# *Stop H-3 Association v. Dole*: Congressional Exemption From National Laws Does Not Violate Equal Protection

## I. INTRODUCTION

In *Stop H-3 Association v. Dole* (*Stop H-3*),[1] the United States Court of Appeals for the Ninth Circuit held that a federal statute[2] which specifically exempted an interstate highway project in the State of Hawaii from meeting the requirements of federal environmental protection laws[3] did not violate equal protection rights of the state's citizens.[4] The court found substantial national and state interests to warrant dismissing the equal protection claims of the plaintiffs in the case. The court's decision focused on congressional intent to complete the project, as evidenced by the statute's legislative history, and on congressional power to make the exemption.

Section II of this note states the facts of *Stop H-3*. Section III gives a historical overview of the development of equal protection law and discusses the standards of review currently utilized by the courts in equal protection cases. Section IV analyzes the court's rationale for ruling that the federal statute did not violate equal protection, and Section V discusses the potential impact of the court's decision on future equal protection challenges involving a congressional exemption of a specific project from federal laws.

## II. FACTS

Interstate Highway H-3 (H-3), as planned, is a six-lane freeway that will extend across the Koolau Mountains on the island of Oahu.[5] The highway will connect the Kaneohe Marine Corps Air Station on the windward side of the

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[1] 870 F.2d 1419 (9th Cir. 1989).

[2] *See infra* note 16 and accompanying text.

[3] *See infra* note 12 and accompanying text.

[4] *See infra* notes 22-25 and accompanying text for a description of plaintiffs' various claims.

[5] Stop H-3 Ass'n v. Coleman, 533 F.2d 434, 438, *cert. denied*, 429 U.S. 999 (1976).

island to the Pearl Harbor Naval Base on the leeward side.[6] While two conventional highways[7] also provide trans-Koolau access, population projections made by the State of Hawaii suggested that these highways would be inadequate by the year 2000.[8]

Nearly 16 years of litigation to block construction of the H-3 resulted in significant disruptions to the highway's completion.[9] First, the H-3 was redesigned to remove it from Moanalua Valley because of the valley's historic import.[10] Second, until the latest litigation, an injunction had been in place for nearly all of the years since the 1972 challenge to construction was initiated.[11] Further, the requirements of the Federal-Aid Highway Act, section 4(f)[12] were

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[6] *Id.*

[7] Neither the Pali Highway nor the Likelike Highway are interstate highways.

[8] Stop H-3 Ass'n v. Dole, 740 F.2d 1422, 1455-58 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985), discussed the impact of H-3 on traffic demands. The Ninth Circuit was unconvinced that the H-3 was necessary to accommodate the increases in traffic projected and had ruled that the "No Build Alternative," (a justification hurdle that the Highway had to overcome since it impacted upon parkland) was not met in the Environmental Impact Statements filed to date. *Id.* at 1458.

[9] The 16-year litigation history is as follows: Stop H-3 Ass'n v. Volpe, 349 F. Supp. 1047 (D. Haw. 1972); Stop H-3 Ass'n v. Volpe, 353 F. Supp. 14 (D. Haw. 1972); Stop H-3 Ass'n v. Brinegar, 389 F. Supp. 1102 (D. Haw. 1974), *rev'd. sub nom.*, Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976); Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149 (D. Haw. 1982), *aff'd in part and rev'd in part*, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985); Stop H-3 v. Dole, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

[10] Despite the State's assertion that Moanalua Valley was of "marginal" local historical importance as determined by the Historic Places Review Board in their Minutes of the Meeting of the Historic Places Review Board, August 5, 1974, the Ninth Circuit held that the potential for registry in the National Register of Historical Places was sufficient to cause the H-3 to comply with Section 4(f) of the Department of Transportation Act of 1966. Stop H-3 v. Coleman, 533 F.2d 434, 440 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976). *See infra* note 12 for text of Section 4(f).

[11] Injunctions blocking construction had been in place since 1972 except for nearly a year when the District Court, in 1983, dissolved the injunctions and construction began pending an appeal to the Ninth Circuit which reinstituted the injunction. Stop H-3 v. Dole, 740 F.2d 1442, 1447 n.1 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

[12] Department of Transportation Act of 1966, § 4(f), 49 U.S.C. § 303 and § 18 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, which contains nearly identical language, are together commonly referred to as "section 4(f) requirements."

Section 4(f) of the Department of Transportation Act provides:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development and Agriculture and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After

found to apply to the H-3 wherever it abutted protected land,[13] so that the highway had to meet the environmental protections of section 4(f)[14] where it abutted Ho'omaluhia Park and the Pali Golf Course.[15]

On October 18, 1986, the President of the United States signed a Continuing Appropriations Bill that included section 114, a provision that exempted the H-3 from the requirements of section 4(f), with the intent of paving the way for the rapid construction of the highway.[16] The State of Hawaii had urged its congressional delegation to attempt such an exemption[17] in the face of delays

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August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

*Id.*

[13] Stop H-3 v. Dole, 740 F.2d at 1447. Applying section 4(f) was consistent with prior holdings. The Ninth Circuit had previously held, in regard to Moanalua Valley, that "construction of a highway adjacent to a potential wilderness area was a 'use' of that land." Stop H-3 v. Coleman, 533 F.2d at 453 (quoting Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 362 F. Supp. 627, 638-39 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974)).

[14] Stop H-3 v. Dole, 740 F.2d at 1447.

[15] Federal Highway Admin., U.S. Dep't of Transp., Highways Div., State of Hawaii Dep't of Transp., Final Second Supplement to the Interstate Route H-3 Environmental Impact Statement (1982) reports that the H-3 is planned to occupy the area separating Ho'omaluhia Park and the Pali Golf Course Park. Additionally, the H-3 will use approximately 3.5 acres of Pali Golf Course land. Stop H-3 v. Dole, 740 F.2d at 1448 n.6.

[16] Continuing Appropriations Bill for Fiscal Year 1987, Pub. L. No. 99-500, 100 Stat. 1783 (later reenacted as Pub. L. No. 99-551, 100 Stat. 3341 because of clerical errors in the original enactment).

Section 114 reads:

Sec. 114, (a) The Secretary of Transportation shall approve the construction of Interstate Highway H-3 between the Halawa interchange to, and including the Halekou interchange (a distance of approximately 10.7 miles), and such construction shall proceed to completion notwithstanding section 138 of title 23 and section 303 of Title 49, United States Code.

(b) Notwithstanding section 102 of this joint resolution the provisions of subsection (a) shall constitute permanent law.

[17] *See* Sunday Star Bull. and Advertiser, Nov. 3, 1985, at B2, col. 1. Entitled, "H-3 Goes to Congress," this editorial comments:

Governor Ariyoshi has adopted a controversial tactic in seeking to win federal approval for the long-stalled H-3 Freeway.

The state administration has gone to Congress in an effort to bypass both federal environmental regulations and court decisions that have blocked this ill-advised and outdated 1960's project.

It is an admission that the state lost the long legal battle and can't come up with better justifications for H-3 required by our courts.

which jeopardized the entire funding of the project and which had caused dramatic increases in projected costs.[18]

While the bill was supported by Hawaii's congressional delegation, the proposed H-3 had detractors within the state besides the Stop H-3 Association.[19] Notably, the administration of the City and County of Honolulu, which comprises the entire island of Oahu and within whose boundaries H-3 wholly lies, was opposed to the highway's construction.[20]

The passage of the exemption did not mark an end to litigation.[21] In the latest litigation, Stop H-3 Association, Life of the Land, and Hui Malama Aina O Ko'olau, plaintiffs, challenged the constitutionality of section 114 claiming it violates the Spending Clause,[22] Separation of Powers,[23] and the Equal Protec-

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All four members of our congressional delegation perhaps as a courtesy have gone along with the state appeal for legislative circumvention.

[18] H.R. REP. NO. 1005, 99th Cong., 2d Sess. 784 (1986) [HOUSE REPORT] stated:

> A recent decision of the Ninth Circuit Court of Appeals makes approval of this project impossible before the 1986 and 1990 deadlines for interstate construction . . . . The conferees also take note of the fact that H-3 has been the subject of litigation for more than 14 years. During that time, construction costs have escalated substantially, and the people of Hawaii have been deprived of a much needed highway. It is the sense of the conferees that it is now time for litigation to be brought to a close and the highway to be built.

[19] *Federal-Aid Highway Act, 1986: Hearing on S. 2405 Before the Subcomm. on Transp.*, 99th Cong., 2d Sess. 23, 47, 86, 297, 328, 329 (May 20, 1986). Those opposing construction of the H-3 and providing written or oral testimony included the City and County of Honolulu, represented by D.G. Anderson, Acting Mayor and Managing Director of the City and County of Honolulu; Office of Hawaiian Affairs (expressing concern about the Luluku archaeological site); Marilyn Bornhorst, City and County of Honolulu Council Chair; League of Women Voters In Hawaii (opposing the congressional tactic of exempting single projects from federal environmental laws). The League of Women Voters of the United States also supported the position of their Hawaii chapter.

[20] Acting Mayor and Managing Director of the City and County of Honolulu, D.G. Anderson provided written testimony:

> An arbitrary waiver of a long standing federal law directed solely at a Honolulu project will preempt both the legal process and the local political process and deprive us of much needed funds to address our local transportation needs. We respectfully disagree with Senators Inouye and Matsunaga that the court was irresponsible and that opponents are obstructionists. In fact, we support the court's opinion that the most "prudent and feasible" alternative is not to build H-3.

*Id.* at 87.

[21] 870 F.2d at 1419.

[22] U.S. CONST. art. I, § 8, cl. 1. The plaintiffs asserted that since H-3 was of only local importance, given that it would connect no states and was allegedly regarded as unimportant by the Department of Defense, the exemption that allowed construction of the H-3 and thus, the expenditure of federal monies, violated the Spending Clause. 870 F.2d at 1427. The court concluded that H-3 was of national importance as determined by Congress's statement in 101(b) of the Federal-Aid Highways Act regarding completion of the Interstate System. *Id.* at 1429.

tion Clause.[24] Plaintiffs alleged, in the Equal Protection challenge, that discrimination occurred when Congress exempted the H-3 Highway from section 4(f) of the Federal-Aid Highways Act.[25] The Equal Protection challenge, a rarely used challenge to congressional authority to make exemptions to environmental laws, will be developed in this Note.[26]

## III. HISTORY

### A. *An Overview of Equal Protection Law*

Equal protection of the laws of the states and the federal government is guaranteed under the Equal Protection Clause of the fourteenth amendment[27] and the Due Process Clause of the fifth amendment[28] of the U.S. Constitution, respectively.[29] The U.S. Supreme Court originally interpreted equal protection

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[23] 870 F.2d at 1436. The Separation of Powers challenge was two-fold. First, although the language of § 114 exempted H-3 from the requirements of § 4(f), the legislative history suggested that Congress was making judicial findings of facts as its reason for the exemption when it reported:

> [The Ninth Circuit] relied on a highly technical reading of Section 4(f) of the Department of Transportation Act, designed to protect publicly owned parkland. In reality, no land from the park involved (Ho'omaluhia) has been, nor will be taken or used by the highway . . . . Section 4(f) as [sic] never intended to block the construction of a highway the design of which was specifically tailored to afford such special protection for parklands.

HOUSE REPORT at 784.

The other Separation of Power argument was that by removing H-3 from the 4(f) requirements, Congress had usurped administrative authority from the Executive Branch, usurped judicial review from the Judicial Branch and disrupted the coordinate branches' functions of government. 870 F.2d at 1436.

[24] U.S. CONST. amend. XIV, § 1.

[25] 870 F.2d at 1429.

[26] The removal of the injunctions prior to the filing of new Supplemental Environmental Impact Statements was also in dispute. These new statements were required because of the discovery of new archaeological sites and a finding that further study of the impact of the highway on banana farmers was warranted. 870 F.2d at 1425.

[27] U.S. CONST. amend. XIV, § 1 provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[28] U.S. CONST. amend. V provides in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

In Bolling v. Sharpe, 347 U.S. 497, 499 (1954), the U.S. Supreme Court interpreted the Due Process Clause of the fifth amendment to guarantee equal protection of federal laws, stating that "discrimination may be so unjustifiable as to be violative of due process."

[29] *See generally*, Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541, 560 (1977)(discussion of the basic congruence of the fifth and fourteenth amendment guar-

primarily as guaranteeing racial equality. In *The Slaughter-House Cases*,[30] the Court upheld a Louisiana statute which granted a company the exclusive right to carry out slaughter-house activities within a certain area which included New Orleans. The Court stated that "the one pervading purpose [of the thirteenth, fourteenth, and fifteenth amendments was] . . . the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[31] There was thus virtually no judicial intervention in equal protection cases beyond those involving racial discrimination until after the early 1960s.[32] Over the years, however, the Court expanded the equal protection doctrine to require that those who are similarly situated be treated alike.[33] The present significance of the equal protection guarantee is such that it has been called "the single most important concept in the Constitution for the protection of individual rights."[34]

Equal protection analysis is applied to government classifications, that is, legislation or administrative rules which burden or benefit a particular class of persons.[35] While all legislation classifies,[36] a classification is generally deemed constitutional if it relates to a legitimate governmental purpose[37] and does not invidiously discriminate.[38]

The Court has required reasonableness or rationality in government classifica-

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antees of equal protection).

[30] 83 U.S. (16 Wall.) 36 (1872).

[31] *Id.* at 71.

[32] Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The Warren Court expanded the scope of equal protection beyond racial considerations. Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 947 (1975).

[33] F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 417 (1920) (state statute which taxed all income of local corporations doing business within and outside of the state, while exempting local corporations which did no local business from taxes on income from out-of-state business, was arbitrary and violated the equal protection clause); Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

[34] J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 14.1, at 524 (3d ed. 1986). Justice Holmes called the Equal Protection Clause "the last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

[35] Galloway, *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 123 (1989); Galloway, *Basic Constitutional Analysis*, 28 SANTA CLARA L. REV. 775, 783 (1988).

[36] Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979); 16A AM. JUR. 2D *Constitutional Law* § 746, at 802 (1979).

[37] Plyler v. Doe, 457 U.S. 202, 216, *reh'g denied*, 458 U.S. 1131 (1982).

[38] "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." Williamson v. Lee Optical, Inc., 348 U.S. 483, 489, *reh'g denied*, 349 U.S. 925 (1955).

tions since it began reviewing social and economic legislation.[39] The rational basis standard assumes that all legislation has a "legitimate public purpose or set of purposes based on some conception of the general good."[40] The concept of judicial scrutiny beyond that of the rational basis standard was first suggested by Chief Justice Stone in his famous footnote in *United States v. Carolene Products Co.*[41] The Chief Justice suggested that there may be cases where the Court would consider "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[42] The Warren Court is credited with developing a two-tiered system of judicial review, consisting of strict scrutiny and the rational basis test.[43] The Burger Court, dissatisfied with the all-or-nothing standards of "the rubber stamp of the rational basis test and the fatal-in-fact, inexorable result under strict scrutiny,"[44] developed a middle tier of intermediate scrutiny.[45] Judicial review of legislation under the equal protection doctrine is now often described as a three-tiered system consisting of the rational basis test, intermediate scrutiny, and strict scrutiny.[46]

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[39] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1439-40 (2d ed. 1988).

[40] *Id.* at 1440.

[41] 304 U.S. 144, 152-53 n.4 (1938).

[42] *Id.*

[43] Gunther, *supra* note 32, at 8. Strict scrutiny has been described as the "new" equal protection signalling the Court's interventionist role, and rational basis the deferential "old" equal protection. *Id.*

[44] Kushner, *Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review*, 53 MO. L. REV. 423, 427 (1988).

[45] It has been posited that the Burger Court established the middle tier in order to weaken the trend of activist equal protection started by the Warren Court and as a device to avoid strict scrutiny. *See id.* The Warren Court's expansion of the suspect classification and the fundamental rights doctrines was thus curtailed by the Burger Court. Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777, 785 (1981).

[46] Jackson Water Works, Inc. v. Public Utils. Comm'n, 793 F.2d 1090, 1093 (9th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987); Hoffman v. United States, 767 F.2d 1431, 1434-35 (9th Cir. 1985).

There is disagreement in the Court as to the proper standards of analysis in equal protection. Justice Stevens, for example, advocates the rational basis test for all classifications. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 451-55 (1985)(Stevens, J., concurring). Justice Marshall, on the other hand, believes that the level of scrutiny should depend on "the constitutional and societal importance of the interest adversely affected," and the invidiousness of the basis of the classification. *Id.* at 460 (Marshall, J., concurring in part and dissenting in part (quoting San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)(Marshall, J., dissenting)).

### B. *Levels of Judicial Review*

The first step in equal protection analysis is determining the appropriate level of review.[47] The appropriate level of review in turn, depends on the type of classification or interest involved in the legislation.[48] Once determined, the level of judicial scrutiny — the rational basis test or strict scrutiny — frequently foretells the outcome of the case. This is not the case with the intermediate level of scrutiny.[49]

#### 1. *Rational basis test*

The rational basis test, described as "minimal scrutiny in theory and virtually none in fact,"[50] is generally applied to social or economic legislation.[51] The test is characterized by a presumption of constitutionality and judicial restraint[52] or deference to the legislature.[53] A court utilizing this kind of review must do a two-part analysis of the legislation. First, the court must decide whether the legislation has a legitimate purpose. Second, if a legitimate purpose exists, the court must decide whether the purpose would be furthered by the classification.[54] If the classification is conceivably related to a valid moral, health, or safety governmental interest, the court will generally determine that a rational basis exists.[55] The test only requires a reasonably conceivable statement of facts to justify the classification[56] and a "rational relationship to a legitimate govern-

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[47] Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986); Jackson Water Works, 793 F.2d at 1093.

[48] Galloway, *Basic Equal Protection Analysis*, *supra* note 35, at 124.

[49] Note, *Alternative Models of Equal Protection Analysis: Plyler v. Doe*, 24 B.C.L. REV. 1363, 1375 (1983).

[50] Gunther, *supra* note 32, at 8.

[51] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (equal protection clause not violated by ban of nonreturnable plastic milk containers since the ban was rationally related to the state's purposes of conserving energy, easing solid waste disposal, and promoting conservation of resources), *reh'g denied*, 450 U.S. 1027 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980)(Railroad Retirement Act of 1974 which eliminated Social Security plus pension windfall unless individuals met certain requirements for length of service and status in order to protect the retirement program upheld), *reh'g denied*, 450 U.S. 960 (1981).

[52] *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1078 (1969).

[53] L. TRIBE, *supra* note 39, § 16-2, at 1442-43.

[54] Jackson Water Works, Inc. v. Public Utils. Comm'n, 793 F.2d 1090, 1094 (9th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

[55] Kushner, *supra* note 44, at 437. The Court has described regulations for the general benefit of society as including those which "promote the health, peace, morals, education, and good order of the people, and . . . increase the industries of the State, develop its resources, and add to its wealth and prosperity." Barbier v. Connolly, 113 U.S. 27, 31 (1885).

[56] There need not be a "tight fitting" relationship between the legislative objective and the

mental interest."[57] A classification is deemed unconstitutional only if it is arbitrary and has no rational basis.[58]

*Williamson v. Lee Optical, Inc.*[59] exemplifies the Court's ability to deduce a rational basis in economic legislation. The *Williamson* Court upheld an Oklahoma statute which made it unlawful for anyone who was not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace lenses or optical appliances into frames without a written prescription from a licensed optometrist or ophthalmologist.[60] The statute specifically exempted sellers of ready-to-wear glasses.[61] The Court presented a number of possible reasons for the statute in its decision, noting that "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."[62] The Court concluded that it could not say that the statute lacked a rational relationship to a legitimate governmental interest.

Similarly, the Court in *City of New Orleans v. Dukes*,[63] found valid a grandfather clause in a New Orleans ordinance which exempted vendors from the prohibition against selling food from pushcarts in the French Quarter, if the vendors had continuously operated the same business for eight or more years prior to a certain date. The Court stated that unless the classification involved fundamental personal rights or was drawn on inherently suspect lines such as race or religion, the Court would presume the statute's constitutionality and require only that the subject classification be rationally related to a legitimate governmental interest.[64] The "relatively relaxed standard"[65] of the rational basis

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classification. Hoffman v. United States, 767 F.2d 1431, 1437 n.7 (9th Cir. 1985). In Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, *reh'g denied*, 331 U.S. 864 (1947), the Court, in light of the unique institution of pilotage, upheld a pilot regulatory system although friends and relatives of incumbent pilots were favored. In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), the Court upheld a statute forbidding a landowner from pumping or otherwise artificially drawing water containing natural mineral salts and carbonic acid gas for the purpose of collecting and selling the carbonic gas as a separate commodity since the statute's purpose was to prevent waste.

If the classification has a reasonable basis, it does not violate the Equal Protection Clause simply because the classification "is not made with mathematical nicety, or because in practice it results in some inequality." *Id.* at 78.

[57] Frontiero v. Richardson, 411 U.S. 677, 683 (1973).

[58] Lindsley, 220 U.S. at 78.

[59] 348 U.S. 483, *reh'g denied*, 349 U.S. 925 (1955).

[60] *Id.* at 485, 491.

[61] *Id.* at 488 n.2.

[62] *Id.* at 487. The Court stated that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Id.* at 487-88.

[63] 427 U.S. 297 (1976)(per curiam).

[64] *Id.* at 303. The Court warned that "the judiciary may not sit as a superlegislature to judge

test and the Court's deference to Congress have been explained by the Court as "reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one."[66]

### 2. *Strict scrutiny*

Strict scrutiny is reserved for "presumptively invidious"[67] classifications that involve either a "suspect" class,[68] such as race,[69] national origin[70] or alienage,[71]

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the wisdom or desirability of legislative policy determinations" in areas that did not affect either fundamental rights or suspect classifications. *Id.*

[65] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

[66] *Id.*

[67] Plyler v. Doe, 457 U.S. 202, 216, *reh'g denied*, 458 U.S. 1131 (1982). *See infra* note 94 and accompanying text.

[68] The term was first used in Korematsu v. United States, 323 U.S. 214, 216 (1944), *reh'g denied*, 324 U.S. 885 (1945). *See infra* note 83 for discussion of *Korematsu*.

Disparate impact on a suspect class is reviewed under the rational basis test unless discriminatory purpose is shown. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)(plaintiffs failed to show racially discriminatory intent or purpose in the denial of an application for rezoning a tract of land to allow construction of racially-integrated low- and moderate-income housing); Washington v. Davis, 426 U.S. 229 (1976)(disproportionate impact of a facially neutral written police recruiting test was not enough to show purposeful discrimination).

The Court defined discriminatory purpose as the implication "that the decision maker . . . [such as a state legislature,] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)(Massachusetts veteran's preference statute did not deprive females of equal protection since the preference was for veterans of either sex over nonveterans, not males over females).

[69] Loving v. Virginia, 388 U.S. 1 (1966)(anti-miscegenation statute prohibiting marriage between a white and a non-white violated equal protection). Strict scrutiny is also used in cases of "benign" racial discrimination which benefits racial minorities but burdens the white majority. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (schoolteacher layoff policy which would retain school system's percentage of black and white teachers was invalid since the policy was not "sufficiently narrowly tailored" to accomplish its purpose), *reh'g denied*, 478 U.S. 1014 (1986); Board of Regents v. Bakke, 438 U.S. 265 (1978)(university racial quota system reserving seats for racial minorities for admission purposes was unconstitutional); City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989)(city set-aside program which required prime contractors on city projects to subcontract at least 30% of the contract amount to Minority Business Enterprises was struck down; city did not show a compelling interest in the apportionment of public contracting opportunities by race and the program was not narrowly tailored to remedy effects of past discrimination).

[70] *See infra* note 83 for discussion of Korematsu v. United States, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945).

[71] J. NOWAK, *supra* note 34, § 14.12, at 630-44 discusses the levels of review utilized by the Court in three categories of alienage cases: 1) strict scrutiny is used for state or local laws classifying on the basis of U.S. citizenship for economic reasons, *e.g.*, Graham v. Richardson, 403 U.S.

or a person's fundamental rights.[72] Fundamental rights are those rights "explicitly or implicitly guaranteed by the Constitution,"[73] and include the right of interstate migration,[74] equal voting weight,[75] privacy,[76] and freedom of association.[77]

Under strict scrutiny's two-pronged test,[78] the government must show first, that the classification is required to promote a compelling governmental interest,[79] and second, that the "less drastic means" available are utilized,[80] that is, that the means used to achieve the government's goal are "narrowly tailored to the achievement of that goal."[81] Since strict scrutiny is deemed necessary to protect liberty and equality,[82] a classification subjected to strict scrutiny seldom

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365 (1971)(states may not deny welfare assistance to resident aliens or aliens who have not resided in the U.S. for a certain number of years); 2) the rational basis test is used for state or local laws regarding the distribution of political power or positions, *e.g.*, Foley v. Connelie, 435 U.S. 291 (1978)(state may limit appointment to police force only to U.S. citizens); and 3) the rational basis test is also used for federal classifications, *e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976)(Congress may impose residence requirements on alien's eligibility for federal medical insurance benefits). *Cf.* Plyler v. Doe, 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982)(the Court applied intermediate scrutiny to illegal alien children).

[72] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34, *reh'g denied*, 411 U.S. 959 (1973).

[73] *Id.*

[74] Shapiro v. Thompson, 394 U.S. 618 (1969)(statute which denied welfare benefits to residents who had not resided within the state for a specified period of time violated the right of interstate travel).

[75] Reynolds v. Sims, 377 U.S. 533 (state apportionment scheme deemed invalid since it was not based on population), *reh'g denied*, 379 U.S. 870 (1964).

[76] Zablocki v. Redhail, 434 U.S. 374 (1978)(striking down statute prohibiting state residents from marrying without a court order if they had minor issue not in their custody and were obligated to support the issue by court order or judgment); Roe v. Wade, 410 U.S. 113 (upholding woman's right to abortion), *reh'g denied*, 410 U.S. 959 (1973). *But see* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3067 (1989)(upholding the ban on the use of public facilities and public staff for performing abortions and requiring viability testing of fetus that physician believes is of a certain gestational age).

[77] NAACP v. Alabama, 357 U.S. 449 (1958)(mandatory disclosure of NAACP membership lists would violate citizens' associational rights).

[78] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, *reh'g denied*, 478 U.S. 1014 (1986).

[79] *Id. See also* Palmore v. Sidoti, 466 U.S. 429, 432 (1984)(no compelling government interest to justify change in custody of a minor child to the father based on the possible damaging impact of racially mixed household in which the mother was living with and eventually married a Negro).

[80] Dunn v. Blumstein, 405 U.S. 330, 343 (1972)(quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[81] *Wygant*, 476 U.S. at 274 (citing Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)).

[82] L. TRIBE, *supra* note 39, § 16-6, at 1451.

prevails.[83] The Court's dissatisfaction with the two-tiered system of judicial review[84] led to the development of the intermediate level of scrutiny, "between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny."[85]

### 3. *Intermediate scrutiny*

Although the Court has not whole-heartedly embraced the intermediate level per se,[86] the Court has generally used intermediate scrutiny for classifications based on gender[87] and illegitimacy,[88] where the classification involved the infringement of "important" rights or interests or "quasi-suspect"[89] means of classification. Unlike the rational basis test, for which a mere conceivable purpose is sufficient, intermediate scrutiny requires that the actual purpose of the legislation be examined.[90] The Court articulated a "middle-tier approach" in *Craig v. Boren*,[91] in which it ruled that a gender-based classification was consti-

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[83] *Id.* at 1451-52. Korematsu v. United States, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945), is the only case in which the Court upheld an explicit racial discrimination under strict scrutiny, according to L. Tribe, *supra* note 39, § 16-6, at 1451-52. Although the Court ruled that classifications based on race are "suspect" and thus subject to "the most rigid scrutiny," the Court upheld the exclusion of people of Japanese ancestry from certain West Coast areas because of the perceived necessities of World War II. *Korematsu*, 323 U.S. at 216. *See also* Hirabayashi v. United States, 320 U.S. 81 (1943)(military curfew for people of Japanese ancestry on West Coast upheld in the beginning of World War II).

[84] *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976)(Marshall, J., dissenting). Justice Marshall objected to the perpetuation of the "rigid two-tiered model."

[85] L. Tribe, *supra* note 39, § 16-32, at 1601.

[86] *See infra* note 91, which states Justice Rehnquist's opposition to the addition of a new tier of judicial review.

[87] Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)(state-supported university's policy of excluding males from enrollment for credit in its nursing school violated equal protection clause).

[88] Clark v. Jeter, 486 U.S. 456 (1988)(six-year statute of limitations to establish paternity of illegitimate child was not substantially related to state's interest in preventing stale or fraudulent claims); Lalli v. Lalli, 439 U.S. 259 (1978)(upholding New York statute that required a court order of paternity issued while the father was alive in order for illegitimate child to inherit from intestate father).

[89] Plyler v. Doe, 457 U.S. 202, 244 (Burger, C.J., dissenting), *reh'g denied*, 458 U.S. 1131 (1982).

[90] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)(federal statute allowing Social Security survivors' benefits only to women violated equal protection). The Court need not accept the asserted legislative purposes "when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Id.* at 648 n.16.

[91] Craig v. Boren, 429 U.S. 190, 210-11 n.* (1976)(Powell, J., concurring), *reh'g denied*, 429 U.S. 1124 (1977).

Justice Rehnquist strongly opposed the addition of another tier to the standards of review:

tutional if it actually served "important governmental objectives and . . . [was] substantially related to achievement of those objectives."[92] The classification in this case, which applied different minimum age levels for males and females for the purchase of 3.2% beer, was not substantially related to the state purpose of encouraging traffic safety, and thus invidiously discriminated against males of a certain age.[93]

Justice Brennan noted in *Plyler v. Doe*[94] that intermediate scrutiny is used "[o]nly when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and [Supreme Court] cases."[95] Although the Court generally reviews educational issues under the rational basis test,[96] in *Plyler*[97] the Court used heightened scrutiny to find that a Texas statute which withheld state funds for educating illegal alien children and which authorized school districts to deny the children enrollment in public schools violated the Equal Protection Clause. Acknowledging that education was not a "fundamental right,"[98] the Court nevertheless ruled that because of the importance of education in American society and because education allows individuals to better their societal positions on merit, the State had to justify its denial of free education by showing that it advanced a "substantial state interest."[99] Justice

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> The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized — the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved — so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement?

*Id.* at 220-21 (Rehnquist, J., dissenting).

[92] *Id.* at 197.

[93] *Id.* at 204.

[94] 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982).

[95] *Id.* at 218 n.16.

[96] *See, e.g.*, Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988)(statute permitting certain school districts to charge user fee for bus transportation did not violate equal protection rights since there was a rational basis for the statute); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 34-35, *reh'g denied*, 411 U.S. 959 (1973)(education is not a fundamental right under the Constitution).

[97] 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982).

[98] *Id.* at 223.

[99] *Id.* at 230. Chief Justice Burger noted in his dissenting opinion that "by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases." *Id.* at 244 (Burger, C.J., dissenting).

Powell, in his concurring opinion, explained the Court's use of heightened scrutiny as due to the "unique circumstances" of the case.[100] *Plyler* demonstrates the Court's ability to apply reasoning beyond that required by the rational basis test when presented with particularly important interests.

### *C. The Court Has Been Reluctant to Expand Its Definitions of Fundamental or Important Rights*

Despite the emergence of the intermediate level of scrutiny, the Court continues to use the rational basis test to review social and economic legislation, even in cases involving such seemingly fundamental or important interests as public welfare[101] and housing.[102] The Court has, however, utilized a heightened form of rational review in certain cases, leading one commentator to suggest the possible existence of a *fourth* level of judicial review,[103] a "rational basis with bite."[104] An enhanced form of rational basis scrutiny has been used by the Court in cases involving semi-important rights, requiring the State to show a higher level of governmental interests. The Court used such heightened scrutiny in *City of Cleburne v. Cleburne Living Center, Inc.*,[105] in which a purchaser of a building who intended to convert the building into a home for the mentally retarded was denied a special use permit to operate the home. The Court declined to hold the mentally retarded as a quasi-suspect class, but did, however, adopt a nondeferential heightened form of rational basis scrutiny to find uncon-

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[100] *Id.* at 239 (Powell, J., concurring). *See also* Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481, 2487-88 (1988), in which the Court noted that it had not extended the holding of *Plyler* beyond its "unique circumstances."

[101] Lyng v. Int'l Union, United Auto., Aerospace and Agricultural Implement Workers, 485 U.S. 360 (1988)(amendment to Food Stamp Act prohibiting household eligibility for food stamps or increased food stamps if household member was on strike was rationally related to governmental interest of avoiding favoritism in a private labor dispute); Bowen v. Gilliard, 483 U.S. 587 (1987)(amendment to Federal Aid to Families with Dependent Children statute requiring inclusion of child support payments made by noncustodial parent in determining family eligibility for benefits was rationally related to Congress's objective of reducing federal spending and governmental interest in fair distribution of benefits); Dandridge v. Williams, 397 U.S. 471, *reh'g denied*, 398 U.S. 914 (1970)(Maryland welfare system which set a maximum monthly payment regardless of family size and need upheld under rational basis).

[102] James v. Valtierra, 402 U.S. 137 (1971)(upholding state constitutional provision which required approval by a majority of voters in local referendums before low-rent housing projects could be developed); Lindsey v. Normet, 405 U.S. 56 (1972)(upholding forcible entry and wrongful detainer statute giving landlords the right to repossess premises while excluding defenses based on landlord's failure to maintain the premises).

[103] Kushner, *supra* note 44, at 458. Kushner credits the Burger Court for adding "teeth to the rational basis" test when reviewing social and economic legislation. *Id.* at 427-28.

[104] *Id.* at 458.

[105] 473 U.S. 432 (1985).

stitutional the application of the zoning ordinance which required the special use permit for the proposed home.[106] Although reluctant to expand the concepts of fundamental rights or suspect class, when faced with an alleged suspect classification or important right, the Court has been able to utilize a heightened scrutiny to protect the interests it deems important.

It is well-settled that the right to a healthful environment is not yet a constitutional right[107] deserving strict scrutiny. The U.S. Supreme Court, however, acknowledged the importance of a healthful environment in *Members of the City Council v. Taxpayers for Vincent*,[108] in which it noted that the aesthetic interest in the improvement of the city's appearance was substantial enough to justify restricting first amendment rights. In *Ward v. Rock Against Racism*[109] the Court found substantial government interest in protecting citizens from unwelcome noise and thus upheld noise guidelines for music programs at a bandshell.[110]

The possibility that the right to a healthful environment may one day attain judicial recognition as a constitutional right has been alluded to by the courts in cases such as *In Re "Agent Orange" Product Liability Litigation*[111] and *Township of Long Beach v. City of New York*.[112] Also significant is the fact that at least a

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[106] *See also* Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)(state veterans' property tax preference for Vietnam veterans who resided in the state before a certain date invalidated); Williams v. Vermont, 472 U.S. 14 (1985)(state auto tax scheme giving preference to Vermont residents was unconstitutional); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, *reh'g denied*, 471 U.S. 1120 (1985)(tax on insurance premiums giving preference to domestic insurance companies struck down); Zobel v. Williams, 457 U.S. 55, 64 (1982)(striking down state scheme to give Alaska oil revenues based on length of state residency). Kushner, *supra* note 44, also cites Plyler v. Doe, 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982) as belonging to this "tier."

[107] 39A C.J.S. *Health and Environment* § 61, at 512-13 (1976). *See, e.g.*, Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971)(constitutional protection for the environment has not yet been given judicial sanction); In re "Agent Orange" Prod. Liab. Litig., 475 F. Supp. 928, 934 (E.D.N.Y. 1979)("there is not yet any constitutional right to a healthful environment"); Pinkney v. Ohio EPA, 375 F. Supp. 305, 310 (N.D. Ohio 1974)(there is no implicit or explicit guarantee of the right to a healthful environment in the Constitution).

[108] 466 U.S. 789 (1984).

[109] 109 S. Ct. 2746, *reh'g denied*, 110 S. Ct. 23 (1989).

[110] The Court also recognized the importance of a clean and healthful environment in Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)(ordinance restricting land use to one-family dwellings upheld as the ordinance was intended to enable "quiet seclusion and clean air"); United States v. S.C.R.A.P., 412 U.S. 669 (1973)(users of natural resources who claimed harm to their use and enjoyment of the resources had standing to challenge actions of a federal agency); Berman v. Parker, 348 U.S. 26, 33 (1954)(interest in an environment that was "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled" justified the taking of private property).

[111] 475 F. Supp. 928, 934 (E.D.N.Y. 1979).

[112] 445 F. Supp. 1203 (D.N.J. 1978). The court stated that "it is not 'desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the

dozen states, including Hawaii, have included provisions recognizing the importance of a healthful environment in their constitutions.[113]

### *D. Congress Has the Right To Expressly Exempt Projects from Federal Laws*

Courts have generally recognized that Congress may exempt projects from federal statutes,[114] and have accordingly allowed legislation to pass constitutional muster. The Alaska Pipeline is one such project exempted by congressional action.[115] The court in *Wilderness Society v. Morton*[116] enjoined the Secretary of the Interior from issuing a special land use permit to allow the Alyeska Pipeline Service Company to construct the Alaska pipeline at a width greater than that allowed by Section 28 of the Mineral Leasing Act of 1920.[117] The court noted its awareness of the "severe impacts"[118] of its ruling, but stated that it would enjoin the issuance of the permit until Congress changed the law either by amending the width limitation of section 28 or by exempting the project from section 28.[119] Congress subsequently amended section 28, removing the width restriction and reforming the law[120] regarding the pipeline rights

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womb of time, but whose birth is distant.' " *Id.* at 1212-13.

[113] HAW. CONST. art. XI, § 9 states:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

*See also* the Constitutions of Florida, Illinois, Massachusetts, Michigan, Montana, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, and Virginia; and J.M. Van Dyke, THE ROLE OF A CONSTITUTION IN RELATION TO THE U.S. OCEANS (June 27, 1988)(unpublished manuscript).

[114] *See infra* notes 115-31 and accompanying text. *But see* Judge Wright's opinion in D. C. Fed'n of Civic Ass'ns, Inc. v. Volpe, 434 F.2d 436, 439 (D.C. Cir. 1970), *infra* note 169 and accompanying text.

The U.S. Supreme Court has stated that "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' " United States v. Will, 449 U.S. 200, 222 (1980)(citing United States v. Dickerson, 310 U.S. 554, 555, *reh'g denied*, 311 U.S. 724 (1940)). Absent express exemption, courts generally do not favor repeal by implication. T.V.A. v. Hill, 437 U.S. 153 (1978).

[115] D.R. MANDELKER, NEPA LAW AND LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT § 5:07, at 10 (1984).

[116] 479 F.2d 842 (D.C. Cir.)(en banc), *cert. denied*, 411 U.S. 917 (1973).

[117] 479 F.2d at 846. The Mineral Leasing Act of 1920 is codified at 30 U.S.C. § 185 (1970).

[118] 479 F.2d at 847.

[119] *Id.* at 847-48.

[120] Pub. L. No. 93-153, 87 Stat. 576 (1973)(codified at 30 U.S.C. § 185 (1976)).

of way.[121]

The San Antonio Freeway was similarly exempted by Congress. In *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*,[122] the court held that section 154 of the Federal-Aid Highway Act of 1973,[123] which terminated federal funding for the San Antonio North Expressway, effected an exemption of the project from meeting NEPA requirements.[124]

In keeping with the courts' general trend of upholding congressional exemptions, the district court in *Friends of the Earth, Inc. v. Weinberger*[125] recognized that Congress, by passing the Jackson Amendment,[126] had exempted the President's report on the basing mode of the MX missile from NEPA requirements.[127] The court noted that "Congress can and does exempt projects from NEPA."[128]

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[121] Alyeska Pipeline Serv. Co. v. United States, 624 F.2d 1005, 1008 (Ct. Cl. 1980). Congress further helped to expedite the project by declaring that the environmental impact statement was satisfactory and by limiting judicial review of the Secretary's actions regarding the plaintiffs' right of way. *Id. See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 584 (1973)(codified at 43 U.S.C. § § 1651-1655 (1976)).

Similarly, Congress added a new section to the National Environmental Policy Act of 1969 (NEPA) to overturn the court's decision in Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 508 F.2d 927 (2d Cir. 1974), *vacated and remanded*, 423 U.S. 809 (1975), that an Environmental Impact Statement (EIS) had to be prepared by the responsible federal agency, not a state agency, to comply with NEPA. The statutory amendment allowed a state agency to prepare the EIS as long as the federal agency and responsible federal official provided guidance and participated in the preparation of the EIS. Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 531 F.2d 637, 638-39 (2d Cir. 1976)(per curiam).

[122] 496 F.2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975).

[123] Pub. L. No. 93-87, § 154, 87 Stat. 250 (1973). Section 154 (a) stated:

> Notwithstanding any other provisions of Federal law or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between Interstate Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-aid project.

[124] The court found congressional intent to exempt the Expressway from the requirements of environmental statutes, supported by the legislative history of the act which showed Congress's purpose of exempting the Expressway from federal environmental statutes including NEPA and § 4(f) of the Dept. of Transportation Act, 49 U.S.C. § 1653(f). Section 4(f) was not part of the case since § 154 terminated federal funding for the project and approval from the Secretary of Transportation was no longer needed. *Named Individual Members of the San Antonio Conservation Soc'y*, 496 F.2d at 1022, n.5.

[125] 562 F. Supp. 265 (D.D.C. 1983), *appeal dismissed without opinion*, 725 F.2d 125 (D.C. Cir. 1984).

[126] Pub. L. No. 97-377, 96 Stat. 1830 (1982).

[127] Friends of the Earth, Inc. v. Weinberger, 562 F. Supp. at 271-73.

[128] *Id.* at 271 (citing Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976)(NEPA must give way when there is "clear and unavoidable conflict" in statutory author-

In yet another case recognizing congressional authority to create specific exemptions from federal laws,[129] the district court in *Sequoyah v. TVA*[130] ruled that Congress had clearly and explicitly exempted the Tellico reservoir from any laws opposing its completion.[131] The cases discussed indicate that opponents of a particular congressional exemption will find it difficult to successfully challenge the exemption, given the courts' general acceptance of and deference to Congress's authority to exempt projects.

## IV. ANALYSIS

The district court applied a "rational basis test" to decide the equal protection claim in *Stop H-3*.[132] The United States Court of Appeals for the Ninth Circuit noted the district court's finding that "no court has found that there is a fundamental right to a healthy environment."[133] The plaintiffs argued that the appropriate standard of scrutiny was the intermediate standard and that the exemption must, therefore, be "substantially related" to the achievement of a governmental goal.[134] The plaintiffs' argument for intermediate scrutiny was based on two points. First, plaintiffs claimed that the environment was an "important right" and laws that impinged upon important rights were deserving of intermediate scrutiny.[135] Second, they argued that in exempting H-3, Congress was classifying a single state and that, in the interest of federalism, this deserved heightened scrutiny.[136]

The Ninth Circuit affirmed the district court's decision that the equal protec-

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ity), *reh'g denied*, 429 U.S. 875 (1976); Izaak Walton League of America v. Marsh, 655 F.2d 346, 367-68 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981)(Congress has shown itself to be capable of demonstrating its intent to exempt projects from NEPA)). *See also* Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 355 (8th Cir. 1972)("Congress has the right to *authorize* projects and to exempt them" from NEPA).

[129] *See also* Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190 (1966)(determining whether section of Fair Labor Standards Act of 1938 which provided exemption for employees working for certain retail or service establishments included a sheet metal company and a tire company), *reh'g denied*, 383 U.S. 963 (1966); Lee Pharmaceuticals v. Kreps, 577 F.2d 610 (9th Cir. 1978)(materials falling within exemption provision to Freedom of Information Act were excluded from the Act), *cert. denied*, 439 U.S. 1073 (1979).

[130] 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). The district court stated that "Congress has the power to make exceptions to rights either it or state legislatures have created by statute, as long as such exceptions are not invidiously discriminatory." 480 F. Supp. at 611.

[131] *Id.* at 611. *See infra* notes 191-96 and accompanying text for a discussion of the case.

[132] 870 F.2d at 1429.

[133] *Id.* (citing Decision and Order, C.R. 507 at 7).

[134] *Id.*

[135] *Id.* at 1430.

[136] *Id.* at 1431.

tion challenge failed.[137] The court found that the exemption of H-3 from section 4(f) did not mean that the State of Hawaii had been classified at all, since H-3 was part of a larger national system and was accessible to all citizens.[138] The court also found that the plaintiffs failed to show the requisite purposefulness in discrimination that is required under intermediate scrutiny.[139] And finally, the court concluded that even had a classification been established and discrimination been demonstrated, the national interest in completing the Interstate Highway System was substantial.[140] As a result of finding a substantial state interest, the court also concluded that the challenge failed under a rational basis test as well.[141]

This analysis will focus on three notable aspects of the Ninth Circuit opinion. First, the court did not exclude the possibility that the right to a healthy environment may be an "important right" for equal protection claims.[142] Second, the court found no state classification for a project that is entirely within one state when the project is exempted from national laws.[143] Third, the court's determination of the national interest of an exemption was based on the initial legislation from which the project was exempted rather than an examination of whether a national interest was served by treating the project differently than others.[144] The court also found that congressional desire to overturn a court ruling demonstrated sufficient national interest to warrant exemptions from environmental laws.[145]

### A. *The Court Did Not Preclude Intermediate Scrutiny When Environmental Rights Are at Issue*

The Ninth Circuit did not decide the important question of whether, when Congress passes legislation to exempt specific projects from national environmental protection laws, it necessitates the application of an intermediate scrutiny test.[146] Instead, the court concluded that even at this heightened level of scrutiny, section 114[147] still was shown to be "substantially related to achieve-

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[137] *Id.* at 1431-32.

[138] *Id.* at 1431.

[139] *Id.*

[140] *Id.* at 1432.

[141] *Id.* at 1432 n.22.

[142] *Id.* at 1430.

[143] *Id.* at 1431.

[144] *Id.* at 1432.

[145] *Id.*

[146] *Id.* at 1430.

[147] *See supra* note 16.

ment of an important governmental purpose."[148]

The Ninth Circuit was sensitive to the possibility that a healthy environment may one day be recognized as an important right of constitutional importance in the context of equal protection.[149] The court cited recent U.S. Supreme Court opinions[150] to explain the court's willingness to explore the "important right" argument.[151] The Ninth Circuit, however, recognized that although the U.S. Supreme Court has been willing to find that the environment is a substantial or compelling state interest against which to weigh individual freedoms, it has yet to hold that it is an important or fundamental right.[152]

The Ninth Circuit gave thoughtful analysis to why the environment may indeed be an "important right" in the area of equal protection. The principles that guided the Supreme Court to apply heightened scrutiny in *Plyler v. Doe*[153] are arguably as evident in environmental cases. The finding in *Plyler v. Doe* that although public education is not a fundamental right it plays a "fundamental role in maintaining the fabric of our society"[154] is not unlike the Ninth Circuit concluding that:

> We agree that it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources. The centrality of the environment to all our undertakings gives individuals a vital stake in maintaining its integrity.[155]

The court, however, was mindful of the opposing tension in current case law. The U.S. Supreme Court has stated that it will apply intermediate scrutiny "[o]nly when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and [Supreme Court] cases . . . ."[156] In light of the Court's reluctance to add new important or fundamental rights, the Ninth Circuit's serious consideration of plaintiffs' assertion that the right to a healthy

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[148] 870 F.2d at 1432.

[149] *Id.* at 1430.

[150] *See infra* notes 107-10 and accompanying text.

[151] The court cited United States v. S.C.R.A.P., 412 U.S. 669 (1973); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Village of Belle Terre v. Boraas, 416 U.S. 1, (1974); Berman v. Parker, 348 U.S. 26 (1954). 870 F.2d at 1430 n.21.

The court also noted several District Court opinions that "anticipate eventual recognition of a constitutional right to a healthful environment." *Id.*

[152] 870 F.2d at 1430.

[153] *See supra* notes 94-100 and accompanying text.

[154] *Plyler*, 457 U.S. at 221.

[155] 870 F.2d at 1430.

[156] *Id.* at 1430 (citing *Plyler*, 457 U.S. at 218 n.16).

environment was an important constitutional right was significant.

### B. *A Facially Neutral Statute That Singles Out a Particular Project Within a Single State Is Not State-Based Discrimination*

The Ninth Circuit recognized that Congress frequently legislates by exemption.[157] The court concluded that legislating by exemption does not create state-based classifications.[158] Further, the court noted that, even were there a state-based classification, an exemption from general laws is not sufficient to show the discriminatory animus[159] toward that state needed to succeed in intermediate scrutiny.[160] Thus, the court concluded that section 114 did not create a state-based classification, or that, even if it did, intermediate scrutiny was necessary.[161]

By removing H-3 from the requirements of section 4(f), section 114 theoretically deprived some citizenry of the protection of 4(f) requirements.[162] Plaintiffs argued that the harmed class was the citizens of the State of Hawaii.[163] Plaintiffs maintained that singling out a state for detrimental treatment violated federalism principles and therefore warranted heightened scrutiny.[164] The court decided that exempting a single project within a state did not amount to a state-based classification.[165] It noted that highway use would not be based on residency, and that the harm would not fall on all state residents.[166]

The argument that an environmental law exemption might single out a state to the detriment of that state, and thus merit heightened scrutiny, was articulated in a concurring opinion in *D.C. Federation of Civic Associations, Inc. v. Volpe*,[167] a case decided on other grounds. The facts were remarkably similar to those in *Stop H-3*: Congress had exempted the Three Sisters Bridge from section 4(f) and the exemption was challenged. Judge Wright, concurring in the decision, stated:

> The net effect of Section 123, construed as Appellees insist it must be, *is to divide*

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[157] *Id.* at 1430.

[158] *Id.* at 1431.

[159] *Id.*

[160] *Id.*, citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

[161] *Id.*

[162] This assumes that § 4(f) was in fact not complied with from the beginning as the Ninth Circuit had held. Stop H-3 Ass'n v. Lewis, 740 F.2d 1442, 1458 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

[163] 870 F.2d at 1431.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] 434 F.2d 436 (D.C. Cir. 1970).

> *citizens of the United States affected by road projects into two classes.* One small group of citizens, the residents of the District of Columbia who will be affected by the Three Sisters Bridge, is deprived of these important rights . . . .[168]

Without mention of *D.C. Federation of Civic Associations*, the Ninth Circuit did not adopt this reasoning. Instead, the Ninth Circuit found that section 114 was facially neutral, and that it did not single out Hawaii for different treatment because the highway was part of a national system to be used by many kinds of people.[169] This is consistent with the reasoning of *Sequoyah v. TVA*[170] where plaintiff, an American Indian group, claimed that a specific exemption to the Endangered Species Act that allowed construction of the Tellico Dam, which threatened the habitat of an endangered species, violated equal protection.[171] Similar to the court in *Stop H-3*, the court in *Sequoyah* noted that Congress can and does make exemptions to laws.[172] Additionally, the court failed to find a discernable classification, stating that, "[t]he flooding of the Little Tennessee will prevent everyone, not just plaintiffs from having access to the land in question."[173] Thus, the Ninth Circuit analysis was consistent with *Sequoyah*.[174]

### *C. Congressional Assessment of National Interest Relating Back to the Federal-Aid Highway Act and Congressional Desire to Overturn a Prior Decision Represented a Substantial State Interest*

The court was particularly persuaded that legislation exempting single projects was commonplace and generally within congressional authority[175] and that the mere exemption of a project did not show discriminatory animus.[176]

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[168] *Id.* at 439 (emphasis added).

[169] 870 F.2d at 1431.

[170] 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 952 (1980).

[171] *Id.*

[172] *Id.* at 611.

[173] *Id.* at 612.

[174] 870 F.2d at 1430.

[175] *Id.* The court cited unsuccessful challenges to congressional exemptions such as Friends of the Earth v. Weinberger, 562 F. Supp. 265 (D.D.C. 1983), *appeal dismissed without opinion*, 725 F.2d 125 (D.C. Cir. 1984)(regarding the MX missile exemption to NEPA); Sequoyah v. T.V.A., 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980)(exemption for Tellico Dam notwithstanding requirements of the Endangered Species Act); Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981)(exemption from NEPA requirements). *See supra* notes 114-31 and accompanying text.

[176] 870 F.2d at 1431.

The court relied on other examples of congressional legislation to demonstrate that Congress often successfully exempts specific projects from general laws.[177] These exempted projects included the Trans-Alaska Pipeline Authorization Act,[178] the Tennessee Valley Authority exemption for the Tellico Dam from the Endangered Species Act,[179] and the MX missile exemption from National Environmental Policy Act (NEPA) requirements.[180]

The Trans-Alaska Pipeline Authorization Act,[181] cited as one example of congressional authority to make exemptions to general laws,[182] exempted the pipeline from requirements of the Mineral Lands Leasing Act, just as it had exempted the pipeline from the requirements of the National Environmental Policy Act previously.[183] While the Ninth Circuit relied on the Trans-Alaska Pipeline Authorization Act as an example of a state-specific exemption that Congress enacted in response to a court decision,[184] the Ninth Circuit did not note that the national interest served by exempting the pipeline from various environmental laws was stated within the statute. Although the Trans-Alaska Pipeline Act expressly provided in section 1651 that the pipeline was of "national interest" and that the amendment became part of that act,[185] section 114 did not explicitly state a national interest in the H-3 exemption. Unlike section 114, the rational basis for the exemption to the Mineral Lands Leasing Act is discernable from the statutory language.

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[177] *See supra* notes 114-31.

[178] *See supra* note 121.

[179] Sequoyah v. T.V.A., 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

[180] 870 F.2d at 1430.

[181] Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (codified at 30 U.S.C. § 185 (1976).

[182] 870 F.2d at 1431.

[183] The Act also exempted the Pipeline from the National Environmental Policy Act of 1969 and limited the period of judicial review of the law to 60 days following enactment. 87 Stat. 584 (codified at 43 U.S.C. § 1652(d)(1976)).

[184] Wilderness Soc'y v. Morton, 479 F.2d 842, 847-48 (D.C. Cir.)(en banc), *cert. denied*, 411 U.S. 917 (1973).

[185] 43 U.S.C. § 1651 states:

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska Pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

Likewise, the Jackson Amendment,[186] which exempted the proposals for the basing of the MX missile silos from NEPA, contained statutory language regarding the national importance of the project, justifications for the exemptions, and alternative requirements to the regular environmental laws that would protect the secrecy of the project.[187] In *Friends of the Earth, Inc. v. Weinberger*,[188] the issue was not equal protection, but whether Congress could moot an existing dispute with the passage of new legislation.[189]

While Congress can and does exempt specific projects from general laws, challenges on the basis of equal protection are scarce. *Sequoyah v. TVA* is similar to *Stop H-3* because Congress exempted[190] the Tellico Dam from the requirements of the Endangered Species Act[191] in an appropriations bill with the intent of ending fourteen years of litigation.[192] As in the H-3 exemption, the statute was simply attached to an appropriations bill, with no statutory language explaining the basis for the exemption.[193] Unlike H-3, the Tellico Dam, at the point of the final litigation had been free of injunctions for nine years, was 90% complete and was an integral part of the entire Tennessee Valley Authority system.[194] Nonetheless, the court in *Sequoyah* was not compelled to look at the motivation of Congress for the exemption, simply concluding that there was no classification and no discrimination at all.[195] But in *Stop H-3*, the court, in applying either a rational basis test or an intermediate scrutiny test did consider the motivations of Congress when it passed the exemption. The Ninth

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[186] Pub. L. No. 97-377, 96 Stat. 1830 (1982).

[187] *Id.* The statute requires, in part, that "an assessment of the environmental impact each such system of the missile would likely have and the identification of possible sites for each such system or missile," would be submitted to Congress. *Id.* at 1846-48.

[188] 562 F. Supp. 265 (D.D.C. 1983), *appeal dismissed without opinion*, 725 F.2d 125 (D.C.Cir. 1984).

[189] 562 F. Supp. at 270.

[190] Pub. L. No. 96-69, 93 Stat. 437 (1979).

[191] Endangered Species Act of 1973 § 2, 16 U.S.C. § 1531.

[192] Sequoyah v. T.V.A., 480 F. Supp. 608, 610 (E.D. Tenn. 1979), *aff'd*, 620 F.2d. 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

[193] The act states:

> [N]otwithstanding provisions of 16 U.S.C., Chapter 35 or any other law, the Corporation is authorized and directed to complete construction, operate and maintain the Tellico Dam and Reservoir Project for navigation, flood control, electric power generation, and other purposes, including the maintenance of a normal summer reservoir pool of 813 feet above sea level.

Pub. L. No. 96-69, 93 Stat. 437 (1979).

[194] *Reauthorization of the Endangered Species Act of 1973: Hearing before the Senate Resource Conservation Sub Committee*, 96th Cong., 1st Sess. 56 (1979)(statement of Hon. John Duncan, Representative from the State of Tennessee).

[195] Sequoyah v. T.V.A., 480 F. Supp. at 612.

Circuit considered the purpose of the Federal-Aid Highway Act[196] and concluded that Congress' desire to finish the entire Interstate System was a sufficient basis for Congress to exempt the H-3 from the section 4(f) environmental requirements.[197]

There is a possible incongruity in this analysis. While Congress did express a desire to complete the Interstate System in section 101, it did not exempt *all* highways from the requirements of section 4(f). Another layer of inquiry, one that plaintiffs urged, was to ask what special importance H-3 demonstrated that it warranted exemption.[198] Under a deferential rational basis test the court's analysis was probably sufficient,[199] but had the court actually been reviewing the statute at either the intermediate level of scrutiny, or even the less rigorous so-called "fourth tier,"[200] their analysis might not have been sufficient.[201] In *Papasan v. Allain*,[202] the U.S. Supreme Court examined an equal protection claim that a particular school district in Mississippi received far less income than the average Mississippi school district.[203] The disparity was a result of the district's selling of lands, prior to the Civil War, that Congress had deeded to them.[204] As a result, their current appropriation from the State of Mississippi was far less than appropriations for districts that generated income from retained lands.[205] The U.S. Supreme Court remanded the case, holding that under a rational basis test, the *variation* in monies appropriated to the districts had to be rationally related to a legitimate state interest.[206] The Court

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[196] 870 F.2d at 1428 (citing 23 U.S.C. § 101 (1988)).

[197] *Id.* at 1432.

[198] Plaintiffs had asserted that H-3 was of minimal national importance according to the Congressional Budget Office. *Id.* at 1427 (citing *The Interstate Highway System: Issues and Options*, Table C-1 (June 1982)).

[199] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 427 (1961)("[T]erritorial uniformity is not a constitutional prerequisite").

[200] *See infra* notes 103-04 and accompanying text.

[201] Even when employing the deferential rational basis test, there is a suggestion that when statutes discriminate on the basis of "territoriality," the court will assume the legislature had a rational basis based on territorial differences. *See, e.g.*, Toyota v. Hawaii, 226 U.S. 184, 191 (1912)(disparate rural/urban state imposed auction rates not violative of equal protection based on assumption that state legislature "took into account varying conditions in the respective localities"); United States v. Tulare Lake Canal Co., 677 F.2d 713, 718 (9th Cir. 1982)(holding disparate acreage limitations based on land being west or east of the 100th meridian by federal land reclamation law not violative of equal protection because the statutes are "rational legislative response to climactic difference between western region and the remainder of the nation").

[202] 478 U.S. 265 (1986).

[203] *Id.* at 268-71.

[204] *Id.* at 273.

[205] *Id.*

[206] *Id.* at 289.

required that the reason for the variation itself must be examined.[207] In *Stop H-3*, the court did not require that the basis for the exemption be scrutinized; it was satisfied to examine the importance of the construction of the Interstate Highway System. Clearly, there was a legitimate government purpose in the construction of the Interstate Highway System, but was there a rational basis for singling out H-3 for an exemption to the environmental statutes to which other construction of interstate highways must adhere? The only apparent purposes for the exemption, as determined by the court examining the legislative history, were desires to complete the entire interstate system and to overrule a court decision that stood to delay the construction of the H-3.[208] The court might properly have concluded that those purposes, without an explicit statement of national interest in the H-3 Highway, were insufficient to allow Congress to deny those citizens affected by the H-3 the protections of section 4(f). The Ninth Circuit might have decided that in order to merit exceptional treatment, the construction of the H-3 must uniquely require special treatment because of either its importance beyond the typical interstate highway or because of unique features of the highway itself. Instead, the court was satisfied that lengthy litigation was a sufficient basis for an exemption.[209]

The court found adequate national interest in congressional intent to exempt certain projects for reasons related to completion of the system without regard to the national interest served by the environmental laws.[210] Significantly, the court did not look to the legislative intent of section 4(f),[211] from which the exemption was actually drawn, but instead was satisfied to look to the general importance of the Federal-Aid Highway Act to determine the national interest.[212] While the weight of case law indicates that Congress can exempt specific projects from environmental laws by separate legislation, and the *Stop H-3* decision is consistent with that, the court might have required that the basis for an exemption be something more than either a desire to overturn a court's interpretation of the general statute or a desire to finish a project that is part of a national program with a goal of completing the entire project.[213]

## V. IMPACT

The Ninth Circuit Court was able to dismiss the plaintiffs' equal protection

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[207] *Id.*

[208] 870 F.2d at 1432.

[209] *Id.*

[210] *See supra* notes 114-31 and accompanying text for a discussion of the history of these exemptions.

[211] *See supra* note 12.

[212] 870 F.2d at 1428-29.

[213] *Id.* at 1432.

claims in *Stop H-3* by finding that the exemption was both rationally *and* substantially related to legitimate *and* important governmental purposes. Traditional deference to Congress was shown in the court's conclusion that there existed strong national and state interests in support of completing the H-3 project. The court's failure to question congressional authority to make the particular exemption in this case or to consider the purpose of the environmental protection laws from which the exemption was sought, raises the concern that such congressional exemptions will not be subjected to meaningful judicial scrutiny in the Ninth Circuit.

The decision of the Ninth Circuit is consistent with the courts' historical deference to congressional authority to expressly exempt a specific project from federal laws. Senator William W. Bradley's statement that the vote in favor of the H-3 exemption did not create a precedent for future exemptions from federal environmental laws is reassuring in this regard.[214] The Senator stressed that "exceptional measures" had been taken to meet or exceed all other State or Federal environmental laws.[215] Although the Ninth Circuit did not discuss Senator Bradley's statement, it did agree with the lower court's assessment that NEPA requirements had been met and that the exemption made moot any section 4(f) issues.

The reasoning that any possible detrimental effects of the exemption would be experienced by all whose "use and enjoyment of Hawaii's environment"[216] was affected by H-3, Hawaii residents and out-of-state visitors alike, is worrisome. No attention was given by the court in its opinion to the possible adverse consequences of the H-3 that were raised by plaintiffs, such as increased air pollution and increased traffic.[217] The court found no state-based classification, but instead drew the classification between those who would be affected by H-3 and those who would not. Based on the court's analysis, opponents of a state-specific exemption would find it practically impossible to successfully assert that

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[214] 132 CONG. REC. S17417-18 (daily ed. Nov. 6, 1986) (statement of Sen. William W. Bradley). *See infra* note 216 for excerpt of statement.

[215] Senator Bradley stated:

> Mr. President, in supporting the exemption of highway H-3 from section 4(f) of the U.S. Department of Transportation Act, I want to make clear my view that this vote does not and should not be seen as setting a precedent for departures in the future from the Nation's environmental laws. My understanding is that exceptional measures have been taken in this case to meet — and in some cases exceed — the requirements of all State and Federal environmental statutes with the exception of this provision of the Transportation Act. The facts surrounding H-3 make this situation unique and in my opinion justify exempting it from the 4(f) requirements.

132 CONG. REC. S17417-18 (daily ed. Nov. 6, 1986)(statement of Sen. William W. Bradley).

[216] 870 F.2d at 1431.

[217] *See* Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1452 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

the exemption discriminated by creating a state-based classification.

The court obliquely addressed the issue of the standard of review for the exemption. The court did not expressly state that the appropriate standard of review in this case was intermediate scrutiny, but it noted that the statute did meet the requirements of intermediate scrutiny because there was no invidious discrimination effected by the statute. The court also found, without rigorous scrutiny, that the statute was "substantially related" to important governmental purposes because the H-3, "as part of the Defense Interstate Highway System, serve[d] an important national defense role."[218] Given the analysis used by this court, equal protection does not present a viable challenge to congressional exemptions from national laws.

The court did not expressly hold that the intermediate level of scrutiny was required in this case, but significantly, it did not state nor imply that heightened scrutiny would be inappropriate. The court left the level of review open for future adjudication. Given the court's deference to Congress, however, an exemption would predictably be found to be rationally based, or, if heightened scrutiny was demanded, it would always be substantially related to an important governmental interest. A court using the Ninth Circuit's reasoning would thus be able to avoid ruling on the issue of the proper standard of review for a congressional exemption.

Although the court agreed with the plaintiffs that protecting a "decent and livable environment"[219] was of "absolute and enduring concern,"[220] it declined to decide the issue of whether the right to a healthful environment was an important right requiring heightened judicial scrutiny.[221] The court instead noted that even if the right to a healthful environment were an important right, the statute would survive intermediate scrutiny. There is hope, however, that the increasing national and state recognition of citizens' rights to a healthful and clean environment may one day compel a court to squarely address the issue.[222]

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[218] *Id.* at 1432.

[219] *Id.* at 1430.

[220] *Id.*

[221] The court's position is perhaps explained by Justice O'Connor's observation that "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3061 (1989)(O'Connor, J., concurring in part and concurring in judgment)(quoting Burton v. United States, 196 U.S. 283, 295 (1905)). If the U.S. Supreme Court is loathe to rule on constitutional issues, a lower court's reluctance to rule on such an issue is understandable.

[222] Arguments against courts granting constitutional status to environmental rights are based on such factors as problems in defining and enforcing such rights, and the lack of qualified judges to do the job. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 715-17 (1977); Interview with Jon Van Dyke, Professor of Law, University of Hawaii at Manoa (Oct. 2, 1989).

The Ninth Circuit's acknowledgment that citizens have a "vital stake"[223] in a healthful environment may help to increase judicial recognition of a right to a healthful environment as a constitutionally protected interest commanding heightened judicial scrutiny.

## VI. CONCLUSION

The United States Court of Appeals for the Ninth Circuit ruled that state citizens' equal protection rights were not violated by congressional legislation which exempted the H-3 Highway specifically from complying with federal environmental protection laws. The court's decision was based largely on the legislative history of the statute and the general circumstances surrounding the project. The court found sufficient national defense interests and state interests in completing the H-3 to hold that the statute was substantially related to Congress's purpose of completing the highway. Congress's ability to exempt projects from federal laws also played an important part in the court's reasoning.

The court did not articulate whether the rational basis test or the intermediate level of scrutiny was the appropriate standard in determining whether a congressional exemption of a particular project from national environmental protection laws violates equal protection. The court instead noted that the statute did not invidiously discriminate since there was no state-based classification created by the statute, and no discriminatory purpose was alleged or shown by the plaintiffs. The question of the proper standard of judicial review in a case such as *Stop H-3* was left open for future adjudication.

The Ninth Circuit saw no need to decide whether the right to a healthful environment was at least an important right, deserving heightened scrutiny, since it found that the statute met the requirements of intermediate scrutiny regardless of the constitutional status of the interest involved. Given the court's considerable deference to Congress's intent to complete the H-3 highway, future challenges to similar congressional exemptions in the Ninth Circuit may prove to be futile.

Hazel Glenn Beh
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[223] 870 F.2d at 1430.