Every Law Maintains an Important Fact:

The Supreme Doctrine of the New Fourth Constitutional Epoch

by
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Every law maintains an important fact: out of the political welter this doctrine has emerged as the supreme doctrine of the new fourth Constitutional epoch. It is widely understood that the scrutiny regime instituted by *West Coast Hotel v. Parrish*,[1] is but one of three which have determined applications of the Constitution since its ratification. As one historian summarizes:

> At one point in its history American constitutional jurisprudence presumed that the distinction between 'judicial' and 'political' questions was intelligible; at another point it presumed that the boundary between public power and private rights could coherently be traced; at another it presumed that there was a clear difference between the sort of legislation that required heightened and the sort that only required minimal scrutiny. Those presumptions did not come from the Constitution or any other legal source. They came from a set of shared social and political attitudes that shaped conceptions of the role of the judiciary in American constitutionalism. As those attitudes changed, presumptions changed with them. A robust constitutional principle of departmental discretion gave way to judicial boundary tracing which gave way to judicially fashioned levels of scrutiny. None of those regimes of constitutional interpretation should be regarded as cast in stone. None should be regarded as intrinsically superior to the others. The scrutiny regime has been with us for approximately 70 years. It may have exhausted itself as a helpful technique of constitutional interpretation. If we understand its historical origins, perhaps we can understand its contingent status.[2]

However, what is less widely known is that three recent cases illustrate how the third epoch has ended and the concerns of the new epoch. Currently the cases are litigated in terms of the meaning of, every, maintain and important.

Equally widely understood is the pervasive importance of maintenance in the Court's jurisprudence. It is one of those terms which was carried over from the pre-scrutiny days into the scrutiny regime, forming part of an informal Supreme Court jurisprudence which would inevitably become part of doctrine and now, in the fourth Constitutional epoch, has done so. In *Village of Euclid, Ohio v. Ambler Realty Co*.,[3] the Court found zoning Constitutional and not a violation of the Fifth Amendment. The question for the *Euclid* Court was, whether zoning violates "'the right of property…by attempted regulations under the guise of the police power, which are unreasonable and confiscatory'?"[4] The *Euclid* Court set up certain facts as important and then sustained the zoning law at issue (a single-family land use law) because it maintained the facts.

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[1] 300 US 379 (1937).
[2] G. Edward White, "Historicizing Judicial Scrutiny," http://law.bepress.com/uvalwps/uva publiclaw/art31, 142.
[3] 272 US 365 (1926).
[4] *Id.*, at 386 (citation omitted).

Maintenance—what it is and what it maintains—is what mattered to the Court. The Court saw housing as what was maintained in the case: "The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded."[5] Note that the Court finds zoning to be an indicium of the *creation* of housing. The Court finds that the zoning law at issue "bears a rational relation to the health and safety of the community"[6]—*not*, it bears pointing out, to a legitimate government purpose; for the Court, "health," "safety," and "community" are facts, not goals or policies. That "rational relation" means maintenance—that government must show *results*, not *goals*, when it defends its policy—is shown when the Court approvingly cites another ruling sustaining zoning laws which preserve facts in the face of "changing conditions."[7] We shall see this concern in *Kelo v. New London*, where Justice Kennedy insists that the "state interest" of the scrutiny regime demands an inquiry, into the past, as to facts.

So how does government show this "rational relation?" By showing that the policy has *demonstrated* a "substantial relation to the public health, safety, morals, or general welfare."[8] This test makes it clear that the Court feels that what others might feel are "legitimate" goals—public health, safety and so on—are, perhaps, important, but the Court is concerned with them as important *facts*. The Court's question for government is, how *has* the policy maintained those facts? not even, how *might* it maintain those facts? The Court passes on, not what *should be* done—it does not assume a legislative or executive role—but rather, on what *has been* done. This is consistent with approach to housing as something which predated government policy with respect to it.

And the Court sees this as a strict test, not a lax test—we shall also see Justice Kennedy following this up. Note that the test is neither minimum scrutiny (rational relation to a legitimate government purpose) nor intermediate scrutiny (substantially advances an important government purpose). It takes one criterion from each test, and forms a test which is no part of the scrutiny regime. Of course, *Euclid* predates *West Coast Hotel* by eleven years. Nevertheless, maintenance clearly DOES play the same role in *West Coast Hotel* which it played in *Euclid*.

The *West Coast Hotel* Court sustained a minimum wage law for women and minors, and in doing so it not only kept the concept of maintenance, but also introduced the notion of importance. The Court sustained the law because it felt a certain wage level was an important fact: "The importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the Adkins Case [the earlier Supreme Court case finding minimum wage laws unconstitutional][9] was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered, make it not only appropriate, but we think imperative, that in deciding the present case

[5] *Id.*, at 390.
[6] *Id.*, at 391.
[7] *Id.*, at 392.
[8] *Id.*, at 395.
[9] *Adkins v. Children's Hospital*, 261 US 525 (1923).

the subject should receive fresh consideration."[10] In short, the wage is an important fact.[11]

The law was found Constitutional because it maintains that wage. The law the Court upheld expressly stated as *fact* that wages lower than the new law allowed, "were not adequate for…maintenance," and research serving as the basis of the law had shown as *fact*, the need for wages "sufficient for…decent maintenance…."[12] The Court adopted both these usages. Thus, importance and maintenance entered the law informally. Nevertheless, the formal adumbration of the scrutiny regime proceeded along different lines. "Freedom of contract" had been alleged as a reason for not permitting minimum wage laws, and Court found that this was an aspect of "an absolute and uncontrollable liberty" and that "the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[13] Obviously, the Court skipped over many important questions: the factual relation between contract and liberty, the meaning of "subjection," and the meaning of "restraints." It is now a commonplace that it was a poor choice to link liberty to minimum wage laws, and such a link had not been advanced by the state of Washington, which had passed the law.[14] How poor, came to be seen in *Lawrence v.*

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[10] *West Coast Hotel* at 390.

[11] In doing so, it felt the need of a fact it considered important, one it considered an indicium of government: the community. This is another term of the Court's informal jurisprudence, one about which we know little. "[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"—apparently community is also an indicium of Due Process under both the Fifth and Fourteenth Amendments. *Id.*, at 391. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Quoted in *id.*, at 392. Minimum wage laws "will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large." Quoted in *id.*, at 397. "[T]he denial of a living wage is not only detrimental to [workers'] health and well being, but [also] casts a direct burden for their support upon the community." *Id.*, at 399. "The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest." *Id.*, at 399-400. Apparently, the political system is not the community, although the political system and maintenance are reconciled through the community. The Court never answers the question, what is the community?

Earlier cases establish that "the community" is characterized by "safety, health, peace, good order, and morals," is, for Constitutional purposes, "civilized and Christian," and is subject to "danger," although there are also facts which are "useful" to it. *Crowley v. Christensen*, 137 US 86, 89, 91, 94 (1890). "The community" vindicates "self-defense, of paramount necessity…." which facts can be "legally enforced…;" it has "persons" who are "residing" in it and "enjoying the benefits of its local government…." *Jacobson v. Masachusetts*, 197 US 11, 27, 37, 38 (1911). The concept itself is ancient; see Steven J. Heyman, "Ideological Conflict and the First Amendment," http://ssrn.com/ abstract=436985.

[12] Quoted in *West Coast Hotel* at 386.

[13] *West Coast Hotel* at 391.

[14] Both the origins and the subsequent history of the "minimum scrutiny" regime are—to put it generously—ramshackle. See Barry Cushman, "Some Varieties and Vicissitudes of Lochnerism," http://ssrn.com/abstract=754190; Peter M. Shane, "Federalism's 'Old Deal': What is Right and Wrong With Conservative Judicial Activism," http://ssrn.com/abstract=208674; Jack M. Balkin, "'Wrong the Day It Was Decided': Lochner and Constitutional Historicism," http://ssrn.com/abstract=726964; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner," http://ssrn.com/abstract=242233. "[S]trict scrutiny did not originate in equal protection cases. Rather, it originated in the First Amendment in the late 1950s and early 1960s and migrated from there to the Equal Protection Clause in the late-1960s…. [T]he compelling state interest test initially appeared in First Amendment litigation in 1957 and that its birthing process was not complete until 1963. At that time, the compelling interest standard coalesced with the First Amendment's narrow tailoring requirement, which was decades older, to form modern strict scrutiny….[I]t took another six years for the component parts of strict scrutiny to migrate from the First Amendment to the Equal Protection Clause. The compelling state interest standard was the last component to make the move. When it did, strict scrutiny rapidly blossomed into one of the late-twentieth century's most fundamental constitutional doctrines....[S]trict scrutiny began as a tool of cost-benefit analysis, not as a means to ferret out illicit governmental motive….[O]ver time the Court has shifted the Equal Protection Clause's 'core value' from a proscription of racial subordination to forbidding racial classification." Stephen A. Siegel, summarizing his article, "The Origin of the Compelling State Interest Test and Strict Scrutiny," http://law.bepress.com/expresso/eps/1514.

Texas,[15] which found sodomy laws unconstitutional. Nevertheless, *West Coast Hotel* became the foundation for what later emerged as the three levels of scrutiny: minimum scrutiny, in which laws are found Constitutional if they are rationally related to a legitimate state interest; intermediate scrutiny, in which laws are found Constitutional if they substantially further an important state interest; and strict scrutiny, in which laws are found Constitutional if they specifically fulfill an overriding state interest.

These tenets and their doctrinal basis, were overthrown by *Lawrence*. Here the Court found that, in certain cases, sodomy was liberty, and found the law banning it in these cases, unconstitutional because the law "furthers no legitimate state interest."[16] That this test may be flipped around into a mandate—and that that mandate is maintenance—is shown by the Court's procedure, which is that of *Euclid*. Regarded as a scrutiny regime case, *Euclid* takes "substantial" from intermediate scrutiny and "relation" from minimum scrutiny. Assuming there is any logical content to the scrutiny regime, how can the Court be so cavalier? By substituting facts for goals. The *Lawrence* Court does the same thing. It takes "furthers" from intermediate scrutiny and "legitimate" from minimum scrutiny. How can it do so? By substituting liberty as a fact for liberty as a goal (the *West Coast Hotel* innovation). In short, the *Lawrence* Court is saying that if liberty is sustained, then it is maintained.

The Court never uses "maintain" or "maintenance" in *Lawrence*. How, then, do we know that the Court is interested in reading "state interest" out of the Constitution? By a line of cases giving increased prominence to "state interest" as a factual test. This was in some doubt after the 1984 *Midkiff* zoning case, in which the Court sustained a law and said that its "state interest" need only be "conceivable."[17] Twelve years later, a pair of cases clarified "state interest" as a question of fact for the trier of fact. In *Romer v. Evans*,[18] which voided a Colorado Constitutional amendment barring any state governmental entity from taking any action to protect homosexuals from discrimination based on their sexual orientation, the Court said that laws must have "an independent and legitimate legislative end…."[19] That is, there must not only in fact be a "state interest," but also, the "state interest" must have a relation to other facts predating the institution of the policy. In a case of the same year, *U.S. v. Virginia*, the Court ended gender discrimination in state higher education, saying, "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."[20]

In its examination of the facts underlying the formation of the "state interest," the Court is interested in seeing that the state has maintained important facts. The gist of the opposition to the *Kelo* case is that the scrutiny regime allows the state to ignore what is, in favor of what might be. Justice Kennedy made it clear in his *Kelo* concurring opinion that that should not be the result. He says the Court needs to know if, in *fact*, there is a government purpose and he says that the Court can only do so after the Court has seen facts relating to specific criteria:

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[15] 539 US 558 (2003).
[16] *Id.*, at 560.
[17] *Hawaii Housing Authority v. Midkiff*, 467 US 229, 241 (1984).
[18] 517 US 620 (1996).
[19] *Id.*, at 633.
[20] *United States v. Virginia*, 518 US 515, 533 (1996).

A court confronted with a plausible accusation of impermissible favoritism to private parties should [conduct]….a careful and extensive inquiry into 'whether, in fact, the development plan [chronology]

[1.] is of primary benefit to . . . the developer…, and private businesses which may eventually locate in the plan area…,

[2.] and in that regard, only of incidental benefit to the city…[.]'

Kennedy is also interested in facts of the chronology which show, with respect to government,

[3.] awareness of…depressed economic condition and evidence corroborating the validity of this concern…,

[4.] the substantial commitment of public funds…before most of the private beneficiaries were known…,

[5.] evidence that [government] reviewed a variety of development plans…[,]

[6.] [government] chose a private developer from a group of applicants rather than picking out a particular transferee beforehand and…

[7.] other private beneficiaries of the project [were]…unknown [to government] because the…space proposed to be built [had] not yet been rented….[21]

Look at the factual indicia on which there must be civil discovery: plausible, impermissible, private, benefit, businesses, incidental, depressed, economic, validity, concern, substantial, commitment, before, review, variety, chose, particular, project, unknown, space, build. In short, there have to be facts in need of a policy; otherwise, law is the maintenance of facts, and there is no state interest.

Finally, the *Guru Nanak* case not so much misread an earlier case, *Oregon v. Smith*—a case upholding the scrutiny regime—as it put the seal on the new doctrine that every law maintains an important fact. This Ninth Circuit case upheld the *Religious Land Use and Institutionalized Persons Act*, specifically the portion which grants freedom of religion strict scrutiny where "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."[22] RLUIPA, and the decision upholding it in *Guru Nanak v. Sutter*,[23] seemed to be simple misreadings of *Oregon v. Smith*.[24] But oddly enough, neither counsel nor Court argued that. This failure is above all a signal that the scrutiny regime has ceased to operate: no one was even bothering to argue it one way or another.

The *Guru Nanak* Court said: "We decide that the County made an individualized assessment of Guru Nanak's [application for a zoning permit to build a church], thereby

[21] 545 US ____ (2005), slip op. (Kennedy, J., concurring) at 2-3.
[22] See the text, and cases related to it, at www.becketfund.org.
[23] No. 03-17343 (2006).
[24] 494 US 872 (1990).

making RLUIPA applicable, and that the County's denial of Guru Nanak's application constituted a substantial burden, as that phrase is defined by RLUIPA. Because RLUIPA applies to this case, we address RLUIPA's constitutionality pursuant to Section Five of the Fourteenth Amendment, and decide that RLUIPA is a congruent and proportional exercise of congressional power pursuant to the Fourteenth Amendment."[25] The use of "individualized assessments" in RLUIPA, assumes—or rather, presumes—that health and welfare regulation affecting an exercise of religion is a policy of affecting an exercise of religion. That is not *Smith*. *Smith* stood for exactly the opposite proposition, although the authors of RLUIPA used the terms from *Smith* in the legislation. The irony of *Guru Nanak* is that in the using the *Smith* decision to uphold RLUIPA, Smith was *defeated* in his claim that he was wrongly denied unemployment compensation when he was dismissed for using peyote for religious purposes. When the *Smith* Court discussed an "individualized governmental assessment," it was referring to "a system of individual exemptions"[26] as a *policy*, not an *effect*. When there was such a system, then strict scrutiny applied when it substantially burdened an exercise of religion. The Court did not mean that the operation of health and welfare regulations was inherently a "system of individual exemptions" and that all effects of the policy were to be subject to strict scrutiny with respect to an exercise of religion. In short, "assessments" are not synonymous with "exemptions." Indeed, there was no evidence in *Guru Nanak* that Sutter had turned its zoning policy into an effect in order to bar the new church. Even the church did not contend this, but the Ninth Circuit blithely assumed it. "Individualized assessment" was conflated with "substantial burden." The meaning of the conflation was that the political system (every) had a burden to determine that law did not affect (maintain) freedom of religion (important).

Should—as seems likely—the Supreme Court uphold *Guru Nanak* on these grounds, it will be irrelevant that it is overruling *Smith* (assuming the case comes up, the Court will not say that it is overruling *Smith*, any more than it said it was overruling *West Coast Hotel* in *Lawrence*—indeed, *Smith* may not come up at all!). That's not how things are done in this early stage of the fourth Constitutional epoch. What will be relevant is that the political system is simply evicting the scrutiny regime. This is consonant with the view that Constitutional epochs succeed each other simply on the basis of perceived political needs, and argues for understanding the exploration the fourth epoch has now undertaken of the indicia of the terms, every, maintain and important.

[25] *Guru Nanak* at 8599.
[26] *Smith* at 884.