (a),⁷⁷ there are convincing reasons why the rationality of laws alleged to further purposes framed at the level of (b) and (c) are also impossible of meaningful measurement.⁷⁸ As has been noted in

⁷¹Linde (n 2) 212.

⁷²(N 14).

⁷³This breakdown is modelled on that offered by Farrell (n 5) 15. See also Note (n 2) 137 (another example of how the levels of abstraction within a purpose can be broken down).

⁷⁴*Fritz* (n 17) 187 quoted in Farrell (n 5) 15.

⁷⁵Farrell (n 5) 16.

⁷⁶Ely (n 68) 1241; Bice (n 4) 15.

⁷⁷Ely (n 68) 1241-48.

⁷⁸Note (n 2) 143-146 (‘Even an apparently objective goal, like the promotion of public safety, can be shown to be too vague for objective measurement’); Farrell (n 5) 16.

a different context, '[t]he purpose of almost any law can be traced back down to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue.'⁷⁹ Once a law is brought under one of these headings it is impossible to show that it does not achieve some understanding of that end in some way. So when courts are confronted with appeals to 'the general welfare', unless they are willing to take substantive positions on just what public health, or national defense demand, they cannot plausibly say that a law brought under one of those headings does not achieve the intended end.

In *Union of Refugee Women* a general appeal to public safety could justify a law preventing foreigners from working as security guards because they will be less 'easily able to prove their trustworthiness'.⁸⁰ This renders rationality review meaningless as all government has to do is pick the right goal among one of four or so basic goals and the law will be upheld.

Similarly, when the purpose is put at the level of regulating an industry or practice, every single law that prohibits some actions and permits others – or permits some people to perform an act and denies that privilege to others – vaguely related to that industry will be rationally related to the purpose. Thus in *Kotch v Board of River Port Pilot Commissioners for Port of New Orleans* the Court used Louisiana's interest in regulating river pilotage to uphold a law that limited pilot licenses to family of existing pilots.⁸¹ It framed the purpose of the law as: 'to secure for the State and others interested the safest and most efficiently operated pilotage system practicable'.⁸² Limiting pilots to a family of existing pilots was held to serve this end because it promoted the '*morale and esprit de corps*' of pilots.⁸³ As that outcome indicates, resort to an interest in 'regulation' will permit any law to survive rational scrutiny.

In South Africa, the futility of setting interests at this level has been specifically recognised. In *Van der Merwe v Road Accident Fund* the Constitutional Court struck down a law that prevented spouses with joint estates from claiming monetary damages from each other.⁸⁴ The government tried to defend the law as a valid means to 'regulate [the] patrimonial consequences of marriage'.⁸⁵ Deputy Chief Justice Moseneke rejected this claim:

A court remains obliged to identify and examine the specific government object sought to be achieved by the impugned rule of law or provision. In other words, we are obliged to look at the specific purpose of [the law] even though the general purpose of regulating property arrangements in marriage may not in itself be open

⁷⁹Clark 'Guidelines for the free exercise clause' (1969) 83 *Harvard LR* 327 at 330 quoted in Wadhvani (n 70) 821.

⁸⁰*Union of Refugee Women* (n 27) para 38.

⁸¹330 US 552 (1947).

⁸²*Id* 564.

⁸³*Id* 563.

⁸⁴(N 14).

⁸⁵*Id* para 33.

to constitutional doubt.⁸⁶

To return to the example of *Weare*, any distinction between people would be one way of regulating gambling. If government decided to limit gambling licenses to people over (or under) a certain weight, that would 'regulate' gambling. What is required, then, is some vision of how gambling should be regulated. While courts will be hesitant to supply that vision, it seems feasible to require government to supply a more specific purpose.

We are left with purposes (d) and (e). Both of these purposes are set at an appropriate level because there is a potential for a court to conclude – even if it requires only the most tenuous of connections – that the means fails to serve the end. The problem is that there is no guidance for judges to know how to choose between (d) and (e) and no assurance that they will not choose one of the other purposes or something in-between. Ultimately judges have the power to manipulate the outcome of the means-ends inquiry by choosing how abstract or specifically to state the purpose. Although we can recognize flaws in reasoning and suggest guidelines, the test leaves this to the discretion of the judges.

4.2.2 Multiple purposes

Related to the problem of the level of generality at which a purpose is presented, is the difficulty that most laws serve multiple and sometimes contradictory purposes.⁸⁷ A law that requires employees injured at work to claim limited compensation from a fund run by government and prevents them from directly suing their employer for the full damages can serve as an example.⁸⁸ Such a law is undoubtedly intended to assure some compensation to employees should their employers be unable to pay, and to make compensation easier to recover. However, it also serves the interests of employers by protecting them from ruinous damages claims. Any proper understanding of the law must recognise both these purposes. If a court only considered the intent to benefit employees, then the provision would seem irrational because it prevents them from claiming from their employer even when the employer can afford to pay.⁸⁹ If both purposes are considered, then the provision is a rational means to strike a balance between two competing goals.

⁸⁶*Id.* But see *Jooste* (n 14) para 17 (holding that the purpose of the law under challenge should properly be phrased as: 'a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment'. This seems to directly contradict the holding in *Van der Merwe* that to state a purpose at the general level of regulation is impermissible).

⁸⁷See generally Farrell (n 5) 17-20; Note (n 2) 132-137; Linde (n 2) 209-210.

⁸⁸This law, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, was challenged in *Jooste* (n 14).

⁸⁹This was the conclusion reached by the High Court. *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 9 BCLR 1106 (E). The decision was overturned by the Constitutional Court which recognised the multiple interests at play. *Jooste* (n 14) para 17.

Another scenario is where the Court simply fails to consider an alternative possibility. In *Gulf, Colorado and Santa Fe Railway v Ellis* the Court struck down a law that permitted successful tort claimants to reclaim attorneys' fees only if the claim was brought against a railroad.⁹⁰ The Court rejected a number of purposes (including ensuring that tortfeasors would compensate their victims, and placing a higher duty to pay attorney's fees on corporations) and found them all under-inclusive and therefore irrational. However, it failed to consider the alternative purpose that railroads had a history of resisting claims and that the statute was aimed only at them.⁹¹ This example indicates how the question of multiple purposes and levels of abstraction may merge into each other. Was the problem in *Ellis* that the Court was considering the purpose too abstractly, or that it was ignoring an alternative purpose? Either way, the conclusion is the same: courts can manipulate the outcome by choosing which purposes they recognise and how they phrase those purposes.

4.3 *Level of Connection*⁹²

The most obvious point at which the rationality test can be altered is the degree of connection between means and ends.⁹³ These are some of the possibilities:

Must proponents of the law demonstrate that the classification advances the legislative purpose to some extent? That a rational person would so believe? That a rational person would so believe if the facts were as the legislature supposed them to be? Or must the proponents demonstrate that the various trade-offs outlined between the costs of narrower and broader classifications are 'rational'?⁹⁴

At the deferential end of the spectrum, the law only needs to potentially further its purpose in some minor way. It may also have many other effects, so long as it also has the potential to further an end. Another way of putting this is that the law may be both under-inclusive – exclude people that should be included – and over-inclusive – include people who should be excluded – as long as some of the people that are included *should* be included. At the spectrum's strictest end, the law must effectively achieve the purpose in the most narrowly tailored way possible. The strict standard is clearly too demanding and would involve too much judicial interference in government. It would also destroy any distinction between

⁹⁰165 US 150 (1897). This example is borrowed from Note (n 2) 133.

⁹¹Note (n 2) 133.

⁹²Price defends the reputation of the Constitutional Court by noting how it has applied a consistent and appropriately deferential standard here (n 7) 375. Firstly, as my more critical evaluation of some of the cases suggests, I do not believe the level of deference applied by the Court thus far is too high. Secondly, I repeat that even if Price's assessment that the Court has so far acted admirably is correct, that does not undermine my contention that the rhetorical form of rational basis review would permit the Court to act with less wisdom and restraint. The decisions of the US Supreme Court certainly bear out that possibility.

⁹³See especially Gunther (n 2) (where it is argued that the rational basis test should be changed to require a direct connection between means and ends and little or no scrutiny of the legitimacy of government purposes).

⁹⁴Stone *et al Constitutional law* (2005) (5th ed) 519.

the different levels of scrutiny employed both in South Africa and the US, where stricter scrutiny is reserved for defined grounds of differentiation.

Rhetorically at least, both US and South African courts have adopted the laxest end of the spectrum.⁹⁵ This extremely differential approach has the potential to let through laws that have massive impacts on groups without proof or even an abstract likelihood of any public benefit: a mere suspicion of minimal advancement of a goal will do. *Railway Express Agency v People of State of New York* is a classic illustration of this danger.⁹⁶ The Court upheld a New York law that banned advertising on vehicles except if the advertising was for the vehicle owner's business. The differentiation was acceptable because '[t]he local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case.'⁹⁷ The outcome in *Railway Express* was not necessarily wrong; Hans Linde has argued that the law could have been justified by considerations of equity.⁹⁸ The problem is that allowing such a fragile link 'is not judicial review but dismissal of a claim of review';⁹⁹ or, as Justice Marshall has written, the test, 'when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld'.¹⁰⁰

Perhaps driven by this recognition, the Supreme Court has occasionally applied a slightly higher standard of review that requires more than a minimal link.¹⁰¹ *Cleburne* is a paradigmatic example.¹⁰² The Court rejected a range of justifications for refusing to permit a building to be used as a home for the mentally disabled including that the home was located on a flood plain, and concerns about legal responsibility and congestion. The Court concluded that all these goals, while legitimate, applied to all people not only to the mentally retarded and were therefore irrational. *Cleburne* invalidates a law for being under-inclusive and therefore clearly sets a higher bar than traditional rationality review. Applying these rationales only to the mentally retarded would still partially further the goal and therefore satisfy basic rationality scrutiny.

The South African Court too has been guilty of departing from the minimal standard it seems to have endorsed in other cases on the two occasions it has found laws irrational. In *Van der Merwe* the Court found that the distinction drawn

⁹⁵See Part 2 above.

⁹⁶336 US 106 (1949). See also *Minnesota v Clover Leaf Creamery Co* 449 US 456 (1981) (upheld a law that banned the use of plastic milk cartons but permitted paperboard cartons despite empirical evidence that plastic posed no greater environmental danger than the paperboard. The Court concluded, based on the evidence before the legislature, that as long as the question was debatable, the law had to be upheld.)

⁹⁷*Railway Express* (n 96) 110.

⁹⁸Linde (n 2) 210. See also Fritz (n 17) 178 (recognised the legitimacy of claims to equity).

⁹⁹Linde (n 2) 210.

¹⁰⁰*Murgia* (n 16) 319.

¹⁰¹See, eg, *Allegheny Pittsburgh Coal v Webster County* 488 US 336 (1989); *Moreno* (n 37).

¹⁰²*Cleburne* (n 16).

by the statute between monetary damages and damages for pain and suffering was not 'reliable' and was 'tenuous at best'.¹⁰³ An honest application of the minimal standard would have upheld the law on those grounds.

The departure is even more obvious in *S v Ntuli*.¹⁰⁴ Didcott J found irrational a law that required unrepresented prisoners to get a judge's certificate before appealing their conviction while imposing no similar requirement on represented prisoners or convicted people not in jail. The purpose of the provision was to prevent appeals that were 'lodged frivolously with a view to no gain but the opportunity for an excursion to court and some temporary relief from the tedium of imprisonment'.¹⁰⁵ Without much analysis Justice Didcott concluded that the scheme violated the guarantee of equal protection of the laws.¹⁰⁶ But the minimal rationality standard would have upheld this law easily as, although some appeals by unrepresented prisoners would have been genuine and some appeals by the other classes of citizens would have been frivolous, the law would have partially furthered its end by preventing some frivolous appeals.

The results in *Cleburne*, *Van der Mewe* and *Ntuli* can only be explained if courts adopt one, or some, combination of the following more demanding tests: (a) require the means to substantially further the end; (b) require a reason for why the state has focused only on one group and not others to achieve the end; or (c) balance the achievement of the end against the harm it causes. These methods – or similar formulations – not only explain existing precedent but also provide standards for future application. The problem is that they necessarily require courts to adjudicate on the extent to which a law must further an end or the wisdom of a legislative choice to single out a particular group. While they can still be applied with deference, they cannot be applied without discretion.

4.3.1 The differentiation

The discussion up to now has covered the well-trodden terrain of the difficulty in determining what purposes are legitimate, defining purposes and setting an appropriate level of scrutiny. But the rational basis test can be made to vacillate between competing goals in a fourth way: the specificity with which the law being challenged is defined. In essence, this reflects the insights about the degree of abstraction of purpose and the simultaneous serving of multiple purposes and applies them to the way the law is understood. There are two basic ways in which the law can be defined in order to induce a different result: it can be considered outside the context of other statutory provisions; only the general provision is considered.

¹⁰³*Van der Merwe* (n 14) para 57.

¹⁰⁴(N 22).

¹⁰⁵*Id* para 22.

¹⁰⁶*Id* para 20.

In *Union of Refugee Women*¹⁰⁷ the majority of the Constitutional Court upheld a section of a statute¹⁰⁸ that permitted only citizens and permanent residents to register as security guards. The majority held that this provision was rationally related to the purpose of ensuring public safety.¹⁰⁹ It stressed that this was not based on any xenophobic tendencies:

It is not that the Authority does not trust refugees. Rather, it requires everyone to prove his/her trustworthiness. The reality is that citizens and permanent residents will be more easily able to prove their trustworthiness in terms of the Security Act.¹¹⁰

Accepting the level at which the purpose is presented¹¹¹ and that a minimal degree of connection was required, there is still a problem with this analysis noted by Justices Mokgoro and O'Regan in dissent:¹¹² the statute also specifically required applicants to prove that they had not been convicted of an offence in the past 10 years. Refugees who are unable to comply with that provision will in any event be barred from being security guards and sidelining refugees who *can* produce proof merely because of their status as refugees will do nothing to ensure the trustworthiness of security guards.¹¹³ Only because the majority limited its challenge to the single section, instead of seeing it in the context of the statute as a whole could it find the statute rational.

United States Railroad Retirement Board v Fritz can be analysed in a similar fashion and also demonstrates how this is an issue of rhetoric as well as sub-

¹⁰⁷ *Union of Refugee Women* (n 27).

¹⁰⁸ Private Security Industry Regulation Act 56 of 2001 s 23(1)(a).

¹⁰⁹ *Union of Refugee Women* (n 27) paras 37-42. Price argues that the purpose was in fact more specific: 'The overall purpose of the legislation was to regulate the private security industry in a way that protects public safety. The specific purpose of the condition that people first be registered was to ensure that only trustworthy people work as security guards, for untrustworthy guards pose a risk to safety' (n 7) 378. This train of thought is another good example of how the purpose of the same law can be stated at various levels. It also shows the overlap between purpose and means. Is ensuring that people are trustworthy the purpose of the section or is it the means to ensure public safety? Price is probably correct that the *Union of Refugee Women* majority did rely on one of the more specific purposes. But I do not think that undermines the point I make about how the failure to consider the additional requirements for registration made being a citizen or refugee redundant; even on the more specific purpose, there is no relation between means and end.

¹¹⁰ *Id* para 38.

¹¹¹ I argued earlier that where a purpose is phrased at this level of generality it will be impossible for the law to fail rationality review. This example might seem to undermine that contention because I argue that the law could properly be found not to be rationally related to the general purpose of public safety. I do not think this conflicts with my earlier contention. The problem in this case is that government (or the Court) identified the wrong general interest. If they had identified the interest as 'economic welfare' the statute, even considering the additional 10 year requirement, would have been rational.

¹¹² *Union of Refugee Women* (n 27) paras 118-119 ('the purpose ... seems to be amply covered by the other provisions of section 23 which achieve this purpose more appropriately and without discriminating against refugees').

¹¹³ Another way of looking at this is that the 10 year requirement 'flushes out' the real purpose of the statute. The provision was based either on naked suspicion of refugees or was intended to economically advantage citizens and permanent residents.

stance.¹¹⁴ The law at issue granted dual railroad and social security retirement benefits for railroad workers with 10 years' experience and some connection with the railroad in 1974, while not granting the same double benefits to people with identical service but who had no railroad connections in 1974. Justice Rehnquist upheld the law, characterising the differentiation as between 'persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry [and those] ... who were no longer in railroad employment when they became eligible for dual benefits'.¹¹⁵ Justice Brennan in dissent preferred this description: 'a retiree is favored by retention of his full vested earned benefits if he had worked so much as one day for a railroad in 1974. ... [T]he fortuity of one day of employment in a particular year ... govern[s] entitlement to benefits earned over a lifetime'.¹¹⁶ Judged in its overall context, the majority phrases the law as distinguishing on the basis of when a person became eligible for social security benefits. The dissent sees the classification as based on time. While this is partially a question of rhetoric – both approaches seem like accurate descriptions – the different way the classification is phrased seems largely determinative of the outcome.

The law can also be treated at different levels of abstraction. This technique is best demonstrated by cases where the government is defending a regulatory scheme that has the effect – intended or otherwise – of excluding a particular group. A comparison of two cases concerning the regulation of hairstylists and florists is instructive. In *Cornwell v Hamilton* a District Court held that California's requirement that African hair-braiders pass its cosmetology exam was not rationally related to a legitimate government purpose.¹¹⁷ It conducted a thorough examination of the activities in which the plaintiff hair-braiders engaged and the subject matter of the exam questions, and concluded that the plaintiff's activities made up only 11% of the exam;¹¹⁸ not enough in its view to establish a rational relationship.¹¹⁹ Of course, the court perhaps required a stricter than usual degree of relationship between means and ends, but if it had not considered the detail of the exam and seen the law merely as requiring some sort of exam it might well have reached a different conclusion.

The failure to consider the specific questions in an exam is part of the explanation for the result in *Meadows v Odom*.¹²⁰ The statute required all florists

¹¹⁴(N 17).

¹¹⁵*Id* 178.

¹¹⁶*Id* 196-197.

¹¹⁷80 FSupp 2d 1101 (SD Cal 1999).

¹¹⁸*Id* 1115.

¹¹⁹*Id* 1108 and 1117 ('Assume the range of every possible hair care act to involve tasks A through Z. From the Court's perspective, Cornwell's activities would cover tasks A, B, and some of C. The State's cosmetology program mandates instruction in tasks B through Z. The overlap areas are B and part of C. This minimal overlap is not sufficient to force Cornwell to attend a cosmetology school in order to be exposed to D through Z, when she only needs B and a portion of C').

¹²⁰360 FSupp 2d 811 (MD Louisiana) vacated as moot by 198 FedAppx 348 (5th Cir 2006).

to take an exam before they could arrange flowers. Rather than striking down the law as facially absurd – as most reasonable people would have been tempted to do – the Court held that it furthered the important purpose of protecting public health because of testimony that ‘trained’ florists are ‘very diligent about not having an exposed pick, not having a broken wire, not hav[ing] a flower that has some type of infection, like, dirt that remained on it when it’s inserted into something they’re going to handle’.¹²¹ Presuming that was the legitimate purpose the law was meant to forward, one would have expected a showing that the exam actually included questions aimed at avoiding those injuries. However, because the court defined the law simply as having an exam without regard to the content of the exam, the law could be considered rational.

An example from South Africa shows the effect, in a slightly different context, of changing the level at which the law is defined.¹²² In 2005 the government re-arranged the borders of a number of provinces to abolish ‘cross-boundary municipalities’ – municipalities that had a provincial boundary running through them – that had proved extremely wasteful and inefficient. Two municipalities challenged the law in part on the basis that it was irrational for government to have placed them in province A rather than province B. Two Constitutional Court Justices took very different approaches to this issue. Sachs J, although not deciding the issue, made it clear that although the benefits of abolishing cross-boundary municipalities presented a legitimate goal, government also had to justify its decision to locate a municipality in one province rather than another.¹²³ In a later case Van der Westhuizen J rejected that reasoning and defined the act requiring justification as the abolition of all cross-boundary municipalities.¹²⁴ He viewed further interrogation of where the provincial boundaries eventually fell as a form of ‘second-guessing’ the legislature.¹²⁵ The point of this example is as follows: If the law is viewed through Justice Sachs’ lens, then a mere resort to the purposes served by abolishing all cross-boundary municipalities – saving costs, better service delivery and so on – are insufficient because, in the absence of additional evidence, they have been equally well served by moving the municipality to the other province. A different or additional purpose is needed.

¹²¹*Id* 824.

¹²²The cases discussed here were not an equal protection challenge but were based on the general principle of the rule of law. However, the only reason for this was that the law which differentiated was a constitutional amendment and therefore not subject to conformity with the Bill of Rights. It was however subject to the more basic rationality norm implicit in the rule of law. If the change had been effected by normal law an ordinary equality challenge could have been brought. I discuss it because I think it is the best example of the phenomenon.

¹²³*Matatiele Municipality v President of the Republic of South Africa (1)* 2006 5 BCLR 622 (CC) paras 101-108 (Sachs J concurring).

¹²⁴*Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) para 114.

¹²⁵*Id*.

These examples indicate that, as with the previous three elements of the test, there is necessarily substantial room for judicial discretion in applying the rationality test. The way that a judge chooses to characterise the law can impact and even determine the outcome of the means-end test. Moreover, if the laws are defined too precisely – every exam question, or every decision as part of a broad scheme – government will become unmanageable. It seems a natural part of regulation of a complicated state that some actions which have a minimal impact might not have an explanation. If even the most minimal disadvantage or differentiation were to require scrutiny under the rational basis test, it would impinge on the important concerns about the separation of powers that underlie the rational basis test.

5 Rationality is dead¹²⁶

In the previous section I demonstrated that at each of the four points of the rational basis test there is room for judicial manipulation that can drastically alter the outcomes of the test. In this section I ask whether that malleability prevents the test from performing the task it is meant to serve.

The rational basis test is supposed to ensure that no law is passed that is motivated by a naked preference for one group of people over another, and that all laws that have the effect of disadvantaging a group of people also in fact serve, in some way, a public purpose. In order to achieve only those narrow goals the test uses the language and tools of rationality – rather than, for example, reasonableness¹²⁷ – in order to prevent judges from second-guessing substantive legislative judgments

¹²⁶The direction of Price's response to this paper is that rationality review is not in need of saving as the existing justifications are sufficient and it has been properly applied by the South African courts. I will admit that the structure of this article – breaking down rational review just to rebuild it – is somewhat rhetorical and that I tend to exaggerate the disease in order to shine the spotlight on the cure. However, while Price makes a compelling case, I remain unconvinced that rationality review – even in South Africa – is in perfect health. Nonetheless, I am happy to lose the descriptive battle about what the currently accepted justifications for rational basis review are, and how courts in fact apply the test today, if I win the conceptual/normative war about what the justifications *should* be and how the courts *should* apply it. Price and I are largely in agreement on the bigger issue, which I discuss in Part 6.

¹²⁷Price argues that there is a clear distinction between rationality and reasonableness: rationality requires that there is at least one reason for an action, reasonableness demands that the reasons for the decision outweigh the reasons against it. While he says we can imagine a spectrum that flows from rationality through to reasonableness, it is better, for the sake of certainty, to keep the two forever apart (n 7) 361-362. I agree entirely with Price on this. The failure to maintain clear boundaries between the standards of review is one of the major failings of American equal protection law, and it has led to legal uncertainty and enlarged the space for judicial manipulation. However, to the extent that Price might be read to imply that my argument endorses such a spectrum (I do not think this was his intention, but some readers might interpret it that way), I wish to point out emphatically that it *does not*. I contend that, within the limits of the rational basis test, however defined – even in Price's 'one-reason-for' formula – there is ample room for manoeuvre. Whether a single reason is a reason for a purpose depends on all the moveable parts I identify in Part 4.

about what policies can be pursued. The test must meet all these purposes, it must outlaw the bias and arbitrariness while denying judges the ability to substitute their views for those of the legislature. My argument is that the test's acute malleability prevents it from reliably keeping these three balls in the air. In general, the test vacillates between being a rubber stamp for any government plan no matter how ludicrous, and a barrier to reasonable regulation with which judges disagree for other substantive reasons. Here I briefly recap the main problems with each part of the test.

Firstly, the ability to redefine naked preferences into legitimate purposes, combined with the inherent impossibility of objectively determining actual purpose, prevents courts from invalidating laws motivated by animus to a disfavoured group. Any law motivated by prejudice can be phrased as a law intended to – and which does in fact – serve some public purpose. As courts are rightfully unwilling, and practically and theoretically unable, to determine whether the real purpose is noble or evil, the test cannot reliably outlaw any law based solely on prejudice.¹²⁸ A decision that a law is based on such malice rests on judicial judgment drawn from multiple factors. That renders the test an unreliable means to root out legislative prejudice. It is the kind of task that will perhaps inevitably be performed imperfectly, but if the rational basis test does not aid courts to identify and proscribe naked preference any further than to identify it as a goal, perhaps it is necessary to rethink either the test or what we expect it to achieve.

Secondly, the ability of government, advocates and the courts to manipulate the level of abstraction at which both the means and the end are defined converts the test into an exercise of judicial discretion. A court that wants to invalidate a law can do so by, for example, looking at the precise terms and effects of a law and phrasing the purpose relatively broadly so that it appears far removed from the means. While it is possible to outlaw purposes that are either tautologically specific or absurdly general, the grey area between those two extremes supplies sufficient space for courts to determine the outcome by the way they phrase the purpose. When it comes to identifying laws there is no way to limit the courts to positing the law at a level that is neither too broad nor too specific. This has a tendency to undermine the requirement that courts do not second-guess legislative judgment. They can privilege their own discretion over that of legislatures while disguising that choice in the language of rationality.

Thirdly, the degree of connection required between means and ends. If the level of connection is set, as it usually is, as requiring the law to further the purpose only in some conceivable way then all laws that identify a legitimate purpose – which we have seen is always possible – will pass the test. This standard fails to fulfill the requirement that a law must be connected to a public end because the connection

¹²⁸Using the means-end part of the inquiry to expose prejudice does not remedy this deficiency. When a naked preference is rephrased as a public purpose the law will achieve both equally well. It is only through suspicion that the legislature was really motivated by the impermissible purpose that the law can be struck down. But that requires an analysis of the law that is uncertain, intrudes substantially into the functioning of the legislature and is potentially fruitless.

is determined by the ingenuity of government and lawyers and the discretion of courts, not the effects of the law; any law can be saved by dreaming up some purpose that it might theoretically serve. It is only by raising this standard that rationality review can become meaningful. But once the standard is raised to something like ‘a fair and substantial relation’,¹²⁹ the test affords judges too much power as many – maybe even a majority of laws – might reasonably be said not to ‘substantially’ advance their purpose. Courts have not been able to identify a mid-point that is both meaningful and restrained.

Fourthly, an element of the means-end test is the use of empirical evidence. If courts refuse to engage it at all, then the test – no matter what theoretical standard is employed – becomes an armchair game for lawyers and judges. While the possibility that a law may further a purpose might be deduced from ‘rational speculation’¹³⁰ the extent to which the purpose is advanced must rest on empirical facts.¹³¹ Evaluative rationality – the essence of rational basis review – only makes sense if courts are willing to examine empirical facts.¹³² But if the courts begin to evaluate the relative worth of competing empirical claims or to make judgments where empirical knowledge is uncertain, then we must ask: why do we trust their judgment in that task more than that of the legislators?

The discretion inherent in the application of the test creates two types of problems. First, there is a massive gap between the rhetoric of courts which emphasises the mechanical nature of the test, and the degree of discretion courts in fact exercise. The lack of transparency is an evil in itself: courts should practice what they preach or, more precisely, preach what they practice. It also reduces certainty. As the American experience demonstrates, courts can apply variable levels of scrutiny while claiming to adhere to the same standard. Moreover, it makes life difficult for litigants who cannot explicitly make some of the arguments that would influence courts, because courts officially deem those arguments irrelevant. Forcing those arguments into the subtext of litigation serves nobody. This is not a criticism that is unique to rationality review; it can and has been made about many areas of law, but it is especially blatant in the rationality context. Justice Marshall has explicitly commented on the discrepancy between word and deed, between rhetoric and reality:

there are problems with deciding cases based on factors not encompassed by the applicable standards. First, the approach is rudderless, affording no notice to interested parties of the standards governing particular cases and giving no firm guidance to judges who, as a consequence, must assess the constitutionality of legislation before them on an ad hoc basis. Second, and not unrelatedly, the

¹²⁹*Royster Guano* (n 23) 415.

¹³⁰*Beach Communications* (n 20) 315.

¹³¹See *Bice* (n 4) 13.

¹³²*Id.* (‘The formal elements of evaluation concern the logical pattern of the actor’s beliefs, namely whether the *actor* believes that his behavior will achieve *his* goals and whether *he* believes that his actions will do so efficiently. The empirical elements of evaluation cannot be satisfied formally; they must be satisfied by reference to an objective standard outside the actor.’)

approach is unpredictable and requires holding this Court to standards it has never publicly adopted. Thus the approach presents the danger that ... relevant factors will be misapplied or ignored.¹³³

Second, rational basis review does not achieve the ends it is meant to achieve. It is either so weak that it fails to invalidate the laws it is meant to invalidate or so uncertain that it treads on the 'negative' requirement underlying its existence: courts must not interfere with legislative wisdom. Of course, many legal tests are imperfect. They often rely on the proper exercise of judicial judgment to achieve their supposed purposes: very few (if any) legal tests are self-executing mechanisms. My criticism is limited to two points. One, understanding the detailed workings of the test suggests that rationality review serves an additional purpose – that of forcing government to justify its decision to treat people differently. Two, the test can be structured better to more closely achieve its goals – including the additional purpose of justification – than the current formulation achieves.

The next section explores the new rationale and shows how it can bridge the gap between the test and its goals. It then proposes a reformulation of the test that aims to acknowledge the malleability of the test and guide judges to best achieve the purposes of the test.

6 Long live rationality!

In *Prinsloo v Van der Linde* Justices Ackermann, O'Regan and Sachs writing together identified three pillars supporting rational basis review. I have mentioned two of them earlier, but to ensure I leave nothing out this time, I repeat the whole passage here.¹³⁴

In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences'¹³⁵ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good,¹³⁶ as well as to enhance the coherence and integrity of legislation.¹³⁷ In *Mureinik's* celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification'.¹³⁸

¹³³*Murgia* (n 16) 321.

¹³⁴*Prinsloo* (n14) para 25 (my emphasis).

¹³⁵Sunstein (n 6).

¹³⁶Tribe (n 33) 1451.

¹³⁷Van Dijk and Van Hoof *Theory and practice of the European Convention on Human Rights* (1990) (2nd ed) 539.

¹³⁸Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32 cited in *Makwanyane* (n 32) para 156 n 1.

The third, and crucial, purpose is the idea that rational basis review promotes a 'culture of justification'. But what does that mean exactly? The phrase, as the Court notes, was coined by Etienne Mureinik who defined it as:

a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.¹³⁹

This particular articulation and emphasis is born from South Africa's transition from past authoritarian government to a new constitutional order and has spawned an extensive South African literature on the notion of 'transformative constitutionalism'.¹⁴⁰ However, the idea of a culture of justification rests on the much more basic idea extremely familiar to American ears that courts act as forums of principle. As Ronald Dworkin puts it:

We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law.¹⁴¹

The idea that the courts are a place where government must come to justify its treatment of its people is as much part of the American tradition as it is a tenet of the South African transformation.

Justification also links with the point I made earlier that rationality review must take place within a 'public value' model of politics. Justification emphasises not only that every law must serve a conceivable public good, but that the government must be able to articulate and defend its own vision of the good and how each law fits into that vision.

But what exactly does seeing rational basis as a requirement for government to justify its actions add to the existing rationales and how does it avoid the pitfalls identified earlier? It is not simply a requirement that the purpose of a statute be articulated by government's lawyers in litigation. That would not solve the problem because the glitches in the other parts of the test would still render it hollow.¹⁴²

¹³⁹Mureinik (n 138) 32.

¹⁴⁰See generally Albertyn and Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309; Botha 'Metaphoric reasoning and transformative constitutionalism (part 1)' (2002) *TSAR* 612; Botha 'Metaphoric reasoning and transformative constitutionalism (part 2)' (2003) *TSAR* 20; Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; Langa 'Transformative constitutionalism' (2006) 3 *Stellenbosch LR* 351.

¹⁴¹'Forum of principle' (1981) 56 *New York Univ LR* 469 at 518. See generally Dworkin *Taking rights seriously* (1977) 69-71; Dworkin *Law's empire* (1986).

¹⁴²*Fritz* (n 17) 197-198 ('Equal protection rationality analysis does not empower the courts to second-guess the wisdom of legislative classifications. On this we are agreed, and have been for over 40 years. On the other hand, we are not powerless to probe beneath claims by Government attorneys

The appeal to justification demands that rationality review is not about trying to apply a mechanical test that resolutely denies responsibility and forces judges to make substantive choices. Justification makes the inquiry about *persuasion* instead of logic.¹⁴³ Persuasion depends on the observer to which it is addressed; the same case may persuade you but not me. That is not true of rationality; an action is rational or irrational independent of who asks the question. When we see rational basis review as representing part of the culture of justification or as part of the recognition of courts as forums of principle, it becomes a right for those who are disadvantaged by laws to demand that government explain the law and convince judges that the law serves some public purpose.¹⁴⁴

The benefit of the justification or persuasion rationale is twofold. It acknowledges that the extent of information and argument required in any case will differ vastly between judges – exactly what the history of the rational basis test suggests – and that the outcomes of cases are necessarily unpredictable.¹⁴⁵ At the same time it justifies the existence of this uncertainty by grounding the test not only in a substantive commitment to abolish certain laws combined with a healthy respect for the separation of powers, but also in a semi-procedural understanding of the role of courts in a constitutional system. For those who have no claim under any other right, rational basis is a means – a procedure – to air their grievances. The test has fuzzy borders and general guidelines, but no bright lines or clear answers.

It also solves the transparency criticism by forcing the substantive and empirical debates and the importance of the way the question is framed – which has for so long gone on beneath the surface – out into the open. Judges do not need to worry that they are exceeding their powers under the test if they weigh empirical evidence, or note that the level at which the test is phrased determines the outcome. Indeed, they are failing in their duties if they do not engage in these questions. In the past,

concerning the means and ends of Congress. Otherwise, we would defer not to the considered judgment of Congress, but to the arguments of litigators’.)

¹⁴³Price finds the justification for rationality review in what he calls the promotion of ‘public reason’ (n 7) 368-370. I do not think that Price has something substantially different in mind when he uses ‘public reason’ from what I mean by ‘justification’ and ‘persuasion’. There may be some subtle differences, but the essence seems the same. In that case, we are largely in agreement about what the fundamental justification for rationality review should be. To my mind most of our other debates should be seen as peripheral to this central point of agreement.

¹⁴⁴I should make clear that it is the judges who must be persuaded by the government. I do not think rationality requires the least well off to be persuaded that a law is rational. That would be a much stricter test as it would be unlikely to permit rational trade-offs. I thank James Fowkes for pointing this out to me.

¹⁴⁵Price argues that ‘the flexible, discretionary character of rationality review’ is not a negative, but ‘*part of its value*’ because it allows courts to apply the same test across a range of different contexts (n 7) 369. I agree. But as Price also notes, the flexibility is both a value and a danger. It does allow courts to tailor their approach to the peculiar circumstances of the case. But if we do not openly acknowledge the flexibility, it allows them to cloak their actions in the objective language of rationality. The flexibility also increases uncertainty. I think that our project should be to consider how to structure the test so as to get the most benefits with the least danger. And I think Price would agree.

the rhetoric of rationality both permitted and required that judges suppress the value judgments and empirical evaluations that are inseparable from a meaningful inquiry into a law's rationality. Seeing rationality as focused on justification, on the contrary, permits and requires judges to explain all the implicit judgments they were previously required to hide. In the long run, this requires a shift not only in the justifications and structure of the test, but also the discourse that surrounds the test. The mere word 'rationality' inevitably tends to obscure the inner workings of the test. In the future, we might do better to abandon the word altogether.

Justification brings the test closer to its already existing purposes: outlawing prejudiced and irrational laws by stressing how uncertain those terms are. It makes the inquiry meaningful by giving it a basis from which to work: the ability of government to explain its actions.

I should make absolutely clear that I do *not* believe that changing the rationale of the test or adopting the new structure I propose will remove the discretion of judges or de-politicise the rationality inquiry. My point is that those are inevitable parts of the rationality inquiry that are in conflict with the supposed purposes and surrounding rhetoric of rationality. We cannot defuse that conflict and save rationality by trying to make it a mechanical test: that is an impossible goal. We can save it by re-imagining rationality as a tool to force government to justify its laws. My approach does not deny the substantive and discretionary elements of rationality review, it embraces them. I do, however, believe that this shift, and the detailed structure I propose, will, over time, make the application of the test more predictable as the implicit judgments become explicit.

The immediately apparent danger of shifting the onus to government is that it will place too great a burden on government and grant courts undue license to interfere with the business of government. This is a well-founded fear and is the reason why the discretion has been suppressed and denied for so long. However, I think it is possible to structure the test in a way that places an appropriate limit on courts.

What will the modified test look like?¹⁴⁶

The basic form of the test can remain, but it will require a number of modifications on the periphery. The important point is that the test must not be structured as a mechanical enterprise; clear thought and experience show that task is futile. It

¹⁴⁶Price is not particularly enthusiastic about my expansive suggestion. He believes that it largely reflects what the Constitutional Court already does (n 7) n 169. It may be that some of the principles I list here are implicit in the Court's approach (although many of them are definitely not), but few of them have been stated explicitly. The thrust of my argument is that we need to explicitly state the details of how we conduct rationality analysis. If the Court wants to take credit for implicitly developing the principles that is fine by me, as long as they clearly announce and adhere to them. I also note that, with one exception (see Price (n 7) n 43 (disputing the need for a clear burden on the state)), Price does not disapprove of the substance of the test I propose.

must be structured in a way that curbs undue judicial intrusion, acknowledges the malleability of the test and permits judges to strike down all laws that government is unable to convince them are motivated by and serve a valid purpose. I offer here one possible construction of the test that tries to meet these goals.

1 Differentiation

The onus is on the litigant to show that the law differentiates between groups.

2 Purpose

- (a) Government must assert what the purpose(s) of the law are.
- (b) The court must accept that assertion as the purpose(s) of the law, even if it believes the law serves other more important ends, unless:
 - (i) The complainant can provide compelling evidence that the law was in fact motivated by naked preference. If so, the law is invalid. Or,
 - (ii) The purpose is stated either so specifically or so abstractly that it automatically justifies the law. If so, the court should recast the purpose at a level so that, if presented with the right evidence, it could conclude that the purpose was not met.

3 Law

The meaning and effect of the law must be understood in light of:

- (a) The evil complained of by the plaintiff;
- (b) The entire statutory scheme and any other relevant laws; and
- (c) The need not to interfere too extensively with the details of government administration.

4 Connection

- (a) The onus is on government to show a connection between the law and its purpose.
- (b) The law must have more than a trivial or hypothetical connection to its purpose but it need not substantially or materially advance it.
- (c) Empirical evidence about the effect of the law may be presented by either side and the evidence must be considered by the court. However, there is no duty on government or the complainant to do so.
- (d) If there is no empirical evidence, the court should base its decision on:
 - (i) The facts relied on by the government, if they are plausible; or
 - (ii) If those facts are not known, the plausible facts most favourable to government.

Other constructions might better represent the interests I have identified as fundamental to the inquiry, but let me briefly explain the reasons for the various elements of my construction.

The onus is on the plaintiff to identify the differentiation to ensure that rationality review does not become a vehicle for forcing the government to justify

every piece of legislation. It is also part of the basic requirement that a litigant clearly state her case. This is a threshold requirement that should be satisfied in almost all cases. Its main purpose is simply to frame the rest of the inquiry.

One of the most important elements of the test is that the government must identify the purpose that the law is intended to serve. This fits directly into the justification rationale: the government must explain *why* it chose to treat different groups of people differently. It is precisely because the purpose of rationality review is to elicit a justification *from government* that the court must ordinarily accept the government's asserted purpose, even if it believes that is not the true purpose. By forcing government to pin its colours to the mast, it also avoids the deficiency of the American jurisprudence that permits judges to imagine hypothetical purposes. It also avoids the immense evidentiary difficulties of judicial inquiries into legislative motive.

However, that is not a foolproof solution as the government is unlikely to admit to a prejudiced purpose and is likely to state the purpose at a level of abstraction that decides the rationality inquiry in its favour. Hence, there are two provisos to the general rule that government's stated purpose must be accepted. Firstly, where there is clear evidence that the government was in fact motivated by naked prejudice, the complainant can produce that evidence which is determinative of the inquiry.¹⁴⁷ Secondly, the court can recast the purpose at a different level of abstraction to make the inquiry meaningful. In doing so, it should, as far as possible retain the substantive content of the purpose.

The next step is defining the law. While the complainant must show some differentiation at the threshold, the exact nature of that differentiation is left to a later stage. It makes no sense here to place an onus on either party as both will, if possible, simply define the law in a way that suits their ends. The definition of the law will not always be open to manipulation, but where it is there seems to be no alternative other than to afford a court a guided discretion to decide what impact it is requiring the government to justify. In doing so it should keep in mind both that rationality review must be meaningful and that government cannot be expected to defend every minute detail of every administrative scheme.

¹⁴⁷Price seems to suggest that courts should never consider legislative motive and points to the recent decision in *Poverty Alleviation Network* (n 12) as supporting this position (n 7) n 24. Price and I agree that it is generally fruitless to make a direct inquiry into legislative motive. He is also correct in saying that the Constitutional Court jurisprudence supports the position that motive is irrelevant. However, I do not believe that motive can always be ignored. Where there is clear evidence that the purpose which the government brings before the court is not the real purpose of the legislation but a construct designed to secure the law's validity, courts should consider that information. These cases will be extremely rare: legislators generally *are* motivated by admirable goals and, even when they are not, they are careful to hide their nefarious intentions. However, the importance of the proviso is both to guard against the rare case and to remind legislators to find legitimate reasons for all their decisions. The other important point is that rationality review (in both its equality and general guises) applies not only to legislative decisions made by multi-member bodies, but also to decisions taken by individuals. We should not allow the difficulties in determining motivation for large bodies to prevent us from inquiring into the motives of individuals.

The core of the inquiry – the connection between the law and its purpose – is also the area that most evades a concise standard. It is perhaps this difficulty that has led judges to embrace the certainty of a standard that permits any conceivable connection to suffice. Yet experience – especially that of American courts – shows that such a standard either renders rationality review toothless, or masks the application of higher levels of scrutiny. The best solution seems to be to exclude the two extremes – any conceivable connection and substantial advancement – and require judges to seek for some degree of connection between those two poles, without trying to give it a label that is more likely to deceive than enlighten.

The other important part of the connection inquiry is the use of empirical evidence. The American courts' shirking of empiricism in this context – they are perfectly happy to use it in other constitutional contexts¹⁴⁸ – is another one of the causes of the test's 'dental' deficiencies. It undermines the whole idea of requiring the state to act rationally for courts to permit it to act contrary to clearly established facts. However, placing a burden on either party to produce evidence would again be futile as in many cases there may not be reliable evidence available. That should not be the end of the case, but in the absence of facts, courts should give the government extensive leeway in determining what the true factual position is. If the government has clearly stated what it believes the factual situation is – and that assessment is plausible – the court should judge the law on that basis. Otherwise it should assume the plausible situation most favourable to government.

7 Conclusion

Despite the comparative detail of this test – it clearly lacks the easy to recite brevity of the original – it leaves many important questions unanswered. What is a 'differentiation'? Even a seemingly universal law such as 'Theft is a criminal offence' can be viewed as a differentiation between those who steal and those who do not, between rich and poor, between kleptomaniacs and those of us lucky enough not to have those urges. It also does not tell us exactly what sort of evidence would be needed to establish a nefarious subjective motive. Are statements in the legislative record enough? If so, what percentage of statements and by whom? Or must the illegitimate purpose appear in the statute itself? The test fails to answer at what time the connection between law and purpose must be made. Must it have been rational at the time the law was enacted, or the time the challenge was brought? Advances in empirical research or changes in social circumstances may alter the answer between those two points in time.

These are just some of the questions that I leave unanswered, partly for reasons of space, and partly because some of these problems do not admit of

¹⁴⁸Most famously, see *Brown v Board of Education of Topeka* 347 US 483 n 11 (1954) (relying on sociological evidence about the impact of segregation on black children to support its decision to strike down the 'separate but equal' doctrine).

clear statement and are better solved through application in particular cases. I see the role of my proposed construction not as answering all the difficulties that inevitably arise in rationality inquiries. Its purpose is to structure the inquiry in a way that saves the constitutional requirement of rational state action from irrelevance, while at the same time guiding courts away from substituting their judgment for that of the legislature. Readers can decide for themselves whether my means are 'rationally connected' to my end ...