January 1988


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Recommended Citation

Link to publisher version (DO1)
https://doi.org/10.15779/Z386M87

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This Comment argues that government decisions to spray pesticides should be subject to a heightened standard of judicial review when the spraying poses a serious threat of physical harm to human beings. Pesticide spraying is a commonly effective and often safe method of pest eradication. However, pesticides can pose a health risk to individuals exposed to the spraying. Many states grant administrative agencies broad discretion in pesticide spraying decisions which, in turn, requires a highly deferential standard of judicial review for these agency decisions. The author asserts that the deference standard offers inadequate protection to judicially recognized individual interests in bodily integrity. The author considers a "strict scrutiny" standard of review but rejects this standard because of practical concerns and judicial reluctance to characterize bodily integrity as a fundamental interest. The author suggests instead that courts adopt an intermediate standard of review, much like the one identified and applied by the Supreme Court in Plyler v. Doe, when spraying may potentially pose a serious threat of physical harm. He bases this conclusion on an analysis of the values inherent in existing constitutional and common law doctrine. The Comment concludes by proposing a balancing test. It suggests that judges should consider the severity of the possible injury and the likelihood that injury would occur before deciding whether to defer to the agency's decision or to require the state to justify its decision.

INTRODUCTION

The discovery of an apple maggot fruit fly on August 24, 1983, in the Smith River area of Del Norte County in Northwestern California resulted in a controversial state-mandated pest eradication program affecting individual property owners, organic farmers, a state agency, and the state legislature. The legal resolution of challenges to this controver-

sial program may determine the scope of individual substantive due process protections under state-authorized pest eradication programs. 3

State concern over maggot destruction developed during 1983 as the California Department of Food and Agriculture (CDFA) discovered increasing numbers of maggots in a six-county area of the north coast. In 1984, the State legislature authorized the CDFA to administer a maggot eradication program where it could show that eradication was both necessary and feasible. 4 Within months the CDFA made the required showings, 5 and the legislature funded the eradication project. 6

Four days prior to the scheduled commencement of spraying, CDFA held a press conference announcing its proposed eradication program. 7 A coalition quickly formed in opposition to the project and filed a mandamus action to enjoin the spraying. 8 The petitioners in Citizens for Non-Toxic Pest Control v. California Department of Food and Agriculture voiced three objections to the project: first, the chemical being used, Imidan, posed potential health risks which had not been sufficiently investigated; 9 second, the CDFA had failed to provide adequate notice of the spraying; and, third, the CDFA had failed to comply with the review


3. This Comment discusses only the issue of substantive due process protections. However, the California laws cited supra note 2 also raise important procedural due process questions concerning the availability of notice and of a hearing to challenge the proposed actions. The statutes reduce the period in which to file mandamus petitions challenging spraying decisions from 180 to 45 days. Cal. Food & Agric. Code § 5052 (Deering Supp. 1988). Notice of the decision need only be published in a newspaper "of general circulation in the county." Cal. Food & Agric. Code § 5051 (Deering Supp. 1988). Lack of actual notice does not extend the forty-five day statute of limitations. Cal. Food & Agric. Code § 5052 (Deering Supp. 1988). For a discussion of the procedural due process implications of the California statutes, see Comment, supra note 1.


7. Comment, supra note 1, at 1309.


9. The chemical is considered to be moderately toxic. The complaint alleged that, because the chemical was never tested for widespread use, its effects in such applications were unknown and might be harmful, particularly to sensitive populations such as pregnant women, the elderly, and children. Comment, supra note 1, at 1308 n.54 (citing California Auditor Gen., The State Lacks Data Necessary to Determine the Safety of Pesticides (1984); Brief for the Plaintiffs at 12-18, Citizens for Non-Toxic Pest Control (No. 75,602); see also Brief for the Plaintiffs at 6-7, California Coalition for Alternatives to Pesticides v. California Dep't of Food and Agric., No. 77,060 (Cal. Super. Ct. March 7, 1986).
requirements of the California Environmental Quality Act (CEQA).\(^\text{11}\)

The Humboldt County Superior Court granted a preliminary injunction on the grounds that the CDFA had not met the CEQA review requirements.\(^\text{12}\) In response, the legislature passed legislation specifically exempting pest eradication projects from CEQA's environmental review requirements\(^\text{13}\) and restricted judicial review of CDFA pest eradication projects to a deferential "arbitrary or capricious" standard.\(^\text{14}\) The injunction was upheld in December 1986.\(^\text{15}\)

Before the legislation took effect, however, another citizens group filed a suit for injunctive relief. In *California Coalition for Alternatives to Pesticides v. California Department of Food and Agriculture*,\(^\text{16}\) the plaintiffs sought to enjoin the Imidan spraying on the grounds that the project would violate CEQA provisions, as well as federal and state due process protections.\(^\text{17}\) The plaintiffs argued that the CDFA director had abused his discretion in two ways: first, by approving the project without evaluating the public health and environmental impact of mass spraying of Imidan (in violation of the pesticide regulatory provisions of the State Food and Agriculture Code);\(^\text{18}\) and, second, by creating hazardous environmental conditions without reasonable public notice (in violation of

\(^{10}\) "All state agencies, boards, and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment." *Cal. Pub. Res. Code* § 21100 (Deering 1987).


\(^{17}\) *See* Brief for the Plaintiffs at 2-3, *California Coalition* (No. 77,060).

\(^{18}\) *Id.* at 6.
CEQA's environmental reporting and notice requirements). In addition, petitioners maintained that the spraying project violated their federal and state substantive due process rights by threatening their health and safety without a demonstrably compelling state purpose. The petitioners sought an injunction barring all actions potentially affecting their health and safety, as well as a declaration that the legislation upon which the projects were based was unconstitutional. The superior court rejected the petition, and the case was not appealed.

Likewise, the appellate court in Citizens upheld the injunction without treating any of the constitutional claims asserted in the Coalition case. The legislature subsequently repealed the statutory provision that had mandated the "arbitrary or capricious" standard of judicial review. This sequence of events leaves open the question of what standard of judicial review applies to agency authorization of pest eradication projects. Without legislative direction, it is now arguable that either a highly deferential approach or an exercise of independent judgment could be appropriate. The appellate court's choice not to address the constitutional arguments raised in Coalition and the legislature's reluctance to establish a standard of independent judicial review leaves several pressing issues in dispute. This Comment focuses on the narrow issue of what specific constitutional principles, if any, might govern state

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19. Id. at 7-8. See CAL. PUB. RES. CODE §§ 21080(c) & 21092 (Deering 1987); Comment, supra note 1 (discussing the procedural due process issues raised by these allegations).

20. Brief for the Plaintiffs at 8-9, 52-76, California Coalition (No. 77,060).

21. Id. at 76-78.

22. Id. at 3.

23. 187 Cal. App. 3d 1575, 232 Cal. Rptr. 729 (1986). The court held that the the gaps in the CDFA's project did not fall within CAL. PUB. RES. CODE § 21080.5(k)'s exemption for procedures that merely duplicate CEQA review requirements. Specifically, the court found that by only "alleg[ing] use of a properly registered pesticide," the CDFA did not satisfy CEQA requirements that, first, an agency must file a negative declaration if it determines that a project will not have a "significant effect" on the environment, and, second, that affected individuals must be properly notified of the proposed action. 187 Cal. App. 3d at 1588, 232 Cal. Rptr. at 735-36 (citing CAL. PUB. RES. CODE §§ 21080(c) & 21092).


25. See, e.g., CAL. CIV. PROC. CODE § 1094.5 (Deering Supp. 1988) (providing authority for an "independent judgment" standard for reviewing certain other administrative decisions).

26. Wide-scale pesticide spraying by the government raises important questions about the state's ability to injure individuals for the sake of the general welfare. These questions involve concerns far beyond the scope of this Comment regarding state police power and the restrictions imposed on that power by the fourteenth amendment. The questions of states' rights, though still unresolved, have been treated at length by several legal scholars. See, e.g., E. FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 8-1 to -7 (1978) (implied limitations on government); Kelso, Substantive Due Process as a Limit on Police Power Regulatory Takings, 20 WILLAMETTE L. REV. 1 (1984); Rowlett, Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality, 34 VAND. L. REV. 603 (1981); Stoebuck, Police Power, Takings, and Due Process, 37 WASH. & LEE L. REV. 1057 (1980).
efforts to initiate wide-scale and potentially harmful pesticide spraying. Part I describes the legislation underlying the controversy in California and the substantive due process concerns raised by such statutes. Part II argues from common law values, the intentions of the constitutional framers, and Supreme Court precedent that the interest of an individual in protection from potentially harmful pesticides deserves a limited degree of federal substantive due process protection. Accordingly, state agency decisions to spray dangerous pesticides in populated areas should be subject to a heightened degree of judicial scrutiny. Part II concludes by proposing a balancing test for analyzing state decisions to spray pesticides.

I

STATE AND FEDERAL STATUTORY SCHEMES AND THE CALIFORNIA EXAMPLE

Presently, no California statute governs the standard of judicial review that must be applied to agency decisions to spray pesticides. This section reviews judicial determinations which suggest that the standard California ultimately adopts may implicate certain constitutional protections. Because pesticide spraying poses serious threats to individuals, provisions that would preclude substantive judicial review might not adequately protect individual interests and hence may violate the due process clauses of the United States and California Constitutions.

A. California’s Statutory Provisions

The California Legislature specifically authorized the CDFA to use pesticides and toxic chemicals to prevent agricultural infestation by pests. Section 403 of the State Food and Agriculture Code requires the CDFA to “prevent the introduction and spread of injurious insect or animal pests, plant diseases, and noxious weeds.” This authority is restricted only by the procedural limitations of CEQA. Prior to 1986, CEQA prohibited “independent judgment on the evidence” and required

27. For purposes of this Comment, pesticides are defined according to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as “(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant . . . .” 7 U.S.C. § 136(u) (1982).


30. CAL. FOOD & AGRIC. CODE § 403 (Deering 1983). The broad powers granted in this statute may be attributed, at least in part, to the importance of agriculture to the California economy. See id. § 802.
courts to "determine whether the act or decision is supported by substantial evidence . . .".\footnote{31} Late in the 1985 legislative session, the legislature amended the Food and Agricultural Code\footnote{32} to include several sections governing legal challenges to CDFA pest eradication projects. The additions, enacted soon after the superior court's holding in \textit{Citizens}, were designed in part to limit judicial review of the CDFA director's pesticide spraying decisions.\footnote{33} The statute authorized the agency's director to order pesticide use\footnote{34} and limited judicial review of such authorization to determining whether the director's action was arbitrary or capricious.\footnote{35} In an attempt to comply with \textit{Citizens}, the legislature repealed the provision restricting the scope of judicial review in September 1987.\footnote{36} This repeal has thrown wide open the question of what standard of judicial review should apply to agency decisions to use pesticides in pest eradication projects.

\section*{B. The Constitutionality of Statutory Restrictions On Judicial Review}

No court has yet ruled directly on the validity of statutes which limit the standard of review for agency decisions to spray pesticides. However, various courts have approved the constitutionality of legislative restrictions of judicial review in other contexts. For instance, in \textit{Lamm v. Weinberger},\footnote{37} the Court of Appeals for the Eighth Circuit considered whether it possessed authority to review the adequacy of the MX Missile project's final environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). The court held that where the Air Force had discretion to choose its course of action, judicial review was appropriate. Where Congress had explicitly stipulated a course of action, however, that action was not reviewable, regardless of

\footnote{31. \textsc{Cal. Pub. Res. Code} § 21168 (Deering 1987).}
\footnote{33. See Comment, supra note 1, at 1312-13 & nn.93-94 for a description of the history of the legislation, Assembly Bill 1525. According to the Comment, Assembly Bill 1525 generated considerable opposition from environmental organizations and consumer groups. The bill passed swiftly through the State Senate, however, and compromise legislation sponsored by the opposition never materialized. \textit{Id.} at 1313 n.94.}
\footnote{34. \textsc{Cal. Food & Agric. Code} § 5051 (Deering Supp. 1988).}
\footnote{35. \textit{Id.} § 5053.}
\footnote{37. 819 F.2d 1445 (8th Cir. 1987). Although the opinion has been withdrawn, 825 F.2d 176 (8th Cir. 1987), it still serves to illustrate typical judicial analysis of the constitutionality of legislative restrictions of judicial review.}
its potential for adverse environmental impact. In Lamm, Congress had legislated courses of action for most of the missile deployment, and thus the court held that most of the deployment decisions were not subject to judicial review. Lamm, then, suggests that individual interests in safety may be left judicially unprotected in favor of legislative determinations of overall public benefit.

Consistent with Lamm, several federal and state statutes exempt governmental actions from judicial review under NEPA or corresponding state environmental quality laws. In fact, many states have adopted statutes specifically allowing agencies broad discretion in pesticide spraying decisions. However, the scope of this discretion has not been tested. How the California pest eradication statute is interpreted and applied by the courts may greatly influence the application of similar statutes in other states, both because it is the first such case and because of California's recognized prominence in agriculture law. Thus, the standard of judicial review of pesticide spraying decisions ultimately adopted in California may have national consequences for pesticide spraying and the substantive due process rights of individuals exposed to that spraying.

II

SUBSTANTIVE DUE PROCESS AND THE STANDARD FOR JUDICIAL REVIEW

Substantive due process "bars certain arbitrary government actions regardless of the fairness of the procedures used to implement them."
Ordinarily, a state need demonstrate only a rational basis to justify any action which adversely affects a citizen. However, when the government action impinges on an individual's "fundamental" or "preferred" interests, courts require the state to show a compelling state interest behind the action.

This section argues that individuals have an important interest in protection from pesticide projects that threaten to cause serious physical harm and that this interest warrants a standard of review more exacting than the rational basis or "arbitrary or capricious" standard. Only a stricter standard for evaluating pesticide spraying decisions would adequately protect the important individual interest at stake.

A. Standards of Judicial Review

The Supreme Court has developed three levels of deference for courts to employ when reviewing governmental actions alleged to violate constitutional protections. The degree of scrutiny the Court applies to the state's justification for its action depends upon the importance of the individual interest at stake. If the Court decides that the interest at stake is "social" or "economic," it will defer almost entirely to the state's judgment, requiring only a "rational basis" for the government action. As long as any basis for the action can be conceived which is not entirely arbitrary or irrational, the act will be upheld. In the past fifty years, the Court has determined that a government act violates this minimum rationality standard only in extremely rare circumstances.

The Court grants less deference where a "fundamental" interest is at stake—that is, an interest explicitly recognized in the Bill of Rights or considered by the Court to deserve the utmost judicial protection. Government actions affecting a fundamental interest must be justified by a "compelling" state interest. For an interest to be compelling, its value

44. These rights are generally defined as those which are enumerated in the Bill of Rights, perhaps including those reserved by the ninth amendment (which states that the first eight amendments are not exclusive). See L. Tribe, supra note 26, §§ 11-2 to -3; Redlich, Are There "Certain Rights . . . Retained by the People?", 37 N.Y.U. L. Rev. 787 (1962).

45. If such injury occurs, there is a question whether the state is then required to compensate the victim(s) under federal civil rights law. See infra note 234 (discussing damages remedy for constitutional tort).

46. See, e.g., Nebbia v. New York, 291 U.S. 502, 539 (1934) (holding that state laws affecting economic interests violate the due process clause of the fourteenth amendment "only if arbitrary, discriminatory, or demonstrably irrelevant," and that under this deferential test a New York law fixing minimum prices for milk was constitutional).


48. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (holding that state actions which restrict the "fundamental right of interstate movement" violate the equal protection clause where they do not promote "a compelling state interest").
must be "so great that it justifies the limitation of fundamental constitutional values."\(^{49}\) In these cases, the Court performs so critical an examination of the state's justification that the state action rarely withstands review.\(^{50}\)

Between these two relatively extreme approaches, a third, "intermediate" level of scrutiny has been applied in recent years, mainly in cases involving claims under the equal protection clause of the fourteenth amendment. In these cases, the Court finds that although the individual interest claimed is not fundamental, it deserves greater protection than that accorded under the rational basis or "arbitrary or capricious" standard.\(^{51}\)

The next subsection concludes that, in light of Supreme Court precedent, the individual interests asserted in the pesticide spraying cases probably would not be categorized as "fundamental" by federal courts. However, the remainder of this section argues that because of common law values and values inherent in constitutional law jurisprudence, the individual interest at stake in the pesticide spraying cases merits a standard of judicial review less deferential than the existing arbitrary or capricious standard.

**B. The Value of Judicial Review**

The argument for requiring a stricter standard of review in pesticide spraying cases rests on the premise that individual concerns are more likely to be considered when judges carefully examine the decisionmaking of agencies.\(^{52}\) The standard has been applied narrowly because substantive review of agency decisions would allow a court "to substitute its judgment for that of the agency."\(^{53}\) In the largely administrative field of environmental law, courts have allowed statutory preemption of substantive review of agency decisions, noting that agencies, and not courts, have the necessary expertise and experience to understand the facts governing decisionmaking in this relatively new and complex area of the law.\(^{54}\) In addition, some argue that in relatively new legal fields, such as environmental law, judges have too few standards by which to make decisions or

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49. J. NOWAK, supra note 47, \(\S\) 14.3, at 530.
50. Id. \(\S\) 11.4, at 357.
51. Id. \(\S\) 14.3, at 531-33.
52. Professor Davis has suggested that unfettered agency action, specifically actions immune to attack in civil judicial proceedings, are a serious threat to individual rights. K. DAVIS, ADMINISTRATIVE LAW TEXT 497 (3d ed. 1972).
set remedies. Others have expressed concern that strict scrutiny of agency actions may inhibit administrators from "taking decisive action." Finally, some argue that the amount of substantive judicial review must be limited to prevent further burdening already overextended judicial resources.

Although arguments to limit strict scrutiny are legitimate in theory, compelling practical considerations favor stricter judicial review in environmental cases. First, the expertise of an agency in pesticide spraying situations may be limited to awareness of the potential benefits of agency action. The agency may be less aware of potential hazards. The CDFA, for example, certainly is qualified to determine that eradication of the apple maggot will benefit farmers and consumers of apples, but it has no expertise concerning the health effects of untested pesticides.

Furthermore, even if the agency does have the expertise, its inherent biases may distort its decisionmaking. If the agency focuses on its overall mission (of, for instance, improving agricultural conditions), it may give little consideration to the impact of its action on individuals. The physical well-being of these individuals would be better protected if an impartial factfinder reviewed the costs as well as the benefits of agency action. New laws in particular call for balancing of competing interests—a task best performed by the judiciary.

Judicial review of administrative decisionmaking may also be desirable because judges tend to be less susceptible to the political influence of interest groups and industry. Because powerful political lobbies do not always represent the best interests of the general public or less powerful interests, political influence may lead to biased decisions. The lobbying mechanisms of agricultural interests, better financed than those of most environmental groups, make undue political influence a particular danger in pesticide spraying cases.

Similarly, it is not at all clear that there are too few standards upon which to base judicial decisions in pesticide spraying cases. In most instances, environmental disputes are concerned less with technical issues of environmental quality than with balancing the risks to individuals against the benefits to the community. Courts, because of their expe-

55. Id.  
56. Comment, Rejecting Absolute Immunity for Federal Officials, 71 CALIF. L. REV. 1707, 1717-18 (1983) (noting that the threat of judicial intervention and sanctions has been criticized as inhibiting appropriate agency action).  
57. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 580 (1965).  
59. Comment, supra note 40, at 418 (arguing for halt to congressional preemption of judicial review in environmental impact decisions).
rience with such balancing, are well suited to the task. If the constitutionality of the state's action is questioned before the individual injury occurs, courts could apply a balancing test to determine whether to enjoin the action.

Finally, fear of inhibiting "decisive" agency action may be misguided. Rather than impair government action, the threat of judicial restraints motivates government decisionmakers to comply with constitutional and statutory mandates. Judicial review makes the government more accountable for its actions. This accountability reduces the risk of lawless governmental action.

Strict scrutiny raises the question of the extent to which our democratic society should protect minority interests at the expense of majoritarian interests. In opposing expanded judicial review, one could argue that if any government action that threatened a minority interest were subjected to such review, then, in practice, every government action would be scrutinized. Besides the administrative burden this would create, the argument continues, courts are neither competent nor legitimately empowered to hear all of these concerns. Indeed, the rise of administrative agencies has been attributed to the courts' inability to resolve these issues adequately.

To prevent overburdening the judiciary or blurring the judicial function, courts must narrowly circumscribe and define the interests that merit high judicial review. Only those values which are already inherent in the law should be protected. Hence, this Comment proposes that judicial review should extend beyond the "arbitrary or capricious" standard.

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60. See, e.g., Winston v. Lee, 470 U.S. 753, 758-63 (1985) (balancing individual interest in privacy and physical security of person against state's interest in law enforcement to determine whether surgical removal of bullet from suspect's chest violated fourth amendment's proscription of unwarranted search and seizure); Roe v. Wade, 410 U.S. 113, 147-64 (1973) (balancing mother's interest in privacy and physical security against state's interest in sustaining the life of the fetus to decide whether state statute prohibiting abortion was unconstitutional); Tinker v. Des Moines School Dist., 393 U.S. 503, 507-14 (1969) (balancing student's first amendment interest in freedom of expression against state's interest in controlling conduct in the schools). See infra text accompanying notes 235-43 (discussing a proposed balancing test).


62. Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 526 (1974) ("The proper object of [judicial] scrutiny is the extent to which the activity of the courts has encouraged agencies to modify their decisionmaking process in an effort to avoid judicial restraints").

63. Comment, supra note 56, at 1718-19 (discussing the desirability of tort actions against the federal government to deter unconstitutional agency action).

64. The term minority is used not to refer to race or other group classifications, but rather in the more general sense of a group of people who are outnumbered by a larger group.

only where pending government or agency action poses a serious threat of physical harm to human beings. Accordingly, this Comment suggests that where government-controlled pesticide use involves such a threat, a higher standard of review should be applied. The following subsection supports this claim on the basis of values implicit in the common law and the Constitution.

C. Values Underlying the Ninth Amendment

While pesticide use has skyrocketed in recent years, legal doctrines have not kept pace. "[The fact that] the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials . . . is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem." This Section considers whether our forefathers might have allowed for increased substantive due process protection against the use of pesticides.

The due process clause applies to the states through the fourteenth amendment. The clause does not apply equally to all interests, however, and thus identifying those protected interests has been a subject of endless scholarly debate. The current trend, if any exists, is towards narrowing the scope of substantive protections under the due process clause. Nevertheless, certain liberty interests have been recognized by the Court beyond those explicitly enumerated in the Bill of Rights. Such

66. See ENVIRONMENTAL DEFENSE FUND & R.H. BOYLE, MALIGNANT NEGLECT 116 (1979) (noting that between 1962 and 1975, pesticide sales in the U.S. increased from $440 million to more than $2 billion a year, and that in 1975 a record 1.6 billion pounds of synthetic organic pesticides were produced); CAL. COMM’N FOR ECONOMIC DEVELOPMENT, POISONING PROSPERITY: THE IMPACT OF TOXICS ON CALIFORNIA’S ECONOMY 1, 11 (1985) (citing Davis & Magee, Cancer and Industrial Chemical Production, 206 SCIENCE 1356, 1358 (1979)).


68. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . " U.S. CONST. amend. XIV, § 1.


It has been argued that the due process clause of the fourteenth amendment incorporates all of the guarantees of the Bill of Rights. See Adamson v. California, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting) ("[N]o state [can] deprive its citizens of the privileges and protections of the Bill of Rights."); Black, supra, at 34. However, a majority of the Supreme Court has never adopted this view.

70. See Hewitt v. Helms, 459 U.S. 460, 466 (1982) ("only a limited range of interests fall within" the fourteenth amendment’s due process protections); L. TRIBE, supra note 26, § 10-19, at 559; Schwartz, supra note 69, at 875.
"unenumerated aspects of liberty"\textsuperscript{71} include fundamental interests in interstate travel,\textsuperscript{72} in teaching one's child a foreign language,\textsuperscript{73} in sending one's child to a private school,\textsuperscript{74} in procreating,\textsuperscript{75} in freedom from certain bodily intrusions,\textsuperscript{76} and in the use of contraception.\textsuperscript{77} Constitutional protection of these unenumerated liberty interests rests on the theory that the due process clause is not limited to those interests expressly stated in the Bill of Rights.\textsuperscript{78} The ninth amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"\textsuperscript{79} supports this theory.

The ninth amendment strongly suggests that the framers recognized the existence of "fundamental but unmentioned" rights.\textsuperscript{80} Professor Redlich finds evidentiary support for such recognition in \textit{The Federalist Papers} and early congressional records.\textsuperscript{81} He has demonstrated that James Madison drafted the ninth amendment because Madison feared that "enumeration of specific rights in a Bill of Rights . . . would imperil others not enumerated."\textsuperscript{82} Professor Redlich therefore argues that "[t]o assert that the people have certain rights other than those specifically mentioned in the Constitution [does] not dilute the Bill of Rights but [adds] to it."\textsuperscript{83}

The largest voting block of the Court in \textit{Griswold v. Connecticut}.\textsuperscript{84}

\textsuperscript{71} L. Tribe, \textit{supra} note 26, § 11-3, at 570.
\textsuperscript{73} Meyer v. Nebraska, 262 U.S. 390 (1923) (fourteenth amendment liberty denotes much more than freedom from bodily restraint).
\textsuperscript{74} Pierce v. Society of Sisters, 268 U.S. 510 (1925).
\textsuperscript{75} Skinner v. Oklahoma, 316 U.S. 535 (1942).
\textsuperscript{76} Rochin v. California, 342 U.S. 165 (1952).
\textsuperscript{77} Griswold v. Connecticut, 381 U.S. 479 (1965).
\textsuperscript{78} This theory is articulated in Justice Harlan's oft-quoted dissenting opinion in Poe v. Ullman:

\begin{quote}
"The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."
\end{quote}

\textsuperscript{367} U.S. 497, 543 (1961); \textit{see also} Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting) ("neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects").
\textsuperscript{79} U.S. Const. amend. IX.
\textsuperscript{80} L. Tribe, \textit{supra} note 26, § 11-3, at 570; \textit{see also} Redlich, \textit{supra} note 44, at 805.
\textsuperscript{81} Redlich, \textit{supra} note 44, at 805. For additional and more thorough discussion of the ninth amendment, see B. Patterson, \textit{The Forgotten Ninth Amendment} (1955); Ritz, \textit{The Original Purpose and Present Utility of the Ninth Amendment}, 25 Wash. & Lee L. Rev. 1 (1968).
\textsuperscript{82} Redlich, \textit{supra} note 44, at 805.
\textsuperscript{83} Id. at 795.
\textsuperscript{84} 381 U.S. 479 (1965).
which established a "fundamental" liberty (as well as privacy) interest in the use of contraceptives, adopted this interpretation.\textsuperscript{85} Hence, the Court may recognize liberty interests beyond those enumerated in the Bill of Rights, particularly when generalized moral or functional values exist to support that interest.

\textit{C. The Difficulty of Finding a Fundamental Interest in Protection from Harmful Pesticides: Some Analogies}

The ninth amendment and the values underlying other constitutional amendments could provide a basis for the Supreme Court to expand constitutional protection for individuals seriously endangered by government pesticide spraying. Extending due process protection to these individuals could rest upon the social value of health protection,\textsuperscript{86} recognized implicitly in many of the Court's previous decisions.\textsuperscript{87} If the Court were to label the individuals' interest "fundamental," a strict scrutiny standard of judicial review would be applied to the government's spraying decisions. Thus, the government would have to show a compelling interest to justify spraying chemicals that pose a serious threat of physical harm to individuals.\textsuperscript{88}

The Supreme Court thus far has not considered whether an individual's interest in protection from harmful chemicals is fundamental. Both the Supreme Court and lower federal courts, however, have rejected constitutional arguments in analogous cases.\textsuperscript{89} Federal courts have refused to recognize fundamental interests in the quality and availability of housing and education, and in a clean environment. Therefore, they are unlikely to categorize an individual's interest in safety from dangerous pesticides as a fundamental interest. Accordingly, they would be unlikely to apply a strict scrutiny standard of review when this interest is claimed to be threatened or injured.

\textit{1. Housing.}

The Supreme Court first rejected the idea of a constitutional right to adequate housing in \textit{Lindsey v. Normet}.\textsuperscript{90} In \textit{Lindsey}, the petitioners

\textsuperscript{85} Id. at 487-93 (Goldberg, J., concurring, joined by Warren, C.J., and Brennan, J.).

\textsuperscript{86} See infra text accompanying notes 193-234.

\textsuperscript{87} See, e.g., Winston v. Lee, 470 U.S. 753 (1985) (prohibiting state from surgically removing bullet from suspect's chest); Roe v. Wade, 410 U.S. 113 (1973) (pregnant women have absolute interest in determining whether to abort during first trimester); Rochin v. California, 342 U.S. 165 (1952) (government's inducing vomiting from suspect violates the due process clause).

\textsuperscript{88} See supra note 48 and accompanying text.

\textsuperscript{89} These cases are analogous in that the petitioner's argument in each instance rested (at least potentially) upon the premise that denial of constitutional protection would result in harm to the individual's health.

\textsuperscript{90} 405 U.S. 56 (1972).
were month-to-month tenants of residential rental property. When the petitioners refused to pay their monthly rent unless certain substandard conditions on the premises were improved, Normet, the property owner, threatened eviction under an Oregon statute that restricted the court's consideration to tenant's default, thus excluding the question of the landlord's breach of duty to maintain the premises.

On appeal before the Supreme Court, the tenants argued that a standard of review more stringent than "mere rationality" should be applied to the statutory limitation of triable issues because "fundamental interests" in the "need for decent shelter" and the "right to retain peaceful possession of one's home" were at stake. The Court rejected the tenants' argument that fundamental interests were injured by the statute, noting that "the Constitution does not provide judicial remedies for every social and economic ill." Because the Court found no mention of the asserted interests in the Constitution, it applied a rational basis standard of review and upheld the statutory provisions.

2. Education

One year after Lindsey, in San Antonio Independent School District v. Rodriguez, the Supreme Court reversed a district court holding that "wealth" is a suspect classification and that the right to an education is a fundamental interest protected by the Constitution. In Rodriguez, the petitioners brought a class action on behalf of schoolchildren residing in school districts with a low property tax base. The petitioners asserted that Texas's system of substantially financing public and secondary schools through local property taxes violated the equal protection clause by creating interdistrict disparities in per student expenditures. They requested the Court to apply a strict scrutiny standard of review to the Texas system. The Court, however, applied a deferential "rational relationship" standard of review because, in its view, although education is recognized as one of the most important services offered by the state, education "is not among the rights afforded explicit protection under our Federal Constitution."

The Court provided a two-fold rationale for its refusal to find a fundamental interest. First, citing Lindsey, the Court expressed concern over its ability to limit application of the interest. It reasoned that many legislative decisions result in inequitable distribution of social bene-

91. Id. at 73.
92. Id. at 74.
93. Id.
95. Id. at 35.
96. Id. at 37.
fits, but that it is not the Court's role to substitute its judgment for the legislature's when social or economic benefits are at issue. In addition, the Court emphasized that when the challenged statute involves the distribution of tax revenues or the formulation of educational policy, extra deference has been and should be given to the legislature's judgment.

3. The Environment

Finally, most analogous to the interest in safety from dangerous pesticides is the individual's interest in environmental preservation. Beginning around 1970, numerous commentators argued that this is a fundamental interest under the Constitution. The gist of these articles was that the fifth and fourteenth amendments' protection of "life, liberty and property" and the ninth amendment's protection of interests not explicitly enumerated combine to establish a constitutionally protected interest in a clean environment.

Although the Supreme Court has never ruled on this question, numerous federal courts have rejected the argument that there is a constitutionally protected fundamental interest in environmental preservation. The Court of Appeals for the Fourth Circuit was the first to reject the argument. In Ely v. Velde, petitioners attempted to enjoin the funding and construction of a medical and reception center for Virginia prisoners in an area that contains historic properties. Petitioners argued that the Virginia Director of the Department of Welfare and Institutions was constitutionally compelled to consider the environmental impact of the decision to locate the center in such an area. The court rejected this argument on the grounds that "this newly-advanced constitutional doctrine has not yet been accorded judicial sanction, and appellants do not present a convincing case for doing so." Similarly, in Hagedorn v. Union Carbide Corporation, the District Court for the Northern District of West Virginia rejected an argument that the fifth, ninth, and fourteenth amendments guarantee a fundamen-

97. Id. at 33, 39.
98. Id. at 40-43.
100. 451 F.2d 1130 (4th Cir. 1971).
101. Id. at 1139. The court also criticized the petitioners' attempt to apply federal law to state agencies. Id.
tal interest in "breath[ing] clean air and liv[ing] in a decent environment including the fundamental human right of survival . . . ." The plaintiffs, residents of a West Virginia town, had alleged that emissions from Union Carbide's plant polluted the air and physically injured residents.

The petitioners asserted constitutional claims against various state agencies, alleging that the agencies should have prevented the air pollution. The court rejected the constitutional claims because no prior decision had identified the interest asserted as fundamental, and because the court believed it lacked authority to establish such an interest on its own. The court did acknowledge, however, that the environmental interest could someday be constitutionally protected, implying that it was up to the Supreme Court to validate the interest.

Federal courts have rejected a fundamental interest in environmental preservation on numerous occasions since the decisions in Ely and Hagedorn. Most recently, in Izaak Walton League of America v. Marsh, the Court of Appeals for the District of Columbia reaffirmed that "generalized environmental concerns do not constitute a property or liberty interest" and refused to enjoin construction of a replacement dam on the Upper Mississippi River.

The federal court opinions rejecting a fundamental constitutional interest in environmental protection seem to reflect two concerns. First, the lower courts appear reluctant to expand the range of constitutional protections without Supreme Court guidance. Secondly, the courts

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103. Id. at 1064.
104. Id. at 1064-65.
105. Id. at 1064 (quoting Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728, 739 (E.D. Ark. 1971)).
106. See In re "Agent Orange" Product Liability Litig., 475 F. Supp. 928, 934 (E.D.N.Y. 1979) ("Since there is not yet a constitutional right to a healthful environment . . . there is not yet any constitutional right . . . to be free of allegedly toxic chemicals" developed by defendants and regulated by the Environmental Protection Agency); Federal Employees for Non-Smokers Rights v. United States, 446 F. Supp. 181, 184-85 (D.D.C. 1978) (rejecting constitutional argument in motion for injunctive relief restricting smoking in federal buildings to designated areas because the activities in question occur in a public place and therefore are distinguishable from privacy rights in the home); Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1212-13 (D.N.J. 1978) (no constitutional interest in environmental protection when downstream township's coastline is adversely affected by city's dumping of garbage and sludge into the Hudson River); Gasper v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716, 720-22 (E.D. La. 1976) (rejecting constitutional interest in breathing "smoke-free air" in the Louisiana Superdome); Pinkney v. Environmental Protection Agency, 375 F. Supp. 309-10 (N.D. Ohio 1974) (upholding government approval of shopping mall development and rejecting petitioner's claim that the additional air and water pollution would violate their fundamental constitutional interest in a healthful environment).
108. Id. at 361.
109. The reluctance to be judicially active is seen in such tentative language as "there is not yet a constitutional right to a healthful environment," In re "Agent Orange" Product Liability Litig., 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (alleged injury from private defendants' development and application of toxic chemicals); and "this Court 'must decline to embrace the exhilarating
apparently believe that the asserted environmental interest is too closely related to the "social welfare" interests alleged in Lindsey and Rodriguez. By quoting the statement in Lindsey that "the Constitution does not provide judicial remedies for every social and economic ill," several lower courts express the Supreme Court's concern that protecting interests in social well-being not explicitly enumerated in the Constitution would result in massive increases in adjudication and in judicial usurpation of legislative powers.  

Finally, judicial recognition of a fundamental interest would require courts to apply a strict scrutiny level of review every time plaintiffs allege that that interest is infringed. Thus, the government would always need to show a compelling interest to justify these intrusions. Unspoken but possibly implicit in the these opinions is a recognition that, because the government rarely wins under the strict scrutiny standard, expanding the scope of fundamental interests would undermine the effective functioning of the agencies. Because of these concerns, the courts refuse to recognize fundamental interests that are neither clearly defined nor limited in their application, nor explicitly mentioned in the Constitution.

The individual and governmental interests in these environmental cases are so similar to the interests at stake in pesticide spraying, that a federal court probably would not recognize a fundamental interest in protection from government spraying of chemicals that pose a serious threat of physical harm. Nevertheless, the next section of this Comment argues that the individual interests at stake in the pesticide spraying situation are important enough, and have been recognized by the courts as important enough, to warrant more than a rational basis standard of review.

**D. An Interest Worthy of Intermediate Scrutiny**

The common law recognizes an interest in protection from bodily harm which is closely related to other interests recognized as fundamental by the Supreme Court. Accordingly, in cases where pesticide spraying would risk bodily harm, courts should apply an intermediate standard of review. Precedent for applying an intermediate standard of

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112. See supra notes 49-50 and accompanying text.

113. See infra notes 197-218 and accompanying text (discussing Court's recognition of fundamental interests in privacy and uninhibited interstate travel).
review where not fundamental but nevertheless important interests are at stake can be found in recent Supreme Court, lower federal court, and state court decisions. These cases hold that when interests are threatened which are not fundamental but which "contribute substantially to the enjoyment of fundamental interests or materially embody values more fully represented by fundamental interests," the state must show a substantial purpose to justify its actions. Although most of these decisions address equal protection challenges, their value-based rationale applies with equal force to certain due process concerns. Moreover, while the Supreme Court has not formally acknowledged this third standard of review, the standard's existence is well documented and accepted by constitutional scholars.

1. Plyler, Its Progeny, and Related Cases

In *Plyler v. Doe,* the Supreme Court held that a Texas statute withholding state funding for the education of children of undocumented aliens and permitting local school districts to deny enrollment to those children was a violation of the fourteenth amendment's equal protection clause. Before reviewing the Texas statute, the Court discussed its method of analyzing the constitutionality of state statutes. The opinion stated that, in addition to the deferential rational basis standard of review and the rigorous strict scrutiny standard, the Court had:

recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these *limited circumstances* we have sought the assurance that the classification reflects a reasoned judgment . . . by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.

114. See J. Nowak, *supra* note 47, § 14.3, at 531-33 (discussing types of cases in which the Supreme Court applies an intermediate standard of review); J.W. v. City of Tacoma, 720 F.2d 1126 (9th Cir. 1983) (applying intermediate test to equal protection challenge by former mental patient); Horton v. Marshall Public Schools, 769 F.2d 1323 (8th Cir. 1985) (applying intermediate standard to Arkansas statute excluding minor children from school unless the child's parent or guardian lived in the school district); Greenberg v. Kimmelman, 99 N.J. 552, 494 A.2d 294 (1985) (applying intermediate scrutiny test to state conflict of interest laws in casino regulation); State v. Phelan, 100 Wash. 2d 508, 671 P.2d 1212 (1983) (applying *Plyler* intermediate scrutiny test to hold that state must give prisoner credit for all jail time served in connection with the crime for which he is eventually sentenced to prison).


116. Id. § 14.3, at 533.


119. Id. at 217-18 (emphasis added).
The Court added in a footnote that “[t]his technique of ‘intermediate’ scrutiny permits us to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles.”120

In analyzing the Texas statute, the majority acknowledged Rodriguez, noting that the individual interest implicated by the statute—the interest of undocumented school-age children in receiving a free public education—“is not a ‘right’ granted to individuals by the Constitution.”121 The majority, however, concluded that the interest in public education is distinguishable from other social benefits.

The majority based this distinction on the fact, recognized in previous Court decisions, that education is a basic value in the United States. First, the majority quoted language from four prior Supreme Court constitutional decisions noting the importance of education “in maintaining our basic institutions”122 by preparing youth to participate in and preserve our system of government. Second, the majority opined that denying free public education to school-age children would interfere with “advancement on the basis of individual merit.”123 Quoting the seminal decision of Brown v. Board of Education,124 the majority found it “‘doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.’”125

The Court held that the statute, by depriving school-age children of the long-term benefits of a public education, infringed upon social values that the Court recognized as important. It considered these values and found that “‘more is involved in these cases than the abstract question . . . [of] whether education is a fundamental right.’”126 Therefore, it applied an intermediate standard of review which was less deferential than rational basis analysis. Under this standard, unless the exclusion of the undocumented children from public education “furthers some substantial goal of the State” the exclusion is not “rational.”127

The standard articulated in Plyler is clearly less deferential than the traditional rational basis test, which requires only a showing that “the classification challenged be rationally related to a legitimate state interest.”128 Unlike courts applying the highly deferential rational basis

120. Id. at 218 n.16.
121. Id. at 221.
122. Id.
123. Id. at 222.
126. Id.
127. Id. at 224.
test, the Plyler majority required more than just a "conceivable basis" for the government action. Instead, the Court carefully considered three justifications offered by the State—that the law protected the State from an influx of illegal aliens, that it preserved the State's limited ability to educate sufficiently its own residents, and that it prevented the expense of educating children who would leave the United States—and rejected them as "wholly insubstantial." The Court held that because the State had not met its burden of showing a "substantial" interest to counterbalance "the costs involved to these children, the State, and the Nation," the Texas statute violated the equal protection clause.

Still, the Court's approach was more deferential than the strict scrutiny test, which requires a "compelling" state interest. The Plyler majority recognized that "a State need not justify by compelling necessity every variation in the manner in which education is provided." Unlike courts applying the strict scrutiny standard, the Plyler Court did not presume that the statute was invalid.

A few years before the Plyler Court adopted an intermediate standard of review in the equal protection context, the Supreme Court appeared to apply a similar standard in its analysis of a due process complaint. In Duke Power Co. v. Carolina Environmental Study Group, Inc., the Court upheld a congressional act limiting the liability of a federally licensed nuclear power plant to $560 million in the event of a nuclear accident. Although the Court stated that it would "defer to the congressional judgment unless it is demonstrably arbitrary or irrational," the Court's analysis suggested that the interest at stake was entitled to greater scrutiny than the economic interests usually associated with the arbitrary or capricious standard. Instead of seeking a conceivable basis for the legislation, the Court carefully examined the legislative history of the act in search of the actual basis. Ultimately, the Court concluded that the statute was constitutional because of Congress's "reasonably just" interest in providing incentives for private development of nuclear energy.

Although the question is open, some commentators believe that the
Duke Power Court applied a more rigorous test than the traditional rational basis analysis. They suggest that despite the Court's initial statement that it would apply a rational basis test, the Court's actual scrutiny of the congressional act went beyond traditional deferential analysis.\(^\text{138}\)

Following the Plyler decision in 1982, the Supreme Court, like numerous lower federal courts and state courts, has applied an intermediate scrutiny standard of review when the individual interests at stake are "sufficiently absolute and enduring"\(^\text{139}\) but not fundamentally protected. For instance, in Pickett v. Brown,\(^\text{140}\) the Supreme Court held that a Tennessee statute imposing a two-year limitations period on paternity and child support actions brought on behalf of certain illegitimate children must be "'substantially related to a legitimate state interest.'"\(^\text{141}\)

The Court acknowledged that although the standard was not "'our most exacting scrutiny,'" it was intended to be "'not a toothless one'"\(^\text{142}\) because of the importance attributed to the interests of illegitimate children.

Similarly, in Cleburne Living Center, Inc. v. Cleburne,\(^\text{143}\) the Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and therefore merits an intermediate standard of judicial review.\(^\text{144}\) Applying that standard, the court invalidated a city zoning ordinance excluding a group home for the mentally retarded from permitted uses in a zoning district.

The Supreme Court reversed the circuit court on the issue of whether an intermediate standard of scrutiny was appropriate, but held


\(^\text{139}\) Plyler, 457 U.S. at 218 n.16.

\(^\text{140}\) Id. at 8 (quoting Mills v. Habluetzel, 456 U.S. 91, 99 (1982)).

\(^\text{141}\) Id. (quoting Trimble v. Gordon, 430 U.S. 762, 767 (1977) and Mathews v. Lucas, 427 U.S. 495, 506, 510 (1976)). Applying this standard, the Court held that the statute violated the equal protection clause.

\(^\text{142}\) 726 F.2d 191 (5th Cir. 1984), aff'd in part and vacated in part, 473 U.S. 432 (1985).

\(^\text{143}\) Id. at 198.
that even under a nominal rational basis test the ordinance was invalid.\textsuperscript{145} In support of its decision to apply a rational basis rather than an intermediate scrutiny test, the Court first attempted to distinguish "quasi-suspect" classes, such as aliens and illegitimate children, whose interests state legislatures had not adequately protected, from the class of mentally retarded individuals, whose interests had been sufficiently protected. Second, the Court explained the practical difficulties of recognizing an additional "quasi-suspect" interest. The Court reasoned that there would be no "principled way to distinguish" the mentally retarded from numerous other groups seeking constitutional protection. Recognition of a stronger interest for the mentally retarded, therefore, would open the floodgates to constitutional challenges of social and economic legislation.\textsuperscript{146}

Although claiming to apply a rational basis test, the Court did not defer to the city's judgment, but rather it examined and rejected each of the city's justifications.\textsuperscript{147} Justice Marshall, dissenting on the issue of whether the individual's interest merited a heightened standard of review, contrasted the scrutiny applied by the majority with the deference evident in previous applications of the rational basis test and concluded that the majority actually applied heightened scrutiny in invalidating the ordinance.\textsuperscript{148} The dissenters also contested the majority's claim that it had no standard for determining whether to apply an intermediate level of scrutiny. According to the dissenters, the standard of review applied "should vary with 'the constitutional and societal importance of the interest adversely affected . . . .'"\textsuperscript{149} Justice Marshall proposed that "the right to establish a home in the community" free from discrimination made heightened scrutiny appropriate in this case.

Other federal courts have followed the approach of the \textit{Plyler} majority and Justice Marshall in applying an intermediate scrutiny standard of review. The Ninth Circuit, in \textit{J.W. v. City of Tacoma},\textsuperscript{151} applied an intermediate level of scrutiny. Although it found that former mental patients did not have a fundamental interest in group homes that served their needs, the patients' interest was worthy of more than minimum rationality protection.\textsuperscript{152} In \textit{Horton v. Marshall Public Schools},\textsuperscript{153} the

\begin{thebibliography}{1}
\bibitem{146} \textit{Id.} at 442-46.
\bibitem{147} \textit{Id.} at 447-50.
\bibitem{148} \textit{Id.} at 455-60 (Marshall, J., dissenting); see also J. NOWAK, \textit{supra} note 47, § 14.3, at 542-43 n.57.
\bibitem{150} \textit{Id.} at 473 (Marshall, J., dissenting).
\bibitem{151} 720 F.2d 1126 (1983).
\bibitem{152} \textit{Id.} at 1130. Under \textit{Plyler}'s "rational" if furthering "some substantial goal" standard, the
\end{thebibliography}
Eighth Circuit applied *Plyler's* intermediate standard of review to analyze the constitutionality of an Arkansas statute that excluded minor children from school unless the child's parent or guardian lived in the school district. Other examples of an intermediate scrutiny approach at the federal level are plentiful. State courts are following *Plyler* as well.

*Plyler*, its progeny, and the related due process cases indicate that when a challenged statute implicates important social values that would be overlooked in a deferential constitutional analysis, a reviewing court may employ a higher, though not the highest, standard of review. Though courts will play a larger role than they would if they applied a rational basis standard, the standard does not allow courts to "second-guess reasoned legislative or professional judgments . . ." Thus, if the government is performing its function of balancing social needs against the needs of individuals and reasonably protecting the individual interests involved, its judgment will not be defeated by the courts. If, however, the government ignores interests which, based upon societal notions of importance, ought to be given great weight in decisionmaking, then the court will step in.

court invalidated a city ordinance denying special use permits for group homes housing former mental patients.

153. 769 F.2d 1323 (8th Cir. 1985).

154. The court found that the statute furthered no "substantial state interest" and was, therefore, invalid under the equal protection and due process clauses of the federal Constitution. *Id.* at 1331-32.


157. *See* Justice Marshall's dissent in Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 472 (1985): "By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless . . . action that offends principles . . . found in the Fourteenth Amendment."

158. *Id.* Arguably, this second-guessing took place in *Plyler*. Presumably, however, the *Plyler* court's conclusion was that the Legislature's judgment was not "reasoned."
2. Addressing the Case for Judicial Restraint in Substantive Due Process Challenges

In pesticide spraying cases, intermediate scrutiny could offer a workable compromise between completely ignoring an individual's interest in protection from serious physical injury and eliminating beneficial government programs. Still, many of the concerns that have led courts to reject the application of a strict scrutiny standard when the interests at stake are in housing, education, or environmental protection may apply to allowing greater scrutiny in pesticide cases. There are two responses to this argument, one general and one more specific. The general response is that the arguments for judicial restraint in the fundamental interest cases are less valid in relation to the intermediate scrutiny test, since the latter is, of course, more of a constraint on judges than the strict scrutiny test. More specifically, certain doctrinal and practical concerns that are prevalent when applying a strict scrutiny test may be absent when a court applies the intermediate scrutiny approach.

a. Doctrinal Concerns

There is a doctrinal difficulty, recognized by the majority in Cleburne, in defining which interests are important or "significant" enough to warrant heightened protection. This concern is two-fold. First, there is the question of whether the courts or the legislature should determine which interests receive constitutional protection. This problem has persisted throughout the history of the Constitution, and remains open to debate. The only response is that because the Supreme Court has consistently embraced the role of defining those interests that it will protect it is competent to continue to do so.

Second, assuming that it is the Court's role to determine which interests receive constitutional protection, there remains the issue of exactly how—that is, upon what "principled" basis—the Court should determine the appropriate level of protection. As Professor Simson points out in his proposal for a three-tiered approach to judicial review of equal protection challenges, commentators have suggested, in the closely related area of identifying fundamental interests, numerous ways to define what protection is received. Professor Simson proposes that the Court continue to use its criteria of "express or implicit mention in the Constitution" to determine whether an interest is fundamental.

Professor Simson's method serves to explain past decisions of the

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159. See Simson, supra note 115, at 678 (suggesting that the interests deserving intermediate scrutiny be labeled "significant").
160. See, e.g., cases cited supra notes 72-77 and accompanying text.
161. Simson, supra note 115, at 710-11.
162. Id. at 710.
Court. However, because scholars cannot settle on what is "implicit" in the Constitution, the analysis by itself cannot serve as a prescriptive device. Simson's analysis must be accompanied by a method to determine what is in fact "implicit" in the Constitution. Justice Marshall's dissent in *Cleburne* provides some guidance. Justice Marshall argued that it is the Court's role in interpreting the Constitution is to look to "fundamental principles upon which American society rests" and, he argued, that in doing so the Court may consider "[s]hifting cultural, political, and social patterns." This seems to be the approach taken in *Plyler* and other "intermediate scrutiny" cases.

Justice Marshall's approach to defining important interests is doubly advantageous. First, because it allows societal notions to set priorities among values, it limits the ability of judges to apply their personal values in ranking interests. Second, it allows constitutional law to evolve with history and accommodate interests, such as racial and gender equality, which at one time were perceived as unimportant. A flexible standard also allows accommodation of interests which for technological reasons were never before a concern, such as the interest in protection from harmful pesticides. Even if such interests are not explicitly recognized in the Constitution, their importance can be recognized by the courts through application of an intermediate level of scrutiny.

This method of ranking interests is far from foolproof. Judges' perceptions of which values are important to society may be easily skewed by their personal values. This prescription, however, would at least limit individual bias in ranking interests while also accommodating changing in societal values.

b. Practical Concerns

The proposal to raise some non-fundamental interests to an intermediate level of protection is not immune to traditional arguments against expanded judicial review. As discussed earlier, expanding judicial review for even one category of cases could further burden an already overloaded judicial system. Moreover, as the majority in *Cleburne* and the courts in the housing, education, and environmental interest cases implied, allowing heightened review for one interest may open the floodgates to heightened review for other interests.

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164. Justice Marshall cited the contrast between early and recent racial and gender discrimination decisions to emphasize this point. *Id.* at 466.
165. For an analogy in fourth amendment privacy doctrine, see *Katz v. United States*, 389 U.S. 347 (1967) (holding government's use without consent of electronic listening device to obtain evidence a violation of defendant's legitimate expectation of privacy and therefore an unconstitutional search under the fourth amendment).
166. See *supra* text accompanying notes 64-65.
The latter concern only highlights the importance of narrowly circumscribing the interests that deserve increased protection. Narrowly defining the category of protected interests limits complainants' ability to burden the courts with minor concerns. Narrow definitions also limit a judge's ability to unduly restrict government action by recognizing negligible individual interests.

Nevertheless, there remains the distinct possibility that courts will not be able to confine the protected interest to those at stake in the pesticide spraying cases. Risks of this sort, however, are inescapable if one accepts the basic idea of substantive due process. In carving out some degree of constitutional protection for certain individual interests unmentioned in the Constitution, such as abortion\textsuperscript{167} or marriage,\textsuperscript{168} the Court has assumed the difficult burden of confining such categories of interests. If the underlying values are significant enough to justify judicial protection of a particular interest, whether or not a court will uphold those values in every situation is irrelevant. Because courts protect interests that are not explicitly mentioned in the Constitution, the decision to provide heightened constitutional protection for a particular interest must be made on a case by case basis.

Of course, expanding independent judicial review for even a strictly defined interest will add to the courts' existing burden. There is no evidence, however, that in the past such expansions of review have thrust the courts into chaos.\textsuperscript{169} Further, in light of the Supreme Court's recent penchant for judicial restraint,\textsuperscript{170} this expansion would likely be offset by retrenchment in other areas of constitutional protection.

The benefits to individuals and to society of heightened review of pesticide spraying decisions clearly outweigh the inconvenience of what would be, most likely, a slight addition to the courts' caseload. Moreover, when plaintiffs seek judicial review prior to governmental action (as is often the case when pesticide spraying is challenged), it may actually prevent costly, damage-seeking litigation after the harm is done. Thus, the fear of added burdens on judicial caseloads may be overstated.

\textsuperscript{169} See Gunther, supra note 117, at 41.
\textsuperscript{170} See generally Choper, Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights, 83 Mich. L. Rev. 1, 106-212 (1984) (discussing Burger Court decisions and how they are less sympathetic to individual rights claims than Warren Court decisions); Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873 (1976) (analyzing Burger Court's retrenchment of certain constitutional protections); Schwartz, supra note 69 (arguing that the Burger Court substantially relinquished well-established state power limitations in the areas of state action, fundamental interests, and suspect classifications); sources cited supra note 70 (further indicating the Burger Court's retreat).
3. Values Inherent in the Pesticide Spraying Cases

The requirement of intermediate review in pesticide spraying cases would depend upon the contemporary social values that underlie the individual interest at stake in these cases. The interest at stake need not be a constitutionally recognized fundamental interest. Intermediate scrutiny should apply, however, when protecting the individual interest is crucial to observing the social value. One such interest meriting intermediate review is that arising in the pesticide spraying cases: the interest in protecting one's body from seriously harmful invasion.


The common law recognizes that a victim of private or, at times, public\textsuperscript{171} spraying has an interest in protection from dangers inherent in this activity.\textsuperscript{172} The common law may protect this interest by requiring parties whose acts endanger individual health interests to exercise a heightened duty of care.

There are numerous theories upon which to base private recovery for injury to persons or property by pesticide spraying.\textsuperscript{173} This section will discuss strict liability. Strict liability is the only theory that holds the sprayer to a heightened duty of care. It imposes liability where the defendant acts neither intentionally nor negligently.\textsuperscript{174}

In California, \textit{Luthringer v. Moore}\textsuperscript{175} established the hazardous activity-strict liability doctrine in 1948. The state Supreme Court ruled:

Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is

\textsuperscript{171} N. LEVY, M. GOLDEN, L. SACKS & J. CHAPIN, CALIFORNIA TORTS § 61.45[3] (1986) [hereinafter, CALIFORNIA TORTS]. Whether the CDFA, for example, should be liable under the common law is, however, beyond the scope of this Comment.

\textsuperscript{172} For a definition of what constitutes an unusually dangerous activity, see Restatement (Second) of Torts § 520 (1977).


\textsuperscript{174} PROSSER & KEETON, supra note 173, § 78, at 554.

\textsuperscript{175} 31 Cal. 2d 489, 190 P.2d 1 (1948) (applying strict liability to fumigation).
done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done.  

The court in Luthringer based its ruling on the idea that certain activities are so dangerous that fairness requires imposing liability on those undertaking such activity if harm actually results. Strict liability also rests on the assumption that the entity that conducts an abnormally dangerous activity is also best able to bear the cost of injury since it may factor those costs into its price. These fairness and risk distribution rationales have been extended to pesticide use in those western states where spraying is categorized as an ultrahazardous activity. Accordingly, these states subject private individuals who spray pesticides to the ultimate standard of care imposed by strict liability doctrine.

The possibility that California would recognize pesticide spraying as an abnormally dangerous activity was suggested recently in SKF Farms v. Superior Court, the first California case to address the issue of whether spraying is abnormally dangerous. In SKF Farms, which involved injuries caused by crop dusting, the court of appeal granted a writ of mandate directing the trial court to vacate its order sustaining the defendant’s demurrer to the plaintiff’s strict liability claim.

In other western states, pesticide spraying is already categorized as an ultrahazardous activity. In Loe v. Lenhardt, the Oregon Supreme Court.

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176. Id. at 500, 190 P.2d at 8 (quoting Green v. General Petroleum Corp., 205 Cal. 328, 333, 270 P. 952, 955 (1928) (emphasis added)). For similar definitions of strict liability for dangerous activities, see RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977); 1 CALIFORNIA TORTS, supra note 171, § 7.04; PROSSER & KEETON, supra note 173, § 78.


180. The appeals court remanded the case, ordering the lower court to weigh all six factors set forth in section 520 of the RESTATEMENT (SECOND) OF TORTS to determine whether crop dusting is an ultrahazardous activity. Those six factors are (1) whether there is a high degree of risk of some harm to the individual or his property; (2) the probability that the harm will be significant; (3) whether the risk could be alleviated by the exercise of reasonable care; (4) the extent to which the activity is uncommon; (5) whether the activity is inappropriate for the place where it is carried out; and (6) the extent to which its value to the community is outweighed by its dangerous attributes. RESTATEMENT (SECOND) OF TORTS, § 520 (1977).

Court held that whether pesticide spraying is an "extrahazardous" activity is a question of law to be decided by the court. The court found that, because of the high probability of harm involved, aerial spraying of pesticides constitutes an extrahazardous activity, thus subjecting the defendant to a heightened standard of care.

In *Langan v. Valicopters, Inc.*, the Washington Supreme Court ruled that crop dusting is an abnormally dangerous activity and therefore is subject to strict liability. The court based its finding on the equitable ground that those who benefit from the use of pesticides should pay for the harm they inflict on innocent parties. Even a statute similar to California's, requiring that the state prevent the spread of insects and pests, did not persuade the court that the individuals adversely affected should not be compensated for their injuries. The court stated: "[t]he justification for strict liability . . . is that useful but dangerous activities must pay their own way." This heightened protection indicates that the common law places great importance upon the interest in safety from chemicals that pose a serious threat of physical harm.

Contrary to the common law, however, many states' pest eradication authorization statutes neglect the individual's interest in bodily security by holding the government to a lesser duty of care than private sprayers. Since spraying by the government threatens the same values—those of health protection and bodily integrity—that are recognized by the common law, the government should be held to as strict a standard under constitutional law as the common law imposes on private parties. To impose on the government a lesser duty of care would inconsistently uphold important values when private parties inflict the harm, but neglect those values when the state acts.

The counterargument to this line of reasoning is that the government cannot operate effectively in the public interest if it is held to such a high standard of care. This is the most common practical justification for the adage that a sovereign cannot be sued except by its own consent. Supposedly, judicial interference with the ordinary functions of the executive department would bring government to a halt.

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182. The Oregon court apparently viewed the terms "extrahazardous" and "ultrahazardous" as synonymous. *See id.* at 249, 362 P.2d at 316.
183. *Id.* at 249-50, 362 P.2d at 316.
184. *Id.* at 251-54, 362 P.2d at 316-18. The Court held the defendant landowner liable for the harmful spraying activities of the independent contractor he had hired.
186. *Id.* at 865, 567 P.2d at 223.
187. CAL. FOOD & AGRIC. CODE § 403 (Deering 1983).
188. 88 Wash. 2d at 865, 567 P.2d at 223.
189. *Id.* at 864 (quoting HARPER & JAMES, LAW OF TORTS comment to § 14.4 (Supp. 1968)); *see also* PROSSER & KEETON, supra note 173, § 78, at 554.
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However, in areas where immunity has been waived, such as under the federal civil rights and tort claims acts, courts have not run rampant. Furthermore, the arguments in favor of sovereign immunity are particularly weak in the pesticide spraying situation. The risk of imposing restrictive monetary penalties upon the government is seldom a concern, since usually the only remedy sought is an injunction. Recognizing a protectable interest in this situation will not incapacitate the government. Rather, the government will only be required to justify more convincingly its spraying activities. Because these practical concerns do not justify treating differently challenges to government and private pesticide use, the government’s pesticide spraying activities should be held to standards close to those applied by the common law to private parties.

b. Judicial Recognition of Bodily Integrity and Health Protection as Social Values

Society places a high premium on physical health. Both the common law and the Constitution reflect this social value, and it is this value which underlies the individual interest asserted in pesticide spraying cases—the interest in safety from chemicals which pose a serious threat of physical harm. Because of the unknown effects of many pesticides such as Imidan, and because of the potentially lethal latent effects of some toxic chemicals, this interest also rests upon the social value of individual survival—a necessary condition to the enjoyment of other freedoms, both enumerated and unenumerated.

i. The Federal Law

The Supreme Court regards health protection as a basic social value. The Court is especially protective of the individual when a state-imposed harm would be a direct bodily intrusion. For example, in Winston v.

191. Id. at 499.
192. Of course, there is still a possibility that a judge, by inaccurately weighing the various factors, may prevent the state from spraying despite a substantial state justification.
193. See supra notes 171-91 and accompanying text.
194. See infra text accompanying notes 197-218.
195. Some doctors estimate that as many as 2530 cancer deaths have occurred in some years in California as a result of exposure to toxic chemicals. CAL. COMM’N FOR ECONOMIC DEV., POISONING PROSPERITY: THE IMPACT OF TOXICS ON CALIFORNIA’S ECONOMY 192 (1985).
196. See L. Tribe, supra note 26, § 11-4, at 573-74.
197. It has also been argued, see Comment, supra note 1, at 1321-22, that government spraying of pesticides may violate the takings clause of the fifth amendment, which forbids “private property be[ing] taken for public use, without just compensation.” U.S. CONST. amend. V.

The argument that property interests at stake in the pesticide spraying situation may rise to a level of constitutional importance is bolstered by the Supreme Court’s analysis of other takings questions. In several cases where it found a taking had occurred, the Court emphasized that the government had physically invaded the plaintiff’s property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (cable installation on plaintiff’s building a taking); United
Lee, the Court held that surgical intrusion into a suspect's chest cavity to recover a bullet believed to have been fired from the suspect's gun was unconstitutional under the fourth amendment because surgery would have subjected the suspect to medical risks of nerve and blood vessel damage. In prohibiting the surgery, the Court applied a balancing test created in Schmerber v. California. The test weighs the magnitude of the intrusion on the individual's physical security against the strength of the state's interest. A "crucial factor" in analyzing the magnitude of intrusion is "the extent to which the procedure may threaten the health or safety of the individual."

In Schmerber, the Court upheld the forcible taking of blood from a drunk driving suspect on the grounds that "for most people [a blood test] involves virtually no risk, trauma, or pain." Yet even a state interest "of great importance" (in the Schmerber case, determining guilt or innocence), may not justify a state action that "endangers the life or..."
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health of the suspect."\textsuperscript{204}

These bodily intrusion cases indicate that, regardless of the ultimate determination of whose interest is paramount, the interest of the individual in protection from state-imposed bodily harm warrants a strong justification for the state's action.\textsuperscript{205} Since state pesticide spraying implicates the same social value of health protection, courts should demand a government justification similar to that required in the Supreme Court and lower federal court\textsuperscript{206} cases involving other threats to an individual's health. The arbitrary or capricious standard of review demands no such justification.

In other Supreme Court cases, the issue is not whether the state can directly intrude upon the individual's body but rather whether the state can indirectly cause bodily harm by limiting how a person may choose to care for her body. The Court in \textit{Roe v. Wade},\textsuperscript{207} considered whether state criminal abortion laws violate a fourteenth amendment interest in privacy. In concluding that the freedom of a woman to decide whether to terminate her pregnancy at an early stage falls within the privacy interest protected by the due process clause, the Court emphasized the physical and psychological harm the State would impose upon pregnant women by denying them the choice of terminating pregnancy.\textsuperscript{208} Moreover, the Court held that even after fetal viability a State may not prohibit abortions "necessary to preserve the life or health of the mother."\textsuperscript{209} Hence, it is quite possible that health reasons "lie at the core of the constitutional liberty identified in \textit{Wade}."\textsuperscript{210}

\textsuperscript{204} Id. at 761, 762 n.5. The \textit{Winston} Court contrasted the result in \textit{Schmerber} with the holding in \textit{Rochin v. California}, 342 U.S. 165 (1952). In \textit{Rochin}, police officers broke into a suspect's room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting. The Court, recognizing the suspect's interest in "human dignity," held that the government's treatment of the suspect violated the due process clause. \textit{Id.} at 174.

For an in depth review of the bodily intrusion cases, see Note, 60 \textit{NOTRE DAME L. REV.} 149, 152-56 (1984).


\textsuperscript{206} See, e.g., \textit{United States v. De Parias}, 805 F.2d 1447, 1456-57 (11th Cir. 1986) (applying \textit{Winston} criterion of reasonableness of bodily intrusion in upholding government's forced taking of hair samples from defendant); \textit{United States v. Oyekan}, 786 F.2d 832, 839-40 (8th Cir. 1986) (applying \textit{Winston/Schmerber} balancing test to rectal probe and pelvic examinations administered to defendants).

\textsuperscript{207} 410 U.S. 113 (1973).

\textsuperscript{208} \textit{Id.} at 153.

\textsuperscript{209} \textit{Id.} at 163-64.

\textsuperscript{210} \textit{Harris v. McRae}, 448 U.S. 297, 316 (1980).
In *Doe v. Bolton*,\(^2\) the Court invalidated three procedural requirements of a Georgia abortion law. One of those requirements, that the abortion be performed in an accredited hospital, was rejected on the grounds that the State failed to show that these hospitals were the only places a patient could receive adequate medical services. One important factor in the Court's discussion of the due process issue was whether the restriction of which facilities the appellants could use adversely affected their "health interests."\(^2\)

Similarly, in *Memorial Hospital v. Maricopa County*,\(^2\) the Court held that a durational residence requirement barring free medical care to some indigents violated the right to interstate travel by denying those indigents "the basic necessities of life."\(^2\) The Court relied on its holding in *Shapiro v. Thompson*,\(^2\) which struck down residency requirements for welfare benefits because the requirements interfered with the interest in freedom of interstate travel. In comparing the restrictions in *Shapiro*, the *Maricopa* Court emphasized society's recognition of the importance of medical care:

> [w]hatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much a "basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance. . . .\(^2\)

The Court even went so far as to quote from then President Nixon's message on health.\(^2\)

*Shapiro* and *Maricopa County* might be distinguished from the pesticide spraying situation because the harm in those cases resulted indirectly, from an attempt by the individual to exercise a fundamentally protected interest (the interest in unimpeded interstate migration), whereas the harm caused by government pesticide spraying is directly inflicted. Still, whatever the reasons for the holdings in *Shapiro* and *Maricopa County*, the decisions recognize the social significance of individual health protection. Furthermore, in its discussions of privacy as a fundamental liberty interest, the Court has often emphasized the importance of freedom from bodily harm. Justice Stevens recently wrote that

\(^2\)12. *Id.* at 195.
\(^2\)14. *Id.* at 259 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969)).
\(^2\)17. "'It is health which is real wealth' said Ghandi, 'and not pieces of gold and silver.'" 415 U.S. at 259 n.14 (quoting Health, Message from the President, 92d Cong., 1st Sess., H.R. Doc. no. 92-49, p. 18 (1971)).
"the interest in freedom from bodily harm surely qualifies as an interest in 'liberty.'" 218

ii. The State Law

Various state courts and constitutions also recognize the importance of physical health and safety. The California Constitution, for example, recognizes the right to safe schools. 219 The Illinois Constitution grants each individual a "right to a healthful environment." 220 Drafters chose the word "healthful" because it "describes the environment in terms of its direct effect on human life." 221

Judicial recognition of health protection as a social value is also commonly found in state cases involving fundamental interests in privacy and the privilege against self-incrimination. 222 For instance, in Jauregui v. Superior Court, 223 police had suspected that Jauregui had swallowed narcotics. After obtaining a search warrant for Jauregui's person and residence, the police took Jauregui to a local hospital, where he refused to consent to treatment. The police then forced Jauregui to drink an emetic solution that caused him to vomit. Reasoning that "a body intrusion search involves heightened Fourth Amendment considerations," the court held that the evidence obtained from the forced vomiting (five balloons of heroin) was not admissible because of the extent of the bodily intrusion. 224 The Massachusetts Supreme Court recently applied a similar balancing test in upholding the reasonableness of ordering a murder-suspect to give the police a blood sample. 225

Other state courts have recognized the individual and social value of health and bodily integrity. An Oregon appellate court recently ruled that the state constitutional provision prohibiting cruel and unusual punishment requires that a prisoner be afforded such medical care in the

219. CAL. CONST. art. I, § 28 (c) ("All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."). According to one commentator, this constitutional provision was intended to protect innocent individuals from criminal violence. See Comment, The Right to Safe Schools: A Newly Recognized Inalienable Right, 14 PAC. L.J. 1309 (1983).
220. ILL. CONST. art. XI, § 2.
222. Although the rationale in both the Supreme Court and state court decisions is that fundamental interests were violated, implicit in judicial protection of these interests is a concern with social values in health protection and bodily integrity. For instance, in attempting to balance the state and individual interests in the surgery at issue in Winston, the Court held that "[t]he medical risks of the operation, although apparently not extremely severe, are a subject of considerable debate; the very uncertainty militates against finding the operation to be 'reasonable.'" 470 U.S. at 766.
224. 179 Cal. App. 3d at 1166, 225 Cal. Rptr. at 311.
form of diagnosis and treatment as is reasonably available.\textsuperscript{226} In a recent decision on a similar issue, an Arizona appellate court held that by sending less medication than medically prescribed for a prisoner's skin rash, the prison pharmacist may have unnecessarily and wantonly inflicted cruel and unusual punishment upon the prisoner in violation of the Eighth Amendment of the Federal Constitution.\textsuperscript{227} The courts' recognition of health protection as an important social value is particularly striking when prisoners' interests are at stake since courts often find that prisoners' interests are entitled to lesser constitutional protections.\textsuperscript{228}

New York state courts view protection of individual health as an important state interest. In \textit{In re Jamaica Hospital},\textsuperscript{229} a hospital sought an order to permit a blood transfusion for a patient who was eighteen weeks pregnant and in critical condition after she refused the transfusion on religious grounds. A special term of the Queens County Supreme Court conducted a hearing at the patient's bedside. The court held that the state's "highly significant interest" in protecting the "life" of the fetus outweighed the patient's constitutionally protected interest in free exercise of her religious beliefs.\textsuperscript{230}

Similar issues arose in \textit{Crouse Irving Memorial Hospital, Inc. v. Paddock},\textsuperscript{231} where the hospital sought an order authorizing blood transfusions to a mother and child during surgically induced childbirth procedures. The hospital testified that without the transfusions both the mother's and the child's lives would be severely endangered, but the parents objected to the transfusions on religious grounds. The Onondaga County Supreme Court ruled in favor of the hospital, holding that the state's interests in the welfare of children\textsuperscript{232} and in saving lives were

\begin{itemize}
\item \textsuperscript{226} Jorgenson v. Schiedler, 87 Or. App. 100, 102, 741 P.2d 528, 529 (1987) (citing Priest v. Cupp, 24 Or. App. 429, 431, 545 P.2d 917, 918 (1976)).
\item \textsuperscript{227} Gunter v. State, 153 Ariz. 386, 736 P.2d 1198 (Ct. App. 1987).
\item \textsuperscript{228} \textit{See}, e.g., United States v. Robinson, 414 U.S. 218, 237-38 (1973) (Powell, J., concurring) ("The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest.").
\item \textsuperscript{229} 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (Sup. Ct. 1985).
\item \textsuperscript{230} \textit{Id.} at 1008, 491 N.Y.S.2d at 900. The fetus was regarded as a human being for purposes of the proceeding, \textit{Id.}
\item \textsuperscript{231} 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup. Ct. 1985).
\item \textsuperscript{232} The health of children has been singled out by federal and state courts as being particularly worthy of protection. The rationale is that because children may be incapable of protecting their own best interests, the state must step in and do so for them. \textit{See}, e.g., New York v. Ferber, 458 U.S. 747, 756-57 (1982) (upholding New York statute prohibiting persons from promoting sexual performances by a child under the age of sixteen, partially to protect the physical and psychological health of children); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (finding compelling the state's interest in excluding the press and public during the testimony of a child victim in a sex offense trial); Ginsburg v. New York, 390 U.S. 629, 637-43 (1968) (sustaining a state law protecting children from exposure to nonobscene but offensive material); Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (upholding statute prohibiting use of children to distribute literature on the street); In re President and Directors of Georgetown College, 331 F.2d
stronger than the mother's constitutional interests in privacy and free exercise of religion.\textsuperscript{233} These compelled treatment cases are further indication that health protection is a social value incorporated into the law.

c. \textit{Summary of the Case for an Intermediate Standard of Review}

This section has discussed the common law and constitutional importance of social values that are endangered when the government sprays pesticides posing a serious risk of physical harm to individuals. The presence of important social values in the pesticide spraying situation requires that the individual interests receive more than deferential rational basis protection from the courts. Even if this individual interest does not deserve the ultimate level of "strict" judicial protection, it does warrant a limited, intermediate level of judicial scrutiny.\textsuperscript{234} The next section considers how that intermediate standard could be articulated and applied.

\textsuperscript{233} Crouse Irving, 127 Misc. 2d at 102-04, 485 N.Y.S.2d at 445-46.

\textsuperscript{234} Moreover, if a court finds that a spraying program violates constitutional interests, a damages remedy might be available to compensate those people whose interests have been significantly injured.

Suits against the government are limited by the eleventh amendment, which commands in part that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced against one of the United States by Citizens of another State." In addition, states may provide for governmental immunity in state court.

However, a few statutorily-created causes of action against the state are available. The Federal Civil Rights Act of 1871, ch. 22, \$ 1, 17 Stat. 13 (codified at 42 U.S.C. \$ 1983 (1982)), created one such cause of action, allowing suit against governmental officials for deprivation of a constitutional right. The purpose of section 1983 was to deter violations of constitutional rights under color of state law.

The troublesome questions are what constitutes a compensable constitutional right and what constitutes a significant harm to that right. Oddly enough, the definition of a compensable constitutional right differs slightly from the definition of an interest meriting due process protection. See \textit{Paul v. Davis}, 424 U.S. 693 (1976) (finding that interest in not being defamed is not protected by section 1983).

A recent case in the area is \textit{Parratt v. Taylor}, 451 U.S. 527 (1981), which attempted to narrow the scope of interests protectable under section 1983. \textit{Parratt} held that a deprivation of a constitutional right occurs only if the injury is the result of some established state procedure and if there is no tort claims procedure available under state law. But \textit{Parratt} is suspect on the grounds that section 1983 was intended to \textit{supplement} state law, not be constrained by it. See \textit{Monroe v. Pape}, 365 U.S. 167 (1961). Consequently, \textit{Parratt}'s precedential effect arguably is restricted to its facts (involving an unauthorized, negligent act by a state official, not affecting a fundamental right. See \textit{Davidson v. Cannon}, 474 U.S. 344 (1986)). In cases where fundamental interests are at stake or the public official acts pursuant to some official policy, \textit{Monroe} is probably the law—thus allowing section 1983 actions independent of state law. See \textit{Monaghan, State Wrongs, State Law Remedies and the Fourteenth Amendment}, 86 COLUM. L. REV. 979 (1986). Because the California Legislature authorizes CDFA's activities, however, \textit{Parratt} may make the analysis of whether an individual fundamental interest exists in California superfluous. Even if it is not, the individual's interest in health may be injured, depending on the impact of spraying.
E. The Requisite Intermediate Standard of Review: A Proposed Balancing Test

This section proposes that when courts review government spraying of pesticides, they apply the Plyler test: that any potential harm from the spraying not "be considered rational unless it furthers some substantial [state] goal..." This test should be less deferential than a traditional rational basis test but more deferential than a traditional strict scrutiny test. Plyler and its progeny related primarily to state actions which are discriminatory under the equal protection clause. There is no compelling reason, however, why the test should be limited to equal protection claims. Although in the past fifty years the Court has tended to expand substantive constitutional protections through the equal protection clause rather than the due process clause, the test could be applied in a due process context if the individual interest is of sufficient importance.

The jurisprudential concern is the same in equal protection and due process cases: that is, whether the state has sufficiently justified using a particular means to achieve a particular end. Moreover, the Supreme Court has never explicitly limited the use of intermediate scrutiny to equal protection cases. In fact, in Duke Power it seemed to apply intermediate scrutiny in addressing a due process claim. If the values underlying the individual interest at stake in a due process case are as important as those underlying the individual interest at stake in an equal protection case governed by the intermediate scrutiny test, it would be, logically inconsistent to fail to apply the intermediate standard of review in the former case. Thus, although the Plyler test was formulated in response to an equal protection claim, it could be applied with equal force to appropriate due process claims, such as those that may arise when the government sprays chemicals that pose a serious threat of physical harm.

1. Some Suggested Guidelines

The intermediate standard of review offers courts a means of balancing an individual's interests against the state's purposes in endangering those interests. One possible weakness of this intermediate standard of review is that it could allow judges to make ad hoc decisions based on personal views rather than on existing constitutional principles. Hence, for an intermediate standard of review to effectively replace complete judicial restraint, a structure of decisionmaking must be followed.

In a pesticide spraying case, the court should begin by examining

236. See supra note 46 and accompanying text.
237. See supra note 48 and accompanying text.
the allegations of the petitioners to determine whether an intermediate standard of review or the traditional rational basis test should be applied. Intermediate scrutiny would be appropriate only if petitioners alleged a serious threat of physical injury, because only then would the social values of health and bodily integrity be involved. The seriousness of the threat should be judged by two factors—the severity of the possible injury and the likelihood that it would occur. If the alleged severity was too slight or the alleged probability too remote, then the court would only inquire whether the government spraying decision was "arbitrary or capricious." If the court found that the plaintiffs had alleged a serious threat of physical injury, the burden of proof would shift to the government.

The state would be allowed to show, through convincing scientific evidence, that the proposed pesticide application actually did not pose the serious threat alleged. Because the state usually gathers information on the safety of chemicals, it is more efficient to impose the burden of proving or disproving the actual effects of a chemical upon the state than upon the individual. Of course, the petitioners should have an opportunity to refute the state's evidence with evidence of their own, indicating that the spraying did pose a serious threat of physical injury.

If the state could prove that the threat of physical harm was not a serious threat, and therefore did not implicate the social values of health protection and bodily integrity, then the court (again) would review the government action under only the traditional rational basis standard. Because there is a strong presumption of constitutionality when this test is applied, the burden would be upon the individual to show the absence of a conceivable basis for the government action.

To determine whether the state has overcome the petitioners' allegation of a serious threat of physical harm, the court would have to analyze the same two factors considered before—the probability of harm and the severity of the potential harm. However, the concern here would be the actual severity of the harm.

The first question is how probable the physical harm must be for the threat to be considered a serious one. The number of people who will suffer severe physical harm, such as cancer, as a result of pesticide use is often quite small—perhaps as low as one in a million. Thus, depending on the size of the class exposed, the number of people that are actually harmed may be extremely small. Even a single case may be unlikely in a sufficiently small group. Because spraying usually involves a small number of exposures, and because the human body, for various physiological reasons, often will resist the harmful effects of chemicals, cases

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involving a significant probability that a large number of people would be physically harmed are quite exceptional.

In addition to the probability of harm, the court must consider the severity of the harm to determine if the threat is a serious one. A threat of severe physical injury or death should be considered by the court, even if the probability of that harm occurring is low. Even the slightest risk of severe injury is not justifiable where the state lacks sufficient justification.

To draw hard and fast lines between injuries that are severe or not severe would be both difficult and inappropriate. Severity is often a question of degree. For instance, it seems reasonable to believe that terminal cancer or a birth defect such as retardation, which are currently the most feared results of chemical exposure, would qualify as “severe” physical harms. At the other extreme, a skin rash or a similarly harmless allergic reaction with no long-term effects would appear to rank low on the scale of severity. In between, however, there is a large grey area in which some harms could be perceived as more “severe” than others.

Courts may not be qualified to determine the seriousness of the threat posed by pesticide spraying. The scientific (usually toxicological and epidemiological) evidence involved in determining severity is highly complicated and even the scientific experts have extreme difficulty determining the physical effects of most chemicals. With few exceptions, scientists can only speculate about such effects. Those speculations usually are based on animal studies, which may not translate well to humans, and on studies from previous human exposure, which are always susceptible to statistical bias. Thus, numerous uncertainties accompany any judicial prediction of the extent of harm that might result from a particular government pesticide spraying program.

Because courts are more likely than government agencies to be impartial, however, the most objective results may still be achieved by presenting the conflicting evidence (or lack of it) to judges. This does not mean that courts are qualified to interpret the various scientific studies: however, they may be in a position to measure the relative validity of studies that reach conflicting conclusions. The court should consider expert testimony and demonstrable physiological evidence and weigh the merits of these conclusions to decide whether the state has met its burden of showing that the probability of harm is acceptably low or the severity of injury acceptably slight.

If the state fails to prove that the threat of injury is not a serious one, its spraying decision will be subject to intermediate scrutiny. At

that point, the state must justify its action by proving that it “furthers some substantial goal.” Thus, even where injury is sufficiently probable and/or severe to make the threat of physical harm a serious one, the state might still prevail. If, however, the state cannot demonstrate a substantial interest, then the courts may hold that the state’s acts do not justify the serious threat of injury.

The magnitude of the state interest necessary to justify pesticide spraying would be a function of the seriousness of the threat of physical harm. In other words, courts should balance individual and state interests rather than creating standards. For example, if the court determines that the probability of injury to an individual is one in one thousand, and the harm will be to cause the individual to experience nausea and loss of appetite for a week, the state’s interest need not be very substantial. If, however, the probability of injury is fifty percent, a more substantial state justification would be required. If the fifty percent probability of injury involved terminal cancer rather than a less severe threat to life or bodily integrity, then the substantial state interest requirement would come close to its most stringent level.

To determine the substantiality of the state’s asserted interests in light of the dangers involved, courts should again look to judicial precedent and to the values emphasized in those decisions. If the state interest is substantial enough to justify both the scope and likelihood of the expected harm, the action should be permitted. If not, the action should be enjoined until the state can show that the potential harms of its course of action have been mitigated to the extent that the threat to individuals is justified.

The procedure proposed in this section is by no means the only method of implementing intermediate scrutiny review. Nor is it a flawless procedure. Admittedly, this method might leave room for courts to impose their personal views in analyzing the importance of the individual and state interests, as well as in interpreting the somewhat ambiguous factors that make up the balancing test. As argued earlier, however, the advantages of imposing some sort of balancing test in the pesticide spraying situation outweigh these costs. Society benefits when an objective, neutral body (the court) operates as a check on arbitrary government action and gives due consideration to the interests of individuals. Still, the intermediate balancing test is not, like the strict scrutiny test, a nearly automatic death-knell for the government’s spraying action. It

242. Some important factors might include: the threat to the health of individuals that would result from delaying or failing to spray; the invasion of fundamentally protected constitutional interests; and the impact on resources that are important to the enjoyment of those interests.
243. *See supra* notes 52-65 and accompanying text.
simply means that all of the factors in a spraying decision are subject to independent judicial review. It is with this goal of careful and comprehensive review in mind that state legislatures should consider this standard and that government spraying actions should be examined under the intermediate scrutiny test.

2. Application of the Standard to a State Action: An Example

The constitutional drawbacks of the deferential standard of review are particularly evident when that standard is applied to real-life situations. This section shows briefly how the balancing test might work in such a real-life situation, using the CDFA spraying program described at the outset of this Comment.

Under the codes of numerous states, judicial review of the Director of the Department of Food and Agriculture's or his or her equivalent's decision to spray pesticides is limited to a highly deferential standard.244 Until recently, that same standard was explicitly mandated in California.245 Hence, under that standard, it would be within the Director's discretion to decide, as he did in the North Coast case, to spray within five miles of the site of every pest discovery.246 The decision is not necessarily irrational because the Director may want to ensure the complete eradication of the pest. Yet the decision might merit constitutional scrutiny in light of the individual interests at stake.

Under the standards proposed in this Comment, individual interests in protection from bodily harm would be recognized. For the plaintiffs to obtain an injunction on constitutional grounds, they first would need to allege that the spraying posed a serious threat of physical injury. If such a threat were, in the court's judgment, alleged, then the burden would shift to the State to show that the actual threat was not a serious one (either because the severity of injury would be slight or the probability remote).

If the State could not meet this burden, it would have to justify its act by showing that the spraying would further a "substantial" goal in light of the probability of injury and the potential magnitude of that injury. In the California case, the state's justification was preservation of its valuable apple crop. Although a more thorough analysis of the values underlying this interest would be required, such an "economic" interest is sometimes accepted by courts.247 This interest might justify spraying

244. See statutes cited supra note 41.
245. See statute cited supra note 14. Note that under the recent change in California law, there exists no clarification of which standard now governs, so that the arbitrary or capricious standard might still apply.
where it is determined that the probability of injury and the potential severity of that injury are, in combination, not very significant. Moreover, the substantiality of an "economic" interest such as the interest in protecting apple crops would vary depending on the magnitude of the economic injury. For example, if one farmer's orchards worth $20,000 were in danger of destruction by a pest, the threat of injury would need to be relatively small for the spraying to be justified. But if all of the orchards in, for instance, the Central Valley of California were at risk, threatening the loss of millions of dollars of crops, then the spraying would be justified unless the probability of harm and the severity of the harm were relatively significant.

Thus, prior to approval of pesticide spraying, the State would need to show either that Imidan did not pose a serious threat of physical harm to the plaintiffs, or that a "substantial" public interest (notwithstanding the serious threat of harm) will be furthered. Absent such a showing, the spraying project would violate the substantive due process interests of the affected individuals.

The proposed due process requirements need not hamstring important government actions. One need only look back to the 1980 embroglio in California over the Mediterranean fruit fly to see that it is quite possible for a state to justify its spraying actions. In that case, the State, through the presentation of scientific evidence, persuaded courts that spraying the chemical Malathion would have a de minimis impact on the people exposed.248 Thus, by showing that the pesticide in question did not pose a serious risk of physical harm to the affected individuals, the State was able to proceed following substantive judicial review of its action.

CONCLUSION

Pesticide use is a common and often necessary aspect of contemporary agricultural life. Pesticide use can also be dangerous, and therefore should be cautiously implemented. Careful analysis of the common law and of federal constitutional law suggest that persons potentially affected by pesticide spraying may have a significant interest in protection from serious physical harm resulting from such spraying. The existence of this interest requires legislatures and courts to adopt a standard of limited but independent judicial scrutiny of the state's actions.

Ultimately, this Comment offers a method of establishing the point at which the state should be allowed to inflict direct bodily injury upon

interest in limiting public expenditures, but rejecting that interest as a justification for injuring individual interests in equal protection and interstate migration).

individuals in the interest of overall public benefit. When the state sprays pesticides, its pervasive ability to affect individuals' lives warrants precaution in its decisionmaking and activities. Such precautions are mandated by the Federal Constitution and by the basic societal values of freedom from bodily harm. In this case, these considerations outweigh the state's interest in unfettered discretion to eliminate perceived threats to the public.

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