California’s rational basis has lost its bite

Overview

California’s equal protection jurisprudence tells the story of a court that briefly surpassed the federal Supreme Court, only to drift back towards it. Since then, the California Supreme Court has never resolved the core question of how much legislative fiction is tolerable in rational basis cases. That mystery has only become more problematic as the real conflict in many modern equal protection cases is not about rationality, but lawmakers’ sincerity and choice of instrument. California should finish what it started and adopt a purpose-first, means-based rational basis review. This flows from the independent California constitutional principles that once led the California Supreme Court to craft a “rational basis with bite” standard years before the federal court did the same in *Moreno*. Reviving that standard would preserve ordinary deference in most cases, while allowing courts to examine actual purpose and clear disconnects between means and ends.

Analysis

A core problem with equal protection law is that a law’s classification determines scrutiny. In turn, scrutiny determines whether the court assesses the legislature’s actual purpose. Thus, rational basis analysis assumes exactly what plaintiffs would challenge: a lawful purpose. This forces courts in rational basis cases into the fiction of assuming the truth of a stated legislative purpose, or inventing one the legislators may have never considered. Courts badly need a yardstick to measure when intent inquiry is warranted. Rather than promoting judicial activism, a bite analysis would give courts a structured way to identify classifications that appear irrational or pretextual — and then force courts to explain why.

“Rational basis with bite” evolved to solve the purpose problem

Rational basis proceeds from the premise that legislation is presumed to be lawful. Courts ask only whether a government action is “rationally related to a legitimate government interest." [1] This tolerates over- or under-inclusion, and legislatures may act "step by step . . . only partially [ameliorating] a perceived evil."[2] Rational basis does not require courts to examine the rationality of the government's actual purpose.[3] Rather, a federal court plaintiff must negate "every conceivable basis which might support it."[4] Yet ordinary rational basis has no clear answer for cases where the legislature's presumed "legitimate" purpose is challenged, or when the legislature's chosen means are rational but extremely burdensome to a particular class.

"Rational basis with bite" thus emerged as a scholarly explanation for the Warren court's pattern of striking down classifications with rational basis, even where a principled analysis would have upheld the law.[5] Where conventional rational basis tolerates over- and under-inclusion, bite analysis shifts the burden to the state to prove the enactment's rationality, and rejects grossly overinclusive or disproportionately burdensome classifications as irrational.[6] Bite cases see courts engaging with the record to determine the government's actual purpose.[7] And where rational basis does not require identifying an "actual" purpose, courts applying bite may invalidate legislation serving an "illegitimate" government interest.[8]

California developed a bite analysis early, grounding its principles in state constitutional obligations.[9] These cases understood the state charter as means-sensitive and purpose-oriented. The California bite analysis treated a law's purpose and the rationality of its chosen methods as the key questions in all equal protection cases. But for many years the California Supreme Court ignored its unique bite approach. Reviving it would give courts the tools they now lack to address modern rational basis challenges.

Parr **and** ***Moreno*** **demonstrate the competing state and federal approaches to legislative purpose**

The key difference between the federal and California bite analyses is in how each treats evidence of legislative animus towards a class of people. Federal law used animus to explain irrationality; California's bite analysis rejected animus as a first principle.

In *Parr v. Municipal Court*, the California Supreme Court crafted a more-stringent rational basis test two years before the federal high court.[10] *Parr* affirmed a challenge to an anti-loitering and vagrancy ordinance: although the ordinance was facially neutral, there was clear intent to target and criminalize "hippies." The court relied on the city council's explicit "expressions of hostility or antagonism" to find an equal protection violation, regardless of the ordinance's other merits.[11]

Two years later, in *Department of Agriculture v. Moreno* the federal high court invalidated a household size classification for food stamp eligibility based on a similar anti-hippie animus.[12] But unlike *Parr*, *Moreno* evaluated the government's proffered rationales for the food stamp rules. [13] The Court only reached the possibility of animus in *Moreno* after rejecting all of the government's explanations as irrational, leaving the court to conclude that the actual purpose must have been wrongful.[14]

While both decisions sought to account for a classification's actual objective, *Parr* is the more ambitious approach. *Moreno* did not require courts to reckon with purpose; it covered only an especially poor fit between legislation and its ends, and animus alone does not provide separate grounds to invalidate a classification. *Parr* is the reverse — purpose is a threshold issue — and it is the stronger holding for it. *Parr* refused to ignore overt hostility and speculate about legislative purpose, making the *absence* of facial animus the prerequisite for deference.[15] Not only did *Parr* reverse the order of analysis from *Moreno*; it also shifted the burden of overcoming the presumption from the plaintiff to the government.

Merlo expanded California's unique bite principles beyond animus

In the years after *Parr,* the California Supreme Court transformed its insight into a broader constitutional principle: rational basis requires deference but rejects outright fiction. The court introduced a universal, deliberate examination of legislation's "means" and "ends" in all scrutiny tiers. And it developed a workable distinction between a maximally deferential rational basis test and a principled inquiry into legislative intent, all sourced in California's constitution.

In *Merlo,* the court first required at least a modest inquiry into legislators' goals, and "substantial *and* rational relation" between means and ends.[16] The court found "no realistic state purpose" for a law barring automobile passengers from suing drivers for negligence, and that the government's apparent rationales all exceeded "the bounds of rationality."[17] It rejected the federal court's "excessively artificial" rational basis analysis, holding instead that a classification "so grossly overinclusive as to defy notions of fairness or reasonableness" is invalid under the California constitution — regardless of any "totally unrealistic 'conceivable'" purposes one might imagine.[18]

Similarly, in *Newland* the California Supreme Court invalidated a statute barring optometrists from serving on the state bar's board, noting government counsel could identify no rational purpose.[19] The court refused to hypothesize justifications untethered to the record, emphasizing that equal protection requires a "serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals."[20] *Fein* reaffirmed that mandate even while finding for the government. [21] Eschewing federal authority, the court emphasized that the deference accorded to the policymaking branches by the state constitution is not absolute, and courts cannot rely on "fictitious purposes" legislators may have entertained in theory. [22]

These cases all remain good law today. But it's been years since the California Supreme Court has applied them. Instead, the court has increasingly relied on federal rational basis cases, producing two major unresolved questions. As a result, California courts are underprepared to address the current frontier of civil rights cases.

Current California rational basis doctrine has two major unanswered questions

At what stage should actual purpose enter the analysis? It could be a preliminary consideration, as *Parr* would hold. If so, that threshold inquiry should drive the scrutiny selection, along with considering "how" the law classifies. Leaving actual purpose to a final step frustrates the role of purpose in determining a classification's legitimacy. Yet the state high court has repeatedly declined opportunities to clarify this.

Justice Liu flagged this problem in *Barrett*, which upheld procedural disparities in the civil commitment context. The court concluded that the distinction could be rationally attributed to "real differences" without needing to delve into actual purpose.[23] It got there by citing *Heller*, a federal high court decision that applied standard rational basis review.[24] Justice Liu was troubled that a law only explainable by "some latent bias" could escape meaningful scrutiny merely because it could be construed as legislating "real differences." Justice Liu was right: an analysis that forces courts to conjure theoretical justifications before investigating actual purpose will always bar them from considering an actual bias conclusion. Had the *Barrett* legislators obviously acted with animus, the state constitution could have required an examination of actual purpose — but the theorizing in *Barrett* and in *Heller* never reaches that question.[25]

The other major unknown is what constitutes sufficient evidence of an "illegitimate" purpose. *Parr,* for instance, remains an obvious citation for lower courts faced with truly brazen antipathy.[26] But what about a modern version of *Moreno* — would the California Supreme Court invalidate a law if all the government's explanations are irrational? For the rest of the state's bite precedent to be of any practicable use, the state constitution must be understood to set some lower bar. That's a particularly pointed inquiry for a court reliant on federal equal protection precedent. So far, the state high court has not furnished a straight answer.

In *Warden,* the California court at least suggested that the "*absence* of legislative facts" cannot be used to infer "less lofty considerations constituted the actual motivation."[27] And in *Johnson*, it reversed its earlier holding in *Hofsheier* that no rational basis supported a distinction between certain sex offenders.[28] Yet the

Johnson court concluded that subsequent legislative developments supplied a rational basis for preserving the disparity. The takeaway would be that the law was unconstitutional when enacted, but it's fine now — except the decision is unclear about whether newly-arisen legislative purposes can redeem old, otherwise-irrational classifications.[29] The court expressly declined to clarify how the state and federal tests interrelate.[30]

After *Warden* and *Johnson* it is perhaps clear that animus must be affirmative and ongoing. But there still is no clear guidance on when a court can consider animus, and what it can consider when it does. As long as "illegitimate" purpose remains defined largely in the negative, California's equal protection doctrine will remain in tension with the line set in *Parr*.

The solution is a burden-shifting bite analysis

California can synthesize and adapt its older bite jurisprudence for present-day contexts by adopting a burden-shifting framework. This would create an intermediate scrutiny tier incorporating the "legislative purpose" and "rational relation" inquiries deployed in *Parr*, *Merlo*, and their progeny. Such a framework would allow California courts to identify and resolve cases that are inappropriate for deferential rational basis or strict scrutiny.

Regardless of how a law classifies, California equal protection should look to actual purpose as a first principle. Regardless of how a law classifies, an equal protection challenge under the state constitution should always reject completely fictitious legislative purposes.[31] Thus, questions of legislative purpose must be resolved before the classification question. The state high court should therefore articulate a threshold requirement for the government to provide an actual purpose, and for the plaintiff to identify the presence of bite triggers such as animus.[32]

This preliminary showing formalizes the early California bite principle that the state constitution rejects an abstract assessment of government intention.[33] The doctrinal challenge here is to reconcile that principle with the *Johnson* majority's requirement that plaintiffs eliminate "every conceivable purpose."[34] *Merlo* and *Newland*, read together, provide a solution: an asserted governmental purpose requires some grounding in evidence to be "*realistically* conceivable," as that term is understood under the state charter.[35] This initial step would allow courts to account for pretext or animus — and avoid *Moreno's* reliance on legal fictions for doing so.[36] Evidence of a bite trigger could be limited to that which is substantial (*Merlo*), affirmative (*Newland; Warden*), and contemporary (*Johnson*).[37]

This initial stage would also build a record for the new bite tier, with two deviations from basic rational basis. Plaintiffs have an opportunity, as in *Parr,* to defeat a classification when overwhelming evidence suggests animus was the primary motivation.[38] And courts would employ a balancing exercise modeled on *Merlo* to evaluate means-end fit.[39] Both are lenses into intent that balance competing concerns about deference to legislative policy creativity and fears for disfavored groups.

Plaintiffs bear the initial burden to trigger bite

To trigger this closer-but-not-strict scrutiny, the plaintiff would face an initial burden to provide affirmative evidence towards two points: to dispute the rationality of the government's claimed purpose, and to furnish an alternative explanation. If the weight of the evidence suggests that animus was the primary motivation, and the government provides no comparable evidence in support of a legitimate intent, the inquiry ends and the plaintiff prevails.[40] This resolves the tension between *Parr* — where the government failed to persuasively present another purpose that outweighed the classification's animus — and *Johnson*, where despite a noted animus in the classification's origin, the legislature proved the law's continued utility.[41]

Once triggered, bite requires more stringent balancing of means and ends

If the plaintiff succeeds in triggering bite scrutiny, but animus is found to coexist with a "good motive" or falls short of the standard to invalidate the legislation in the first instance, the court can evaluate the means–end fit.[42] As in existing heightened scrutiny tiers, plaintiffs could contest the legislature's means–end fit by proposing a less discriminatory alternative, demonstrating the law's over- or under-inclusiveness, or furnishing evidence disputing whether its ends are legitimate. Rather than the typically insurmountable presumption that the legislation is "rational," the court would be tasked with a more deliberative fact-driven inquiry into whether the legislature's approach "exceeds the bounds of rationality," in light of the whole record. This preserves the outcome of *Merlo* and *Fein*, while keeping a degree of presumed validity for government action.[43]

A practical example: a formalized bite analysis solves for *Skrmetti's* "excessively artificial" rational basis

Making a bite analysis available would better equip California courts to analyze anti-transgender legislation. This is necessary because California's contemporary reversion to the federal "excessively artificial" rational basis analysis has left the state courts unprepared to grapple with such legislation. As seen in *Skrmetti*, that federal approach suffers from two key problems.[44]

One problem is that federal rational basis outcomes are still predetermined largely by the level of scrutiny chosen.[45] The Supreme Court's decision in *Skrmetti* turned precisely on this technicality, finding Tennessee's ban on puberty blocker prescriptions classified based not on sex, but on medical purpose and age. The court thus avoided examining legislative motivations. Current law would provide the same result in California, despite California's expanded list of suspect classes.[46] Given the modern state high court's uncritical application of federal rational basis law, it is easy to imagine a California version of the Tennessee law evading review with a simple citation to *Skrmetti*.[47]

Even worse, a court looking to actual legislative purpose might still find anti-transgender legislation rationally related to some other legitimate goal. In *Skrmetti* the court accepted Tennessee's account of its legislature's speculation that puberty blockers prescribed to treat gender dysphoria pose unique risks — despite medical consensus that puberty blockers are safe.[48] A court applying bite analysis could have delved into the evidence before the state legislature, potentially finding Tennessee's abstract speculation to be constitutionally problematic. Instead, a California court applying *Skrmetti* would be required to accept the legislature's conclusion, no matter how untethered from the relevant science.

But a California court armed with a bite analysis could reject such a "totally fictionalized" purpose and quickly dispose of provably ill-intended legislation like that in *Skrmetti.* Government counsel would face an initial burden to furnish the legislature's actual purpose. A plaintiff could then introduce evidence of animus or pretext to dispute that purpose, and the court could weigh those competing showings. If the evidence of improper motivation is overwhelming — such as if legislators exclusively referred to the law as a classification on transgender status (rather than one of age or diagnosis) or made frequent reference to speculative transphobic rhetoric — the court could cite *Parr* to end the inquiry.

Even if legislation is drafted to carefully avoid a sex classification, the plaintiff could dispute the government's claimed purpose and trigger bite scrutiny by producing evidence of animus. Only then would a court set out to determine how the legislation classifies, to evaluate the law for a *Merlo* means-end fit and to determine if it "lacks rationality."[49] A plaintiff in California could, for instance, identify the well-documented safety profile of puberty blockers when treating other conditions to rebut the government's claimed purpose, especially if such evidence was ignored by legislators.[50] Under a traditional rational basis review that evidence would be irrelevant. But with bite, a plaintiff would have a meaningful opportunity to challenge legislation that survives only by dodging explicit sex classification.

A formalized bite is compatible with separation of powers principles

One critique of a bite analysis flows from the separation of powers. The concern is that a court empowered to challenge any sort of classification could overstep into judicial activism. But this concern is even more grave, given the current confused state of rational basis doctrine:The danger in rational basis with bite is not that courts sometimes inquire into legislative purpose; California law already permits them to do so. The danger is that courts lack a principled framework for deciding when that inquiry is appropriate. Compared to a clear rule, the status quo arguably permits greater judicial discretion and produces arbitrary results. Adopting a bite analysis would avoid those problems while preserving the general principle that irrational or antipathetic classifications offend the state charter.

The state high court's shift from *Hofsheier* to *Johnson* illustrates this point. A significant issue that the *Johnson* majority took with *Hofsheier* was that it had been misapplied as precedent in various contexts with no discussion of purpose — much less the identification of an invidious or irrational intent.[51] The *Hofsheier* majority did not discuss animus or rely on it explicitly in its reasoning. [52] But its factfinding revealed that the classification originated in a perception that oral sex was uniquely immoral because of its association with homosexuality. With a clearly bounded bite analysis available, the *Johnson* decision could have avoided the absurd result of validating an admittedly prejudicial law, or at least limited *Hofsheier* to its facts. Other classifications void of animus and with a sufficient government purpose, then, could have been upheld without calling into question the value of California's bite principles.

Formalizing a bite analysis can improve correspondence between the judiciary and legislature. An irony emerges from *Johnson*: despite the court's inference that the legislature intended to keep its disparate sentencing scheme, the legislature responded by codifying *Hofsheier* and amending the scheme.[53] The legislative findings discussed the two opinions, aligned the legislature's position with that of *Hofsheier*, and said that the classification reflected an animus no longer in line with its contemporary values.[54] A means-oriented rational basis analysis, placing the court in the role of a factfinder, could likewise play a positive role in prompting legislative action. In contrast to a fictionalized approach, judicial sensitivity to actual purpose engages the constitution to continually align oft-neglected legislation with evolving values.

Conclusion

Tensions abound in California's rational basis doctrine. Although in the recent past the state high court suggested that California equal protection law aligns with federal doctrine, the court has never expressly linked California and federal law. Nor has it reconciled its California-specific cases with federal law. The solution is to revive the rational basis with bite analysis that has long existed in California Supreme Court cases. The bite principles from those cases still recur, even in recent decisions relying on the federal rational basis test. Resolving this tension by formalizing a burden-shifting framework would make this area of the law better suited to modern statutory drafting strategies. A bite analysis is compatible with the policy goal of limiting judicial activism and could foster a cooperative relationship between courts and lawmakers.

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Olivia Grimes is a third-year student at Berkeley Law.

1. *Compare New Orleans v. Dukes* (1976) 427 U.S. 297, 303 (quoted) with *People v. Cannon* (2025) 18 Cal.5th 497, 517. ↑
2. *New Orleans v. Dukes* (1976) 427 U.S. 297, 303. ↑
3. *See Heller v. Doe by Doe* (1993) 509 U.S. 312, 320. ↑
4. *Id.* ↑
5. *See Gerald Gunther, Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection* (1972) 86 Harv. L. Rev. 1, 2*; see also Gayle Lynn Pettinga, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name* (1987) 62 Ind. L.J. 779. ↑
6. Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?* (2015) 90 N.Y.U. L. Rev. 2070, 2075. ↑
7. *Id.* ↑
8. *Id.* ↑
9. *Brown v. Merlo* (1973) 8 Cal.3d 855, 866–67. ↑
10. *Contrast Parr v. Municipal Court* (1971) 3 Cal.3d 861, *with Department of Agriculture v. Moreno* (1973) 413 U.S. 528 ↑

11. *Parr*, 3 Cal.3d at 864–65. ↑

12. *Moreno*, 413 U.S. at 538. ↑

13. *Id.* at 534. ↑

14. *Id.* ↑

15. *See Parr*, 3 Cal.3d at 864–66. ↑

16. *See Merlo*, 8 Cal.3d at 866, 882. ↑

17. *Id.* at 865, 877–80 ↑

18. *Id*. at 865 n.7, 877. ↑

19. *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711. ↑

20. *Id.* ↑

21. *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 163–64. ↑

22. *Id.* ↑

23. *People v. Barrett* (2012) 54 Cal.4th 1081, 1111–13. ↑

24. *Heller*, 509 U.S. at 321–26. ↑

25. *See id.* ↑

26. *See, e.g., Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1019–20 (following *Parr* to invalidate ballot measure barring public funding of any organization that "promotes, encourages, endorses, legitimizes or justifies homosexual conduct," including by providing support services to HIV positive patients. Noting "all that is lacking is a sack of stones for throwing."). ↑

27. *Warden v. State Bar of California* (1999) 21 Cal.4th 628, 649 (emphasis added, internal quotations omitted). ↑

28. *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874, 887 n.9 (quoting *Heller*, 509 U.S. at 320). ↑

29. *See id.*; *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1202, 1213 n.5, overruled by *Johnson*, 60 Cal.4th 871, 887. *But see Merlo*, 8 Cal.3d at 872 (recognizing "a classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered"). ↑

30. *Johnson*, 60 Cal.4th at 881 ("Here, as in *Hofsheier*, there is no reason to suppose that analysis under the federal equal protection clause would lead to a result different than that obtained under a state clause analysis."). ↑

31. *See Merlo*, 8 Cal.3d at 866. ↑

32. For a more comprehensive discussion of other bite "triggers," *see generally* Raphael Holoszyc-Pimentel, 90 N.Y.U. L. Rev. 2070, 2075. ↑

33. *Newland*, 19 Cal.3d at 711. ↑

34. *Johnson*, 60 Cal.4th at 881. ↑

35. *See Merlo*, 8 Cal.3d at 865–66; *Newland*, 19 Cal.3d at 711. ↑

36. *Compare Parr v. Municipal Court* (1971) 3 Cal.3d 861, *with Department of Agriculture v. Moreno* 413 U.S. 528. ↑

37. *See Newland*, 19 Cal.3d at 711; *Merlo*, 8 Cal.3d at 866; *Johnson*, 60 Cal.4th at 879*; Warden*, 21 Cal.4th 628, 649. ↑

38. *Parr*, 3 Cal.3d at 864. ↑

39. *Merlo*, 8 Cal.3d at 882. ↑

40. *Parr*, 3 Cal.3d at 864 ↑

41. *Contrast id. with Johnson*, 60 Cal.4th at 879. ↑

42. *Cf. Merlo*, 8 Cal.3d at 882 ↑

43. *See id.* at 877; *Fein*, 38 Cal.3d at 163–64. ↑

44. *United States v. Skrmetti* (2025) 605 U.S. 495, 511. ↑

45. *See* Gunther, 86 Harv. L. Rev. at 8. ↑

46. *Cf. Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d at 1 (subjecting sex classification to strict scrutiny under the state constitution); *see also In re Marriage Cases* (2008) 43 Cal.4th 757, 844 (declining to create an intermediate scrutiny tier specifically for sex classifications). ↑

47. *Cf. Barrett*, 54 Cal.4th at 1112 (following the federal high court's about-face on whether individuals with disparate mental capacities are "similarly situated"). ↑

48. *Skrmetti*, 605 U.S. at 524–25. ↑

49. *See Merlo*, 8 Cal.3d at 880. ↑

50. *See, e.g.,* Anna Miroshnychenko, Yetiani Roldan, Sara Ibrahim, Chan Kulatunga-Moruzi, Steven Montante, Rachel Couban, Gordon Guyatt, & Romina Brignardello-Petersen, *Puberty blockers for gender dysphoria in youth: A systematic review and meta-analysis*, (2025) Archives of Disease in Childhood 429–36. ↑

51. *See Johnson*, 60 Cal.4th at 880 n.5. ↑

52. *See generally Hofsheier.* ↑

53. SB 145, 2019–20 Leg. Sess. (Cal. 2019). ↑

54. "Sex offenders: registration:" hearing on SB 145 Before Assemb. Comm. on Pub Safety, 2019 Leg. 6 (Cal. Jul. 9 2019). ↑