JUSTICE MARSHALL AND EQUAL PROTECTION REVIEW: A SPECTRUM OF STANDARDS?

For nearly a century from the ratification of the fourteenth amendment until the Warren Court era, the equal protection clause played a minor role in the Supreme Court's jurisprudence.[1] The Court narrowly interpreted the clause to serve the primary purpose of its drafters[2] and largely restricted its use to cases involving racially discriminatory legislation.[3]

Today equal protection is a powerful and frequently invoked, yet confused, constitutional doctrine. Depending upon the class of persons or nature of the interests affected by the challenged legislation, the Court has employed one of two purportedly distinct standards of review, rational basis or strict scrutiny. Because two-tiered scrutiny has often proved a blunt instrument the Court has developed a number of analytic techniques to sharpen rational basis scrutiny and to dull strict scrutiny.[4] In addition, the Court now acknowledges a third standard of review.[5]

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1. Substantive due process analysis overshadowed the role of equal protection analysis during this period. *See, e.g.,* Lochner v. New York, 198 U.S. 45 (1905) (New York law limiting working hours of bakery employees held to violate 14th Amendment liberty of contract). In addition to employing substantive due process analysis, the Court also affirmatively rejected equal protection challenges during this era. *See, e.g.,* Buck v. Bell, 274 U.S. 200, 208 (J. Holmes) (labelling equal protection "the usual last resort of constitutional arguments"); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873) (upholding state law denying women the right to practice law). However, successful equal protection challenges to legislation were not unknown. Legislation drawn along racial lines was invalidated under the equal protection clause, *see infra* note 3, and even economic legislation fell prey to equal protection challenges. *See, e.g.,* Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897) (regulation requiring railroads but not other defendants to pay attorneys' fees to successful plaintiffs held unconstitutional under equal protection clause).

2. The primary, although not necessarily the only purpose of the equal protection clause was to protect the newly freed slaves from the legislative disabilities imposed by the Black Codes, laws passed by Southern states after the Civil War. *See* STAMPP, THE ERA OF RECONSTRUCTION, 79-81, 135-45 (1965). *See also* The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

3. *See, e.g.,* Strauder v. West Virginia, 100 U.S. 303 (1880) (West Virginia statute excluding blacks from juries held to violate equal protection).

4. *See, e.g.,* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Treiman, *Equal Protection and Fundamental Rights—A Judicial Shell Game*, 15 TULSA L.J. 183, 226-29 (1979); Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U. DET. J. URB. L. 867, 881 (1980); Wilkerson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 947-54 (1975).

5. In addition to strict scrutiny and rationality review, intermediate review seems to be ac-

Despite these efforts, a close examination of the Court's decisions reveals a number of cases in which the result does not comport with the announced standard of review. One of the earliest and most persistent critics of this judicial practice was one of the Court's own members, Justice Marshall. He has proposed a "sliding scale"[6] approach to equal protection review as a more realistic and just alternative to what he sees as the Court's manipulation of the standard of review.

This Note discusses Justice Marshall's "sliding scale" and suggests that his analysis, although more sensitive to affected interests and classes than the model adhered to by most of the Court, exhibits many of the same flaws as the Court's present three-tiered system of review. Even when applying his sliding scale technique, Justice Marshall frequently engages in the same manipulative tactics employed by other members of the Court, subjecting challenged legislation to heightened rationality review[7] or finding the violation of a fundamental right by expanding the scope of the right.[8] In the rare cases in which he actually does formulate a new standard of review, that standard proves strikingly similar to the present intermediate standard of review.[9] This Note therefore suggests that Justice Marshall does not employ a "spectrum of standards,"[10] but the same number of standards as the rest of the Court.

I. THE DEVELOPMENT OF SUSPECT CLASSES AND FUNDAMENTAL INTERESTS

The traditional standard of equal protection review employed by the Court, mere rationality, requires that distinctions drawn by a challenged statute bear some rational relationship to a legitimate state purpose.[11] Inspired by the original purpose of the fourteenth amendment,[12] the

cepted by most members of the Court for cases involving gender discrimination. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (gender classifications must be substantially related to important governmental objectives). *See also* Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982) (opinion by Justice O'Connor announcing same standard); Michael M. v. Superior Court, 450 U.S. 464, 468 (1981) (opinion by Justice Rehnquist acknowledging "sharper focus" for review of gender-based classifications).

6. Gunther, *supra* note 4, at 17-18.

7. *See infra* note 24 and accompanying text.

8. *See infra* note 25 and accompanying text.

9. *See infra* note 87 and accompanying text.

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

11. *See, e.g.*, McDonald v. Bd. of Election, 394 U.S. 802, 809 (1969).

12. *See supra* note 2.

Court first elevated this standard and applied strict scrutiny to classifications drawn along racial lines.[13] Soon thereafter, the Court designated legislation that drew distinctions on the basis of ethnicity or national origin as immediately suspect.[14] Not until the Warren Court era, however, did equal protection become a forceful judicial concept in areas besides race and ethnicity.

The Warren Court, drawing from ideas first suggested by Justice Stone's footnote to his opinion in *United States v. Carolene Products Co.*,[15] expanded the "suspect class" doctrine[16] and developed the area of

13. Korematsu v. United States, 323 U.S. 214, 216 (1944), ("[A]ll legal restrictions which curtail the civil rights of a single racial group [are] immediately suspect.")

14. The Court first suggested this extension in Strauder v. West Virginia, 100 U.S. 303, 310 (1880) ("Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.") *See also* Hernandez v. Texas, 347 U.S. 475 (1954) (discrimination against Mexican-Americans in jury selection held to violate equal protection clause).

15. 304 U.S. 144, 152-53 n.4 (1938). Justice Stone suggested that legislation directed at "discrete and insular minorities" deserved particularly searching inquiry, as did legislation that contravened specific constitutional principles. *Id.*

16. Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 356 (1949) (describing the "suspect classification" doctrine was described in 1949 as "the doctrine which establishes a presumption of unconstitutionality against a law employing certain traits").

Few classes actually receive the "suspect" label: race, in Korematsu v. United States, 323 U.S. 214, 216 (1944); national origin, in Oyama v. California, 332 U.S. 633, 644-46 (1948); and alienage, in Graham v. Richardson, 403 U.S. 365, 372 (1971). In addition, alienage now seems to be suspect only in certain contexts. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979) (alienage classifications in areas of public employment with important ties to the political process are not subjected to strict scrutiny.) Fiallo v. Bell, 430 U.S. 787 (1977) (deferential review of federal immigration laws).

The Court has noted several indicia of suspectness. *See, e.g.*, Mississippi University for Women v. Hogan, 458 U.S. 718, 725 (1982) (implying that classifications that perpetuate stereotypes are impermissible); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality) (classifications based on immutable traits are suspect); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (implying that classes subject to a history of discrimination are suspect); Weber v. Aetna Cas. & Sur. Co., 466 U.S. 164, 175-76 (1972) (classes stigmatized by governmental action are suspect).

Commentators have found evidence of other indicia of suspectness. *See, e.g.*, ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 154-57 (1980) (suspect classifications may be "those involving a generalization whose incidence of counterexample is significantly higher than the legislative authority appears to have thought it was."); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1125-27 (1969) (hypothesizing that race and lineage are suspect because of historical basis of 14th amendment, stigma of inferiority linked to those classifications, and individual powerlessness to alter or control traits).

Certain classes, labelled "quasi-suspect," bear some but not all of the indicia of suspectness. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 505 (1976) (illegitimacy, like race, is a characteristic not within the individual's control, and bears no relation to the ability to participate in society). These classes are frequently accorded either a heightened form of rationality review, as in Mathews v. Lucas, *supra*, or an explicitly intermediate standard of review. *See supra* note 5. Just as no one indicator makes a class suspect, *see* ELY, *supra*, at 148-70, there does not seem to be a magic number

"fundamental rights."[17] The Court subjected legislation affecting either

or combination or indicators that make it either suspect or quasi-suspect. *See* Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912, 916-19 (1981).

17. Although it did not flourish until the era of the Warren Court, the fundamental rights branch of equal protection analysis is usually considered to have begun with the Court's decision in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (labelling procreation "one of the basic civil rights of man and invalidating an Oklahoma statute requiring the sterilization of those convicted three or more times of crimes of moral turpitude). Two scholars in the 1940's noted that the Court in *Skinner* failed to thoroughly evaluate the state interest or the reasonableness of the classification. Tussman and tenBroek, *supra* note 16, at 379. In retrospect, this failure can be attributed to the fact that virtually any classification prohibiting a class from exercising a fundamental right will be invalid.

As with suspect classes, the precise determinants of fundamental rights are unclear. One fundamental right, the right to freedom of speech, is expressly provided for by the Constitution. The others are related, in varying degrees of closeness or attenuation, to the guarantees of the Constitution. Voting in state elections, for example, is not guaranteed explicitly by the Constitution, but there are enough guarantees of the right to vote in federal elections in the Constitution that voting in state, and sometimes local elections have been accorded "fundamental" status. *See, e.g.*, Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979); Kusper v. Pontikes, 414 U.S. 51 (1973).

Access to the legal process, both criminal and civil, has also been identified as fundamental. Presumably this line of expansion runs from the explicit constitutional guarantee of the right to a fair trial. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1973) (state required to furnish appointed counsel to represent indigent criminal defendants in appeal as of right). There was a hint that the Burger Court would broaden this right of access to the judicial process to civil litigation in Boddie v. Connecticut, 401 U.S. 371 (1971) (state may not deny indigents seeking divorce access to the courts solely because of their inability to pay fees). *But see* Ortwein v. Schwab, 410 U.S. 656 (1973) (refusing to extend logic of *Boddie* to invalidate state filing fee for review of denial of welfare benefits); United States v. Kras, 409 U.S. 434 (1973) (refusing to extend *Boddie* to invalidate bankruptcy filing fees).

The right of interstate travel, which has been recognized as fundamental, seems to stem from the "nature of our Federal Union and our constitutional concepts of personal liberty." Shapiro v. Thompson, 394 U.S. 618, 629 (1969). For cases recognizing this right see, *e.g.*, Zobel v. Williams, 457 U.S. 55, 66-68 (1982) (Alaska scheme distributing state surplus to citizens in varying amounts based on length of state residence unconstitutional violation of free interstate migration) (Brennan, J., concurring); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (invalidating Arizona requirement that indigents reside in a county one year before receiving free nonemergency medical care as penalizing the right to travel). *But see* Sosna v. Iowa, 419 U.S. 393, 406-09 (1975) (rejecting right to travel challenge to Iowa's one year residence requirement for divorce).

Despite the Constitution's property guarantees, economic interests generally have not been recognized as fundamental. This may be due to the judicial notion that local legislatures are best suited to deal with local economic conditions, but the nagging suspicion that the "different treatment of personal interests . . . rest[s] upon a belief that they are simply more important than others" is hard to escape. *Developments, supra* note 16, at 1128.

A group of decisions has established an area of personal privacy and liberty given varying degrees of protection by the due process and equal protection clauses. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (Wisconsin statute prohibiting marriage by party not in compliance with standing child support orders held unconstitutional); Roe v. Wade, 410 U.S. 113 (1973) (Texas law making it a crime to procure an abortion held unconstitutional). The personal interests strand of the fundamental rights doctrine is perhaps even stronger in due process than in equal protection cases, a fact

of these categories to strict scrutiny, requiring it to be necessary to serve a compelling state interest.[18]

The Burger Court further expanded the reach of heightened scrutiny by establishing an intermediate standard of review. The intermediate standard has not always been consistent, but courts now treat classifications based on gender,[19] illegitimacy,[20] and alienage[21] as at least "quasi-suspect" and accord them heightened, if not strict scrutiny. The Burger Court, however, refused to recognize new suspect classes[22] and slowed the expansion of fundamental interests.[23] The Burger Court's pattern of

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mentioned here because Justice Marshall borrows from both the due process and equal protection branches of the doctrine in his sliding scale opinions.

18. *See* In Re Griffiths, 413 U.S. 717, 722-23 n.9 (1973) (describing the means test applicable to suspect classifications as "necessary" and acknowledging that the required end may be variously characterized as "overriding," "compelling," "important," or "substantial," without there being any significance between "these variations in diction"). Commentators have noted that this level of scrutiny is "strict in theory and fatal in fact." Gunther, *supra* note 4, at 8.

19. The Court began to scrutinize gender classifications more strictly in Reed v. Reed, 404 U.S. 71 (1971), striking down an Idaho law giving automatic preference to men over women as administrators of estates, although it supposedly was searching for a rational relationship between the statute's ends and means. In Frontiero v. Richardson, 411 U.S. 677, 688 (1973), a successful challenge to a federal law permitting male members of the armed forces an automatic dependency allowance for wives but requiring servicewomen to prove the dependency of their husbands, the plurality opinion went so far as to call sex classifications "inherently suspect." In subsequent cases the Court retreated from this suggestion and settled on an "intermediate" level of scrutiny. The standard enunciated in Craig v. Boren, 429 U.S. 190, 197 (1976), "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives," seems to have carried the day.

20. The level of scrutiny in cases involving illegitimacy, as with gender and alienage, has been inconsistent. *See, e.g.*, Pickett v. Brown, 462 U.S. 1, 18 (1983) (invalidating Tennessee law requiring that any paternity suit be brought before child was two years old for failure to meet the substantial relationship test); Lalli v. Lalli, 439 U.S. 259, 265 (1978) (applying the substantial relationship test to uphold New York provision allowing illegitimate child to inherit from intestate father only on showing of court-acknowledged paternity); Mathews v. Lucas, 427 U.S. 495, 504-05 (1976) (rejecting suspect status for illegitimacy but acknowledging that laws arbitrarily disadvantaging illegitimates have been found impermissible). *Compare* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 168-70 (1972) and Levy v. Louisiana, 391 U.S. 68, 71 (1968) (heightened rational basis scrutiny) *with* Labine v. Vincent, 401 U.S. 532, 536 n.6 (1971) (implying that Louisiana intestate succession law barring illegitimate child from sharing equally with legitimate children in father's estate is not subject even to "rational basis" test).

21. *See supra* note 16.

22. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (rejecting discrimination on basis of wealth alone as justification for strict scrutiny).

23. The Burger Court added only one fundamental right to the list. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (calling marriage a fundamental right or if not fundamental, then deserving of heightened scrutiny).

Some scholars have argued that education and subsistence benefits should be regarded as fundamental rights. *See, e.g.*, Binion, *The Disadvantaged Before the Burger Court: The Newest Unequal*

review was far more flexible than the two or three-tiered model indicates. Through a variety of analytic devices, the Burger Court invalidated laws while purporting to use only "rational" review[24] and at the same time developed methods to mitigate the impact of strict scrutiny.[25]

Protection, 4 LAW AND POL'Y Q. 37, 63 (1982); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Note, *Selecting the Appropriate Standard of Review for Equal Protection Challenges to Legislation Concerning Subsistence Benefits*, 53 U. CIN. L. REV. 587 (1984).

The Court, however, has not followed this suggestion. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (refusing to recognize education as a fundamental right); Dandridge v. Williams, 397 U.S. 471 (1970) (holding that Maryland's maximum per household grant limit for AFDC regardless of family size did not violate equal protection). *See also* Lindsey v. Normet, 405 U.S. 56 (1972) (rejecting heightened scrutiny for Oregon statute prescribing eviction procedures for nonpayment of rent).

24. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). *See also* Gunther, *supra* note 4, at 18 (calling this type of scrutiny "rational review with bite").

To invalidate laws while purporting to use rational review, the Court has at times rejected the state's asserted purpose as insufficiently important. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151-52 (1980) (rejecting administrative convenience as a sufficiently important state purpose); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (rejecting reduction of judicial workload and intrafamily controversy as insufficient state purposes). The Court has also rejected the state's purpose as disingenuous, *see, e.g.*, Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975) (calling apparent purpose of statute providing benefits to widows with children to enable them to care for children and not work, rather than state-advanced purpose of redressing past discrimination), or selectively considered the purposes advanced by the state. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 449 (1972) (stating that statute prohibiting distribution of contraceptives is so "riddled with exceptions" that proferred purpose of deterring premarital sex cannot reasonably be regarded as true purpose. In addition, the Court has sometimes refused to hypothesize legitimate purposes to support the statute, *see, e.g.*, Cleveland Bd. of Educ. of LaFleur, 414 U.S. 632, 641 n.9 (1974) (refusal to consider role of "outmoded taboos" in banning pregnant teachers from classroom); Griswold v. Connecticut, 381 U.S. 479 (1965) (refusal to consider state interest in banning sex without procreational purpose), or tightened the "fit" required between legislative means and ends. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977). Finally, the irrebuttable presumption doctrine has been employed to heighten review without resorting to strict scrutiny. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory pregnancy leaves for schoolteachers unconstitutional); Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (irrebuttable presumption in Food Stamp Act of non-dependency of non-minor children not living at home unconstitutional); Vlandis v. Kline, 412 U.S. 441 (1973) (state now allowed to deny in-state tuition rates to individual by irrebuttable presumption of nonresidence); Stanley v. Illinois, 405 U.S. 645 (1972) (father may not be deprived of custody of illegitimate children without hearing by presumption of unfitness).

25. *See* Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777, 840; Treiman, *supra* note 4, at 203 n.133 & 226-29. One of the most common methods used to dull strict scrutiny has been to vary the level of impact required to violate a fundamental right. In some cases a slight interference with the exercise of the right might be unconstitutional. *See, e.g.*, Zobel v. Williams, 457 U.S. 55 (1982)

II. JUSTICE MARSHALL'S CRITICISMS

Out of this confusing analytic framework emerged Justice Marshall's call for a flexible and forthright model of equal protection review. In *Dandridge v. Williams*[26] and subsequent cases Justice Marshall articulated his criticisms of equal protection doctrine. Principally, he objects to the mechanical application of rational basis scrutiny in cases not involving business or economic regulation simply because the triggers of suspect class or fundamental interest are absent.[27] He also opposes the application of rational basis review to "legislation providing fundamental services or distributing government funds to provide for basic human needs,"[28] or discriminating against "particularly disadvantaged or powerless classes."[29] By contrast, he seldom finds state discrimination against economic or commercial interests invalid, characterizing such in-

(Brennan, J., concurring) (state surplus distribution scheme to citizens based on length of residency within state unconstitutional as threatening free interstate migration). In other cases the Court requires the exercise of the right to be "significantly" burdened. *See, e.g.*, Califano v. Jobst, 434 U.S. 47 (1977) (termination of Social Security benefits upon marriage does not violate right to marry); Maher v. Roe, 432 U.S. 464 (1977) (state's refusal to pay costs of abortion for indigent women does not impinge on constitutional right to have abortion). The Court has also limited the scope of the right itself, so that the legislation did not invoke strict scrutiny. *See, e.g.*, Califano v. Aznavorian, 439 U.S. 1 (1978) (upholding termination of Social Security benefits when recipient leaves country for more than 30 days because international travel not a fundamental right); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (sustaining election scheme for water storage district in which only landowners were permitted to vote and votes were proportioned by land valuation). At times the Court has described a class so as to make it less suspect. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (denial of disability benefits to pregnant women did not discriminate on basis of sex because statute distinguished between "pregnant women and non-pregnant persons.") Finally, the Court has on occasion purported to apply strict scrutiny, but accepted questionable means as "necessary." *See, e.g.*, Marston v. Lewis, 410 U.S. 679 (1973) (upholding durational residence requirement for voting without requiring state to show least restrictive means).

26. 397 U.S. 471 (1970) (Marshall, J., dissenting). *See also* Harris v. McRae, 448 U.S. 297, 342 (1980) (Marshall, J., dissenting); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting); Marshall v. United States, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 78, 90 (1971) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

27. In *Dandridge*, for example, Marshall decried the Court's dispositive classification of the case as one "in the area of economics and social welfare," tartly observing that "[a]ppellees are not a gas company or an optical dispenser, they are needy dependent children and families who are discriminated against by the state." 397 U.S. at 520, 529.

28. Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting).

29. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting).

terests as "far removed from constitutional guarantees."[30] Although he asserts that classifications bearing some, but not all, of the traditional indicia of suspectness do not merit strict scrutiny, he also believes that they do not deserve to be sanctioned by the "rubber stamp" of rational basis review.[31]

Justice Marshall does not advocate a sharp break with recent equal protection jurisprudence. Instead, he claims that his standard is merely a forthright declaration of a standard that the rest of the Court applies disingenuously.[32] Marshall has also noted that the Court "adjusts" the scrutiny level in different cases according to the "constitutional significance of the interests affected and the invidiousness of the particular classification."[33] Marshall does not object to this case-by-case adjustment of the standard of review, but rather to the Court's failure to articulate both the standard actually applied and the reasons for selecting a particular standard. He accuses the Court of "selecting in private" the cases which will be "afforded special consideration without acknowledging the true basis of its action."[34]

Justice Marshall believes that the Court's failure to articulate the actual standard of scrutiny applied and the reasons for selecting that standard fosters irrational and inconsistent decisonmaking and compromises judicial integrity.[35] Moreover, he fears that the Court's refusal to acknowledge its true standard of scrutiny may permit a return to the *Lochner* era's unprincipled review of economic and commercial legislation, under the guise of the rational basis standard.[36] Finally, in Justice Marshall's view, the Court's present analysis fails to guide lower courts in the selection of scrutiny levels.[37]

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30. *Id.*

31. TRIBE, AMERICAN CONSTITUTIONAL LAW 1089 (1978).

32. *See, e.g.*, Cleburne v. Cleburne Living Center, 87 L.Ed.2d 313, 330, 334 (1985) (Marshall, J., concurring) (Court does not acknowledge its use of heightened scrutiny to invalidate ordinance); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) (Court "should admit" its model for equal protection review does not conform to two-tier model); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (Court's equal protection decisions defy "easy categorization" into strict or rational basis scrutiny).

33. *Rodriguez*, 411 U.S. 109.

34. *Id.* at 111.

35. *Id.* at 109.

36. *Cleburne*, 87 L.Ed.2d 333.

37. *Id.*

III. JUSTICE MARSHALL'S SLIDING SCALE

The analytic scheme Justice Marshall proposes would require the Court to consider three factors to determine the appropriate level of scrutiny for a particular case: "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification."[38] In practice, Justice Marshall examines only two of these factors, the character of the classification and the importance of the benefits denied, to determine whether heightened scrutiny is appropriate, and if so, what that standard of scrutiny should be. Then, unless Justice Marshall finds the legislation totally irrational or violative of a fundamental right, he either balances the state interest against the suspectness of the class and the importance of the interest[39] or formulates and applies a new level of scrutiny.[40]

Justice Marshall correctly asserts that the Court has employed, but failed to acknowledge its use of, various techniques to avoid the tyranny of two-tier review.[41] His scheme, however, does not resolve the current confusion over standards of review. The difficulties and ambiguities inherent in Justice Marshall's scheme become apparent when one considers his own reluctance to apply it. Although he has identified fifteen cases as appropriate for his "sliding scale" determination of the scrutiny level,[42]

38. *Dandridge*, 397 U.S. at 521.

39. In Beal v. Doe, 432 U.S. 435 (1977) (Marshall, J., dissenting), Justice Marshall frankly balanced the factors of class and individual interest against the state interest. In this case he called his three-factor test a "standard" in and of itself. *Id.* at 458. As employed in *Beal*, his test is simply a balancing test. This is not typical. Generally, he intends an initial balancing of his sliding scale factors to determine the standard of scrutiny, which is then applied in the traditional means-end analysis.

40. *See infra* note 87 and accompanying text.

41. *See supra* notes 24-25 and accompanying text.

42. Cleburne v. Cleburne Living Center, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring); Martinez v. Bynum, 461 U.S. 321 (1983) (Marshall, J., dissenting); Plyler v. Doe, 457 U.S. 202 (1982) (Marshall, J., concurring); Harris v. McRae, 448 U.S. 297 (1980) (Marshall, J., dissenting); Vance v. Bradley, 440 U.S. 93 (1979) (Marshall, J., dissenting); Illinois State Bd. of Elec. v. Socialist Workers Party, 440 U.S. 173 (1979); Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (Marshall, J., dissenting from denial of *cert.*); Beal v. Doe, 432 U.S. 438 (1977) (Marshall, J., dissenting); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (Marshall, J., dissenting); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Marshall v. United States, 414 U.S. 417 (1974) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting); Dunn v. Blumstein, 405 U.S. 330 (1972); Richardson v. Belcher, 404 U.S. 78 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471 (1971) (Marshall, J., dissenting).

This Note discusses only the above cases. For cases in which Justice Marshall comes very close to

he has actually carried his analysis far enough to enunciate and apply a new standard of heightened review in only four cases.[43] When Justice Marshall does apply his own standard, it bears a striking resemblance to the standard of intermediate scrutiny in *Craig v. Boren*.[44] In the remaining eleven cases Marshall participates in the same evasive tactics as the rest of the Court.[45]

A. Rationality Review With "Bite"

In six of the fifteen "sliding scale" opinions, Justice Marshall does not have to formulate a new standard of review because he finds that the legislative classification at issue fails the "rational relationship" test. To make this finding of irrationality, he employs some of the same analytic devices used by other members of the Court. These include tightening the fit between means and ends, denigrating the importance of the state interest, and selectively considering the asserted state interests.

In four of these cases,[46] Justice Marshall found the relationship between the state's asserted goals and the classifications drawn to promote them so tenuous as to fail rationality review. The close means-ends fit he demands bears little resemblance to the rational relationship required by *Williamson v. Lee Optical*,[47] although it might be appropriate under the

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either advocating or employing his sliding scale analysis, but stops short of doing so, see Califano v. Boles, 443 U.S. 282, 304 (1979) (Marshall, J., dissenting); Califano v. Aznavorian, 439 U.S. 170, 178 (1978) (Marshall, J., concurring); Fiallo v. Bell, 430 U.S. 787, 810 (1977) (Marshall, J., dissenting); Sosna v. Iowa, 419 U.S. 393, 420 (1975) (Marshall, J., dissenting); James v. Valtierra, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting).

43. *See infra* note 87 and accompanying text.

44. 429 U.S. 190 (1976).

45. *See infra* notes 46-86. Three of the sliding scale opinions, not discussed in the text, are actually "hybrids:" cases in which Justice Marshall announced his three-factor test for determining review, but did not need to formulate a new standard because he found that the legislation violated a fundamental right. *See* Illinois State Bd. of Elec. v. Socialist Workers Party, 440 U.S. 173 (1979) (statute implicated two fundamental rights, voting and political association); Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974) (statute impinged on the fundamental right of interstate travel); Dunn v. Blumstein, 405 U.S. 330, 335 (1972). (The benefit withheld, the right to vote, and the basis for the classification, recent interstate travel, triggered strict scrutiny, but the state interest was not "substantial and compelling.")

46. Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (Marshall, J., dissenting); Marshall v. United States, 414 U.S. 417 (1974) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471 (1970) (Marshall, J., dissenting).

47. 348 U.S. 483 (1955) (Oklahoma statute barring opticians from fitting lenses into frames held not violative of equal protection). Justice Marshall has criticized the majority for the same

framework of heightened scrutiny he thinks the legislation deserves.[48]

In *Dandridge*, for example, Justice Marshall pursued a detailed means-ends analysis and found the legislation both grossly under- and over-inclusive. He concluded that its purpose could be served by means considerably less "destructive" of the interests at stake.[49] Although arguably correct, this conclusion begs the question of whether a rational relationship between the provision and its asserted goals exists.[50] Justice Marshall's analyses in *Rodriguez* and *Marshall* reveal similar defects. In these cases he purported to review the rationality of the legislation but, in fact, analyzed the wisdom of its policy.[51]

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failing. *See, e.g., Cleburne*, 87 L. Ed. 2d 332 ("[H]owever labeled, the rational basis test invoked is most assuredly not the rational basis test of *Williamson v. Lee Optical*.")

48. *See infra* note 50 and accompanying text. A good case can be made, however, that Justice Marshall correctly perceived the state action as irrational in Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (Marshall, J., dissenting). *Hollenbaugh* involved the discharge of two public employees for living together out of wedlock. The District Court found the action rational because it could legitimately be concluded that the petitioners' relationship affected their job performance and that the library's failure to discharge them would be tacit approval of their lifestyle. Justice Marshall dissented from the Supreme Court's denial of certiorari, finding that there was no evidence of the former, or that the petitioners' status impaired the library's performance of its public function. *Id.* at 1056-57. Although Justice Marshall did assume that the library's desire not to appear to condone the petitioners' lifestyle was related to its desire to perform its function of serving the community effectively, this assumption seems justifiable because a mere expression of disapproval would hardly seem to be a legitimate state interest.

49. 397 U.S. at 529.

50. Rational basis scrutiny has assumed different forms at different times. *Compare* Williamson v. Lee Optical, 348 U.S. 483, 387 (1955) (Court willing to posit hypothetical legislative purposes) *with* McGinnis v. Royster, 410 U.S. 263, 270 (1973) (Court asked "whether the challenged distinction rationally furthers some legitimate, articulated state purposes," and refused to supply an "imaginary basis or purpose" to sustain the statute). Indeed, the nature of the mean-ends fit required under rational basis scrutiny is one of the fundamental points of disagreement between Justice Marshall and some of the other members of the Court.

Justice Marshall has at different times propounded two species of rational basis review. He has advocated a *Williamson v. Lee Optical*-type of rational review for commercial regulation. *See, e.g., Cleburne*, 87 L. Ed.2d 332-33; Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 321 (1976). He has also called for "heightened," "searching," or " 'second order' rational basis" review. *See, e.g., Cleburne*, 87 L.Ed.2d at 332. This differential treatment corresponds, of course, with the rationale for Justice Marshall's sliding scale: that legislation affecting interests more important than commercial ones but not recognized as fundamental should not be relegated to a pro forma process of review guaranteeing automatic approval. Nevertheless, it seems inconsistent for Justice Marshall to acknowledge that rational review of business regulation is barely any review at all, and at the same time to undertake an exacting means-end review, such as that in *Rodriguez*, while insisting it is being done under the guise of "mere rationality." The more honest and less confusing course would be to acknowledge in a case like *Rodriguez* that scrutiny has indeed been elevated, rather than argue that heightened scrutiny is inappropriate, and then labor to find the statute irrational.

51. In *Rodriguez* Justice Marshall concluded that Texas's property-tax based scheme of local school financing bore no rational relationship to the state's asserted goal of local control over educa-

Justice Marshall has at times emphasized one state interest over others in seeking to prove either its constitutional inadequacy or its irrational relationship to the means involved. In *Richardson v. Belcher*, for example, the majority found a workers' compensation offset to Social Security benefits a rational response to a congressional fear that a duplication of benefits would undermine support for state workers' compensation programs.[52] Justice Marshall rejected this purpose, finding no evidence in the legislative history that Congress intended to protect such state programs.[53] He further asserted that the measure's sole concern, the prevention of "excessive combined benefits,"[54] was a constitutionally impermissible purpose because Congress had not similarly treated other supplemental disability payments.[55]

B. Quasi-Suspect Classes and Quasi-Fundamental Rights

For most of the Court, the boundaries of the suspect class category are fairly clear and rigid, and the list of fundamental interests is short and

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tion. He pointed out that the state itself controlled many of the features of public education. 411 U.S. at 127. Moreover, he insisted that a genuine concern for local control would permit voters to set their own tax base for school support, instead of mandating the amount of property in a district as the tax base for school funding. *Id.* at 127-28. Although these features might make the state scheme *less* rational than it might have been, they do not rob it of rationality. Regardless of how taxes are levied, a local tax base helps ensure local control over budget-related matters. In addition, the state could have rational reasons for setting certain minimum standards for education, but leaving other matters up to local decision.

In *Marshall*, Justice marshall found the two-felony exclusion for participation in the state's drug-rehabilitative alternative to incarceration irrational because it did not exempt criminals whose two prior felonies were drug-related. 414 U.S. at 433-34. The majority also implied that such an exception would have been wise, but did not find that its absence rendered the legislation irrational: the legislature logically could have concluded that the presence of any repeat offenders would endanger the success of such a program. *Id.* at 427.

52. 404 U.S. 78, 83-84 (1971) (Marshall, J., dissenting).

53. *Id.* at 92.

54. *Id.* at 92 n.6.

55. *Id.* at 92. In Harris v. McRae, 448 U.S. 297 (1980) (Marshall, J., dissenting) Justice Marshall again focused on a state interest the majority did not consider, dissenting from the holding that the Hyde Amendment was constitutional. The majority found the amendment's denial of Medicaid funds for most abortions, therapeutic as well as non-therapeutic, a rational way to promote the legitimate state interest in protecting potential life. *Id.* at 324-26. Justice Marshall did not dispute that the protection of potential life was a legitimate state interest, but he balanced this interest against a woman's constitutional right to have an abortion. This inquiry clearly goes beyond the mere legitimacy of the state interest. *Id.* at 344, 346. Furthermore, he chose an interest, the encouragement of normal childbirth, asserted by the state in Maher v. Roe, 432 U.S. 464 (1977), and found that the Hyde Amendment bore no rational relationship to that end. 448 U.S. at 344-45. The majority did not discuss this interest, and there is no indication that the government advanced it.

select.[56] For Justice Marshall, however, those boundaries are elastic, and the penumbras of the recognized fundamental interests are generous. Thus he finds "quasi-suspect" classes and "quasi-fundamental" interests in many contexts where a majority of the Court does not.

1. Quasi-Suspect Classes

Two elements of Justice Marshall's equal protection analysis make him more likely than other members of the Court to label a classification "quasi-suspect." First, he exhibits an extraordinary sensitivity to previously recognized indicia of suspectness, particularly when more than one such factor is present.[57] Second, he analyzes the impact of the legislation in question, not simply its facial classification.[58]

Justice Marshall's sensitivity to certain indicia of suspectness leads him to find that legislation affecting the poor, the elderly, and the mentally or physically disabled deserves heightened scrutiny. For example, wealth classifications exerting a differential effect upon suspect or quasi-suspect classes such as blacks or women, or upon classes traditionally accorded legal favor, such as children, are particularly likely to trigger Marshall's "spectrum of standards" analysis.[59] In *Beal v. Doe*,[60] the Court held that

56. *See supra* notes 18, 19 & 33 and accompanying text.

57. For example, in *Dandridge* Justice Marshall described the affected AFDC recipients as a "powerless minority," 397 U.S. at 523, evoking both the *Carolene Products* warning about legislation directed at "discrete and insular minorities," and indications from other opinions that "political powerlessness" is relevant to the proper level of scrutiny. *See supra* note 18. In *Murgia*, *Vance*, and *Cleburne* Justice Marshall borrowered from the rationale of the gender cases that justify heightened scrutiny on the basis of a history of discrimination against the affected group. 87 L.Ed.2d at 334, 440 U.S. at 114, 427 U.S. at 324. He also took a leaf from Justice Brennan's plurality opinion in Frontiero v. Richardson, 411 U.S. 677 (1973), when in *Dandridge*, *Murgia*, and *Beal* he pointed out that the discrimination at issue bore no relationship to the worth of the members of the class, or to factors they could control. 432 U.S. at 458, 427 U.S. at 320, 397 U.S. at 523.

58. Justice Marshall's use of this technique is not limited to his sliding scale opinions. *See, e.g.*, Califano v. Boles, 443 U.S. 282 (1979) (Marshall, J., dissenting) (finding children rather than mothers the affected class); Fiallo v. Bell, 430 U.S. 787 (1977) (Marshall, J., dissenting) (finding citizen children, rather than their alien fathers, the affected class); Jefferson v. Hackney, 406 U.S. 535 (1972) (Marshall, J., dissenting) (giving far more consideration than the majority to claim that the assignment of lower benefits to AFDC recipients than to other state-aid recipients was racially motivated).

59. Justice Marshall described the class legislated against in Dandridge v. Williams as a "powerless minority—poor families without breadwinners." 397 U.S. 471, 520 (1970) (Marshall, J., dissenting). The legislation distinguished "between children on the basis of a factor over which they [had] no control—the number of their brothers and sisters." *Id.* at 523. He found a similar affected class in *Rodriguez*—"schoolchildren of property-poor districts." 411 U.S. 1, 91 (1973) (Marshall, J., dissenting). As he pointed out, his perception of the classification contrasts sharply with the majority's characterization of it as one between school districts. *Id.*

Title XIX of the Social Security Act did not require the funding of non-therapeutic abortions as a condition of state participation in Medicaid. Justice Marshall saw the class affected, female Medicaid participants, as one "unfairly burdened by invidious discrimination unrelated to the individual worth of its members."[61] The classification had racial overtones as well: the impact of the legislation would "fall with great disparity upon women of minority races."[62]

Justice Marshall displayed his solicitude for older workers in *Massachusetts Board of Retirement v. Murgia*[63] and *Vance v. Bradley*,[64] two cases in which the Court upheld mandatory retirement provisions for government workers. Justice Marshall acknowledged distinctions "between the elderly and traditional suspect classes such as Negroes, and between the elderly and quasi-suspect classes such as women or illegitimates." He noted the existence of protective legislation and entitlements that favor the elderly and members of suspect classes but not the members of quasi-suspect classes.[65] Nevertheless, he found "older workers" "subject to repeated and arbitrary discrimination in *employment*."[66] Thus, the intersection of the class, which bore some indicia of suspectness, and the interest, employment, pointed to heightened scrutiny.

In other cases the presence of more than one indicator of suspectness has also led Justice Marshall to elevate scrutiny. In *Richardson v. Belcher*, for example, Justice Marshall pointed out that the affected class included "the destitute [*sic*], disabled, or elderly."[67] Justice Marshall implied that any one of these categories is somewhat suspect; it is logical to think he considers them even more suspect in combination. Thus, the elderly poor, like elderly workers, comprise a quasi-suspect class for Justice Marshall.

Justice Marshall's opinion in *Richardson* suggested that he would accord the physically disabled heightened scrutiny, and in *Cleburne v. Cleburne Living Center* he stated that the mentally disabled deserve such

60. 432 U.S. 438 (1977) (Marshall, J., dissenting).

61. *Id.* at 458 (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320 (1976)).

62. 432 U.S. at 459. In Harris v. McRae, 448 U.S. 297 (1980) (Marshall, J., dissenting), Marshall identified a similar class, "indigent pregnant women," . . . "a substantial proportion of whom [were] members of minority races."

63. 427 U.S. 307 (1976) (Marshall, J., dissenting).

64. 440 U.S. 93 (1979) (Marshall, J., dissenting).

65. 427 U.S. at 325.

66. *Id.* at 324.

67. 404 U.S. 78, 90 (1971) (Marshall, J., dissenting).

treatment.[68] In his concurring opinion Justice Marshall argued that the long history of "segregation and discrimination" affecting the mentally retarded required the application of heightened scrutiny.[69]

Justice Marshall's examination of the ultimate, as opposed to the facial, impact of a classification has also led him to find suspect classes not recognized by the rest of the Court. In some cases his analysis seems more realistic than that of the majority; in others he might fairly be accused of analyzing the wisdom of a policy rather than its constitutionality. For example in *Dandridge*, Justice Marshall, unlike the majority, focused on the children of Aid to Families and Dependent Children (AFDC) beneficiaries not the adult recipients themselves.[70] Given the child-centered purpose of AFDC, this focus seems logical. In *Richardson*, however, Marshall's analysis of the legislation's impact was less logical. He pointed out that the provision limiting Social Security benefits affected not only the wage-earner but his family as well, and this observation led him to find women and children in the affected class.[71] This analysis ignored the primary purpose of the legislation at issue: the elimination of double benefits.[72]

In *Beal v. Doe*, Justice Marshall focused on the incidental impact upon minority women of the withholding of Medicaid funds for abortions.[73] On its face the provision at issue equally disadvantaged all Medicaid recipients of childbearing age, but Justice Marshall found invidious racial discrimination.[74] His analysis failed to recognize that the legislature's desire to limit the availability of a controversial procedure, abortion, could have spurred the legislation, without any intention to disadvantage a particular class.

2. *Quasi-Fundamental Interests*

By extending the logic of dicta in earlier equal protection or due process cases. Justice Marshall also recognizes quasi-fundamental interests

68. 87 L.Ed.2d 313 (1985).

69. *Id.* at 334 (Marshall, J., concurring).

70. 397 U.S. at 523.

71. 404 U.S. at 91.

72. Social Security benefits are not always need-based; AFDC benefits presumably are. The Court has remarked upon this difference. *See, e.g.*, Mathews v. Eldridge, 425 U.S. 319 (1976) (pretermination hearing not required for cutoff of disability benefits); Goldberg v. Kelly, 397 U.S. 254 (1970) (pretermination hearing required for cutoff of welfare benefits).

73. 432 U.S. at 459. *See also* Harris v. McRae, 448 U.S. 297 (1980), discussed *supra* note 55.

74. *See supra* text accompanying notes 60-62.

not recognized by the majority of the Court.[75] He would extend heightened scrutiny to interests that involve what he perceives as vital governmental benefits or important aspects of personal liberty.[76] For example, in *Dandridge v. Williams*[77] and *Richardson v. Belcher*[78] Justice Marshall found the interest in subsistence or unemployment benefits important enough to elevate scrutiny.[79] In addition, he has stated flatly that he considers public education a fundamental right because of its "unique status" in America and its close connection to the "basic constitutional values" of political participation and first amendment rights.[80]

Justice Marshall's reasons for applying heightened scrutiny to legislation affecting education and welfare benefits are mirrored in the justifications he offers for heightening the scrutiny of basic liberty interests. He pursues two main analytic paths. He may find the interest closely linked to, or necessary for the fulfillment of an explicitly constitutional guarantee. Alternatively, he may expand on dicta from earlier cases, sometimes

75. Justice Marshall is not the only member of the Court to interpret the boundaries of the fundamental interest category flexibly, however. *See supra* note 17. Nor are his sliding scale opinions the only ones in which he does so. *See, e.g.*, Buckley v. Valeo, 429 U.S. 1, 287 (1976) (Marshall, J., dissenting) (fundamental interest in promoting equal access to the political arena at issue, not equalization of candidates' financial resources); Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) (restrictive definition of "family" in a single-family zoning ordinance violated fundamental rights of association and privacy); United States v. Kras, 409 U.S. 434, 461-62 (1973) (Marshall, J., dissenting) (fundamental interest, access to the courts, rather than the right to discharge in bankruptcy at issue).

76. As applied to fundamental interests, Justice marshall's equal protection scheme bears a striking resemblance to Lawrence Tribe's description of intermediate scrutiny. *See* TRIBE, *supra* note 31, at 1089-90. According to Tribe, the circumstances that trigger intermediate review are present when important, but not fundamental, interests are violated: "either a significant interference with liberty or a denial of a benefit vital to the individual." Similarly, Tribe asserts that intermediate review is appropriate when "sensitive, although not necessarily suspect, criteria of classification are involved." *Id.* This too resembles Justice Marshall's pattern.

77. 397 U.S. 471 (1970) (Marshall, J., dissenting).

78. 404 U.S. 78 (1971) (Marshall, J., dissenting).

79. In *Dandridge*, Justice Marshall called AFDC benefits "the stuff that sustains those children's lives," 397 U.S. at 522, and asserted that their denial withheld from the children "even a subsistence existence." *Id.* at 530. In *Richardson*, the legislation at issue affected the distribution of "government funds to provide for basic human needs." 404 U.S. at 90.

80. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting). Three of the sliding scale opinions deal with education: Martinez v. Bynum, 461 U.S. 321 (1983) (Marshall, J., dissenting) (upholding constitutionality of Texas statute denying non-resident children the right to attend public school); Plyler v. Doe, 457 U.S. 202 (1982) (Marshall, J., concurring) (holding unconstitutional Texas statute barring children of illegal aliens from public school); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting) (upholding constitutionality of Texas property tax-based scheme of school funding).

even *Lochner*-era cases, to illustrate the importance the Court has accorded the interest in the past.

For example, in *Hollenbaugh v. Carnegie Free Library*[81] Justice Marshall found that the implied constitutional right of privacy and the explicit guarantee of freedom of association, both cast long shadows. He asserted that the discharge of two public employees for living together out of wedlock implicated a host of privacy and associational rights.[82] The implicated interests, freedom of choice in patterns of lifestyle and residence, are less obvious constitutional guarantees than freedom from unreasonable search and seizure or the right of association for political reasons. Yet in Justice Marshall's view, they are, as logical extensions of these explicit constitutional guarantees, important if not "fundamental" interests.[83]

The government action in *Hollenbaugh* violated not only rights of privacy and association, but, also in Justice Marshall's view, "the right of the individual . . . to engage in any of the common occupations of life."[84] Justice Marshall relies primarily on the language of *Lochner*-era cases to support his belief that the right to work is not just important, but also deserving of special protection under the equal protection clause.[85] Support for his view of the centrality and importance of work can be found in more recent cases as well, and Justice Marshall cites a number of them as secondary authorities for his position.[86]

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81. 439 U.S. 1052 (1978) (Marshall, J., dissenting). For a further discussion of *Hollenbaugh* see *supra* note 48.

82. In Justice Marshall's estimation, these include the rights: "to be free, except in very limited circumstances, from unwarranted governmental intrusion into one's privacy," *id.* at 1055, and "to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment." *Id.* In addition, the discharge impinged upon the employees' "freedom of personal choice in matters of marriage and family life," *id.*, their "associational interests," *id.* at 1056, and the "interests of the child in having a two-parent home." *Id.*

83. *Id.* at 1055.; *See also* 87 L.Ed.2d 313, 334 (1985) (Marshall, J., concurring) ("interest of the retarded in establishing group homes" is "substantial").

84. 439 U.S. at 1055 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

85. In Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (Marshall, J., dissenting), Justice Marshall expressed the view that the right to work is encompassed "within the concept of liberty guaranteed by the Fourteenth Amendment," *id.* at 322, by quoting from *Meyer* again, as well as from an 1884 case, Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884), that called the right to work "an inalienable right." *Id.* at 762. He also quoted a 1914 case, Smith v. Texas, 233 U.S. 630 (1914), to support his view that "all men are entitled to the equal protection of the law in their right to work for the support of themselves and families." *Id.* at 641.

86. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

IV. CONCLUSIONS: A NEW STANDARD OF REVIEW?

In the four sliding scale opinions in which Justice Marshall actually enunciates a new standard of review, that standard bears a strong resemblance to the intermediate level of scrutiny formulated in *Craig v. Boren* and now accepted by most of the Court for gender classifications.[87] For this reason, it is not clear that Justice Marshall has advanced the debate over standards of review. Nevertheless, Justice Marshall's meticulous analysis of the impact of legislative classifications highlights the insensitivity of the present framework, which requires rigid application of a particular level of scrutiny regardless of the context.

Justice Marshall's primary contribution to equal protection jurisprudence is an increased sensitivity to affected classes and interests rather than the development of a more coherent and a principled standard of review. Justice Marshall's "spectrum" of standards analysis requires courts to draw such subtle distinctions that it is all but impossible to apply. If, however, courts conform to Justice Marshall's own practice, rather than his theory, and apply roughly intermediate scrutiny to quasi-suspect classes and interests, his standard may prove workable. Admittedly, the extension of intermediate scrutiny to a number of groups and interests will present line-drawing problems, but Justice Marshall's sensi-

87. 429 U.S. 190, 197 (1976) (requiring gender classifications to be "substantially related" to an "important" governmental objective). In Vance v. Bradley, 440 U.S. 93 (1979) (Marshall, J., dissenting), Justice Marshall uses the very language employed in *Craig*; *id.* at 115; in Cleburne v. Cleburne Living Center, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring), he announced that he would require the zoning ordinance at issue to be "convincingly justified as substantially furthering legitimate and important purposes." *Id.* at 334. In Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (Marshall, J., dissenting), Justice Marshall stated that he would require the mandatory retirement provision at issue to be "reasonably closely tailored" to furthering a "reasonably substantial" state interest. *Id.* at 375. In Martinez v. Bynum, 461 U.S. 321 (1983) (Marshall, J., dissenting), he advocated that the exclusion of non-resident children from public schools have to be "narrowly tailored" to serving a "substantial" state interest. *Id.* at 347.

It is unclear whether, or if, these standards differ substantively from intermediate scrutiny. The standard in *Vance* is identical to the intermediate scrutiny standard; as is the standard in *Cleburne*, assuming that "legitimate," usually associated with a lower standard, adds nothing to "important." It is difficult to perceive, also, how the *Murgia* means-requirement that legislation be "reasonably closely tailored" to its end differs from the requirement that it be "substantially related." The *Murgia* requirement that the state interest be "reasonably substantial" might be something less than "important," but the converse is arguable too. The only standard that might convincingly be distinguished from the others is the one urged in *Martinez*. Although Justice Marshall describes the required state interest as "substantial," his use of "narrowly tailored" may indeed imply a stricter means test than "substantially related." Because, however, "narrowly tailored" seems less strict than "necessary," it is difficult to envision the practical differences between "narrowly tailored" and "substantially related."

tivity to affected classes and interests avoids, at least in part, the often arbitrary and unjust results reached under the present framework.

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