DePaul Law Review

Volume 35
Issue 2 *Winter 1986*

Article 9

Shedding Tiers for the Mentally Retarded: City of Cleburne v. Cleburne Living Center

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NOTES

SHEDDING TIERS FOR THE MENTALLY RETARDED: *CITY OF CLEBURNE v. CLEBURNE LIVING CENTER*

I. INTRODUCTION

> [T]o say that [equal protection] decisions do not fall into a neat pattern is not to say that they fall into no pattern. In fact, they illustrate a not unusual characteristic of legal development: broad principles are articulated, narrowed when applied to new contexts, and finally replaced when the distinctions they rely on are no longer tenable.[1]

For nearly ninety years, the constitutional analysis of federal equal protection controversies remained relatively constant.[2] Under the fourteenth amendment, the Supreme Court struck down most laws that classified along racial or ethnic lines[3] and upheld most economic and social legislative classifications.[4] During the 1960's, the Warren Court began to invalidate statutory classifications that impaired personal fundamental rights.[5] The Burger Court further altered conventional equal protection analysis by invalidating classifications against different groups based on immutable traits or historically unequal treatment.[6] The Court now uses three separate levels

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1. Cabell v. Chavez-Salido, 454 U.S. 432, 436 (1982).

2. *Compare* Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 165 (1897) (legislative classifications must be justly and properly related to reasonable grounds) *with* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (economic legislation must be rationally related to a legitimate state purpose).

3. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Casteneda v. Partida, 430 U.S. 482 (1977) (national origin).

4. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (tax on oil and gas which exempted royalty owners but not others does not deny equal protection); City of New Orleans v. Dukes, 427 U.S. 297 (1976) (ordinance exempting pushcart food sales in operation for more than eight years from ban on that business does not deny equal protection); Dandridge v. Williams, 397 U.S. 471 (1970) (ceiling on welfare payments upheld as rational); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) (statute exempting nonresidents from *ad valorem* tax does not violate equal protection); Williamson v. Lee Optical, 348 U.S. 483 (1955) (statute barring anyone but licensed optometrists or ophthalmologists from fitting or replacing lenses without a prescription does not deny equal protection).

5. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (denial of welfare benefits to state residents of less than one year's duration violates right to travel); Reynolds v. Sims, 377 U.S. 533, 563 (1964) (dilution of voting strength violates equal protection); Douglas v. California, 372 U.S. 353, 357 (1963) (denial of counsel in an appeal of right to indigent criminal defendants denies equal protection); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (denial of free transcript to indigent criminal defendant for appeal of right denies equal protection).

6. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (gender); Matthews v. Lucas, 427 U.S. 495 (1976) (illegitimacy).

of scrutiny[7] to review legislative statutes: strict scrutiny,[8] heightened scrutiny,[9] and minimum rationality.[10]

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7. *See* Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality,* 8 HASTINGS. CONST. L.Q. 777 (1981); Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court,* 14 U.S.F.L. REV. 525 (1980); Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection,* 48 Mo. L. REV. 587 (1983); Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny,* 45 OHIO ST. L.J. 161, 161-63 (1984); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945 (1975).

8. Strict scrutiny demands that legislative classifications bear a substantial relationship to a compelling state interest. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The state has the burden of overcoming a presumption of unconstitutionality. *Dunn,* 405 U.S. at 343. This level of review has been "'strict' in theory and fatal in fact." Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for the Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

9. Heightened scrutiny applies to classifications that present particular constitutional difficulties, Plyler v. Doe, 457 U.S. 202, 217-18 (1982), and has been extended to classifications involving gender, Craig v. Boren, 429 U.S. 190 (1976), and illegitimacy, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). Classifications subject to heightened scrutiny will be upheld only if they are substantially related to an important governmental objective. Craig v. Boren, 429 U.S. 190, 197-98 (1976). Heightened scrutiny sanctions a judicial balance of important state interests against individual rights affected, and it provides greater latitude in judicial review of suspect legislation without adding to the list of inherently suspect classifications. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082-89 (1978). An embryonic form of heightened scrutiny was applied by the Warren Court, particularly in cases in which legislation was found to discriminate against the poor. *See, e.g.,* Douglas v. California, 372 U.S. 353 (1963) (denial of appointed counsel on appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (challenge of fees for criminal trial transcripts). Many fundamental rights cases, like *Douglas* and *Griffin,* deal with the effect of the justice system on the poor. *See also* Bounds v. Smith, 430 U.S. 817 (1977) (states must provide poor prisoners with access to law libraries and must provide assistance in preparing and filing meaningful legal papers); Boddie v. Connecticut, 401 U.S. 371 (1971) (states may not deny indigents access to court for dissolution of marriage merely for failure to pay court fees and costs). The Burger Court has been reluctant to expand the rights of the poor. *See, e.g.,* Ross v. Moffitt, 417 U.S. 600 (1974) (no right to counsel for discretionary appeal); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (no right to equal education between "poor" school districts and "rich" school districts); United States v. Kras, 409 U.S. 434 (1973) (no fundamental right to declare bankruptcy); Dandridge v. Williams, 397 U.S. 471 (1970) (states may impose ceilings on welfare payments).

10. The minimum rationality test applies to legislation that is neither drawn along suspect lines nor injurious to fundamental rights. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). It presumes the constitutionality of such legislation and requires only that legislation be minimally rationally related to a legitimate state purpose. Exxon Corp. v. Eagerton, 462 U.S. 176, 181 (1983); Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 668 (1981). The language the Court uses to describe this test is absolute. *See, e.g.,* Turner v. Fouche, 396 U.S. 346, 362 (1970) (classification must be "wholly irrelevant" to state purpose); Reed v. Reed, 404 U.S. 71, 76 (1971) ("wholly unrelated"). A statute is "not required to resort to close distinctions or to maintain precise, scientific uniformity with reference to composition." Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959). A state may resort to both underinclusion, Williamson v. Lee Optical, 348 U.S. 483, 489 (1955), and overinclusion,

Each level of review applies to particular types of classifications and, in the past, yielded predictable results. Strict scrutiny is used to review inherently suspect classifications—race, national origin and alienage[11]—as well as classifications that impair individual enjoyment of fundamental rights.[12] Under strict scrutiny, there is a strong presumption of unconstitutionality which can only be overcome by showing that a classification is closely tailored to a compelling state interest.[13] Heightened scrutiny is used to review "quasi-suspect" classifications.[14] Quasi-suspect classifications share certain charac-

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Dandridge v. Williams, 397 U.S. 471, 485 (1970). A state does not have to prove that the effects of the legislation are actually related to the purpose. Rather, the court looks at whether a legislature could reasonably have believed, at the time it passed the law, that the statute would serve the asserted state purpose. *Lee Optical,* 348 U.S. at 487-88.

11. *See, e.g.,* Casteneda v. Partida, 430 U.S. 482 (1977) (national origin); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race).

12. Successful equal protection challenges in the fundamental rights area fall into six categories: (1) access to the courts and liberty interests of criminal defendants; *see* James v. Strange, 407 U.S. 128 (1972) (indigent criminal defendants denied the same protective exemptions as other debtors); Jackson v. Indiana, 406 U.S. 715 (1972) (incompetent criminal defendants subjected to more liberal commitment standards and more stringent release standards than either competent criminal defendants or non-criminal incompetents); Lindsey v. Normet, 405 U.S. 56 (1972) (poor denied access to courts by requirement of double bond to appeal forcible entry and detainer decision); Mayer v. City of Chicago, 404 U.S. 189 (1971) (poor denied equal opportunity to exercise right of statutory appeal without adequate trial record); (2) access to the ballot; *see* Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979) (more stringent petition requirements deny minor party candidates access to the ballot); American Party of Texas v. White, 415 U.S. 767 (1974) (minor party candidates' names left off absentee ballot); Lubin v. Panish, 415 U.S. 709 (1974) (poor denied access to ballot by high filing fees); (3) equal representation and voting rights; *see* Connor v. Finch, 431 U.S. 407 (1977) (differently sized voting districts dilute voting strengths of blacks); O'Brien v. Skinner, 414 U.S. 524 (1974) (denial of absentee ballot to misdemeanor convicts and detainees if incarcerated in county residence); White v. Regester, 412 U.S. 755 (1973) (dilution of voting strength of blacks and Mexican-Americans); (4) the right to travel; *see* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (one year durational residency requirement for indigent services at county hospital); Dunn v. Blumstein, 405 U.S. 330 (1972) (one year durational residency requirement for voting); (5) marriage/privacy rights; *see* Zablocki v. Redhail, 434 U.S. 374 (1978) (fathers not paying child support denied right to remarry); and (6) first amendment rights; *see* Carey v. Brown, 447 U.S. 455 (1980) (denial of picketing rights near private residences to only some groups denies equal protection); Grayned v. City of Rockford, 408 U.S. 104 (1972) (denial of picketing rights near private residences to particular groups denies equal protection).

13. Dunn v. Blumstein, 405 U.S. 330, 343 (1972); *accord* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

14. A quasi-suspect classification is one that discriminates against a group which shares certain "indicia of suspectness" with inherently suspect classes. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). The presumption under heightened scrutiny is that a statute must be reasonably related to a substantial state interest. This form of review was proposed in Professor Gunther's groundbreaking work. *See supra* note 8.

Some suspect characteristics assessed under heightened scrutiny include: (1) immutable traits; *see* Oyama v. California, 332 U.S. 633 (1948) (national origin); (2) social disabilities; *see* Griffin v. Illinois, 351 U.S. 12 (1956) (indigency); Gomez v. Perez, 409 U.S. 535 (illegitimacy); (3) a history of unequal treatment; *see* Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J.,

teristics with inherently suspect classifications, but the Court recognizes that a substantial state interest often justifies classification along such lines. As a result, the presumption of unconstitutionality is not as strong as that associated with strict scrutiny. Under heightened scrutiny, the Court requires a substantial, rather than compelling, state interest to which the classification must be substantially related.[15]

Classifications that are not drawn on suspect lines and do not adversely impact on fundamental rights are presumed to be constitutional.[16] These classifications need only meet the minimum rationality test which requires that a legislature be rationally capable of believing that the classification used will further some legitimate state interest.[17] The Court has been extremely deferential to legislatures when applying this standard—even to the point of suggesting legitimate state purposes where none could be found in the statutory text, the legislative history or previous judicial proceedings.[18] As applied, the minimum rationality test has most often meant no review at all.[19]

Against this background, the Supreme Court took the startling step of striking down the application of four state laws under the heretofore extremely deferential minimum rationality test.[20] The challenged statutes in each of these cases dealt with either taxation or zoning,[21] areas in which

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dissenting) ($500 property tax exemption for widows, but not widowers); (4) unpopularity of trait or affiliation; *see* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (drug usage); (5) identifiability of group membership; *see* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (unrelated persons living together).

15. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

16. Exxon Corp. v. Eagerton, 462 U.S. 176, 181 (1973); Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 668 (1981); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

17. Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 668. For a discussion of the development of the minimum rationality test, see Shaman, *supra* note 7, at 162.

18. *See, e.g.*, Williams v. Lee Optical, 348 U.S. 483, 487 (1955) ("the legislature *might have concluded* . . . a prescription is necessary . . . a written prescription *may or may not be necessary.* But the legislature *might have concluded* that one was needed . . . . Or the legislature *may have concluded* . . .") (emphasis added).

19. Under the Warren Court, and until this past term, minimum rationality review was inevitably "minimum scrutiny in theory and virtually [nonexistent] in fact." Gunther, *supra* note 8, at 8.

20. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) (special use permit to operate home for the mentally handicapped not rationally related to state purpose as applied to plaintiffs); Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985) (tax credits for Vietnam veterans taking up residence in the state only before May 6, 1976, not rationally related to any legitimate purpose); Williams v. Vermont, 105 S. Ct. 2465 (1985) (tax credit for residents who paid auto sales tax in another state, but only if a resident at time of purchase, not rationally related to purpose of collecting revenue for maintenance of state highway system); Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985) (promotion of domestic industry not a legitimate purpose when furthered by discriminatory tax against nonresidents).

21. *Cleburne* involved a zoning statute; the other three cases involved tax statutes. *See supra* note 20.

legislatures had previously enjoyed the utmost leeway in classification.[22] Paradoxically, this apparent break with precedent was undertaken with an almost dogmatic adherence to previous theoretical formulations.[23] Justices have referred to this use of the minimum rationality test as "scrutiny that is neither minimal nor strict, but strange unto itself"[24] and accused the Court of "provid[ing] no principled foundation for determining when more searching inquiry is to be invoked, [leaving lower] courts . . . in the dark . . . and this Court . . . unaccountable for its decisions."[25]

In *City of Cleburne v. Cleburne Living Center,*[26] the final equal protection decision of the 1984 Term, the Court unanimously[27] struck down a zoning statute as applied to a group of mentally retarded persons. However, there was no agreement among several factions on the Court about the principles that should inform review of laws under the equal protection clause.[28] This

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22. *See, e.g.,* Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981) (retaliatory tax should be sustained if rationally related to a legitimate state purpose); Agins v. City of Tiburon, 447 U.S. 255 (1980) (governmental purpose of protecting its citizens through zoning long recognized as legitimate). *Accord* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (zoning); Lehnausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973) (taxation); Goldblatt v. Hempstead, 369 U.S. 590 (1962) (zoning); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) (taxation); Madden v. Kentucky, 309 U.S. 83 (1940) (taxation); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) (taxation).

23. In Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985), the Court adhered to the traditional formula that a tax classification must be rationally related to a legitimate state purpose. The Court held, however, that promotion of domestic industry was not a legitimate state purpose when furthered by tax discrimination against nonresidents. *Id.* at 1684. *But see* Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981) (promotion of state industry is a legitimate state interest). In Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985), the Court held that it was not rational to reward with a $2000 property tax exemption only those veterans who had resided in the state prior to May 8, 1976, while denying such benefits to those veterans who moved to the state after that date. *Id.* at 2868-69. In Williams v. Vermont, 105 S. Ct. 2465 (1985), the Court held unconstitutional a state statute that gave credits to state residents for out-of-state sales taxes paid on automobiles, but deprived credits to residents who moved into the state after they bought the car.

24. Williams v. Vermont, 105 S. Ct. 2465, 2476 (1985) (Blackmun, J., dissenting).

25. City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3265 (1985) (Marshall, J., concurring and dissenting).

26. 105 S. Ct. 3249 (1985).

27. All of the justices agreed that the zoning ordinance in question was invalid as applied to the plaintiffs. *Id.* at 3260. Justices Brennan, Marshall and Blackmun would have invalidated the ordinance on its face. *Id.* at 3263 (Marshall, J., concurring and dissenting).

28. The decision was announced in three opinions. The majority opinion, written by Justice White and joined by all except Justices Marshall and Blackmun, applied the traditional three-tiered analysis. *See infra* notes 113-34 and accompanying text. A separate concurring opinion, written by Justice Stevens and joined by Chief Justice Burger, proposed that all equal protection cases should be reviewed under a single rational relationship standard. *See infra* notes 135-44 and accompanying text. A concurring and dissenting opinion, written by Justice Marshall and joined by Justices Brennan and Blackmun, proposed that the class of the mentally ill should be considered quasi-suspect and reviewed under a heightened scrutiny balancing test. *See infra* notes 145-57 and accompanying text.

Note reviews the *Cleburne* decision and the theories of equal protection analysis espoused by the separate opinions in the case. The Note further demonstrates that any successful equal protection challenge to legislation ultimately involves the balancing of governmental and individual interests customarily associated with heightened scrutiny—regardless of whether the Court labels its review strict, heightened or minimal. Finally, the Note will show that there are two common features present in all successful equal protection challenges: (1) that the Court only invalidates laws under the equal protection clause where there is a serious harm; and (2) that the challenging class inevitably possesses one or more characteristic commonly associated with inherently suspect classes. This Note will refer to such characteristics as "suspect characteristics." Following these conclusions, this Note concludes that equal protection analysis should be recast to provide substantive review only for legislation shown to be the result of prejudicial, stereotyped or thoughtless exploitation of the suspect characteristics of a class, and to invalidate such legislation where the state interests at stake do not outweigh the injury to the defendant class.

II. DEVELOPMENT OF EQUAL PROTECTION ANALYSIS

A. Pre-Burger Court Development

Five years after ratification of the fourteenth amendment[29] the Supreme Court declared that it could not foresee application of the equal protection clause to cases other than state discrimination against a disadvantaged racial minority.[30] By inference, if not by actual application, the Court quickly retreated from that position and heard case after case in which white and corporate defendants were involved in equal protection disputes with state governments that had nothing to do with racial discrimination.[31] Despite the Court's willingness to hear these claims, the Court's deference to classifications drawn by state legislatures was so complete as to give the clause almost no effect in non-racial cases.[32] Not until 1897, in *Gulf, Colorado &*

29. The fourteenth amendment became law on July 28, 1868. U.S. CONST. art. XIV.

30. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

31. *See* Pembina Mining Co. v. Pennsylvania, 125 U.S. 181 (1888) (challenge of privilege tax assessed against out-of-state corporations); Hayes v. Missouri, 120 U.S. 68 (1887) (greater number of peremptory juror challenges allotted to residents of particular counties in state); Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512 (1885) (harsher tort damages assessed against defendant railroads than other classes of defendants); Barbier v. Connolly, 113 U.S. 27 (1885) (particular businesses required to cease operation at night); Missouri v. Lewis, 101 U.S. 22 (1879) (appeal to state supreme court allowed for residents of some counties but not for others).

32. In Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512 (1885), the Court held that states had complete authority to classify people to receive benefits and burdens as long as all those who were classified together received the same treatment. In other words, states could discriminate against whomever they pleased, so long as they created a legislative classification for those against whom they wished to discriminate.

Santa Fe Railway Co. v. Ellis,[33] did the Court invalidate non-racial legislation on equal protection grounds.[34] The Court's formulation of equal protection in *Ellis* is a readily identifiable forerunner of the modern construction of the clause.[35] Under *Ellis,* classifications are upheld if they are based on grounds that bear a "reasonable and just" relation to the classification.[36]

Prior to the Burger Court, equal protection cases were reviewed under two tiers of scrutiny: strict scrutiny[37] and minimum rationality.[38] Classifications drawn along lines of race or national origin, or which affected enjoyment of fundamental rights, underwent strict scrutiny.[39] All legislation not subject to strict scrutiny needed only to pass the minimum rationality test.[40]

B. Developments in the Burger Court

The Burger Court expanded equal protection analysis by creating an intermediate level of review for classifications based on gender[41] and illegitimacy.[42] Initially, this "heightened scrutiny" took place under the pretense

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33. 165 U.S. 150 (1897).

34. *Id.* The Court invalidated a Texas statute that required railroads to pay attorneys fees to prevailing creditor plaintiffs, while other debtor corporations did not pay fees.

35. *See, e.g.,* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

36. 165 U.S. at 155.

37. *See supra* note 8.

38. *See supra* note 10.

39. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental rights); McLaughlin v. Florida, 379 U.S. 184 (1969) (race); Hernandez v. Texas, 347 U.S. 475 (1954) (national origin).

40. *See supra* note 10.

41. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (state nursing school that admitted only women students violates equal protection); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (statute that gave husband unilateral right to dispose of community property without wife's consent violates equal protection); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (workers compensation laws giving different benefits to surviving male and female spouses violates equal protection clause); Califano v. Westcott, 443 U.S. 76 (1979) (welfare benefits based on unemployment of father, but not mother, denies equal protection); Zaban v. Mohammed, 441 U.S. 380 (1979) (treating unmarried parents differently based only on gender denies equal protection); Califano v. Goldfarb, 430 U.S. 199 (1977) (differing survivor benefits based on gender violates equal protection); Craig v. Boren, 429 U.S. 190 (1976) (different legal drinking age based on gender denies equal protection); Frontiero v. Richardson, 411 U.S. 677 (1973) (basing dependent benefits on gender denies equal protection); Reed v. Reed, 404 U.S. 71 (1971) (giving preference to men over women in appointment as estate administrator denies equal protection).

42. Pickett v. Brown, 462 U.S. 1 (1983) (two-year statute of limitations on paternity suits violates equal protection); Trimble v. Gordon, 430 U.S. 762 (1977) (statute allowing illegitimate children to inherit by intestate succession only from their mothers denies equal protection); Jimenez v. Weinberger, 417 U.S. 628 (1974) (more onerous requirements for illegitimate children than legitimate children to receive social security benefits denies equal protection); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (limiting welfare assistance to families with legitimate children denies equal protection); Gomez v. Perez, 409 U.S. 535 (1973) (basing right to paternal support on legitimacy violates equal protection); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (basing workers compensation benefits on the legitimacy of dependent

of minimum rationality,[43] but it was soon recognized as a separate level of review.[44] The Burger Court continues to assert that wide latitude is given to legislative classifications subjected to minimum rationality review.[45] However, the Court has recently departed from this position often enough to raise doubts about the principles which actually guide the Court's decisions.

In order to elicit some pattern from the Burger Court's decisions, this Note will discuss the levels of review that the Court uses as they relate to the factual situations which "trigger" these different levels of scrutiny. The *Cleburne* opinion suggests three factual situations which trigger a level of review higher than minimum rationality in equal protection cases: (1) the use of classifications that are inherently suspect,[46] (2) the use of classifications that impair fundamental rights,[47] and (3) the use of classifications that are "quasi-suspect."[48] This Note will examine Burger Court equal protection decisions under these three headings. Additionally, an examination of equal protection challenges which have been upheld under the minimum rationality test will show that a common factual basis exists for these cases as well.

1. Inherently Suspect Classifications

The Burger Court has consistently claimed that the primary focus of the equal protection clause is to protect against racial discrimination.[49] It has also held that other classifications, such as those based on national origin and alienage, are equally irrelevant to legitimate governmental objectives and therefore inherently suspect.[50] The Court has continued to find that legislation which classifies along these lines should undergo strict scrutiny.[51] Nevertheless, because of developments in civil rights law, such scrutiny is no longer

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children denies equal protection). The Warren Court did invalidate some illegitimacy classifications. *See* Levy v. Louisiana, 391 U.S. 68 (1968) (striking exclusion of illegitimate children from wrongful death action). However, it was the Burger Court that introduced intermediate review.

43. *See* Gunther, *supra* note 8, at 18-19.

44. *See Cleburne,* 105 S. Ct. at 3255.

45. *Compare Cleburne,* 105 S. Ct. at 3254-55 ("[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes") *with* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("our decisions presume the constitutionality of the statutory discrimination").

46. *Cleburne,* 105 S. Ct. at 3255 ("race, alienage [and] national origin . . . are so seldom relevant . . . [that they] are subjected to strict scrutiny").

47. *Id.* ("[strict scrutiny] by the courts is due when state laws impinge on personal rights protected by the Constitution").

48. *Id.* ("[l]egislative classifications based on gender . . . [and] illegitimacy . . . are also subject to somewhat heightened review").

49. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 (1978).

50. *Id.* at 292-93.

51. *Cleburne,* 105 S. Ct. at 3254-55.

"fatal in fact."[52] The Court is willing to apply a balancing test to classifications that foster de facto discrimination.[53] The Court also accepts affirmative action as a constitutional remedy for past, intentional discrimination.[54] Finally, although the Court originally treated alienage classifications under strict scrutiny,[55] the level of review in these cases is now contingent upon the type of governmental activity involved.[56] Strict scrutiny, while still demanding a substantial relationship to a compelling state interest, is not as strict as it was under the Warren Court and is often indistinguishable from heightened scrutiny.[57]

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52. Gunther, *supra* note 8, at 8.

53. De facto discrimination is exhibited when there is a disparate impact on a suspect class, despite a facially neutral classification. Such classifications will be invalidated only if there is a showing of invidious discriminatory intent. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976). Some of the factors to be weighed are stated in Arlington Heights v. Metropolitan Housing Dev. Corp.: (1) discriminatory impact; (2) specific sequence of events leading to decision; (3) substantive departures from normal procedures; and (4) legislative and administrative history. 429 U.S. 252, 264-68 (1977). *See also* Note, *Discriminatory Purpose and Mens Rea: Tortured Argument of Invidious Intent,* 93 YALE L.J. 111 (1984) [hereinafter cited as Note, *Discriminatory Purpose*] (equates the Court's current intent requirement with criminal standard of specific intent, and argues for a lower level of intent, such as knowledge).

54. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (racial classification will be upheld if based on congressional attempt to remedy present effects of past discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (remedying effects of past official discrimination may only be undertaken upon a finding of such discrimination by a competent governmental body); United Jewish Orgs. of Williamsburgh v. Carey, 430 U.S. 144 (1977) (dilution of Jewish voting strength not a denial of equal protection where redistricting plan was drawn with purpose of preserving black voting strength).

55. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (states may not impose United States citizenship requirements on receipt of welfare payments). Alienage classifications had been invalidated by earlier Courts. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (law that barred aliens from buying fishing licenses unconstitutional). *See also* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discriminatory administration against aliens of facially neutral statute). The Burger Court was the first to apply strict scrutiny to alienage classifications. *Graham,* 403 U.S. at 372 ("[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate").

56. Alienage classifications in the economic and social realm continue to receive strict scrutiny, but the government may regulate alien participation in political and policy-making functions. *See* Bernal v. Fainter, 104 S. Ct. 2312, 2317 (1984) ("[w]e have . . . lowered our standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations 'go to the heart of representative government' "); Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (state may, consistent with equal protection, deprive aliens of employment as parole officers); Ambach v. Norwick, 441 U.S. 68 (1979) (state may deprive alien of certification as public school teacher); Foley v. Connelie, 435 U.S. 291 (1978) (state may require state police officers to be United States citizens).

57. Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167, 193 (argues that there is only one tier of judicial scrutiny that balances all competing interests). That the Court actually applies only one test balancing all of the relevant factors has been recognized by at least two of the justices. *See Cleburne,* 105 S. Ct. at 3260-61 (Stevens, J., concurring); *id.* at 3260 (Marshall, J., concurring and dissenting). The factors

2. Quasi-suspect Classifications

In terms of equal protection analysis, the Burger Court is most closely identified with the creation of an intermediate level of review for quasi-suspect classifications.[58] The Court gives quasi-suspect classifications heightened scrutiny, which requires that any such classification be substantially related to an important state interest.[59] Heightened scrutiny affords the Court the opportunity to subject legislative classifications to a more rigorous review, while still allowing states the opportunity to justify the classification.[60]

The Court has granted quasi-suspect status to gender and illegitimacy classifications because these groups share certain characteristics with classes considered inherently suspect.[61] These characteristics, or "indicia of suspectness,"[62] include immutable traits,[63] social disabilities,[64] a history of unequal treatment,[65] absolute or relative political impotence,[66] unpopularity of

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to consider include the nature of the class, the governmental interest, and the nature of the injury or right affected. *Id.* at 3261-62 (Stevens, J., concurring); *id.* at 3265 (Marshall, J., concurring and dissenting).

58. *See supra* note 14.

59. Craig v. Boren, 429 U.S. 190, 197 (1976).

60. *See* L. TRIBE, *supra* note 9, at 1082-89.

61. *See, e.g.*, Matthews v. Lucas, 427 U.S. 495, 505 (1976) (illegitimacy, like race or national origin, is a characteristic beyond the control of the individual and bears no relation to the individual's ability to function in society); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (gender classifications are similar to race, alienage and national origin because there is a long history of discrimination, presence of immutable traits, and irrelevant stereotyping).

62. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

63. *Id.* Immutable traits include race, gender, *and* mental retardation. *Cleburne,* 105 S. Ct. at 3256. One commentator has suggested that other types of conditions might be considered immutable. *See* Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723, 730 n.36 (1974) ("many characteristics that are theoretically changeable are not practically so; distinctions of Constitutional magnitude should not partake of the pretense that any poor working man can significantly change his lot in life . . . if he will only shape up . . . Must a trait be 'congenital' in order to be 'unalterable'?").

64. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Such disabilities include poverty, lack of education and language ability.

65. Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973); Brown v. Board of Educ., 347 U.S. 483 (1954).

66. Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973). *See also Cleburne,* 105 S. Ct. at 3268-69 (Marshall, J., concurring and dissenting) (mentally handicapped are politically impotent, despite recent public initiatives in their behalf). *But see id.* at 3257 (legislative response on behalf of the mentally handicapped negates any claim that they are politically impotent). Political impotence is often the major focus of any equal protection claim for status as a suspect group. The most frequently cited authority for that proposition is United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). *Compare id.* ("a special condition . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry") *with* Heckler v. Matthews, 104 S. Ct. 1387, 1395 (1984) ("we have repeatedly emphasized [that] discrimination itself, . . . stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community can cause

trait or affiliation,[67] and identifiability of group membership.[68] The development of quasi-suspect status has led to challenges of legislation that classified people on the basis of poverty,[69] obesity,[70] residence,[71] length of residence,[72] mental handicap,[73] matrimonial status,[74] physical handicap,[75] age[76] and sexual preference.[77] Nonetheless, the Court has refused to grant quasi-suspect status to classifications other than gender and illegitimacy, despite the urgings of several commentators.[78]

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serious non-economic injur[y]"). Many commentators feel that such a breakdown of the normal political processes should be the sole focal point of judicial review. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980) (judicial review should concern itself only with questions of participation, not with the substantive merits of the political choice). Others believe the Court should take a more active role in the review of legislation. *See, e.g.*, Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1086 (1980) (Constitution cannot be understood in the absence of a theory of fundamental rights based on substantive choices). For a discussion of both sides of the issue, see Nichol, *Giving Substance its Due*, 93 YALE L.J. 171 (1983); Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89 (1984); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

67. New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 (1979) (drug users); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (hippies).

68. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 19 (1973). *See also* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (separate educational facilities stigmatize the segregated minority).

69. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (school financing scheme resulting in higher per capita spending in "rich" school districts than in "poor" ones does not deny equal protection).

70. Vance v. United States, 434 F. Supp. 826 (N.D. Tex.) (regulations that provided for discipline and discharge of overweight service personnel without reference to job performance does not deny equal protection), *aff'd*, 565 F.2d 1214 (5th Cir. 1977).

71. Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981) (higher tax for foreign than domestic insurance companies does not violate equal protection).

72. Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985) (Court declined to grant heightened scrutiny to new residence classification but invalidated statute under minimum rationality test).

73. *Cleburne*, 105 S. Ct. 3249 (1985) (mentally handicapped not a suspect class).

74. Murillo v. Bambrick, 681 F.2d 898 (3d Cir. 1982) (higher filing fees for marital dispute cases than for other actions does not deny equal protection).

75. *In re* Kirschner, 74 Misc. 2d 20, 344 N.Y.S.2d 164 (1973) (requiring state to bear reasonable cost of public education for handicapped children).

76. Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement at age sixty for foreign service employees does not violate equal protection); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (mandatory retirement of uniformed state police at age fifty does not deny equal protection).

77. National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984) (statute providing for dismissal of teachers for engaging in public homosexual acts does not deny equal protection), *aff'd*, 105 S. Ct. 1858 (1985).

78. Commentators have suggested that quasi-suspect status be granted to a variety of classifications. *See* L. TRIBE, *supra* note 9, at 1077-82 (age); McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?* 28 VAND. L.

3. *Fundamental Rights*

Theoretically, statutes that affect fundamental rights receive strict scrutiny.[79] A review of Burger Court decisions in this area, however, reveals two striking features. First, although those challenges which were successful were not always brought by members of classes considered inherently or quasi-suspect, the challenging class inevitably exhibits "indicia of suspectness" (or suspect characteristics).[80] Second, the level of review in such cases has not always risen to strict scrutiny.[81] The fact that successful fundamental rights

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REV. 987 (1975); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Comment, *Constitutional Law—Right to Travel—Equal Protection—Durational Residency Requirements*—Zobel v. Williams, 29 N.Y.L. SCH. L. REV. 829 (1985); Comment, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); Note, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity*, 47 S. CAL. L. REV. 943, 979-85 (1974); Note, *Equal Protection and Intelligence Classifications*, 26 STAN. L. REV. 647 (1974); Note, *Intermediate Equal Protection Scrutiny of Welfare Laws that Deny Subsistence*, 132 U. PA. L. REV. 1547 (1984); Note, *Mental Illness: A Suspect Classification?* 83 YALE L.J. 1237 (1974).

79. *Cleburne*, 105 S. Ct. at 3255 (1985); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

80. Successful challenges have been brought by several groups: (1) blacks; *see* Carey v. Brown, 447 U.S. 455 (1980); Grayned v. City of Rockford, 408 U.S. 104 (1972); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); (2) the poor; *see* Lubin v. Panish, 415 U.S. 709 (1974); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); James v. Strange, 407 U.S. 128 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Mayer v. City of Chicago, 404 U.S. 189 (1971); (3) the mentally ill; *see* Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); (4) criminal defendants; *see* O'Brien v. Skinner, 414 U.S. 524 (1974); James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); (5) political minorities and dissidents; *see* Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979); American Party of Texas v. White, 415 U.S. 767 (1974); and (6) new state residents or nonresidents; *see* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972). Some of these challenges were brought by groups fitting more than one of these categories. Race, of course, has been held to be inherently suspect. The other classes listed above each exhibit suspect characteristics. The poor possess social disabilities, a history of unequal treatment, relative political impotence, and an unpopular trait. It has been suggested that their condition could also be considered immutable. *See* Ely, *supra* note 63, at 730 n.36. The mentally ill are saddled with an immutable trait, social disabilities, a history of unequal treatment, political impotence and an unpopular trait. Criminal defendants belong to an unpopular and identifiable class and can be said to have a history of unequal treatment. By definition, political minorities also belong to an unpopular class, have histories of unequal treatment, and are the object of special constitutional protections such as the rights of free speech and peaceful assembly. New and nonresidents suffer from absolute or relative political impotence. Nonresidents in particular have historically received unequal treatment and have been the object of special constitutional protections.

81. *See* Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719 (1973) (close connection between assessment of fees and use of water justifies limiting voting for water district board to landowners on basis of acreage owned). *Accord* Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) (choosing replacement for retired public representative by appointment and not election justified as politically expedient and causing only de minimis injury); Estelle v.

cases were invariably brought by groups with suspect characteristics suggests that the Court is highly concerned with the nature of the disadvantaged class as well as with the seriousness of the injury or the nature of the right.[82] Other challenges brought by these same disadvantaged groups have failed.[83] This evidences that the Court is willing to balance the alleged "fundamental" injury against the state interest—a method of review associated with heightened, rather than strict, scrutiny.

Additionally, the Court's review of fundamental rights claims has varied based on the presence of suspect characteristics. Many fundamental rights

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Dorrough, 420 U.S. 534 (1975) (denial of statutory appeal in prison escape cases justified by state interests in deterring escapes and promoting surrender); Mahan v. Howell, 410 U.S. 315 (1973) (preserving traditional political subdivisions is important state purpose justifying 16.4% deviation in relative voting strength).

82. If the Court were concerned only with whether a fundamental right had been impaired, then there should be cases striking statutes that impair rights even though the affected classes had no suspect characteristics. Moreover, per se impairment of fundamental rights would constitute a due process violation. As an example, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), was an equal protection case rather than a due process or first amendment case. In *Mosley*, the city of Chicago had banned all picketing within 150 feet of schools but had exempted labor picketing. Because the city could have banned all picketing within a limited and specified area without violating due process or the first amendment, the ordinance could not be invalidated on those grounds. Rather, favoring one type of speech (labor dissent) and creating a disfavored class of speech (other dissent) violated equal protection. In this case, the seriousness of the right affected (free speech) was sufficient to create an equal rights violation even when coupled with a class (dissenters) with only limited suspect characteristics. Although the plaintiffs in this case happened to be black, the ordinance was facially neutral as to race and discriminated only against disfavored dissent.

83. Such unsuccessful challenges have been brought by several suspect groups: (1) the poor; *see* Schweiker v. Hogan, 457 U.S. 569 (1982) (Congress may differentiate between different categories of poor in benefit programs); Harris v. McRae, 448 U.S. 297 (1980) (states need not pay for certain medically necessary abortions not funded by the federal government); Maher v. Roe, 432 U.S. 464 (1977) (states may decline to fund non-therapeutic abortions); Ross v. Moffitt, 417 U.S. 600 (1974) (state need not fund discretionary criminal appeals); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (no right to equal funding of public schools); (2) the mentally ill; *see* Schweiker v. Wilson, 450 U.S. 221 (1981) (Congress may provide benefits for medically needy without including all possible groups); (3) criminal defendants; *see* Estelle v. Dorrough, 420 U.S. 534 (1975) (state may rescind escapees' right to appeal conviction); Marshall v. United States, 414 U.S. 417 (1974) (Congress may decline to provide rehabilitative treatment for chronic repeat offenders); McGinnis v. Royster, 410 U.S. 263 (1973) (state may deny application of good time credit for pre-sentence incarceration period); (4) political minorities and dissenters; *see* American Party of Texas v. White, 415 U.S. 767 (1974) (state may have different ballot qualification proceedings for parties of differing size); Storer v. Brown, 415 U.S. 724 (1974) (state may bar major political party members from running for office as independent or new party candidates within six months of resignation from party); and (5) nonresidents of state; *see* Northeast Bancorp v. Board of Governors, 105 S. Ct. 2545 (1985) (state may exclude out-of-state banks from doing business within the state); Jones v. Helms, 452 U.S. 412 (1981) (state may impose higher penalty on criminal defendants who leave the state than those who do not); Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981) (state may tax foreign insurance companies at a higher rate through retaliatory tax).

challenges have been brought by groups that do not possess *any* suspect characteristics. While such challenges were often based on the impairment of the same rights as those successfully alleged by groups with suspect characteristics, challenges brought by groups without suspect characteristics have not been successful.[84] The Court's refusal to uphold those challenges suggests that the presence of some suspect characteristics in a plaintiff class is an essential element in any successful equal protection challenge.[85]

4. *Minimum Rationality*

The Burger Court continues to maintain the position that classifications which do not classify along suspect lines or impair fundamental rights will be upheld unless there is absolutely no rational basis to defend them.[86] From 1971 through 1984, only three statutes were invalidated without reference to strict or heightened scrutiny.[87] However, during the 1984 Term, the Court upheld four equal protection challenges under the minimum rationality test.[88] Taken together, these seven decisions illustrate the failure of the three-tiered system.[89] Traditionally, the Court invalidates statutes under the minimum

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84. *See, e.g.*, Brown v. Thomson, 462 U.S. 835 (1983) (89% maximum deviation of legislative district population upheld since there was no evidence of racial or other improper discrimination); Clements v. Fashing, 457 U.S. 957 (1982) (law that prevented current officeholders from running for new offices during their term upheld); Ball v. James, 451 U.S. 355 (1981) (denial of voting rights to tenant farmers upheld); Corbitt v. New Jersey, 439 U.S. 212 (1978) (more severe sentences for murder defendants who exercised their right to trial upheld).

85. *Cf.* Dallas County v. Reese, 421 U.S. 477, 480 (1975) ("A successful attack . . . must be based on findings . . . that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population"). *Compare* Brown v. Thomson, 462 U.S. 835 (1983) (89% maximum deviation from median voting representation held not to violate rights of residents of larger counties) *with* Connor v. Finch, 431 U.S. 407 (1977) (19.3% maximum deviation held to violate rights of districts with large black populations).

86. *Cf.* Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 671-72 (1981) (equal protection clause is satisfied if a legislature rationally could have believed that the statute would promote its objective); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (legislatures need not remedy all ills at once, or in the same way, but may remedy them step-by-step). *Accord* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983); Vance v. Bradley, 440 U.S. 93 (1979).

87. *See* Plyler v. Doe, 457 U.S. 202 (1982) (denial of free education to children of illegal aliens violates equal protection); Zobel v. Williams, 457 U.S. 55 (1982) (distributing tax rebates progressively on the basis of length of residence violates equal protection); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (statute passed specifically to deny food stamps to hippies violates equal protection).

88. *Cleburne*, 105 S. Ct. 3249 (1985); Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985); Williams v. Vermont, 105 S. Ct. 2465 (1985); Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985). *See supra* notes 20 & 23.

89. These are the aberrant cases, in which the Court found equal protection violations without resort to the conventional avenues of invalidation of strict scrutiny, heightened scrutiny, or fundamental rights. *Cleburne*, 105 S. Ct. 3249 (zoning); Hooper v. Bernalillo County

rationality test only where there is no rational basis for the classification whatsoever.[90] However, none of the challenged statutes in these cases were totally irrational or devoid of legitimate purpose.[91] In these cases, the Court seems to have confused the requirement of rationality, which is associated with the minimum rationality test, with the requirement of substantial relevance, which is associated with heightened and strict scrutiny.[92]

Assessor, 105 S. Ct. 2862 (1985) (property taxes); Williams v. Vermont, 105 S. Ct. 2465 (1985) (sales tax rebates); Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985) (corporate taxes); Plyler v. Doe, 457 U.S. 202 (1982) (education); Zobel v. Williams, 457 U.S. 55 (1982) (state revenue disbursements); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (food stamp benefits). Only in *Plyler* did the plaintiffs argue that the affected right was fundamental. 457 U.S. at 230 (Marshall, J., concurring).

The traits of the challenging groups varied. *Moreno, Zobel, Hooper,* and *Williams* dealt with new state residents. *Metropolitan Life* involved the rights of foreign corporations. *Cleburne* assessed the rights of the mentally handicapped. None of these groups have ever been held to be inherently or quasi-suspect. Although the Court has invoked the "right to travel" as a fundamental right in the past, as in Shapiro v. Thompson, 394 U.S. 618 (1969) (challenging residency requirements for welfare benefits), it did not raise that "right" in *Zobel, Hooper,* or *Williams.* The Court apparently recognized that the challenged statutes in these cases did not actually discourage interstate travel.

90. *See supra* note 10.

91. Of the three statutes involved, only the statute in *Moreno* could be said to have had an illegitimate purpose, because the statute was aimed specifically at depriving an unpopular group (hippies) of a government benefit (food stamps). The statute purportedly related to other governmental interests, such as cost, administrative efficiency and minimizing fraud. 413 U.S. at 535. The other statutes were designed for other purposes. Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985) (to reward resident veterans, state provides present residents with tax credits); Williams v. Vermont, 105 S. Ct. 2465 (to finance highway maintenance, state collects sales and use tax on the automobiles of new residents); Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985) (to promote local insurance industry, state taxes foreign companies for doing business in the state); Plyler v. Doe, 457 U.S. 202 (1982) (to preserve the state's resources for lawful residents and ensure the quality of education, state limits school attendance to legal residents); Zobel v. Williams, 457 U.S. 55 (1982) (to reward Alaska citizens for past contributions to the state, state distributes progressively higher tax rebates based on years of residency).

92. *Rationality* relates to a hypothesized perception of a legislature that a classification will advance a permissible state goal. *See, e.g.,* Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 668 (1981) (minimum rationality test looks only at whether legislature could rationally believe that a classification would serve a legitimate governmental interest). *Relevancy,* on the other hand, looks at how closely the classification serves the asserted state interest *in fact.* Traditionally, it is only under strict or heightened scrutiny that the Court requires a close fit. *See* Comment, *Suspect Classifications: A Suspect Analysis,* 87 DICK. L. REV. 407, 437-39 (1983) (comparing the function of rationality and relevancy in equal protection analysis). For example, in Williams v. Vermont, 105 S. Ct. 2465 (1985), the Court looked at how well the statute accomplished its goals (relevancy) rather than at whether the legislature could have believed that it would do so (rationality). In Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985), the Court refused to focus on the legislature's belief that the classification used would further the state's goals. It focused instead on the nature of the classification. In both of these cases the method of analysis is associated with heightened scrutiny rather than

On first impression, the Court's higher scrutiny of non-suspect classifications signals a more substantive review of legislative goals and methods than the Court has undertaken in the past. However, a careful examination of the recent decisions reveals that each of these suits was brought by a class with suspect characteristics.[93] Moreover, in some of these cases, the Court expressly objected to the nature of the classifications used by legislatures rather than to the asserted legislative goals or methods.[94] This focus on the nature of the classification and insistence on a substantial degee of relevancy is actually heightened scrutiny.[95] However, the Court chose to phrase its decisions in minimum rationality language rather than redefine the factual basis necessary to trigger heightened scrutiny.

C. *Summary*

Close examination of Burger Court decisions shows that the Supreme Court does not actually use a three-tiered system of review. To the contrary, the Court applies only two levels of review.[96] To warrant overturning a statute, though, the Court requires at a minimum that the statutory classification hurt some group with some suspect characteristics.[97] If the classification affects no such groups, then the Court applies its traditional minimum

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minimum rationality.

In the past, the Court has not been concerned with the relevancy of non-suspect classifications unless they were found to be totally irrelevant. Where that has been the case, the Court has held that such classifications violated the due process clause. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (arbitrarily foreclosing review of employment disputes after certain time period violates due process). *See also* Bolling v. Sharpe, 347 U.S. 497 (1954) (equal protection is component of fifth amendment due process clause, applied against federal government).

93. Four cases dealt with residency requirements, which tend to exploit a politically weak group of outsiders. Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985); Williams v. Vermont, 105 S. Ct. 2465 (1985); Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985); Zobel v. Williams, 457 U.S. 55 (1982). Plyler v. Doe dealt with illegal alien children, a group that has social disabilities, a history of discrimination, political impotence and unpopularity of trait. 457 U.S. 202 (1982). The hippies in United States Dep't of Agriculture v. Moreno were a politically unpopular group. 413 U.S. 528 (1973).

94. *See* Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676, 1684 (1985) (promotion of domestic business is not a legitimate state purpose *when furthered by discriminating against non-residents*) (emphasis added); Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862, 2869 (1985) ("[t]he New Mexico statute creates . . . second-class citizens").

95. Heightened scrutiny demands substantial relevance. Craig v. Boren, 429 U.S. 190, 197 (1976). Minimum rationality requires only that a legislature be rationally capable of believing that a classification is relevant to the state's goals. *See supra* note 92 (how 1985 equal protection cases treat relationship of relevance and rationality).

96. *See supra* note 57 (scrutiny of inherently suspect classifications more akin to heightened scrutiny), 79-85 (scrutiny of fundamental rights challenges actually in form of heightened scrutiny), & 86-95 (successful minimum rationality challenges actually receive heightened scrutiny).

97. *See supra* notes 79-85 (fundamental rights) & 86-95 (minimum rationality).

rationality test. If such groups are hurt by a state classification, then the Court applies a form of heightened scrutiny. Under that test, the Court balances the relevance of the proposed classification, the seriousness of the injury to the class, and the state's interest in the legislative scheme.

III. *CITY OF CLEBURNE V. CLEBURNE LIVING CENTER*

A. Facts and Procedures

A zoning ordinance in effect in Cleburne, Texas, during 1980 ordered operators of special facilities for the mentally retarded to obtain a special use permit from the city council before locating a facility in an area zoned R-3.[98] Although multiple occupancy units were permitted in R-3 zones,[99] special facilities including "[h]ospitals for the insane or feeble-minded" needed the annual renewable permit.[100] Cleburne Living Center (CLC) planned to establish a home for mentally retarded adults and registered for the appropriate permit.[101] The city council denied the permit, ostensibly prompted by a concern for the attitudes of adjacent property owners, the proposed facility's proximity to a junior high school, its location on a five-hundred-year flood plain, and the number of potential occupants. Finally, the council concluded that CLC would contribute inordinately to the community's population density and street congestion.[102]

CLC sued the city in federal district court, claiming that the zoning ordinance denied them equal protection.[103] The district court found that there were no fundamental rights at stake and that mental retardation did not constitute a quasi-suspect class. Accordingly, the court applied the minimum rationality test to the ordinance and held that the ordinance was rationally related to the city's interests.[104] The Court of Appeals for the Fifth Circuit reversed the district court. It found that the mentally retarded were, and are, characterized by a history of oppression, political impotence and an immutable condition.[105] The court held that classifications based on mental retardation are quasi-suspect and subject to heightened scrutiny.[106] The court of appeals concluded that the ordinance was not substantially related to an

98. 105 S. Ct. 3248 (1985).

99. These units included apartment houses, dormitories, fraternity and sorority houses, apartment hotels, hospitals, sanitariums and various types of nursing homes. *Id.* at 3252-53.

100. *Id.*

101. *Id.* at 3252.

102. *Id.* at 3260.

103. The district court's opinion was not reported. *See* Cleburne Living Center v. City of Cleburne, No. CA 3-80-1676-F (N.D. Tex. April 16, 1982).

104. 105 S. Ct. at 3253. The city's interests were CLC's legal responsibilities, the safety and fears of neighbors, and the number of potential occupants.

105. 726 F.2d 191, 197 (5th Cir. 1984).

106. *Id.* at 198.

important governmental interest and that it was therefore facially unconstitutional.[107]

On appeal, the Supreme Court unanimously agreed that the ordinance was unconstitutional, but only as applied to CLC.[108] The Court also held, by a 6-3 vote, that mental retardation is not a quasi-suspect classification and does not merit heightened scrutiny. The Court found, however, that the ordinance failed the minimum rationality test.[109] Justice Marshall, joined by Justices Brennan and Blackmun, argued that classifications based on mental retardation deserve heightened scrutiny and that the ordinance was facially invalid.[110] Although six Justices agreed that mental retardation should not receive heightened scrutiny, only four agreed fully with the majority's reasoning. In a separate opinion, Justice Stevens, joined by the Chief Justice, rejected the Court's three-tiered method of analysis.[111] In view of these separate opinions, the majority opinion expressed only a plurality view on the appropriate method of equal protection review.[112]

B. *The Opinions in* Cleburne

Each opinion in *Cleburne* exhibits a different approach to equal protection analysis. Justice White's majority opinion reviews the city's actions by the traditional three-tiered approach. Justice Stevens's concurring opinion proposes a "rational basis" test for all equal protection cases, by which he would review state classifications *sui generis* to test their rationality. Finally, Justice Marshall's concurring opinion proposes a balancing test, which accords a progressively more rigorous review to classifications that affect groups with greater suspect characteristics.

1. *Majority Opinion of Justice White*

Justice White's majority opinion followed the traditional three-tiered approach to equal protection.[113] He recognized that mental retardation is immutable. However, he cited immutability as a reason for *denying* quasi-suspect status, because immutability is relevant to many classifications which are designed to benefit or protect the mentally retarded.[114] Justice White

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107. *Id.* at 200.

108. 105 S. Ct. at 3260.

109. *Id.* at 3255-56.

110. *Id.* at 3262 (Marshall, J., concurring and dissenting).

111. *Id.* at 3260 (Stevens, J., concurring).

112. Only four justices accepted the three-tiered system of equal protection analysis without reservation: Justices White, Powell, Rehnquist, and O'Connor.

113. The opinion held that racial, ethnic and alienage classifications and infringements on fundamental rights should receive strict scrutiny; that gender and illegitimacy classifications should receive heightened scrutiny; and that all other legislative classifications need be only rationally related to a legitimate state purpose. *Cleburne,* 105 S. Ct. at 3254-55.

114. *Id.* at 3256.

glossed over the history of oppression against the mentally retarded[115] and stated that recent legislative concern for their plight negated any claim of political impotence.[116] Against this background, he held that mental retardation was not a quasi-suspect classification that required heightened scrutiny.

Justice White appeared more troubled by the ramifications of granting quasi-suspect status to the mentally retarded than by the possibility of legislative animosity against them. He made three arguments against quasi-suspect status for the mentally retarded: (1) that it would engross the courts in legislative-type decisions about the mentally handicapped;[117] (2) that a high level of judicial scrutiny would hinder legislative aid to the mentally retarded;[118] and (3) that expanding quasi-suspect status beyond gender and illegitimacy to the mentally retarded would create a demand for like treatment from a myriad of other groups.[119] Nevertheless, Justice White found enough "bite" in the minimum rationality tier of equal protection to invalidate the ordinance as applied to CLC.[120] In doing so, he examined the city's purposes behind the ordinance and the relevance of the classification to those purposes, rather than whether the city council could have rationally believed that the classification would promote some legitimate goal.[121]

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115. *Id.* at 3258. *But see id.* at 3262 (Stevens, J., concurring) (court of appeals correctly observed that mentally handicapped have a history of unfair and grotesque mistreatment). *See also id.* at 3266-67 (Marshall, J., concurring) (discusses historical treatment of the mentally retarded in the United States).

116. *Id.* at 3257.

117. *Id.* at 3255. The Court declared that heightened scrutiny inevitably involves substantive judgments about legislative decisions. *Id.* at 3256. In fact, the opposite is true. Presumptions of invalidity under strict and heightened scrutiny encourage automatic invalidation on a means-focused basis, rather than on a more substantive ends-focused basis. It is when the Court substitutes its own judgment about the best means of achieving state goals, or about what those goals should be, that the Court renders a substantive judicial decision. *See* Cox, *The Role of the Supreme Court in American Society,* 50 MARQ. L. REV. 575, 584 (1967) (when courts weigh and balance the interests behind a statute, they make personal judgments about the relative importance of all of the elements).

118. *Cleburne,* 105 S. Ct. at 3258. The Court stated that granting quasi-suspect status would "subject all government action based on [a suspect] classification to more searching evaluation." *Id.* at 3258. Furthermore, the Court stated that consideration of mental handicaps was relevant to many governmental objectives; laws designed to benefit the mentally handicapped must necessarily be classified along those lines.

119. The Court could not resist the floodgate argument, noting that "the aging, the disabled, the mentally ill, and the infirm" would all attempt to show unequal treatment from at least some segment of society. *Id.* at 3258. But the Court does not address the logical rejoinder: if these groups can show that a legislative body has invidiously or thoughtlessly exploited their vulnerability, why should they not expect their interests to be protected by the judiciary?

120. The Court examined each of the city's objectives, as identified by the court of appeals, and found that the special use permit was not rationally related to any of them. *Id.* at 3258-60.

121. *Id.*

The majority opinion in *Cleburne* highlights three serious weaknesses in the three-tiered system.[122] First, by focusing its attention on the challenged classification rather than on the disadvantaged plaintiff class,[123] the Court generalizes the harm perpetrated by the government and overlooks the possibility of "the sort of prejudiced, thoughtless or stereotyped action that offends principles of equality found in the Fourteenth Amendment."[124] This, in turn, depersonalizes the underlying cause of action and causes the Court to lose sight of the "peculiar disadvantage [to the] suspect class."[125] Also, the three-tiered approach pigeonholes legislation by classification of the parties affected; the classification in turn predetermines the type of scrutiny applied and often predetermines the outcome as well.[126] Such judicial stereotyping is as improper as the legislative stereotyping which the Court so often condemns. For example, the Court demands that legislative classifications be based on such criteria as height, weight and strength, rather than on the basis of gender.[127] Accordingly, a decision to grant heightened scrutiny

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122. The Court's movement toward a middle level of scrutiny was initially hailed as a means of invalidating discriminatory classifications without denying the legislatures the ability to justify the use of those classifications in certain instances. Professor Gunther, in particular, saw great hope in minimum rationality with "bite." Gunther, *supra* note 8. The cases he cited to support this view, such as Reed v. Reed, 404 U.S. 71 (1971), were the forerunners of heightened scrutiny, though they were also phrased in minimum rationality terms. The Court's resistance to expanding heightened scrutiny beyond gender and illegitimacy, its balancing of principles in affirmative action and alienage cases, and its renewed application of the minimum rationality standard have led to almost universal criticism of the three-tiered approach. Professor Shaman criticized the rigidity of the three-tiered system, particularly the total deference given to all legislation not classified as suspect and therefore relegated to an extremely deferential minimum rationality review. *See* Shaman, *supra* note 7, at 178 ("[i]n reaching [his conclusion in *Plyler*] the Chief Justice insisted that the state law was not 'irrational' only after admitting in the very first sentence of his opinion that the law was 'senseless.' But such oxymorons [sic] are endemic to minimal scrutiny"). Professor Hutchinson also criticized the current tendency of the Court to apply the same type of analysis regardless of the level of scrutiny the Court claims it is using. *See* Hutchinson, *supra* note 57. Other critics have focused on the Court's failure to concretely and consistently articulate the factors considered in balancing competing interests. *See* L. TRIBE, *supra* note 9, at 1082 (factors should include the importance of the state's objective, the relationship of the classification to the state's objective, the state purposes articulated prior to litigation, the state purposes articulated during litigation, and the opportunity afforded plaintiffs to rebut presumptions inherent in the classifications affecting them). *Accord* Fox, *supra* note 7, at 525 (arguing for the application of Professor Tribe's factors).

123. *See* Sherry, *supra* note 66, at 105-08 (discussing the different effects of focusing on classifications rather than classes).

124. 105 S. Ct. at 3272 (Marshall, J., concurring and dissenting).

125. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

126. *See* Shaman, *supra* note 7, at 173 (criticizes the rigidity of the three-tiered system).

127. Many gender classifications would pass constitutional muster under the minimum rationality test, because that standard allows for classification on the basis of legislative efficiency, and gender is loosely related to certain legislative choices. *See, e.g.*, Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959). By requiring other, more specific methods of classification, legislators are forced to look at the specific characteristics that created a former gender preference and classify on that basis (e.g. height, weight, strength, etc.). In that way, the door is opened to qualified candidates of either gender, while unqualified candidates are still excluded.

should be based on the presence of suspect characteristics that a legislature may have exploited, rather than on the conclusion that the classification itself is often, or always, used for improper purposes. The Court seems unwilling to review equal protection challenges on the basis of the characteristics which a challenging class possesses. To the contrary, the Court brands whole classifications as "inherently suspect," "quasi-suspect," or "not suspect" and applies a predetermined level of review to each label. This was the case in *Cleburne,* where the Court ostensibly refused to apply heightened scrutiny[128] even though the mentally retarded are politically impotent, have a history of discriminatory treatment, are saddled with an immutable trait and are victims of irrational prejudice.[129]

The second weakness in the three-tiered system is the operation of presumptions which the Court attaches to the different levels of review.[130] Justice White feels that granting quasi-suspect status to the mentally retarded would also require the Court to invalidate laws which only incidentally burden that class or are actually designed to benefit it.[131] While the Court has at times allowed such a presumption of invalidity to operate in regard to race,[132] it has certainly not done so in regard to gender, illegitimacy, alienage or fundamental rights.[133] The implication that such presumptions would bind the courts or inhibit legislatures is therefore not a realistic concern.

The third flaw in the three-tiered system is the inflexibility of the review. Although all of the justices agreed that the law under review in *Cleburne* was unfairly discriminatory in some respect, their refusal to grant quasi-

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128. Justice Marshall argued that the Court actually applied heightened scrutiny. *Cleburne,* 105 S. Ct. at 3263 (Marshall, J., concurring and dissenting). *See also supra* notes 86-95 (heightened scrutiny actually applied in all successful minimum rationality challenges).

129. *Cleburne,* 105 S. Ct. at 3260.

130. Justice White feels that legislation subjected to heightened scrutiny should be presumed unconstitutional. *Cleburne,* 105 S. Ct. at 3258 ("quasi-suspect classification . . . subject[s] all governmental action based on that classification to more searching evaluation"). *But see id.* at 3262 (Stevens, J., concurring) ("every law that places the mentally retarded in a special class is not presumptively irrational").

131. *Cleburne,* 105 S. Ct. at 3258.

132. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (race specific classifications are inherently suspect even if the complainant is white).

133. *See* Heckler v. Matthews, 104 S. Ct. 1387 (1984) (gender classifications used for a limited time to secure expectations formed prior to change in law not unconstitutional); Brown v. Thomson, 462 U.S. 835 (1983) (89% deviation in average county representation does not deny equal protection); Lehr v. Robertson, 463 U.S. 248 (1983) (law that deprives unwed father of notice of adoption proceeding, where father had failed to request such notice during statutory period, does not deny equal protection); Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (requiring parole officers to be United States citizens does not deny equal protection); Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) (statutory rape law that differentiates on basis of gender does not deny equal protection); Parham v. Hughes, 441 U.S. 347 (1979) (barring father from suing for wrongful death of illegitimate child does not deny equal protection); Ambach v. Norwick, 441 U.S. 68 (1979) (denying teacher certification to aliens does not deny equal protection).

suspect status to the mentally handicapped left the Court no doctrinal foothold permitting it to invalidate the ordinance. The traditional minimum rationality test would have been insufficient to support invalidation because the city proferred several justifications for its zoning decision.[134] Only by giving the rationality test teeth could the Court achieve its compromise of depriving the mentally retarded quasi-suspect status and yet lending them support in the single case before it. By stiffening the minimum rationality test in *Cleburne* and other cases this Term, the Court has undermined the predictability of the three-tiered scheme.

2. *Concurring Opinion of Justice Stevens*

Justice Stevens rejected the three-tiered analysis purportedly applied by the majority. In its place, he proposed a unitary standard of equal protection that would only ask whether the challenged legislation has a rational basis.[135] Justice Stevens defined a rational classification as one that an impartial lawmaker could logically believe to serve a legitimate public purpose and that benefits society more than it harms the disadvantaged class.[136] He also identified three factors to weigh in passing on the rationality of a classification: (1) the nature of the class harmed; (2) the public purposes served by the classification; and (3) the characteristics used to distinguish one class from another.[137] Finally, Justice Stevens rejected any blanket presumption of unconstitutionality for certain types of classifications. He wrote that the various degrees of relevancy of classifications to their corresponding legislative goals should be the focus of the Court's analysis.[138]

Justice Stevens's "rational basis" test clearly calls for a higher degree of relevancy than does the traditional minimum rationality test.[139] However, Justice Stevens explained neither how the listed factors should specifically bear on particular legislation, nor in what way the factors relate to each

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134. *See* Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 668 (1981) (minimum rationality test asks only whether the challenged legislation has a legitimate purpose and whether it would be reasonable for the lawmakers to believe that the use of the challenged classification would promote that purpose); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959) ("it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause . . . *if any state of facts reasonably can be conceived that would sustain it*") (emphasis added); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) ("[e]vils in the same field may be of different dimensions . . . requiring different remedies, or so the legislature may think . . . . [R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind").

135. *Cleburne,* 105 S. Ct. at 3261 (Stevens, J., concurring).

136. *Id. See also* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring) ("we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature").

137. *Cleburne,* 105 S. Ct. at 3261-62 (Stevens, J., concurring).

138. *Id.* at 3262 (Stevens, J., concurring).

139. *See supra* notes 86-95 and accompanying text.

other. Because the test has no external standards, it is apparently based on the internal values of the particular judges hearing a case. As Justice Stevens noted, "I have always asked *myself* whether *I* could find a 'rational basis' for the classification at issue."[140] By merely substituting the judgment of the Court for the judgment of the legislature, this analysis epitomizes substantive judicial decision-making.[141]

Justice Stevens fails to define the degree of rationality that he would demand in equal protection cases. Nor does he state whether he would require different degrees of rationality based on the tradition of disfavor, the importance of the governmental interest or the relevancy of the classified characteristic.[142] The only hint given by Justice Stevens is that he would be "especially vigilant" in evaluating the rationality of classifications involving groups with a "tradition of disfavor."[143] This Note fails to discern any

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140. *Cleburne*, 105 S. Ct. at 3261 (Stevens, J., concurring).

141. As Justice Holmes stated: "[p]eople want to know under what circumstances [they will be affected by the laws]. The object of our study [of law], then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." O. HOLMES, COLLECTED LEGAL PAPERS 167 (1920). Rules of law that depend solely on the subjective standards of individual judges operate unpredictably. Subjectivity in equal protection analysis has often been criticized. *See* Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U. DET. J. URB. L. 867, 917 (1980) (Supreme Court's "inconsistency in applying its standards of review" has given the appearance of subjective adjudication and has resulted in uncertainty about what the Court will do in the future). Moreover, judical lawmaking has been criticized as anti-democratic because judges are neither elected nor politically responsible to the people. H. DEAN, JUDICIAL REVIEW AND DEMOCRACY 5-6 (1966). The argument against indiscriminate lawmaking in the equal protection context has been concisely stated by Judge Ripple:

> "[a]ssuming, *arguendo*, the legitimacy of the judiciary's role in Constitutional policy making, its capacity to obtain sufficiently comprehensible information . . . and to assess that information is hardly a given. Neither a judge's training in the law nor the usual tools of the judicial process are geared to permit the absorption, digestion, and appreciation of all the data necessary to making fundamental policy choices. While the adversary process works quite well in establishing adjudicative facts . . . it is hardly the ideal forum to analyze major economic and social trends of a diverse society."

K. RIPPLE, CONSTITUTIONAL LITIGATION 65-66 (1984).

This is not to say that judicial review of equal protection should never take place, but merely that judges should invalidate legislation only subject to "simple, realistic and reasonably specific legal rules." Weidner, *supra*, at 917. In most contexts, it is beyond the competency of the judiciary to consider exactly the same interests as the legislature. However, in equal protection cases, once the court determines that the disadvantaged group is beyond the circle of political effectiveness, the court is obliged to examine whether the legislature has adequately considered the interests of that group. If the courts intervene in the legislative process only in the manner suggested in this Note, then such intervention does not violate separation of powers. To the contrary, it is an exercise of that principle because the judiciary acts as a check on the majoritarian excesses of the legislature, to ensure that the government operates on a minimum level of equality for all persons.

142. *See supra* note 92 (discussing the difference between relevance and rationality).

143. *Cleburne*, 105 S. Ct. at 3261 n.6 (Stevens J., concurring).

appreciable difference between "heightened scrutiny for suspect classes" and "special vigilance for disfavored groups." It is uncertain how Justice Stevens intends to break away from current equal protection analysis.

As Justice Marshall points out, lower courts should be able to apply the Supreme Court's rationale to cases brought before them.[144] Although Justice Stevens may know unfair discrimination when he sees it, his proposed rational basis test does little to help lower courts to apply his standard consistently. Absent major revisions, this approach would soon be found unworkable. Nonetheless, Justice Stevens's approach possesses two attractive features. First, by eliminating stereotyped classifications, his approach exposes more discriminatory legislation to potential review in the courts. Second, because there are no presumptions of unconstitutionality imbedded in his analysis, the courts can explicitly balance all of the factors in a case without having to reach threshold questions about the character of the injured class. Justice Stevens's rational basis test allows courts to balance the degree and nature of the injury against the state's objectives to determine whether equal protection has been denied.

3. *Concurring and Dissenting Opinion of Justice Marshall*

Justice Marshall concurred in the holding of the case, but dissented from the Court's decision to base its holding on the minimum rationality test.[145] According to Justice Marshall, the Court actually applied heightened scrutiny to the case. He reviewed previous applications of the minimum rationality test to show that the *Cleburne* ordinance could easily withstand that test.[146] Justice Marshall wrote that the Court should have expressly applied heightened scrutiny to the mentally retarded because that class suffers political impotence and a history of unequal treatment.[147] Under heightened scrutiny, Justice Marshall concluded that the *Cleburne* ordinance was facially unconstitutional.[148]

Justice Marshall has presented perhaps the most consistent and concrete alternative view of equal protection analysis among the Court's justices.[149] More than any other justice, he has recognized that what the Court says

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144. *Id.* at 3265 (Marshall, J., concurring and dissenting).

145. *Id.* at 3263.

146. *Id.* at 3264-65.

147. *Id.* at 3266-67.

148. *Id.* at 3268.

149. *See* Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting) ("concentration must be placed upon the character of the classification in question, the relative importance to individuals . . . of the governmental benefits . . . and the asserted state interests"). *Accord* Plyler v. Doe, 457 U.S. 202, 230 (1982) (Marshall, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting).

and what it does have frequently been worlds apart.[150] Like Justice Stevens, Justice Marshall rejects any rigidly tiered system of equal protection analysis.[151] He argues that the Court should employ a balancing test with a sliding scale of scrutiny that varies with the character of the classification, the nature of the alleged injury, and the governmental interests asserted in support of the classification.[152] Justice Marshall's equal protection analysis differs from Justice White's and Justice Stevens's tests in two respects: Justice Marshall keeps minimum rationality review truly minimal,[153] and he carefully distinguishes the types of cases to which he would apply heightened scrutiny.[154] In contrast to Justice Stevens, who would apply his test to all challenged legislation, Justice Marshall would limit his heightened scrutiny review to social legislation.[155] For classifications subject to heightened scrutiny, Justice Marshall would balance the injury and the "recognized invidiousness of the basis upon which the particular classification is drawn" against the asserted governmental interest.[156]

Justice Marshall's willingness to grant heightened scrutiny to all social legislation would not allay the fears raised in Justice White's opinion. Justice White would see such a threshold for review as establishing the Court as a guarantor of minority interests, handcuffing legislators in their attempt to solve complex social problems through experimental legislation. Justice Marshall's analysis would allow the Court to review any social legislation in which it discerned "unfair" discrimination,[157] unbounded by any presump-

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150. *Cleburne,* 105 S. Ct. at 3264 (Marshall, J., concurring and dissenting) ("the Court does not label its handiwork heightened scrutiny . . . [b]ut however labeled, the rational basis test invoked today is most assuredly not the rational basis test of *Williamson v. Lee Optical, Allied Stores v. Bowers,* and their progeny") (citations omitted). *Accord* Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting).

151. Plyler v. Doe, 457 U.S. 202, 231 (1982); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973).

152. Justice Marshall argues that the Court has followed this approach all along, though couching its handiwork in minimum rationality language. *Cleburne,* 105 S. Ct. at 3264 (Marshall, J., concurring and dissenting) (Supreme Court's method of analysis is "precisely the sort of probing inquiry associated with heightened scrutiny").

153. *Id.* at 3264-65 (Marshall J., concurring and dissenting) (true minimum rationality test would be insufficiently stringent to invalidate Cleburne's ordinance).

154. *Id.* at 3265 (suggestion that the traditional rational basis test allows this sort of searching inquiry creates precedent for Court to subject economic and commercial classifications to stiffer "ordinary" rational basis review).

155. *Id.* (Marshall, J., concurring and dissenting). Justice Marshall characterized the potential for invalidation of economic legislation as "a small and regrettable step back toward the days of *Lochner.*"

156. *Id.*

157. For instance, Justice Marshall would have used heightened scrutiny to review legislation that set a ceiling on welfare benefits, Dandridge v. Williams, 397 U.S. 471, 508 (Marshall, J., dissenting), although the only disadvantaged class was "large families." *Id.* at 475. Justice

tion that would automatically require invalidation. He would then apply a balancing test and invalidate those statutes in which the state's interest did not outweigh the discriminatory effects of the classification.

IV. IMPACT

The plurality opinion in *Cleburne* purportedly adhered to the three-tiered system of equal protection analysis. Nevertheless, six justices plainly abandoned the lower limits of minimum rationality and raised the level of scrutiny in a case where traditional equal protection analysis failed to achieve a just result.[158] However, as Justice Marshall demonstrated, a rational basis test fails to establish objective standards for lower courts to apply and leaves the Supreme Court unaccountable for its decisions.[159] A rational basis test, in theory, can be used to invalidate any type of legislation. It can be used to invalidate economic legislation with no discernible adverse impact on any group with suspect characteristics, or it can be used only to invalidate those classifications that have a disparate impact on groups which, while not inherently or quasi-suspect, nevertheless share certain indicia of suspectness. Precedent shows that it has been the tendency of the Burger Court to do the latter.[160] The unusual number of decisions rendered during the 1985 Term under the minimum rationality test may send a signal to the lower courts that a more substantive review of equal protection cases will be tolerated. However, such review by the lower courts may not evidence the same concern for the presence of suspect characteristics that the Supreme Court has exhibited.

This split over the need for objective standards is not unique to equal protection. The debate over the appropriate standard of review for equal protection is contained within a larger debate over the role of judicial review. Observers who support active, substantive judicial review[161] would support

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Marshall's view of who should receive heightened scrutiny is highly substantive and includes the "destitue [sic], disabled, [and] elderly individuals." Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting).

158. Justice Stevens and Chief Justice Burger would apply the rational basis test to all equal protection challenges. *Cleburne*, 105 S. Ct. at 3260-61 (Stevens, J., concurring). Justices White, Powell, Rehnquist and O'Connor would apply the rational basis test to classifications not subject to strict or heightened scrutiny. *Id.* at 3258.

159. *Id.* at 3265 (Marshall, J., concurring and dissenting).

160. *See supra* notes 79-83 and accompanying text.

161. A substantive approach to judicial review is related to the philosophy of judicial activism. L. TRIBE, *supra* note 9, at 991. This philosophy encompasses review based on judicial standards found outside the constitutional text, such as standards discovered in some form of "natural law." Tushnet, *supra* note 66, at 1042-45 (1980). The natural law theory was employed as early as 1823 by Justice Bushrod Washington. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (privileges and immunities clause applies to those rights which, by their nature, are fundamental, and belong, of right, to the citizens of all free governments). Substantive theory reached its apex in the *Lochner* era, when the Court required a high degree of

minimum constraints on judicial decisions about equal protection. Observers who believe that constitutional review should only be undertaken with reference to specific textual and precedential criteria will insist on objective equal protection standards.[162] Any consistent approach to constitutional adjudication must examine the nature of the equal protection clause and its place within the constitutional framework. This Note argues that a decision to *grant* heightened scrutiny should be made by reference to objective standards. However, once the court has decided that heightened scrutiny is appropriate, it must be free to weigh substantively the propriety of the classification.

Commentators favor two alternatives to the current three-tiered analysis. The most popular is the approach favored by Justice Marshall, in which the challenged legislation is reviewed under a single balancing test where the nature of the classification is one of many factors to consider.[163] The other is a process-based approach, reminiscent of the two-tiered Warren Court

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rationality for all types of legislation, economic and social alike. Tribe, *supra* note 66, at 1065-66 (1980). Modern-day adherents of substantive theory are more apt to limit the reaches of substantive review to social legislation. *See, e.g., Cleburne,* 105 S. Ct. at 3265 (Marshall, J., concurring and dissenting). Substantive theory is result-oriented and relies on the internal values of the particular reviewing judge or court. The major contention posited by the theory's opponents is the failure of substantive theory to adequately explain when expanded judicial review is appropriate and to set any logical, concrete limits on judicial initiative. *See generally* Sherry, *supra* note 66.

162. This review is termed "process-based." Tribe, *supra* note 66, at 1063. As Professor Tribe explains: "The theme was anticipated by John Marshall [McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435-36 (1819)]; it assumed a central role for Harlan Fiske Stone [United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)]; it signally motivated Earl Warren [*See* Ely, *The Chief,* 88 HARV. L. REV. 11, 12 (1974)]; and it has been elaborated . . . most powerfully in the work of John Ely." (Citations inserted in place of footnotes). Tribe, *supra* note 66, at 1072-73. Process-based theories contend that judicial review should be limited to either those instances in which normal political processes break down; *see* Sherry, *supra* note 66, at 103-04; or when there are formal or functional obstacles to the assertion of political power. *See* Tushnet, *supra* note 66, at 1045. *See generally* J. ELY, *supra* note 66 (merits and shortcomings of interpretivism in judicial review).

163. Professor Shaman explicitly favors the Marshall approach. Shaman, *supra* note 7, at 177-78. Others propose variations on the balancing test theme. Professor Wilkinson suggests that the Court should focus on the nature of the inequality rather than on the disadvantaged group. He balances the importance of the opportunity being denied, the strength of the state interest served in denying it, and the character of the groups whose opportunities are being denied. Wilkinson, *supra* note 7, at 991. In an interesting twist, Professor Wilkinson proposes that inequalities in political opportunity should receive strict scrutiny, inequalities in economic opportunity should receive heightened scrutiny, and mere economic inequalities should receive a minimum rationality review. *Id.* at 946. It is difficult to see how this proposal accounts for a case such as *Cleburne,* which involved none of those types of inequality. Most balancing tests would apply a single level of review to these various types of classifications, with the nature of the inequality being one of the variable factors. *See, e.g.,* Blattner, *supra* note 7, at 841-42 ("[t]he answer to the question of 'what inequalities are tolerable under what circumstances' lies not in the mechanical application of various standards of review, but in a vision of what constitutes just and unjust disadvantaging").

analysis. Under this approach, classifications that discriminate against a class excluded from the political process should invariably be struck down, while those that do not are allowed to stand.[164] The first alternative focuses mainly on the method of review; the character of the challenging class is just one of many factors to weigh. The second focuses almost entirely on the nature of the classification, thus limiting any meaningful review.[165]

Alternatively, this Note proposes a three-step analysis that borrows features from both of these tests. The first step would be to determine whether the classified group possesses one or more suspect characteristic or "indicia of suspectness."[166] The second step would be to find whether the legislation exploits those characteristics to the detriment of the class. If the legislation did not exploit a suspect characteristic, further review would be denied.[167] If the legislation did exploit a suspect characteristic, the third step would be to subject the legislation to heightened scrutiny. This heightened scrutiny would consist of a single balancing test in which the Court would weigh the seriousness of the alleged injury (or the nature of the right affected), the nature of the allegedly exploited characteristic, and the importance of the governmental interest. In those cases where an injury results from prejudiced, thoughtless or stereotyped exploitation of a group's suspect characteristics,[168] the law should be struck down unless the governmental purpose is found to outweigh the injury.

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164. *See, e.g.*, Sherry, *supra* note 66 (arguing that the major focus should be on the disadvantaged class rather than on the classification); Hutchinson, *supra* note 57, at 193 (recent decisions have had "the combined effect of turning the interpretation of the Equal Protection Clause into an exercise of balancing competing interests whose weights are a function of prior case law only to a limited degree").

165. The failure of the first alternative is its inability to posit any objective standards for assessing which groups should be protected by the equal protection clause. While the second alternative offers such a standard, it denies the judiciary any meaningful review as to whether the legislature has properly considered the interests of protected groups. The equal protection clause presents us with perhaps the greatest of constitutional paradoxes—while judicial review of legislative enactments is certainly antimajoritarian, *see supra* note 141, the equal protection clause specifically places a check on the majoritarian exploitation of politically disfavored groups. *See infra* notes 173-86 and accompanying text. Any effective model for equal protection analysis must take both of these principles into account.

166. *See supra* notes 62-68 and accompanying text.

167. The result may be a corollary of the political question doctrine. *See* Baker v. Carr, 369 U.S. 186, 217 (1969) ("[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"). *Cf.* K. RIPPLE, *supra* note 141 (the judiciary does possess the tools for making legislative decisions).

168. 105 S. Ct. at 3272 (Marshall, J., concurring and dissenting). Proof of legislative intent to discriminate should not be required. A showing that the legislature failed to account for the interests of protected groups should be sufficient to warrant review. *See* Note, *Discriminatory Purpose, supra* note 53 (intent requirements in this area unreasonable).

A. Granting Review—Process or Substance?

Professor Lawrence Tribe has shown that many of the Constitution's most crucial commitments are substantive in character[169] and that taking a purely process-based approach to the entire gamut of judicial review is logically inconsistent.[170] However, he concedes that many parts of the Constitution address solely procedural matters.[171] In view of the different purposes served by separate sections of the Constitution, it is not necessary to take a strict, unitary approach to all constitutional review. To the contrary, it would not be inconsistent to apply different kinds of judicial review to different clauses of the Constitution.[172] Accepting that process-based and substantive review each may be appropriate for different constitutional issues, the threshold question is whether the equal protection clause was meant to create substantive rights or was meant to ensure the proper operation of the political process.

Although there is little consensus about the original intention behind the fourteenth amendment,[173] it is clear that Congress adopted the equal protection clause to ensure that states did not deny recently freed slaves the concrete enjoyment of substantive rights granted under the thirteeth,[174] fourteenth[175] and fifteenth[176] amendments and various federal statutes.[177] As such, the clause appears to be a procedural safeguard, primarily for blacks, and was originally interpreted that way.[178] Beyond this threshold consideration, it must be asked whether Congress intended to create a provision that would prohibit classification on the basis of irrelevant criteria (requiring a substantive form of review) or whether it was intended to prohibit majoritarian infringement of minority rights (requiring a process-based response).

No serious commentator would suggest today that race has relevancy as a classification for any but the most unusual purposes.[179] Yet to the framers

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169. Tribe, *supra* note 66, at 1065.

170. *Id.* at 1067.

171. *Id.*

172. *See* Sherry, *supra* note 66, at 103 ("[t]hose who seek to avoid the defects of the two extreme models [of pure colorblind review and substantive review] must construct a theory that places some workable constraints on judicial action and that is consistent with both history and precedent").

173. J. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 73 (1983).

174. U.S. CONST. amend. XIII, § 1 (abolition of slavery).

175. U.S. CONST. amend. XIV, § 1 (citizenship, privileges and immunities, and due process clauses).

176. U.S. CONST. amend. XV, § 1 (voting rights).

177. *See, e.g.*, The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (current version at 42 U.S.C. 1981 (1982)). It was to ensure the constitutionality of this and other acts that the fourteenth amendment was proposed. J. BAER, *supra* note 173, at 76.

178. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

179. Race has been held to be a relevant factor when legislatures or courts seek to remedy

of the fourteenth amendment, race was a highly relevant trait.[180] The consensus among the legislators who passed the fourteenth amendment was that blacks were inferior to whites, but that certain rights inured to the individual quite apart from capacity. Chief among these rights was equality in regards to the rights and benefits of citizenship.[181] Apparently, relevancy of classification was not the key to the framers' demand for equal protection.

If nothing else, a primary purpose of the fourteenth amendment was to ensure against majoritarian backlash, negating and limiting the rights of a

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the present effects of past discrimination. *See* Fullilove v. Klutznik, 448 U.S. 448 (1980) (race specific classifications made by Congress do not violate equal protection if Congress has passed such laws to remedy the present effects of past discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (race specific legislation will be allowed if related to remedy of past official discrimination, provided a determination of such discrimination has been made by a competent body); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (legislature may dilute the voting strength of Hasidic Jewish community in order to ensure that black voting strength is not diluted); Keyes v. School Dist., 413 U.S. 189 (1973) (courts may order race specific remedy to correct effects of past de jure discrimination).

180. J. BAER, *supra* note 173, at 83. *See, e.g.*, Congressional Globe, 39th Cong., 1st Sess. 177-78 (1866) (remarks of Rep. Boyer) (blacks should first be educated, and if they prove not to be intellectually and spiritually inferior to whites, given the right to vote). *See generally* THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS (A. Avins ed. 1967) [hereinafter cited as RECONSTRUCTION AMENDMENTS' DEBATES].

181. J. BAER, *supra* note 173. A pre-war debate between Jefferson Davis of Mississippi and Henry Wilson of Massachusetts is representative:

> WILSON: The natural equality of all men I believe in, as far as rights are concerned. So far as mental or physical equality is concerned, I believe the African race inferior to the white race.
>
> DAVIS: "Natural equality" would imply that God had created them equal, and had left them equal, down to the present time . . . .
>
> WILSON: I believe in the equality of rights of all mankind. I do not believe in the equality of the African race with the white race, mentally or physically, and I do not think morally . . . . [B]ut upon the question of equality of rights, I believe in the equality of all men of every race, blood and kindred.
>
> DAVIS: When the Senator says "equality of rights of all men," does he mean political and social rights—political and social equality? . . .
>
> WILSON: I believe that every human being has the right to his life and to his liberty and to act in this world so as to secure his own happiness. I believe, in a word, in the Declaration of Independence, but I do not, as I have said, believe in the mental or physical equality [of the African race].
>
> DAVIS: Then the Senator believes and he does not believe. He believes . . . that all men are equal; but he [believes] that there is a difference between the two races.
>
> WILSON: I believe that there are a great many men in the world of the white race inferior to the Senator from Misissippi [sic], and I suppose there are quite a number superior to him; but I believe that he and the inferior man and the superior have equal natural rights.

Congressional Globe, April 12, 1860, S. 1685-86; RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 181, at 27-28.

despised class.[182] Two hundred and fifty years of slavery[183] had left blacks for the most part poor, uneducated, despised and disenfranchised.[184] Moreover, the color of their skin made them easy targets for discrimination. Such traits left them open to exploitation by a more politically powerful majority. Because classifications based on national origin, alienage, gender and illegitimacy share many of the defects associated with classifications based on race, they too have been declared suspect.[185] Precedent also shows that the Court has consistently looked to the nature of the disadvantaged class, even when invalidating legislation that inhibits fundamental rights or that does not satisfy the minimum rationality test.[186] The decision whether to grant review to equal protection challenges is therefore properly a process-based determination. Under the proposed model, step one would grant review only on a finding that the plaintiff is a member of a group with suspect characteristics, and step two would require that the classification actually turn on, or exploit, one of those suspect characteristics.

The Court's current system of granting heightened scrutiny only when certain disfavored classifications are used is unsuitable. This approach results in either the judicial gymnastics of a standardless rational basis review, or the absence of meaningful review for classifications that do not "qualify" for heightened scrutiny.[187] Rather than reviewing legislation on the basis of classification, the Court should look to whether the plaintiff challenging the legislation is a member of a class which has suspect characteristics and whether the challenged legislation improperly exploits those characteristics.[188]

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182. *See supra* notes 173-81 and accompanying text. *See also* McLaughlin v. Florida, 379 U.S. 184 (1964) (central purpose of equal protection clause is to eliminate racial discrimination from official sources within the states). *Cf.* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60 (1955) (fourteenth amendment deals with all discrimination, not just racial discrimination).

183. The first slaves were brought to the colonies in 1619. D. BELL, RACE, RACISM AND AMERICAN LAW 1 (1st ed. 1973).

184. These traits and conditions exemplify the "indicia of suspectness" that have been identified by the Court, *see supra* notes 61-68 and accompanying text, as the primary focal point in determining whether a class is suspect and deserving of heightened scrutiny.

185. *See supra* note 50 and accompanying text.

186. *See supra* notes 79-85 and accompanying text (fundamental rights cases actually turn on presence of class with suspect characteristics) & 86-95 and accompanying text (minimum rationality decisions actually turn on the presence of a class with suspect characteristics).

187. *See supra* notes 123-34 and accompanying text.

188. One example is United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). In *Moreno*, Congress identified a politically disfavored group and wrote a statute that exploited a group characteristic—communal living among hippies—and deprived food stamps to that class. In New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), the transit authority refused to employ users of narcotic drugs, including those who used methadone to recover from heroin addiction. Such legislation should receive heightened scrutiny because it facially discriminates against a despised class. In *Beazer*, though, the transit authority's legitimate concern for the safety of its employees and passengers presented a suitable, non-biased reason for the classification. Under the test proposed in this Note, the case would receive heightened

Such review would require the judiciary to take a more liberal view of what constitutes suspect classifications. Courts would also need to study the characteristics of the challenging group in each case, and determine whether the challenged legislation exploits those characteristics, rather than merely examining the supposed relevance of the classification as a whole.[189] Without tying their hands in future cases, courts could then protect such groups as the illegal alien children of *Plyler v. Doe*,[190] the hippies of *United States Department of Agriculture v. Moreno*,[191] the poor of *Griffin v. Illinois*,[192] the homosexuals of *National Gay Task Force v. Board of Education*,[193] the drug users of *New York City Transit Authority v. Beazer*,[194] and the mentally handicapped of *Cleburne*. Contrary to Justice White's concerns, new classifications of suspect groups would not create graven presumptions of unconstitutionality in all cases. Statutes that disadvantage a group but do not unfairly exploit group infirmities would still be upheld.

B. Method of Review—Substantive Heightened Scrutiny

To say that the decision to *grant* review should be process-based does not necessarily require a process-based *method* of review. The Court's current approach to equal protection has led to a focus on classifications and presumptions of unconstitutionality which make the Court unwilling to extend quasi-suspect status beyond gender and illegitimacy.[195] Such near-sighted reliance on classifications has resulted in both the validation of legislation which has a de facto disparate impact on suspect classes and the invalidation of state action designed to benefit such groups.[196]

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scrutiny, but the challenge would fail if the state could prove that methadone users caused safety risks.

189. The "all or nothing" approach that the Court applies in the traditional three-tiered analysis would deny heightened scrutiny to groups in which individual members have distinguishing characteristics that legislatures may properly take into account, or to which many legislative classifications are likely to be valid. *Cleburne*, 105 S. Ct. at 3255, 3258. *But see id.* at 3269-71 (Marshall, J., concurring and dissenting) (characteristics must be relevant under particular circumstances). Such an approach leaves no avenue for the invalidation of non-suspect classifications, such as that found in *Cleburne*, other than the standardless rational basis test. Alternatively, by reviewing on the basis of characteristics and by requiring the plaintiff to show that such characteristics have been improperly exploited, the Court would be free to balance the seriousness of the injury against the governmental interests.

190. 457 U.S. 202 (1982) (statute bars resident alien children from attending free public school).

191. 413 U.S. 528 (1973). *See supra* note 188.

192. 351 U.S. 12 (1956) (challenge to fees for criminal trial transcript necessary for statutory appeal).

193. 729 F.2d 1270 (10th Cir. 1984) (statute bars from employment as teacher anyone who advocates homosexual lifestyle), *aff'd*, 105 S. Ct. 1858 (1985).

194. 440 U.S. 568 (1979). *See supra* note 188.

195. *See supra* notes 117-20 and accompanying text.

196. Sherry, *supra* note 66, at 114-19. For example, in Washington v. Davis, 426 U.S. 229

A primary purpose of the equal protection clause was to ensure that the political processes did not work to the detriment of certain classes.[197] Nevertheless, the guarantee of equality is itself substantive.[198] The meaning of the word is largely personal in nature and not easily written into exact statutory language. It is precisely the role of the judiciary to give concrete substantive meaning to enduring principles that evade rigid codification.[199] For this reason, a balancing test such as that proposed by Justice Marshall is the most appropriate method of review for determining whether a suspect statutory scheme is the result of "prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment."[200] At this third step in the proposed model, a court *should* consider the relevancy of the classification to determine whether the classification is suitably tailored to an important state interest. A balancing test implies the application of substantive values. The judiciary must determine what harms are serious and what interests are compelling or important. Such an approach may overlap the role of the legislature, but a process-based approach to granting heightened review limits such review to classifications that impinge only on the politically powerless.[201] This overlap of the judicial and legislative roles is preferable to allowing the rights of the politically powerless to fall through the cracks of the governmental system.

(1976), the Court held that a test given to police officer candidates did not violate equal protection, even though it had a discriminatory impact on black applicants. The Court reasoned that the test was neither facially nor intentionally discriminatory. This argument overlooks the fact that by leaving a test in operation that is known to have racially discriminatory effects, a legislature is negligently or knowingly, if not intentionally, discriminating. *See* Note, *Discriminatory Purpose, supra* note 53. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), the Court struck down a voluntary affirmative action program, even though the program did not degrade minorities. The individual plaintiff, a white applicant to medical school, had no vested right to attend any particular school and had the necessary qualifications to attend any number of other medical schools. Justice Powell, delivering the Court's opinion, used a "color-blind" approach. He reasoned that if facially racial classifications were wrong at all, they were wrong no matter which race was disadvantaged. It is more likely that the intent of the equal protection clause was to protect the politically weak rather than to declare race a constitutional irrelevancy. *See supra* notes 179-86 and accompanying text.

197. *See supra* notes 173-86 and accompanying text.

198. L. TRIBE, *supra* note 9, at 991 ("a norm of equality [cannot] be given real content without imposing significant constraints upon the substantive choices that political majorities . . . might feel strongly inclined to make").

199. *Id. See also* Greenwalt, *How Empty is the Idea of Equality?* 83 COLUM. L. REV. 1167 (1983) (discussing equality as an aspect of moral evaluation); Westen, *The Empty Idea of Equality,* 95 HARV. L. REV. 537 (1982) (proposition that "people who are alike should be treated alike" is tautological and creates confusion).

200. *Cleburne,* 105 S. Ct. at 3272 (Marshall, J., concurring and dissenting).

201. To do otherwise would make the Court the watchdog of minority political aspirations. It is not minorities per se that require judicial protection, but rather despised minorities. The Court should not protect the political agendas of these minorities. It should protect their right to be free from burdens that the politically powerful do not share and to share the benefits that the politically powerful vote for themselves.

C. *Review of "Non-Suspect" Legislation*

Under a process-based method of granting review, legislation that was not shown to exploit the suspect characteristics of a challenging class would be upheld without further inquiry.[202] However, this should not leave legislatures free to enact arbitrary statutes. Totally arbitrary laws—laws that have no relationship to any legitimate state interest—violate the due process clause and could be invalidated on that ground.[203] But other non-suspect classifications that exhibit some relationship to a legitimate state purpose should be left to the normal political processes.[204] However, it should be re-emphasized that the proposed model would work only if the judiciary is willing to grant review to legislative classifications on the basis of potentially improper exploitation of suspect characteristics.[205]

D. *Application of the Proposed Review*

Under the proposed model for equal protection review, the *Cleburne* statute would be reviewed under heightened scrutiny and invalidated. The mentally retarded are politically ineffective as a class, have a history of unequal treatment and have been despised as a group.[206] As Justice White pointed out, there was a strong possibility that the *Cleburne* ordinance "rest[ed] on an irrational prejudice" against the mentally retarded.[207] Therefore, with a strong possibility that the ordinance exploited the suspect characteristics of that group, substantive review of the ordinance and its effect is appropriate. Because the Court held that governmental objectives served by the legislation did not outweigh the harm to the disadvantaged class, the ordinance would be invalidated under this Note's model.

In another case from last term, *Metropolitan Life Insurance Co. v. Ward*,[208] a narrow majority of the court invalidated an Alabama statute that taxed foreign insurance companies at a higher rate than domestic ones. Justice Powell, speaking for the Court, reasoned that the asserted state purpose behind the statute, promoting domestic industry, was not validly served by discrimination against foreign corporations.[209] Under this Note's model, the Court would first have to determine whether the disadvantaged group, foreign insurance companies, possessed any suspect characteristics.

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202. Under a true minimum rationality test, a classification will only be invalidated for violating due process. *See supra* note 92.

203. *See supra* note 92.

204. If a law is not totally arbitrary or violative of some other constitutional provision, it is expressly the province of the legislature to enact it through the normal "give-and-take" political processes.

205. *See supra* notes 187-96 and accompanying text.

206. *See, e.g., Cleburne*, 105 S. Ct. at 3266-67 (Marshall, J., dissenting).

207. *Id.* at 3260.

208. Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676, 1684 (1985).

209. *Id.*

Although the dormant commerce clause does not apply to the insurance industry by congressional decree,[210] and the privileges and immunities clause does not apply to corporations,[211] there is nevertheless a strong constitutional bias against the unequal treatment of nonresidents.[212] This constitutional bias is supported by the historical prejudice against foreign corporations. Although corporations can lobby to protect their interests in any state, foreign corporations are not the political equals of a united domestic industry. Because foreign corporations as a class share some suspect characteristics, the next step would be to determine whether Alabama exploited those characteristics by imposing a tax. It is doubtful that a legislature could exploit the political ineffectiveness of an industry as politically powerful as insurance companies.[213] Also, nothing in the record showed that the tax was inspired by a prejudiced desire to benefit domestic companies at the expense of outsiders. To the contrary, there was some evidence that the tax advantage enabled domestic insurers to provide needed insurance services to state residents that the foreign companies did not offer.[214] It is fair to conclude that the Alabama statute did not exploit the suspect characteristics of foreign insurance companies. Under this Note's model, further review would be denied.

V. CONCLUSION

The majority decision in *Cleburne* highlights the deficiencies present in the three-tiered system of analyzing equal protection challenges.[215] While the Court has attempted to compensate for these deficiencies under the guise of giving "bite" to minimum rationality, such cases fail to inform the lower courts or the legislatures of the principles which guide the Court. Taken with other Burger Court decisions, *Cleburne* demonstrates a pattern wherein the Court uses heightened scrutiny only to review classifications that affect classes with suspect characteristics, but reviews such classifications substantively.[216] However, the failure of the Court to articulate such a standard is particularly troubling. As Justice Marshall points out, such failure "provides no principled foundation for determining when more searching inquiry is to

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210. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1982), reserves regulation of the insurance industry to the states.

211. Hemphill v. Orloff, 277 U.S. 537 (1928).

212. Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. at 1682 ("[t]he validity of the view that a State may not constitutionally favor its own residents . . . is confirmed by a long line of this Court's cases so holding"). That bias is reflected in the privileges and immunites clause, the full faith and credit clause, and the supremacy clause, as well as the commerce and equal protection clauses.

213. The plaintiffs were a coalition of thirty-nine out-of-state insurance companies. *Id.* at 1679 n.4.

214. *Id.* at 1686-87 (O'Connor, J., dissenting).

215. *See supra* notes 122-34 and accompanying text.

216. *See supra* notes 96-97 and accompanying text.

be invoked. Lower courts are thus left in the dark . . . and this Court remains unaccountable for its decisions."[217]

When the Burger Court was in its infancy, Professor Gunther sensed "a Court divided, uncertain and adrift."[218] Fourteen years later, with the makeup of the Court relatively unchanged,[219] equal protection analysis remains confused. The pattern of decisions evidences a record of granting heightened scrutiny on the basis of the relative political impotence of the challenging class. However, with an unarticulated standard of review, a substantially new Court would not be bound to practice the Burger Court's process-based granting of review.[220]

Justice White's quote at the opening of this Note appropriately describes the current state of equal protection. The broad patterns articulated by the Warren Court and the early Burger Court have been narrowed as new contexts have arisen. The Court has reached the point, however, where some of the previous distinctions relied upon are no longer tenable and need to be replaced. A rearticulation of equal protection analysis is needed to encompass the principles that the Court already practices, but has failed to preach. Such a rearticulation, based merely on the Court's past decisions, could provide a useful guide for lower courts and legislatures and an enduring legacy for the Burger Court.

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217. *Cleburne*, 105 S. Ct. at 3265 (Marshall, J., concurring and dissenting).

218. Gunther, *supra* note 8, at 1.

219. The possibility of a "substantially new Court" in the near future is a subject of popular speculation. *See* Serrill, *An Illness Ties up the Justices*, TIME, Apr. 8, 1985, at 59 (discussing the age and health of the current members of the Court).

220. *Cf. Cleburne*, 105 S. Ct. at 3265 (Marshall, J., concurring and dissenting) ("[t]he suggestion that the traditional rational basis test allows . . . searching inquiry creates precedent . . . to subject economic and commercial classifications to similar and searching 'ordinary' rational basis review . . . .").