Montana Law Review

Volume 48
Issue 1 *Winter 1987*

Article 8

January 1987

Butte Community Credit Union v. Lewis: A New Constitutional Standard for Evaluating General Assistance Legislation

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CASENOTES

BUTTE COMMUNITY UNION V. LEWIS: A NEW CONSTITUTIONAL STANDARD FOR EVALUATING GENERAL ASSISTANCE LEGISLATION

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I. INTRODUCTION

In 1985 the Montana Legislature enacted a comprehensive revision of general assistance eligibility requirements.[1] The new law declared that able-bodied persons under the age of thirty-five having no dependent minor children living with them would no longer be eligible for general assistance.[2] Able-bodied persons between the ages of thirty-five and forty-nine were eligible for general assistance for no more than three months each year.[3] The bill placed no similar restrictions on the eligibility of able-bodied persons over the age of forty-nine. In *Butte Community Union v. Lewis*,[4] the Montana Supreme Court held this law unconstitutional. A coalition of groups representing general assistance (GA) recipients filed suit[5] challenging the statute on two state constitutional grounds.[6] Plaintiffs argued first that the law violated the constitutionally guaranteed right to welfare for the aged, infirm, or unfortunate set forth in the Montana Constitution.[7] Second, plaintiffs argued that

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1. H.B. 843 (1985 Mont. Laws 670).
2. *Id.* at ch. 670 § 4(3).
3. *Id.* at ch. 670 § 10(2).
4. ___ Mont. ___, 712 P.2d 1309 (1986).
5. In addition to the Butte Community Union, Plaintiffs/Respondents included the Rocky Mountain Development Council; Human Resources Development Council District #12 and #13; God's Love, Inc.; the Montana State AFL-CIO; and Montana Legal Services Association. Two *Amicus Curiae* briefs in support of Plaintiffs/Respondents were filed, one by the Montana Catholic Conference and the other on behalf of the Butte Ministerial Association; the city of Anaconda, Montana; the city of Walkerville, Montana; the International Union of Operating Engineers, Local 375, Butte, Montana; the National Coalition for the Homeless; and the Woman's Lobbyist Fund.
6. This article does not deal with two other issues assigned for review: (1) whether the district court used an incorrect standard for issuing the preliminary injunction, and (2) whether H.B. 843 violated the Montana Human Rights Act.
7. Brief for Respondents at 25, 39-51. MONT. CONST. art. XII § 3(3) provides: "The legislature shall provide such economic assistance and social and rehabilitative services as

the law violated the right to equal protection of the laws guaranteed by the Montana Constitution.[8]

The Montana Supreme Court ruled that the Montana Constitution did not establish a fundamental right to welfare.[9] The court did however conclude that H.B. 843 established an impermissible, discriminatory classification which denied equal protection. Applying for the first time the "middle-tier" standard of review, the court struck H.B. 843 as unconstitutional.[10]

After the *Butte Community Union* decision, the forty-ninth Legislature's June 6, 1986 special session enacted House Bill Number 33.[11] This legislation eliminated the age classifications in H.B. 843 and limited able-bodied persons who do not have dependent minor children to two months of general assistance benefits per year.[12] A supplemental complaint has been filed challenging the new law.[13] On June 18, 1986, the court handed down its decision in *Deaconess Medical Center v. Department of Social and Rehabilitation Services*.[14] Applying the middle-tier test, the court upheld income limitations on GA recipients.

This note will begin with a brief overview of middle-tier review. It will then discuss how the Montana Supreme Court developed its own unique test and its application to H.B. 843. After introducing *Deaconess*, it will conclude by comparing the *Butte Community Union* and *Deaconess* decisions, offering some conclusions as to the constitutionality of H.B. 33.

II. LEGISLATIVE AND JUDICIAL HISTORY

Butte Community Union filed a complaint in February of 1984 seeking a preliminary injunction preventing implementation of Department of Social and Rehabilitative Services (SRS) proposed

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may be necessary for those inhabitants who, by reason of age, infirmity, or misfortune may have need for the aid of society."

8. Brief for Respondents at 52-53. MONT. CONST. art. II, § 4 provides:

> Individual dignity. The dignity of the human being is invaluable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

9. *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1311-12.

10. *Id.* at ___, 712 P.2d at 1313-14.

11. H.B. 33, 49th Leg. 2d Spec. Sess. (1986 Mont. Laws 10 §§ 1-8) [hereinafter "H.B. 33"] amended MONT. CODE ANN. §§ 53-3-108, -109, -205, -206, and -209.

12. *Id.* at § 1.

13. Butte Community Union v. Lewis, No. 50268 (1st Jud. Dist., original complaint filed Feb.14, 1984, motion to file supplemental complaint filed Aug. 11, 1986, motion granted Nov. 5, 1986).

14. ___ Mont. ___, 720 P.2d 1165 (1986).

regulations establishing aid to families with dependent children (AFDC) guidelines as the guidelines for determining GA benefits.[15] On June 29, 1984, the District Judge Arnold Olson issued the preliminary injunction.[16] The Montana Legislature enacted House Bill 843 which eliminated GA payments to able-bodied individuals under thirty-five who have no minor dependent children and substantially restricted GA payments to able-bodied individuals between thirty-five and fifty who have no minor dependent children.[17]

Butte Community Union then amended its original complaint challenging H.B. 843 as unconstitutionally restricting or denying GA benefits to able-bodied individuals with no minor dependent children.[18] The trial court issued a preliminary injunction on the date that H.B. 843 was to take effect, July 1, 1985.[19] After hearing and briefing, Judge Olson held that the provision of the Montana Constitution established a fundamental right to welfare "for those who by reason of age, infirmities or misfortune may have need for the aid of society."[20] Judge Olson held further that the respondents raised serious questions as to whether H.B. 843 established an impermissible discriminatory classification, denying constitutional guarantees of equal protection.[21] The court issued a preliminary injunction; SRS appealed to the Montana Supreme Court.[22]

III. EQUAL PROTECTION

Equal protection ensures that the law treats similarly situated individuals in a similar manner.[23] It requires, at a minimum, that individuals be treated equally in the exercise of their fundamental rights and that the classifications used to allocate other rights not be based on unconstitutional criteria.[24]

Whenever classifications are drawn and challenged, the United States Supreme Court has traditionally evaluated the bases upon which the legislature has distinguished between individuals, identi-

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15. *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1310.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at ___, 712 P.2d at 1311.
23. *See generally* Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). *See also* J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 523-43, 790-93 (3d ed. 1983).
24. NOWACK, ROTUNDA & YOUNG, *supra* note 23, at 587.

fying potentially impermissible classifications, e.g., race, gender. The court has determined this by applying one of three tests: rational basis,[25] strict scrutiny or compelling interest,[26] and mid-level review. The constitutionality of a classification depends upon both the purpose which the court attributes to the legislative act and the relationship it believes obtains between the asserted governmental end and the classification.[27] Classifications can relate to governmental ends in any one of five ways.[28]

The *Butte Community Union* court quickly resolved the fundamental right issue and shifted attention to the classification, declaring:

> [T]hat the Montana Constitution does not establish a fundamental right to welfare for the aged, infirmed or misfortunate. However, because the constitutional convention delegates deemed welfare to be sufficiently important to warrant reference in the Constitution, we hold that a classification which abridges welfare benefits is subject to a heightened scrutiny under an equal protection analysis . . . .[29]

The heightened analysis the court called for is middle-tier scrutiny.

The U.S. Supreme Court has only applied this controversial intermediate standard of review in gender discrimination cases.[30]

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25. If the court invokes the rational relationship test it will ask only whether the classification bears a rational relationship to an end of government which is not prohibited by the Constitution. "So long as it is arguable that the other branch of government has such a basis for creating the classification, a court will not invalidate the law." NOWACK, ROTUNDA & YOUNG, *supra* note 23, at 530. This test gives a strong presumption of constitutionality to government acts.

26. Under the strict scrutiny standard the court requires the government to show a "compelling or overriding end"—one whose value is so great that it justifies the limitation of fundamental constitutional values. *Id.* The court will uphold the classification only if it is necessary to promote that compelling interest. *Id.* A statute is subject to the strict scrutiny test when it affects any of the people who are known as "suspect classes" or when the statute inhibits the exercise of any "fundamental rights." *Id.* at 531.

27. NOWACK, ROTUNDA & YOUNG, *supra* note 23, at 528-29.

28. NOWACK, ROTUNDA & YOUNG, *supra* note 23, at 526, *citing* Tussman and tenBroek, *supra* note 23 at 367. The classification can be (1) perfect, treating similar persons similarly; (2) totally imperfect, including the wrong class and excluding the class legitimately relating to the purpose of the statute; (3) under-inclusive, including some who legitimately relate while excluding some similarly situated; (4) over-inclusive, including all who legitimately relate to the statute's purpose and more; and (5) a mixture of under- and over-inclusions.

29. *Butte Community Union*, ___ Mont. ___, 712 P.2d 1311.

30. Reed v. Reed, 404 U.S. 71 (1971) (sex may not be the basis for determining whether an individual is able to be an executor of an estate); Craig v. Boren, 429 U.S. 190, 197 (1976) (nor whether an individual is mature enough to drink alcoholic beverages). The *Butte Community Union* court noted that the latter case adopted "the middle-tier of review for analyzing gender-based discrimination." *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1312.

The classification created must be "substantially related" to an "important governmental objective."[31] The U.S. Supreme Court has never held, in a majority opinion, that there is any right to receive subsistence payments or welfare benefits of any kind. The Court calls such programs general economic and social welfare measures and reviews them under the rational basis standard.[32] The Court has left the states to determine the criteria for granting these benefits.[33]

IV. BUTTE COMMUNITY UNION V. LEWIS

The Montana Supreme Court began its analysis by noting that traditional equal protection analysis has been two-tiered.[34] Since the classification under review neither infringes on a fundamental right nor involves a suspect classification, the state needed only show "something less than a compelling state interest in order to limit" the welfare benefit.[35] Rational basis has been the standard applied in this situation. The court implied that this test was too easily satisfied and that a stricter one was needed. The court also reviewed some relevant commentary.[36] Case law from other jurisdictions provides little assistance in this area.[37]

Making clear its intent "not [to] be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state

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31. *Craig*, 429 U.S. at 197.

32. The Court has refused to employ the strict scrutiny standard to review welfare statutes. It overturned a recent state supreme court decision holding that economic legislation violated the equal protection clause. *Idaho Dep't of Employment v. Smith*, 434 U.S. 100 (1977) (per curiam). The disputed statute denied unemployment benefits to otherwise eligible persons if they attended school during the day. Since the statute neither abrogated any "fundamental right" nor affected any "suspect class" the U.S. Supreme Court applied the rational relationship test, holding that it was social welfare and economic legislation.

33. *See* Dandridge v. Williams, 397 U.S. 471 (1970) discussed in text accompanying notes 40-46 *infra*.

34. *See supra* notes 28 & 29.

35. *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1312.

36. The court referred to Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17-20 (1972) for problems associated with the two-tier system. *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1312. It also cites Nowack, *Realigning the Standards of Review under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1082 (1974) for the proposition that the middle-tier test is "a 'demonstrable basis standard of review' where the government must show a factual basis for the discrimination." *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1312-13.

37. Only New York has a constitutional provision similar to MONT. CONST. art. XII, § 3(3). *See* Tucker v. Toia, 43 N.Y.2d 1, 371 N.E.2d 449 (Ct. App. N.Y. 1977). *See also* Brief for Respondent, Appendix J, Cases from Other Jurisdictions Support the Right to General Assistance.

constitution"[38] the court quotes Justice Sheehy:

> "[T]hus, states may interpret their own constitutions to afford greater protections than the Supreme Court of the United States has recognized in its interpretations of the federal counterparts to state constitutions . . . . Federal rights are considered minimal and a state constitution may be more demanding than the equivalent federal constitutional provision."[39]

The court found its source for the new test primarily in the dissent of Justice Marshall in *Dandridge v. Williams*.[40] In that case the United States Supreme Court denied fundamental right status to welfare benefits. Justice Marshall proposed in dissent a mid-level review "balancing test."[41] The Court upheld a Maryland maximum grant provision that limited aid to families with dependent children (AFDC). The statute fixed an upper limit on the number of children for which any family could receive subsistence payments.[42] The majority applied the rational relationship test, stating that although the classification "involves the most basic economic needs of impoverished human beings . . . we can find no basis for applying a different constitutional standard."[43] Justice Marshall dissented, taking the position that the " 'mere rationality' test" while well suited for testing economic and business regulations, should not be applied to the interests of the poor in basic assistance.[44] Marshall argued that the vital interests of a powerless minority at stake in this case clearly distinguish it from the business regulation equal protection cases. For this reason the majority erred in relegating the issue into " 'the area of economics and so-

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38. *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1313.

39. *Id.* (quoting Pfost v. State, ___ Mont. ___, ___, 713 P.2d 495, 500 (1985)) (citations omitted). The Montana Supreme Court affirmed this view in State v. Johnson, ___ Mont. ___, ___ P.2d ___, 43 St. Rptr. 1010, 1017 (1986). " 'This court need not blindly follow the United States Supreme Court when deciding whether a Montana statute is constitutional pursuant to the Montana Constitution . . . .' " ___ Mont. ___, ___ P.2d ___, 43 St. Rptr. 1010, 1017 (1986) (citing *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1313). In the following sentence the *Butte Community Union* court directs attention to Justice Brennan's dissent in Idaho Dep't of Employment v. Smith, 434 U.S. 100, 103 (1977), which advocated allowing Idaho to determine whether its constitution allowed the classification. The court then cited his article, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

40. 397 U.S. 471.

41. As will be noted, Justice Marshall has consistently advocated a balancing approach. *See, e.g., Dandridge*, 397 U.S. at 508-30 (Marshall, J., dissenting); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21, (1976) (Marshall, J., dissenting).

42. *Dandridge*, 397 U.S. at 474.

43. *Id.* at 485.

44. *Id.* at 520 (Marshall, J., dissenting) (quoting Williamson v. Lee Optical Co., 348 U.S. 483 (1955)). Justice Brennan joined with Justice Marshall in the *Dandridge* dissent.

cial welfare.' "[45] Marshall concludes that these cases require the Court to consider the facts and circumstances behind the law, as well as the interests of both the State and those disadvantaged by the classification. Justice Marshall's views have given rise to a variety of academic justifications for a third standard of review under the equal protection guarantee.[46] The *Butte Community Union* court touched on Marshall's proposed test. "[C]oncentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[47] Citing the need to develop a meaningful middle-tier analysis, the court concluded that there should be a balancing of the rights infringed and the governmental interests to be served by such an infringement. It then announced its own middle-tier test for determining whether H.B. 843 violated the Montana Constitution.[48] The test required the state to show that H.B. 843 satisfied two criteria to suit the Montana Constitution: (1) that the classification of welfare benefits on the basis of age is reasonable; and (2) that its interest in classifying welfare recipients on the basis of age must be more important than the people's interest of obtaining welfare benefits.[49] The state did not show that those under the age of fifty are more capable of surviving without assistance than those over fifty.[50] The statutory classification based on age therefore arbitrarily failed to satisfy the first part of the test. Balancing the interests of the individuals affected against those of the state, the court determined that the classification failed to satisfy the second part of the test as well, ruling that the "trial record does not show the State to be in such a financially unsound position that the welfare benefit, granted constitutionally, can be abrogated."[51]

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45. *Id.* at 520 (Marshall, J., dissenting).

46. *See* Simpson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977); Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89; Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C.L. REV. 1 (1978). Especially helpful is Spece, *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 So. CAL. L. REV. 1281 (1978), for analyzing the difficulty of applying tests in areas where government regulates activity not considered "fundamental rights."

47. *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1313 (quoting *Dandridge*, 397 U.S. at 520-21 (Marshall, J., dissenting)).

48. *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1314.

49. *Id.*

50. *Id.*

51. *Id.*

V. Subsequent Application of the Middle-Tier Test

The court applied the middle-tier test a second time in *Deaconess Medical Center, Inc. v. Department of Social and Rehabilitative Services.*[52] That case concerned Montana's system for providing medical care for those unable to afford private medical insurance. Plaintiffs contended that Montana's statutory income limitations violated the state constitutional guarantee of assistance for the medically needy.[53] The court held that the statutory and county income limitations were constitutional.

The legislature by statute established a county medical assistance program supervised by SRS. Eligibility criteria were established by the county board and approved by SRS.[54] The Petroleum County plan contained a much lower income limitation than the ceiling income in the statute.[55] The statutory income ceiling standard was two and one-half times greater than the income limitation in the county plan. Because of this difference the court reviewed the income limitation.

Plaintiff provided $10,000 in medical care to Zane Wymore, who was uninsured and unable to pay. Wymore applied for county medical assistance. His unemployment compensation of $740 per month *exceeded* the county standard of $564 per month. The county denied assistance to Wymore.

Deaconess contended that the statute's denial of benefits to those with incomes in excess of 300% of the GA standard violated the Montana Constitution and equal protection guarantees of the state and federal constitutions. The court decided to test the classifications contained in the statute and the plan under the middle-tier analysis adopted in *Butte Community Union.*[56]

Deaconess argued that denials of medical benefits based solely on income are unreasonable and therefore do not pass the first

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52. ___ Mont. ___, 720 P.2d 1165.

53. *Id.* at ___, 720 P.2d at 1166. The plaintiff based its claim on Mont. Const. art. XII, § 3(3), the same general assistance provision construed in *Butte Community Union.*

54. Mont. Code Ann. § 53-3-103(3) (1985) establishes the following income limitation eligibility criteria:

> The department may promulgate rules to determine under what circumstances persons in the county are unable to provide medical aid and hospitalization for themselves, including the power to define the terms "medically needy." However, the definition may not allow payment by a county for general assistance-medical for persons whose income exceeds 300% of the limitation for obtaining regular county general relief assistance . . . .

55. "The maximum gross income level for an applicant or recipient is . . . current AFDC [Aid to Families with Dependent Children] benefit standard for family of same size." *Deaconess*, ___ Mont. at ___, 720 P.2d at 1114.

56. *Id.* at ___, 720 P.2d at 1168.

prong of the test. The court noted that the statute sets the maximum income at three times the income limitation for GA, "twice again as much income beyond that needed for basic necessities by which a party can purchase medical insurance and pay other medical bills."[57] It was therefore reasonable to assume that a person with an income three times the GA level is not medically indigent. The income limitation passed the reasonableness test.

The court then examined the interests of the state in limiting the receipt of medical assistance based on income. Without a limit, there would be no incentive for anybody to purchase medical insurance. Given the high cost of medical care, most uninsured parties would be unable to pay their medical bills. Requiring the state to provide medical assistance to all who apply would be unreasonable. "The State cannot afford to become the medical insurer for individuals who can afford their own medical insurance."[58] Balancing these interests against the interests of the recipients the court pointed out that people with an income more than 300% of the GA level "can reasonably be expected to obtain their own insurance."[59] The state's interest *outweighs* the interest in obtaining benefits by those whose incomes exceed the limitation. The statute passed middle-tier scrutiny.[60]

VI. The Legislative Response to Butte Community Union

The Montana Legislature convened in a special legislative session in June of 1986.[61] The legislature adopted an alternative measure in light of the *Butte Community Union* decision. That measure, H.B. 33,[62] deleted all references to the unconstitutional age classifications of H.B. 843 and added: "(3) The legislature, in recognition of the need to expand the employment opportunities available to able-bodied persons *who do not have dependent minor children*, will provide 2 months of general relief so that such able-bodied persons may be eligible for the job readiness training authorized in 53-3-304(3)."[63] Section 5 of the bill amended section 53-3-205(2) of Montana Code Annotated to read: "(2) Able-bodied persons . . . *without dependent minor children living in the household* are eligible for no more than . . . 2 months of non-med-

57. *Id.*
58. *Id.* at ____, 720 P.2d at 1169.
59. *Id.*
60. The court's application of middle-tier scrutiny to the county plan is omitted.
61. *Deaconess* was decided on June 18, 1986.
62. H.B. 33, 49th Leg. 2d Spec. Sess. (1986 Mont. Laws).
63. *Id.* at § 1(3) (emphasis added).

ical general relief assistance within any 12-month period, except that assistance received prior to November 1, 1986 shall not be counted."[64] This approach re-classified GA recipients into two groups: (1) able-bodied individuals *with* minor dependent children and the infirm; and (2) able-bodied individuals *with no* minor dependent children.

H.B. 33 has been challenged on essentially the same grounds alleged in *Butte Community Union*. A hearing date has been set for November 17, 1986. The case will undoubtedly be appealed to the Montana Supreme Court. The court will face the task of evaluating the new law in light of the *Butte Community Union* and *Deaconess* determinations and the "middle-tier" level of scrutiny enunciated, looking to the purpose of the legislation by applying the two part test. A finding that H.B. 33 is constitutional requires the state to demonstrate two factors: (1) that its classification of GA recipients by able-bodiedness and presence of dependent children is reasonable, and (2) that its interest in classifying GA recipients by able-bodiedness and presence of dependent children outweighs the interest of those excluded from obtaining welfare benefits.

VII. ANALYSIS

The *Deaconess* decision upheld a classification based on income limitations. The *Butte Community Union* decision struck down a classification based on age. An analysis of the difference between the two decisions should reveal general rules for construction of Montana's constitutional guarantee of general assistance.

Most of the *Butte Community Union* decision was devoted to background justification for adoption of the middle-tier approach. It was remarkably short on analytical application of the test to the classifications in question. The court devoted only two short paragraphs to the task of excising the age classification. The opinion was silent on the able-bodiedness and parental status classifications. The state did not show that those under fifty were more capable of surviving without assistance that those over fifty. Nor did it demonstrate that the interests of the individuals affected outweighed those of the state. If the court balanced the financial soundness of both, it would appear at first blush that the state's interests could never outweigh those of the recipients.

Deaconess stands for the proposition that income limitations permissibly restrict individuals from GA benefits. The court de-

64. *Id.* at § 5(2) (emphasis added).

ferred to the legislature's ability to determine the level of benefits, provided that limitation meets equal protection requirements. Recall that if there were no ceiling, the very purpose of providing GA would be defeated. The state would go broke paying benefits to those who can afford to live without them. The interests of the state outweigh the interests of the individuals whose incomes exceed the reasonable limitations. People with an income more than 300% of the GA level "can reasonably be expected to obtain their own insurance."[65] The state's interest in limiting medical assistance to those with incomes less than 300% of the limitation for GA *outweighs* the interest in obtaining benefits by those whose incomes exceed the limitation. State interests can outweigh individual ones.

The difference between the two classifications is simple. Income limitations constitute a reasonable eligibility requirement because they effectuate the purpose of the legislation. GA is intended to supplement the incomes of those who have actual need. Income limitations filter out those who do not have actual need as established by the legislature. Age classifications arbitrarily screen some persons who have actual need, denying these individuals equal protection.

H.B. 33 treats members of the same class differently: able-bodied persons without dependent minor children are eligible only 2 months a year, while able-bodied individuals with dependent minor children and the infirm are eligible 12 months a year. The legislature simply eliminated the constitutionally offensive age classification.

The court, by creating the middle-tier test, acknowledged that aged, infirm, and unfortunate persons have an interest in obtaining welfare benefits. This raises at least one interesting question. One wonders whether the court invoked the test because it believed that the legislature used a classification something like a traditional suspect classification or because the classification was overinclusive. Clearly the presence of the constitutional provision creates a low level suspect classification we might call "the welfare recipient" which calls for heightened scrutiny. If the court had not so believed, it could simply have applied the rational basis test and let the benefit go unprotected. It seems equally clear, though, that the age classification in H.B. 843 was not overinclusive. The classification that the legislature drew precisely fit the purpose--saving money. When reviewing H.B. 33, the court should more clearly de-

65. *Deaconess*, ___ Mont. at ___, 720 P.2d at 1168.

fine the suspect classification it has acknowledged and look to see whether the legislative classification is overinclusive.

The classification "able-bodied with no minor dependent children" bears no logical relation to need for assistance. The first part, able-bodiedness, relates to the recipient's physical condition. One imagines that the legislature intended this classification both as an incentive for welfare recipients to find and maintain employment and as a way to eliminate the indolent from the welfare rolls. H.B. 33 classifies the infirm, incapable of working because of physical handicaps, differently. This differentiation has no relation to the purpose of providing GA. Many if not most able-bodied persons find themselves on GA, not because of physical handicaps, but because of the socio-economic situation in which they find themselves. For this reason the term "able-bodied" is misleading. The justification for limiting able-bodied persons to two months of GA per year is that the most diligent should be able to find work in that time. The able-bodied may be more handicapped in the job market than the infirm for many of the same reasons.[66] The legislature falsely assumed that the excluded class is an employable one. Since the classification is not a viable and logical work incentive it bears no reasonable relation to the purpose of the constitutional guarantee. It overinclusively incorporates both indolent and non-indolent recipients. A constitutionally granted welfare benefit protects recipients and prevents the legislature from making this arbitrary sort of distinction.

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66. Job Service interviewers asked to rate whether GA recipients were "job ready" mentioned the following "barriers to employment," using a checklist provided by the Department:

1)	Out of job market for more than one year	43.5%
2)	Lack of transportation	39.1%
3)	Lack of skills and experience	34.2%
4)	Poor job hunting skills	30.2%
5)	No address or phone	28.5%
6)	Education	18.5%
7)	Appearance	17.6%
8)	Other barriers, including age discrimination, particularly for individuals in their forties and fifties.	15.7%
9)	Chronic health problems	14.6%
10)	Special skills for which there is no demand	14.1%
11)	Poor work history	13.4%
12)	Poor hygiene	10.4%
13)	Drug/alcohol abuse	5.5%
14)	Poor attitude	5.2%

Mont. Dept. of Lab. and Industry, Final Report on a Job Search Program for General Assistance Recipients, at 1-17 (1986). The author would like to thank Bob McCarthy, his classmate, formerly Director of the Butte Community Union, for his valuable assistance in obtaining this and other information.

The second part of the classification, "without dependent minor children" is equally unreasonable. Clearly, a larger family will require more assistance than a smaller one. There remains however a base level of assistance without which it is clearly unreasonable to expect that a human being will be able to survive. *Deaconess* held that it was reasonable to assume that individuals with incomes above a certain level were not medically indigent. This assumption served the purpose of the statute. The opposite must also be true. That is, individuals whose income falls below a certain level (set by the legislature) must be indigent. The purpose of the constitutional protection is to increase the income of the unfortunate who have actual need. Token benefits do not accomplish this purpose. The classification therefore unreasonably limits the GA eligibility of childless individuals to a mere $424 a year.

A common rationale supports the conclusions of both the *Deaconess* and *Butte Community Union* decisions. *Deaconess* holds that the legislature may set income limitations that do not impede the purpose of the constitutional provision.[67] *Butte Community Union* precludes invidious classifications that do not, under middle-tier review, relate to that purpose.[68]

Both branches of government have unique roles to play in this process. The legislature has the exclusive authority to define the level of income that constitutes indigency. The court monitors legislative action to assure equal protection. By adopting the classification "able-bodied persons without dependent minor children," the legislature excluded these individuals without regard for their need. By so doing the legislature exceeded its authority to define indigency, denying equal protection. The court, charged with protecting the equal protection rights of the class, must then step in and invalidate the statute.

The classification faces a second challenge, the balancing part of the middle-tier test. For purposes of this analysis H.B. 33 and H.B. 843 are identical. The state enacted both to save money. As the *Butte Community Union* court succinctly put it:

> [T]he State's objective in enacting H.B. 843—saving money—must be balanced against the interest of misfortunate people under the age of 50 [here able-bodied persons without dependent minor children] in receiving financial assistance from the State. The trial record does not show the State to be in such a financially unsound position that the welfare benefit, granted con-

67. *Deaconess*, ___ Mont. at ___, 720 P.2d at 1166.
68. *Butte Community Union*, ___ Mont. at ___, 712 P.2d at 1314.

stitutionally, can be abrogated.[69]

Since the court decided *Butte Community Union* the state's financial position has deteriorated dramatically.[70] This raises an interesting separation of powers question. The court has not yet clearly defined the interests to be weighed under the balancing portion of the middle-tier test. If the court balances the financial soundness of the state against that of the individuals affected, it would be compelled logically to consider funding options the legislature *might have* taken. Budget writing, however, is clearly a legislative, not a judicial function. Setting the level of taxation likewise falls exclusively to the legislature. When considering H.B. 33's constitutionality, the court should clearly define what interests it is balancing and demonstrate how this approach avoids intruding upon legislative functions.[71]

VIII. CONCLUSION

The Montana Supreme Court has adopted a middle-tier standard of analysis for the constitutional provision for general assistance. If H.B. 33 fails either part of the two-tier test, reasonableness or balancing, it will fall as unconstitutional. The classification itself suggests no reason why this particular group should be singled out for this harsh exclusion. The state has arbitrarily selected this class for invidious treatment, denying them equal protection. H.B. 33 is merely an unconstitutional device to conserve state funds.

This does not mean that the hands of the legislature are tied. It remains free to enact reasonable income limitations which do not unfairly differentiate,[72] or to devise other approaches that do not unfairly single out individuals for austere treatment. The court has placed the legislature on notice that the Montana Constitution precludes the tragic consequences of unfairly denying a class of human beings the minimum resources needed to survive. By in-

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69. *Id.*

70. On November 4, 1986 Montana voters passed Initiative 105, which froze property taxes at 1986 levels. This will surely add to anticipated revenue shortfalls.

71. *See* NettikSimmons, *Toward a Theory of State Constitutional Jurisprudence*, 46 MONT. L. REV. 261, 282-84 (1985) (discussing the relationship between state courts and other branches of government). The separation of powers problem posed by the balancing test might be aided by recognizing that judicial review "need not . . . simply substitut[e] the court's judgment for that of another branch; rather, it would publicly hold the legislature . . . accountable to fulfill its constitutional duty." *Id.* at 284.

72. *See* State *ex rel.* Bartmess v. Board of Trustees, ___ Mont. ___, 726 P.2d 801 (1986), in which the court applied the middle-tier standard of review to uphold a limitation on eligibility for high school extra-curricular activities.

cluding the general assistance provision in the new constitution, Montanans consciously insisted that this sensible, compelling respect for human beings be preserved. Equal protection demands no less.