The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality

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"No State shall . . . deny to any person . . . the equal protection of the laws."[1]

"Once loosed, the idea of Equality is not easily cabined."[2]

"Judges cannot make us equal."[3]

Introduction

During the past decade, the Supreme Court abandoned the "rigid two-tier"[4] analysis of legislative and administrative classifications that dominated the equal protection decisions of the Warren era.[5] The Court supplemented the virtual prohibition against

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1. U.S. CONST. amend. XIV, § 1.

2. Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

3. Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1, 28 (1980).

4. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

5. Under the "two-tier" regime, statutory classifications based on race or national origin, *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967), or those inhibiting the exercise of a "fundamental right," *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969), were constitutionally permissible only if necessary to achieve a compelling government interest. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969) [hereinafter cited as *Developments*]. Any other classification was permissible unless it "rest[ed] on grounds wholly irrelevant to the achievement of the State's objective." McGowan v. Mary-

legislation that discriminates on the basis of race or national origin,[6] or that infringes upon "fundamental interests,"[7] with a variety of intermediate approaches used to strike down some, but not all, classifications that discriminated on the basis of gender,[8] alienage,[9] and illegitimate birth,[10] or that hamper certain "semi-fundamental" interests.[11]

The Court's explicit extension of protection to groups[12] other than racial and ethnic minorities is significant because it signals a clear departure from the once widely held view that the Four-

land, 366 U.S. 420, 425-26 (1961). The Warren Court's equal protection decisions are discussed in text accompanying notes 46-63 *infra.*

6. The only instances in which the Court has upheld government classifications based on national origin are Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of Americans of Japanese ancestry immediately after Pearl Harbor), and Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding curfew for persons of Japanese heritage). In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court held that a provision requiring that, in the absence of an administrative waiver, at least ten percent of the federal funds granted for state or local public works projects must be used by the recipient to obtain services or goods furnished by a "minority business enterprise" owned, at least in part, by citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts" did not violate the Fifth Amendment's guarantee of equal protection. *See* notes 101-19 and accompanying text *infra. See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (opinion of Powell, J., and opinion of Brennan, White, Marshall & Blackmun, JJ., concurring and dissenting)(state university medical school may consider the race of its applicants in attempting to obtain academically diverse student body).

7. The Court has upheld minimal interferences with fundamental interests. *See, e.g.,* Califano v. Jobst, 434 U.S. 47 (1977) (upholding provision of Social Security Act terminating certain disability benefits if the recipient marries person not entitled to disability benefits under Act, despite adverse impact on the right to marry); Marston v. Lewis, 410 U.S. 679 (1973) (per curiam) (upholding fifty-day voter residency requirement despite its impact on right of interstate travel).

8. *See, e.g.,* Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190 (1976). *See also* notes 122-40 and accompanying text *infra.*

9. Although the Supreme Court has announced that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny," Graham v. Richardson, 403 U.S. 365, 371-72 (1971)(footnote omitted), recent cases indicate the emergence of a far less "suspicious" analysis of some alienage-based classifications. *See, e.g.,* United States v. Clair, 100 S. Ct. 895 (1980); Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978). The Court's alienage decisions are discussed in text accompanying notes 71-77 *infra.*

10. *See, e.g.,* Trimble v. Gordon, 430 U.S. 762 (1977).

11. *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972) (legislation imposing greater restrictions on the ability of unmarried persons to purchase contraceptives violated equal protection clause).

12. As used herein, "groups" refers simply to all of those individuals possessing a particular identifying characteristic. A more detailed discussion of the significance of social and political groups is included in text accompanying notes 298-307 *infra.*

teenth Amendment condemns only racial discrimination,[13] the evil it was primarily,[14] but not exclusively,[15] intended to eradicate.[16] In determining the scope of protection afforded by the clause, however, the Burger Court has failed to articulate a meaningful rationale explaining why some characteristics and activities are entitled to heightened judicial solicitude while classifications disadvantaging other, arguably similar, attributes and endeavors are denied more than minimal protection. As several commentators have noted,[17] the Court's failure to develop a consistent explanation for its treatment of cases arising under the equal protection clause reflects an underlying uncertainty about the nature of the limitations the provision places on the powers of the states and the federal government.[18] This has resulted in what one observer has described as "an accumulation of ad hoc doctrines flexible enough to accommodate a cautious Court's preferences for mildly progressive results."[19]

This essay analyzes the Supreme Court's various "intermediate" approaches to equal protection cases. Five possible underlying assumptions concerning the purpose and scope of the equal protection clause are developed, evaluated, and compared with the Bur-

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13. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 777 (Rehnquist, J., dissenting).

14. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 71 (1873). *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59-63 (1955).

15. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72 (1873). Unlike the Fifteenth Amendment, the Fourteenth Amendment contains no language limiting the scope of its protection to discrimination on the basis of "race, color, or previous condition of servitude." *See* U.S. CONST. amend. XV.

16. Recent extension of heightened scrutiny under the Fourteenth Amendment to gender-based classifications prompted one sympathetic commentator to observe that "[b]oldly dynamic interpretation, departing radically from the original understanding, is required to tie to the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities." Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161, 161.

17. *See, e.g.*, A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976). "The Justices have been notably unsuccessful in formulating viable general principles explaining their votes and imparting a measure of consistency to their decisions." *Id.* at 73.

18. The Fourteenth Amendment's prohibition against the denial of equal protection of the laws by a state has been held to be a part of the Fifth Amendment's guarantee of due process and is therefore binding on the federal government. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). *See also* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).

19. Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 946 (1975).

ger Court's equal protection decisions. Part I contains an overview of the analytic framework developed and used by the Supreme Court in equal protection cases decided before 1970, and a discussion of the Burger Court's equal protection decisions. In Part II, a brief note on the historical context in which an attempt to give meaning to the equal protection clause is followed by a discussion of five "mediating principles"[20] that have been advanced as possible rationales for determining which government actions deny "equal protection of the laws." Though each of these five models refers to one or more values considered necessary for a just society, all are found to be "imperfect" in that they are dependent on an externally supplied vision of a proper allocation of rights and responsibilities among the branches of government and between the government and the individual.[21] Part III consists of a critical analysis of the scope of protection afforded by the Burger Court to various groups and interests under the equal protection clause. This is followed by an evaluation of the analytic devices used by the Supreme Court in the past decade. The Court's recent equal protection decisions are compared with the models developed in Part II and are found to be explicable only in terms of a judicially concealed substantive vision, described here as "just and unjust disadvantaging."

I. A Brief Chronicle of the Supreme Court's Equal Protection Jurisprudence

A. Background

For nearly eighty years after its ratification in 1868, the equal protection clause was interpreted as placing relatively few limits on the power of state governments to favor or disfavor particular groups within their borders.[22] Throughout that period, the clause was held to forbid only the overt or covert[23] use of racial[24] or eth-

20. *See* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

21. *See* Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

22. *See, e.g.*, The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (upholding, as beyond the scope of the Fourteenth Amendment, Louisiana's legislatively created slaughterhouse monopoly); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873) (upholding a state ban on the practice of law by women).

23. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

24. Strauder v. West Virginia, 100 U.S. 303 (1880).

nic[25] classifications to disadvantage[26] racial or ethnic minorities.

During the 1940s, the elements of the equal protection analysis currently favored by the Supreme Court began to take shape.[27] The first decision to hold that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"[28] and "that courts must subject them to the most rigid scrutiny,"[29] is, ironically, one of only two decisions that upheld such a restriction.[30] In *Korematsu v. United States*,[31] a sharply divided[32] Supreme Court held that a military order requiring that all persons of Japanese origin be excluded from designated areas of the west coast was justified by "the military urgency of the situation."[33]

Despite its inauspicious beginnings, the "suspect classification"[34] doctrine served as the engine for the destruction of most[35] official race discrimination in the United States. The standard was rigorous; in order to survive strict scrutiny, a suspect classification had to be found "necessary to the accomplishment"[36] of an "overriding statutory purpose."[37] With the exception of the infamous wartime decisions on the treatment of Americans of Japanese descent, no government action explicitly based on a racial or ethnic classification withstood constitutional challenge before 1978.

Nearly coincident with the birth of the suspect classification doctrine was the appearance of the second element of the judicial

25. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

26. In the absence of a showing of unequal treatment of a racial minority, the use of overt racial classifications was permissible. *See* Plessy v. Ferguson, 163 U.S. 537, 540 (1896) (upholding "equal but separate" accommodations for whites and blacks in railroad passenger cars).

27. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

28. Korematsu v. United States, 323 U.S. 214, 216 (1944).

29. *Id.*

30. *See also* Hirabayashi v. United States, 320 U.S. 81 (1943). *Cf.* Fullilove v. Klutznick, 448 U.S. 448 (1980) (discussed at text accompanying notes 101-19 *infra*).

31. 323 U.S. 214 (1944).

32. Justices Roberts, Murphy and Jackson dissented in separate opinions. *Id.* at 225, 233, 242.

33. *Id.* at 223.

34. *See* Tussman & tenBroek, *supra* note 27, at 356; *Developments*, *supra* note 5, at 1087-1119.

35. *But see* Palmer v. Thompson, 403 U.S. 217 (1971) (upholding the closing of municipal swimming pools prompted by a federal court's order to desegregate them).

36. Loving v. Virginia, 388 U.S. 1, 11 (1967).

37. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

approach to equal protection cases: strict scrutiny of classifications that infringe upon "fundamental interests." In *Skinner v. Oklahoma*,[38] the Court considered an Oklahoma statute that provided for the sterilization of "habitual criminals," that is, those persons who had been convicted three times of "crimes 'amounting to felonies involving moral turpitude.' "[39] The statute excluded persons convicted of embezzling funds, but not persons convicted of grand larceny.[40] After reciting the litany of cases requiring the Court to give "large deference" to classifications found in state statutes,[41] Justice Douglas, writing for the Court, declared that:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[42]

Finding that Oklahoma lacked "the slightest basis"[43] for its differing treatment of embezzlers and those who commit grand larceny, the Court struck down the statute as a violation of the equal protection clause.

Skinner marked the beginning of the development of the "fundamental interest" doctrine,[44] which requires a showing that a classification that penalizes the exercise of a "fundamental right" is "necessary to promote a *compelling* governmental interest."[45] During the Warren Court era, the list of fundamental interests swelled to include the rights of interstate travel,[46] "equal voting opportunity,"[47] and "equal litigation opportunity."[48]

38. 316 U.S. 535 (1942).
39. *Id.* at 536-37.
40. *Id.* at 537-39.
41. *Id.* at 540-41. *See* notes 50-63 and accompanying text *infra*.
42. 316 U.S. at 541.
43. *Id.* at 542.
44. *See Developments*, *supra* note 5, at 1131-32. Tussman and tenBroek referred to this development as "substantive equal protection." Tussman & tenBroek, *supra* note 27, at 361.
45. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original).
46. *Id.*
47. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-10 (1978). *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (state poll tax violated the equal protection clause).
48. L. TRIBE, *supra* note 47, § 16-11. *See, e.g.*, Douglas v. California, 372 U.S. 353

The "suspect classification" and "fundamental interest" doctrines defined the two areas in which the Warren Court interpreted the equal protection clause to require extraordinary justification for legislative classifications. The "suspect classification" doctrine effectively precluded overt distinctions on the basis of particular characteristics. The "fundamental interest" doctrine conditioned government regulation of specified zones of human interaction upon its equal treatment of all those affected, regardless of their particular characteristics.[49]

The Supreme Court has used a far less critical approach in evaluating legislative classifications outside these two areas. The Court's deference to the judgment of the political branches has taken two forms. First, legislation that resulted in the unequal treatment of individuals but that did not create a classification simply was not perceived as falling within the scope of the equal protection clause.[50] Second, any non-suspect classification passed constitutional muster so long as it rested "on grounds [not] wholly irrelevant to the achievement of the State's objective."[51] This standard, often called the "reasonable classification"[52] requirement, or simply "minimal scrutiny,"[53] demanded only that the Justices recite some plausible set of facts that would allow the Court to justify the statute in question.[54]

The minimal scrutiny standard reflected the Supreme Court's

(1963) (requiring that indigent defendants be provided with counsel for appeals as of right).

49. *See* L. TRIBE, *supra* note 47, at 992-93.

50. *See, e.g.,* Puget Sound Co. v. Seattle, 291 U.S. 619, 624-26 (1934). For a more recent articulation of this view, see San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). "The function of the Equal Protection Clause . . . is simply to measure the validity of *classifications* created by state laws." *Id.* at 59 (Stewart, J., concurring) (emphasis in original). *See* Clune, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment,* 1975 SUP. CT. REV. 289, 290-293. This limited conception of equal protection prompted Professor Michelman to lament that "[u]nless [a] grievance can be rendered into the verbal and conceptual forms of inequality and discrimination, it will remain suspended—accusing, oppressive, and unresolved—in some moral heaven." Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 57-58 (1969).

51. McGowan v. Maryland, 366 U.S. 420, 425 (1961). Before the Warren era, this requirement sometimes was given more bite. *Compare* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) *with* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

52. *Developments, supra* note 5, at 1076-87; Tussman & tenBroek, *supra* note 27, at 344-53.

53. Gunther, *supra* note 4, at 8.

54. *See Forum: Equal Protection and the Burger Court,* 2 HASTINGS CONST. L.Q. 645, 647 (1975).

reluctance[55] to interfere with legislative decisions. The Court was quick to conjure factual bases which rendered legislative classifications "rational" in deference to the fact-finding competence of state legislatures.[56] It tolerated "under-inclusiveness,"[57] stating that a state legislature may attempt to achieve its objectives "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[58] The Court's failure to proscribe any legislative purpose other than "invidious discrimination"[59] also demonstrated its avowed hesitation[60] to substitute judicial value judgments for those of the elected branches.[61]

Thus, at the close of the Warren Court era, the selection of one of the two scrutinies was the beginning and end of the Court's analysis of the constitutionality of a statute under the equal protection clause. Professor Gunther noted that the Warren Court applied either "scrutiny that was 'strict' in theory and fatal in fact"[62] or "minimal scrutiny in theory and virtually none in fact."[63]

B. The Burger Court's Decisions

The appointment of Warren Burger as Chief Justice came at a time when a variety of factors pressured the Supreme Court to change its approach to equal protection cases. First, the Warren Court's "fundamental interest" doctrine had been harshly criti-

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55. Throughout the Warren era, only one statute was struck down by the Supreme Court when "minimal scrutiny" was invoked. Morey v. Doud, 354 U.S. 457 (1957), *overruled*, City of New Orleans v. Dukes, 427 U.S. 297 (1976). Although the Court purported to apply the minimum rationality standard in Rinaldi v. Yeager, 384 U.S. 305, 308-11 (1966) (striking down New Jersey statute requiring only unsuccessful criminal appellants who received prison sentences to repay the costs of transcripts used in pursuing their appeals) the actual method of analysis employed was far more rigorous than the "traditional test of rationality." *Id.* at 311 (Harlan, J., dissenting).

56. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

57. An underinclusive statute is one in which "[a]ll who are included in the class [created by the law] are tainted with the mischief [that the legislature sought to affect], but there are others also tainted whom the classification does not include." Tussman & tenBroek, *supra* note 27, at 348. An overinclusive law "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims." *Id.* at 351.

58. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

59. *See* text accompanying notes 27-49 *supra.*

60. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937).

61. The analytic weaknesses of the reasonable classification doctrine are discussed in notes 292-307 and accompanying text *infra.*

62. Gunther, *supra* note 4, at 8.

63. *Id.*

cized.[64] Second, popular awareness of discrimination against groups other than those defined by race had increased,[65] causing increased demands for judicial protection. Third, the greater availability of legal counsel for the disadvantaged[66] coincided with, and perhaps triggered, the development of new rationales for judicial intervention on their behalf.[67]

The explosion of equal protection decisions which had commenced during the tenure of Earl Warren continued unabated during the first decade of the Burger Court.[68] But the expansion of the suspect classification and fundamental interest doctrines, begun in the activist days of the Warren Court, slowed nearly to a halt.[69] Instead, the uneven development of judicial protection for a variety of groups and interests emerged through a number of "intermediate" approaches to equal protection cases.[70]

1. *Suspect Classifications*

The list of classifications given strict judicial scrutiny did seem to gain one addition at the beginning of the decade. Alienage, a characteristic that had provoked heightened judicial scrutiny even before the Warren Court,[71] was formally given suspect classification status in *Graham v. Richardson*.[72] In that case, the Court struck down two state laws denying welfare benefits to all but a few resident aliens.[73] Later cases, however, have made it clear that

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64. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 86 (1970).

65. *See, e.g.*, N. GLAZER & D. MOYNIHAN, BEYOND THE MELTING POT (2d ed. 1970); G. GREER, THE FEMALE EUNUCH (1971).

66. Many of the major equal protection suits of the past decade have been brought by publicly financed legal counsel. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 620-21 (1969).

67. Gunther, *supra* note 4, at 9 n.41.

68. *See* Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 2-4 (1977).

69. *See* J. ELY, DEMOCRACY AND DISTRUST 148-49 (1980).

70. On the changing environment confronting the Burger Court, see Mishkin, *Equality*, 43 LAW & CONTEMP. PROB. 51, 63-64 (1980).

71. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948) (striking down a state law forbidding the ownership of agricultural land by aliens ineligible for citizenship); Truax v. Raich, 239 U.S. 33 (1915) (striking down a state law barring employers from employing more than twenty percent aliens).

72. 403 U.S. 365 (1971).

73. In one of the two companion cases, the statute did allow aliens who had resided in the United States for more than fifteen years to collect benefits. *Id.*

alienage enjoys only quasi-suspect status;[74] congressional classifications based on alienage[75] and state-enacted classifications disqualifying aliens from activities involving a broadly defined "right to govern"[76] satisfy the clause's imperative as long as they pass a relaxed "rational relationship" test.[77]

Two other developments affected the original "suspect classification"—race. First, in two landmark cases,[78] the Supreme Court held that it would not apply strict scrutiny to government actions having a disparate impact on members of different races unless the actions were based on an overt or covert racial classification, or unless the government decisionmaker actually intended to disadvantage a racial group.[79] In light of recent decisions revealing the difficulty of satisfying the intent requirement[80] and apparently extending it to cases involving fundamental rights,[81] proof of discriminatory intent appears to pose an often "insurmountable"[82] obstacle to establishing a violation of equal protection.

Second, the Supreme Court has spoken with many voices as to

74. Justice Marshall now cites the alienage cases as examples of "an 'intermediate' level of scrutiny." Harris v. McRae, 448 U.S. 297, 342 n.3 (1980) (Marshall, J., dissenting).

75. *See* Mathews v. Diaz, 426 U.S. 67, 81-82 (1976).

76. Ambach v. Norwick, 441 U.S. 68 (1979) (upholding state law barring the certification of foreign-born persons as public school teachers unless they are, or have manifested an intention to become, American citizens); Foley v. Connelie, 435 U.S. 291, 297 (1978) (upholding state law barring aliens from the state police because of police "authority to exercise an almost infinite variety of discretionary powers"). *See* Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516 (1979).

77. Foley v. Connelie, 435 U.S. 291, 296 (1978).

78. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

79. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977).

80. *See* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (upholding state's absolute hiring preference for veterans despite its disparate impact on women). " 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

81. *See* City of Mobile v. Bolden, 446 U.S. 55 (1980) (plurality opinion) (upholding Mobile's at-large system of electing members of its governing commission, despite its adverse impact on black voters, in the absence of a showing that adoption of the seventy-year-old system was motivated by a discriminatory purpose).

82. L. TRIBE, *supra* note 47, at 1031. *See also* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 49-50 (1977). The significance of the intent requirement is discussed in text accompanying notes 230-36 *infra*.

whether or not so-called "benign" racial classifications—those which primarily disadvantage whites—should be viewed with the same suspicion as are classifications that harm racial minorities.[83] In *Regents of the University of California v. Bakke*,[84] the Court was called upon to determine the constitutionality of the admissions program used by the medical school at the University of California at Davis, which reserved approximately sixteen of the one hundred places in each class for disadvantaged " 'Blacks,' 'Chicanos,' 'Asians' and 'American Indians.' "[85] Citing the distaste with which all distinctions based on race have traditionally been regarded[86] as well as the difficulty of evaluating the competing claims of black Americans and other ethnic groups for preferential treatment,[87] Justice Powell[88] applied the formulation normally described as "strict scrutiny" to the admissions program.[89] After rejecting a variety of justifications for the University's scheme,[90] Justice Powell strayed from the course traditionally followed to invalidate suspect classifications[91] and found that "the attainment of a diverse student body" was a sufficiently compelling goal to justify a university's consideration of an applicant's race[92] though not sufficient to justify the particular quota-based admissions system used by the defendant.[93]

Justices Brennan, White, Marshall and Blackmun followed an

83. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

84. 438 U.S. 265 (1978). In this case, a rejected white applicant argued that the University of California at Davis Medical School admissions program violated the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970). Chief Justice Burger and Justices Stewart, Rehnquist and Stevens concluded that the program violated Title VI and did not reach the equal protection issue. *See id.* at 408, 412 (Stevens, J., concurring in the judgment in part and dissenting in part).

85. *Id.* at 274.

86. *Id.* at 294.

87. *Id.* at 295-300.

88. Although Justice Powell announced the judgment of the Court, his analysis of the equal protection question was not joined by any other Justice.

89. *Id.* at 306-15.

90. *Id.* at 307-11.

91. *See* text accompanying notes 28-37 *supra*.

92. 438 U.S. at 311.

93. Justice Powell concluded that the University had unlawfully discriminated against Bakke and that the medical school must admit him. Although the race of an individual applicant could be considered by the admissions program in its attempt to create a diverse student body, race could not be the determinative factor in excluding any person from consideration for any place in the class. 438 U.S. at 319-20.

arguably[94] different analytic approach to a clearly different conclusion. Finding the classifications disadvantaging the white majority lacked the "traditional indicia of suspectness"[95] that justifies the application of strict scrutiny, but fearful that superficially "benign" classifications could be used to stigmatize or stereotype the minorities they seek to aid,[96] the "Brennan Four" concluded that "racial classifications designed to further remedial purposes . . . must serve important governmental objectives and must be substantially related to achievement of those objectives."[97] The four Justices measured the admissions scheme against the University's "articulated purpose of remedying the effects of past societal discrimination"[98] and, after determining that the admissions system did not operate to stigmatize the minority students the University intended to benefit,[99] pronounced it entirely constitutional.[100]

In a case dealing with related issues, *Fullilove v. Klutznick*,[101] the Court upheld the constitutionality of a provision of the Public Works Employment Act of 1977[102] that required states or localities to use at least ten percent of federal grants earmarked for the construction of public works projects to buy services and supplies from "minority business enterprises" owned, at least in part, by citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." In an opinion joined by Justice White and Justice Powell,[103] Chief Justice Burger declared that remedying "the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportu-

94. *But see* Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 22 (1979). "Can anyone seriously argue that Justice Powell or the Justices of the Brennan group would have voted differently if each had been required to decide within the framework of the other's standard of review?" *Id.*

95. 438 U.S. at 357 (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). The Supreme Court's indicia of suspectness are discussed in text accompanying notes 248-52 *infra*.

96. 438 U.S. at 360-62.

97. *Id.* at 359, *quoting* Califano v. Webster, 430 U.S. 313, 317 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)). This formulation, the standard most often referred to as "intermediate scrutiny," is discussed in notes 404-08 & 426-33 and accompanying text *infra*.

98. 438 U.S. at 362. The technique of examining only a state's articulated purpose(s) is discussed in text accompanying notes 417-22 *infra*.

99. *Id.* at 373-76.

100. *Id.* at 379.

101. 448 U.S. 448 (1980).

102. 42 U.S.C. §§ 6701, 6705-08, 6710 (1976 ed., Supp II 1979).

103. Justice Powell also wrote a concurring opinion. 448 U.S. at 495.

nities" was an objective within Congress' broad powers under the spending and commerce clauses as well as under section five of the Fourteenth Amendment.[104] The Chief Justice then found that the ten percent set-aside was a permissible means of achieving that objective, despite the possibility of its underinclusiveness,[105] because Congress was to be given "necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives."[106]

Perhaps because of the criticism leveled at the various standards of review used in *Bakke*,[107] Chief Justice Burger's opinion concluded with an attempt to avoid the choice of a "scrutiny":

> Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke* . . . . However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several *Bakke* opinions.[108]

Citing the need "to articulate judicial standards of review in conventional terms,"[109] Justice Powell concurred. He concluded that the set-aside provision satisfied the "strict" standards set forth in his opinion in *Bakke* because Congress had made adequate findings of discrimination[110] and because the set-aside remedy was "a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors."[111]

In an opinion joined by Justices Brennan and Blackmun, Justice Marshall concurred in the judgment. Applying the same "in-

104. *Id.* at 473.

105. Because the plaintiffs had mounted only a facial challenge to the provision, the Chief Justice discounted the possibility that the statute was overinclusive, citing a provision allowing the Secretary to waive the ten percent requirement and to exclude minority businesses that attempt to exploit the program "by charging an unreasonable price . . . not attributable to the present effects of past discrimination." *Id.* 488.

106. *Id.* at 490.

107. *See* note 94 *supra.*

108. 448 U.S. at 491 (citations omitted).

109. *Id.* at 495 (Powell, J., concurring).

110. *Id.* at 515.

111. *Id.*

termediate" approach the "Brennan Four" had applied in *Bakke*, the concurring Justices examined "Congress' articulated purpose for enacting the set-aside provision [which] was to remedy the present effects of past racial discrimination."[112] They found that the set-aside provision did not stigmatize minorities and was "substantially related to the achievement of "the statute's remedial purpose."[113]

Justice Stewart, joined by Justice Rehnquist, rejected the contention that Congress has broad powers to use race-conscious means to remedy the effects of past racial discrimination. Apparently viewing Congress' remedial authority as co-extensive with that of a court, Justice Stewart concluded that because there was "no evidence that Congress ha[d] in the past engaged in racial discrimination in its disbursement of federal contracting funds"[114] and because the provision "may have been enacted to compensate for the effects of social, educational, and economic 'disadvantage,' "[115] the provision was both impermissibly overinclusive and directed toward achieving impermissible objectives.

In a separate dissent,[116] Justice Stevens conceded Congress' broad authority to use race-conscious remedies to cure the effects of past discrimination but argued that the "slapdash statute" was poorly suited to providing relief either for the broad class of persons harmed by racial discrimination or for the narrow group of minority contractors that had suffered from racism in the building industry.[117] Because in his view, the equal protection clause "impose[s] a special obligation to scrutinize any governmental decisionmaking process" which draws racial distinctions or discriminates against non-citizens, Justice Stevens examined the deliberations leading to the passage of the provision and concluded on the basis of the "perfunctory consideration" revealed in the legislative history that Congress had failed to demonstrate that "its unique statutory preference is justified by a relevant characteristic that is shared by the members of the preferred class."[118] In effect, Justice Stevens remanded the provision to Congress with directions

112. *Id.* at 520 (Marshall, J., concurring in the judgment).
113. *Id.*
114. *Id.* at 528 (Stewart, J., dissenting).
115. *Id.* at 529 (footnote omitted).
116. *Id.* at 532 (Stevens, J., dissenting).
117. *Id.* at 539-40.
118. *Id.* at 554.

tions to try again.[119]

2. *Less-than-suspect Classifications*

Except for the partial elevation of alienage to suspect status, the Supreme Court has refused to apply strict scrutiny to classifications adversely affecting other groups.[120] Yet the Court has responded differently to each, giving women and illegitimate children more protection than, for example, the poor and the aged.[121]

a. Gender-based Classifications

Before the 1970's, the Supreme Court, applying minimal scrutiny, consistently upheld gender-based classifications that disadvantaged women.[122] In two of the better-known cases, the Court upheld laws prohibiting women from practicing law[123] and from working as bartenders,[124] accepting without hesitation the states' proffered objective of preserving the established social order.

The Court's very deferential treatment of gender discrimination ended with its 1971 decision in *Reed v. Reed.*[125] Although the Court purported to use a "rational relationship" standard exhumed from a 1920 decision,[126] its condemnation of an Idaho pro-

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119. *Id.*

120. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973) (sex-based classifications). *See also* Mathews v. Lucas, 427 U.S. 495 (1976) (classification based on illegitimate percentage); Massachusetts Retirement Bd. v. Murgia, 427 U.S. 307 (1976) (age-based classification); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth-based classification).

121. The logic of the Court's treatment of these groups is discussed in notes 327-45 and accompanying text *infra.*

122. *See* L. TRIBE, *supra* note 47, at 1060. Although most statutes disadvantaging men were also upheld, *e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage law for women), some *Lochner*-era decisions did strike down social legislation geared exclusively to helping women, *e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923).

123. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872).

124. Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding statute which denied bartending licenses to all women except the wife or daughter of a bar owner and limited these licenses to working on the family premises).

125. 404 U.S. 71 (1971).

126. "The Equal Protection Clause does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Id.* at 75-76 (quoting F.S. Royster Guano Co. v. Vir-

bate law preferring men over "equally entitled" women as administrators of decedents' estates can be explained only on the basis of heightened scrutiny provoked by judicial disapproval of sex discrimination.[127]

In 1973, gender classifications fell one vote short of obtaining suspect status when in *Frontiero v. Richardson*,[128] the Court struck down federal statutes which granted the wife of a male member of the armed services dependency benefits but denied those benefits to a spouse of a female member of the military unless he could prove dependence upon his wife for one-half his support. But for the Court's reluctance to "enact" judicially the proposed Equal Rights Amendment,[129] sex-based classifications could quite possibly have been held to the strict scrutiny standard.

In the wake of *Frontiero*, the Supreme Court evolved an intermediate standard in gender discrimination cases, requiring that the classification[130] in question "serve important governmental objectives and . . . be substantially related to achievement of those objectives."[131] The Court's analysis has focused on the determina-

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ginia, 253 U.S. 412, 415 (1920)). *See* text accompanying notes 268-86 *infra*.

127. *See* Michael M. v. Superior Court, 101 S. Ct. 1200 (1981) (plurality opinion); Gunther, *supra* note 4, at 34. *See also* Ginsburg, *supra* note 16, at 165.

128. 411 U.S. 677 (1973). Justice Brennan, joined by Justices Douglas, Marshall and White, found that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.* at 688. Justice Stewart concurred in the judgment, finding that the legislation constituted "an invidious discrimination" like that condemned in *Reed. Id.* at 691 (construing Reed v. Reed, 404 U.S. 71 (1971)).

129. Justice Powell issued an opinion, joined by Chief Justice Burger and Justice Blackmun, in which, referring to the proposed Equal Rights Amendment, he wrote that "[i]t seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes." *Id.* at 692. (Powell, J., concurring in the judgment).

130. In Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), the Supreme Court held that the rule announced in Washington v. Davis, 426 U.S. 229 (1976) (applying minimal scrutiny to government actions having a disparate racial impact on the absence of a racial classification or a showing of discriminatory intent), applied to government actions having a disparate impact on men and women. *See* note 80 *supra*. *See also* Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding exclusion of pregnancy benefits from state employment disability program on ground that it did not discriminate against women).

131. Craig v. Boren, 429 U.S. 190, 197 (1976); Reed v. Reed, 404 U.S. 71 (1971). Recently, some of the Justices have hinted that they might prefer a return to a formulation similar to that articulated in *Reed*, turning on whether the gender classification "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Michael M. v. Superior Court, 101 S. Ct. 1200, 1204 (1981) (Rehnquist, J., joined by Burger, C.J., Stewart & Powell, JJ.). *See also* Rostker v. Goldberg, 101 S. Ct. 2646, 2658-59 (1981).

tion and evaluation of the governmental decisionmaker's actual motive for discrimination based on gender.[132] It has repeatedly struck down legislation based on "archaic and overbroad generalizations"[133] about the status of women and has consistently rejected "administrative convenience" as a justification for rules summarily discriminating between the sexes with respect to the eligibility for a government benefit.[134] With two rather unsettling exceptions[135] in the past five years, only a clear showing, based on the

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Rostker is discussed in note 135 *infra*.

132. *See* L. TRIBE, *supra* note 47, § 16-25.

133. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

134. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980). *See also* Califano v. Goldfarb, 430 U.S. 199, 219 (1977) (Stevens, J., concurring in the judgment).

135. First, in Michael M. v. Superior Court, 101 S. Ct. 1200 (1981), the Court, in a plurality opinion, upheld California's statutory rape statute, which makes it a felony for males over the age of eighteen to engage in sexual intercourse "with a female not the wife of the perpetrator," who is under the age of eighteen. Although the statute did not punish a minor female for having sex with an adult male, a majority of the Court found that the law was "sufficiently related" to California's stated objective of reducing teenage pregnancy "to pass constitutional muster." *Id.* at 1206 (plurality opinion). *See also id.* at 1211-13 (Blackmun, J., concurring in the judgment).

The Court's decision in *Michael M.* is particularly unsettling for two reasons: First, in upholding the statute, despite the fact that it punished only males, the Court ignored the previously articulated requirement that a gender-based classification be substantially related to the legislature's objective. *See id.* at 1215-16 (Brennan, J., dissenting); *id.* at 1218-20 (Stevens, J., dissenting). Second, the Court accepted the prevention of teenage pregnancy as the statute's objective despite the fact that "in deciding *Michael M.* . . . the California Supreme Court decided for the first time in the 130-year history of the statute, that pregnancy prevention had become one of the purposes of the statute." *Id.* at 1217-18 n.10 (Brennan, J., dissenting).

Second, in Rostker v. Goldberg, 101 S.Ct. 2646 (1981) (6-3 decision), the Court upheld a provision of the Military Selective Service Act, 50 U.S.C. § 453. The Act empowers the President to require "every male citizen" and male resident alien between the ages of eighteen and twenty-six "to register with the Selective Service in order to provide a pool of possible inductees in the event that a military draft is resumed. After citing "the imposing number of cases from this Court . . . suggest[ing] that judicial deference to [the] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies [U.S. CONST. art. I, § 8, cls. 12-14] . . . is challenged," 101 S.Ct. at 2654, the Court examined the legislative history of the section and concluded that, unlike other statutes disadvantaging women, "the decision to exempt women from registration was not the 'accidental byproduct of a traditional way of thinking about women.' " *Id.* at 2656 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977)).

The Court accepted without question the statutory restrictions on the participation of women in combat, 101 S.Ct. 2657-58, and concluded in the face of substantial evidence to the contrary, that "the purpose of registration was to prepare for a draft of combat troops." *Id.* at 2658. *See id.* at 2668-71 (Marshall, J., dissenting). What is most troubling about the decision is the Court's tautological conclusion that "[t]he exemption of women from registration is not only sufficiently but closely related to Congress' purpose in authorizing registration," *id.* at 2658, which the Court had found to be the development of an *all-male* pool

language of a statute and its legislative history,[136] that a gender-based classification was *actually* intended "to compensate [women] for past [economic] discrimination"[137] has convinced the Court to uphold such a classification.

Ironically, most of the gender-based classifications passed upon by the Supreme Court have, at least superficially, disadvantaged men, not women.[138] Unlike race discrimination, however, sex discrimination is characterized by an attitude of " 'romantic paternalism' which, in practical effect, put[s] women not on a pedestal, but in a cage."[139] Because the Court has perceived a danger that legislation "favoring" women may sometimes serve to perpetuate their previously isolated role outside the mainstream of economic and political activity, it has measured classifications disadvantaging either sex against the same "intermediate" standard.[140]

b. Classifications Related to Illegitimate Parentage

The Supreme Court has used a variety of techniques to analyze disparities in the legal status of unwed fathers and mothers. In one instance the Court struck down as a denial of due process a statute found to presume conclusively that all unwed fathers are unfit to have custody of their children, while granting all other natural parents a hearing on the issue of fitness. Four Justices concluded that the law also constituted a denial of equal protection.[141]

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of potential combat troops.

136. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 318-19 (1977).

137. *Id.* at 318. *See also* Orr v. Orr, 440 U.S. 268, 280-81 (1979) (defining one condition for finding compensatory purpose as "whether women had in fact been significantly discriminated against in the sphere to which the statute applied a sex-based classification").

138. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (striking down an Oklahoma statute allowing women to drink alcoholic beverages upon reaching the age of eighteen, but barring men from doing so until reaching the age of twenty-one. *See also* Califano v. Webster, 430 U.S. 313 (1977). In other cases the Court has been split on whether the classification in question disadvantaged men or women. *E.g.*, Califano v. Goldfarb, 430 U.S. 199, 206-09 (1977) (viewing the challenged statute as discriminating against women); *id.* at 223 (Stevens, J., concurring in the judgment) (viewing the statute as discriminating against men).

139. Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

140. *See* Califano v. Webster, 430 U.S. 313 (1977). There is some reason to believe that the Court has begun to retreat from the principle that classifications burdening men must satisfy the standard articulated in *Craig v. Boren.* In his plurality opinion in Michael M. v. Superior Court, 101 S. Ct. 1200 (1981), Justice Rehnquist stated: "[W]e find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts." *Id.* at 1207-08.

141. Stanley v. Illinois, 405 U.S. 645 (1972). Justice White wrote the opinion for the Court, joined by Justices Brennan, Stewart and Marshall, and joined in part by Justice

Perhaps due to criticism of the use of the irrebuttable presumption approach,[142] in later cases the Court used a more conventional equal protection analysis focusing on whether or not the statutory scheme or issue provided procedures by which an unwed father could gain legal status equal to that automatically given to an unwed mother.[143]

The availability of legal proceedings in which an illegitimate child or her natural parents can establish parentage has also determined the outcome of recent Supreme Court cases analyzing legislation that discriminates on the basis of illegitimate parentage.[144] Although heightened judicial scrutiny of such statutes originated before the Burger era,[145] the level of scrutiny to be applied to classifications based upon illegtimacy has been determined only within the last five years. The Court, through a comparison of the treatment received by illegitimate children with that received by blacks, chose a level of scrutiny that is neither strict nor "toothless,"[146] but intermediate; it required that such classifications be "substantially related to permissible state interests."[147]

The Court has rejected the constitutional validity of a state's proffered purpose of discouraging "immoral" activity[148] and has re-

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Douglas, who did not join the Court's discussion of the equal protection clause. Chief Justice Burger and Justice Blackmun dissented. *Id.* at 659.

142. *See* text accompanying notes 434-38 *infra*.

143. *Compare* Caban v. Mohammed, 441 U.S. 380 (1979) (striking down a section of New York Domestic Relations Law which permitted an unwed mother, but not an unwed father, to block her child's adoption) *with* Parham v. Hughes, 441 U.S. 347 (1979)(Powell, J., concurring in the judgment)(upholding a Georgia law denying father of illegitimate son, whom the father could have legitimated by court petition, recovery for the son's wrongful death, while allowing recovery by child's mother or by legitimating father if the mother was deceased). Although the plurality in *Parham* found that the statute did not discriminate on the basis of either sex or illegitimacy, it distinguished *Caban* on the ground that the father in that suit lacked a means of legitimating his child. *Id.* at 356 n.9.

144. *See* J. Ely, *supra* note 69, at 164 n.93.

145. *See* Levy v. Louisiana, 391 U.S. 68 (1968) (striking down a statute barring recovery by illegitimate child for wrongful death of parent); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (striking down same statute when used to bar parent's recovery for wrongful death of illegitimate child).

146. Mathews v. Lucas, 427 U.S. 495, 506-10 (1976) (upholding a survivors' benefits provision of the Social Security Act that presumed dependency of all children except those illegitimate children who were ineligible to inherit under state law and who had neither been legally acknowledged by their father nor determined by a court to be the child of the decedent).

147. Lalli v. Lalli, 439 U.S. 259, 265 (1978). *See* Trimble v. Gordon, 430 U.S. 762, 767-72 (1977).

148. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972). *See also* New

quired that the disadvantages imposed by the state on unwed parents and illegitimate children be closely related to easing the administrative burden of determining the right to government benefits,[149] the right of inheritance,[150] or the right to sue for wrongful death.[151] Because of the problems of proof which often arise in those contexts, the Court has upheld classifications disadvantaging on the basis of illegitimacy if the father, during his lifetime, had an opportunity to acknowledge his child[152] or if the surviving party has the opportunity to establish parentage.[153]

c. The Court and the Poor

Judicial protection for the poor predates the Warren Court. In *Edwards v. California*,[154] a decision as remarkable for the constitutional basis of its holding as for the scope of its language, the Supreme Court struck down a statute forbidding the importation of a nonresident indigent into California as a violation of the commerce clause. In a concurrence resting on equal protection grounds, Justice Jackson wrote that "a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. . . . The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."[155]

During Earl Warren's tenure as Chief Justice, the "fundamen-

Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 620 (1973).

149. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495 (1976).

150. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977).

151. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1967).

152. Parham v. Hughes, 441 U.S. 347 (1979); Lalli v. Lalli, 439 U.S. 259 (1978).

153. Mathews v. Lucas, 427 U.S. 495 (1976). *But see* Lalli v. Lalli, 439 U.S. 259 (1978) (upholding statute barring intestate inheritance from father unless child has been legally declared father's during father's lifetime); Trimble v. Gordon, 430 U.S. 762 (1977) (striking down state law barring illegitimate children from inheriting from their fathers by intestate inheritance); Labine v. Vincent, 401 U.S. 532 (1971) (upholding state law denying illegitimate children, who had been acknowledged, the right to inherit equally from the estate of a father who died intestate). These decisions seem to be irreconcilable. *See, e.g.*, 439 U.S. at 277-79 (Brennan, J., dissenting); 430 U.S. at 776 n.17. If the Court really intends to require a substantial relationship between the goal of facilitating a quick and accurate determination of survivor's rights and an illegitmacy based classification, then one must agree with Justice Brennan's conclusion that the availability of any "less drastic means" of determining a survivor's rights should condemn any statute disadvantaging illegitimate survivors. 439 U.S. at 278-79 (Brennan, J., dissenting).

154. 314 U.S. 160 (1941).

155. *Id.* at 184-85 (Jackson, J., concurring).

tal interest" doctrine[156] served as a major vehicle for condemning wealth-based classifications. For example, the Court struck down legislation interfering with an indigent person's rights to vote,[157] to run for office,[158] and to enjoy equal access to the courts.[159] In addition, the Court declared a "right of interstate travel" in a case where the legislation in question burdened a welfare recipient's right to travel.[160]

During the Burger Court era, however, "the retreat from the once glittering crusade to extend special constitutional protection to the poor has turned into a rout."[161] Prompted in part by a fear that extension of greater judicial protection to the poor could bankrupt the treasury,[162] and perhaps in part by the realization that in a society in which wealth is distributed unequally, every price discriminates against the poor,[163] the Court has pursued three strategies in rendering the equal protection clause a meager shelter for the poor.

First, in *San Antonio Independent School District v. Rodriguez*,[164] the Court denied "suspect classification" status to wealth.[165] Speaking for a five-Justice majority, Justice Powell concluded that "at least where wealth is involved, the equal protection clause does not require absolute equality or precisely equal advantages."[166] The majority applied the most minimal of scrutinies in holding that Texas' local property tax system for financing public schools, which resulted in substantial inequalities in funding be-

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156. *See* text accompanying notes 38-48 *supra.*

157. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

158. Bullock v. Carter, 405 U.S. 134 (1972).

159. Douglas v. California, 372 U.S. 353 (1963) (requiring the state to supply indigent criminal defendants with counsel to prepare their appeals); Griffin v. Illinois, 351 U.S. 12 (1956) (requiring that a state provide indigent criminal defendants with a free transcript for their appeals). *See also* Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that due process clause bars state from requiring that indigents who seek a divorce pay fees and costs in order to have access to its courts).

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

161. J. ELY, *supra* note 69, at 148.

162. *See* Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

163. Michelman, *supra* note 50, at 32.

164. 411 U.S. 1 (1973).

165. Although the Court indicated that the case did not present an instance of clear-cut wealth discrimination, *id.* at 23, it has cited *Rodriguez* for the proposition set forth in the text. *See* Maher v. Roe, 432 U.S. 464, 471 (1977) (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973)).

166. 411 U.S. at 23 (footnote omitted). Justices Douglas, Brennan, White and Marshall dissented.

tween rich and poor districts, rationally served the state's asserted purpose of preserving local control of schools.[167]

Second, the Burger Court checked the growth of the list of "fundamental interests," denying the existence of constitutional rights to decent shelter,[168] to more than "some identifiable [minimal] quantum of education,"[169] or to a publicly financed abortion,[170] even if medically necessary.[171] In addition, the Court has arrested development of the previously established right of equal access to the courts[172] by upholding state rules requiring the payment of filing fees for commencing a bankruptcy proceeding,[173] and the right to pursue an administrative appeal of the denial of welfare benefits,[174] for no more compelling justification than that the rules added money to the states' coffers. In addition, the Court has upheld a state's money-saving practice of denying indigent defendants appointed counsel for nonmandatory appellate proceedings.[175] Only the right to travel interstate[176] and some rights associated with familial privacy[177] have provided the basis for any expansion in substantive protection for the poor under the equal protection clause.

Finally, the Supreme Court has reserved its most deferential scrutiny for the type of legislation that most often affects the poor.

167. *Id.* at 55. As Justice White pointed out in his dissent, under Texas' school financing system, poorer districts became *more* dependent on state and federal revenues, thereby *reducing* local control over the schools. *Id.* at 63 (White, J., joined by Douglas & Brennan, JJ., dissenting).

168. Lindsey v. Normet, 405 U.S. 56, 73 (1972).

169. In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), Justice Powell assumed, without deciding, that some education may be "a constitutionally protected prerequisite to the meaningful exercise" of the right of free speech and the right to vote. *Id.* at 36-37.

170. Maher v. Roe, 432 U.S. 464, 471-72 (1977) (upholding restriction limiting expenditure of Medicaid funds to childbirth, not abortion).

171. Harris v. McRae, 448 U.S. 297 (1980).

172. *See* note 159 *supra*.

173. United States v. Kras, 409 U.S. 434 (1973).

174. Ortwein v. Schwab, 410 U.S. 656 (1973).

175. Ross v. Moffitt, 417 U.S. 600 (1974).

176. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (striking down Arizona's twelve-month residence requirement for the provision of nonemergency medical services to the indigent).

177. *See* Zablocki v. Redhail, 434 U.S. 374, 404 (1978) (Stevens, J., concurring) (Wisconsin law requiring a divorced parent without custody of his child, but with child support obligations, to obtain court permission before remarrying constituted "invidious" discrimination against the poor).

In *Dandridge v. Williams*,[178] the Court upheld a flat limitation on the amount of Aid to Families with Dependent Children benefits payable to a family regardless of its size, ruling that:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[179]

The Burger Court has upheld other classifications disadvantaging groups of poor persons, in spite of credible evidence that the distinctions in question were carelessly or arbitrarily drawn, based on *Dandridge*'s instruction to defer to the legislature.[180]

Dandridge notwithstanding, not all social welfare legislation has received such light-handed treatment by the Supreme Court. In two 1973 cases, the Court struck down provisions of the Food Stamp Act that appeared, based on their legislative history, to have been enacted with the intent to exclude " 'hippies' and 'hippie communes' "[181] and " 'college students [who are] children of wealthy parents' "[182] from eligibility. Finding that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest,"[183] the Court in *United States Department of Agriculture v. Moreno*, struck down the anti-hippie commune provision, reasoning that the prohibition against providing benefits to households with unrelated occupants was not a rational device to achieve the government's only legitimate objective, that of preventing benefits fraud. In *United States Department of Agriculture v. Murry*, the Court found that the statute's "irrebuttable presumption"[184] that all persons over eighteen years old listed as dependents on tax returns in the previous

178. 397 U.S. 471 (1970).

179. *Id.* at 485 (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

180. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535, 546 (1972) (upholding state social welfare program which paid a lower percentage of recognized standard of "need" to AFDC recipients than to those who received benefits because they were elderly, blind or disabled).

181. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

182. United States Dep't of Agric. v. Murry, 413 U.S. 508, 512-13 (1973).

183. 413 U.S. at 534 (emphasis in original). *See also* James v. Strange, 407 U.S. 128, 140-42 (1972) (striking down as discriminatory and irrational a Kansas statute denying indigent defendants, against whom the state had obtained a recoupment judgment for the cost of legal fees, certain exemptions provided for all other judgment debtors).

184. 413 U.S. at 514.

year were not "needy," was "often contrary to fact" and "lack[ed] critical ingredients of due process."[185] Two Justices concurred on equal protection grounds.[186]

d. The Aged

The last of the major demands by an identifiable interest group for heightened judicial protection under the equal protection clause came in a case challenging Massachusetts' requirement that state police officers retire upon reaching the age of fifty. In *Massachusetts Board of Retirement v. Murgia*,[187] the Supreme Court rejected the plaintiff's claim that age-based classifications were constitutionally "suspect," and applied a "rational-basis standard . . . reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one."[188] The Court found that the mandatory retirement rule was rationally related to the Commonwealth's objective of maintaining a fit police force despite the fact that every police officer was already required to take an annual physical.[189] In a 1979 case, the Court made still clearer its determination that, to challenge an age-based discrimination successfully, a plaintiff "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[190]

Whether or not the varying degrees of deference shown to legislative classifications adversely affecting particular groups is explicable by the Burger Court by reference to any coherent vision of the purpose of the equal protection clause is discussed in the next two parts of this article.

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185. *Id.*

186. *Id.* at 514-15 (Stewart, J., concurring); *id.* at 517 (Marshall, J., concurring). Justice Marshall's concurrence, which combines elements of due process and equal protection, is quoted in note 330 *infra*.

187. 427 U.S. 307 (1976).

188. *Id.* at 314.

189. *Id.* at 325-26 (Marshall, J., dissenting). On the necessity for requiring individualized determinations of competence where age-based classifications prevent the aged from engaging in fundamental activities, and where administrative costs are not appreciably increased, see L. TRIBE, *supra* note 47, at 1080-81.

190. Vance v. Bradley, 440 U.S. 93, 111 (1979) (upholding compulsory retirement of Foreign Service officers at age sixty).

II. The Five "Mediating Principles"

"Every law enacted, unless it applies to all persons at all times and in all places, inevitably imposes sanctions upon some and declines to impose the same sanctions on others."[191]

A. Some Preliminary Considerations

Laws, by their nature, classify persons according to the presence or absence of one or more characteristics[192] and, by virtue of the classifications, destine them for different treatment. Often a statute makes a particular attribute very significant; its existence or absence may condemn two otherwise identical persons to dramatically different fates.[193] As Justice Rehnquist has observed, however, "[a]ll legislation involves the drawing of lines, and the drawing of lines necessarily results in particular individuals who are disadvantaged by the line drawn being virtually indistinguishable for many purposes from those individuals who benefit from the legislative classification."[194] In the face of this jurisprudential fact of life stands the Fourteenth Amendment, enjoining the government from denying any person "the equal protection of the laws." Owen Fiss described the problem: "[R]ecognition of the inevitability and indeed the justice of some line-drawing makes the central task of equal protection theory one of determining which lines or distinctions are permissible."[195] As the length, volume and divisiveness of the Supreme Court's equal protection opinions indicate,[196] the task has been far from simple.

To satisfy the popular conception of the role of the courts, any attempt to derive a mediating principle that gives meaning to the

191. Trimble v. Gordon, 430 U.S. 762, 785 (1977) (Rehnquist, J., dissenting).

192. As used in this discussion, the words "characteristic" and "attribute" encompass engaging in, or having engaged in, a particular activity.

193. The Jim-Crow laws are perhaps the best example.

194. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 660 (1974) (Rehnquist, J., dissenting).

195. Fiss, *supra* note 20, at 108.

196. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (in which the Justices' five opinions covered 137 pages); Zablocki v. Redhail, 434 U.S. 374 (1977) (in which the Justices issued six opinions, each with a different rationale, in an eight-to-one decision). The Supreme Court has not limited its proliferation of opinions to equal protection decisions. *See* Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 24-26 (1980) (chastising the Justices for "their insistence upon individual opinions in first amendment cases"). *See also* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981).

bare words of the equal protection clause must satisfy two conditions: It must be susceptible of a formulation consistent with the text and history of the Fourteenth Amendment,[197] and it must contain a rationale for judicial reversal of judgments made by democratically elected officials or their delegates.[198]

1. *Intent of the Draftsmen*

An analysis of the proceedings leading to the adoption of the Fourteenth Amendment is beyond the scope of this essay. Most of the scholars who have analyzed its passage reached an unsurprising conclusion: that at a minimum the Amendment was intended to ensure that the post-bellum Civil Rights Acts, which banned many forms of racial discrimination, were constitutional.[199] Beyond this, the extent of the protection to be afforded by the provision's sweeping language[200] was deliberately left unclear.[201] As Professor Ely described it, "the content of the Equal Protection Clause . . . will not be found anywhere in its terms or in the ruminations of its writers."[202] But because "[t]he original understanding forms the starting link in the chain of continuity which is a source of the Court's authority,"[203] the temptation to liken, or to distinguish, the plight of any person disadvantaged by a government action to, or from, the condition of blacks before the Civil War is often overwhelming.[204] But the harms visited upon blacks in ante-bellum America were complex and hence susceptible to a variety of descriptions. Blacks were enslaved, impoverished, treated irrationally and unequally, disenfranchised, and generally victimized by prejudice.[205] Once the equal protection clause is interpreted as offering protection to groups other than blacks, the question re-

197. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 780-81 (1977) (Rehnquist, J., dissenting).

198. *See generally* J. ELY, *supra* note 69.

199. *See, e.g.*, Bickel, *supra* note 14, at 59-61.

200. On the difference in language between the Fourteenth Amendment and the other Civil War Amendments, see note 14 *supra* and J. ELY, *supra* note 69, at 30.

201. Bickel, *supra* note 14, at 59-63. *See* J. ELY, *supra* note 69, at 30 n.70. *See also Developments*, *supra* note 5, at 1068-69.

202. J. ELY, *supra* note 69, at 32. *See also* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

203. Bickel, *supra* note 14, at 4-5.

204. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 506 (1976); Frontiero v. Richardson, 411 U.S. 677, 684-88 (1973). *See also* Fiss, *supra* note 20, at 147-48.

205. *See* K. STAMPP, THE PECULIAR INSTITUTION (1956).

mains: *Which* of these evils does the clause condemn? Requiring allegiance to the "original understanding" offers little assistance to the search for the meaning of equal protection.

2. The Proper Role of the Judiciary

Professor Ely has characterized the United States as "a society [that] from the beginning, and now almost instinctively, [has] accepted the notion that a representative democracy must be our form of government."[206] Given these democratic aspirations, it is not surprising that much of "the original Constitution is devoted almost entirely to structure"[207] and to providing a framework through which the popular will can be determined—and once determined, exercised—while minimizing the risk of overcentralized power that the forefathers saw as the precondition for tyranny.[208] But portions of the original constitution were obviously intended to place limits on the power of the people's representatives, regardless of the public's desires;[209] many of its twenty-six amendments simply forbid the democratic branches from making laws having certain proscribed impacts.[210]

The irony of a representative democracy binding itself to an ancient charter that places substantive limitations on its government's power has not gone unnoticed. Professor Tribe has asked "why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement—made by the people, binding on their children, and deliberately structured so as to be difficult to change."[211] The answer is obvious: The Framers saw the need for limitations on the popular sovereignty. Their Constitution requires all state and federal elected officials and judges to take an oath "to support this Constitution,"[212] even, presumably, when doing so contradicts the majority's demands.[213] Thus, the limitations on governmental action enumerated in the Fourteenth Amendment and elsewhere in the Constitution are limitations on the authority

206. J. ELY, *supra* note 69, at 5 (footnote omitted).
207. *Id.* at 90.
208. *See* L. TRIBE, *supra* note 47, §§ 2-1 to 2-4.
209. *See, e.g.*, U. S. CONST. art. I, § 9, cl. 3.
210. *See, e.g.*, U. S. CONST. amend. I.
211. L. TRIBE, *supra* note 47, at 9.
212. U. S. CONST. art. VI, § 3.
213. L. TRIBE, *supra* note 47, at 9-10.

of duly elected, or appointed, public officials. The Constitution itself is sometimes "counter-majoritarian."

Related to the irony of a deliberately counter-majoritarian Constitution is the dilemma posed by judicial review: federal judges enjoy life tenure and for this reason are far less accountable to the electorate than are most government officials. Charged by the Constitution with enforcing its limitations on the power of the other branches,[214] the judiciary, and in particular the Supreme Court, has tremendous power to dismantle the work of popularly elected representatives.[215] As Professor Bickel has noted, "the supreme autonomy that the Court asserts in many matters of substantive policy needs justification in a political democracy."[216] That justification, like the justification for a constitution that limits the exercise of popular sovereignty, must derive from a theory for determining which activities are best left beyond the reach of the people's representatives and when a particular government action is inconsistent with this nation's sense of justice. Thus, an effort to give meaning to the equal protection clause must be shaped by an understanding that much of the Constitution exists to instruct us on when the democratic process should not be trusted. That the task of giving meaning to its instructions is partially delegated to judges who are not popularly elected should not bar those judges from answering the question asked by the Fourteenth Amendment: Are the limits imposed on a representative democracy by an injunction against denying "equal protection of the laws" exceeded by the government activity in question? Five partial answers are discussed below.

B. Model One: Protection from Prejudice

1. *The Model Described*

The equal protection clause is often viewed as a mandate to the judiciary to prevent individuals from being treated unequally as a result of a governmental decisionmaker's "prejudiced" motive. As most recently articulated by John Hart Ely,[217] the "protection

214. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

215. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

216. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 86 (1970).

217. J. ELY, *supra* note 69, at 145-70. Professor Ely's "representation-reinforcing" theory of judicial review actually combines two of the models discussed herein: the protection-from-prejudice model and the model of equal treatment. The latter portion of Ely's theory

from prejudice" model posits the legitimacy of most decisions arrived at by democratically elected bodies. According to adherents of the model, because most government actions that disadvantage a group have resulted from a legislative process to which the group's members had sufficient access, most differences in treatment are presumed to be legitimate, and therefore constitutional, outcomes of the democratic process.

But the presence of prejudice in the minds of decisionmakers strips the political process of its presumption of legitimacy. According to the proponents of this model, a strong and widely held bias against a particular group has two distinct but related effects on the political process.[218] First, prejudice often works to exclude groups from access to decisionmaking authority.[219] When a disenfranchised group is disadvantaged, the source of legitimacy in a democratic society—the consent of the governed—is lacking. Second, and perhaps more important now that virtually all but the young, the mentally deficient[220] and aliens can vote, prejudice is believed to create a malfunction in the democratic process[221] by causing biased legislators to underestimate, or to desire the negative effect that a proposed statute has upon a despised group, and to refuse to bargain with its representatives.[222] According to Professor Ely:

> Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative

is discussed in text accompanying notes 336-39 *infra*.

218. *See* J. ELY, *supra* note 69, at 103.

219. *See* A. BICKEL, *supra* note 216, at 85.

220. *See* Note, *Mental Disability and The Right to Vote*, 88 YALE L.J. 1644 (1979). *See also* Schweiker v. Wilson, 101 S. Ct. 1074 (1981). Because a Social Security Act provision denying subsistence benefits to individuals institutionalized in public mental institutions does not discriminate against the mentally ill, as a discrete group, the Court expressed no view as to which standard of review applies to such legislation. *Id.* at 1081 n.13.

221. Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 980 (1978).

222. *See* Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

system.[223]

A statute that contains an explicitly "prejudiced" classification or that is otherwise clearly intended to disadvantage a despised minority has two negative qualities. First, prejudiced motivation robs the legislation of its process-derived legitimacy. Second, the simple use of the suspect classification or the passage of an obviously prejudiced law perpetuates the isolation and stigmatization of the victimized group.[224] Though a government action that the protection-from-prejudice model condemns usually has both negative features, only the former is considered relevant within the framework of the model.[225]

The protection-from-prejudice model seems to be what the Supreme Court invokes when it uses the suspect classification doctrine to condemn an instance of "invidious discrimination."[226] The Court's use of the equal protection clause to condemn prejudice dates back at least to 1880, when, in *Strauder v. West Virginia*,[227] it reversed a conviction by a jury from which blacks had been barred. In his opinion for the Court, Justice Strong explained the purpose of adopting the Fourteenth Amendment:

> By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws.[228]

A reading of its recent decisions reveals that the Supreme Court still considers protection from prejudice to be the primary purpose of the equal protection clause.[229] Among the analytic tech-

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223. J. ELY, *supra* note 69, at 103 (emphasis in original).

224. *See* Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 11 (1976).

225. *See* J. ELY, *supra* note 69, at 160 n.*. The view that the equal protection clause prohibits government action that "stigmatizes" certain groups is discussed in text accompanying notes 268-86 *infra*.

226. *See* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). "[W]hat is it that 'suspect classifications' are suspected of? The suspicion, in that phrase, is suspicion of *prejudice*." *Id.* at 201-02 (emphasis in original).

227. 100 U.S. 303 (1880).

228. *Id.* at 309.

229. *See generally* Tribe, *The Puzzling Persistence of Process-Based Constitutional*

niques used by the Court in several of its recent "intermediate" equal protection decisions,[230] both its sometime focus on the legislature's actual purpose in passing a statute,[231] and its refusal to consider legitimate a desire to disadvantage certain groups[232] are consistent with a desire to invalidate only legislation motivated by prejudice. In addition, its refusal to invalidate actions having a disparate impact on racial minorities in the absence of a showing of discriminatory intent[233] seems to reflect adherence to the antiprejudice model. Finally, its reluctance, without "some reason to infer antipathy," to invalidate "improvident decisions" made by the legislature is consistent with a belief that the clause bars only governmental actions stemming from prejudice.[234]

Perhaps the greatest virtue of the protection-from-prejudice model is its ability to explain the varying levels of justification required of different legislative classifications. To one of the model's adherents, the scrutinies constitute an "evidentiary system through which the Court assesses the probable truthfulness of the government's explanation of its action."[235] Because the model condemns a prejudiced motive, and because governmental decisionmakers are rarely so foolish as to assert such purposes in support of a statute when doing so would condemn the law as unconstitutional,[236] the Court has created the scrutinies to serve as a set of presumptions about a decisionmaker's real motives.

Thus, where the hostility directed toward a group targeted by a statutory classification is pronounced and the group's identifying characteristic is irrelevant to the achievement of a legitimate governmental purpose, the Court is "suspicious"[237] that the legisla-

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Theories, 89 YALE L.J. 1063 (1980). *But see* Michael M. v. Superior Court, 101 S. Ct. 1200 (1981), where the majority notes: "The question for us—and the only question under the Federal Constitution—is whether the legislation violates the Equal Protection Clause of the Fourteenth Amendment, not whether its supporters may have endorsed it for reasons no longer generally accepted." *Id.* at 1206.

230. *See* text accompanying notes 399-453 *infra*.

231. *E.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). *But see* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177-78 (1980).

232. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

233. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

234. Vance v. Bradley, 440 U.S. 93, 97 (1979).

235. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1043 (1978). *See also* J. ELY, *supra* note 69, at 147-48.

236. Clark, *supra* note 221, at 977.

237. This is, as Professor Ely says, *le mot juste*. J. ELY, *supra* note 69, at 147-48.

ture's stated objective is merely a pretext for a prejudiced motive. To allay its suspicions, the Court requires that a proffered objective be both compelling and precisely tailored to the classification in question. Where, as with gender, the characteristic described by a legislative classification identifies a group that has suffered from prejudicial treatment but is relevant to a legitimate state purpose,[238] the model demands that a "substantial" relationship to an "important" governmental purpose be shown in order to rebut a weaker presumption of bias.[239] Finally, the rational relationship test reflects a judicial presumption that most legislation is not motivated by prejudice; only a showing of manifest irrationality[240] can convince the Court that prejudice is the motive for a statute that does not contain an offensive classification.

2. *The Model Evaluated*

Challenges to the anti-prejudice model can be made at three levels: the practical, the political, and the philosophical.

Assume for the moment that the determination of what constitutes an unconstitutional motivation can be made by referring to an unambiguous source within the Constitution. Nevertheless, ascertaining whether a particular legislative action is the result of a prejudiced motivation is a very difficult task.[241]

A legislature is, by definition, a lawmaking body composed of many representatives. Each lawmaker may vote for a particular measure for different reasons, or for a variety of reasons. Thus, the notion of a single legislative purpose is often a fallacy.[242] In addition, few decisions are preceded by open and extensive deliberations that are painstakingly chronicled in legislative histories. Few legislative histories contain explicit "admissions" of prejudicial motives by even a tiny minority of the legislators. Few legislators

238. *Cf.* Dothard v. Rawlinson, 433 U.S. 321 (1977) (upholding, against a Title VII challenge, a state regulation barring the use of women as guards in an unusually violent maximum security prison for men).

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

240. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1263 (1970).

241. *See* Michael M. v. Superior Court, 101 S. Ct. 1200, 1204 (1981). "This Court has long recognized that 'inquiries into congressional motives or purposes are a hazardous matter,' and the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive." *Id.* at 1204 (citations omitted).

242. *See* Ely, *supra* note 240.

harboring invidious motives would condemn their desired objective by openly confessing their reasons for acting.[243] As a result, the process of determining whether or not a decisionmaker acted because of a prejudicial motivation is generally *inferential*;[244] the court must reason from the absence of a plausible, nonprejudicial motive to a conclusion of unconstitutional motivation.[245]

The difficult inferential quality of the search for prejudicial motivation helps to explain the development of the varying levels of scrutiny. Based upon judicial preconceptions about the likelihood that legislation containing a particular classification was motivated by prejudice, the scrutinies are burden-shifting devices which in most cases assign the difficult task of proving an unconstitutional motivation to the disadvantaged party.

The conception of the political process underlying the protection-from-prejudice model is susceptible to a variety of criticisms. A noncriticism may be dispensed with first: Some supporters of the model, as well as its critics, complain that analyzing the legislative process condemns the judiciary to a more intrusive role than would an approach focusing solely on the results of legislative decisions;[246] that is, by searching for evidence of unconstitutional motivation, the courts must intrude into the political branches' deliberations. If the equal protection clause demands a prejudice-free legislative process, however, then the commentators' lament is a justification for, rather than a criticism of, judicial intervention.[247]

The use of standards of review, in lieu of a case-by-case determination of whether or not a prejudicial motive contributed to the adoption of a particular statute, makes the decision to accord a characteristic "suspect classification" status extremely important. Thus, the categorization of groups according to the relative likeli-

243. *See id.* at 1214-15.

244. Much has been written regarding the significance and detection of unconstitutional motivation. *See, e.g.*, Clark, *supra* note 221; Ely, *supra* note 240; Simon, *supra* note 235. To what extent a discriminatory motive must influence a particular decision is also a question that has provoked considerable attention. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 57-59 (1977).

245. *See* J. ELY, *supra* note 69, at 139; Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1052 (1980).

246. *See, e.g.*, Bork, *Commentary: The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 698-99; Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978).

247. *See* Linde, *supra* note 226, at 239.

hood of legislative prejudice against them is an integral part of the application of the protection-from-prejudice model. The criteria used for selecting "endangered" groups, like much of the analysis developed by the model's adherents, have been greatly influenced by pluralist political theory.

The most frequently cited criteria for determining whether a group is entitled to heightened judicial protection originated in the now famous footnote four of *United States v. Carolene Products Co.*,[248] that is, whether the disadvantaged persons constitute a "discrete and insular minorit[y]," against whom "prejudice" may tend "seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities." Evidently, the "political process" that Justice Stone had in mind was the coalition building which is the cornerstone of pluralist political theory:[249] Because no single interest group possesses sufficient authority to control all political decisions, members of minorities are protected from majoritarian oppression by their ability to build coalitions on a variety of issues, trading their participation in legislative coalitions for assurances that future disadvantaging will not occur.

As was discussed earlier,[250] prejudice threatens a minority in two ways: First, it may result in the actual disenfranchisement of members of the minority, thereby rendering it unable to defend itself in the political arena. Second, and more common, prejudice may create a semi-permanent majority composed of a coalition of interest groups who are willing to overlook their occasionally inconsistent interests in order to disadvantage a hated or simply misunderstood minority.[251] Given this conception of the democratic process, it is hardly surprising that proponents of the anti-prejudice model consistently list as criteria for heightened judicial scrutiny disenfranchisement, widespread public hostility, and the prevalence of generalizations favorably comparing the legislative majority to the disadvantaged group.[252] These criteria account for malfunctions in the process of interest-group coalition building that is central to the pluralists' idealization of the political system.

248. 304 U.S. 144, 152-53 n.4 (1938).

249. *See, e.g.*, A. BICKEL, *supra* note 216, at 37; R. DAHL, WHO GOVERNS (1961). *See also* Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1191 (1977).

250. *See* text accompanying notes 218-23 *supra*.

251. *See* J. ELY, *supra* note 69, at 154-57.

252. *Id.* at 150-60.

The model's reliance on pluralist political theory reveals its limited conception of prejudice and undermines the notion of process-derived legitimacy that justifies its usual deference to the political branches. As many political scientists have pointed out, pluralist theory fails to take into account the inability of some individuals who share a common set of interests to organize into effective political interest groups.[253] Because of the incidence of a variety of transaction costs, the "nongroups'" claims fail to reach the legislative agenda, and their interests are inadequately protected from abuse by the legislative majority.[254] In contending that the interests of all members of society are taken into account before a political decision is made, the pluralist theory therefore fails to consider those interests that, for economic or social reasons, are not well represented in the political arena.[255]

This critique of pluralism reveals the first great weakness in most articulations of the protection-from-prejudice model: their limited conception of prejudice.[256] The majority's consistent failure to consider the common interests of individuals lacking the incentive or the resources to initiate social discourse constitutes an exercise of political power that results in the systematic disadvantaging of groups such as the poor and the sick that are neither "discrete" nor truly "insular." The victimization of these groups often stems not from hostility, but from a lack of public awareness of their demands.[257] Though such groups are at the mercy of the political process,[258] most current definitions of prejudice fail to protect them from disadvantageous governmental decisions.

Moreover, acceptance of a pluralist political vision belies the conception of a legitimate public purpose that constitutes the anti-

253. P. BACHARACH & M. BARATZ, POWER AND POVERTY: THEORY AND PRACTICE (1970); R. W. COBB AND C. D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (1972); E. E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE (1960).

254. *See* A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

255. *See* authorities cited in note 253 *supra*.

256. This criticism was elaborated by Judge J. Skelly Wright in Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 789 (1971).

257. *See* Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977). "When the burden of legislation falls most heavily on a group that is likely to be the subject of the legislature's *systematic neglect*, it is natural for judicial scrutiny to be heightened." *Id.* at 24-25 (emphasis added) (footnote omitted).

258. *See* Wright, *supra* note 256, at 789.

prejudice model's justification for most legislatively created inequality.[259] Because *all* government actions are the result of one coalition's triumph over another, the pluralist recognizes that all government actions may also be seen as the deliberate favoring of one segment of the population over another. Given this characterization of the political process, the emptiness of the model's definition of "prejudice" is revealed; what is subsumed in the concept of "prejudice" is a set of value judgments about when the government may or may not treat particular groups or individuals unequally. Only a judicially supplied definition of "just and unjust disadvantaging" can give meaning to the model's concept of prejudice.[260]

For example, assume that in addition to possessing the power to sentence burglars to life in prison,[261] the state could also punish them by compelling them to travel in the back of public buses or to use separate bathrooms. In this time of increasing concern about crime, it is also fair to assume that the public feels hostility toward burglars, and that a majority of the legislature passing such a law made unflattering generalizations about them. Yet treating burglars as blacks had been treated for a hundred years would not provoke heightened judicial scrutiny under the equal protection clause.[262] What distinguishes burglars from blacks is not that the old generalizations about blacks were more inaccurate than are those about burglars; it is that reference to our own moral constellation, our vision of the right "place" for people possessing particular characteristics or engaging in particular activities, convinces us that treating blacks unequally is unjust, while treating burglars unequally is just. Thus, contrary to the position taken by the adherents of the protection-from-prejudice model, "prejudice" is not an intoxicant that distorts the vision of decisionmakers; it is the conclusion one draws when an individual has unjustly suffered a harm or been denied a benefit by the government because that individual possessed a certain characteristic or engaged in a certain activity.[263]

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259. Tussman & tenBroek, *supra* note 27, at 350.

260. *See* Eisenberg, *supra* note 244, at 147.

261. *See* Rummel v. Estelle, 445 U.S. 263 (1980); Tribe, *supra* note 229, at 1075.

262. *Cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding regulation barring past and present methadone users from employment by transit authority).

263. After all, wasn't it fear of "invidious discrimination" that prompted the Supreme Court to prevent a burglar from being sterilized? *See* Skinner v. Oklahoma, 316 U.S. 535

Once the value judgments underlying a finding of prejudice are apparent, an alternative, nonevidentiary explanation for the various levels of scrutiny is inevitable. If a suspect classification can be upheld based upon a finding that it serves a compelling state interest in spite of the presence of widespread animosity toward the disadvantaged group,[264] strict scrutiny can no longer be described as a presumption about prejudice; it simply becomes a vehicle for judicial interest balancing. Divergent results under intermediate formulations[265] can be similarly attributed to a judicial conclusion that sometimes the legislature may disadvantage a particular group, and sometimes it may not.[266]

Finally, because the Court often treats it as an analytic approach distinct from the protection-from-prejudice model,[267] the requirement of legislative rationality is analyzed as a separate model.

The problems with a theory that purports to explain the Court's equal protection decisions in terms of presumptions about whether or not particular legislative decisions are motivated by prejudice are insurmountable. At a practical level, the search for evidence of a single legislative purpose is inherently unrealistic and

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(1942).

See Tribe, *supra* note 229. "[T]he conclusion that a legislative classification reveals prejudicial stereotypes must, at bottom, spring from *a disagreement with the judgments that lie behind the stereotype. . . .*" *Id.* at 1075 (emphasis in original).

264. Korematsu v. United States, 323 U.S. 214 (1944). *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 490 (1980) (opinion of Burger, C.J., joined by White & Powell, JJ.) (dictum); *id.* at 507 (Powell, J., concurring) (statutory provision requiring that ten percent of contracts on state and local public works projects financed with federal grants be set aside for "minority business enterprises" satisfies "strict scrutiny").

Note that Chief Justice Burger's opinion did not spell out the analysis implicit in his conclusion that the provision satisfied strict scrutiny. *See* notes 107-08 and accompanying text *supra.* In upholding the provision as "a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors," *id.* at 515, and in doing so based on a "reasonable congressional finding of discrimination," *id.* at 503 n.4, Justice Powell shows far greater deference to the legislature than is normally present in cases wherein strict scrutiny is applied. *See The Supreme Court, 1979 Term,* 94 HARV. L. REV. 77, 132-33 (1980).

265. *Compare* Michael M. v. Superior Court, 101 S. Ct. 1200 (1981) *with* Orr v. Orr, 440 U.S. 268 (1979).

266. *See* Michael M. v. Superior Court, 101 S. Ct. 1200, 1219 n.4 (1981) (Stevens, J., dissenting). *See also* Cox, Book Review, 94 HARV. L. REV. 700 (1981). In equal protection cases, "the Court is always deciding whether in its judgment the harm done to the disadvantaged class by the legislative classification is disproportionate to the public purposes the measure is likely to achieve." *Id.* at 706.

267. *E.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

often fruitless. At a political level, the protection-from-prejudice model is locked into a set of inaccurate perceptions concerning the political significance of certain characteristics and the functions of the democratic process. Most importantly, the model is dependent upon two concepts, "prejudice" and "legitimate governmental objective," that are meaningless without reference to a vision of just and unjust disadvantaging that cannot be derived from the constitutional text.

C. Model II: The Model of Required Rationality

1. *The Model Described*

The equal protection clause is often described as a prohibition against government action that "irrationally" or "unreasonably" disadvantages some segment of the population.[268] As such, the clause is translated into a requirement that the government treat all "similarly situated" individuals equally, unless distinguishing among them "rationally" serves a legitimate public purpose.[269]

During the *Lochner* era,[270] the Supreme Court used the required-rationality model to strike down state tax laws that "arbitrarily" taxed some businesses while not taxing others. For example, in *F.S. Royster Guano Co. v. Virginia*,[271] the Supreme Court held that a Virginia tax statute exempting local corporations that did no business within the state while including all the income of local corporations doing business both in and out of the state violated the equal protection clause. In so doing the Court articulated one frequently quoted formulation of the rationality requirement: "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[272]

During the period between the conclusion of the *Lochner* era and the end of the Warren Court, the Court considered the requirement of legislative rationality to be satisfied so long as it could find that the legislature had a "conceivable basis" for believ-

268. *E.g.*, Dandridge v. Williams, 397 U.S. 471, 489 (1970) (Harlan, J., concurring).
269. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 75-76 (1971).
270. Lochner v. New York, 198 U.S. 45 (1905).
271. 253 U.S. 412 (1920).
272. *Id.* at 415.

ing that the classification rationally served a legitimate state interest.[273] Although the Burger Court has continued to apply this "minimal scrutiny" in the majority of nonsuspect classification cases,[274] it has stiffened the requirement of legislative rationality in others, striking down several statutes for failing to serve rationally any legitimate governmental objective.[275]

2. *The Model Evaluated*

Like the protection-from-prejudice model, the requirement of legislative rationality has analytic difficulties which hamper its application, as well as an open-endedness that deprives it of meaning. Under the required-rationality model, the government's burden of justifying its unequal treatment of two groups is satisfied by a showing that the groups are not "similarly situated."[276] Without some externally supplied notion of exactly where all individuals *are* situated, however, a court applying this formulation must ask, "situated with respect to what?" According to Tussman and tenBroek, "[t]he inescapable answer is that we must look beyond the classification to the purpose of the law."[277] Thus, the requirement

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273. *See* text accompanying notes 52-61 *supra.*

274. *E.g.*, New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976).

Although the Court has continued to uphold most legislative classifications to which it has applied the rationality requirement, its willingness to accept a statute's stated objective, and to assume that the legislature acted rationally in using a classification to achieve it, has varied markedly from case to case. A recent example is quite dramatic. In United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980), the Court, per Justice Rehnquist, declared that Congress had intended to draw the distinction it had made in a statute eliminating "windfall" retirement benefits for certain former railroad employees and that Congress had not acted irrationally in attempting to achieve its objective through the classification it used. *Id.* at 176-79. Justices Brennan and Marshall dissented. *Id.* at 182.

Six weeks later, in his opinion for the Court in Minnesota v. Clover Leaf Creamery Co., 101 S. Ct. 715 (1981), Justice Brennan engaged in a considerably more extended discussion of the rationality of a Minnesota statute that banned the sale of milk in plastic nonreturnable containers. Rather than accept as given that the legislature's stated purpose was its actual purpose and that Congress had acted rationally, the Court in *Clover Leaf*, as it had done in *Fritz*, engaged in a thorough examination of the legislative history to buttress its conclusion that the distinction between plastic and nonplastic containers was rationally related to the statute's actual purpose. *Id.* at 723 n.7, 724-27. For a discussion of the "numerous formulations" of the rational-basis test applied by the Burger Court see Schweiker v. Wilson, 101 S. Ct. 1074, 1087 n.4 (1981) (Powell, J., dissenting).

275. *E.g.*, United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

276. *See, e.g.*, Rostker v. Goldberg, 101 S.Ct. 2646, 2658-59 (1981); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

277. Tussman & tenBroek, *supra* note 27, at 346. *See, e.g.*, Michael M. v. Superior

that the government treat equally those "similarly situated" must be viewed simply as a demand that the classification in question bear some logical relationship to the purpose of the statute.[278]

Even if a definition of "legitimate governmental purpose" could somehow be derived from within the required-rationality model, it would be difficult to say when the relationship between a legislative classification and a permissible governmental objective is "rational." The concept of rationality is itself quite difficult to apply to legislation, as the Supreme Court's varied use of the term indicates.[279] In most instances, the Court has found legislative classifications to be "rational" which bear, at most, slight relationships to the ends served by the statutes, regardless of the incidence or cost of counterproposals.[280] In some cases, however, the Court has used a more utilitarian calculation, condemning as "irrational" statutes when their underinclusiveness or overinclusiveness has triggered judicial ire.[281] Thus, although "rationality" in other contexts is used to denote the balancing of a proposal's costs and benefits,[282] the Supreme Court has varied its use of the term, sometimes simply asking if a classification creates any positive benefits whatsoever, and occasionally demanding a clear showing of net benefit.

Judge Learned Hand has written that "a law which can get itself enacted is almost sure to have behind it a support which is

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Court, 101 S.Ct. 1200, 1208-11 (1981) (Stewart, J., concurring).

The statement in the text reflects a deeper conflict, which Roberto Unger describes as "the antimony of rules and values." R. UNGER, KNOWLEDGE AND POLITICS 91 (1975). Because, according to Unger, language has no objectively discernable meaning, and because our culture lacks a broad consensus on values and on how the world is perceived and understood, legal rules can be applied only by determining whether the application of the rule will serve its maker's purposes. Under this "purposive theory," judges are given the difficult responsibility of assessing the "instrumental rationality" of a proposed application of a rule. *Id.* at 95-96.

What is especially problematic about the required-rationality model is the Court's instrumental analysis of whether or not a classification serves a legitimate statutory objective to determine conclusively if the resulting inequality is consistent with the purposes of the equal protection clause.

278. Tussman & tenBroek, *supra* note 27, at 346.

279. *See* note 274 *supra*.

280. *E.g.*, Kotch v. River Port Comm'rs, 330 U.S. 552 (1947). *See* Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 817 (1978) [hereinafter cited as *Equal Protection*].

281. *E.g.*, Eisenstadt v. Baird, 405 U.S. 439 (1972).

282. *See* H. RAIFFA, DECISION ANALYSIS (1970).

not wholly unreasonable."[283] Unless some government objectives are held to be impermissible, any piece of legislation can be justified as rationally serving the purpose of disadvantaging those treated unequally.[284] Therefore, the rationality model requires that a statutory classification serve a *permissible* governmental interest. With the exception of language condemning as impermissible a "bare congressional desire to harm a politically unpopular group,"[285] however, the Court has failed to articulate a standard against which governmental objectives may be measured. In any case, such a standard cannot be derived from any definition of "rationality," nor from the language of the equal protection clause. Whether, as some have argued, the list of proscribed government objectives is drawn from the remainder of the Constitution,[286] or from some other vision of when it is proper to treat individuals unequally, the requirement that legislation rationally serve permissible government objectives, like the protection-from-prejudice model, is meaningless without a theory of just and unjust disadvantaging.

D. Model III: "Wards of the Equal Protection Clause"[287]

1. The Model Described

The equal protection clause has been characterized as a mandate for the judicial protection of "specially disadvantaged groups,"[288] which previously have been disadvantaged by the democratic branches. According to this theory, the equal protection clause is a mandate for the judiciary to prevent the government from inflicting further harm upon groups, particularly blacks, whose members historically have been the victims of unjust treatment.

Proponents[289] of this model offer two justifications for height-

283. L. HAND, THE SPIRIT OF LIBERTY 8 (1952).

284. Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972) [hereinafter cited as *Legislative Purpose*]. For an example of what Justice Brennan has described as a "tautological approach to statutory purpose," see United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-78 (1980). *Id.* at 186-87 (Brennan, J., dissenting).

285. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

286. *See* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7-8 (1969).

287. Fiss, *supra* note 20, at 147.

288. *Id.* at 155.

289. The theory is most strongly and thoughtfully advanced by Owen Fiss. *See* Fiss, *supra* note 20.

ened judicial protection of disadvantaged groups. The first is that any redistribution of wealth which results from prohibiting government action having a negative impact on a protected group is appropriate compensation for previous damage inflicted upon the group by the political process.[290] The second is that judicial solicitude for such groups, including any such redistribution, may have the effect of ending the group's lower-caste status, an outcome to be desired for a variety of reasons.[291]

The model differs from the approach currently used by the Supreme Court in several significant respects.[292] Like the suspect-classification doctrine, the "group-disadvantaging principle"[293] bars use of a group-identifying characteristic in a statutory distinction that disadvantages a protected group; however, the model sanctions "benign" use of such a characteristic in legislation designed to improve the group's status. Such legislation would receive only "minimal scrutiny" to determine whether protected group members would be stigmatized by the statute.[294] Such scrutiny would be far less strict than that now used by the Court to test "benign" race and gender classifications.[295] In addition, the "wards of the equal protection clause" model condemns government actions, whether or not based on a group-identifying classification, which have a disparate impact on a protected group, regardless of the intent of the decisionmaking body. The Supreme Court, on the other hand, assigns great weight to the factor of intent.[296] Finally, the model would provide a rationale for compelling affirmative governmental responses to circumstances, such as pov-

290. *Id.*

291. Professor Fiss lists three justifications for "the elimination of caste": "preserving social peace," "maintaining the community . . . as one cohesive whole," and "permitting the fullest development of individual [group] members." *Id.* at 151.

292. For example, the Court would be required to repudiate the language in many of its cases to the effect that "the benefits afforded by the Equal Protection Clause 'are by its terms, guaranteed to the individual.'" Fullilove v. Klutznick, 448 U.S. 448, 526 (1980) (Stewart, J., dissenting) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)). *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 288 (1978) (Powell, J.). *See also* Brest, *supra* note 224, at 48-52.

293. Fiss, *supra* note 20, at 147.

294. *Id.* at 161.

295. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Califano v. Webster, 430 U.S. 313 (1977); discussion in text accompanying notes 78-119 *supra.*

296. *See, e.g.,* Mobile v. Bolden, 446 U.S. 55, 65-74 (1980) (opinion of Stewart, J.); Washington v. Davis, 426 U.S. 229 (1976). *See also* discussion in text accompanying notes 78-82 *supra.*

erty and lack of educational opportunity, which perpetuate the lower-class status of a protected group.[297]

2. The Model Criticized

To give the protected-wards model substance, its adherents must supply meaning for the concepts of "group," "disadvantaged status," and "group harm," which are central to the model's analysis. As with the previous models, each of these notions is open-ended, being dependent either on a particular social vision or on a theory of just and unjust disadvantaging.

Every human being has a nearly infinite variety of characteristics. Most, if not all, such traits are shared by other persons, all of whom could be lumped together into a number of "groups," each defined by its common characteristic. As Professor Freund aptly observed "the central problems of a philosophy of equality [are] the problems of relevant groupings."[298]

One proponent of the "wards of the equal protection clause" model has offered a definition of "group" which spotlights the model's underlying problems. Professor Fiss defines a "social group" as having two characteristics: (1) an identity, that is, "a distinct existence apart from its members," and (2) an "interdependence" between "the identity and well-being of the members of the group and the identity and well-being of the group . . . ."[299] Like all such definitions, this one is tied to the social consensus about what kinds of characteristics supply individuals with a common identity;[300] but because that consensus is itself shaped by a normative vision about what *ought* to be relevant for determining how individuals are treated by the state,[301] reliance on any definition of "group" inevitably introduces the calculation of "just and

297. *See, e.g.*, San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56, 74 (1972); Dandridge v. Williams, 397 U.S. 471, 485, 487 (1970). *See* Fiss, *supra* note 20, at 168.

298. Freund, *The Philosophy of Equality*, 1979 WASH. U.L.Q. 11, 12.

299. Fiss, *supra* note 20, at 148.

300. In his essay, Fiss is careful to distinguish between "social groups" and "artificial classes" created by legislation. *Id.* at 156. But as Unger observed, in a society where "all values are individual and subjective," all "[g]roups are artificial" because of the absence of a common understanding of what characteristics identify *real* groups. R. UNGER, *supra* note 277, at 83. *See also id.* at 236-95.

For a thoughtful articulation of a contrary position, see Horowitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 607 (1979).

301. *See* Tribe, *supra* note 229, at 1074-75.

unjust disadvantaging" into the protected-wards model.

Proponents of the model must next determine which groups are entitled to be made wards of the equal protection clause. Professor Fiss suggests three criteria: (1) that the group be a "social group"; (2) that it have been "in a position of perpetual subordination"; and (3) that its political power have been "severely circumscribed."[302] Like the adherents of the protection-from-prejudice model,[303] Professor Fiss looks to the treatment afforded certain groups by the political process to justify selection of these criteria for identifying protected groups.[304] The "wards of the clause" model must look to an externally derived theory of what constitutes just and unjust disadvantaging,[305] however, in order to determine which groups the political system has *wrongfully* subordinated.

Finally, invocation of the protected-wards model requires a finding that a particular government action has resulted in harm to a protected group. Finding "group harm" requires determining which government actions having an unequal impact on a particular group are condemned by the group-disadvantaging principle. Although Fiss advocates a conception of "status harm" that proscribes only "state conduct that impairs the status of a specially disadvantaged group,"[306] his theory is by no means the only one consistent with the "wards of the clause" approach. Impaired group status is not the only damage visited upon members of groups found to be "specially disadvantaged."[307] Typically, the effects of discriminatory treatment take far more concrete forms. These attempts to define group harm reveal once again the inadequacy of the model, for in order to arrive at the conclusion that a particular government action results in proscribed group harm, one must look beyond the model to some theory about what kind of injury to a group constitutes unjust disadvantaging.

302. Fiss, *supra* note 20, at 154-55. According to Professor Fiss, however, possession of some, but less than all, of the characteristics listed would entitle a group to some "variable standard" of judicial protection. *Id.*

303. *See* text accompanying notes 248-52 *supra*.

304. Fiss, *supra* note 20, at 151-55.

305. *See* text accompanying notes 259-63 *supra*.

306. Fiss, *supra* note 20, at 157.

307. *See* Eisenberg, *supra* note 244, at 62 (articulating a "causation principle" that "no person should suffer relative disadvantage at the hands of the government, regardless of official purpose or intention, if such disadvantage is reasonably attributable to race").

E. Model IV: Procedural Equal Protection

1. *The Model Considered*

With increasing frequency during the last several years, the equal protection clause has been interpreted to require that only particular decisionmaking bodies following appropriately deliberate procedures may authorize government actions disadvantaging certain groups.[308] This focus on "due process of lawmaking"[309] requires a court to weigh *who* made a particular decision, and *how* it was made,[310] when determining whether or not a particular governmental deviation from the norm of equal treatment is constitutionally permissible.

To date, the Supreme Court has manifested an interest in "procedural equal protection" in four contexts.[311] First, in a line of cases dating from the Warren era, the Court passed upon the validity of state constitution and local charter provisions which required the approval of a specified majority of voters before a particular government action could be taken. Without ever discussing the question of how much "legislative" authority could be delegated to, or retained by, the voters,[312] the Court struck down two measures mandating public referenda before a state or town could enact open housing legislation[313] but upheld provisions requiring taxpayer consent before a municipality could begin construction of low-cost housing,[314] or grant a zoning variance.[315]

Second, the Supreme Court has sometimes refused to consider a proffered justification for a government action where achievement of the objective was considered beyond the competence of

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308. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 495 (1980) (Powell, J., concurring); *id.* at 532 (Stevens, J., dissenting); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

309. Linde, *supra* note 226, at 238.

310. *See* C. BLACK, *supra* note 286, at 69-70. In analyzing how a decision was made, the Court will consider the scope and content of the decisionmakers' deliberations and the opportunity those disadvantaged by the resulting classification had for an individualized determination.

311. The voting opportunity cases are not considered as part of the procedural equal protection model because in those cases the Court did not consider the *process* by which particular group-disadvantaging decisions were made; instead, it determined that the right to participate in the process itself must be provided to all persons equally.

312. *See* Sager, *Insular Majorities Unabated*: Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1402-03 (1978).

313. Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

314. James v. Valtierria, 402 U.S. 137 (1971).

315. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).

the decisionmaker. In two cases involving the disadvantaging of aliens, the Court refused to consider the advancement of foreign policy or the encouragement of naturalization as legitimate objectives for decisionmaking bodies other than the Congress or the President.[316] Similarly, in *Bakke*, Justice Powell found that, in the absence of explicit legislative or judicial authority, the University of California could not use a race-conscious formula to remedy the effects of past racial discrimination in society.[317]

Third, in a much criticized[318] line of cases, the Supreme Court struck down rules disadvantaging pregnant women,[319] unwed fathers,[320] and out-of-state residents,[321] among others, where it found that each of the rules contained an "irrebuttable presumption" conclusively linking an identifying characteristic with a government objective. The Court did not explicitly prohibit the government from disadvantaging those with the identifying characteristics, it only prohibited the government from doing so without offering them the opportunity to rebut the inference drawn by the rule.[322]

Finally, in a number of cases, the Court refused to consider a proffered justification for a government action in the absence of evidence that the decisionmaker actually intended to achieve the asserted objective.[323] According to one proponent of the procedural equal protection model, the Court's refusal to weigh any objective other than the legislature's stated purpose "can improve the quali-

316. Nyquist v. Mauclet, 431 U.S. 1, 10-11 n.13 (1977) (state could not assert encouragement of naturalization as justification for denying higher education assistance to resident aliens not intending to become citizens); Hampton v. Mow Sun Wong, 426 U.S. 88, 104-14 (1976) (United States Civil Service Commission could not assert foreign policy as justification for barring aliens from employment in Civil Service).

317. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-10 (1978) (Powell, J.). *See* Fullilove v. Klutznick, 448 U.S. 448 (1980). "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power [to ameliorate the effects of past discrimination] than in Congress. . . ." *Id.* at 483 (Burger, C.J.).

318. *See, e.g.*, Weinberger v. Salfi, 422 U.S. 749, 772 (1975); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975) [hereinafter cited as *Irrebuttable Presumptions*]. The doctrine is discussed in text accompanying notes 434-38 *infra*.

319. Turner v. Department of Employment Security, 423 U.S. 44 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

320. Stanley v. Illinois, 405 U.S. 645 (1972).

321. Vlandis v. Kline, 412 U.S. 441 (1973).

322. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1539 (1974).

323. *E.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 648-52 (1975); Eisenstadt v. Baird, 405 U.S. 438, 448-49 (1972). *See* text accompanying notes 399-416 *infra*.

ty of the political process . . . by encouraging a fuller airing in the political arena of the grounds for legislative action."[324]

2. *The Model Evaluated*

Like each of the other models, the procedural equal protection model is not without its analytical gaps. The inherent difficulties of applying the irrebuttable presumption doctrine, the rule against considering any purposes other than those actually intended by the legislature, and the "spheres of legislative competence" approach will be discussed in detail in Part III-C.[325] The question presented here is a deeper one, requiring value judgments regarding how the Court may determine when a decisionmaker, or a decisionmaking process, is not the proper vehicle for arriving at a group-disadvantaging decision. One theory, examining the point at which prejudice denies a group full access to the political bargaining process, was discussed in Part II-B.[326]

Much like the suspicion of "prejudiced" political processes is Justice Stevens' stated disregard for legislative conclusions based on "habit" or "traditional" views rather than on extensive deliberations.[327] Obviously, some habits and traditions are proper, while others are not. Clearly the problem is not that a legislature has substituted long and deeply held values for thorough consideration of an issue; rather, it is that those values may sometimes be unacceptable.[328]

Other theories are more frankly dependent upon visions of social justice currently unfamiliar to equal protection jurisprudence.[329] All of them recognize, as they must, that the determination of how a disadvantaging decision must be reached is dependent upon a substantive vision of the relative importance of competing interests and upon an assessment of the propriety of

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324. Gunther, *supra* note 4, at 44.

325. *See* text accompanying notes 399-453 *infra*.

326. *See* text accompanying notes 248-63 *supra*.

327. *See* Fullilove v. Klutznick, 448 U.S. 448, 557 (1980) (Stevens, J., dissenting); Califano v. Goldfarb, 430 U.S. 199, 222 (1977) (Stevens, J., concurring in the judgment); Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting).

328. *See* J. ELY, *supra* note 69, at 157.

329. *E.g.*, L. TRIBE, *supra* note 47, §§ 17-1 to -3; Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 307 (1975); Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS XVIII, DUE PROCESS 126, 153 (J. Pennock & J. Chapman eds. 1977).

particular procedures.[330]

F. Model V: Mandating "Equal Treatment"[331]

Finally, the equal protection clause may be construed as a demand that the government ensure that all persons are treated equally with respect to a particular activity or interest. To fulfill such a demand, the government may be simultaneously prohibited from distinguishing among "similarly situated" persons and obligated to treat differently those needing assistance in order to engage in an activity on an equal basis with others.[332] This equal-treatment model underlies the "fundamental interest" doctrine.[333]

Unlike the other models, the equal-treatment model suffers from few difficulties in application,[334] for once the government is required to provide equal treatment with respect to a particular interest, only the proper limits of that interest are at issue. Thus, the critical issue in applying the model is whether or not the interest in question is one which the government should be required to ensure that all persons may enjoy equally. At least since the time of Aristotle,[335] the criteria for determining the solution to this problem have remained in dispute.

Professor Ely has argued that fundamental interests should be

330. *See* Tribe, *supra* note 229. "The question of whether adjudicative or representative process is required in a given context simply cannot be analyzed in terms of how fairly and accurately various participatory processes reflect the interests and inputs of those governed by them. Deciding what *kind* of participation the Constitution demands requires analysis not only of the efficacy of alternative processes but also of the character and importance of the interest at stake—its role in the life of the individual as an individual. That analysis, in turn, requires a theory of values and rights as plainly substantive as, and seemingly of a piece with, the theories of values and rights that underlie the Constitution's provisions addressing religion, slavery, and property." *Id.* at 1069. *See also* United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973). The Court must "assess the public and private interests affected by a statutory classification and then decide in each instance whether individualized determination is required or categorical treatment is permitted by the Constitution." *Id.* at 519 (Marshall, J., concurring).

331. *See* L. TRIBE, *supra* note 47, at 992.

332. *Id.* at 992-93.

333. *See* text accompanying notes 38-49 *supra.*

334. One major problem does hamper application of the fundamental interest doctrine. Although significant infringements of fundamental rights demand compelling justification, *e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386 (1978), reasonable restrictions may be imposed. Califano v. Jobst, 434 U.S. 47 (1977). The problem, of course, is deciding where to draw the line. *See Developments in the Law—The Constitution and The Family*, 93 HARV. L. REV. 1156, 1194 (1980).

335. *See* ARISTOTLE, POLITICS, line 1318a-18b.

confined to voting rights, that is to those rights "that are essential to the democratic process and . . . whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo."[336] This intimation that fundamental rights must be linked to the proper working of the democratic process is found in some of the recent equal protection cases.[337] As Professor Michelman has recently argued, however, a vast array of benefits, including education, "health and vigor, presentable attire, . . . [and] shelter, not only from the elements, but from the physical and psychological onslaughts of social debilitation" may be "prerequisites of effective participation in democratic representation."[338] Although Professor Ely's formulation may be attractive to a court concerned with limiting its impact upon the public treasury,[339] its rationale can be expanded far beyond the narrow scheme of rights Ely has envisioned.

In a long series of articles,[340] Professor Michelman has sought to provide a rationale for making "minimal protection"[341] of the poor a part of equal protection. According to Michelman, borrowing from John Rawls,[342] there are a number of "just wants," the satisfaction of which all would agree are a precondition for any just society.[343] The equal protection clause does not demand equality of all things, only an equal protection "against certain hazards associated with impecuniousness which even a society strongly committed to competition and incentives would have to find unjust."[344]

There is no value-free way to determine when all persons should be treated equally by the government, for once the door is opened to use of the clause as a vehicle for "substantive equal pro-

336. J. Ely, *supra* note 69, at 170 (footnote omitted).

337. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 36 (1973). *But see, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978). The Burger Court's choice of interests for extraordinary judicial protection is discussed in text accompanying notes 366-98 *infra*.

338. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U.L.Q. 659, 677.

339. *See* Tribe, *supra* note 229. "Such an account permits courts to perceive and portray themselves as servants of democracy even as they strike down the actions of supposedly democratic governments." *Id.* at 1063 (footnote omitted).

340. *E.g.*, Michelman, *supra* note 50; Michelman, *supra* note 338.

341. Michelman, *supra* note 50, at 35.

342. J. Rawls, A Theory of Justice (1971).

343. Michelman, *supra* note 50, at 15.

344. *Id.* at 42 (footnote omitted). *See also* L. Tribe, *supra* note 47, at 819-20.

tection,"[345] the Court must look beyond the language of the Fourteenth Amendment to determine when and with respect to what interests the government must ensure equal treatment. Thus, like each of the previous models, the model of equal treatment is dependent on external value judgments to determine when it is just for the government to cause, or to countenance, inequality.

III.

In this segment of the article, by analyzing the extent of the protection afforded to various groups and interests and by evaluating the various analytic devices employed by the Court, an attempt will be made to determine how the five models discussed above have been applied in the Burger Court's equal protection decisions.

A. The Scope of Protection Given to Various Groups By the Burger Court

As discussed earlier,[346] the Burger Court has couched most of its equal protection decisions in the language of the protection-from-prejudice model.[347] In determining which level of scrutiny to use on a statutory classification, it has purported to inquire whether or not the disadvantaged group has suffered from a history of "discriminatory" treatment[348] and whether or not such treatment has required the group to receive "extraordinary . . . protection from the majoritarian political process."[349] The Court's reliance on other criteria for determining which level of scrutiny to apply to a classification, however, along with its consistent refusal to analyze closely a disadvantaged group's status in the political arena and its willingness to engage in a balancing of the costs and benefits of particular statutes,[350] reflects both a failure to embrace fully the norm of equality expressed in the anti-prejudice model and the problems inherent in applying the model.

345. Tussman & tenBroek, *supra* note 27, at 361-65.

346. *See* text accompanying notes 248-52 *supra*.

347. *E.g.*, Graham v. Richardson, 403 U.S. 365, 371-72 (1971). *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291-300 (1978) (Powell, J.).

348. *E.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam); Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

349. Mathews v. Lucas, 427 U.S. 495, 506 (1976) (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

350. *See* text accompanying notes 264-65 *supra*.

In addition to searching for "prejudice," the Court has sometimes focused on whether or not the characteristic identifying a disadvantaged group is "immutable."[351] Although some immutable qualities are generally irrelevant to legitimate legislative purposes, and statutes relying upon them are therefore likely to be motivated by animus, many classifications based on immutable characteristics, such as "physical ability and intelligence, are typically accepted as legitimate."[352] Thus, either immutability is a criterion for the selection of groups for judicial protection which is itself irrelevant to whether or not the statute in question was motivated by animus, or, more likely, it is one criterion the Court uses to determine exactly what "prejudice" is. Whether or not the Court articulates its conclusion that prejudice is involved, however, its use of immutability as a criterion for selecting the appropriate level of scrutiny reflects its recognition that it is sometimes unjust to disadvantage someone on the basis of a characteristic he or she is powerless to change.

Although the list of criteria the Court has used to determine which level of scrutiny is appropriate frequently has been criticized,[353] the Court's application of these criteria has provoked far more critical responses. Instead of engaging in a careful analysis of how much political power a disadvantaged group possesses, the Court has drawn from its own vision of how much influence a particular minority can wield and how odious a particular classification may be. Thus, legislative classifications disadvantaging whites,[354] women,[355] men,[356] and illegitimate children[357] generally receive little deference from the Court, while those disadvantaging the aged,[358] methadone users,[359] and recipients of Aid to Families

351. *E.g.*, Parham v. Hughes, 441 U.S. 347, 351 (1979) (plurality opinion). *See also* Nyquist v. Mauclet, 432 U.S. 1, 17-21 (1977) (Rehnquist, J., dissenting).

352. J. ELY, *supra* note 69, at 150.

353. *E.g.*, *id.* at 148-55.

354. Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

355. Reed v. Reed, 404 U.S. 71 (1971).

356. Orr v. Orr, 440 U.S. 268 (1979). Heightened judicial scrutiny of classifications discriminating against men may be ending. *But see* Michael M. v. Superior Court, 101 S. Ct. 1200 (1981). "[W]e find nothing to suggest that men, because of past discrimination or peculiar disadvantages are in need of the special solicitude of the courts." *Id.* at 1207-08.

357. Trimble v. Gordon, 430 U.S. 762 (1977).

358. Vance v. Bradley, 440 U.S. 93 (1979).

359. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

with Dependent Children[360] are given a strong presumption of constitutionality. Without attempting a detailed comparison of the relative social standing and political influence of groups receiving judicial protection with that of groups not receiving such protection, it seems fair to observe that no description of American society has yet to rank the former groups consistently below the latter in political power or social status. If the Supreme Court is seeking to use the equal protection clause to correct a "malfunctioning" of the political process,[361] it obviously is not attempting to protect groups from the effects of popular hatred or political impotence.[362] Instead, in a manner reminiscent of the "wards of the equal protection clause" model, the Court apparently has sought to reverse the effects of its own rather unusual conception of "prejudice."

Adherents of the protection-from-prejudice model have criticized the Burger Court's apparent inconsistency and have sought to distinguish its "value-oriented jurisprudence"[363] from the allegedly neutral judgment dictated by the model. But the model's notion of prejudice is necessarily dependent on a set of value judgments about when it is just to disadvantage individuals on the basis of a given characteristic.[364] Thus, the only sound criticism of the Burger Court's selection of groups for heightened protection is not that it reflects a "value-imposition methodology,"[365] but that it reflects a conception of the political power of particular groups and their "just" place within the society that is inconsistent with the critics', or our own, ideal of fairness.

B. The Court's Selection of Interests for Heightened Judicial Protection

As was noted in the previous discussion of the Court and the poor,[366] the Burger Court has added only one "fundamental inter-

360. Jefferson v. Hackney, 406 U.S. 535 (1972).

361. *See* text accompanying notes 218-25 *supra.*

362. As critics have pointed out, whites and men have hardly been the subject of widespread animus by those who have made this country's laws. *See, e.g.,* J. ELY, *supra* note 69, at 148-49 n.52. On the other hand, welfare recipients and former addicts have consistently suffered from societal opprobrium. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 603-04 n.8 (1979) (White, J., dissenting); Jefferson v. Hackney, 406 U.S. 535, 575 (1972) (Marshall, J., dissenting). *See also* Michelman, *supra* note 50, at 19-20.

363. J. ELY, *supra* note 69, at 149 n.52.

364. *See* text accompanying notes 259-63 *supra.*

365. J. ELY, *supra* note 69, at 149 n.52.

366. *See* text accompanying notes 168-77 *supra.*

est," the right to marry,[367] to the list of activities with respect to which individuals have a right to "equal treatment." At the same time, the Court has rejected demands that education,[368] housing,[369] public employment[370] and publicly financed abortion[371] be declared fundamental interests. In *Zablocki v. Redhail*,[372] the Court struck down a Wisconsin law requiring a divorced parent with a court-imposed child-support obligation to obtain court permission before remarrying. In its opinion, the Court reaffirmed "the fundamental character of the right to marry,"[373] but unlike its earlier "fundamental interest" decisions,[374] the Court explicitly recognized that the substantiality of a state's justification for regulation of a fundamental right is a function of the extent to which the regulation burdens the exercise of that right:

> [W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites to marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marriage relationship may legitimately be imposed.[375]

As noted above, the "equal treatment" model, which is the source of equal protection fundamental interests, must draw meaning from some externally supplied vision of the circumstances under which the government must treat all persons equally.[376] A number of formulations have been advanced as rationales for the Court's selection of fundamental interests; however, none are totally consistent with the Court's decisions. Some commentators have argued that interests should be accorded "fundamental" status under the equal protection clause if they are protected else-

367. Zablocki v. Redhail, 434 U.S. 374 (1978). Although the right to marry has previously been recognized as important, Loving v. Virginia, 388 U.S. 1 (1962), Skinner v. Oklahoma, 316 U.S. 535 (1942), *Zablocki* is the first equal protection decision squarely resting on its fundamentality.

368. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), discussed at text accompanying notes 164-67 *supra*.

369. Lindsey v. Normet, 405 U.S. 56 (1972).

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

371. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

372. 434 U.S. 374 (1978).

373. *Id.* at 386.

374. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

375. Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

376. *See* text accompanying notes 331-44 *supra*.

where in the Constitution.[377] Although this rationale may explain the Court's decisions regarding the rights to appellate review and to marital privacy,[378] it fails to explain the Court's holdings in the abortion and right-to-travel cases.[379] The notion, discussed earlier, that interests are "fundamental" only if they are necessary to allow an individual to participate fully in the political process is both open-ended[380] and inconsistent with the Court's decisions finding the rights to marry and to procreate "fundamental."[381] As with the Supreme Court's choice of groups for heightened judicial protection, its selection of fundamental interests can be attributed only to the Court's own vision of what constitutes just and unjust disadvantaging.

The Supreme Court has used a variety of the analytic devices characteristic of "intermediate" scrutiny to extend some protection to a number of intimate activities not explicitly deemed "fundamental." In *Eisenstadt v. Baird*,[382] while purporting to use only a rational relationship test in "an opinion in which the actual intensity of scrutiny was at variance with the articulated standard,"[383] the Court struck down a Massachusetts statute making it more difficult for unmarried persons than for married persons to obtain contraceptives. As is necessary to avoid making the required ra-

377. *See, e.g.*, C. BLACK, *supra* note 286, at 27-28. Perhaps such an interpretation could explain why the Court occasionally analyzes a statute prohibiting only certain kinds of speech under the equal protection clause rather than under the First Amendment. *See* Carey v. Brown, 447 U.S. 455 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); L. TRIBE, *supra* note 47, at 1002.

378. Both interests have also received protection under the due process clause. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Griffin v. Illinois, 351 U.S. 12 (1956).

379. Although in Maher v. Roe, 432 U.S. 464 (1977) and Harris v. McRae, 448 U.S. 297 (1980), the Court sought to distinguish the right to have an abortion, which found protection under the due process clause in Roe v. Wade, 410 U.S. 113 (1973), from the right to have a publicly financed abortion, 432 U.S. at 474, 448 U.S. at 315; it is clear that the state's attempt to discourage the exercise of a constitutional right was no different from that condemned in Shapiro v. Thompson, 394 U.S. 618 (1969) (in which no constitutional provision other than the equal protection clause was used as authority for the proposition that a state could not discourage a person from exercising the right of interstate travel). *See* Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1123-25 (1980).

380. *See* text accompanying notes 326-27 *supra*.

381. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Skinner v. Oklahoma, 316 U.S. 535 (1942).

382. 405 U.S. 438 (1972).

383. Gunther, *supra* note 4, at 36.

tionality model a tautology,[384] the Court refused to consider two legislative purposes that were asserted by the Commonwealth at trial but which appeared to be inconsistent with the language and history of the statute.[385] Then, conjuring up another purpose plainly ill-served by the statute, that of banning contraceptives, the Court found the statutory distinction on the basis of marital status irrational, "invidious" and unconstitutional.[386]

The commentators are split on a determination of which vision of the equal protection clause the Court invoked in *Eisenstadt*. Whether the Justices drew upon a determination that some public purposes are not sufficient to justify limiting an individual's interest in purchasing contraceptives,[387] or upon a theory about how the legislature must reach a decision affecting such an interest,[388] it is clear that no incantation of "rationality," without more, can explain the Court's decision.[389]

Finally, the Court has extended protection to certain "constitutionally preferred interests"[390] by striking down "irrebuttable presumptions"[391] and requiring case-by-case determinations that certain judicially prescribed conditions exist before the government may adversely affect those interests. In three cases, the Court used the irrebuttable presumption doctrine to strike down classifications infringing upon the constitutionally recognized interest in child rearing.[392] The first case invalidated an Illinois law found to be conclusively presuming unwed fathers to be unfit to have cus-

384. *See* text accompanying notes 275-84 *supra*.

385. The Court dismissed the Massachusetts Supreme Judicial Court's finding that the law was intended to deter premarital sex, noting that unmarried persons could lawfully obtain contraceptives to prevent disease and that married persons could obtain contraceptives without regard to their use. Eisenstadt v. Baird, 405 U.S. 438, 445-49 (1972). In addition, the Court examined the history of the statute and determined that the protection of public health could not have motivated the legislature to enact the limited prohibition. *Id.* at 450-52.

386. *Id.* at 454-55.

387. Professor Gunther has argued that the Court's "rejection of proffered state purposes strongly suggests a value-laden appraisal of the legitimacy of ends." Gunther, *supra* note 4, at 35.

388. *Id.* at 43-47.

389. *See Legislative Purpose, supra* note 284, at 125-27.

390. Ackerman, *The Conclusive Presumption Shuffle*, 125 U. PA. L. REV. 761, 774-75 (1977).

391. "Irrebuttable presumptions" are discussed in text accompanying notes 434-38 *infra*.

392. *See also* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

tody of their children, while granting all other parents the right to a hearing on fitness.[393] The second and third cases struck down rules "presuming" pregnant women to be incapacitated, thereby barring them from teaching[394] and from collecting unemployment benefits.[395]

The irrebuttable presumption doctrine was also used in a case involving an interest closely linked with the right of interstate travel. In *Vlandis v. Kline*,[396] the Court struck down as "not necessarily or universally true in fact"[397] a Connecticut law which, according to the Court, presumed that unmarried applicants to the University of Connecticut who had legal addresses outside the state during the prior year, and married applicants who had out-of-state addresses at the time of application, were nonresidents for tuition purposes.[398]

In selecting interests important enough to merit its least deferential scrutiny of impinging legislation, the Court has not adhered to completely any one of the models previously discussed. Though it has drawn from the equal-treatment model in fixing certain rights as fundamental, its selection of fundamental interests is more probably attributable to the Court's own ideas about what constitutes just and unjust disadvantaging. It has rendered decisions in language consistent with the required-rationality model, yet this model alone does not provide a complete explanation for the Court's decisions.

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393. Stanley v. Illinois, 405 U.S. 645, 654, 657-58 (1972). *See* text accompanying note 141 *supra*.

394. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645-46 (1974) (striking down mandatory leave of absence for pregnant teacher beginning four months before the expected birth of her child).

395. Turner v. Department of Employment Security, 423 U.S. 44, 45-46 (1975) (per curiam) (striking down Utah statute making women ineligible for unemployment benefits during last twelve weeks of pregnancy and for six weeks following childbirth).

396. 412 U.S. 441 (1973).

397. *Id.* at 452.

398. *See also* Carrington v. Rash, 380 U.S. 89 (1965) (striking down a Texas ban on voting by military personnel because it was found to presume conclusively that all soldiers did not reside in the counties where they were stationed).

For an analysis of the Court's selection of interests for protection under the "irrebuttable presumption doctrine," see notes 434-38 and accompanying text *infra*.

C. The Analytic Techniques of Intermediate Scrutiny

1. *Failing to Accept a Possible Governmental Objective as a Justification for a Statutory Classification*

The centerpiece of the Supreme Court's analysis of cases arising under the equal protection clause is its evaluation of possible government justifications for treating individuals unequally. When it has concluded that a particular classification fails to advance an objective of sufficient importance to justify the distinction, the Court has offered five rationales in support of its conclusion.

a. The Proscription of Illegitimate Purposes

Where the language or history of a statute indicates that the legislature intended to harm or punish those disadvantaged by the provision, the Court has sometimes found the legislative motive illegitimate. Then, applying the required-rationality model, it has held that the statute fails to serve rationally a "*legitimate* governmental interest."[399] But the determination that a particular motive is "invidious" states a conclusion, not an analysis. The Court has not indicated why it is permissible for the legislature to intend to disadvantage recipients of Aid to Families with Dependent Children in comparison with other public-benefit recipients[400] but impermissible to disadvantage deliberately those living in households consisting of two or more unrelated persons by denying them food stamps.[401] Similarly, the Court has offered no explanation why it is impermissible for a state to discourage unmarried persons from purchasing contraceptives[402] but permissible to discourage indigent women from having abortions.[403] The explanation cannot be found in the words of the equal protection clause; it is hidden in the Court's vision of which inequalities are just and which are unjust.

399. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (emphasis in original). *See also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) (finding it "illogical and unjust" to condemn extramarital "liasons" by denying illegitimate children the right to recover under workmen's compensation law).

400. *See* Jefferson v. Hackney, 406 U.S. 535, 575 (1972) (Marshall, J., dissenting) (citing evidence that a Texas law giving AFDC recipients a lower percentage of "need" level than that of disabled or aged persons was motivated by unpopularity of AFDC recipients).

401. United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

402. This is the proposition for which *Eisenstadt v. Baird* was cited by the Court in Carey v. Population Serv. Int'l, 431 U.S. 678, 686-87 (1977).

403. Harris v. McRae, 448 U.S. 297, 315 (1980).

b. Rejecting Insufficiently Important Objectives

Where a group or interest found to be entitled to heightened judicial protection is disadvantaged by a statutory classification, the Court has often required proof by the government that the distinction serves an "important" governmental objective.[404] In these cases, the Court has rejected proffered justifications based solely on improved "efficiency" or "administrative convenience" which are inherent whenever a rational-basis test is used.[405] This requirement is characteristic of the protection-from-prejudice model.[406] Other than by dismissing administrative convenience as inadequate and by finding certain "benign" purposes sufficient, however,[407] the Court has failed to indicate its criteria for determining which governmental objectives are "important" or "compelling."[408]

c. Examining Only the Legislature's Actual Purpose

In several "intermediate" equal protection decisions, the Supreme Court has refused to consider a proffered governmental purpose where the language or history of a statute indicated that the legislature had not intended to achieve that objective.[409] This has

404. *E.g.*, Craig v. Boren, 429 U.S. 190, 198 (1976). *See* L. TRIBE, *supra* note 47, at 1082-83.

405. *E.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151-52 (1980); Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

406. *See* text accompanying notes 260-65 *supra*.

407. To date, members of the Court have found seven purposes sufficiently important to satisfy the test articulated in Craig v. Boren, 429 U.S. 190, 198 (1976): (1) remedying the effects of past racial discrimination, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360-62 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring and dissenting); (2) achieving an academically diverse student body, *id.* at 311 (Powell, J.); (3) remedying the effects of discrimination against women, Califano v. Webster, 430 U.S. 313 (1977); (4) "avoiding difficult problems in proving paternity after the death of an illegitimate child," Parham v. Hughes, 441 U.S. 347, 359-60 (1979) (Powell, J., concurring in the judgment); (5) "providing for the well-being of illegitimate children," Caban v. Mohammed, 441 U.S. 380, 391 (1979); (6) preventing teenage pregnancy, Michael M. v. Superior Court, 101 S. Ct. 1200, 1216 n.7 (1981) (plurality opinion); *id.* at 1214-15 (Brennan, J., dissenting); and (7) "raising and supporting armies," Rostker v. Goldberg, 101 S. Ct. 2646, 2654 (1981). *See also* Wengler v. Druggists Mut. Ins. Co., 146 U.S. 142 (1980). "Providing for needy spouses is surely an important governmental objective." *Id.* at 151.

408. *See* Elections Bd. v. Socialist Worker's Party, 440 U.S. 173 (1979). "I have never been able to fully appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all." *Id.* at 188 (Blackmun, J., concurring).

409. *E.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Eisenstadt v. Baird, 405 U.S. 438, 449 (1972).

occurred most frequently in cases involving gender discrimination, in which the Court has generally struck down statutes favoring women except where it found that the decisionmaker actually intended to redress the effects of past discrimination or to achieve some other "important" objective.[410] Recent decisions, however, suggest that a majority of the Court will consider any purpose proffered by the defenders of the legislative classification, even if there is convincing evidence that few, if any, legislators sought to achieve it.[411]

Scrutinizing only a decisionmaker's actual purpose is consistent with two of the models previously discussed. Where a legislature enacts a law because of a hostile motive, the protection-from-prejudice model would condemn the statute even if it actually did serve legitimate state objectives.[412] However, without some theory regarding which legislative motives are proscribed, considering only a statute's "actual" purpose is a meaningless exercise because any classification is likely to dovetail with the objective that motivated enactment of the statute.[413]

The "actual purpose" requirement may also reflect use of the procedural equal protection model. As Gerald Gunther argued, considering only those purposes that actually motivated the legislature may improve the quality of legislative deliberations by compelling decisionmakers to state their real reasons for enacting a new law, thereby increasing their political accountability.[414] Al-

410. *Compare* Califano v. Goldfarb, 430 U.S. 199, 216 (1977) *with* Califano v. Webster, 430 U.S. 313, 317-18 (1977).

411. Michael M. v. Superior Court, 101 S. Ct. 1200, 1204-07 (1981) (plurality opinion). For a debate between two Justices about whether the Court has ever accepted the argument that it may consider only the legislation's actual purpose, see Kassel v. Consolidated Freightways Corp., 101 S. Ct. 1309, 1322 n.3 (1981) (Brennan, J., concurring in the result and arguing the affirmative); *id.* at 1332 (Rehnquist, J., dissenting and arguing the negative).

412. Writing for a four-judge plurality in Michael M. v. Superior Court, 101 S. Ct. 1200 (1981), Justice Rehnquist rejected the proposition that the equal protection clause condemns a statute enacted in part because of an "illicit" legislative motive. "[T]he only question under the Federal Constitution—is whether the legislation violates the Equal Protection Clause . . ., not whether its supporters may have endorsed it for reasons no longer generally accepted. Even if [an impermissible objective] were one of the motives of the statute, . . . [the] argument must fail because 'it is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" *Id.* at 1206 n.7 (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).

413. *See* text accompanying note 284 *supra;* J. ELY, *supra* note 69, at 126 n.34.

414. *See* Gunther, *supra* note 4, at 47. *See also* United States R.R. Retirement Bd. v.

though this rationale has provoked a great deal of criticism from other commentators,[415] there is little indication in the Court's opinions that it has employed the procedural equal protection model when it has "limit[ed] the use of afterthought."[416]

d. Refusing to Consider Purposes Not Argued by a Classification's Defenders

Where a decisionmaker's apparent purpose has become controversial, and where, perhaps as a result, government counsel failed to assert that objective as a justification for the classification, the Court has occasionally refused to consider it as a rationale for the rule.[417] Proponents of this approach have argued that requiring government lawyers to articulate justifications for a statute enhances the accountability of the political process.[418] But because government counsel may fail to assert a justification for a variety of reasons,[419] and because many equal protection issues arise in cases between private parties,[420] this justification for "requiring current articulation"[421] is not persuasive.[422]

Fritz, 449 U.S. 166, 187-193 (1980) (Brennan, J., dissenting) (refusing to accept "a justification suggested by government attorneys, but never adopted by Congress," where there was a suspicion "that Congress may have been misled" by the lobbyists who drafted the statute); Fullilove v. Klutznick, 448 U.S. 448 (1980). Where "the classification was not adequately . . . explained by a statement of legislative purpose," Justice Stevens would reach a "more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue . . . merits." *Id.* at 2811-14 (Stevens, J., dissenting) (footnote omitted). *But see* Tushnet, *supra* note 245, arguing that "suspensive vetoes [like that suggested by Justice Stevens] are often a charade." *Id.* at 1059-60.

415. *See, e.g.*, J. ELY, *supra* note 69. "It is difficult to imagine that accountability would be enhanced by such a system: an individual legislator would remain free to disavow some of the purposes listed [in a statutory preamble designed to mention objectives sufficient to justify the measure] and to attribute others that seem useful to his or her understanding of the [legislative history]." *Id.* at 128.

416. L. TRIBE, *supra* note 47, at 1085.

417. *E.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974). According to Professor Ely, the Supreme Court "seems to ignore [this approach] more often than it invokes it." J. ELY, *supra* note 69, at 125 (footnote omitted).

418. *See* Gunther, *supra* note 4. "A state court's or attorney general office's description of purpose should be acceptable. If the Court were to require an articulation of purpose from an authoritative state source, rather than hypothesizing one of its own, there would at least be indirect pressure on the legislature to state its own reasons for selecting particular means and classifications." *Id.* at 47.

419. *See* J. ELY, *supra* note 69, at 126-27.

420. *E.g.*, Orr v. Orr, 440 U.S. 268 (1979).

421. L. TRIBE, *supra* note 47, at 1083.

422. Note, however, that because a "lawyer wants to win, and in order to do so is

e. Manipulating the Formulation of the Legislature's Objective

Finally, in order to find a distasteful classification "irrational," the Court may describe the legislature's motivation as the achievement of a single, narrow objective.[423] Because, as was discussed earlier, most statutes are the result of a compromise struck by several interest groups,[424] formulating the legislative purpose in terms of only one goal will maximize the appearance of underinclusiveness or overinclusiveness, which often is a deliberate result of political bargaining.[425] Therefore, in order to condemn a statute by scrutinizing the breadth of its objective, the Court must require a closer "fit"—a smaller incidence of overinclusiveness or underinclusiveness—than is normally required under the rational-relationship standard.

2. *Demanding "Close Fit"*[426]

When a group found to require heightened protection is disadvantaged by a classification, the Supreme Court has often required that the classification be "substantially related" to the statute's purposes in order to justify the inequality.[427] This requirement of "close fit" constitutes a demand that a classification describe most of those included within the ambit of the statutory objective and few of those falling outside the scope of the legislative purpose.[428] Although "close fit" has been explicitly required in many decisions involving classifications based on race, gender, alienage and illegitimate birth,[429] the Court sometimes has condemned overinclusiveness and underinclusiveness when important interests were in-

likely to rely on any purpose that will help—that is, any that is not flat-out unconstitutional," J. ELY, *supra* note 69, at 126 (footnote omitted), the requirement of current articulation is unlikely to result in the invalidation of many statutes.

423. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972). *See Legislative Purpose, supra* note 284, at 135.

424. *See* Linde, *supra* note 226. "[T]he ineffectiveness of a law to achieve its goal may be itself a policy . . . and may be the price for permitting the law to reach enactment." *Id.* at 233.

425. *Legislative Purpose, supra* note 284, at 137.

426. L. TRIBE, *supra* note 47, at 1083.

427. *E.g.*, Califano v. Webster, 430 U.S. 313, 316-17 (1977).

428. *See generally, Equal Protection, supra* note 280.

429. Trimble v. Gordon, 430 U.S. 762, 769 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976); *In re* Griffiths, 413 U.S. 717, 721-22 (1973); Loving v. Virginia, 388 U.S. 1, 12 (1967).

fringed upon by statutory rules.[430]

The "close fit" requirement is consistent with the protection-from-prejudice model's "search" for illicit legislative motive.[431] As was concluded earlier, however, the verbal formulations constituting strict and intermediate scrutiny simply mask judicial weighing of the benefits and harms of any given statutory classification.[432] Filtered through the model, the "close fit" requirement may be viewed as a command to the government to avoid *unnecessarily* disadvantaging members of a protected group.[433]

3. *Condemning Irrebuttable Presumptions*

For a brief period during the first half of the 1970's, the Supreme Court often condemned "conclusive presumptions" when a government classification adversely affected certain important interests.[434] In these cases, the Court did not prohibit the state from taking the characteristic embodied in the statutory classification into account; instead, it required that an individual disadvantaged by the classification be given an opportunity to rebut the presumption linking the characteristic to the government objective. Condemning an irrebuttable presumption has the effect of reallocating decisionmaking authority to officials charged with determining whether the government purpose purportedly served by the initial classification would actually be served by disadvantaging a particular individual.[435] Consequently, the individual is granted the opportunity to participate in the decisionmaking process, a result favorable both for instrumental reasons and because such participation may enhance the individual's sense of dignity.[436]

"[B]ecause virtually any summarily classifying rule is susceptible to challenge as a conclusive presumption,"[437] however, the Su-

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430. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

431. *See* text accompanying notes 235-37 *supra*.

432. *See* text accompanying notes 262-65 *supra*.

433. As Owen Fiss pointed out, "[i]n contrast to the case of shoes, the concept of fit [in equal protection doctrine] . . . has no quantative content." Fiss, *supra* note 20, at 121. Thus, requirements that a statute be "substantially related to" or "necessary to achieve" a legislative purpose are susceptible of considerable manipulation by a court, particularly if no indication is given about how the costs of using alternative classifications are to be weighed. *See Equal Protection, supra* note 280.

434. *See* text accompanying notes 390-98 *supra*.

435. *See* L. TRIBE, *supra* note 47, at 1095, 1097.

436. *Id.*

437. *Irrebuttable Presumptions, supra* note 318, at 450 (footnote omitted).

preme Court must offer some set of qualifying criteria to determine whether adjudication is required or rulemaking is sufficient when a particular interest is adversely affected by a legislative classification. But other than some vague language in a 1975 *per curiam* decision,[438] the Court has offered no indication of which interests the government may not infringe upon through the use of summary classifications. Perhaps the difficulty of such a task, or the obvious need to explain any selection criteria in terms of judicial value judgments that have rarely been made openly, has convinced the Court to abandon the doctrine in its infancy.

4. *Delineating Spheres of Decisionmaking Competence*

In a number of recent equal protection cases, the Supreme Court has drawn upon its own conception of the proper allocation of decisionmaking authority among the branches and agencies of government. It has rejected a proffered justification for a classification that it found was not illegitimate *per se*, but which was beyond the authority of the agency drawing it. For example, in *Hampton v. Mow Sun Wong*,[439] the Court struck down a United States Civil Service Commission regulation barring aliens from the federal civil service. In so doing, it refused to consider the Commission's asserted objective of encouraging nationalization, finding this to be properly a concern for Congress rather than for the agency.[440] Later developments in the case make it clear that it was dissatisfaction with the decisionmaker, not with the disqualification, that motivated the Court's decision.[441]

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438. Turner v. Department of Employment Security, 423 U.S. 44 (1975). "The Fourteenth Amendment requires that [a state] must achieve legitimate state ends through more individualized means when basic human liberties are at stake." *Id.* at 46. This was the last time a statute was condemned as a conclusive presumption. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 592 n.38 (1979) (finding "no merit" in District Court's "due process argument" that the Authority's rule against employing methadone users created an irrebuttable presumption of unemployability).

439. 426 U.S. 88 (1976).

440. *Id.* at 103. *Cf.* Rostker v. Goldberg, 101 S. Ct. 2646, 2652 (1981) (discussing the Courts' "healthy deference to legislative and executive judgment in the area of military affairs"); Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (Congress has "broad remedial powers" to ameliorate the effects of past race discrimination).

441. After the Court's decision, President Ford issued an executive order barring resident aliens from the Federal Civil Service. Exec. Order No. 11,935, 5 C.F.R. § 7.4 (1980). The Ninth Circuit affirmed a district court decision upholding the constitutionality of the executive order. Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980). *But see* Mathews v. Diaz, 426 U.S. 67, 81-82 (1976).

The Court has also varied its approach to classifications disadvantaging aliens according to whether or not the role from which noncitizens were barred was, in the Court's opinion, an integral part of a state's political process. Where an alien was prohibited from serving in a position that "involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community,"[442] the Court has applied "minimal scrutiny."[443] Elsewhere, as previously noted, the Court has applied strict scrutiny to state statutes discriminating on the basis of alienage.[444]

The Court has also found that legislation "[i]n the area of economics and social welfare"[445] is peculiarly within the competence of the political branches and has required only a "reasonable basis" for classifications in statutes directed to these cases. The decisions striking down social welfare legislation,[446] however, indicate that the invocation of the *Dandridge* formulation states a description of, not the justification for, the Court's very deferential approach.

Every attempt to rest an equal protection decision upon a determination of the proper allocation of decisionmaking authority requires reference to some set of value judgments concerning the qualities a rulemaking body must possess in order to be adjudged competent to disadvantage a particular group or interest. Although some of the Court's opinions rely upon explicit Constitutional grants of decisionmaking authority to Congress or the executive, other opinions fail to explain the reason for judicial deference.[447]

5. *Characterizing the Classification*

Where a legislative scheme does not explicitly identify the classes receiving different treatment, the Court has considerable freedom in characterizing affected groups or interests. For exam-

442. Foley v. Connelie, 435 U.S. 291, 296 (1978).

443. *Id.*

444. *See* text accompanying notes 71-73 *supra*.

445. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

446. *E.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

447. *Compare* Rostker v. Goldberg, 101 S. Ct. 2646, 2649 (1981) (deferring to Congressional judgment in light of Constitutional delegation of power to raise and support armies) *with* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (no textual explanation for Court's deference to state judgments in one area of economics and social welfare).

ple, in *Geduldig v. Aiello*,[448] a provision denying unemployment disability benefits to pregnant women was described by the majority as a distinction between "pregnant women and non-pregnant persons"[449] requiring only minimal scrutiny, while the dissenters found a gender-based classification demanding strict scrutiny.[450]

The importance of how a classification is characterized stems from the approach taken by the Court to equal protection cases. Because the Court purports to analyze only classifications,[451] not outcomes, and because the characterization of a rule determines which level of scrutiny must be applied,[452] the outcome of the battle over the fate of a rule can be determined by the description of those disadvantaged by it.[453]

Conclusion

The answer to the question of "what inequalities are tolerable under what circumstances"[454] lies not in the mechanical application of various standards of review,[455] but in a vision of what con-

448. 417 U.S. 484 (1974).

449. *Id.* at 496 n.20.

450. *Id.* at 502-04 (Brennan, J., dissenting). *See also* Parham v. Hughes, 441 U.S. 347, 351 (1979); *id.* at 361, in which the Justices split 5-4 on whether a Georgia statute (denying the father, but not the mother, of an illegitimate child the right to recover for a child's wrongful death unless the father had legally acknowledged the child) contained a gender-based classification.

451. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring).

452. *Compare* Nyquist v. Mauclet, 432 U.S. 1, 7 (1977) (rule disadvantaging only some resident aliens found inherently suspect) *with* Geduldig v. Aiello, 417 U.S. 484 (1974) (rule disadvantaging only some women upheld using minimal scrutiny).

453. *Cf.* Karst & Horowitz, *supra* note 94, at 22 (in which the authors described Justice Powell's opinion in *Bakke*: "[F]or Justice Powell, the standard of review is not merely the reflection of some equal protection principle: it *is* the principle").

The intent requirement articulated in Washington v. Davis, 426 U.S. 229 (1976), may be understood as an effort to avoid the classificatory problems discussed herein. *See* text accompanying notes 78-81 *supra*. *Compare* Geduldig v. Aiello, 417 U.S. 484 (1974) *with* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).

454. J. ELY, *supra* note 69, at 32.

455. After reviewing the Supreme Court's recent equal protection cases, Professors Karst and Horowitz concluded that "in focusing on the standard of review, the Court gave insufficient attention to matters of substance. If its decisions are to be seen as principled, the Court must explain its principles as elaborations of substantive values in the Constitution. What is needed, then, is not further refinement of judicial methodology, but clear statement of the substantive meaning of equal protection." Karst & Horowitz, *supra* note 94, at 24. Recent developments suggest that the Court may be beginning to retreat from its total reliance on standards of review. *See, e.g.*, Rostker v. Goldberg, 101 S. Ct. 2646 (1981).

stitutes just and unjust disadvantaging. As was discussed earlier, however, no single understanding of the meaning of the equal protection clause animates the Supreme Court's selection of groups and interests for heightened protection or its use of various analytic devices to decide particular cases. Indeed, the Burger Court has simply failed to explain what its "theory of justice" is.[456] Planted in its opinions, however, are the seeds of five models of equal protection, each of which articulates one or more norms that help to distinguish just from unjust government regulation. But because they are dependent on the more specific value judgments necessary to decide real cases, the models of equal protection, like the clause itself, can only serve as lenses through which to contemplate the value of equality.

"We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further 'refinement' in the applicable tests. . . . Announced degrees of 'deference' to legislative judgment, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. *Id.* at 2654. On "the fruitless controversy over standards of review," see Tushnet, Book Review, 78 MICH. L. REV. 694, 701 (1980).

456. That the Court has failed to do so is hardly surprising, in light of the fact that a coherent theory of the proper limits on governmental authority depends on a consistent vision of the role of the individual in a liberal society. *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 360-62, 382 (1979). Professor Kennedy argues that there is an inherent contradiction between the ideal of individual freedom and the "communal coercive action that is necessary to achieve it," which dooms to failure any attempt to derive a consistent set of assumptions covering the proper spheres of individual and collective conduct. *Id.* at 211. If so, a more candid attempt by the Court to outline the normative premises underlying its equal protection decisions can do little to save constitutional theory from the inherent contradiction. *See* Tushnet, *supra* note 245, at 1060-62.