Portrait of a Man in the Middle—Mr. Justice Powell, Equal Protection, and the Pure Classification Problem

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From amid the confusion surrounding the United States Supreme Court's equal protection analysis,[1] Justice Powell's vote has emerged as the single most accurate barometer of the Burger Court's attitude in this area of the law. While the Warren Court had concentrated on determining which rights were to be deemed fundamental in equal protection cases,[2] the Burger Court seems preoccupied with what might be called the "pure classification problem": the question of which *groups* deserve special judicial protection.[3] In the pure classification areas of greatest controversy—so-called "reverse" racial discrimination and discrimination based on alienage, sex and illegitimacy—through the 1978-79 term Justice Powell had participated in twenty-one decisions in which a divided Court adjudicated constitutional claims.[4] In twenty of these cases, including

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1. For the purposes of this article, the term "equal protection analysis" includes not only cases decided under the equal protection clause of the fourteenth amendment, but also those decided under the equal protection component of the due process clause of the fifth amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). In general, the same standards of review apply under both clauses. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975). *See* generally Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977). *But compare* Mathews v. Diaz, 426 U.S. 67 (1976) (rejecting challenge to restrictions of Social Security benefits to aliens who had been in the country for at least five years) *with* Graham v. Richardson, 403 U.S. 365 (1971) (striking down similar restrictions on welfare benefits provided by states).

2. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right of interstate movement). *See also* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-9 & nn. 33-40 (1972).

3. The fundamental rights problem has not been entirely absent from Burger Court equal protection jurisprudence. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (right to travel). However, the current Court seems more inclined to deal with such issues under the due process clause. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973).

4. The twenty-one cases are Caban v. Mohammed, 99 S. Ct. 1760 (1979) (sex); Parham v. Hughes, 99 S. Ct. 1742 (1979) (sex); Ambach v. Norwick, 99 S. Ct. 1589 (1979) (alienage); Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy); Foley v. Connelie, 435 U.S. 291 (1978) (alienage); Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Fiallo v. Bell, 430 U.S. 787 (1977) (illegitimacy and sex); Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Califano v. Goldfarb, 430 U.S. 199 (1977) (sex); United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977) ("reverse" racial discrimination); Craig v. Boren, 429 U.S. 190 (1976) (sex); Mathews v. Lucas, 427 U.S. 495 (1976) (illegitimacy); Examing Bd. of Eng'rs, Architects, and Surveyors v. Flores de Ortero, 426 U.S. 572 (1976) (alienage); Schlesinger v. Ballard, 419 U.S. 498 (1975) (sex); Jiminez v. Weinberger, 417 U.S. 628 (1974) (illegitimacy); Kahn v. Shevin, 416 U.S. 351 (1974) (sex); *In re* Griffiths, 413 U.S. 711 (1973) (alienage); Sugarman v. Dougall, 413 U.S. 634 (1973) (alienage); Frontiero v. Richardson, 411 U.S. 677 (1973) (sex); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (illegitimacy); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (illegitimacy). *See also* Califano v. Boles, 99 S. Ct. 2767 (1979) (restriction of "mother's benefits" to spouses); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (procedural due process analysis of discrimination against aliens); Geduldig v. Aiello, 417 U.S. 484 (1974) (exclusion of

seven of the eight decided by a five-to-four vote,[5] Justice Powell has concurred in the Court's decision on the merits of the equal protection claim.[6]

This article examines Justice Powell's approach to pure classification cases. Part I will explore the various standards he has applied in reviewing equal protection claims. It will be shown that Justice Powell's version of the traditional two-tier approach contemplates some meaningful review under the lower-tier, rational basis test, and that his upper-tier, strict scrutiny of schemes based on suspect classifications is not always "fatal in fact."[7] It will further be shown that while Justice Powell purports to have adopted a single standard in dealing with cases in the rapidly developing middle tier[8] he actually applies three standards of scrutiny which differ in intensity in those cases. Part II will assess the clarity of Justice Powell's positions and the appropriateness of their results.

I. THE POWELL APPROACH

A. *Two-Tier Analysis*

The basis for Justice Powell's approach to most equal protection

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pregnancy from disability benefits program). The list does not include cases in which dissenting opinions dealt only with procedural matters rather than the merits of the constitutional claim presented. *See, e.g.*, Orr v. Orr, 99 S. Ct. 1102 (1979); Gomez v. Perez, 409 U.S. 535 (1973). Nor does it encompass cases in which the only division on the Court is over the appropriate remedy. *See* Califano v. Westcott, 99 S. Ct. 2655 (1979). Ironically, the list also does not properly include the case that is perceived by the lay public as the clearest example of Justice Powell's position as a "swing man" on constitutional issues—Regents of the Univ. of Cal. v. Bakke, 438 U.S. 256 (1978). In *Bakke*, the medical school of the University of California at Davis maintained a special admissions program for which whites were not eligible. This exclusion of whites was challenged under both federal statutory law and the Constitution. Although the Court held by a 5-4 vote that a total exclusion of whites from such a program was illegal, five members of the Court also concluded that race could permissibly be considered as a factor in the admissions process.

Only Justice Powell agreed with both majorities. *Compare* 438 U.S. at 268-320 (opinion of Powell, J.) *with id.* at 408-21 (opinion of Stevens, J.). However, there was no constitutional point in the case on which there was both a division of the Court and a majority disposition. On the question of the constitutionality of the total exclusion, there was a clear division. *Compare* 438 U.S. at 319-20 (opinion of Powell, J.) *with id* at 355-79 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). But on this point no majority of the Court subscribed to either position; four members of the Court avoided the constitutional issue by resting their opinion solely on a statutory ground. *See* 438 U.S. at 412-21 (opinion of Stevens, J.). Thus, the Court cannot be said to have reached a conclusion on this issue.

A clear majority of the Court did indicate that the Constitution permitted some consideration of race in the admissions process. *See* 438 U.S. at 320 (opinion of Powell, J.); *id.* at 326 n.1 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). But on the merits of this point, there was no dissent; four members of the Court simply did not reach this issue. *See* 438 U.S. at 408-11 (opinion of Stevens, J.).

5. The eight five-to-four decisions are Caban v. Mohammed, 99 S. Ct. 1760 (1979); Parham v. Hughes, 99 S. Ct. 1742 (1979); Ambach v. Norwick, 99 S. Ct. 1589 (1979); Lalli v. Lalli, 439 U.S. 259 (1978); Nyquist v. Mauclet, 432 U.S. 1 (1977); Trimble v. Gordon, 430 U.S. 762 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); and Schlesinger v. Ballard, 419 U.S. 498 (1978).

6. The one exception is Nyquist v. Mauclet, 432 U.S. 1 (1977), discussed in the text accompanying notes 126-31 *infra*.

7. *Cf.* Gunther, *supra* note 2, at 8.

8. For purposes of this discussion a "middle-tier" case is one in which the court adopts a standard of review that is more searching than the rational basis test, but less exacting than strict scrutiny. *See* notes 58-120 and accompanying text *infra*.

problems remains the two-tier system developed by the Warren Court.[9] Indeed, early in his career he was the author of the majority opinion in *San Antonio Independent School District v. Rodriguez*,[10] the case that was probably the high water mark of two-tier analysis. In *Rodriguez*, plaintiffs sued as representatives of the class of minority school children who allegedly were the victims of discrimination on the basis of wealth. It was alleged that because the Texas system of financing public schools relied in part on local property taxes, children living in poorer school districts were disadvantaged in violation of the equal protection clause of the fourteenth amendment.

Justice Powell defined the task of the Court as follows:

> We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate articulated state purpose . . . .[11]

In applying this formula, Justice Powell determined that the system did not discriminate against a class of individuals that was both definable and suspect. The Court, Powell noted, had never held that wealth discrimination alone, like classifications by race,[12] national origin,[13] and alienage,[14] was a sufficient basis for invoking strict scrutiny.[15] Justice Powell further determined that unlike rights to vote,[16] to travel interstate,[17] and to procreate and use contraceptives under the umbrella of privacy,[18] the right to education is not explicitly or implicitly protected by the Constitution, and therefore not "fundamental."[19] Thus, the Court declined to employ the strict scrutiny standard[20] and used the less rigorous rational basis test. Finding a rational basis for the Texas plan, Justice Powell found the financing program constitutionally unobjectionable.

Even when he purports to apply two-tier analysis, however, Justice

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9. For general discussions of the two-tier system, see, *e.g.*, Gunther, *supra* note 2, at 8-10; DEVELOPMENTS IN THE LAW: EQUAL PROTECTION, 82 HARV. L. REV. 1065, 1076-113 (1969).

10. 411 U.S. 1 (1973).

11. *Id.* at 17.

12. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

13. *See* Hernandez v. Texas, 347 U.S. 475 (1954); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).

14. *See In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

15. 411 U.S. at 29.

16. Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

17. Shapiro v. Thompson, 394 U.S. 618 (1969).

18. Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Roe v. Wade, 410 U.S. 113 (1973) (contraception).

19. 411 U.S. at 35.

20. *Id.* at 40.

Powell deviates at least slightly from the Warren Court formulation of that approach. The remainder of this subpart explores his approach to each level of the test.

1. *The Lower Tier*

The classic statement of the rational basis test is that of Chief Justice Warren in *McGowan v. Maryland*:[21] "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[22] As any number of commentators have noted, application of the *McGowan* approach is tantamount to no review at all.[23] Yet Justice Powell plainly contemplates some meaningful review even when lower-tier analysis is employed, as is demonstrated by his position in *New York City Transit Authority v. Beazer*.[24] *Beazer* was a challenge to the policy of the New York City Transit Authority toward methadone use. The only constitutional issue with which the majority dealt in the case was whether the Transit Authority's refusal to hire *current* methadone users violated the equal protection clause;[25] Justice Powell concurred in the opinion holding that it did not.[26] In a separate opinion, however, he concluded, with little discussion, that an absolute bar to employment of those who have successfully completed a methadone maintenance program would not pass the rational basis test and thus would violate the equal protection clause.[27]

Justice Powell's hypothetical holding clearly would require the use of some level of scrutiny higher than the classical rational basis test. As the district court found in *Beazer*, persons who successfully complete methadone maintenance programs are more likely to revert to heroin use than is the general population,[28] and all parties accepted the proposition that heroin usage is relevant to the performance of the duties of employees of the Transit Authority. Thus, the exclusion plainly had some relationship to the goal of improving employee efficiency. Justice Powell nonetheless would have found the classification unconstitutional using lower-tier analysis. Apparently, he reasoned that the incidence of reversion to heroin use was sufficiently small that a truly rational system would rely on individualized determinations rather than on a blanket exclusion. But under the rational basis test envisioned in *McGowan*,[29] the possible

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21. 366 U.S. 420 (1961).

22. *Id.* at 426.

23. *See, e.g.*, Gunther, *supra* note 2, at 8; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 368-72 (1949); *Developments*, *supra* note 9, at 1087.

24. 99 S. Ct. 1355 (1979). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651-57 (1974) (Powell, J., concurring in the result); James v. Strange, 407 U.S. 128 (1972).

25. 99 S. Ct. at 1359 n.3.

26. 99 S. Ct. at 1370 (Powell, J., concurring in part and dissenting in part).

27. *Id.* at 1370-71 (Powell, J., concurring in part and dissenting in part).

28. Beazer v. New York City Transit Authority, 399 F. Supp. 1032, 1051 (S.D.N.Y. 1975), *aff'd*, 558 F.2d 97 (2d Cir. 1977), *rev'd*, 99 S. Ct. 1355 (1979) (by implication).

29. *See* text accompanying note 22 *supra*.

existence of a more rational system to serve the state's interest is irrelevant. *Massachusetts Board of Retirement v. Murgia*[30] provides a prime example of the application of this principle. In *Murgia*, a regulation that set age fifty as the mandatory retirement age for policemen was challenged under the equal protection clause. It was argued that if ensuring the physical fitness of police officers was the governmental goal, the purpose would more appropriately be served by individualized determinations of physical well-being. The Court rejected this contention, noting:

> That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum age limitation. It is only to say that with regard to the interest of all concerned, the State has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."[31]

Just as the classification in *Murgia* was not rendered irrational because there existed a "better" way for the state to achieve its goals, so the total exclusion of former methadone users is not totally irrational solely because a more efficient means of serving the state's interest might have been devised. Thus, in *Beazer*, Justice Powell must be viewed as having required a level of justification at least marginally more substantial than that typically required by lower-tier analysis.

On the other hand, the intensity of the scrutiny that Justice Powell applies in lower-tier cases should not be overstated. He has never dissented from a majority opinion that applied the rational basis test in rejecting an equal protection challenge,[32] and while he joined some of the majorities that struck down classifications under the rational basis test in the early seventies,[33] such majorities have been nonexistent in recent terms of the Court. It follows that, while Justice Powell clearly advocates some meaningful scrutiny of lower tier classifications, his voting record indicates a belief that the appropriate level of that scrutiny is very low.

2. *The Upper Tier*

Justice Powell's inclination to raise the level of rational basis scrutiny is apparently matched by a determination to soften the rigors of upper-tier "strict" scrutiny. His opinion in *Regents of the University of California v. Bakke*[34] provides a striking example. *Bakke* considered a claim that preferential treatment for nonwhites in determining admission to state medical school violated the equal protection clause. Alone among those

30. 427 U.S. 307 (1976) (per curiam).

31. *Id.* at 316, *citing* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (footnote omitted).

32. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979); New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam).

33. *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972).

34. 438 U.S. 265 (1978).

who addressed the issue,[35] Justice Powell concluded that since the state treated applicants differently according to their race, the same strict scrutiny that applied to discrimination against Blacks should also apply to discrimination against whites.[36] In order for any such classification to stand under the two-tier system, it must be found to be necessary to serve a compelling governmental interest.[37] Justice Powell found the promotion of diversity in academic communities to be such an interest[38] and concluded that some consideration of race in the admissions process was constitutionally unobjectionable.[39]

Justice Powell's conclusion that state action could survive upper-tier scrutiny, while not unprecedented in fundamental right cases,[40] is all but unique in pure classification jurisprudence under the two-tier system.[41] For Justice Powell, however, the conclusion represented the injection of a necessary flexibility into the traditionally rigid two-tier system. Unlike the other Justices who addressed the constitutional issue in *Bakke*, Justice Powell could find no principled distinction between classifications on the basis of race that worked to the disadvantage of whites and those that worked to the disadvantage of minority races.[42] It thus became necessary for him to apply strict scrutiny. If, however, such scrutiny had been construed to be "fatal in fact," as it has been described by one commentator,[43] legislatures would have been effectively hamstrung in their efforts to ameliorate the effects of past racial discrimination on minority groups. By taking the approach he did, Justice Powell was able to avoid reliance on a distinction that he viewed as untenable while at the same time preserving at least some measure of legislative flexibility in dealing with the problems of disadvantaged minorities.

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35. Four justices resolved the case entirely on statutory grounds. *See id.* at 412-21 (Stevens, J., concurring in part). The remaining four justices applied a middle-tier approach. *See id.* at 356-62 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part).

36. *See* 438 U.S. at 287-305.

37. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 375 (1971); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

In *Bakke*, the exact formulation employed by Justice Powell was that "in 'order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" 438 U.S. at 305, *quoting In re* Griffiths, 413 U.S. 717, 721-22 (1973). However, in *Griffiths*, Justice Powell indicated that this conceptualization was the exact equivalent of the more normal statement that a "compelling" state interest was required. *See In re* Griffiths, 413 U.S. 717, 722 n.9 (1973).

38. 438 U.S. at 311-15.

39. *Id.* at 320. However, Justice Powell found the particular program challenged in *Bakke* to be unconstitutional. *Id.*

40. *See, e.g.*, American Party of Tex. v. White, 415 U.S. 767 (1974); Marston v. Lewis, 410 U.S. 679 (1973) (per curiam).

41. *See generally* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring); Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting); Gunther, *supra* note 2, at 8. *But see* Korematsu v. United States, 323 U.S. 214 (1944).

42. 438 U.S. at 291-99. *Cf. id.* at 356-62 (Powell, J.); *id.* at 356-62 (Brennan, White, Marshall, and Blackman, JJ., concurring in part).

43. Gunther, *supra* note 2, at 8.

The impact that Justice Powell's position in *Bakke* will have on his approach to suspect classifications in other contexts is unclear. One can hardly envision him countenancing discrimination against minorities on the basis of race or national origin on any significant scale. The only other generally recognized suspect class is aliens.[44] Justice Powell would give state legislatures some flexibility in dealing with this group; however, this flexibility is not, as it was in *Bakke*, provided through the manipulation of the concept of strict scrutiny itself, but through other means. In order to fully understand his contribution in this regard, one must first examine the early development of the modern law of alienage in two-tier analysis.

Prior to 1979, the key case defining the parameters of the ability of states to discriminate between citizens and aliens was *Sugarman v. Dougall*.[45] In *Sugarman*, the Court applied strict scrutiny in striking down a New York law that excluded aliens from all state civil service positions. However, the Court was careful to narrow its holding, noting:

> [We do not] hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. Just as "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," . . . "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." . . . Such power inheres in the State by virtue of its obligation, already noted above, "to preserve the basic conception of a political community." . . . And this power and the responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. . . .
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> [O]ur scrutiny will not be so demanding where we deal with matters resting firmly within the State's constitutional perogative. . . . This is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions, . . . and a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.[46]

Even *Sugarman* itself created a situation unique in two-tier analysis. Under the *Rodriguez* approach, *any* discrimination against a suspect class would be subject to strict scrutiny.[47] By contrast, *Sugarman* suggested that

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44. *See, e.g.*, Examining Bd. of Eng'rs, Architects, and Surveyors v. Flores de Otero, 426 U.S. 572 (1976); Graham v. Richardson, 403 U.S. 365 (1971).

It should be emphasized that discrimination against aliens is "suspect" only when essayed by the states; such discrimination by the federal government is subject to different standards of review. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 100-01 (1976). *Compare* Graham v. Richardson *with* Mathews v. Diaz, 426 U.S. 67 (1976). *See generally* Maltz, *The Burger Court and Alienage Classifications*, 31 OKLA. L. REV. 671, 680-85 (1978); Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275.

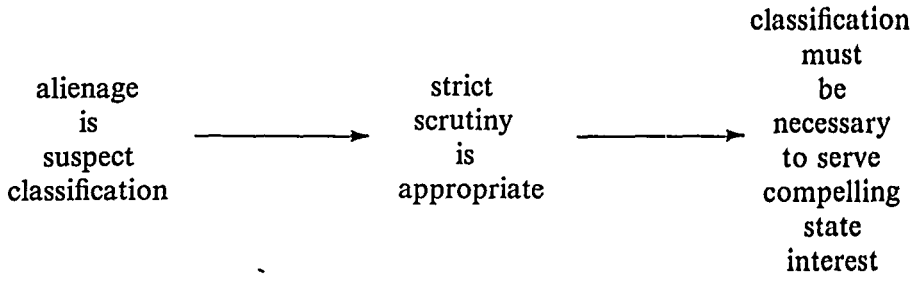
45. 413 U.S. 634 (1973).

46. *Id.* at 647-48 (citations and footnotes omitted).

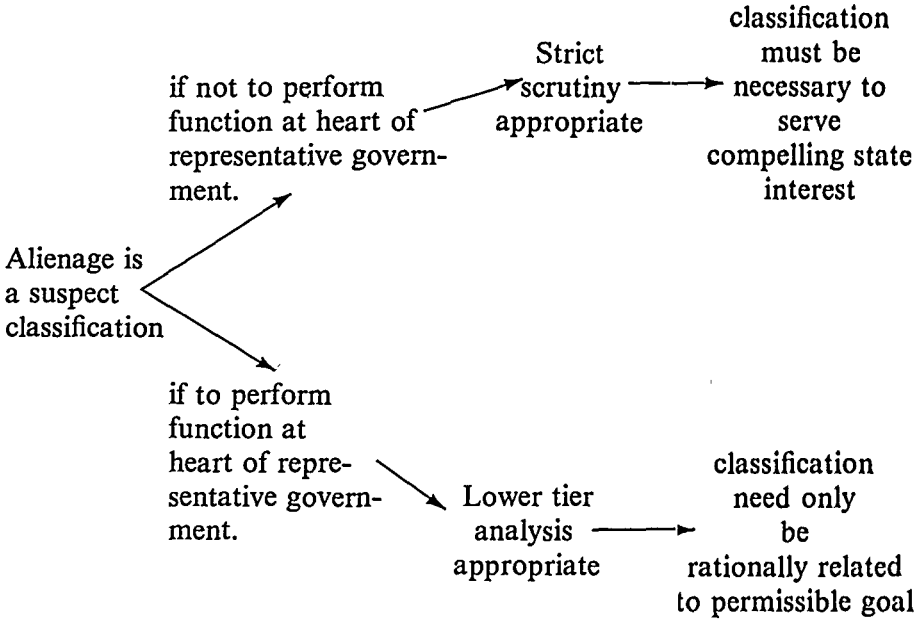
47. *See* text accompanying notes 10-20 *supra*.

if the question were whether an alien was to perform a function that "go[es] to the heart of representative government," discrimination against the alien could be justified by reference to a less demanding standard.

The difference between the *Rodriguez* and *Sugarman* approaches can perhaps best be illustrated diagrammatically. Under *Rodriguez* the analysis would be as follows:



By contrast, the approach actually employed by the *Sugarman* Court follows this course:



But the departures from the two-tier structure suggested by *Sugarman* were dictated by very basic concepts of federalism. Few would argue that strict scrutiny is applicable to discrimination against any but *lawfully resident* aliens—that is, aliens that the federal government has determined should be allowed to live in this country.[48] From the point of view of the

48. *Cf.* De Canas v. Bica, 424 U.S. 351 (1976) (state law restricting employment of illegal aliens not preempted).

states, if strict scrutiny is applied, the decision of the federal government to admit an alien in effect becomes an order to treat the alien the same as a citizen. But the basic principles of federalism underlying the Constitution limit the power of the federal government to affect certain aspects of state governmental operations, particularly those lying at the core of the sovereign status of the states.[49] There is no function more basic to this status than the designation of those who are to make the policy decisions on governmental issues. Thus, even given the general proposition that aliens should be a suspect class, a strong argument can be made that states should be permitted to constitutionally exclude aliens from policymaking positions.[50]

Initially, Justice Powell seemed to indicate that he fully accepted the *Sugarman* approach. He concurred in the majority opinion in *Sugarman* itself, and in *In re Griffiths*[51] wrote a majority opinion in which strict scrutiny was applied to strike down a state ban on the admission of aliens to the bar. However, his approach in *Ambach v. Norwick*[52] represented a substantial departure from *Sugarman*.[53] *Ambach* was a challenge to a New York statute that precluded any lawfully resident alien from becoming a schoolteacher unless he had manifested an intention to apply for citizenship. Conceding that alienage is a suspect classification,[54] Justice Powell concluded that, because teachers performed important governmental functions, the rational basis test was the appropriate standard of review.[55] Applying this test, Justice Powell had no trouble rejecting the constitutional challenge.

In support of his conclusion, Justice Powell did cite the language from *Sugarman* which indicated that alienage classifications that preserve "the basic conception of a political community" will not be subjected to strict judicial scrutiny.[56] But it is difficult if not impossible to characterize the *Ambach* classification as fitting within that mold or to justify the result in the case by reference to the principles of federalism which underlay the *Sugarman* concept. Education is no doubt one of the most important functions of the state, but teachers are in no sense policymakers; they

49. *See* Oregon v. Mitchell 400 U.S. 112 (1970) (prior to enactment of constitutional amendment, Congress had no power to order states to lower voting age). *See generally* National League of Cities v. Usery, 426 U .S. 833 (1976).

50. *See* Maltz, *supra* note 44, at 690. *Cf.* Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

51. 413 U.S. 717 (1973).

52. 99 S. Ct. 1589 (1979).

53. It has been argued that the erosion of the *Sugarman* principles actually began with the Court's decision in Foley v. Connelie, 435 U.S. 291 (1978), in which the Court refused to strike down a state ban on the employment of aliens as police officers. *See id.* at 307-12 (Stevens, J., dissenting); *id.* at 302-07 (Marshall, J., dissenting). However, in *Foley*, the analysis employed by the majority tracked the *Sugarman* approach very closely. *See id.* at 297-300 (majority opinion).

54. 99 S. Ct. at 1593, *citing* Graham v. Richardson, 403 U.S. 365 (1971).

55. 99 S. Ct. at 1594-96.

56. *Id.* at 1593, *quoting* Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

simply carry out educational policies much as public employees generally carry out other policies devised by governmental leaders. To define the teaching function as being at the core of the sovereign prerogative of the state would be to extend that concept far beyond the bounds envisioned in *Sugarman*. Thus, if the decision in *Ambach* is to be adequately explained, it must rest on other factors.

For Justice Powell, one critical factor may well have been his aversion to "federalization" of the educational process. The theme of local control of school systems is one that runs through many of Justice Powell's opinions, not only in equal protection cases but in other areas as well.[57] His resistance to what he views as the trend toward the Court becoming a national school board no doubt strongly influenced his approach to the *Ambach* case.

B. *The Middle Tier*

Perhaps the most dramatic development in Burger Court equal protection jurisprudence has been the formal emergence, if not general acceptance, of a standard of review more demanding than the rational basis test but less stringent than strict scrutiny.[58] This "middle-tier" analysis has been explicitly recognized in cases dealing with discrimination on the bases of sex and legitimacy of birth.[59] Justice Powell has been an active participant in the evolution of the standard governing such cases.[60] His first opinion in a case concerning sex-based discrimination came in *Frontiero v. Richardson*.[61] *Frontiero* was a challenge to a federal statute which provided that wives of servicemen would automatically be treated as dependents for purposes of the men receiving certain special benefits; husbands of servicewomen, by contrast, would only be considered dependents if it were shown that the wife provided over one-half of the support for her spouse. Four members of the Court voted to overturn the classification on the ground sex should be considered a suspect classification and that strict scrutiny should therefore be applied.[62] Justice

57. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 682 (1977) (Powell, J.); Goss v. Lopez, 419 U.S. 565, 600 n.22 (1975) (Powell, J., dissenting).

58. Among the more notable descriptions of the rise of middle-tier analysis are Gunther, *supra* note 2, and Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee: Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

59. Justice Powell has also applied middle-tier analysis to an equal protection case that a majority of the court analyzed as involving a fundamental right which triggered strict scrutiny. Zablocki v. Redhail, 434 U.S. 374, 396-403 (1978) (Powell, J., concurring in the result) (right to marry).

60. Of course, Justice Powell is not alone on the Court in his recognition of the existence of a middle level of review. Only Justice Rehnquist continues to resist the concept entirely. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting); Craig v. Boren, 429 U.S. 190, 217-28 (1976) (Rehnquist, J., dissenting). Even he, however, has recently joined in an opinion which applied middle-tier scrutiny in finding a sex-based classification constitutionally invalid. Califano v. Westcott, 99 S. Ct. 2655, 2665-66 (1979) (Rehnquist, J., joining in opinion of Powell, J., concurring in part).

61. 411 U.S. 677 (1973).

62. *Id.* at 682-91 (Brennan, J.).

Powell concurred in this result,[63] but declined to adopt the strict scrutiny rationale. Instead, he argued that the classification was unconstitutional under the standard that a unanimous Court had applied in *Reed v. Reed*[64]—that a distinction must " 'rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . . ' "[65]

The *Reed* Court seemed to be attempting to cast its decision in terms of traditional rational basis analysis;[66] from his reliance on *Reed* it might have been inferred that Justice Powell was attempting to fit the *Frontiero* result into the lower-tier as well. But any suggestion that "no conceivable set of facts" would support either the statute challenged in *Reed* or the discrimination attacked in *Frontiero* is obviously untenable.[67] Thus, if the rational basis test as formulated in *McGowan v. Maryland* had been applied, the Court would have upheld both laws.

Recognizing the apparent dissonance between cases such as *McGowan* on the one hand and *Frontiero* and *Reed* on the other, in *Craig v. Boren*[68] Justice Powell formally rejected the applicability of two-tier analysis to sex discrimination. In *Boren*, the Court struck down an Oklahoma law that allowed women to buy 3.2% beer at age eighteen, but prohibited men from buying such beer until age twenty-one. Concurring, Justice Powell conceded that the distinction had a rational relationship to the governmental interest in promoting traffic safety;[69] he insisted, however, that the *Reed v. Reed* standard compelled an invalidation of the Oklahoma law. He conceded that "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification."[70] The *Boren* opinion is important not only for its candid recognition of a middle-tier test, but also because it seemed to indicate that Justice Powell would apply the same substantial relationship test to discrimination against men as to discrimination against women.[71]

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63. *Id.* at 691-92.

64. 404 U.S. 71 (1971). In *Reed*, the Court struck down an Idaho statute that gave preference to men over women when a person of the same "entitlement class" applied for appointment as administrator of a decedent's estate.

65. 404 U.S. at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

66. *See* 404 U.S. at 76 (stating question as whether discrimination has rational basis).

67. *See* Frontiero v. Richardson, 411 U.S. 677, 682-84 (1977) (Brennan, J.).

68. 429 U.S. 190 (1976).

69. *Id.* at 211 (Powell, J., concurring) (by implication).

70. *Id.* at 210-11 n.* (Powell, J., concurring). *See also id.* at 210.

71. The phrasing of this test has not been entirely consistent. *Compare, e.g.*, Caban v. Mohammed, 99 S. Ct. 1760, 1766 (1979) ("question . . . is whether the distinction . . . between unmarried mothers and unmarried fathers bears a substantial relation to some *important* state interest") (emphasis added) *with* Lalli v. Lalli, 439 U.S. 259, 265 (1979) (Powell, J.) (issue whether classification "substantially related to some *permissible* state [interest]"). However, the potentially critical difference between an "important" and a "permissible" state interest has thus far had no practical significance. When the Court has struck down classifications using a middle-tier approach, the importance of the asserted governmental interest has generally been conceded; the flow that has

While this theoretical framework has been the basis of all his sex discrimination opinions, Justice Powell has employed a number of different formulations to describe his approach to the analysis of discrimination based on illegitimacy. His first opinion dealing with such classifications came in *Weber v. Aetna Casualty & Surety Co.*,[72] in which the Court struck down a Louisiana statute denying unacknowledged illegitimate children the right to recover under workmen's compensation laws for the death of their natural fathers. Speaking for the Court, Justice Powell characterized the inquiry as "a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[73] He conceded that "the regulation and protection of the family has indeed been a venerable state concern."[74] He argued, however, that "penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent."[75] He also noted the state concern with obviating "potentially difficult problems of proof";[76] but in *Weber*, he found that the elimination of the exclusion of unacknowledged illegitimates would impose no additional burden on the state court system, since all claimants were already required to prove dependency.[77] Thus, Justice Powell concluded that the exclusion of unacknowledged illegitimates violated the equal protection clause.

The language of his *Weber* opinion suggested that Justice Powell viewed an ad hoc balancing test as appropriate in cases concerning discrimination against illegitimates. His majority opinion in *Trimble v. Gordon*[78] reinforced this impression. In *Trimble*, an equal protection challenge was mounted to an Illinois statute that prevented illegitimates from inheriting from their natural fathers who died intestate. The interests considered by the Court were much the same as those rejected in *Weber*—the promotion of legitimate family relationships[79] and the need to avoid protracted litigation over issues of paternity.[80] Justice Powell conceded

been found is that the challenged classification is not sufficiently related to that interest. *See, e.g.*, Caban v. Mohammed, 99 S. Ct. 1760 (1979); Craig v. Boren, 429 U.S. 190, 211 (1976) (Powell, J. concurring).

It should also be noted at this juncture that the application of the same test to all gender-based discrimination regardless of which sex is disadvantaged by the classification does not necessarily mean that men and women are to be dealt with equally. There is some indication that Justice Powell views with greater tolerance discrimination in favor of women when the purpose is to ameliorate past disadvantages suffered by that sex. *See* notes 109-14 and accompanying text *infra*.

72. 406 U.S. 164 (1972).

73. *Id.* at 173.

74. *Id.*

75. *Id.* at 175.

76. *Id.* at 174.

77. *Id.*

78. 430 U.S. 762 (1977).

79. *Id.* at 768-70.

80. *Id.* at 770-73. Justice Powell also considered the possibility that the statute was enacted in an attempt to carry out the "presumed intentions of the citizens of the state who died [intestate]." 430 U.S. at 774. While not passing on the question of whether the discrimination in *Trimble* could have been constitutionally justified by such a purpose, *see id.* at 775 & n.16, he concluded that effectuation of

that the challenged classification served the latter interest.[81] He nevertheless found the Illinois scheme constitutionally infirm, applying a standard that he described as less than the Court's "most exacting scrutiny" but "not toothless"[82]—a phrase borrowed from an earlier opinion of Justice Blackmun.[83] Under this standard, Justice Powell held that a discrimination must be " 'carefully tuned to alternative considerations.' "[84] He found that the *Trimble* statute failed the test because the state could further its interest sufficiently by adopting a "middle ground" between complete exclusion and case-by-case determinations of paternity.[85]

In *Lalli v. Lalli*, [86] Justice Powell assimilated his concept of a statute " 'carefully tuned to alternative considerations' " to the language of his sex-discrimination analysis. The Court was faced with a statute that allowed all legitimate children to inherit from their fathers who died intestate, but gave the same right to only those illegitimate children who

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presumed intentions was not in fact a goal that actuated the legislative enactment of the challenged discrimination. *See id.* at 774-76.

But even if this perception is accurate, Justice Powell does not appear to have addressed all of the relevant governmental interests in *Trimble*. His focus on the need to avoid difficulties of proof of paternity may well have been accurate in cases such as *Weber*, which deal with attempts to recompense children for the loss of their parents. Given that even before the Court's decision in Gomez v. Perez, 409 U.S. 535 (1973) (per curiam), illegitimate children generally had a right to financial support from their parents, *see* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 177 (1968), the only conceivable justification for denying them such recompense is either blind prejudice or an attempt to avoid protracted litigation over paternity.

But intestate succession laws are on an entirely different footing. Such laws are not intended to provide compensation. Rather, they address the far more basic question of who has the most just claim to the property of a decedent where the decedent has expressed no preference. The statutory scheme in *Trimble* was based upon what might be called a positivist theory, with the legislative judgment being that those with the most just claim on the estate were those whose relationship was based on some contract-type legal relationship such as marriage.

Such judgments are classically legislative. Yet in *Trimble* Justice Powell implicitly denied the states the right to make such a choice. Instead, he viewed the Constitution as requiring that, with respect to children, the state follow a kind of natural law theory—blood relationship equated with the right to inherit intestate. Only where a policy consistent with the natural law theory is being furthered—the elimination of problems of proof, for example—may the state deviate from such a strict natural law concept.

Of course, it might be argued that such a conclusion is implicit in the factors that lead the Court to closely scrutinize classifications based on legitimacy. Such an argument would have considerable force if the distinction between legitimates and illegitimates were the only area in which the positivist theory had manifested itself. But such a theme pervades many intestate succession schemes; for example, spouses are generally provided for, while paramours are not, even though their respective biological relationship with the intestate are identical. *See* Labine v. Vincent, 401 U.S. 532, 538 (1971).

This is not to say that Justice Powell might not have appropriately reached the same conclusion even if he had dealt with the basic ethical decisions involved in *Trimble* and *Lalli*. It is possible to conclude that the dangers inherent in discrimination against illegitimates generally are sufficiently strong that legislation manifesting such discrimination, as a result of legislators' basic concepts of justice, ought to be deemed constitutionally infirm. But the failure to even address the argument leaves the impression that Justice Powell does not fully appreciate all the factors involved in cases such *Trimble*, and thus casts doubts on the balance that he draws.

81. 430 U.S. at 770-72 (by implication).

82. *Id.* at 767.

83. Mathews v. Lucas, 427 U.S. 495, 506, 510 (1976).

84. 430 U.S. at 772, *quoting* Mathews v. Lucas, 427 U.S. 495, 513 (1976).

85. 430 U.S. at 771.

86. 439 U.S. 259 (1978).

had obtained a legal "order of filiation" during the lifetime of the decedent.[87] Speaking only for a plurality, Justice Powell argued that the statute was distinguishable from that struck down in *Trimble*.[88] Rather than repeating the "not toothless" language of his *Trimble* opinion, he characterized the issue as whether the statute was "substantially related to . . . important state interests"[89]—an echo of the middle-tier standard that he had embraced in *Frontiero* and *Boren*. Focusing, as he did in *Trimble*, on the governmental interest in promoting the speedy and efficient settlement of estates,[90] he reasoned that the *Lalli* statute effected an acceptable reconciliation of the competing interests because it provided a means by which the illegitimate could remove the statutory burden placed upon him.[91] Thus, Justice Powell found the disparate treatment in *Lalli* constitutionally unobjectionable.

Justice Powell's role as a swing vote in illegitimacy cases is well illustrated by *Trimble* and *Lalli*; he was the only Justice to concur in the result in both cases. *Caban v. Mohammed*[92] and *Parham v. Hughes*[93] provide evidence that he occupies a similar position in cases dealing with discrimination against men. *Caban* dealt with a New York statute that required the consent of the mother but not the father of an illegitimate child prior to the adoption of the child; in *Parham*, the Court was faced with a Georgia statute that provided that a mother could sue for the wrongful death of her illegitimate child, but the father of the child could only bring such a suit if he had legitimated the child and the mother was dead. The application of both statutes was challenged on the ground that they discriminated against the father on the basis of sex. The New York statute was struck down, but the challenge was rejected in *Parham*. Justice Powell, invoking the language of *Craig v. Boren*, was the only member of the Court to concur in both results.[94]

Justice Powell's performance in the middle-tier classification cases is not noteworthy solely because of his pivotal position on the Court. Unlike some of his colleagues, who appear to be satisfied with ad hoc applications of the rather nebulous "substantial relation" and "not toothless" formulas,

87. *Id.* at 261-62.

88. Justice Powell spoke for himself, Chief Justice Burger, and Justice Stewart. Justice Rehnquist concurred on the ground that he believed that *Trimble* was wrongly decided. *Id.* at 276 (Rehnquist, J., concurring in the judgment). *See* Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting). Justice Blackmun concurred in *Lalli* on the ground that *Trimble* was of little precedential significance and should be dismissed as a case turning on "the overtones of its appealing facts." 439 U.S. at 277 (Blackmun, J., concurring in the judgment).

89. 439 U.S. at 275.

90. *Id.* at 268-71.

91. *Id.* at 273.

92. 99 S. Ct. 1760 (1979).

93. 99 S. Ct. 1742 (1979).

94. In *Caban*, Justice Powell wrote the majority opinion. 99 S. Ct. at 1763-69. In *Parham*, there was no majority opinion; however, Justice Powell did write an opinion explaining his reasons for concurring in the judgment. 99 S. Ct. at 1749-50 (Powell, J., concurring in the judgment).

Justice Powell appears to have developed relatively concrete principles to guide his thinking in these cases. From his verbalization of his views of the appropriate tests to be applied in these cases, one would expect Justice Powell to apply the same standards to all cases relating to discrimination on the bases of sex or legitimacy. However, as the forthcoming discussion will demonstrate, a close examination of his opinions and voting records reveals at least three different sets of principles that Justice Powell applies, depending upon the specific nature of the discrimination being challenged.

1. *Discrimination Against Illegitimates and Noncompensatory Discrimination Against Males*

For Justice Powell, the key factor in determining whether discrimination against illegitimates is constitutionally permissible is whether the illegitimate is given the opportunity to prove that he is eligible for the right or benefit to which the discrimination relates. For example, both *Weber* and *Trimble* were cases in which the illegitimate himself was powerless to remove the disability placed upon him; while neither case involved an "insurmountable barrier" created by state law, in both cases the statutory impediments could only be removed by the parent of the illegitimate.[95] Thus, Justice Powell voted in both cases to invalidate the challenged law. By contrast, in *Lalli*, the relevant statutes provided the illegitimate himself with the power to prove that he was entitled to the same benefits as a legitimate child; therefore, Justice Powell voted to reject the constitutional attacks. Similarly, in *Mathews v. Lucas*,[96] a statute established a presumption that certain classes of illegitimates[97] would not be eligible for survivor's benefits based on the death of their respective fathers; however, the benefits were provided to all illegitimates who could prove dependency on the dead parent. As in *Lalli*, Justice Powell voted to uphold the challenged discrimination.

Caban and *Parham* demonstrate that the same factor governs Justice Powell's attitude toward discrimination against men that is not intended to ameliorate the effects of extrinsic discrimination against women. In *Caban*, his majority opinion denounced as "another example of 'overbroad generalizations' "[98] a New York statute that precluded a father

95. In *Trimble*, the illegitimate could have inherited from its natural father if the father had left a will. In *Weber*, illegitimates were generally eligible for workmen's compensation if acknowledged by the parent in accordance with state law. This option was not available to the parent in *Weber* because of the rather unusual factual context in which the case arose. *See* 406 U.S. at 176-77 (Blackmun, J., concurring in the result). The majority opinion, however, makes it fairly clear that the result would have been no different even if the parent had been allowed to acknowledge the child.

96. 427 U.S. 495 (1976).

97. Illegitimate children were automatically deemed dependent if, prior to his death, the deceased "(a) had gone through a marriage ceremony with the other parent, resulting in a purported marriage between them which, but for a nonobvious legal defect would have been valid; or (b) in writing had acknowledged the child to be his; or (c) had been decreed by a court to be the child's father; or (d) had been ordered by a court to support the child because the child was his." *Id.* at 499.

98. Caban v. Mohammed, 99 S. Ct. 1769 (1979), *citing* Califano v. Goldfarb, 430 U.S. 199, 211 (1977); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975).

from effectively objecting to the adoption of his illegitimate child while requiring the consent of the mother: "[T]his *undifferentiated* distinction between unwed mothers and unwed fathers, applicable in *all* circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests."[99] By contrast, concurring in the result in *Parham*, he relied almost exclusively on the fact that "[i]t lies entirely within a father's power to remove himself from the disability that only he will suffer."[100] The opinion distinguished *Caban* and *Trimble* as cases in which "the burdened individual . . . has been powerless to remove himself from the statutory burden—regardless of the proof of paternity."[101]

The only exception to this pattern is Justice Powell's opinion in *Fiallo v. Bell.*[102] *Fiallo* presented a challenge to the definition of "child" and

99. 99 S. Ct. at 1769 (footnote omitted) (emphasis added).

100. Parham v. Hughes, 99 S. Ct. 1742, 1750 (1979) (Powell, J., concurring in the judgment).

101. *Id.* Of course, the application of the principles enunciated by Justice Powell in the cases such as *Caban* and *Parham* depends upon his perception of whether the disadvantaged individual is given the legal means by which he can overcome his disability. In general, this determination will be relatively clear; but occasionally a problem will arise, as *Caban* itself demonstrates. In *Caban*, although New York law did not generally require the consent of the natural father of an illegitimate child for the adoption of the child, the law did require the consent "[o]f any person . . . having lawful custody of the adoptive child." 99 S. Ct. at 1765 n.4, *quoting* N.Y. DOM. REL. LAW § 111 (McKinney 1977). This statute would seem to indicate that if the natural father of an illegitimate child gained custody of the child, the child could not be adopted without his consent. If in fact this opportunity had been available to the father in *Caban*, then he would have had it in his power at least to attempt to remove his disability; since he did not make that attempt, under the principles enunciated by Justice Powell in *Parham*, his equal protection claim would have had to be rejected. Obviously, however, in *Caban* Justice Powell did not accept this line of reasoning. Noting that no New York court had ever explicitly ruled that unwed fathers with legal custody had the power to veto adoptions and relying on *In re* Mendelsohn's Adoption, 180 Misc. 147, 149, 39 N.Y.S.2d 384, 386 (1943), as indicating that the provision requiring consent of those with legal custody only applied where the natural parents are dead, he argued that "[w]e should not . . . speculate whether, if Caban had sought and obtained legal custody of his children, his legal rights would have been different under New York Law." 99 S. Ct. at 1766 n.6.

If, as indicated by his opinion in *Parham*, the critical factor for Justice Powell in *Caban* was the presence of an insurmountable barrier to the father gaining the right denied to him, this refusal to "speculate" is puzzling. The question whether such a barrier exists depends upon the interpretation of the state law. If in fact a father who obtained custody could have blocked the adoption, then one can make a strong argument that in the absence of even an attempt to gain custody, a father could not argue that the statutory scheme violated his rights to equal protection.

Just as the plaintiff may in fact have faced no insurmountable burden in *Caban*, in a factual context different from that facing the Court in *Parham*, a father might be faced with an insurmountable barrier to bringing a wrongful death action under the statute considered in that case. The Georgia law not only required that the unwed father have legitimated the child in order to maintain the lawsuit, it also required that there be "no mother." *See* Parham v. Hughes, 99 S. Ct. 1742, 1744 n.1 (1979), *quoting* GA. CODE § 105-1307. Thus, in a case in which the mother of the illegitimate child was still living, no action that the natural father could have taken would have given him the right to bring a wrongful death action.

But Justice Powell quite properly did not take this possibility into account in his opinion in *Parham*. With narrow exceptions not relevant here, *see generally, e.g.*, Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Void-For Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960), the Court does not rule on the facial validity of statutes; rather, it only passes on the constitutionality of the application of statutes to particular fact situations. In the fact situation presented to the Court in *Parham*, the only factor preventing the unwed father from recovering under the wrongful death statute was his failure to legitimate the child; thus, it was only the requirement of such legitimation that was appropriately measured against the requirements of the equal protection clause.

102. 430 U.S. 787 (1977).

"parent" in a provision of the Immigration and Naturalization Act of 1952, which granted preferential immigration status to children and parents of United States citizens or lawful permanent residents.[103] "Child" was defined as including only legitimate or legitimated natural children, adopted children, stepchildren, or illegitimate children claiming by virtue of their relationship to their natural mother;[104] "parent" was defined by a relationship to a "child."[105] Thus the Act discriminated not only against illegitimates but also against males, since mothers but not fathers of illegitimates could claim the special preference. If Justice Powell had applied the principles enunciated in *Trimble* and *Caban*, he would have voted to strike down the discrimination in *Fiallo*, since at least the illegitimates had no recourse available to them by which they could remove the statutory disability.[106] Yet Justice Powell's majority opinion rejected the constitutional challenge.

Fiallo is explainable by its unique context. The opinion was explicitly based upon the exceptionally narrow scope of judicial review of congressional decisions in matters dealing with immigration and naturalization.[107] The opinion explicitly noted that in such a case, decisions to discriminate against illegitimates "need not be as 'carefully tuned to alternative considerations' " as those that deal only with domestic matters.[108] Thus, *Fiallo* should be viewed as sui generis, without precedential significance for cases concerned only with discrimination among citizens.

2. *Compensatory Discrimination Against Males*

Justice Powell appears to have adopted a somewhat different standard in dealing with discrimination against men that he perceives as ameliorating disadvantages generally suffered by women. Justice Powell has not written opinions in any such cases; however, his silent concurrences in the majority opinions in *Kahn v. Shevin*[109] and *Schlesinger v. Ballard*[110] are instructive. In *Kahn*, the Court dealt with a constitutional challenge to Florida's property tax statute, which provided for a $500 exemption for widows without making similar provision for widowers. The rationale of the Court for rejecting the challenge was that the disparate treatment was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for

103. *Id.* at 788.

104. *Id.* at 788-90 n.1, *quoting* 8 U.S.C. § 1101(b)(1) (1970).

105. 430 U.S. at 789, *citing* 8 U.S.C. § 1101(b)(2) (1970).

106. It is unclear whether the natural fathers in *Fiallo* had the option of legitimating their children and thus removing their own statutory disability. However, the disposition of the case clearly did not turn on this issue.

107. 430 U.S. at 792-96. *Cf.* Mathews v. Diaz, 426 U.S. 67 (1976) (Congress has broader authority than states to discriminate among aliens).

108. 430 U.S. at 799 n.8, *quoting* Mathews v. Lucas, 427 U.S. 495, 513 (1976).

109. 416 U.S. 351 (1974).

110. 419 U.S. 498 (1975).

which that loss imposes a disproportionately heavy burden."[111] Similarly, in *Ballard* the Court rejected an attack on the promotion system of the Navy, which allowed women officers thirteen years to achieve promotion before mandatory discharge, but made male officers subject to discharge after only nine years without promotion. The rationale of the majority opinion was that women had less opportunity for promotion than men, particularly in view of their ineligibility for combat or sea duty, and, therefore, the disparity was justified to produce "fair and equitable career advancement programs."[112]

Both *Kahn* and *Ballard* rested on the kind of overbroad generalizations that Justice Powell condemned in *Caban*. No doubt there were a significant number of men who lost their primary means of support upon the death of their respective spouses and yet were denied the benefit of the Florida tax exemption; similarly, some male naval officers probably faced advancement opportunities as limited as those available to female officers. Moreover, administratively workable options that could have identified the relevant men were available to the government in both cases; in *Kahn*, Florida could have required widowers to prove dependency on the deceased spouse in order to claim the tax exemption, and in *Ballard*, the Navy could have granted the extended time to achieve promotion to male officers who could demonstrate that they were denied the opportunity to obtain combat or sea duty.

One possible explanation of Justice Powell's dissimilar treatment of discrimination against men is that, given the evolution that has taken place in Justice Powell's approach to equal protection analysis, he would no longer adhere to the opinions in which he concurred in *Kahn* and *Ballard*. Both cases were decided well before *Caban* and *Parham*, even before his recognition in *Craig v. Boren* that a middle-tier analysis existed. However, no opinion by Justice Powell or any opinion in which he has concurred even suggests that he sees the precedential value of *Kahn* or *Ballard* as having been diluted; indeed, such evidence as there is suggests the contrary conclusion. In *Califano v. Webster*,[113] the Court upheld a Social Security Act provision allowing females a more favorable means of computing benefits than that allowed to males. Justice Powell joined in the *per curiam* opinion, which cited both *Kahn* and *Ballard* to support the conclusion that redressing society's longstanding disparate treatment of women is an important governmental interest. The opinion noted that " '[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to women seeking any but the lowest paid jobs.' "[114] Based on this vote, it seems likely that Justice

111. 416 U.S. at 355.

112. 419 U.S. at 508, *quoting* H.R. REP. No. 216, 90th Cong., 1st Sess. (1967).

113. 430 U.S. 313 (1977) (per curiam) (Powell, J., concurring without comment).

114. *Id* at 318, *quoting* Kahn v. Shevin, 416 U.S. 351, 353 (1974).

Powell continues to view compensatory sex classifications more favorably than discrimination against men generally.

3. *Discrimination Against Women*

The votes of Justice Powell in *Frontiero* and *Califano v. Goldfarb*[115] demonstrate a far less lenient attitude toward discrimination against women than seen in other cases in which he has employed middle-tier analysis. As already noted, *Frontiero* dealt with a statute that gave all servicemen the right to claim their wives as dependents for purposes of receiving additional benefits; servicewomen, on the other hand, could only claim husbands as dependents who were in fact dependent upon their wives for one-half of their support.[116] An almost identical scheme governed the availability of survivor's benefits to spouses under the Social Security Act in *Goldfarb*.[117]

Analyzing both cases as involving discrimination against women,[118] Justice Powell concluded that each was unconstitutional. Yet the legislative technique employed by Congress in devising the statutory schemes struck down in *Goldfarb* and *Frontiero* is indistinguishable from that which produced the discrimination found constitutionally unobjectionable by Justice Powell in *Mathews v. Lucas*.[119] In each case the congressional intent was to provide benefits only where the relative was in fact dependent upon the wage earner. Moreover, just as the empirical validity of the congressional assumption regarding the probable dependency of various classes of children in *Mathews* seems indisputable, one can hardly question the accuracy of the assumption made by Congress in *Frontiero* and *Goldfarb*—that husbands are less likely to be economically dependent upon wives than vice versa. Nonetheless, Justice Powell voted to uphold the discrimination against illegitimates in *Mathews*, but to strike down the discrimination against women in *Frontiero* and *Goldfarb*.

The only plausible explanation for the differing votes is that Justice Powell in fact subjects discriminations against women to more intensive scrutiny than those laws discriminating against men or illegitimates. Indeed, if he finds the type of classifications at issue in *Goldfarb* and *Frontiero* unconstitutional, it is difficult to see what discrimination against women he would uphold. Nonetheless, there has been no indication that Justice Powell is willing to abandon the position that he espoused in *Frontiero*[120] and label discrimination against women formally suspect.

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115. 430 U.S. 199 (1977).

116. *See* notes 61-65 and accompanying text *supra*.

117. *See* 430 U.S. at 201.

118. *See id.* at 206; Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Powell, J.). *Compare* Califano v. Goldfarb, 430 U .S. 199, 242 (1977) (Rehnquist, J., dissenting) *and id.* at 218 (Stevens, J.).

119. 427 U.S. 495 (1976). *See* text accompanying notes 96-97 *supra*.

120. *See* text accompanying notes 63-65 *supra*.

II. A CRITIQUE OF JUSTICE POWELL'S PERFORMANCE

A. *Articulation of Principles*

Whenever the Court uses the equal protection clause as a vehicle to strike down laws that do not discriminate on the basis of race, it faces the criticism that it is merely applying the subjective preferences of a majority of the Justices rather than adhering to sound principles of constitutional adjudication.[121] One's reaction to this argument depends largely on one's view of the appropriate function of the Constitution and the institutional role of the judiciary in defining the norms by which our society is to be governed.[122] Clearly, however, the criticism has less force when a holding of unconstitutionality is based upon clearly defined criteria rather than a simple ad hoc pronouncement on the facts of a particular case.[123] The development of that type of criteria also has the salutary effect of giving guidance to lower courts and legislatures that are attempting to tailor their actions to fit within the pronouncements of the Court.[124]

In the context of pure classification problems, the first question must be what characteristics a class must have in order to be entitled to special judicial protection—that is, upper- or middle-tier scrutiny—under the constitution. The first indication of Justice Powell's theory on this issue came in *Weber*, in which he argued that the challenged discrimination against illegitimates was "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing" and that "no child is responsible for his birth. . . ."[125] This language suggests that, for Justice Powell, the factor triggering intensive equal protection scrutiny is a characteristic that is not the result of any action by members of that group and which they are powerless to change. His position in *Nyquist v. Mauclet*[126] reinforces this impression in the context of classification by citizenship. *Mauclet* dealt with a provision of a New York statute that granted certain forms of state-provided financial aid for higher education only to citizens and legally resident aliens who (1) had applied for citizenship; (2) if not qualified for citizenship, had filed a statement affirming an intent to apply for citizenship as soon as eligible; or (3) who had been admitted to the aid program under the parole authority of the attorney general.[127] Applying the strict scrutiny standard generally

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121. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting); R. BERGER, GOVERNMENT BY JUDICIARY 363-72 (1977).

122. *Compare* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 999-1000 (1978) *with* Rehnquist, *The Notion of a Living Constitution*, 54 TEX L. REV. 693 (1976).

123. *See generally* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

124. *See* Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1026 (1972).

125. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

126. 432 U.S. 1, 15-17 (1977) (Powell, J., dissenting).

127. *Id.* at 3-4, *quoting* N.Y. EDUC. LAW § 661(3) (McKinney Supp. 1976).

applied to alienage classifications,[128] the Court held the exclusion of noneligible aliens to be unconstitutional. In dissent, Justice Powell adopted by reference[129] the position of Justice Rehnquist that a key factor in earlier alienage cases was that the disadvantaged group was "categorized by a factor beyond their control."[130] Since all of those denied benefits in *Mauclet* had the power to escape the disadvantaged class, then, Justice Rehnquist reasoned, the rational basis test should apply.[131]

The theories expressed in *Mauclet* and *Weber* fit well with Justice Powell's approach to discrimination against males and illegitimates.[132] If the key factor in deciding to apply intensive scrutiny in such cases is that sex and legitimacy are beyond the control of the disadvantaged persons, it makes some logical sense to hold that such classifications are nonetheless acceptable if class members are afforded an opportunity to remove the particular disability. But clearly, lack of individual responsibility for a trait is not the sole determining factor in Justice Powell's decision to abandon the rational basis test in a given case. For example, one can hardly imagine a trait more immutable than old age, yet Justice Powell has joined silently in applications of lower-tier analysis rejecting constitutional attacks on discrimination against the elderly in *Massachusetts Board of Retirement v. Murgia*[133] and *Vance v. Bradley*.[134]

The problem, then, is to find a characteristic that is broad enough to encompass discrimination based on race, alienage, and sex, yet narrow enough to exclude discrimination based on age. The key may lie in the *Murgia* opinion, joined by Justice Powell without comment. Considering only the possibilities that strict scrutiny or the rational basis test should be applied, the Court held the latter approach appropriate because old age "marks a stage that each of us will reach" rather than defining a " 'discrete and insular' group . . . in need of 'extraodinary protection from the majoritarian political process.' "[135]

While not directly applicable to middle-tier classifications, a principle analogous to that expressed in *Murgia* could adequately distinguish such classifications from those that receive only such scrutiny as lower-tier analysis requires. Gender and illegitimacy are not only characteristics that affected persons are powerless to escape, but also define classes that persons born outside the relevant class will never enter. It might be argued that the fact that a class is absolutely closed to both entry and exit is

128. 432 U.S. at 7. *See generally* text accompanying notes 44-57 *supra*.

129. 432 U.S. at 15.

130. *Id.* at 19 (Rehnquist, J., dissenting).

131. *Id.* at 21 (Rehnquist, J., dissenting).

132. *See* text accompanying notes 95-114 *supra*.

133. 427 U.S. 307 (1976) (per curiam).

134. 440 U.S. 93 (1979).

135. 427 U.S. at 313, 314, *quoting* United States v. Carolene Products, Co., 304 U.S. 144, 152-53 n.4 (1938).

the key to the determination that something more than lower-tier scrutiny is appropriate.

Justice Powell has never explicitly adopted this position; in fact, his articulation of the principles that guide his decision to abandon the rational basis test in a given case has thus far been either incomplete or misleading.[136] Until these principles are clearly stated, this and other analyses will remain mere speculation.

Justice Powell faces a similar problem with respect to the various classifications within the middle-tier. He clearly subjects discriminations against females to more stringent scrutiny than those that disadvantage males or illegitimates.[137] Thus, it is incumbent upon him to identify the characteristics that entitle women to greater constitutional protection. The difficulty is compounded by his failure to explicitly recognize that a difference in the level of scrutiny even exists.[138] In order to cure the deficiencies in his approach, Justice Powell must prepare (or at least concur in) an opinion that both recognizes the disparities in the level of review applied and clearly enunciates the rationale for these disparities.[139]

B. *Appropriateness*

Of course, the analysis of Justice Powell's approach does not end with the question of whether he has adequately justified the *relative* levels of scrutiny applied to various classifications. One must question whether, in *absolute* terms, the tests that he applies are appropriate. In this regard, the outstanding feature of Justice Powell's equal protection jurisprudence is his approach to discrimination against males and illegitimates with its focus on the ability of the disadvantaged person to overcome the relevant disability. This factor also influences the approach of other members of the

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136. Justice Powell has concurred in one fairly detailed discussion of the problem. Mathews v. Lucas, 427 U.S. 495, 505-06 (1976) (Blackmun, J.). In addition to noting that illegitimacy is an immutable characteristic, the opinion also suggested that one reason the rational basis test was inappropriate was that legitimacy "bears no relation to the individual's ability to participate in or contribute to society." *Id.* at 505. But this argument also fails to adequately explain the failure to subject discrimination against the elderly to some degree of judicial scrutiny more searching than the rational basis test; old age per se is also irrelevant to ability. Of course, old age may be correlated to certain abilities, or lack thereof; but the same may be said of sex. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977) (per curiam); Kahn v. Shevin, 416 U.S. 351 (1974). Justice Powell has also joined in some opinions which suggest that the use of the rational basis test is inappropriate if the classification at issue discriminates against some class of persons in need of special protection from the operation of the political process. *See* New York City Transit Authority v. Beazer, 99 S. Ct. 1355, 1369-70 & n.40 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam). However, this explanation would fail to justify the relatively intensive scrutiny which Justice Powell applies to discrimination against men.

For other discussions of the appropriate criteria to be applied in determining whether middle-tier analysis is appropriate, *see, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 358-62 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part); Califano v. Goldfarb, 430 U.S. 199, 218-19 (1977) (Stevens, J., concurring).

137. *See* text accompanying notes 95-120 *supra*.

138. *See* Craig v. Boren, 429 U.S. 190, 210 (1977) (Powell, J., concurring).

139. For an example of such an opinion, see Califano v. Goldfarb, 430 U.S. 199, 217-24 (Stevens, J., concurring).

Court to equal protection problems;[140] Justice Powell, however, puts a far greater emphasis on this issue in middle-tier cases than does any other Justice.

If formally adopted by the Court, Justice Powell's theory would provide some needed certainty in an area of law thus far characterized by a bewildering variety of pronouncements. But, at the same time, it would significantly restrict the flexibility of legislatures in attempting to reach perfectly legitimate objectives. Consider, for example, the situation in *Mathews v. Lucas*.[141] To have voted to uphold the challenged discrimination in that case,[142] Justice Powell must have accepted two propositions: that the economic benefit achieved by limiting benefits to dependents was a sufficiently important governmental interest to justify discriminating against illegitimates, and that a relatively large portion of the class discriminated against was in fact not dependent. But given these premises, it is difficult to accept the argument that a total exclusion of the relevant class would not be "substantially related" to the governmental interest, since a significant number of nondependents would be eliminated by such an exclusion. Admittedly, the total exclusion would be overinclusive with respect to the governmental purpose; but to say that a given classification is overinclusive in relation to a given goal is not the same as saying that it is not substantially related to that interst.

In addition to bearing a substantial relationship to the goals accepted as sufficient in *Mathews*, a total exclusion might serve other interests not furthered by a statutory scheme such as was approved in that case. Assume that there is a fixed amount of money available for a given benefit program intended to aid dependent children, and that this amount must cover both the benefits distributed and the administrative costs of operating the program. By defining dependency in terms of easily identifiable characteristics statistically related to actual dependency and excluding all those not possessing those characteristics, administrative costs would be reduced and there would be more money available for benefit payments. Although admittedly, the benefits would be less accurately distributed than in a system providing for individual determinations of dependency, such a policy determination would seem to be an entirely appropriate, although not inevitable, legislative judgment. Nonetheless, the Court in *Mathews* would probably have rejected such an approach as unconstitutional. The *Mathews* Court distinguished *Jiminez v. Weinberger*,[143] an earlier case in which a structurally similar provision of the Social

140. *See* Mathews v. Lucas, 427 U.S. 495, 512 (1976) (Blackmun, J.); Jiminez v. Weinberger, 417 U.S. 628 (1974) (Burger, C.J.) *Cf., e.g.*, Vlandis v. Kline, 412 U.S. 441 (1973) (irrebutable presumptions violates due process clause); Stanley v. Illinois, 405 U.S. 645 (1972) (same). *See generally* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

141. 427 U.S. 495 (1976).

142. *See* text accompanying notes 96-97 *supra*.

143. 417 U.S. 628 (1974). As in *Mathews*, Justice Powell concurred silently in the majority opinion in *Jiminez*.

Security Act had been invalidated, relying largely on the fact that in *Jiminez*, unlike *Mathews*, the disadvantaged illegitimates were foreclosed from rebutting the presumption of nondependency on their natural father.[144]

Under Justice Powell's approach, the *Jiminez/Mathews* dichotomy would be extended to cover all discrimination against illegitimates, as well as most discrimination against men. The arguments for applying such a theory are strongest in cases, such as *Weber*, that deal with broad-based discriminations against illegitimates generally; in such cases one could plausibly argue that there is a great danger that the discrimination is the result of mere blind prejudice, rather than a conscious legislative consideration of the relative interests at stake.[145] By contrast, *Jiminez* presents a weaker case for the application of Justice Powell's theory; the fact that the statute differentiated among narrowly-defined subclasses of illegitimates rather than discriminated generally against children of unwed parents[146] belied any suggestion that the discrimination was merely the product of an automatic reaction against illegitimates generally. In such a situation it is at best questionable whether the gain in certainty engendered by a bright line rule such as that advocated by Justice Powell outweighs the disadvantages caused by the rigidity that such a rule imposes on the legislative process.

III. CONCLUSION

Justice Powell has made considerable progress toward developing a coherent approach for dealing with pure classification problems. He has moderated both tiers of the two-tier test, and without expanding the list of suspect classifications, he has subjected certain questionable classifications to more rigorous scrutiny than previously called for by traditional standards. It remains, however, for Justice Powell to articulate the heretofore unknowable premises on which his opinions are based, especially in regard to scrutiny of discrimination against women and aliens.

144. *See* 427 U.S. at 511-12.

145. *See generally* Mathews v. Lucas, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting).

146. *See* 417 U.S. at 631 n.2.