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TO:

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FROM:

Chai Feldblum

COMMENT:



GEORGETOWN UNIVERSITY LAW CENTER

Chai R. Feldblum
Associate Professor of Law

TO: Marvin Krislov
FROM: Chai Feldblum *CF*
DATE: February 5, 1996
RE: Standard of Review: Disability

Richard Socarides called to say a meeting was possibly being planned to discuss the legal questions surrounding a constitutional challenge to discrimination based on disability. I noted to Richard that I did not believe the question was completely closed regarding the appropriate standard of review to be applied in such cases. I recognize there is a relative uniformity of views regarding the meaning and application of the Supreme Court's decision in *Cleburne*. But my review of Supreme Court jurisprudence in this area (which I undertook as part of a project designed to analyze the appropriate standard of review for classifications based on sexual orientation) led me to question that settled wisdom.

Richard suggested I send these pages over to you so you can glance at them before the meeting. My musings on disability are relegated to footnote 108 on p. 32 -- but you need the text on the rest of the pages for the footnote to make any sense.

Cheers.

cc. Richard Socarides
Marsha Scott

Sexual Orientation, Morality and the Law:
Devlin Revisited

Chai R. Feldblum

Sexual Orientation, Morality and the Law: Devlin Revisited
Table of Contents

INTRODUCTION	2
I. THE LIBERAL PARADIGM OF EQUALITY	11
A. <u>The Judicial Arena: Equal Protection Challenges</u>	13
B. <u>Supreme Court Equal Protection Jurisprudence</u>	16
C. <u>Application to Sexual Orientation</u>	35
a. <u>Political Powerlessness</u>	36
b. <u>Immutability</u>	51
c. <u>The Relevance of <i>Bowers v. Hardwick</i></u>	60
II. AN EYE TOWARDS A NEW PARADIGM	82
A. <u>The Avoidance of Morality in the Traditional Paradigm</u>	82
B. <u>The Pitfalls in Avoiding Morality</u>	90
C. <u>Devlin Revisited</u>	101
D. <u>Application to Prohibiting Discrimination on the Basis of Sexual Orientation</u> ...	112
a. <u>The Immorality of Compelled Deceit</u>	112
b. <u>The Morality of Love</u>	127
III. CONCLUSION	133

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While these alternative approaches have appeal, they certainly have no guarantee of success. Thus, these arguments do not displace the need to argue that classifications based on sexual orientation should receive heightened scrutiny by the courts. An analysis of how to argue most effectively for such heightened scrutiny requires a brief review of Supreme Court jurisprudence in the area of equal protection law.

B. Supreme Court Equal Protection Jurisprudence

The Supreme Court's jurisprudence in the "classification" prong of equal protection bears the mark of case-by-case adjudication, not the mark of a coherently developed theory applied

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uniformly and systematically to all comers.³⁷ The initial conceptual basis for the idea that courts should strictly scrutinize certain governmental actions stems from one sentence in a footnote penned by Justice Stone in a 1938 Supreme Court case upholding the constitutionality of the Filled Milk Act of 1923.³⁸ Most of the Supreme Court's subsequent cases dealing with strict scrutiny of governmental classifications are noteworthy either for their lack of explanation of the principles justifying the scrutiny applied, or for their tendency to "slide into" or "back down" from strict scrutiny without ever explicitly acknowledging that any movement has taken place in the Court's analysis.

For example, strict scrutiny of classifications based on ethnicity or national origin was introduced without much theoretical fanfare. In 1944, the Court baldly stated in *Korematsu v. United States* that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"³⁹ but provided no particular elaboration of the principle. Nor was there much more analysis in the Supreme Court's opinion the year before in *Hirabayashi v. United States*,⁴⁰ in which the Court noted that "distinctions between citizens solely because of their ancestry" are "odious to a free people whose institutions are founded upon the doctrine of

³⁷ The Court's lack of systematic application of an equal protection theory has been commented upon by various Justices. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

³⁸ *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938)(citations omitted), "Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

³⁹ 323 U.S. 214, 216 (1944).

⁴⁰ 320 U.S. 81 (1943).

equality."⁴¹

The Court's stated justification for applying strict scrutiny to governmental classifications based on race (predominantly African-American race) has similarly been short and uncomplicated. The Court has noted that such classifications "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States" and that "[t]his strong policy renders racial classifications 'constitutionally suspect' and subject to the 'most rigid scrutiny' and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose."⁴²

As compared to the "brevity" approach that marks cases dealing with race and national origin, the "creeping progression/regression" approach is evident in Supreme Court cases analyzing classifications based on illegitimacy and alienage. In early cases challenging governmental discrimination against children or parents because of the illegitimacy status of the children, the Supreme Court used the language of "rational basis" review,⁴³ but invalidated several laws on the grounds that they constituted "invidious discrimination,"⁴⁴ or were "illogical

⁴¹*Id.* at 100.

⁴²*McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)(citations omitted). *See also Loving v. Virginia*, 388 U.S. 1 (1967).

⁴³ In *Levy v. Louisiana*, 391 U.S. 68, 71 (1968), the Court clearly stated a rational basis review standard: "Though the test has been variously stated, the end result is whether the line drawn is a rational one." In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972), the Court still articulated a rational basis standard ("The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bears some rational relationship to a legitimate state purpose."), *id.*, but its conclusion invoked the language of what would become intermediate scrutiny ("The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no *significant* relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve.")(emphasis added). *Id.* at 175. *See also Mathews v. Lucas*, 427 U.S. 495, 516 (1970).

⁴⁴*Levy*, 391 U.S. at 72.

and unjust."⁴⁵ While the Court explicitly refused to accord "strict scrutiny" to governmental classifications based on illegitimacy,⁴⁶ it noted vaguely that its scrutiny was "not a toothless one,"⁴⁷ and that "mere incantation of a proper state purpose" in these cases was not sufficient.⁴⁸ In 1978, the Supreme Court first used the complete language of "intermediate scrutiny" in a case dealing with illegitimacy,⁴⁹ and ten years later, it officially announced that classifications based on illegitimacy do indeed receive intermediate scrutiny review.⁵⁰

The Court's cases dealing with alienage reflect the "creeping regression" approach. In *Graham v. Richardson*,⁵¹ the Supreme Court announced that classifications based on alienage are "inherently suspect,"⁵² with stated reasons quite similar to the simple, straightforward ones found

⁴⁵*Weber*, 406 U.S. at 175.

⁴⁶*Lucas*, 427 U.S. at 505; *Trimble v. Gordon*, 430 U.S. 762, 767 (1977).

⁴⁷*Lucas*, 427 U.S. at 510.

⁴⁸*Trimble*, 430 U.S. at 769.

⁴⁹*Lalli v. Lalli*, 439 U.S. 259, 275-76 (1978). The manner in which the Court introduced this full formulation represents a classic example of the Court's "creeping progression" approach without explication. In the beginning of its opinion, the Court stated that classifications based on illegitimacy were invalid under the Fourteenth Amendment "if they are not *substantially related to permissible state interest*," *id.* at 265 (emphasis added) -- a hybrid standard made up of what would soon be termed intermediate scrutiny language ("substantially related") and existing rational basis language ("permissible" state interest). At the end of the opinion, however, the Court summed up by stating: "We conclude that the requirement imposed by [the challenged statute] on illegitimate children . . . is *substantially related to important state interests* the statute is intended to promote. We therefore find no violation of the Equal Protection Clause." *Id.* at 275-76 (emphasis added). Thus, in the course of one opinion, the Court progressed from a hybrid rational basis/intermediate scrutiny standard to the intermediate scrutiny standard (as it would be termed in subsequent Court cases) -- with neither an acknowledgment nor an explanation of the progression.

⁵⁰*Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.")

⁵¹403 U.S. 365 (1971).

⁵²*Id.* at 371.

in the Court's cases dealing with classifications based on race or national origin: "Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."⁵³ The Supreme Court soon realized, however, that it did not really mean (or want to mean) everything it said in *Graham v. Richardson*.⁵⁴ Six years later, the Court officially carved out from strict scrutiny review, and relegated to rational basis review, any challenges based on alienage but involving "matters firmly within a State's constitutional prerogative."⁵⁵ The reason, according to the Court, was that "[t]he distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."⁵⁶ Subsequent cases thus turned on whether the challenged exclusion on the basis of alienage was from some "governmental function,"⁵⁷ which was then subject to rational basis review, or from some non-governmental function, which remained subject to strict scrutiny.

The Court's treatment of classifications based on gender stands in its own unique

⁵³*Id.* at 371-72 (citations omitted).

⁵⁴Before the Court made any official change to the standard of scrutiny applied to classifications based on alienage, it already voiced reservations about invalidating certain of these classifications. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (noting that a State could, "in an appropriately defined class of positions," require citizenship as a qualification for office).

⁵⁵*Foley v. Connelie*, 435 U.S. 291, 296 (1977) (quoting *Dougall*, 413 U.S. at 648). The Court also took the occasion to provide a bit more detail as to why "certain" restrictions on aliens were treated with "heightened judicial solicitude": this was necessary "since aliens -- pending their eligibility for citizenship -- have no direct voice in the political process." *Id.* at 294.

⁵⁶*Ambach v. Norwick*, 441 U.S. 68, 75 (1979).

⁵⁷*Id.* at 75.

category. After upholding numerous discriminatory classifications based on gender,⁵⁸ the Court in *Reed v. Reed*,⁵⁹ struck down a state probate law based on gender. While never explicitly departing from traditional "rational basis" review, the unanimous Court (as a later plurality pointed out) clearly rejected the state's "apparently rational explanation of the statutory scheme."⁶⁰

In *Frontiero v. Richardson*,⁶¹ Justice Brennan made the case for a plurality of the Court for strict scrutiny of classifications based on gender.⁶² While Justice Brennan devoted more effort to explaining his decision than had any previous Court decision applying strict scrutiny,⁶³ his analysis was still presented in a relative theoretical void.

The case for strict scrutiny, as presented by the plurality in *Frontiero*, rested primarily on three "considerations."⁶⁴ The first was the history of discrimination suffered by women. Justice Brennan noted that the nation has been marked by a "long and unfortunate history of sex discrimination," rationalized by an "attitude of 'romantic paternalism,'"⁶⁵ and that while the

⁵⁸The line of cases from *Bradwell v. Illinois*, 83 U.S. 130 (1873), to *Hoyt v. Florida*, 368 U.S. 57 (1961), exemplify this era of the Supreme Court's gender jurisprudence.

⁵⁹404 U.S. 71 (1971).

⁶⁰*Frontiero v. Richardson*, 411 U.S. 677, 683 (1973)(describing decision in *Reed*).

⁶¹411 U.S. 677 (1973).

⁶²*Id.* at 682. ("[A]ppellants contend that classifications based on sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree ...").

⁶³One presumes Justice Brennan engaged in such an extensive analysis in *Frontiero* partly in order to catch the elusive fifth vote.

⁶⁴*Id.* at 688.

⁶⁵*Id.* at 684.

position of women has improved in recent decades, they still face "pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."⁶⁶ Justice Brennan never specifically explained, however, why a history of discrimination was relevant to establishing a strict scrutiny analysis; he seemed to assume we would understand that on our own.⁶⁷

The second consideration for the plurality was that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."⁶⁸ Quoting from the Court's opinion in *Weber v. Aetna Casualty & Surety Co.*, the plurality observed that "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship

⁶⁶*Id.* at 686 (footnotes omitted). In a footnote to this sentence, Justice Brennan described the extent of discrimination against women in the political arena as follows: "In part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate and only 14 women hold seats in the House of Representatives." *Id.* at 686, n.17. Lower courts, when faced with the question of what standard of review to apply to classifications based on sexual orientation, subsequently separated the factors of "history of discrimination" and "political powerlessness" and seized upon this footnote as a guide to determining political power. See *High-Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 n.10 (9th Cir. 1990); see also *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Evans v. Romer*, No. 92-CV7223 1993 WL 518586, at 12 (Colo. Dist. Ct. Dec. 14, 1993). The difficulty with this, of course, is that the plurality did not write this footnote as a barometer to establish the point of some magical sufficient political power, but rather, as a description of the residual effects of historical discrimination against women as reflected in the political arena. Even if and when women's participation in that arena improves (as it certainly has since 1973), the fact that women suffered a history of discrimination in this country, and continue to suffer residual effects of that discrimination, remains a valid factor in the strict scrutiny analysis under a "history of discrimination" prong. See also *infra* text accompanying notes 116-170 for further discussion of political powerlessness.

⁶⁷Justice Brennan noted that a unanimous Court in *Reed v. Reed*, 404 U.S. 71 (1971) had, in practice, departed "from 'traditional' rational basis analysis with respect to sex-based classifications," and that this departure was "clearly justified." Then, presumably to explain why that departure was justified, Justice Brennan immediately moved to a lengthy description of the history of discrimination suffered by women. The analytical connection between the *conclusion* that the departure from rational basis review in *Reed* had been justified, and the *description* of the history of discrimination, was left for the reader to fill in.

⁶⁸*Frontiero*, 411 U.S. at 686 (citing *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972)).

to individual responsibility⁶⁹

The absence of a theoretical construct in *Frontiero* is painfully evident in this discussion of immutability. In fact, the Court in *Weber v. Aetna Casualty* never invoked the truism that children cannot be held responsible for their births as a reason for applying a higher standard of review in judging classifications based on illegitimacy. At the time the Court decided *Weber*, it was still emitting vague and contradictory signals about *what* standard of review it believed should be applied to these classifications.⁷⁰ The fact that children could not be held responsible for their births was relevant to the Court in *Weber* -- but solely as a reason why, when it *applied* its standard of review (whatever that was), the governmental classification was found wanting. As the Court explained: "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent."⁷¹ Thus, according to the Court, the penalty visited upon illegitimate children in the state's workmen's compensation law at issue could not be rationally (or even significantly) related to society's presumed interest in condemning "irresponsible liaisons beyond the bound of marriage."⁷²

The plurality in *Frontiero* itself recognized that the immutability of a characteristic on which a governmental classification is based could not, by itself, justify a higher standard of

⁶⁹*Id.*

⁷⁰See *supra* text accompanying notes 43-50.

⁷¹*Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972).

⁷²*Id.* The principle of "lack of responsibility" was invoked as well in the Court's opinion in *Plyler v. Doe*, 457 U.S. 202 (1982). As in the case of *Weber v. Aetna Sur. Co.*, this principle was not invoked to heighten the standard of review. Rather, it was again used when the Court *applied* its standard of review, whatever that actually was in that case. According to the Court, the fact that children of illegal aliens have no responsibility for their parents' illegal entry into the country made it illogical (i.e., irrational) and unjust to punish them for their parents' actions. See *Plyler*, 457 U.S. at 219-220.

review. For example, the plurality was not ready to concede that governmental classifications based on "intelligence or physical disability" (presumably immutable characteristics that are sometimes accidents of birth) should also be subject to strict scrutiny. The plurality's explanation for why sex was different from intelligence or physical disability, and "align[ed] with the recognized suspect criteria," was that "the sex characteristic frequently bears no relation to ability to perform or contribute to society."⁷³

As a third consideration, the plurality threw in the fact that Congress had "manifested an increased sensitivity to sex-based classifications" through passage of laws such as Title VII of the Civil Rights Act of 1964.⁷⁴ This "conclusion of a coequal branch of Government" that "classifications based upon sex are inherently invidious," stated the plurality, "is not without significance to the question presently under consideration."⁷⁵

Again, the plurality never explained why such action on the part of a co-equal branch of government should have any relevance to a court's determination of whether to apply strict scrutiny to a governmental classification. Indeed, when the Court began to develop a theoretical construct for its strict scrutiny cases -- an effort it first undertook in 1982 in *Plyler v. Doe*⁷⁶, and then again in 1985 in *Cleburne v. Cleburne Living Center*,⁷⁷ it concluded that positive legislative

⁷³*Frontiero*, 411 U.S. at 686-87. As the plurality thus concluded, "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."

⁷⁴*Id.* at 687.

⁷⁵*Id.* at 687-88.

⁷⁶457 U.S. 202 (1982).

⁷⁷473 U.S. 432 (1985).

action on behalf of a group challenging a governmental classification should be grounds for the Court to be less willing to apply strict scrutiny.⁷⁸

Ironically, the point appended by the *Frontiero* plurality to its discussion of immutability -- the fact that a characteristic on which a governmental classification is made bears no relationship to an individual's ability to perform a job or to contribute to society -- emerged as the key factor in the Court's analysis when it finally presented a theoretical construct to justify heightened scrutiny in *Plyler* and *Cleburne*. By contrast, the factor of immutability -- the consideration which had generated the appendage -- was explicitly rejected by the Court as having any relevance to the standard of review that should be applied to challenged classifications.⁷⁹

The long-awaited theoretical construct for the application of strict scrutiny first appears in

⁷⁸This twist on positive legislative action was made by Justice White, writing for the majority in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 443-44 (1985), and not by Justice Brennan, writing for the Court in *Plyler*. See *infra* text accompanying notes 103-104. It was also in *Cleburne*, albeit in an opinion dissenting from the majority's analysis, that Justice Marshall, joined by Justices Brennan and Blackmun, finally proffered a theoretical basis for using positive legislative action as grounds to support strict scrutiny. 473 U.S. at 466. ("Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.")

⁷⁹*Cleburne*, 473 U.S. at 445. The final upshot in the Court's standard of review analysis for gender-based classifications was true to form. In *Craig v. Boren*, 429 U.S. 190, 197 (1976), a Court majority pronounced that "previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." This standard came to be termed "intermediate scrutiny," and was viewed as somehow different from "strict scrutiny." The Supreme Court, however, has never explicitly rejected strict scrutiny for gender-based classifications. Various Justices on the Court have pointed out periodically that the question whether gender-based classifications deserve strict scrutiny is still open. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982)(O'Connor, J.); *J.E.B. v. Alabama*, 114 S.Ct. 1419, 1426 n.6 (1994)(Blackmun, J.); *Harris v. Forklift Systems*, 114 S.Ct. 367, 373 (1993)(Ginsburg, J.). When several women's rights groups, and other civil rights groups, petitioned the Supreme Court to review the Fourth Circuit opinion in *United States v. Virginia*, 976 F.2d 890 (1992), they took the opportunity to ask the Court to revisit the question whether gender-based classifications deserve strict scrutiny. See *United States v. Virginia*, ___ F.3d ___ (4th Cir. 1995), *cert granted*, ___ S.Ct. ___, 1995 WL 334952 (U.S. Oct. 5, 1995).

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³⁶A related principle is that "a bare . . . desire to harm a politically unpopular group" is not a legitimate state interest. See *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); see also *Zobel v. Williams*, 457 U.S. 55, 63 (1982). Again, the challenge for the advocate would be to convince the court that the discriminatory action at issue truly represented a bare desire to harm an unpopular group, and was not designed to achieve some other, legitimate, state purpose.

uniformly and systematically to all comers.³⁷ The initial conceptual basis for the idea that courts should strictly scrutinize certain governmental actions stems from one sentence in a footnote penned by Justice Stone in a 1938 Supreme Court case upholding the constitutionality of the Filled Milk Act of 1923.³⁸ Most of the Supreme Court's subsequent cases dealing with strict scrutiny of governmental classifications are noteworthy either for their lack of explanation of the principles justifying the scrutiny applied, or for their tendency to "slide into" or "back down" from strict scrutiny without ever explicitly acknowledging that any movement has taken place in the Court's analysis.

For example, strict scrutiny of classifications based on ethnicity or national origin was introduced without much theoretical fanfare. In 1944, the Court baldly stated in *Korematsu v. United States* that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"³⁹ but provided no particular elaboration of the principle. Nor was there much more analysis in the Supreme Court's opinion the year before in *Hirabayashi v. United States*,⁴⁰ in which the Court noted that "distinctions between citizens solely because of their ancestry" are "odious to a free people whose institutions are founded upon the doctrine of

³⁷ The Court's lack of systematic application of an equal protection theory has been commented upon by various Justices. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

³⁸ *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938)(citations omitted), "Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

³⁹ 323 U.S. 214, 216 (1944).

⁴⁰ 320 U.S. 81 (1943).

equality."⁴¹

The Court's stated justification for applying strict scrutiny to governmental classifications based on race (predominantly African-American race) has similarly been short and uncomplicated. The Court has noted that such classifications "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States" and that "[t]his strong policy renders racial classifications 'constitutionally suspect' and subject to the 'most rigid scrutiny' and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose."⁴²

As compared to the "brevity" approach that marks cases dealing with race and national origin, the "creeping progression/regression" approach is evident in Supreme Court cases analyzing classifications based on illegitimacy and alienage. In early cases challenging governmental discrimination against children or parents because of the illegitimacy status of the children, the Supreme Court used the language of "rational basis" review,⁴³ but invalidated several laws on the grounds that they constituted "invidious discrimination,"⁴⁴ or were "illogical

⁴¹*Id.* at 100.

⁴²*McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)(citations omitted). *See also Loving v. Virginia*, 388 U.S. 1 (1967).

⁴³ In *Levy v. Louisiana*, 391 U.S. 68, 71 (1968), the Court clearly stated a rational basis review standard: "Though the test has been variously stated, the end result is whether the line drawn is a rational one." In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972), the Court still articulated a rational basis standard ("The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bears some rational relationship to a legitimate state purpose."), *id.*, but its conclusion invoked the language of what would become intermediate scrutiny ("The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no *significant* relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve.")(emphasis added). *Id.* at 175. *See also Mathews v. Lucas*, 427 U.S. 495, 516 (1970).

⁴⁴*Levy*, 391 U.S. at 72.

and unjust."⁴⁵ While the Court explicitly refused to accord "strict scrutiny" to governmental classifications based on illegitimacy,⁴⁶ it noted vaguely that its scrutiny was "not a toothless one,"⁴⁷ and that "mere incantation of a proper state purpose" in these cases was not sufficient.⁴⁸ In 1978, the Supreme Court first used the complete language of "intermediate scrutiny" in a case dealing with illegitimacy,⁴⁹ and ten years later, it officially announced that classifications based on illegitimacy do indeed receive intermediate scrutiny review.⁵⁰

The Court's cases dealing with alienage reflect the "creeping regression" approach. In *Graham v. Richardson*,⁵¹ the Supreme Court announced that classifications based on alienage are "inherently suspect,"⁵² with stated reasons quite similar to the simple, straightforward ones found

⁴⁵*Weber*, 406 U.S. at 175.

⁴⁶*Lucas*, 427 U.S. at 505; *Trimble v. Gordon*, 430 U.S. 762, 767 (1977).

⁴⁷*Lucas*, 427 U.S. at 510.

⁴⁸*Trimble*, 430 U.S. at 769.

⁴⁹*Lalli v. Lalli*, 439 U.S. 259, 275-76 (1978). The manner in which the Court introduced this full formulation represents a classic example of the Court's "creeping progression" approach without explication. In the beginning of its opinion, the Court stated that classifications based on illegitimacy were invalid under the Fourteenth Amendment "if they are not *substantially related to permissible state interest*," *id.* at 265 (emphasis added) -- a hybrid standard made up of what would soon be termed intermediate scrutiny language ("substantially related") and existing rational basis language ("permissible" state interest). At the end of the opinion, however, the Court summed up by stating: "We conclude that the requirement imposed by [the challenged statute] on illegitimate children . . . is *substantially related to important state interests* the statute is intended to promote. We therefore find no violation of the Equal Protection Clause." *Id.* at 275-76 (emphasis added). Thus, in the course of one opinion, the Court progressed from a hybrid rational basis/intermediate scrutiny standard to the intermediate scrutiny standard (as it would be termed in subsequent Court cases) -- with neither an acknowledgment nor an explanation of the progression.

⁵⁰*Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.")

⁵¹403 U.S. 365 (1971).

⁵²*Id.* at 371.

in the Court's cases dealing with classifications based on race or national origin: "Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."⁵³ The Supreme Court soon realized, however, that it did not really mean (or want to mean) everything it said in *Graham v. Richardson*.⁵⁴ Six years later, the Court officially carved out from strict scrutiny review, and relegated to rational basis review, any challenges based on alienage but involving "matters firmly within a State's constitutional prerogative."⁵⁵ The reason, according to the Court, was that "[t]he distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."⁵⁶ Subsequent cases thus turned on whether the challenged exclusion on the basis of alienage was from some "governmental function,"⁵⁷ which was then subject to rational basis review, or from some non-governmental function, which remained subject to strict scrutiny.

The Court's treatment of classifications based on gender stands in its own unique

⁵³*Id.* at 371-72 (citations omitted).

⁵⁴Before the Court made any official change to the standard of scrutiny applied to classifications based on alienage, it already voiced reservations about invalidating certain of these classifications. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (noting that a State could, "in an appropriately defined class of positions," require citizenship as a qualification for office).

⁵⁵*Foley v. Connellie*, 435 U.S. 291, 296 (1977) (quoting *Dougall*, 413 U.S. at 648). The Court also took the occasion to provide a bit more detail as to why "certain" restrictions on aliens were treated with "heightened judicial solicitude": this was necessary "since aliens -- pending their eligibility for citizenship -- have no direct voice in the political process." *Id.* at 294.

⁵⁶*Ambach v. Norwick*, 441 U.S. 68, 75 (1979).

⁵⁷*Id.* at 75.

category. After upholding numerous discriminatory classifications based on gender,⁵⁸ the Court in *Reed v. Reed*,⁵⁹ struck down a state probate law based on gender. While never explicitly departing from traditional "rational basis" review, the unanimous Court (as a later plurality pointed out) clearly rejected the state's "apparently rational explanation of the statutory scheme."⁶⁰

In *Frontiero v. Richardson*,⁶¹ Justice Brennan made the case for a plurality of the Court for strict scrutiny of classifications based on gender.⁶² While Justice Brennan devoted more effort to explaining his decision than had any previous Court decision applying strict scrutiny,⁶³ his analysis was still presented in a relative theoretical void.

The case for strict scrutiny, as presented by the plurality in *Frontiero*, rested primarily on three "considerations."⁶⁴ The first was the history of discrimination suffered by women. Justice Brennan noted that the nation has been marked by a "long and unfortunate history of sex discrimination," rationalized by an "attitude of 'romantic paternalism,'"⁶⁵ and that while the

⁵⁸The line of cases from *Bradwell v. Illinois*, 83 U.S. 130 (1873), to *Hoyt v. Florida*, 368 U.S. 57 (1961), exemplify this era of the Supreme Court's gender jurisprudence.

⁵⁹404 U.S. 71 (1971).

⁶⁰*Frontiero v. Richardson*, 411 U.S. 677, 683 (1973)(describing decision in *Reed*).

⁶¹411 U.S. 677 (1973).

⁶²*Id.* at 682. ("[A]ppellants contend that classifications based on sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree ...").

⁶³One presumes Justice Brennan engaged in such an extensive analysis in *Frontiero* partly in order to catch the elusive fifth vote.

⁶⁴*Id.* at 688.

⁶⁵*Id.* at 684.

position of women has improved in recent decades, they still face "pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."⁶⁶ Justice Brennan never specifically explained, however, why a history of discrimination was relevant to establishing a strict scrutiny analysis; he seemed to assume we would understand that on our own.⁶⁷

The second consideration for the plurality was that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."⁶⁸ Quoting from the Court's opinion in *Weber v. Aetna Casualty & Surety Co.*, the plurality observed that "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship

⁶⁶*Id.* at 686 (footnotes omitted). In a footnote to this sentence, Justice Brennan described the extent of discrimination against women in the political arena as follows: "In part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate and only 14 women hold seats in the House of Representatives." *Id.* at 686, n.17. Lower courts, when faced with the question of what standard of review to apply to classifications based on sexual orientation, subsequently separated the factors of "history of discrimination" and "political powerlessness" and seized upon this footnote as a guide to determining political power. See *High-Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 n.10 (9th Cir. 1990); see also *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Evans v. Romer*, No. 92-CV7223 1993 WL 518586, at 12 (Colo. Dist. Ct. Dec. 14, 1993). The difficulty with this, of course, is that the plurality did not write this footnote as a barometer to establish the point of some magical sufficient political power, but rather, as a description of the residual effects of historical discrimination against women as reflected in the political arena. Even if and when women's participation in that arena improves (as it certainly has since 1973), the fact that women suffered a history of discrimination in this country, and continue to suffer residual effects of that discrimination, remains a valid factor in the strict scrutiny analysis under a "history of discrimination" prong. See also *infra* text accompanying notes 116-170 for further discussion of political powerlessness.

⁶⁷Justice Brennan noted that a unanimous Court in *Reed v. Reed*, 404 U.S. 71 (1971) had, in practice, departed "from 'traditional' rational basis analysis with respect to sex-based classifications," and that this departure was "clearly justified." Then, presumably to explain why that departure was justified, Justice Brennan immediately moved to a lengthy description of the history of discrimination suffered by women. The analytical connection between the *conclusion* that the departure from rational basis review in *Reed* had been justified, and the *description* of the history of discrimination, was left for the reader to fill in.

⁶⁸*Frontiero*, 411 U.S. at 686 (citing *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972)).

to individual responsibility⁶⁹

The absence of a theoretical construct in *Frontiero* is painfully evident in this discussion of immutability. In fact, the Court in *Weber v. Aetna Casualty* never invoked the truism that children cannot be held responsible for their births as a reason for applying a higher standard of review in judging classifications based on illegitimacy. At the time the Court decided *Weber*, it was still emitting vague and contradictory signals about *what* standard of review it believed should be applied to these classifications.⁷⁰ The fact that children could not be held responsible for their births was relevant to the Court in *Weber* -- but solely as a reason why, when it *applied* its standard of review (whatever that was), the governmental classification was found wanting. As the Court explained: "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent."⁷¹ Thus, according to the Court, the penalty visited upon illegitimate children in the state's workmen's compensation law at issue could not be rationally (or even significantly) related to society's presumed interest in condemning "irresponsible liaisons beyond the bound of marriage."⁷²

The plurality in *Frontiero* itself recognized that the immutability of a characteristic on which a governmental classification is based could not, by itself, justify a higher standard of

⁶⁹*Id.*

⁷⁰See *supra* text accompanying notes 43-50.

⁷¹*Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972).

⁷²*Id.* The principle of "lack of responsibility" was invoked as well in the Court's opinion in *Plyler v. Doe*, 457 U.S. 202 (1982). As in the case of *Weber v. Aetna Sur. Co.*, this principle was not invoked to heighten the standard of review. Rather, it was again used when the Court *applied* its standard of review, whatever that actually was in that case. According to the Court, the fact that children of illegal aliens have no responsibility for their parent's illegal entry into the country made it illogical (i.e., irrational) and unjust to punish them for their parents' actions. See *Plyler*, 457 U.S. at 219-220.

review. For example, the plurality was not ready to concede that governmental classifications based on "intelligence or physical disability" (presumably immutable characteristics that are sometimes accidents of birth) should also be subject to strict scrutiny. The plurality's explanation for why sex was different from intelligence or physical disability, and "align[ed] with the recognized suspect criteria," was that "the sex characteristic frequently bears no relation to ability to perform or contribute to society."⁷³

As a third consideration, the plurality threw in the fact that Congress had "manifested an increased sensitivity to sex-based classifications" through passage of laws such as Title VII of the Civil Rights Act of 1964.⁷⁴ This "conclusion of a coequal branch of Government" that "classifications based upon sex are inherently invidious," stated the plurality, "is not without significance to the question presently under consideration."⁷⁵

Again, the plurality never explained why such action on the part of a co-equal branch of government should have any relevance to a court's determination of whether to apply strict scrutiny to a governmental classification. Indeed, when the Court began to develop a theoretical construct for its strict scrutiny cases -- an effort it first undertook in 1982 in *Plyler v. Doe*⁷⁶, and then again in 1985 in *Cleburne v. Cleburne Living Center*,⁷⁷ it concluded that positive legislative

⁷³*Frontiero*, 411 U.S. at 686-87. As the plurality thus concluded, "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."

⁷⁴*Id.* at 687.

⁷⁵*Id.* at 687-88.

⁷⁶457 U.S. 202 (1982).

⁷⁷473 U.S. 432 (1985).

action on behalf of a group challenging a governmental classification should be grounds for the Court to be less willing to apply strict scrutiny.⁷⁸

Ironically, the point appended by the *Frontiero* plurality to its discussion of immutability -- the fact that a characteristic on which a governmental classification is made bears no relationship to an individual's ability to perform a job or to contribute to society -- emerged as the key factor in the Court's analysis when it finally presented a theoretical construct to justify heightened scrutiny in *Plyler* and *Cleburne*. By contrast, the factor of immutability -- the consideration which had generated the appendage -- was explicitly rejected by the Court as having any relevance to the standard of review that should be applied to challenged classifications.⁷⁹

The long-awaited theoretical construct for the application of strict scrutiny first appears in

⁷⁸This twist on positive legislative action was made by Justice White, writing for the majority in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 443-44 (1985), and not by Justice Brennan, writing for the Court in *Plyler*. See *infra* text accompanying notes 103-104. It was also in *Cleburne*, albeit in an opinion dissenting from the majority's analysis, that Justice Marshall, joined by Justices Brennan and Blackmun, finally proffered a theoretical basis for using positive legislative action as grounds to support strict scrutiny. 473 U.S. at 466. ("Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.")

⁷⁹*Cleburne*, 473 U.S. at 445. The final upshot in the Court's standard of review analysis for gender-based classifications was true to form. In *Craig v. Boren*, 429 U.S. 190, 197 (1976), a Court majority pronounced that "previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." This standard came to be termed "intermediate scrutiny," and was viewed as somehow different from "strict scrutiny." The Supreme Court, however, has never explicitly rejected strict scrutiny for gender-based classifications. Various Justices on the Court have pointed out periodically that the question whether gender-based classifications deserve strict scrutiny is still open. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982)(O'Connor, J.); *J.E.B. v. Alabama*, 114 S.Ct. 1419, 1426 n.6 (1994)(Blackmun, J.); *Harris v. Forklift Systems*, 114 S.Ct. 367, 373 (1993)(Ginsburg, J.). When several women's rights groups, and other civil rights groups, petitioned the Supreme Court to review the Fourth Circuit opinion in *United States v. Virginia*, 976 F.2d 890 (1992), they took the opportunity to ask the Court to revisit the question whether gender-based classifications deserve strict scrutiny. See *United States v. Virginia*, ___ F.3d ___ (4th Cir. 1995), *cert granted*, ___ S.Ct. ___, 1995 WL 334952 (U.S. Oct. 5, 1995).

a few pages set forth by Justice Brennan for the Court in *Plyler v. Doe*.⁸⁰ The construct is explicitly built on the principles of separation of powers. The Court in *Plyler* notes that the Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike."⁸¹ But, concomitantly, "things which are different" do not have to be treated the same.⁸² And, explains the Court, "[t]he initial discretion to determine what is 'different' and what is the 'same' resides in the legislatures of the States."⁸³ The practical reason for this is clear to the Court: "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every evil."⁸⁴

To properly accommodate the role of the legislature, Justice Brennan explains, courts are appropriately deferential when dealing with a constitutional challenge to most forms of state action, requiring merely that "the classification at issue bears some fair relationship to a legitimate public purpose."⁸⁵ But the Equal Protection Clause was also "intended as a restriction on state legislative action inconsistent with elemental constitutional premises," and so the courts' obligations under the Fourteenth Amendment also require that they not apply "so deferential a

⁸⁰457 U.S. 202, 216-217 (1982).

⁸¹*Id.* at 216 (citation omitted).

⁸²*Id.*

⁸³*Id.* Under the Fifth Amendment, the initial discretion to make this determination resides in the federal legislature.

⁸⁴*Id.*

⁸⁵*Id.*

standard to every classification."⁸⁶ An example of a classification that requires a less deferential review is a classification that "disadvantage[s] a 'suspect class.'"⁸⁷

In explaining *how* the Court determines when a classification disadvantages a "suspect class," Justice Brennan first concedes that "[s]everal formulations might explain our treatment of certain classifications as 'suspect.'"⁸⁸ This is no surprise, given that previous cases had never attempted to set forth *any* real "formulation" of their treatment of certain classifications as "suspect." But Justice Brennan then proffers two plausible formulations for determining when a classification disadvantages a "suspect class," both of which comport with his separation of powers model.

First, a classification is suspect if it is "more likely than other [classifications] to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective."⁸⁹ Legislation that is predicated on prejudice is clearly "incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law,"⁹⁰ and thus courts have reason to intervene with strict scrutiny in cases of this kind. Another tip-off for the courts is that "[c]lassifications treated as suspect tend to be irrelevant to any proper legislative goal."⁹¹ Presumably, such classifications are adopted primarily as a result

⁸⁶*Id.*

⁸⁷*Id.* Another example would be a classification that burdens a fundamental right. *Id.* at 216-17.

⁸⁸*Id.* at 216 n.14 (emphasis added).

⁸⁹*Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

⁹⁰*Id.*

⁹¹*Id.*

of prejudice, if the classifications are ordinarily irrelevant to proper legislative goals.

This formulation is sufficient to explain why the Court granted strict scrutiny to classifications based on race and national origin in its previous cases. Indeed, the Court cites both *McLaughlin v. Florida*⁹² (racial classification) and *Hirabayashi v. United States*⁹³ (national origin classification) as examples of this first formulation. This formulation is also sufficient to explain why classifications based on gender deserve strict scrutiny, as a plurality of the Court held in *Frontiero*.⁹⁴

This formulation comports with the separation of powers model set forth by Justice Brennan. It is legitimate for courts to apply strict scrutiny to actions of a legislature, a co-equal branch of government, if there is reason to believe the legislature is acting out of prejudice rather than legislative rationality. And, although Justice Brennan never acknowledges this explicitly, and indeed, subsequently confuses the issue, a court should be justified in adopting such scrutiny regardless of whether the classification adopted by the legislature operates to the disadvantage of a group that sometimes has some form of political access.⁹⁵

The second formulation presented by Justice Brennan to explain the Court's previous applications of strict scrutiny was that "certain groups, including largely the same groups, have historically been 'relegated to such a position of political powerlessness as to command

⁹²379 U.S. 184 (1964).

⁹³320 U.S. 81 (1943).

⁹⁴As noted, the Supreme Court has never explicitly rejected strict scrutiny for gender-based classifications. See *supra* n. 79. Under the first theoretical formulation presented in *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982), gender-based classifications should receive such scrutiny.

⁹⁵This point was made three years later by Justice Marshall, in his opinion dissenting in *Cleburne*, joined by Justices Brennan and Blackmun. *Cleburne*, 473 U.S. at 472 n.24.

extraordinary protection from the majoritarian political process."⁹⁶ While Justice Brennan asserts that the groups who experience political powerlessness are "*largely the same groups*" as are accorded strict scrutiny under the first formulation, this phrase seems like a careless and unfortunate addition on his part. The only case Justice Brennan cites in support of the second formulation, in which strict scrutiny was actually applied by the Court, is *Graham v. Richardson*,⁹⁷ which applied strict scrutiny to classifications based on alienage. Indeed, the *only* cases in which the Supreme Court has applied strict scrutiny, and has simultaneously invoked the issue of political power, have been in cases dealing with classifications based on alienage. As the Court explained in *Foley v. Connelie*, it is necessary to treat certain restrictions on aliens with heightened judicial solicitude because "aliens--pending their eligibility for citizenship--have no direct voice in the political process."⁹⁸

This second formulation, standing independently from the first, would comport as well with a separation of powers model. In some situations, courts may not be confident as to whether a legislative classification can be said to be based more on prejudice than on legislative rationality. But if the classification targets a group that literally has *no* real access to the political system -- because, for example, they are denied the right to vote -- that in itself should be sufficient to warrant strict scrutiny of such classifications.⁹⁹

⁹⁶*Phyller*, 457 U.S. at 216, n.14 (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

⁹⁷403 U.S. 365 (1971).

⁹⁸435 U.S. 291, 294 (1978).

⁹⁹A majority of the Court has never explicitly accepted this second formulation, standing on its own, as a sufficient justification for the application of strict scrutiny. From a separation of powers perspective, however, it is difficult to see why this formulation should not be sufficient on its own.

Justice Brennan's presentation of two formulations to explain the Court's previous applications of strict scrutiny is welcome to a reader in search of a theoretical construct for such applications. The contribution, however, is clouded by the implication that the two formulations are either one and the same, or perhaps interdependent in some way. Justice Brennan's theoretical construct was subsequently taken up by Justice White in *Cleburne v. Cleburne Living Center*,¹⁰⁰ where the two formulations were explicitly intertwined.

Justice White begins his discussion in *Cleburne* with the same separation of powers model set forth in *Plyler*. He notes the general rule that a court will sustain a legislative classification as long as it is "rationally related to a legitimate state interest," and notes the rule gives way when a statute classifies by race, alienage, or national origin.¹⁰¹ Justice White then explains why: "These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy-- a view that those in the burdened class are not as worthy or deserving as others."¹⁰² This is a fair rendition of the first formulation presented in *Plyler*, and it logically should have been sufficient to justify granting strict scrutiny. Justice White continues, however: "For these reasons *and*

Justice Brennan concludes his footnote with the following sentence: "Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish." There are no case citations to this statement and it is unclear whether this sentence is intended to stand as a separate formulation that justifies heightened scrutiny for groups characterized solely by circumstances beyond their control. This is quite unlikely. The Court was clearly aware of the limitations of this "non-responsibility" principle when it invoked it in *Frontiero* and it would soon explicitly reject the relevance of that principle in *Cleburne*. Given the allusion to prejudice in the sentence, it is probably most appropriate to view the final sentence of the footnote as yet a further illumination of the first formulation.

¹⁰⁰473 U.S. 432 (1985).

¹⁰¹*Id.* at 440.

¹⁰²*Id.*

because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."¹⁰³

Thus, in *Cleburne*, Justice White articulates the issue of a group's political powerlessness on an equal par with the issue of whether the legislative action adopting the classification is more likely the result of prejudice than legislative rationality. In actually applying the theoretical construct, however, Justice White's conclusion that rational basis review is appropriate for classifications based on mental retardation appears to be shaped primarily by his conclusion that "those who are mentally retarded have a reduced ability to cope with and function in the everyday world" and that "[t]hey are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one."¹⁰⁴

To Justice White, the fact that a group's characteristic is one a legislature may legitimately need to take into account in various circumstances is of key importance within his separation of powers model: "The 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. In such cases, the

¹⁰³*Id.* (emphasis added).

¹⁰⁴*Id.* at 442. As Justice White goes on to explain: "How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation." *Id.* at 442-43.

Equal Protection Clause requires only a rational means to serve a legitimate end."¹⁰⁵

Once Justice White determines that mental retardation is a type of characteristic "relevant to interests the State has the authority to implement," other factors the Court has looked at in previous cases either fall into place or fall by the wayside. Whether a characteristic is immutable or not is clearly irrelevant to the separation of powers question; what is relevant is whether the characteristic (immutable or not) "often [is] relevant to legislative purposes."¹⁰⁶ The fact that Congress had passed several laws dealing with people with mental retardation (an anti-discrimination law; a vocational rehabilitation law; a special education law) simply reinforces for the Court the appropriateness of its deference based on separation of powers: clearly people with mental retardation "have unique problems"¹⁰⁷ (thus requiring several different types of laws), and clearly "lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."¹⁰⁸

¹⁰⁵*Id.* at 441-42.

¹⁰⁶*Id.* at 442-43, n.10 (quoting J. ELY, *DEMOCRACY AND DISTRUST* 150 (1980)). This is not to say that Justice White believes the immutability of a characteristic has no relevance to the *application* of a standard, whether that standard is rational basis review or strict scrutiny. As noted above, the lack of responsibility that characterizes illegitimate children and the children of illegal aliens was of key importance to the Court's conclusions in *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972) and *Plyler v. Doe*, 457 U.S. 202, 233 (1982) that the statutes at issue were illogical and unjust. See *supra* text accompanying notes 70-72 and n.72. In other words, even if the standard applied is one of rational basis review, the fact that a characteristic is immutable and/or an accident of birth has *significant* relevance in determining whether the state's action is even *rational* related to some legitimate state interest.

¹⁰⁷*Id.* at 443.

¹⁰⁸*Id.* Given this theoretical construct, I do not believe *Cleburne* necessarily stands for the proposition that classifications based on *any* disability receive only rational basis view. This certainly is the prevailing wisdom regarding *Cleburne*'s holding. See, e.g., *Doe v. University of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1267 (11th Cir. 1995) ("Classifications involving individuals with disabilities are subject only to rational basis scrutiny."); *Spragens v. Shalala*, 36 F.3d 947, 950 (10th Cir 1994)(rational basis standard applies to classification involving blind persons); *Contractors Ass'n of E. Pennsylvania v. Philadelphia*, 6 F.3d 990 (3d Cir 1993) ("rational basis" correct standard of review for classification of business owners with disabilities; ADA did not overrule *Cleburne*). But while it is not unreasonable to say that people with mental retardation present a range of "difficult" and

On the issue of political powerlessness, Justice White devotes one sentence: "[This] legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers."¹⁰⁹ It is difficult to treat this sentence as a thoughtful explication of the relevance of political powerlessness.¹¹⁰ Indeed, it seems to be a simple reiteration of the point made previously by the Court that it sees no reason to suspect that legislative classifications based on mental retardation are the result of prejudice, rather than legislative rationality.

To my mind, the Court in *Cleburne* inappropriately conflated, perhaps inadvertently, the two formulations first presented in *Plyler v. Doe*. There is no way of knowing if the *Cleburne* majority would have agreed the second formulation in *Plyler* could have stood legitimately on its own; that is, if they would have agreed that a group absolutely precluded from participating in the political process, for example, by denial of the right to vote, would automatically warrant heightened scrutiny.¹¹¹ But absolute, or even relative, political powerlessness did not appear to

"technical" matters for a legislature to respond to, *Cleburne*, 473 U.S. at 442-43, the same can hardly be said of every physical or mental disability. For most people with disabilities, as for women and for racial minorities, what is primarily needed is the removal of stereotypes and the provision of some reasonable accommodations. See, e.g., Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, in *IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT* (Lawrence O. Gostin et al. eds., 1993). Thus, classifications on the basis of disability in general should not automatically be assumed to warrant only rational basis review.

¹⁰⁹*Id.* at 445.

¹¹⁰In this respect, this sentence is similar to the plurality's footnote in *Frontiero* describing the relative absence of women from the political arena — a description never intended as a barometer scale for identifying sufficient political power to negate the need for strict scrutiny. See *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973). The unfortunate irony of Supreme Court jurisprudence is that these two sentences constitute the sum total of the Court's descriptive analysis of political powerlessness. *Id.*

¹¹¹Indeed, I doubt a majority of the current Court, or the *Cleburne* Court would agree with this formulation without some "flavoring" of prejudice thrown in. Under this formulation, legislation affecting minors would be

have been a critical point for the *Cleburne* majority. What was important was the characteristic at issue, mental retardation, was one likely to demand various and nuanced responses from the legislature in a range of settings; and there was no reason for the Court to assume the legislative response to this characteristic was driven more by prejudice than by legislative rationality.

Aside from its brief forays into theoretical constructs for strict scrutiny presented in *Plyler* and *Cleburne*, the Court's opinions denying strict scrutiny to other challenged classifications are marked -- as are most of its opinions granting strict scrutiny -- primarily by brevity of analysis. For example, in *San Antonio Indep. School Dist. v. Rodriguez*,¹¹² the Court considered and rejected three different approaches that might have warranted application of strict scrutiny in that case. The third approach depended on viewing the challenged statute as constituting a classification scheme based on district wealth discrimination. The Court's complete analysis rejecting that approach was as follows:

[A]ppellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. 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

subject to strict scrutiny because minors are completely excluded from the political system. While that result seems correct under a separation of powers model, it was explicitly rejected by Justices Marshall, Brennan, and Blackmun in their dissent in *Cleburne*. 473 U.S. at 472.

¹¹²411 U.S. 1 (1973).

command extraordinary protection from the majoritarian political process.¹¹³

While this "checklist" of factors is notable for the fact that it describes each factor as standing on its own in the strict scrutiny analysis (saddled with disabilities *or* subjected to history of discrimination *or* politically powerless), there is no accompanying analysis as to why any of these factors (standing alone or together) should justify the application of heightened scrutiny by the courts. And in four subsequent cases in which the Court refused to apply strict scrutiny to a challenged classification, it simply quoted portions of this paragraph from *Rodriguez* and announced the challenged classification did not meet any of the listed factors.¹¹⁴

C. Application to Sexual Orientation

* * *

I do not describe the Supreme Court's cases regarding strict scrutiny to make the unexceptional point that judicial decisions are often rendered prior to, and in the absence of, a

¹¹³411 U.S. at 28.

¹¹⁴In *Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974) the Court refused to apply heightened scrutiny to a class of conscientious objectors stating that the class did "not possess an 'immutable characteristic determined solely by the accident of birth'" nor was the class "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 process."

In *Massachusetts v. Murgia*, 427 U.S. 307, 313 (1976), the Court declined to subject a law mandating retirement for state police over 50 to strict scrutiny. According to the Court, the group did not meet any of the *Rodriguez* factors: people over 50 had not experienced a history of discrimination; had not been subjected to unique disabilities "on the basis of stereotyped characteristics not truly indicative of their abilities;" and gave no indication of needing "extraordinary protection from the majoritarian political process."

In *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), the Court refused to apply heightened scrutiny to a "disadvantaged class ... comprised by parents, children, and siblings." Justice Stevens' one sentence analysis drew on *Rodriguez* and cited *Murgia* as support: "As a historical matter, [members of the disadvantaged class] have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless." One year later, in *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), Justice Stevens repeated the same sentence to deny heightened scrutiny to the same class disadvantaged by a different federal statute. The fact that this claim is dealt with in one brief sentence by Justice Stevens is probably the source of one inaccurate characterization: the parent-child relationship and sibling relationship are usually considered (relatively) immutable.

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pp. 25-35 of yesterday's fax.
pls call if you have questions.



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Standard of
Review
- Disability



GEORGETOWN UNIVERSITY LAW CENTER

Chai R. Feldblum
Associate Professor of Law

TO: Marvin Krislov
FROM: Chai Feldblum *CF*
DATE: February 5, 1996
RE: Standard of Review: Disability

Richard Socarides called to say a meeting was possibly being planned to discuss the legal questions surrounding a constitutional challenge to discrimination based on disability. I noted to Richard that I did not believe the question was completely closed regarding the appropriate standard of review to be applied in such cases. I recognize there is a relative uniformity of views regarding the meaning and application of the Supreme Court's decision in *Cleburne*. But my review of Supreme Court jurisprudence in this area (which I undertook as part of a project designed to analyze the appropriate standard of review for classifications based on sexual orientation) led me to question that settled wisdom.

Richard suggested I send these pages over to you so you can glance at them before the meeting. My musings on disability are relegated to footnote 108 on p. 32 -- but you need the text on the rest of the pages for the footnote to make any sense.

Cheers.

cc. Richard Socarides
Marsha Scott

Sexual Orientation, Morality and the Law:

Devlin Revisited

Chai R. Feldblum

Sexual Orientation, Morality and the Law: Devlin Revisited
Table of Contents

INTRODUCTION	2
I. THE LIBERAL PARADIGM OF EQUALITY	11
A. <u>The Judicial Arena: Equal Protection Challenges</u>	13
B. <u>Supreme Court Equal Protection Jurisprudence</u>	16
C. <u>Application to Sexual Orientation</u>	35
a. <u>Political Powerlessness</u>	36
b. <u>Immutability</u>	51
c. <u>The Relevance of <i>Bowers v. Hardwick</i></u>	60
II. AN EYE TOWARDS A NEW PARADIGM	82
A. <u>The Avoidance of Morality in the Traditional Paradigm</u>	82
B. <u>The Pitfalls in Avoiding Morality</u>	90
C. <u>Devlin Revisited</u>	101
D. <u>Application to Prohibiting Discrimination on the Basis of Sexual Orientation</u> ...	112
a. <u>The Immorality of Compelled Deceit</u>	112
b. <u>The Morality of Love</u>	127
III. CONCLUSION	133

illegitimate government purpose. This principle was invoked and applied in Supreme Court cases such as *Palmore v. Sidoti*³⁴ and *Cleburne v. Cleburne Living Center*.³⁵ The challenge for the advocate, of course, would be to convince the court that the particular discriminatory action at issue (denying openly gay people the right to serve in the military, firing a gay person from a government job, etc.) has been motivated solely by the desire to cater to the prejudices and fears of others.³⁶

While these alternative approaches have appeal, they certainly have no guarantee of success. Thus, these arguments do not displace the need to argue that classifications based on sexual orientation should receive heightened scrutiny by the courts. An analysis of how to argue most effectively for such heightened scrutiny requires a brief review of Supreme Court jurisprudence in the area of equal protection law.

B. Supreme Court Equal Protection Jurisprudence

The Supreme Court's jurisprudence in the "classification" prong of equal protection bears the mark of case-by-case adjudication, not the mark of a coherently developed theory applied

³⁴466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.")

³⁵473 U.S. 432, 448 (1985) ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings and the like. . . . [T]he city may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic.")

³⁶A related principle is that "a bare ... desire to harm a politically unpopular group" is not a legitimate state interest. *Sae United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *see also Zobel v. Williams*, 457 U.S. 55, 63 (1982). Again, the challenge for the advocate would be to convince the court that the discriminatory action at issue truly represented a bare desire to harm an unpopular group, and was not designed to achieve some other, legitimate, state purpose.

uniformly and systematically to all comers.³⁷ The initial conceptual basis for the idea that courts should strictly scrutinize certain governmental actions stems from one sentence in a footnote penned by Justice Stone in a 1938 Supreme Court case upholding the constitutionality of the Filled Milk Act of 1923.³⁸ Most of the Supreme Court's subsequent cases dealing with strict scrutiny of governmental classifications are noteworthy either for their lack of explanation of the principles justifying the scrutiny applied, or for their tendency to "slide into" or "back down" from strict scrutiny without ever explicitly acknowledging that any movement has taken place in the Court's analysis.

For example, strict scrutiny of classifications based on ethnicity or national origin was introduced without much theoretical fanfare. In 1944, the Court baldly stated in *Korematsu v. United States* that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"³⁹ but provided no particular elaboration of the principle. Nor was there much more analysis in the Supreme Court's opinion the year before in *Hirabayashi v. United States*,⁴⁰ in which the Court noted that "distinctions between citizens solely because of their ancestry" are "odious to a free people whose institutions are founded upon the doctrine of

³⁷ The Court's lack of systematic application of an equal protection theory has been commented upon by various Justices. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

³⁸ *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938) (citations omitted), "Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

³⁹ 323 U.S. 214, 216 (1944).

⁴⁰ 320 U.S. 81 (1943).

equality."⁴¹

The Court's stated justification for applying strict scrutiny to governmental classifications based on race (predominantly African-American race) has similarly been short and uncomplicated. The Court has noted that such classifications "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States" and that "[t]his strong policy renders racial classifications 'constitutionally suspect' and subject to the 'most rigid scrutiny' and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose."⁴²

As compared to the "brevity" approach that marks cases dealing with race and national origin, the "creeping progression/regression" approach is evident in Supreme Court cases analyzing classifications based on illegitimacy and alienage. In early cases challenging governmental discrimination against children or parents because of the illegitimacy status of the children, the Supreme Court used the language of "rational basis" review,⁴³ but invalidated several laws on the grounds that they constituted "invidious discrimination,"⁴⁴ or were "illogical

⁴¹*Id.* at 100.

⁴²*McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)(citations omitted). *See also Loving v. Virginia*, 388 U.S. 1 (1967).

⁴³ In *Levy v. Louisiana*, 391 U.S. 68, 71 (1968), the Court clearly stated a rational basis review standard: "Though the test has been variously stated, the end result is whether the line drawn is a rational one." In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972), the Court still articulated a rational basis standard ("The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bears some rational relationship to a legitimate state purpose."), *id.*, but its conclusion invoked the language of what would become intermediate scrutiny ("The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no *significant* relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve.")(emphasis added). *Id.* at 175. *See also Mathews v. Lucas*, 427 U.S. 495, 516 (1970).

⁴⁴*Levy*, 391 U.S. at 72.

and unjust."⁴⁵ While the Court explicitly refused to accord "strict scrutiny" to governmental classifications based on illegitimacy,⁴⁶ it noted vaguely that its scrutiny was "not a toothless one,"⁴⁷ and that "mere incantation of a proper state purpose" in these cases was not sufficient.⁴⁸ In 1978, the Supreme Court first used the complete language of "intermediate scrutiny" in a case dealing with illegitimacy,⁴⁹ and ten years later, it officially announced that classifications based on illegitimacy do indeed receive intermediate scrutiny review.⁵⁰

The Court's cases dealing with alienage reflect the "creeping regression" approach. In *Graham v. Richardson*,⁵¹ the Supreme Court announced that classifications based on alienage are "inherently suspect,"⁵² with stated reasons quite similar to the simple, straightforward ones found

⁴⁵*Weber*, 406 U.S. at 175.

⁴⁶*Lucas*, 427 U.S. at 505; *Trimble v. Gordon*, 430 U.S. 762, 767 (1977).

⁴⁷*Lucas*, 427 U.S. at 510.

⁴⁸*Trimble*, 430 U.S. at 769.

⁴⁹*Lalli v. Lalli*, 439 U.S. 259, 275-76 (1978). The manner in which the Court introduced this full formulation represents a classic example of the Court's "creeping progression" approach without explication. In the beginning of its opinion, the Court stated that classifications based on illegitimacy were invalid under the Fourteenth Amendment "if they are not *substantially related to permissible state interest*," *id.* at 265 (emphasis added) -- a hybrid standard made up of what would soon be termed intermediate scrutiny language ("substantially related") and existing rational basis language ("permissible" state interest). At the end of the opinion, however, the Court summed up by stating: "We conclude that the requirement imposed by [the challenged statute] on illegitimate children . . . is *substantially related to important state interests* the statute is intended to promote. We therefore find no violation of the Equal Protection Clause." *Id.* at 275-76 (emphasis added). Thus, in the course of one opinion, the Court progressed from a hybrid rational basis/intermediate scrutiny standard to the intermediate scrutiny standard (as it would be termed in subsequent Court cases) -- with neither an acknowledgment nor an explanation of the progression.

⁵⁰*Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.")

⁵¹403 U.S. 365 (1971).

⁵²*Id.* at 371.

in the Court's cases dealing with classifications based on race or national origin: "Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."⁵³ The Supreme Court soon realized, however, that it did not really mean (or want to mean) everything it said in *Graham v. Richardson*.⁵⁴ Six years later, the Court officially carved out from strict scrutiny review, and relegated to rational basis review, any challenges based on alienage but involving "matters firmly within a State's constitutional prerogative."⁵⁵ The reason, according to the Court, was that "[t]he distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."⁵⁶ Subsequent cases thus turned on whether the challenged exclusion on the basis of alienage was from some "governmental function,"⁵⁷ which was then subject to rational basis review, or from some non-governmental function, which remained subject to strict scrutiny.

The Court's treatment of classifications based on gender stands in its own unique

⁵³*Id.* at 371-72 (citations omitted).

⁵⁴Before the Court made any official change to the standard of scrutiny applied to classifications based on alienage, it already voiced reservations about invalidating certain of these classifications. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (noting that a State could, "in an appropriately defined class of positions," require citizenship as a qualification for office).

⁵⁵*Foley v. Connelie*, 435 U.S. 291, 296 (1977) (quoting *Dougall*, 413 U.S. at 648). The Court also took the occasion to provide a bit more detail as to why "certain" restrictions on aliens were treated with "heightened judicial solicitude": this was necessary "since aliens -- pending their eligibility for citizenship -- have no direct voice in the political process." *Id.* at 294.

⁵⁶*Ambach v. Norwick*, 441 U.S. 68, 75 (1979).

⁵⁷*Id.* at 75.

category. After upholding numerous discriminatory classifications based on gender,⁵⁸ the Court in *Reed v. Reed*,⁵⁹ struck down a state probate law based on gender. While never explicitly departing from traditional "rational basis" review, the unanimous Court (as a later plurality pointed out) clearly rejected the state's "apparently rational explanation of the statutory scheme."⁶⁰

In *Frontiero v. Richardson*,⁶¹ Justice Brennan made the case for a plurality of the Court for strict scrutiny of classifications based on gender.⁶² While Justice Brennan devoted more effort to explaining his decision than had any previous Court decision applying strict scrutiny,⁶³ his analysis was still presented in a relative theoretical void.

The case for strict scrutiny, as presented by the plurality in *Frontiero*, rested primarily on three "considerations."⁶⁴ The first was the history of discrimination suffered by women. Justice Brennan noted that the nation has been marked by a "long and unfortunate history of sex discrimination," rationalized by an "attitude of 'romantic paternalism,'"⁶⁵ and that while the

⁵⁸The line of cases from *Bradwell v. Illinois*, 83 U.S. 130 (1873), to *Hoyt v. Florida*, 368 U.S. 57 (1961), exemplify this era of the Supreme Court's gender jurisprudence.

⁵⁹404 U.S. 71 (1971).

⁶⁰*Frontiero v. Richardson*, 411 U.S. 677, 683 (1973)(describing decision in *Reed*).

⁶¹411 U.S. 677 (1973).

⁶²*Id.* at 682. ("[A]ppellants contend that classifications based on sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree ...").

⁶³One presumes Justice Brennan engaged in such an extensive analysis in *Frontiero* partly in order to catch the elusive fifth vote.

⁶⁴*Id.* at 688.

⁶⁵*Id.* at 684.

position of women has improved in recent decades, they still face "pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."⁶⁶ Justice Brennan never specifically explained, however, why a history of discrimination was relevant to establishing a strict scrutiny analysis; he seemed to assume we would understand that on our own.⁶⁷

The second consideration for the plurality was that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."⁶⁸ Quoting from the Court's opinion in *Weber v. Aetna Casualty & Surety Co.*, the plurality observed that "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship

⁶⁶*Id.* at 686 (footnotes omitted). In a footnote to this sentence, Justice Brennan described the extent of discrimination against women in the political arena as follows: "In part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate and only 14 women hold seats in the House of Representatives." *Id.* at 686, n.17. Lower courts, when faced with the question of what standard of review to apply to classifications based on sexual orientation, subsequently separated the factors of "history of discrimination" and "political powerlessness" and seized upon this footnote as a guide to determining political power. See *High-Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 n.10 (9th Cir. 1990); see also *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Evans v. Romer*, No. 92-CV7223 1993 WL 518586, at 12 (Colo. Dist. Ct. Dec. 14, 1993). The difficulty with this, of course, is that the plurality did not write this footnote as a barometer to establish the point of some magical sufficient political power, but rather, as a description of the residual effects of historical discrimination against women as reflected in the political arena. Even if and when women's participation in that arena improves (as it certainly has since 1973), the fact that women suffered a history of discrimination in this country, and continue to suffer residual effects of that discrimination, remains a valid factor in the strict scrutiny analysis under a "history of discrimination" prong. See also *infra* text accompanying notes 116-170 for further discussion of political powerlessness.

⁶⁷Justice Brennan noted that a unanimous Court in *Reed v. Reed*, 404 U.S. 71 (1971) had, in practice, departed "from 'traditional' rational basis analysis with respect to sex-based classifications," and that this departure was "clearly justified." Then, presumably to explain why that departure was justified, Justice Brennan immediately moved to a lengthy description of the history of discrimination suffered by women. The analytical connection between the *conclusion* that the departure from rational basis review in *Reed* had been justified, and the *description* of the history of discrimination, was left for the reader to fill in.

⁶⁸*Frontiero*, 411 U.S. at 686 (citing *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972)).

to individual responsibility⁶⁹

The absence of a theoretical construct in *Frontiero* is painfully evident in this discussion of immutability. In fact, the Court in *Weber v. Aetna Casualty* never invoked the truism that children cannot be held responsible for their births as a reason for applying a higher standard of review in judging classifications based on illegitimacy. At the time the Court decided *Weber*, it was still emitting vague and contradictory signals about *what* standard of review it believed should be applied to these classifications.⁷⁰ The fact that children could not be held responsible for their births was relevant to the Court in *Weber* -- but solely as a reason why, when it *applied* its standard of review (whatever that was), the governmental classification was found wanting. As the Court explained: "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent."⁷¹ Thus, according to the Court, the penalty visited upon illegitimate children in the state's workmen's compensation law at issue could not be rationally (or even significantly) related to society's presumed interest in condemning "irresponsible liaisons beyond the bound of marriage."⁷²

The plurality in *Frontiero* itself recognized that the immutability of a characteristic on which a governmental classification is based could not, by itself, justify a higher standard of

⁶⁹*Id.*

⁷⁰See *supra* text accompanying notes 43-50.

⁷¹*Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972).

⁷²*Id.* The principle of "lack of responsibility" was invoked as well in the Court's opinion in *Plyler v. Doe*, 457 U.S. 202 (1982). As in the case of *Weber v. Aetna Sur. Co.*, this principle was not invoked to heighten the standard of review. Rather, it was again used when the Court *applied* its standard of review, whatever that actually was in that case. According to the Court, the fact that children of illegal aliens have no responsibility for their parent's illegal entry into the country made it illogical (i.e., irrational) and unjust to punish them for their parents' actions. See *Plyler*, 457 U.S. at 219-220.

review. For example, the plurality was not ready to concede that governmental classifications based on "intelligence or physical disability" (presumably immutable characteristics that are sometimes accidents of birth) should also be subject to strict scrutiny. The plurality's explanation for why sex was different from intelligence or physical disability, and "align[ed] with the recognized suspect criteria," was that "the sex characteristic frequently bears no relation to ability to perform or contribute to society."⁷³

As a third consideration, the plurality threw in the fact that Congress had "manifested an increased sensitivity to sex-based classifications" through passage of laws such as Title VII of the Civil Rights Act of 1964.⁷⁴ This "conclusion of a coequal branch of Government" that "classifications based upon sex are inherently invidious," stated the plurality, "is not without significance to the question presently under consideration."⁷⁵

Again, the plurality never explained why such action on the part of a co-equal branch of government should have any relevance to a court's determination of whether to apply strict scrutiny to a governmental classification. Indeed, when the Court began to develop a theoretical construct for its strict scrutiny cases -- an effort it first undertook in 1982 in *Plyler v. Doe*⁷⁶, and then again in 1985 in *Cleburne v. Cleburne Living Center*,⁷⁷ it concluded that positive legislative

⁷³*Frontiero*, 411 U.S. at 686-87. As the plurality thus concluded, "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."

⁷⁴*Id.* at 687.

⁷⁵*Id.* at 687-88.

⁷⁶457 U.S. 202 (1982).

⁷⁷473 U.S. 432 (1985).

action on behalf of a group challenging a governmental classification should be grounds for the Court to be less willing to apply strict scrutiny.⁷⁸

Ironically, the point appended by the *Frontiero* plurality to its discussion of immutability -- the fact that a characteristic on which a governmental classification is made bears no relationship to an individual's ability to perform a job or to contribute to society -- emerged as the key factor in the Court's analysis when it finally presented a theoretical construct to justify heightened scrutiny in *Plyler* and *Cleburne*. By contrast, the factor of immutability -- the consideration which had generated the appendage -- was explicitly rejected by the Court as having any relevance to the standard of review that should be applied to challenged classifications.⁷⁹

The long-awaited theoretical construct for the application of strict scrutiny first appears in

⁷⁸This twist on positive legislative action was made by Justice White, writing for the majority in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 443-44 (1985), and not by Justice Brennan, writing for the Court in *Plyler*. See *infra* text accompanying notes 103-104. It was also in *Cleburne*, albeit in an opinion dissenting from the majority's analysis, that Justice Marshall, joined by Justices Brennan and Blackmun, finally proffered a theoretical basis for using positive legislative action as grounds to support strict scrutiny. 473 U.S. at 466. ("Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.")

⁷⁹*Cleburne*, 473 U.S. at 445. The final upshot in the Court's standard of review analysis for gender-based classifications was true to form. In *Craig v. Boren*, 429 U.S. 190, 197 (1976), a Court majority pronounced that "previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." This standard came to be termed "intermediate scrutiny," and was viewed as somehow different from "strict scrutiny." The Supreme Court, however, has never explicitly rejected strict scrutiny for gender-based classifications. Various Justices on the Court have pointed out periodically that the question whether gender-based classifications deserve strict scrutiny is still open. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982)(O'Connor, J.); *J.E.B. v. Alabama*, 114 S.Ct. 1419, 1426 n.6 (1994)(Blackmun, J.); *Harris v. Forklift Systems*, 114 S.Ct. 367, 373 (1993)(Ginsburg, J.). When several women's rights groups, and other civil rights groups, petitioned the Supreme Court to review the Fourth Circuit opinion in *United States v. Virginia*, 976 F.2d 890 (1992), they took the opportunity to ask the Court to revisit the question whether gender-based classifications deserve strict scrutiny. See *United States v. Virginia*, ___ F.3d ___ (4th Cir. 1995), *cert granted*, ___ S.Ct. ___, 1995 WL 334952 (U.S. Oct. 5, 1995).