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Commentary

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COMMENTARY

GERALD GUNTHER*

In 1985 I asked Gerald Gunther to comment on the genesis and impact of his article, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*.¹ He responded in a letter of April 9, 1985. The letter was not published at the time, but Professor Gunther has now graciously agreed to let it be printed as part of this Symposium. His comments should be read as reflections on the law as of 1985, as they have not been updated to take account of subsequent developments. —Fred R. Shapiro

Although I find it awkward to comment on an article I wrote, I will try to answer your questions briefly. As to the context that led me to write it, it stemmed from an invitation to write the annual Foreword to Harvard's Supreme Court issue, a fairly important forum for people in constitutional law, and one designed to elicit the author's views of important recent trends on the Supreme Court. I agreed to write the Foreword several months before the end of the Supreme Court's Term, and when I agreed to do so, I had no notion as to what I would be writing on. I have always thought that the Foreword ought to deal with a matter of particular interest during the preceding Term, and of course I could not know what that would be when I agreed to write it.

At the time, I was doing my annual supplement to my constitutional law casebook, which in any event requires me to read the Supreme Court's constitutional opinions with care, in order to summarize them for the next semester's teaching. I wrote the supplement and the article at the same time, during the summer of 1972. In examining the cases, it seemed to me striking that there were a considerable number which struck down legislation on the ground that it did not meet the allegedly deferential standard of "rationality" review under the Equal Protection Clause. As you know, in the Warren years, deferential review under equal protection virtually always meant approval of the challenged law, and Chief Justice Warren himself had expressed the appropriate Court approach—of extreme deference to the legislature—in striking and recurrent terms. I decided to com-

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

ment on the new phenomenon in the 1971-72 Term—at least new for some decades—of a considerable handful of cases resulting in invalidation of state laws even though allegedly deferential rationality review was being applied. In examining the cases, it became clear to me that in all of the cases—such as *Reed v. Reed*, the first of the important modern sex discrimination cases—unarticulated, hidden factors were in fact playing a significant role in causing the invalidations. The Court in 1972 obviously was not interested in saying that gender was a semi-suspect classification, yet it struck down, on asserted rationality grounds, a discriminatory law against women which would surely have survived judicial review if the Court had applied the Warren Court's variety of deferential scrutiny.

My basic conclusion, after a general survey of the Warren Court's equal protection jurisprudence, was twofold: first, that the Burger Court's exercise that year of "rationality" review was in fact more intrusive and less deferential than prior invocations of deferential review would have suggested, that the invalidations were somewhat disingenuous, and that, in each case, background factors not articulated by the Court were involved that would explain the result in the cases; but, second, that the idea of putting some real teeth into rationality review made independent sense for the reasons I explained at length in the article. In short, in developing that second theme, I argued for an across-the-board, candid rationality review somewhat less deferential to the legislatures than the Warren Court had been accustomed to being, and I advocated that as a desirable Court approach, for a number of reasons. In short, I presented a model of equal protection scrutiny that I hoped the Court would adopt and I called my model of rationality, deferential review "with bite."

As to my expectations regarding reception: I am not sure I had any particular ones. I normally do my writing to get some ideas off my chest and write them down as carefully and persuasively as I can. In 1972, when I wrote, there was already a large and growing literature on equal protection on the books in view of the developments of the strict scrutiny, "new" equal protection by the Warren Court, especially in the 1960s. I hoped I would add a significant "newer equal protection" ingredient to the ongoing debate.

I have of course been pleased that the article has received as much attention as it has. I would not overestimate that impact: after all, a good many of the citations are in contexts that are critical of my theory, or that cite my article largely because it is a general discussion of equal protection developments on the Warren Court, not only a

prescription for where the Court should go in the future. Therefore, I should think one could discount a lot of the citations simply as reflecting the desire of another author to either refer to a general discussion of equal protection themes, or to take issue with my position.

Still, there has been some reception, both supportive and critical, in the literature as well as by judges—on state and federal courts generally, and citations by Supreme Court Justices as well. The Court has continued, sporadically, to apply something akin to my equal protection “with bite,” with its emphasis on articulated rather than hypothesized ends and with a greater concern than that of the Warren Court to the actual relationship between the means and the ends. I suppose if one counted all the Justices that behaved at one time or another in rough accordance with my model, one would get a majority of the Court. Unfortunately, no Court majority has ever at the same time endorsed my theory, and many of the favorable references to my theory are in separate concurring or dissenting opinions. Moreover, my general impression is that the Court continues to act a good deal in a rather ad hoc manner and has not really developed a coherent and consistently applied approach to rationality review under equal protection. . In short, if it were ever my aim to bring coherence and consistency to the Court’s execution of rationality review, I have fallen short of my goal (although, I suppose, hope springs eternal). If I have had any impact, I suppose, I have been able to make a fair number of people, both on and off the bench, think more clearly about the implications of rationality review.

Certainly the attention given to my article has been helped by the fact that equal protection review has continued to be a widely exercised variety of judicial scrutiny, and that the cases keep coming (just a couple of weeks ago, the Court struck down another law—a state tax law—on equal protection grounds, for reasons I consider quite misguided). The fact that this has been such a prolific source of litigation no doubt partly accounts for the amount of attention to my piece.

