ON THE "USEFULNESS" OF SUSPECT CLASSIFICATIONS

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If state action is the paradigm of a "conceptual disaster area" in constitutional analysis, the system of "tiers" of scrutiny in equal protection cases must be judged a close second. Justice Marshall's criticism of the Supreme Court's "rigidified approach"[1] has never been refuted, and the addition of an intermediate tier (or tiers) in the last decade has failed to dispel the confusion.[2] Indeed, the fact that the Justices insist that identifiable tiers exist but cannot agree on their number must be a source of doctrinal discomfort.

Nevertheless, some differentiation in the intensity of judicial scrutiny of challenged legislation seems necessary. The allied principles of majoritarian democracy and judicial restraint require that courts give substantial deference to most actions of the political branches of government, while the guarantees of the fourteenth amendment demand more active judicial oversight of some egregious types of discrimination. The only practical approaches are a sliding scale or a system of categories. Since the Court has nominally rejected the former, we must try to make sense of the tiers.

Since the selection of the applicable tier for a particular case is usually outcome determinative, much attention has been given to the selection criteria. For nearly a half century following *Carolene Products*[3] the appropriate factors were uncontroversial, and debate

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1. San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

2. Citations to the body of scholarly criticism of the tiered system would be unduly burdensome, even for a journal more liberal in such matters than this one.

3. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *See* Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

centered on application of the factors to particular groups. But in the recent case of *City of Cleburne v. Cleburne Living Center*,[4] the Court cast doubt on the criteria themselves. The Justices announced, as an additional requirement, a rule of "presumptive irrelevance" of the classification to legitimate governmental objectives.

The previous (if not "original") understanding held that legislative enactments were subject to more exacting scrutiny if they discriminated against a readily identifiable group that had suffered a history of invidious discrimination and was powerless, disenfranchised, or substantially disadvantaged in the political arena.[5] Some of the cases also spoke of the immutability of the group's distinguishing trait, the "innocence" of individuals who had not voluntarily selected group membership, and harkening back to *Carolene Products*, the discreteness and insularity of the group in society.[6] Taken together, these factors roughly indicated the likelihood that legislators may be motivated by prejudice to treat group members unfairly.

The issue in *Cleburne* was the appropriate level of review for laws that discriminate against people with mental retardation. Applying the traditional tests, the Fifth Circuit had held that heightened scrutiny was warranted. But because mental retardation was a useful classification for some legitimate legislative purposes, the court of appeals declined to declare it "suspect" and chose instead to employ the "middle" tier of scrutiny used in gender cases. Under this test, the constitutionality of a discriminatory statute depends on whether it is closely related to an important governmental purpose.

The Supreme Court vacated this part of the Fifth Circuit's opinion and held that the proper measure for discrimination against retarded people was the rational basis test.[7] The Court made only a

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4. 105 S. Ct. 3249 (1985).

5. A typical description was provided by the *Rodriquez* majority in rejecting a claim of suspectness:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political processes.

411 U.S. at 28.

6. "In my opinion, the phrase 'discrete and insular' applies to groups that are not embraced within the bonds of community kinship but are held at arm's length by the group or groups that possess dominant political power." Lusky, *supra* note 3, at 1105 n.72.

7. The Court went on to invalidate the zoning ordinance in question by holding that it did not even meet the minimal test of rationality. The distortion of the rational basis test that this holding requires, as well as other aspects of *Cleburne*, are beyond the scope of this article and shall be reserved for another occasion.

feeble attempt to argue that mental retardation does not meet the traditional indicia of suspectness. The principal message of the Court's opinion is that any form of heightened scrutiny is inappropriate for classifications that reasonable legislators *could* conscientiously use for legitimate purposes. "Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, . . . we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate."[8] Irrelevance to any legitimate legislative purpose is a prominent feature of those classifications that are deemed suspect. Indeed, over the years, almost every Justice has rationalized strict scrutiny by noting that the classification at hand is seldom relevant to legitimate governmental purposes.[9] However, these references have always been dicta, and the Court had never before suggested that the occasional usefulness of a particular classification was dispositive of the level of scrutiny.[10] The doctrinal news in *Cleburne* is that the classification must be *presumptively* irrelevant to valid legislation before even intermediate scrutiny is justified.

Observations about the frequency with which suspect traits are irrelevant are a far cry from a rule that presumption of irrelevance must be established as a prerequisite to careful judicial scrutiny of

8. 105 S. Ct. at 3258.

9. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion of Brennan, J.). *See also* Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982) ("Classifications treated as suspect tend to be irrelevant to any proper legislative goal."). Interestingly, one of the earliest references to this concept predates the full development of "tiered" analysis. " 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring).

10. The *Cleburne* majority attempts to persuade that this is not true. Justice White contends:

> [T]he lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how and to what extent those interests should be pursued.

105 S. Ct. at 3255 (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)).

But the *Murgia* opinion provides no support for this proposition. In that case, the Court concluded that aged persons did not constitute a suspect class because, historically, they had not been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." 427 U.S. at 313. The actual lessons of *Murgia* were that the absence of a history of invidious discrimination precluded the finding of a suspect class, and that legislation based on the actual characteristics of a group should not be deemed invidious. The lesson of *Cleburne*, by contrast, is that past invidious discrimination against a group based on "stereotyped characteristics not truly indicative of their ability" is irrelevant to the issue of suspectness if some discriminatory laws are based on actual group characteristics.

discriminatory laws. The case of mental retardation is a good example. Numerous laws treat people with mental retardation differently from people who are mentally typical. Over the years, legislatures have deemed mental disability to be relevant to such issues as guardianship, educational placement, public assistance, and civil commitment. Some of these laws, such as entitlement to disability benefits and the requirement of appropriate special education opportunities, are based on realistic perceptions of the effects of mental retardation. Others, such as categorical exclusion from public schools, institutional commitment without a requirement of dangerousness to self or others, and Cleburne's exclusionary zoning ordinance, are based on false stereotypes. *Cleburne* teaches that the existence and legitimacy of the former groups of laws precludes heightened scrutiny of the latter, even where a substantial likelihood is shown that some such laws are invidiously discriminatory.

Justice Rehnquist has correctly observed that "every classification is relevant to some purposes and irrelevant to others."[11] Race has been found to be usable for remedying some kinds of past discrimination and for implementing constitutional remedies to school segregation. Gender has been held relevant to conscription and the definition of statutory rape. Alienage is an acceptable ground for exclusion from some kinds of government jobs. If the fact that these classifications are relevant to some constitutionally valid purposes were to preclude heightened scrutiny of all discriminatory laws affecting these classes, there would be nothing left of the principle embodied in Footnote Four.

The irrelevance of "presumptive irrelevance" can be seen by considering whether it should be sufficient, in the absence of the traditional indicia, to warrant heightened scrutiny. Left-handed people are a minority, and hypothetical laws that might use this trait as a classifying device would seldom, if ever, be related to rational governmental objectives. Thus "handedness" can be considered, even with greater certainty than race or gender, to be presumptively irrelevant to legitimate legislative goals. But left-handedness presents a weak claim under the traditional test for suspect classes. Although left-handedness is a largely immutable characteristic, there has been no history of serious discrimination against this minority, nor are its members disadvantaged in the political arena. The political process would surely reject legislative proposals treating this group unfairly, and should discriminatory legislation somehow be enacted, a minimal level of judicial scrutiny would suffice to reject truly irrational discrimination.

11. Toll v. Moreno, 458 U.S. 1, 42 n.13 (1982) (Rehnquist, J., dissenting).

The device selected for rationing heightened judicial scrutiny should roughly measure the likelihood that a particular instance of discrimination against the group in question is invidious. The traditional indicators of suspectness are useful because they show that discriminatory legislation may be invidious and that the political branches of government may be disinclined to protect the disfavored group. The *Cleburne* requirement of presumptive irrelevance deprives the courts of the means they need to detect unconstitutional discrimination against minorities that have been treated invidiously in the past and are now viewed with residual animosity or ambivalence by the majority.

Once again, mentally retarded people present a good illustration of the problem. Mental retardation is an immutable characteristic that retarded people do not adopt voluntarily. Their history of invidious discrimination and oppressive legislation is matched by few other groups in our society.[12] A principal purpose of these laws was to maintain strict segregation of retarded people from the rest of society because they were viewed by legislators as a "social menace" (e.g., Utah) and "unfit for citizenship" (Mississippi). Despite some recent ameliorative efforts, much of this legislation remains on the books. People with mental retardation are the quintessential disenfranchised minority: many states bar them from voting by statute or state constitution, and the nature of their disability prevents substantial political participation even when legal barriers are removed.

Justice White's efforts to demonstrate that mentally retarded people do not meet the traditional test for suspectness are unsuccessful. The majority opinion does not even address the history of invidious discrimination, although this has been a principal focus in traditional analysis and is probative of the likelihood that discriminatory laws are the result of prejudice. The opinion observes that there are different degrees of retardation, and thus it is not a completely homogeneous class. But the relevance of this observation is unclear, since invidious laws have almost invariably discriminated against retarded people without regard to the severity of their handicap. The majority then declares that it can find no "continuing

12. This history is briefly recounted in Justice Marshall's concurring and dissenting opinion. 105 S. Ct. at 3266-67. It is noteworthy that five members of the Court described this history as "grotesque." 105 S. Ct. at 3266 (Marshall, Brennan, and Blackmun); 105 S. Ct. at 3262 (Stevens and Burger). For a somewhat fuller discussion of the nature of mental retardation and the history of laws affecting retarded people, see Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 416-32 (1985). The amici curiae briefs of the American Association on Mental Deficiency et al. and the Association for Retarded Citizens et al. contain much more detailed historical information, including statutory and historiographical appendices.

antipathy or prejudice"[13] on the part of legislators, and observes that retarded people should not be viewed as politically powerless. Justice White's opinion supports these conclusions by noting the existence of recent federal and state enactments designed to assist mentally disabled people. But the existence of some beneficial laws does not preclude the existence of some (old or new) that are based on stereotyped prejudices. Indeed, the record of the Cleburne zoning controversy stands as irrefutable evidence that such prejudices endure.[14] The Court's attempt to avoid heightened scrutiny by means of the traditional factors proves too much: applied to groups already granted special judicial protection it would require a return to minimal scrutiny. If the fact that advocates have obtained passage of some noninvidious, protective legislation precludes heightened scrutiny, women and racial minorities should now be consigned to the rational basis test. Similarly, if diversity within a group negates suspectness, few previously recognized minorities are entitled to suspect status.

The majority opinion relies more heavily on the new doctrine of presumptive irrelevance than it does on the traditional considerations for suspectness. This new doctrine is even more central to Justice Stevens's concurring opinion, which was joined by Chief Justice Burger. Justice Stevens, while joining the majority opinion, renewed his argument that there are not really any tiers at all, but rather different ways of explaining the application of a single standard of analysis. He once again argued that the rational basis test, "properly understood," is sufficient to explain even the racial discrimination cases. He acknowledged that "[t]he Court must be especially vigilant in evaluating the rationality of any classification" that has been traditionally disfavored,[15] and goes on to label as "grotesque" past discrimination against retarded people. But he also observed that mental retardation is relevant to some legitimate legislative goals, and therefore concluded that it cannot be said that all laws employing the classification are presumptively irrational.

Somewhat more puzzling is the reliance Justice Stevens places on his supposition that some of the laws that disadvantage mentally retarded people on the basis of relevant criteria could be supported by a hypothetical legislator who was mentally retarded. If this is

13. 105 S. Ct. at 3256.

14. The Cleburne controversy was illustrative of the irrationality of the opposition to integration of mentally retarded people, but it lacked the violence that often accompanies such disputes. *See* amici curiae brief of American Association on Mental Deficiency et al. at 16 n.25, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). *See generally* D. ROTHMAN & S. ROTHMAN, THE WILLOWBROOK WARS 180-99 (1984).

15. 105 S. Ct. at 3261 n.6 (Stevens, J., concurring).

meant merely to illustrate that some discriminatory laws, unlike the Cleburne ordinance, are demonstrably rational, it is unexceptionable but not particularly enlightening. If, on the other hand, it is intended to suggest that a classification cannot warrant heightened scrutiny when some members of a disadvantaged class could vote for some discriminatory legislation, larger problems loom. (Readers are requested not to inform Mrs. Phyllis Schlafly that her existence and views are sufficient to overturn the decisions recognizing gender as a semi-suspect classification).

These concurring Justices supplied the crucial votes for Justice White's majority opinion.[16] It is difficult to know exactly what to make of the concurrence. While denying the existence of a system of tiers, it acquiesces in the assignment of an admittedly vulnerable group to the lowest tier. Perhaps it is to be understood as simply a refusal to engage in the process of designating tiers (a position more consistent with the previous opinions of Justice Stevens than those of the Chief Justice). If so, it lends little support to Justice White's majority, because the two opinions would merely agree for different reasons on the rational basis test as the lowest common denominator. If, on the other hand, it is an exercise in tier-assigning under protest, it represents a stronger commitment to the new presumptive irrelevance doctrine than Justice White's, since the concurrence does not purport to use the traditional indicators at all.

Perhaps the majority and concurring opinions can best be interpreted as attempts to signal that the era of expansion of heightened scrutiny has ended. Many observers (and perhaps the Justices) thought this had been accomplished more than a decade ago in *Rodriquez*, but some Justices may still be uneasy about the prospect of other minority groups seeking judicial protection. Justice White's opinion suggests as much when it argues that affirming the Fifth Circuit's opinion would make it

> difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[17]

That the Court was worried primarily about extending protection to groups other than mentally retarded people is supported by

16. The dissenting Justices reject the idea that presumptive irrelevance is a prerequisite to heightened scrutiny. 105 S. Ct. at 3270-71 (Marshall, Brennan, and Blackmun, JJ., concurring and dissenting).

17. 105 S. Ct. at 3257-58.

the fact that the Court *invalidated* the statute in question. Indeed, the discussion of the appropriate tier of analysis, and surely the transformation of presumptive irrelevance into a prerequisite, were unnecessary dicta. Having determined that the Cleburne ordinance could not pass the rational basis test, the majority need not have ruled on whether any stricter test applied. The fact that the Justices reached out for the issue suggests that they wanted to send a message regarding heightened scrutiny: "this far but no further."

It is inconceivable that the Court would apply the *Cleburne* doctrine of presumptive irrelevance to classifications previously recognized as suspect or semisuspect. Therefore its importance is for minorities upon which the Justices have not yet ruled. As the majority opinion noted, a number of these groups exist.

The new rule declares that heightened scrutiny will only be applied to classifications that are rarely relevant to legitimate governmental purposes. Therefore, the rational basis test will apply to groups that meet the traditional indicators of suspectness but are deemed relevant to some constitutionally acceptable legislative purposes. This means either that invidious laws will escape careful scrutiny because of the deference traditionally associated with that test, or the test will be given new "bite" for these groups. The Court chose the latter course in *Cleburne*, and appeared to suggest that lower courts should do the same in future mental retardation cases.[18] It gave no indication whether the same approach is to be followed regarding other groups denied explicit recognition of entitlement to heightened scrutiny. If this approach is to be generally followed, it creates an unacknowledged fourth tier of analysis, the contours and requirements of which are unexplained.

The Court's unsatisfactory analysis appears to derive from two sources. The first may be the Court's concern that the Footnote Four criteria cannot be given free rein without substantial incursion into legislative prerogatives. Justice Powell, for example, has warned that the criteria do not provide a "neat formula for constitutional adjudication," nor do they require judicial intervention on behalf of "any group that loses a legislative battle."[19] The Justices' resistance to providing a judicial forum for reviewing the merits of

18. The Court cited U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973), and Zobel v. Williams, 457 U.S. 55 (1982), to illustrate the proper use of the rational basis test. These are widely recognized as atypically rigorous examples of the test.

19. Powell, Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1090-92 (1982). Justice Rehnquist has gone further, arguing that the *Carolene Products* footnote should not be used to extend strict scrutiny beyond racial minorities, because "[i]t would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

each political defeat of every minority in our society is understandable.[20] The apparent conviction that this consequence can only be avoided by use of a narrowly restrictive presumption, however, seems an ill-considered overreaction.

The other source of the Court's difficulty is its failure to acknowledge the consequences of creating more than one level of heightened scrutiny. In the two-tiered world of equal protection before *Craig v. Boren*,[21] the Court operated from a strong presumption that the politically accountable branches of government acted within constitutional bounds; once that deference was abandoned upon the finding of a fundamental right or suspect classification, the Court erected an equally formidable presumption against constitutionality. With the new creation of the middle tier(s), the presumption of unconstitutionality is weaker for laws involving quasi-suspect classes. The government must assert an important (not "compelling") interest; however, the relationship between statute and purpose that must be "close" need not be a perfect fit. But the Court has failed to elucidate what features characterize a quasi-suspect class or to explain the relationship between such classes and the nature of intermediate scrutiny. *Cleburne* added nothing to our understanding of either issue.

The Court has overlooked the opportunities intermediate scrutiny offers for less "rigidified" analysis than the two-tiered system. The middle tier can accommodate groups that match the traditional indicia of suspectness less perfectly than racial minorities (e.g., women) and those who possess those indicators but whose characteristics are not presumptively irrelevant to all legitimate

20. Or perhaps part of the Court's concern may be the difficulty in some cases of determining whether an enactment really is a loss for the minority. As in the race and gender cases, the specters of beneficial legislation and benign discrimination appear to be troubling the Court. Although cases like *Bakke* are extraordinarily difficult, there is no reason to introduce their conundrums into the issue of which groups should receive heightened judicial protection.

Legislation that should survive heightened scrutiny is of two types: beneficial legislation designed to offset disadvantages that result from past discrimination, and legislation based on real (rather than stereotypical) differences between groups. The latter is nearly an empty set for race, but not for mental retardation and other semi-suspect classes. This fact seems particularly troubling for Justice Stevens and the Chief Justice. It may not be perfectly clear whether such legislation (for example, guardianship for mentally retarded people) is beneficial to the suspect class. Guardianship is beneficial in some cases and disadvantageous in others. It is inappropriate to focus on whether retarded people are advantaged by the law in question, because the equal protection clause should not be read to insure that all legislation will be beneficial. Rather the focus should be on whether the particular legislation is based on real differences between groups instead of invidious prejudice. Courts should resist the suggestion that heightened scrutiny be employed only when discriminatory legislation disadvantages the suspect class. *Cf.* Note, *The Suspect Context: A New Suspect Classification Doctrine for the Mentally Handicapped*, 26 ARIZ. L. REV. 205 (1984).

21. 429 U.S. 190 (1976).

legislation (e.g., mentally retarded people). For each group, lawmakers need more latitude than strict scrutiny affords, but the deference inherent in the rational basis test is incompatible with realistic concerns about the likelihood that legislation may be invidiously discriminatory.

In rejecting intermediate scrutiny, the *Cleburne* majority expressed concern that "merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all."[22] Shaping constitutional doctrines to accommodate such political consequences is arguably ultra vires[23] and certainly seems ill-advised in this instance. A legislator considering the enactment of legislation such as the Education For All Handicapped Children Act (Pub. L. No. 94-142) would hardly be deterred by apprehension that courts might rule that the legislation was not "closely related to an important governmental purpose."

Presumptive irrelevance has a useful role to play in equal protection analysis, but it should not be a prerequisite to intermediate scrutiny. Rather, the Court should first inquire about the likelihood of invidious discrimination through the use of the traditional indicia for suspectness. Once the likelihood is found to be substantial, the existence of legitimate uses of the classification should be a factor in choosing between "middle tier" analysis and strict scrutiny, and perhaps in selecting the precise formulation of the intermediate test for that particular group.

This approach would avoid unwarranted intrusions into the prerogatives of legislators without ignoring the real possibility of discrimination against vulnerable minorities. It would also give lower courts more useful guidance than *Cleburne*'s apparent mandate to use the rational basis test with vaguely sketched variations in the degree of skepticism judges are to bring to the issue of legislative motives.

Unfortunately, the *Cleburne* majority left the area of equal protection in worse disarray than it found it. It should reconsider its approach to those classifications that are useful in some situations and invidious in others.

22. 105 S. Ct. at 3257.

23. For another example of this practice, see Jones v. United States, 463 U.S. 354, 368 n.17 (1983).