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A Lack of Deference: Rational Basis With Bite in Caldwell v. MACO Workers' Compensation Trust

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NOTE

A LACK OF DEFERENCE: RATIONAL BASIS WITH BITE IN *CALDWELL V. MACO WORKERS' COMPENSATION TRUST*

William Mac Morris*

I. INTRODUCTION

Caldwell v. MACo Workers' Compensation Trust provides a striking example of the Montana Supreme Court applying a rational basis standard with significant bite.[1] In *Caldwell*, the Court, while purporting to apply the deferential rational basis standard of review, struck down on equal protection grounds a workers' compensation provision that terminates access to "vocational rehabilitation benefits" when a worker becomes eligible to receive social security retirement. *Caldwell* is significant for numerous reasons. First, *Caldwell* demonstrates a clear divide within the Court about the appropriate level of scrutiny, or deference, that should be applied in assessing the constitutionality of workers' compensation provisions. Second, *Caldwell* is part of a "recent trend" in which the Court has declared a workers' compensation provision unconstitutional.[2] Third, the political and legislative backdrop in which *Caldwell* arises provides insight into the conversation between the Court and the political branches of government in the area of workers' compensation law.

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1. *Caldwell v. MACo Workers' Compen. Trust*, 256 P.3d 923 (Mont. 2011).

2. *Reesor v. Mont. St. Fund*, 103 P.3d 1019, 1025 (Mont. 2004) (Rice, Gray & Warner, JJ., dissenting) (citations omitted).

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As of 2010, Montana employers paid the highest workers' compensation premiums in the country.[3] In 2011, Governor Schweitzer signed into law House Bill 334, a bill that represents a major overhaul of the workers' compensation system and is designed to reduce premiums through substantial cuts to worker benefits.[4] The sponsor of House Bill 334, Representative Scott Reichner, blamed the judicial system for necessitating the reforms: "We had businesses just up and walking across the border to Idaho and North Dakota. It was killing us. Lawyers push the envelope and make the system looser and looser and next thing you know we're covering everybody for everything."[5] *Caldwell* provides insight into this larger conversation between the Court, which exhibits suspicion of limits on workers' compensation benefits, and of the political branches of government, which are operating with a mandate to keep workers' compensation costs down.[6]

This note examines *Caldwell* and argues that the Montana Supreme Court's lack of deference to the legislative determination was improper. The note critiques the Court's current framework for analyzing the constitutionality of workers' compensation regulations and proposes adoption of a test that addresses the unique circumstances of workers in the workers' compensation system, while enabling faithful adherence to rational basis review.

Section II discusses the rational basis test, its roots, and the purposes it serves. Section III details *Caldwell* and the Court's holding. Section IV analyzes the Court's decision in detail, and discusses the concurrences and dissent. Section V concludes the note with thoughts about the possible unintended negative consequences of applying heightened scrutiny in the area of workers' compensation law and urges adoption of a new analytical framework for assessing the constitutionality of workers' compensation laws.

3. Jay Dotter & Mike Manley, *2010 Oregon Workers' Compensation Premium Rate Ranking Summary* tbl. 2, http://www.cbs.state.or.us/imd/rasums/2082/09web/09_2082.pdf (Oct. 2010).

4. Phil Drake, *Governor Signs Bill Aimed at Major Workers' Compensation Reform*, http://montana.watchdog.org/2011/04/12/governor-signs-bill-aimed-at-major-workers-comp-reform (Apr. 12, 2011); Mellissa Maynard, *Workers' Comp. System Getting Stricter*, Stateline, http://www.stateline.org/live/details/story?contentId=594750 (Aug. 18, 2011).

5. Maynard, *supra* n. 4.

6. *See* Drake, *supra* n. 4; Mike Dennison, *Bills Aim to Cut Costs of Montana Workers' Comp Program*, Missoulian, http://missoulian.com/news/state-and-regional/bills-aim-to-cut-costs-of-montana-workers-comp-program/article_3ada9a14-2d00-11e0-aecf-001cc4c03286.html (Jan. 30, 2011); Jeff Windmueller, *HB 334 Will Lower Employers' Work-Comp Payments*, Helena Independent Record, http://helenair.com/news/article_bb607566-7eb6-11e0-8c48-001cc4c002e0.html (May 15, 2011).

II. Foundation and Background of the Rational Basis Test

The "rational basis test" provides the default framework for Montana and federal courts when assessing the constitutionality of regulations affecting economic policy.[7] The test provides that a reviewing court will uphold a regulation if the law bears a rational relationship to a legitimate state end.[8] Under rational basis review, a statute is presumed constitutional, and, if the policy behind a law is unclear, a court may consider any possible legitimate purpose that the court can conceive to uphold the statute.[9] It is the most deferential standard of review, and it demonstrates the courts' recognition of, among other things, the expertise of the political branches to craft complicated, economic regulation.[10] In Montana, so long as a regulation does not affect a suspect class or implicate a fundamental constitutional right, rational basis review is applied in equal protection challenges.[11]

The rational basis test was developed by the United States Supreme Court and is regarded by commentators as a response to the political climate in the 1930s and a rejection of the so-called Lochner Era, an era when state regulations were routinely struck down by the courts through Fourteenth Amendment constitutional challenges.[12] The Lochner Era takes its name from *Lochner v. New York*.[13] In *Lochner*, the Court overturned a New York statute that prohibited bakers from working more than sixty hours in one week.[14] The Court held that the statute was not a legitimate exercise of the state's police powers and infringed on bakers' constitutional right of freedom to contract.[15] *Lochner* is widely criticized as a symbol of the Court's tendency for judicial overreaching throughout the period.[16] Critics argue that in the decades around *Lochner*, the Court sought to impose its own political views and beliefs, and gave little deference to laws created by the democratically elected political branches.[17] Thus, critics contend, the Court during the Lochner Era violated the proper respect due

7. Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 Ky. L.J. 591, 601 (2000).

8. *See e.g. Caldwell*, 256 P.3d at 926 (citing *Satterlee v. Lumberman's Mut. Cas. Co.*, 222 P.3d 566, 572 (Mont. 2009)).

9. *See e.g. Satterlee*, 222 P.3d at 575.

10. *See e.g. Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 373 (1949).

11. *See e.g. Henry v. St. Compen. Ins. Fund*, 982 P.2d 456, 461 (Mont. 1999).

12. Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. Rev. 677, 684–685 (2005).

13. *Lochner v. N.Y.*, 198 U.S. 45 (1905).

14. *Id.* at 64.

15. *Id.*

16. *See e.g.* Balkin, *supra* n. 12, at 686.

17. *Id.*

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to the separate spheres of government power.[18] The result of this judicial overreaching was to stifle the ability of state and federal legislatures to craft pragmatic polices that met the critical needs and desires of the people.[19]

Thirty years after *Lochner*, in *West Coast Hotel Company v. Parrish*,[20] the Court signaled an end to the Lochner Era.[21] There, the Court upheld a minimum wage law for women against a due process challenge, affording substantial deference to the state legislature in a decision that has come to define the rational basis test.[22] The Court stated, "we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."[23] The Court limited its review of the law to determining whether the law was "arbitrary or capricious," reiterating that "even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment."[24]

Scholars view *West Coast Hotel* as providing a significant step toward creating a jurisprudential climate that allowed states and the federal government to enact social reforms and New Deal legislation.[25] The rational basis test was developed for three primary reasons: (1) to recognize the dangers of judicial interference in the area of economic policy, (2) to respect the political process that reflects the will of the people, and (3) to place practical limits on judicial power. Thus, in *Williamson v. Lee Optical of Oklahoma*,[26] the United States Supreme Court famously declared:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . For protection against abuses by legislatures the people must resort to the polls, not to the courts.[27]

18. *Id.*

19. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. Rev. 1383, 1385 (2001); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 1 (Duke University Press 1993); Herbert Hovenkamp, *The Culture Crises of the Fuller Court Troubled Beginnings of the Modern State 1888–1910*, 104 Yale L.J. 2309, 2310 (1995).

20. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

21. Balkin, supra n. 12, at 686.

22. *W. Coast Hotel Co.*, 300 U.S. at 398–400.

23. *Id.* at 398.

24. *Id.* at 399.

25. Balkin, supra n. 12, at 686.

26. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955).

27. *Id* at 488.

This level of judicial deference stems, at least in part, from the recognition that "courts have only the power to destroy, not to reconstruct."[28] By 1963, Justice Black, writing for a unanimous Court in *Ferguson v. Skrupa*, described the jurisprudential shift from *Lochner* to *West Coast Hotel* thus:

> The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "We are not concerned . . . with the wisdom, need, or appropriateness of the legislation." Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."[29]

Both federal and Montana courts have recognized that judicial restraint is especially appropriate when analyzing equal protection challenges. In *Eastman v. Atlantic Richfield Co.*, the Montana Supreme Court declared that "'[t]he problem of legislative classification is a perennial one, admitting of no doctrinaire definition.'"[30] The Montana Supreme Court has also cited with approval the following classic formulation for judicial restraint in the area of equal protection provided by *West Coast Hotel*: "The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' . . . There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms."[31]

This paradigm of judicial deference has not always been precisely followed. Since the development of the rational basis test, Courts occasionally fail to apply the judicial restraint that the standard demands, and instead apply a heightened level of scrutiny while purportedly adhering to the traditional rational basis test.[32] Commentators refer to this inexplicit heightened scrutiny as "rational basis with bite."[33] Courts applying rational basis with bite review are criticized for two major reasons: (1) for failing to specify the factors prompting a heightened scrutiny, and (2) for threatening to under-

28. *Stratemeyer*, 855 P.2d at 510 (quoting Tussman, supra n. 10, at 373).

29. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

30. *Eastman v. A. Richfield Co.*, 777 P.2d 862, 866 (Mont. 1989) (quoting *Williamson*, 348 U.S. at 489).

31. *State v. Safeway Stores*, 76 P.2d 81, 92 (quoting *W. Coast Hotel Co.*, 300 U.S. at 400).

32. The most notorious example is likely *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). *See id.* at 458 (Marshall, Brennan & Blackmun, JJ., concurring in part and dissenting in part).

33. *See* Brianne J. Gorod, *Does* Lochner *Live?: The Disturbing Implications of* Craigmiles v. Giles, 21 Yale L. & Policy Rev. 537, 539 (2003); *see also* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

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mine constitutional limits on judicial power by repeating the mistakes associated with the Lochner Era.[34] Justice Marshall, dissenting in *City of Cleburne, Texas v. Cleburne Living Center*, described well the dangers of applying a freewheeling rational basis standard:

> The suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational-basis review—a small and regrettable step back toward the days of *Lochner v. New York*. Moreover, by failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.[35]

The Montana Supreme Court has repeatedly acknowledged that equal protection challenges to workers' compensation laws are appropriately analyzed under rational basis review, because workers' compensation laws neither affect a suspect class nor infringe on any fundamental right.[36] The Montana Supreme Court has adopted the standard set forth in *West Coast Hotel*, quoting it with approval.[37] The Court has further held that under rational basis review, a challenged statute will be upheld if "any reasonably conceivable state of facts" supports it.[38] Yet, the Court's opinion in *Caldwell* reveals a less-than-faithful adherence to this standard, discarding it in favor of rational basis with bite. As with other courts applying rational basis with bite, the Montana Supreme Court can be criticized on the same grounds.

III. Facts and Procedural History

On November 25, 2005, Harold Caldwell sustained head injuries in a slip-and-fall accident while working as manager at the Ravalli County Airport.[39] Caldwell was 77 years old at the time.[40] Caldwell's head injuries prevented him from returning to work at the airport.[41] Caldwell received

34. *See City of Cleburne*, 473 U.S. at 460 (Marshall, Brennan & Blackmun, JJ., concurring in part and dissenting in part).

35. *Id.* at 459–460.

36. *See e.g. Henry*, 982 P.2d at 461–462; *Stratemeyer v. Lincoln Co.*, 855 P.2d 506, 509 (Mont. 1993).

37. *Stratemeyer*, 855 P.2d at 511; *State v. Safeway Stores*, 76 P.2d 81, 85–86 (Mont. 1938); *Geil v. Missoula Irrigation Dist.*, 59 P.3d 398, 406 (Mont. 2002).

38. *See e.g. Satterlee*, 222 P.3d at 575; *Kottel v. State*, 60 P.3d 403, 416 (Mont. 2002).

39. *Caldwell*, 256 P.3d at 924.

40. *Id.*

41. Br. of Appellee at 1, *Caldwell*, 256 P.3d 923.

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wage loss and medical benefits through the airport's workers' compensation insurer, MACo Workers' Compensation Trust ("MACo").[42]

After recovering, Caldwell filed a claim with MACo for vocational rehabilitation benefits.[43] MACo denied the claim pursuant to Montana Code Annotated § 39–71–710, which cuts off eligibility for vocational rehabilitation benefits when the worker becomes eligible for Social Security retirement benefits.[44] Caldwell had been collecting Social Security retirement benefits since age 62,[45] and was 79 years old when he applied for vocational rehabilitation benefits.[46]

Caldwell challenged the constitutionality of § 39–71–710, contending that it violated his right to equal protection under the law because the statute denied him benefits based solely on his age and access to Social Security.[47] The Workers' Compensation Court held that the statute violated equal protection because it created two similarly situated classes that were treated differently under the law and the disparate treatment was not rationally related to any legitimate state end.[48] MACo appealed and the Montana Supreme Court, in a 5–2 opinion written by Justice Morris, affirmed the decision of the Workers' Compensation Court.[49] The Court held that the statute served no legitimate government interest other than cost containment of the workers' compensation system, and that this interest alone was insufficient to justify the disparate treatment.[50]

Justice Cotter filed a concurring opinion, joined by Justice Nelson, in which she argued that striking down the law would have little impact on the cost of workers' compensation, because eligibility for vocational rehabilitation benefits is subject to screening wherein age and capacity are taken into consideration.[51] Justice Nelson filed a concurring opinion in which he argued that the graying of the American workforce, as well as the increase in the cost of living, were reasons to find the statute irrational.[52] Nelson also rejected a toothless review of the law, and urged the Court to adopt a stricter rational basis standard than the one that the dissent pointed to as

42. *Caldwell*, 256 P.3d at 924.

43. *Id.* at 925.

44. *Id.*; Mont. Code Ann. § 39–71–710 (2011).

45. *Caldwell*, 256 P.3d at 924.

46. Br. of Amicus Mont. St. Fund at 2, *Caldwell*, 256 P.3d 923. Montana State Fund is the legislatively created body that administers the Workers' Compensation system. *See* Mont. Code Ann. § 37–1–201.

47. *Caldwell*, 256 P.3d at 925.

48. *Id.*

49. *Id.*at 931.

50. *Id.* at 930.

51. *Id.* at 931.

52. *Id.* at 931–932.

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providing reason to uphold the law.[53] Justice Baker filed a dissenting opinion, joined by Justice Rice, in which she argued that the Court failed to afford the legislature proper deference under rational basis review, and that notwithstanding the policy arguments of the majority, the statute should be upheld because it was rationally related to the legitimate government objective of targeting limited resources toward those who are most likely to use them.[54]

IV. Analysis

The Court's opinion in *Caldwell* consistently exhibits an improper level of scrutiny in reviewing the challenged statute's limitation on benefits. At each stage—interpreting the statutory framework, reviewing precedent, determining if the classes were similarly situated, and applying rational basis scrutiny—the Court did little to afford the statute the appropriate benefit of presumptive constitutionality and glossed over reasons to uphold the statute. The Court rejected a series of arguments that should have legitimated the statute under a deferential standard. The analysis that follows will take up each of these stages and demonstrate how the Court strayed from the deferential standard, exhibiting, instead, a level of suspicion that is inappropriate when applying rational basis review. First, however, the note will provide some background about the challenged statute and two prior Montana Supreme Court decisions in which the law's other provisions were reviewed.

A. The Challenged Statute: § 39–71–710

The challenged statute in *Caldwell*, Montana Code Annotated § 39–71–710, is entitled "Termination of benefits upon retirement." It applies to workers who are eligible to receive Social Security retirement benefits and cuts off their eligibility for, among other benefits, vocational rehabilitation benefits.

Vocational rehabilitation benefits are provided by operation of Montana Code Annotated § 39–71–1006 which is designed to return the disabled worker to work and offers vocational training funds including tuition, fees, books, and other retraining expenses in order to assist the worker "in acquiring skills or aptitudes to return to work" in order to "reasonably reduce[ ] the worker's actual wage loss."[55] To be eligible for vocational rehabilitation benefits, a workers must meet the definition of a "disabled

53. *Caldwell*, 256 P.3d at 932.

54. *Id.* at 932–935.

55. *Id.* at 925; Mont. Code Ann. § 39–71–1011(4).

worker" in addition to other criteria.[56] A "disabled worker" is "a worker who has a permanent impairment . . . from a work-related injury that precludes the worker from returning to the job . . . and who has an actual wage loss as a result of the injury."[57]

Eligibility for vocational rehabilitation benefits requires a considerable procedural review beyond simply meeting the definition of a "disabled worker."[58] First, a rehabilitation provider, as designated by the insurer, must certify that "the worker has reasonable vocational goals and reasonable reemployment opportunity."[59] Second, the rehabilitation provider must certify that rehabilitation will result in "a reasonable reduction in the worker's actual wage loss."[60] Third, the rehabilitation planner must draft a specific rehabilitation plan "tak[ing] into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests."[61] Finally, the worker must agree to and follow the plan.[62] When all of these conditions are met, the worker may receive biweekly rehabilitation benefits for up to 104 weeks.[63]

The Court's opinion and Justice Cotter's concurrence did not address the procedural burden placed on the insurer when providing vocational rehabilitation benefits. Justice Cotter proposed that the concern that striking down the statute was going to result in rising costs for the insurer was "largely unwarranted" because "there is a likelihood that the [system] will screen a large number of older applicants out of the system." This analysis, however, does not take into account the procedural burden that nevertheless must be implemented in order to determine whether an individual is eligible for rehabilitation benefits. It also fails to consider the cost of addressing challenges to an insurer's denial of benefits. While Justice Cotter may be correct that a large portion of claims could be screened out, resulting in no actual payment of vocational rehabilitation benefits, the challenged statute undoubtedly reduces the cost incurred in processing claims for vocational rehabilitation benefits.

B. Prior Challenges to § 39–71–710: Reesor *and* Satterlee

In addition to creating a cut-off for eligibility for vocational rehabilitation benefits, § 39–71–710 provides that when a worker becomes eligible to

56. Mont. Code Ann. § 39–71–1006(1)(a)(i).
57. *Id.* at § 39–71–1011(3).
58. *Id.* at § 39–71–1006(4)–(7).
59. *Id.* at § 39–71–1006(1)(b).
60. *Id.*
61. *Id.* at § 39–71–1006(1)(c).
62. Mont. Code Ann. § 39–71–1032.
63. *Id.* at § 39–71–1006(2).

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receive Social Security benefits, he also becomes ineligible to receive permanent partial disability benefits and permanent total disability benefits.[64] Prior to *Caldwell*, these other two components of § 39–71–710 were challenged on equal protection grounds.

In 2004, the Court decided *Reesor v. Montana State Fund*,[65] and overturned, on equal protection grounds, § 39–71–710's elimination of eligibility for permanent partial disability benefits ("PPD benefits").[66] The Court reversed the decision of the Workers' Compensation Court in a 4–3 decision. The Court rejected State Fund's argument that the receipt of Social Security retirement benefits was sufficient to create two dissimilarly situated classes, and held that "age . . . is the only identifiable distinguishing factor between the two classes."[67] The Court further held that Social Security retirement benefits and workers' compensation disability benefits were distinct programs, so that no duplication of benefits occurred by providing a worker with both benefits simultaneously.[68] Ultimately, the Court held that the provision violated equal protection because no rational basis existed to deny workers' compensation disability benefits solely on the basis of age.[69] Justice Rice, in dissent, argued strenuously that the Court "failed to properly exercise rational basis review."[70]

By contrast, in 2009, the Court decided *Satterlee v. Lumberman's Mutual Casualty Company*,[71] in which it upheld, against an equal protection challenge, § 39–71–710's termination of eligibility for permanent total disability benefits ("PTD benefits"). In a 5–2 opinion, the Court distinguished *Reesor*, finding that "the purposes of PPD and PTD differ greatly."[72] The Court held that "while a PPD claimant will presumably be able to return to work and earn an income, a PTD claimant will not."[73] The Court noted that PPD benefits exist for a limited amount of time while "without the statute, PTD benefits would run on until the claimant's death."[74] Ultimately, the Court concluded that "it is rational for the workers' compensation system to terminate PTD benefits at a time when, statistically, most people's worklives have ended. While this may not seem fair, it is not unconstitutional."[75] Justice Morris, in dissent, argued that "'rational basis with bite'

64. *Id.* at § 39–71–710.
65. *Reesor*, 103 P.3d 1019.
66. *Id.* at 1024.
67. *Id.* at 1022.
68. *Id.* at 1023–1024.
69. *Id.*
70. *Id.* at 1026 (Rice, Gray & Warner, JJ., dissenting).
71. *Satterlee*, 222 P.3d 566.
72. *Id.* at 573.
73. *Id.* at 572.
74. *Id.* at 574.
75. *Id.*

. . . surely would invalidate the legislature's . . . effort to use SSRI eligibility as a proxy for retirement."[76] Justice Morris criticized the majority's "toothless approach," and concluded that he would "resolve [the policy] debate in favor of injured workers who have foregone their right to seek damages through the tort system."[77]

Through *Reesor*, *Satterlee*, and *Caldwell*, every provision of § 39–71–710 has been challenged on equal protection grounds. Furthermore, every decision regarding the statute has resulted in divided courts with the opposing sides disagreeing about the appropriate level of deference or scrutiny that the Court should apply to the statute.

C. The Majority Opinion in Caldwell

The majority opinion in *Caldwell* was written by Justice Morris. As evident from his dissent in *Satterlee*, Justice Morris favors rational basis with bite. The analysis that follows is not meant to discredit the arguments made by the Court. While an effort is made to closely scrutinize the opinion and critique the Court's reasoning, ultimately the point to be made is not that the Court "got everything wrong," but to demonstrate the wide disparity between the deference that should be applied under a traditional rational basis standard in which "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act," and the Court's readiness in *Caldwell* to find reasons to reject the challenged statute.[78]

1. Framing the Issue

The Court framed the issue before it as follows: "Does the categorical denial of rehabilitation benefits to a workers' compensation claimant violate equal protection when the basis for denial turns solely on the claimant's age-based eligibility for social security benefits?"[79] With the issue thus framed, the Court's ultimate holding seemed a foregone conclusion.

If the denial of rehabilitation benefits truly turned solely on the claimant's age, then finding a violation of equal protection is likely mandated by common sense and the Court's holding in *Reesor*. MACo and amicus Montana State Fund ("State Fund") contended that the denial of benefits was based on more than just age. As a preliminary matter, State Fund argued that the denial was based on the differences between the two classes, both inherent and statutory.[80] MACo argued that the basis for the denial was

76. *Id.* at 577 (Morris & Nelson, JJ., dissenting).
77. *Satterlee*, 222 P.3d at 577, 579.
78. *Powell v. St. Compen. Ins. Fund*, 15 P.3d 877, 881 (Mont. 2000).
79. *Caldwell*, 256 P.3d at 924.
80. Br. of Amicus State Fund, *supra* n. 46, at 8–14.

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rooted in a variety of legitimate reasons besides even the differences attending age, including, among others, containing the cost of the workers' compensation system, avoiding a duplication of benefits, and tailoring benefits to need.[81]

2. *The Three-Step Process for Analyzing Equal Protection Challenges*

The Court followed its established three-step process for analyzing equal protection challenges.[82] Under this approach, as a threshold issue, the plaintiff must demonstrate that the challenged statute results in disparate treatment of two similarly situated classes.[83] The next step is to determine the appropriate level of scrutiny.[84] The third and final step is to evaluate the statute by applying the appropriate level of scrutiny.[85]

A notable problem with this three-step process is that the Court's level of scrutiny in the first step, evaluating whether there are two similarly situated classes, is undefined. It appears to be more appropriate to evaluate whether there are two similarly situated classes after determining the level of scrutiny. This approach would provide the Court with some guidance as to how similarities or differences are to be weighed. If deference is due to the legislative determination because rational basis is appropriate, then deference should also be given to the legislature to draw lines based on real differences. By contrast, in cases where strict scrutiny is found to be appropriate, the Court would closely scrutinize the legislative line-drawing, making it easier to find similarly situated classes.

Alternatively, the determination of this threshold issue should be analyzed with a presumption that the classes are not similarly situated. Such an approach would be consistent with the Court's stated policies that statutes are presumed constitutional and that the party challenging the constitutionality of a statute must prove its unconstitutionality beyond a reasonable doubt.[86] While no standard of scrutiny for making this threshold determination has been expressed, the Court's current framework seems to favor a presumption of similarly situated classes, rather than a presumption against it.[87] This contravenes the Court's stated position that statutes are presumed constitutional.

81. *Caldwell*, 256 P.3d at 929.

82. *Id.* at 926 (citing *Satterlee*, 222 P.3d at 571).

83. *Id.*

84. *Id.* at 927.

85. *Id.*

86. *See e.g. Satterlee*, 222 P.3d at 569–570.

87. The *Satterlee* Court, for example, found that the classes were similarly situated, although it later drew distinctions between those older persons who are considered "retired" by the statute and those younger persons who are considered by the statute to remain in the workforce. *Compare Satterlee*, 222 P.3d at 571 *with id.* at 574.

a. Step One: Determining Whether the Two Classes are Similarly Situated

MACo stipulated that the two classes were similarly situated and the Court agreed.[88] But in an amicus curiae brief supporting MACo's position, State Fund argued that the two classes were distinct. State Fund contended that those eligible for Social Security retirement benefits were "permanently out of the workforce" by operation of § 39–71–710(1) which states that once a claimant is eligible for Social Security retirement he is "considered to be retired."[89] State Fund quoted *Satterlee* which held that "when an individual is considered retired, they [sic] have, by definition, ended their work life."[90] Accordingly, State Fund argued that those retired and permanently out of the workforce cannot be similarly situated with those who are not retired and remain in the workforce."[91]

Relying on both *Satterlee* and *Reesor*, the Court rejected State Fund's argument.[92] The majority held that the two classes were similarly situated because both met the statutory definition of a "disabled worker"[93] who "must rely on the Workers' Compensation Act as their exclusive remedy."[94] Quoting *Reesor*, the majority held that age was "'the only identifiable distinguishing factor between the two classes'"[95] and that "'chronological age . . . is unrelated to a person's ability to engage in meaningful employment.'"[96]

It is curious that MACo did not argue that the two classes were dissimilarly situated. While both *Satterlee* and *Reesor* found similarly situated classes, the disability benefits at issue in those cases and the purpose served by those benefits, are distinct from the benefits sought in *Caldwell*. Receipt of vocational rehabilitation benefits is predicated on the worker pursuing an education in a new field of work and possessing the potential to succeed in the new field,[97] while receipt of disability benefits is simply predicated on wage loss and the category of injury incurred by the worker in a work-related accident.[98] This distinction is relevant to distinguishing between

88. *Caldwell*, 256 P.3d at 926.

89. Br. of Amicus State Fund, *supra* n. 46, at 8–14; Mont. Code Ann. § 39–71–710(1).

90. Br. of Amicus State Fund, *supra* n. 46, at 11.

91. *Id.* at 13.

92. *Caldwell*, 256 P.3d at 926.

93. *See* Mont. Code Ann. § 39–71–1011(3).

94. *Caldwell*, 256 P.3d at 926 (citing § 39–71–710).

95. *Id.* (quoting *Reesor*, 103 P.3d at 1022 in turn citing *Satterlee*, 222 P.3d at 571).

96. *Id.* (quoting *Reesor*, 103 P.3d at 1022).

97. Mont. Code Ann. § 39–71–1006(b) (worker must have "reasonable vocational goals and reasonable reemployment opportunity"); *id.* at § 39–71–1006(2) (rehabilitation benefits paid "while the worker is satisfactorily progressing in the agreed-upon rehabilitation plan").

98. *Id.* at § 39–71–703(1); *id.* at § 39–71–702.

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older workers who may be less likely to desire, seek training in, or succeed in an entirely new vocation, and younger workers who may be eager for vocational training which could serve them for the remainder of their presumably much longer work life. Indeed, age is one factor used in determining a worker's eligibility for vocational rehabilitation benefits.[99]

Furthermore, a worker receiving Social Security retirement benefits is distinct from one who is not receiving retirement benefits in the obvious sense that the "retired" worker is already receiving some income from the government, whereas the younger worker is probably not. The younger injured worker might rely exclusively on workers' compensation assistance for income, unlike an older injured worker who is also eligible for retirement benefits. Therefore, the "retired" worker is arguably less likely to need all the benefits offered by workers' compensation assistance.

The Court's position that age is the only distinguishing factor between the two classes is overstated. Changes in age are attended by changes in a variety of characteristics, including health and physical ability. The Court's contention that age is "unrelated to a person's ability to engage in meaningful employment" is similarly overstated. Age-based restrictions on the legal right to work or to work in certain positions are common and clearly defy this sweeping proclamation of the majority.[100]

Relying on *Reesor* and *Satterlee*, and the stipulation of MACo, the Court spent little time in making the determination that the classes were similarly situated, and quickly moved on to the next step.[101] Though, the issue was not strenuously argued, the Court stridently rejected State Fund's arguments and gave little deference to the legislative determination that the classes were distinct.

b. Step Two: Determining the Appropriate Level of Scrutiny

Having found that the classes were similarly situated, the Court moved to the next step of the equal protection analysis—determining the appropriate level of scrutiny. Equal protection claims challenging workers' compensation statutes have consistently implicated a level of scrutiny no higher than rational basis review.[102] Courts reason that rational basis review is appropriate because workers' compensation statutes do not "infringe upon

99. *Id.* at § 39–71–1006(1)(c).

100. *See e.g.* Naval Military Personnel Manual 1040150, ¶ 3 (1983) (setting maximum age for enlistment in Naval Reserve at 42); *see also* 5 U.S.C. § 8401(14)(ii) (2006) (requiring firefighters to be "young and physically vigorous individuals"); *see also* U.S. Const. art. II, § 1, cl. 4 (limiting qualification for office of presidency to those who "have attained to the Age of thirty five Years").

101. *Caldwell*, 256 P.3d at 926.

102. *See e.g. Reesor*, 103 P.3d at 1022; *Satterlee*, 222 P.3d at 572; *Henry*, 982 P.2d at 462.

the rights of a suspect class or involve fundamental rights."[103] Accordingly, the parties agreed that rational basis was the appropriate standard.[104]

The Court spent only a sentence defining this standard: "Rational basis requires that § 39–71–710, MCA, bear a rational relationship to a legitimate governmental interest."[105] The majority's brevity in discussing the level of scrutiny is telling. By contrast, Justice Baker, dissenting, spent much of her opinion defining rational basis review and discussing the appropriate deference it requires.[106] Justice Baker noted that appropriate application of rational basis mandates upholding a challenged statute if the Court can conceive of a rational basis for it, notwithstanding "forceful public policy argument[s]" against it.[107] Likewise, Justice Nelson spent much of his concurrence addressing rational basis review—arguing for a stricter standard.[108]

The Court's single sentence discussion of the standard of review stands in stark contrast to prior cases. For example, in *Stratemeyer v. Lincoln County*,[109] the Court, addressing an equal protection challenge to a workers' compensation provision, delivered an opinion that reads like a paean to judicial deference.[110] The Court's brevity in *Caldwell* in discussing the deference required by rational basis review reveals the majority's likely awareness that the deferential standard conflicts with the scrutinizing analysis ultimately applied.

c. Step Three: Evaluating the Statute Under Rational Basis Review (with Bite)

i. Analyzing Precedent

After brief comment on the standard of scrutiny, the Court moved quickly to the final step of its analysis—evaluating the statute under rational basis review. The Court began by reviewing the most relevant precedent: *Reesor* and *Satterlee*.[111] According to the *Caldwell* Court, the "critical distinction" between the two cases was that whereas PPD benefits must terminate after 375 weeks, PTD benefits do not necessarily terminate after a

103. *Satterlee*, 222 P.3d at 572.
104. *Caldwell*, 256 P.3d at 926.
105. *Id.*
106. *Id.* at 932–935 (Baker & Rice, JJ., dissenting).
107. *Id.* at 935.
108. *Id.* at 931–932 (Nelson, J., concurring).
109. *Stratemeyer*, 855 P.2d at 505.
110. *Id.* at 508–511.
111. *Caldwell*, 256 P.3d at 925–926.

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limited number of weeks.[112] Noting that, like the PPD benefits in *Reesor*, vocational rehabilitation benefits are provided for only a limited number of weeks, the majority aligned the issue before the Court to *Reesor*, and found *Satterlee* only relevant to situations in which there was a risk that a benefit could "run on until the claimant's death."[113]

Satterlee's holding, however, was premised on a rationale more fundamental than the distinction between PPD's time-limited availability and PTD's lack of an automatic termination. *Satterlee*'s fundamental reason for upholding the statute was as follows: "[I]t is rational for the workers' compensation system to terminate PTD benefits at a time when, statistically, most people's work-lives have ended."[114] Considering this statement from the Court, *Satterlee* ultimately determined that the statute was rationally related to the end of directing limited resources to those who were statistically likely to be in the workforce.

The *Satterlee* rationale, basing the cut-off on statistical likelihoods, could similarly apply to eligibility for vocational rehabilitation benefits. Indeed, the rationale would arguably apply with even greater force. If a worker may be denied wage-loss benefits because most people at that age are not working, then *a fortiori* a worker in the same statistical category may be denied rehabilitation benefits that would retrain him to reenter the workforce.

In *Caldwell*, however, the Court rejected this fundamental holding from *Satterlee* without overruling it, and treated it as something conjured up only by the dissent rather than apposite precedent:

> Immediately beneath the surface of MACo's and MSF's "best allocation" and "tailoring" arguments lurks the belief that society should not rehabilitate older people because the return on the investment may not be as high. This bias also permeates the Dissent's reasoning that the legislature may "allocate resources toward those who, statistically speaking, will use them . . . ."[115]

Thus, *Satterlee*'s fundamental holding was discarded, and labeled as demonstrating only the dissent's bias. Meanwhile, the distinction made by the *Satterlee* Court between PTD and PPD benefits was elevated by the *Cald-*

112. *Id.* at 927. While the *Satterlee* Court stated that without the termination imposed by § 39–71–710, PTD benefits could "run on until the claimant's death." *Satterlee*, 222 P.3d at 574. In reality, PTD benefits are only available so long as the claimant suffers a permanent total disability as defined by § 39–71–116(27). This status requires evidence in the form of objective medical findings. Moreover, though referred to as a "permanent" and "total" disability, the statutory framework contemplates the possibility of moving from a "permanent total disability" to any of the lesser categories of injury, such as permanent partial disability or temporary partial disability. Therefore, the "timeframe" distinction between *Reesor* and *Satterlee*, actually represents a flawed understanding of the availability of PTD benefits.

113. *Caldwell*, 256 P.3d at 927–928.

114. *Satterlee*, 222 P.3d at 574.

115. *Caldwell*, 256 P.3d at 930.

well Court to stand for *Satterlee*'s primary holding so that the Court could assert that precedent favored striking down the law.

ii. Defining the Policy and Purposes Served by Vocational Rehabilitation Benefits

After establishing that precedent provided no direct support for the law, the Court examined the policy behind, and the purposes served by, providing rehabilitation benefits. It determined that the policy behind providing vocational rehabilitation benefits was found at § 39–71–105(3), subpart three of the "Declaration of Public Policy" which prefaces the Workers' Compensation Act. Section 39–71–105(3) provides that "an objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease."[116] The Court noted that rehabilitation benefits assist a worker "in acquiring skills or aptitudes to return to work" and "reasonably reduce a worker's actual wage loss"[117] The Court stated that the differences in purposes served by various benefits under the workers' compensation system "guide our analysis as to whether the categorical elimination of rehabilitation benefits . . . violates equal protection."[118]

In focusing on the purposes served by providing the benefit, the Court largely glossed over the purposes served by placing limitations on the benefit. The Workers' Compensation Court had held that terminating rehabilitation benefits "[flew] in the face of [the] stated legislative objective" of returning a worker to work after a work related injury.[119] The Court quickly noted that it was error to focus solely on the policy for providing the benefit when "§ 39–71–105(3) provides the policy statement for providing rehabilitation benefits, as opposed to the policy statement for the elimination of rehabilitation benefits in § 39–71–710,"[120] but the Court almost immediately contradicted itself, stating, "[t]he WCC correctly looked to the policy statement in § 39–71–105(3), MCA, however, to consider whether the categorical elimination in § 39–71–710, MCA, rationally relates to the governmental interests served by rehabilitation benefits."

While focusing at length on the policy for providing the benefit, the Court did not adequately address the policy that discusses the limitations on workers' compensation benefits. The first subpart of the "Declaration of Public Policy" provides:

116. *Id.* at 928.

117. *Id.*

118. *Id.*

119. *Id.* (quoting *Caldwell v. MACo Workers' Compensation Trust*, 2010 MTWCC 24, ¶ 27 (Montana Workers' Compensation Court 2010).

120. *Id.*

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> An objective of the Montana workers' compensation system is to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. *Wage-loss benefits are not intended to make an injured worker whole but are intended to provide assistance to a worker at a reasonable cost to the employer*. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.[121]

This policy statement appears first in the declaration of public policy, and is to be used "for the purposes of interpreting and applying" the entire Act.[122] This opening declaration clearly indicates that the legislature wanted to emphasize the limits on benefits available in the workers' compensation no-fault system. In analyzing § 39–71–710, a statute that serves as a limit on workers' compensation benefits, the *Caldwell* Court should have more fully addressed this policy statement, which discusses the limits on workers' compensation benefits.[123] Section 39–71–105(3), the statute describing the policy for *providing* vocational benefits, is irrelevant to the analysis.

iii. Analyzing the Asserted Legitimate State Interest Served by the Statute

1. Cost Alone Insufficient

The Court next considered MACo's arguments that the statute was rationally related to a legitimate government interest.[124] The majority began by declaring that "cost containment alone" cannot justify disparate treatment under the Workers Compensation Act.[125] It acknowledged that legislative attempts to control the cost of the workers' compensation system "lie[s] within constitutional authority," but held that this cannot be the "sole reason for disparate treatment" because "[i]f the Court permitted otherwise 'cost containment' alone could justify nearly every legislative enactment without regard for the guarantee of equal protection of the law."[126]

The Court's reliance on this principle was absolutely critical to its holding. Section 39–71–710 provides a limitation on benefits. Therefore, it serves, indisputably, to contain the costs of the workers' compensation system. The principle that cost containment alone cannot justify disparate

121. Mont. Code Ann. § 39–71–105(1) (emphasis added).

122. *Id.*

123. The Court did cite § 39–71–105, addressing it without fully quoting it. The Court contended that it was inapplicable because rehabilitation benefits "do not replace lost wages." *Caldwell*, 256 P.3d at 929. The Court's contention that rehabilitation benefits do not replace lost wages argument is more fully addressed below in the discussion of duplication of benefits.

124. *Caldwell*, 256 P.3d at 928.

125. *Id.*

126. *Id.*

treatment first appeared in *Heisler v. Hines Motor Company*.[127] Though routinely followed,[128] this "sweeping conclusion" was vigorously disputed by Justice Gray in her dissent in *Heisler*.[129] Justice Gray argued that this holding was "incorrect and ill-advised":

> The entire workers' compensation system is premised on an economic compromise determined to be in the best interests of all concerned: employees gave up the right to sue employers in tort for work-related injuries in exchange for a guaranteed compensation system; employers avoided the potential of unlimited tort liabilities in exchange for required "no fault" compensation payments to injured workers. . . . Thus, to an extraordinary extent, the entire system is grounded in "cost control" of various kinds. The Court's conclusion that cost control can never justify disparate treatment eviscerates the purpose and provisions of the Act.[130]

Justice Gray thus explained that the workers' compensation system is based on a fundamental compromise, a quid pro quo between employer and employee, and that cost-containment is elemental to this compromise.

In addition to Justice Gray's contention, the approach creates a further problem. It subtly displaces the burden of proof, shifting it to the State when the constitutionality of legislative enactments should be presumed.[131] This burden shifting is particularly evident in *Caldwell* in the following statement: "We must *scrutinize* attempts to *disguise* violations of equal protection as legislative attempts to 'contain the costs' or 'improve the viability' of the worker's [sic] compensation system. Cost alone does not justify the disparate treatment of similar classes."[132]

Considering the "grand bargain" represented by the workers' compensation system and the application of the Act on presumably non-suspect classes, cost control of workers' compensation benefits should be regarded as a stand-alone legitimate state interest. There would be two exceptions to this rule. In testing for these exceptions the statute's constitutionality should be presumed. Cost control alone would be insufficient if (1) the Court determines that the statute disparately burdens a suspect class, or (2) the statute violates the quid pro quo, resulting in a substantive due process violation. For example, if the legislature were to eliminate benefits only for members of a certain race, then cost control alone would clearly be insufficient to justify the provision. Likewise, if the legislature were to simply eliminate wage loss benefits while forcing workers to find their exclusive

127. *Heisler v. Hines Motor Co.*, 937 P.2d 45, 52 (Mont. 1997) (striking down as violative of equal protection workers' compensation statute that allowed certain workers' compensation plans to limit a workers' choice of physician).

128. *Henry*, 982 P.2d at 461; *Satterlee*, 222 P.3d at 574;

129. *Heisler*, 937 P.2d at 54 (Gray, J., concurring and dissenting).

130. *Id.*

131. *See e.g. Walters v. Flathead Concrete Products, Inc.*, 249 P.3d 913, 921 (Mont. 2011).

132. *Caldwell*, 256 P.3d at 928 (emphasis added.)

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remedy through workers' compensation, then the quid pro quo would not be met, resulting in a violation of the worker's substantive due process rights.[133]

By contrast, if the legislature eliminates certain benefits to non-suspect groups without violating the quid pro quo, the deferential rational basis test should serve, and cost containment should represent a stand-alone legitimate state interest. This approach is correct because unless one of the two above named exceptions exists, a workers' compensation statute is indistinguishable from other economic provisions. In such a circumstance, legislative expertise to make difficult choices on policy mandates deference.

The limitation on benefits at issue in *Caldwell* was not directed at a class traditionally regarded as suspect, nor would it appear that the limitation violates the quid pro quo. Thus, to the extent the statute results in disparate treatment, the legislature—not the Court—is best situated to fix the manner of payment of workers' compensation benefits.

2. Assisting the Worker at a Reasonable Cost to the Employer

After establishing that cost containment alone would be insufficient to uphold the statute, the Court evaluated MACo's other asserted interest.[134] MACo asserted that the statute served the legitimate state interest in assisting the worker at a reasonable cost to employers.[135] The Court rejected this argument, holding that the statute did not relate to this interest and that it

133. *See Stratemeyer v. Lincoln County*, 915 P.2d 175, 180 (Mont. 1996) ("*Stratemeyer II*"); *Walters*, 249 P.3d at 918.

134. Combined, MACo and State Fund offered seven legitimate state interests that the statute served, beyond cost-containment. MACo asserted: (1) creating a wage replacement system, (2) assisting the worker at a reasonable cost to the employer, (3) controlling the costs of the workers compensation program in order to continue providing benefits, (4) avoiding duplication or overlapping of benefits. State Fund asserted: (5) providing wage-loss benefits that a bear a reasonable relationship to actual wages lost, (6) creating reasonably constant rates for employers, and (7) tailoring benefit entitlement to need. *Caldwell*, 256 P.3d at 929. This note will limit its review to the three most contentious issues: (1) assisting the worker at a reasonable cost to the employer, (2) avoiding duplication of benefits, and (3) tailoring benefit entitlement to need.

135. *Id.* at 928. The majority first stated that MACo had asserted that the challenged statute served the legitimate state interest in "creating a wage replacement system." The Court seems to have misconstrued MACo's argument on this point. In its brief, MACo quoted § 39–71–105(1), and emphasized that the wage replacement system created by the Workers' Compensation Act was expressly limited to assistance that could be supplied at a "reasonable cost to the employer." Br. of Appellant at 8–9, *Caldwell*, 256 P.3d 923. The Court, however, seems to have believed that MACo argued that the statute served the purpose of "creating a wage replacement system." It is not clear how this interest would forward MACo's position, because the challenged statute served as a limitation on benefits rather than a creation of benefits. At any rate, the Court concluded: "The elimination of rehabilitation benefits cannot be understood as serving, or even relating to, the governmental interest in creating a wage-replacement system that bears a reasonable relationship to actual wages lost." The Court's holding largely ignored MACo's emphasis on the *limitation* on providing wage-replacement benefits.

was duplicative of the cost-containment rational.[136] In addressing this argument the Court stated: "We particularly reject the argument that 'reasonable cost to the employer' always means 'lower cost to the employer.'"[137]

The Court here expressed disdain for the State's interest in enacting legislation that reduces the cost of workers' compensation by limiting worker benefits. This is consistent with the Court's abbreviated discussion of § 39–71–105(1), the declaration of public policy which addresses the *limits* on wage-loss benefits. The Court's strident rejection of the State's interest in reducing the employer's cost reveals a stark contrast between the Court's deferential review of a limitation on benefits in *Satterlee* and the scrutinizing review evident in *Caldwell*.

3. Avoiding Duplication of Benefits

MACo also contended that the statute served the legitimate state interest of avoiding a duplication of benefits.[138] MACo reasoned that once a claimant begins receiving Social Security benefits it is rational for the legislature to reduce available benefits under the Workers' Compensation Act.[139] Other jurisdictions have accepted this argument.[140] Courts taking this position often cite Larson's Workers' Compensation Law,[141] "a leading treatise on workers' compensation,"[142] which provides:

> Wage-loss legislation is designed to restore to the worker a portion . . . of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a worker undergoes a period of wage loss due to all three conditions, it does not follow that he or she should receive three sets of benefits simultaneously and thereby recover more than his or her actual wage. The worker is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit.[143]

The treatise thus asserts that providing wage-loss benefits is the common goal of both workers' compensation laws and Social Security. Accord-

136. *Caldwell*, 256 P.3d at 929.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See e.g. Brown v. Goodyear Tire & Rubber Co.*, 599 P.2d 1031, 1037 (Kan. App. 1979); *Harris v. St. Dept. of Labor & Indus.*, 843 P.2d 1056, 1066 (Wash. 1993); *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71, 76–77 (Ky. 2002).

141. Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* vol. 9 (Matthew Bender, rev. ed., 2011).

142. *Harris*, 843 P.2d at 1066.

143. *Larson*, supra n. 141, at § 157.01.

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ingly, one Washington court held that "[t]he cause of wage loss—whether it be old age, disability, or unemployment—is irrelevant."[144]

Notwithstanding this position, the Court rejected MACo's, and the dissent's, contention that the statute related to the governmental interest in avoiding duplication of benefits.[145] The Court here relied heavily on *Reesor*, wherein it had expressly rejected the duplication of benefits argument.[146] The Court held that "no coordination of benefits exists between the Workers' Compensation Act and the social security system" and maintained that "social security retirement benefits are not wage loss benefits."[147]

Two points about *Reesor*'s holding on this issue should be noted: (1) *Reesor* did not address *McClanathan v. Smith*,[148] in which the Court expressly recognized that offsets for payments received through the Social Security system serve the legitimate government interest of avoiding duplication of benefits,[149] and (2) *Reesor* was a 4–3 decision that appeared significantly circumscribed five years later by *Satterlee*.[150]

The Court insisted that "[r]ehabilitation benefits do not replace lost wages,"[151] but a review of the statutory framework contradicts this position. The statute provides that rehabilitation benefits are only available to a "disabled worker" when his injury has resulted in "actual wage loss."[152] Furthermore, the "disabled worker" is eligible for rehabilitation benefits only if "the worker will have a reasonable reduction in the worker's actual wage loss with rehabilitation."[153] While the Court may be correct that rehabilitation benefits do not *directly* replace lost wages, the statutes reveal that the ultimate purpose of providing rehabilitation benefits is to replace lost wages.

Given this, the precedent from *McClanathan*, and Larson's position that Social Security retirement is rooted in replacing lost wages, the Court's rejection of the duplication argument cannot be squared with the deference mandated by the rational basis test.

144. *Frazier v. Dept. of Lab. & Indus.*, 3 P.3d 221, 225 (Wash. App. Div. 2 2000).

145. *Caldwell*, 256 P.3d at 929–930.

146. *Id.*

147. *Id.*

148. *McClanathan v. Smith*, 606 P.2d 507 (Mont. 1980).

149. *Id.* at 514.

150. *See Reesor*, 103 P.3d at 1026 (Rice, J., dissenting) (citing *McClanathan*, 606 P.2d at 513).

151. *Caldwell*, 256 P.3d at 929.

152. Mont. Code Ann. §§ 39–71–1006(1)(a)(i), 39–71–1011(3).

153. *Id.* at § 39–71–1006(1)(b) (emphasis added).

4. Tailoring Benefit Entitlement to Need

The Court also rejected State Fund's "tailoring benefit entitlement to need" argument.[154] The Court criticized State Fund for its failure to cite any applicable authority for this argument.[155] But one need not search for authority suggesting that government programs tailor benefits according to need. One could argue that most government entitlement programs are premised on tailoring benefits according to need.[156] For example, in Montana, a person entitled to public assistance is termed a "needy person."[157] Similarly, by operation of the graduated tax rate, those who have lower annual incomes are subject to a lower tax rate.[158]

Furthermore, *Walters v. Flathead Concrete Products, Inc.*—decided by the Court only two months prior to *Caldwell*—provided relevant precedent for the "tailoring benefits to need" rationale.[159] In *Walters*, Tim Walters, who had no dependents, was killed in a work-related accident. A workers' compensation statute directed wage-loss benefits to the dependents of deceased workers, but, for workers without dependents, it provided only a $3,000 lump sum to the decedent's parents. Though Walters' mother had lived with her son and received some assistance from him, she did not meet the statutory definition of a dependent. Consequently, aside from hospital bills and funeral expenses, the only compensation paid to Walters for her son's death was the $3,000 lump sum. Walters challenged the constitutionality of the statute, arguing that the meager payment violated the quid pro quo and thus infringed on substantive due process.

The *Walters* Court rejected Walters' challenge and held that the denial of wage loss benefits was a rational allocation of limited funds to those most in need—the dependent family members of deceased workers. The Court held that "it was not irrational that the Legislature may have decided to protect 'the most vulnerable claimants . . . .'"[160] The *Walters* Court continued: "[the] favored treatment . . . reflects a legislative determination that [those with dependents] require greater compensation, because of . . . need."[161]

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154. *Caldwell*, 256 P.3d at 930.

155. *Id.*

156. Indeed, Justice Baker echoes this idea in her dissent, where she stated, "the cut-off represents a policy choice, entrusted to the legislature, to allocate resources toward those who, statistically speaking, will use them. This is no more a mere cost-containment measure than our tax code is a mere revenue-generating measure . . . ." *Id.* at 934 (Baker, J., dissenting).

157. Mont. Code Ann. § 53–2–101(2).

158. *Id.* at § 15–30–2103(1).

159. *Walters*, 249 P.3d 913.

160. *Id.* at 920 (quoting *Satterlee*, 222 P.3d at 575).

161. *Id.* at 921 (quoting *Taylor*, 694 P.2d at 1162).

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Thus, through *Walters* and a plethora of statutes the *Caldwell* Court had readily available authority to support State Fund's "tailoring" argument. Again, the Court rejected this asserted interest in derogation of the rational basis standard's stated deference to legislative determinations.

iv. Suggesting that Caldwell is a Member of a Suspect Class

Ultimately, the Court criticized MACo's tailoring argument for what it felt lurked "immediately beneath the surface."[162] The Court vehemently rejected the notion that the legislature could direct resources to those who, statistically, would most utilize the benefit. The Court characterized this argument as "bias" against "older people." The Court stated that this "approach would permit the legislature to provide benefits unequally to similarly situated persons so long as 'empirical evidence' or statistics supported the legislature's decision. . . . The statistical majority holds no monopoly on equal protection guarantees."[163] Here, the Court exposed what is bubbling beneath the surface of its opinion—the unspoken belief that low-income, elderly workers operating within the workers' compensation system are in fact a quasi-suspect class entitled to increased protection. The Court asserted:

> Our equal protection analysis does not allow the legislature to violate the equal protection rights of those persons who, statistically speaking, represent the minority of persons who must continue working at ages beyond eligibility for social security because they could not otherwise provide for themselves or their families.[164]

One senses in these sentences that had Caldwell sought heightened scrutiny the Court may well have overturned established precedent and agreed. The Court clearly suggests that Caldwell is a member of a "minority," thus providing the Court with justification for applying rational basis with bite. As noted above, rational basis only applies when a law affects neither a suspect class nor implicates a fundamental right.

The position that those operating within the workers' compensation system constitute a pseudo-suspect class due greater protection through a more scrutinizing review of limitations on benefits has garnered some support from dissenting justices in the past. As previously noted, Justice Morris criticized the Court for applying a "toothless" standard in his dissent in *Satterlee*. Also, Justice Trieweiler, dissenting in *Stratemeyer*, made the case that the beneficiaries of workers' compensation constitute a quasi-suspect class, so that intermediate scrutiny was the appropriate level of scru-

162. *Caldwell*, 256 P.3d at 930.

163. *Id.*

164. *Id.*

tiny.[165] Justice Trieweiler contended that "[i]n recent years in Montana, no group has had less political influence and been the subject of more political demagoguery than those unfortunate people injured and disabled during the course of their employment."[166] A similar concern for the dwindling political influence of those in workers compensation system was expressed by Justice Nelson, who dissented in *Walters*. There, Justice Nelson expressed suspicion of "the direction of workers' compensation reform" which, he argued, increasingly threatened to undermine the quid pro quo on which the system is based.[167]

Notwithstanding these concerns, the Court has repeatedly and uniformly rejected invitations to apply heightened scrutiny review of workers' compensation statutes.[168] Addressing specifically the same class of persons as impacted in *Caldwell*, the *Satterlee* Court roundly rejected the plaintiff's invitation to apply heightened scrutiny:

> Satterlee . . . urges us to apply a middle-tier analysis "given the rare combination of age discrimination and the total loss of workers' compensation benefits found in the present statute." . . . The statute at issue here does not infringe upon the rights of a suspect class or involve fundamental rights. While we are sympathetic to any worker who suffers a loss of income, it would be inappropriate for us to disregard the well established principle that rational basis review applies to workers' compensation claims. We do not agree with Satterlee's contention that the facts presented justify a heightened level of scrutiny. Thus, rational basis is the appropriate level of scrutiny to apply to the instant case.

The Court was correct to reject the invitation to apply heightened scrutiny in *Satterlee*. Classifications based on age have never been recognized as creating a suspect class in Montana.[169] Moreover, the argument that those within the workers' compensation system lack political influence ignores the fact that a great percentage of the voting population is covered by workers' compensation insurance.[170]

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165. *Stratemeyer*, 855 P.2d at 516–518 (Trieweiler, J., dissenting).

166. *Id.* at 512.

167. *Walters*, 249 P.3d at 923 (Nelson, J., dissenting).

168. *See Satterlee*, 222 P.3d at 572 (collecting cases).

169. *See e.g. Jaksha v. Butte-Silver Bow Co.*, 214 P.3d 1248, 1253–1254; *Arneson v. State By and Through Dept. of Admin., Teachers' Retirement Div.*, 864 P.2d 1245, 1247–1248 (Mont. 1993).

170. It is estimated that 124.4 million people were covered by workers' compensation in 2010, and the total voting population in the U.S. numbered 229.7 million. *See* Ishita Sengupta, Virginia Reno, et. al, *Workers' Compensation: Benefits, Coverage, and Costs 2010* 7, National Academy of Social Insurance (Washington D.C. 2012) http://www.nasi.org/sites/default/?les/research/NASI_Workers_Comp_2010.pdf, and *U.S. Census Bureau, Statistical Abstract of the United States: 2012*, Table 399, http://www.census.gov/compendia/statab/2012/tables/12s0399.pdf.

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V. Conclusion

In the area of workers' compensation, the Montana Supreme Court has stated repeatedly that "the power of the legislature to fix [the] amounts, time and manner of payment of workers' compensation benefits is not doubted."[171] The Court in *Caldwell* seems to have lost sight of this principle.

What is worse, the Court's efforts to closely scrutinize limits on workers' compensation benefits may ultimately have unintended negative consequences for workers in the system. In this context, the Court's efforts and the legislature's response via House Bill 334, call to mind Justice Black's dissent in *Goldberg v. Kelly*.[172] In *Goldberg*, Justice Black criticized the Court's imposition of a constitutional due process requirement that a welfare beneficiary receive a full evidentiary hearing before welfare benefits could be terminated:

> The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. . . . While this Court will perhaps have insured that no needy person will be taken off the rolls without a full 'due process' proceeding, it will also have insured that many will never get on the rolls . . . .[173]

As evidenced by the recent cuts to workers' compensation benefits through legislation that was motivated, at least in part, by a feeling that the judiciary had created a workers' compensation system where the State was forced to "cover everybody for everything," Black's argument may apply with substantial force to the Court's decision in *Caldwell*. Indeed, House Bill 334 attempts to insure that many will never get on the rolls by redefining "permanent partial disability," so that it is much harder to obtain permanent partial disability status and its associated benefits. The Montana Legislature has a mandate to curtail the rising costs of workers' compensation premiums. The Court is an improper governmental tool to thwart this mandate.

The current divide in the Montana Supreme Court about the appropriate level of scrutiny, or deference, that should be applied under rational basis review should be resolved in favor of deference according to the traditional standard. Limits on judicial power must be recognized. Furthermore, applying a "freewheeling" rational basis standard, as Justice Marshall warns, is a flawed and "potentially dangerous" approach.[174] To maintain the integrity of *stare decisis*, and to hedge against arbitrary application of

171. *See Walters*, 249 P.3d at 920 (quoting *Satterlee*, 222 P.3d at 575) (alterations in original).

172. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

173. *Id.* at 278–279 (1970) (Black, J., dissenting).

174. *City of Cleburne*, 473 U.S. at 478 (Marshall, Brennan & Blackmun, JJ., concurring in part and dissenting in part).

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the levels of scrutiny, the Court must faithfully adhere to the tests it purports to apply.

Though the Court is rightly sensitive to limitations on workers' compensation benefits, the Court's current approach addresses this concern inappropriately. The worker's situation is uniquely concerning because the worker has given up the right to ordinary legal redress and must find his remedy exclusively within the workers' compensation system. But instead of applying rational basis with bite, a better approach would faithfully apply rational basis, recognizing that "cost control" measures further stand-alone legitimate state interests. For the reasons noted above, however, two preliminary determinations could be made before finding that "cost control" provisions serve stand-alone legitimate state interests: (1) the Court must determine if the statute operates on a suspect class, and (2) the court must determine if the provision violates substantive due process by upsetting the quid pro quo. Making these preliminary determinations assures that the Court adequately addresses the unique circumstances of workers in the workers' compensation system. If the statute passes these two tests, however, the statute should be regarded as an ordinary economic regulation due traditional deference.

In *Caldwell*, the Court deviated substantially from the traditional rational basis standard of review. While the Court should not ignore the unique position of workers in the workers' compensation system, the Court should resist diluting its standards of review. In the area of economic regulation, the inherent limits on judicial power and respect for the separate spheres of government power demands a faithful application of judicial restraint. Ultimately, judicial restraint in this area best serves both the worker and the courts.

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