Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.

Richard B. Saphire
University of Dayton

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Constitutional Law Commons, and the Fourteenth Amendment Commons

Click here to let us know how access to this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol88/iss3/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.

By Richard B. Saphire* 

I. Introduction

Among the most interesting and vigorously debated questions in contemporary constitutional law is whether judicial review should proceed in a "rule-like" or "standard-like" fashion. As Professor Kathleen Sullivan has recently noted, disagreements within the Supreme Court are frequently about much more than the content of particular constitutional doctrines. The Justices, Sullivan notes, "split not only on results but on methods—on the forms that the vast grid of doctrines, tests, and formulas comprising constitutional law should take." 1

According to some accounts, these methodological disputes 2 can be quite consequential. 3 On a practical level, the judge’s methodological

---

* Professor of Law, University of Dayton. Work on this Article was supported by a University of Dayton School of Law summer research grant. Thanks go to Jan Konya and Dan Martin for research assistance, and to Jan Konya, Ann Bartow, Michael Solimine, and John Valauri for helpful comments on earlier drafts of this Article.


2 The term “methodology” can have many meanings or dimensions. In this Article, I use the term to describe the set of interpretive devices and conventions that are commonly invoked to guide or inform efforts to determine the appropriate meaning of a piece of legal (here, constitutional) text. A methodology will represent an approach to a set of fundamental hermeneutic problems that are likely to be relevant to the general practice of constitutional interpretation, such as the appropriate role that the historical context or the framers’ original understanding should play in efforts to determine the meaning of constitutional texts. See generally Richard B. Saphire, Originalism and the Importance of Constitutional Aspirations, 24 Hast. Const. L.Q. 599 (1997). It will also represent a response to more specific issues that may vary from case to case. These include determining which (typically three or four-part) “test,” which categorical label (with its attendant doctrines or tests), and which “standard of review” or level of judicial scrutiny are appropriate for the case at hand. This Article will be concerned with the second, more specific, set of methodological considerations.

3 For example, in Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996), the Court had before it a First Amendment chal-
choices, including her determination of which standards are applicable to a particular issue and how they apply, can have very important implications for the lawyers (and their clients) who appear in court to attack or defend official action challenged on constitutional grounds. This is because the choice among different methodologies, tests, or standards will often influence, if it does not actually determine, the outcome of litigation. For example, we may know from what the courts have said about a standard......
that they regard it as difficult, if not impossible, to satisfy.\(^5\) Or we may be able to infer from a series or pattern of court decisions that the application of a particular standard will almost invariably lead to the rejection of a constitutional challenge.

The choice of standards can also have broader, more theoretical implications. For example, a judge’s methodological choices—including the sort of test or standard he or she believes is appropriate for a given problem—can tell us much about that judge’s general philosophy of constitutional interpretation. It can provide a window into the judge’s thinking about overarching questions of judicial role—whether that judge believes that the court should play a relatively active or passive role in reviewing the decisions of government officials.\(^6\) Moreover, the so-called “rule of law” values of objectivity, consistency, and fair notice may be furthered in constitutional law, if at all,\(^7\) through the creation and applica-

---

\(^5\) One thinks here about the observation that the Fourteenth Amendment standard of “strict scrutiny” is “strict in theory but fatal in fact.” Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

\(^6\) Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996), is again illustrative. As noted earlier, see supra note 3, Justices Breyer and Kennedy engaged in an extensive discussion and debate about the need for and relevance of First Amendment standards. Justice Kennedy had much to say about the general importance of standards to First Amendment interpretation. For him, adherence to preestablished standards for analyzing First Amendment problems was essential for preserving clarity and continuity in First Amendment jurisprudence. Kennedy put it this way:

Standards are the means by which we state in advance how to test a law’s validity, rather than letting the height of the bar be determined by the apparent exigencies of the day. They also provide notice and fair warning to those who must predict how the courts will respond to attempts to suppress their speech.

*Id.* at 785.

And Justice Kennedy also had a good deal to say about the particular (non?)standard that Justice Breyer’s plurality opinion ultimately articulated and applied. He argued that the plurality’s standard was both ambiguous and manipulable—that its “words end up being a legalistic cover for an ad hoc balancing of interests.” *Id.* at 786. This criticism is shorthand for a general concern about judicial role: that so-called “ad hoc balancing” entails the sort of freewheeling and illegitimate discretion that unelected judges should avoid. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943 (1987).

\(^7\) It appears to be the case that no one seriously believes in pure formalism any longer. That is to say, no one believes that formal methodological structures created
tion of methodological structures. Absent such structures—and absent some meaningful degree of stability in their maintenance and application—there is little if any common basis for judges, lawyers, and others to organize and direct their consideration of the meaning of many constitutional provisions for individual cases.9

Given the importance of standards, the occasions on which the Supreme Court signals its intent to alter a reigning standard or set of standards should be viewed as significant events. The degree of significance will depend upon a number of factors. A change may be dramatic or modest; it may affect a broad area of constitutional jurisprudence or it may have implications for a more discreet aspect of constitutional doctrine.10

for, and applied to, the interpretation of constitutional texts completely eliminate the "risk" of judicial discretion. (Whether the elimination, "complete" or not, of discretion from the judicial process is an unmitigated good is, of course, at the heart of the debate over rules and standards to which I earlier referred.) But serious arguments are advanced for the proposition that such structures can at least minimize this risk. See Antonin Scalia, The Rule of Law and the Law of Rules, 56 U. CHI. L. REV. 1175 (1989).

8 See Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 TEX. L. REV. 1307, 1366-67 (1995) (discussing demands on courts to provide guidance to legal actors and referring to "the overwhelming use of multifactor tests or formulaic standards as a means" to respond to that demand).


10 Take, for example, the Supreme Court's recent decision in United States v. Lopez, 514 U.S. 549 (1995), where, for the first time in nearly sixty years, the Court struck down an act of Congress on the grounds that it exceeded congressional power under the Commerce Clause. To the extent that the Court altered its previously settled approach, its decision may turn out to be, in the words of Justice Souter's dissent, "epochal," having far-ranging implications for the future of the constitutional jurisprudence of federalism. Id. at 615 (Souter, J., dissenting). Whether or not Lopez is properly understood in this way is already the subject of vigorous debate. See Symposium: Reflections on United States v. Lopez, 94 MICH. L. REV. 533 (1995) (containing a collection of articles commenting on Lopez and its significance for constitutional federalism). For an indication that
The change may be clear and acknowledged explicitly, or it may be signaled more subtly or indirectly. Indeed, whether a case signals a methodological shift may be a subject of some dispute, both within and outside the Court.

In this Article, I consider the standards developed and applied by the Supreme Court in determining whether government action violates the Equal Protection Clause of the Fourteenth Amendment. For the last

Lopez does not portend a radical change in Commerce Clause doctrine, see Condon v. Reno, 120 S. Ct. 666 (2000) (rejecting a Commerce Clause challenge to the federal Driver’s Privacy Protection Act).

An example of a case which might be understood as revising an existing methodology in a way likely to have a limited effect on constitutional doctrine is Madsen v. Women’s Health Centers, Inc., 512 U.S. 753 (1994). In upholding certain aspects of a lower court’s injunction limiting the expressive activity of protesters at an abortion clinic, the Court adjusted its established standards for assessing content-neutral regulations of speech in a way that reflected the need for “somewhat more stringent application of general First Amendment principles in this context.” Id. at 765 (citations omitted). Although a dissenting Justice Scalia referred to the Court’s modification of the established methodology as tantamount to leaving “a powerful loaded weapon lying about,” there has been no apparent indication that Madsen is likely to have any wide-ranging effect on First Amendment jurisprudence. Id. at 815 (Scalia, J., dissenting).

An example of a clear and explicit change can be found in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 531 (1985), where the Court criticized and rejected the four-part test it had previously adopted in National League of Cities v. Usery, 426 U.S. 833 (1976), and its progeny for determining whether an exercise of congressional authority under the Commerce Clause exceeded state sovereignty limits on that authority.

A number of recent decisions by the Court have either announced, or have been taken to signal, significant methodological shifts. Others have sought to clarify prior methodological uncertainty. Examples of the former include United States v. Lopez, 514 U.S. 549 (1995) (modifying the decades-long paradigm for assessing the scope of Congress’s power under the Commerce Clause), and Employment Division v. Smith, 494 U.S. 872 (1990) (modifying prior First Amendment, Free Exercise Clause analysis). Examples of the latter include Adarand Construction, Inc. v. Pena, 515 U.S. 200 (1995) (signaling the applicability of strict scrutiny equal protection analysis to all affirmative action programs), and (at least arguably) Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality opinion rejecting the framework of Roe v. Wade and establishing an “undue burdens” test for analyzing the constitutionality of regulations of pre-viability abortions).

The Supreme Court has applied equal protection principles to the federal government under the auspices of the Due Process Clause of the Fifth Amendment.
twenty-five years, the basic methodological framework of equal protection analysis has been well settled. In the usual case, the Court makes a threshold determination of the appropriate standard of review it will apply to the challenged classification. The choice is made from among three such standards: rational basis scrutiny, \(^4\) intermediate scrutiny, \(^5\) and strict scrutiny. \(^6\) Each level of scrutiny entails a prescribed test with increasingly demanding requirements that must be satisfied if the challenged classification is to withstand constitutional challenge.

This framework has been relatively stable, at least since the mid-1970s, when the Supreme Court first articulated and applied the intermediate standard to gender-based classifications. \(^7\) This is not to say that the framework has not been questioned or criticized. \(^8\) Justices from all sides of the ideological spectrum have occasionally argued that trifurcated (or for that matter, bifurcated) standards of review are not warranted by the constitutional text, that they are not necessary to further the principles of equal protection, or that they raise serious questions about the proper judicial role. \(^9\) But because most of the Justices have been reasonably satisfied with the framework, \(^20\) or perhaps because they simply have been

---


\(^{14}\) See infra notes 24-25 and accompanying text.

\(^{15}\) See infra notes 42-44 and accompanying text.

\(^{16}\) See infra notes 39-40 and accompanying text.


\(^{19}\) See, e.g., Craig, 429 U.S. at 221 (Rehnquist, J., dissenting) (arguing that the adoption of an intermediate standard of review for gender classifications would, among other things, "invite subjective judicial preferences or prejudices relating to particular types of legislation").

\(^{20}\) Standards of review (or the general framework they provide) in equal protection jurisprudence, as elsewhere, may function as what Professor Sunstein has termed "incompletely theorized agreements." Cass R. Sunstein, Legal Reasoning and Political Conflict 35-61 (1996). These agreements allow the Justices to decide a range of equal protection issues in a reasonably satisfactory and coherent manner without having to resolve the even more complex issues associated with the construction of a general theory of constitutional equality.
unable to agree on an alternate framework to take its place, there have been few signs that it is likely to be abandoned.

To say that the framework has been reasonably stable, however, is not to say that it has been completely free from flux and ambiguity. For example, on occasion the "strictness" of strict scrutiny has been called into question. And recently, the Court has suggested that intermediate scrutiny may actually have greater bite to it than previously had been thought.

The "rational basis" standard has been perhaps the most stable of the three. Arguably, rational basis (or "rationality") review represents the first and oldest strand of modern equal protection analysis. It is also the most basic. Unlike the other standards, it provides a requirement that all classifications must satisfy if they are to pass the test of constitutional validity. Thus, the rational basis test provides an important guidepost to lawmakers who take seriously their prerogative and responsibility to enact

---

21 In a lecture given in 1975 or 1976, I heard Justice Blackmun say that he believed that a majority of his colleagues were troubled by the Court's tiered equal protection methodology and that several of them would like to replace it with some alternative framework if only they could agree upon one. For interesting insight into a debate inside the Supreme Court about its equal protection methodology, see Mark Tushnet, Justice Lewis F. Powell and the Jurisprudence of Centrism, 93 Mich. L. Rev. 1854, 1860 (1995) (concluding that, by the mid-1970s, "the Court was hopelessly divided on equal protection theory, or at least on the verbal formulations that conscientious Justices used to describe standards of review").

22 See, e.g., Adarand Constr., Inc. v. Pena, 515 U.S. 200, 237 (1995) (indicating that strict scrutiny, contrary to a widely held view, was not necessarily "strict in theory, but fatal in fact").

23 See United States v. Virginia, 518 U.S. 515, 556 (1996) (stating that intermediate scrutiny requires that the state establish an "exceedingly persuasive justification" for gender classifications). See also Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 73 (1996) (claiming that Virginia "heightens the level of [intermediate] scrutiny and brings it closer to the 'strict scrutiny' that is applied to discrimination on the basis of race").

24 The standard has been traced back to at least 1897. See Robert W. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Calif. L. Rev. 1049, 1052 (1979) (tracing the rational basis standard to Gulf, Colorado & Santa Fe Railway v. Ellis, 165 U.S. 150 (1897)).

25 See Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1068 (1979) ("Satisfaction of this 'rational relationship' requirement is a necessary condition of constitutionality under equal protection: no classification failing to satisfy the requirement is constitutional. . . .").
constitutional laws, to judges who must determine the constitutionality of enacted laws, to lawyers who advise their clients about the validity of enacted laws, and to persons who are subject to laws whose constitutionality they may wish to question.

The rational basis test, as a general matter, entails a significant degree of judicial deference. In Part II, I discuss the modern framework for equal protection analysis and situate rational basis review within that framework. Part II then identifies an important Supreme Court decision, *Williamson v. Lee Optical*, as establishing a paradigm for rational basis review, examines the degree of judicial deference embodied in that paradigm, and briefly discusses several cases which have represented deviations from the paradigm. Part III focuses on the United States Supreme Court's 1985 decision in *City of Cleburne v. Cleburne Living Center, Inc.* While *Cleburne* purported to apply rational basis review, both its explication and application of the rational basis standard proved difficult to square with the sort of judicial deference that the paradigm clearly requires. The conspicuousness of the Court's departure from the rationality paradigm raised questions concerning the continued integrity of the paradigm itself. Part III assesses the reaction to *Cleburne*. It traces developments in the lower federal courts to determine whether those courts interpreted *Cleburne* as destabilizing the general equal protection framework or its rational basis component. Part III finds evidence of such a destabilizing effect in the years immediately following *Cleburne*. This effect is illustrated principally through an examination of *Cleburne*'s application in several cases challenging the military's power to discharge gay and lesbian servicemen and women.

However, evidence of *Cleburne*'s destabilizing effect on equal protection analysis was mixed. That is, while some courts understood *Cleburne* to either require or permit the sort of meaningful judicial scrutiny that the established rationality paradigm precluded, others did not. At least this was the situation until the early 1990s when the Supreme Court, in a series of cases, revisited the fundamental nature of rational basis review. Part IV examines one of these cases, *Heller v. Doe*, in which the Court articulated and applied a rational basis standard that appeared to be every bit as deferential as the one established in *Lee Optical*. Part V then considers whether and the extent to which *Heller* actually reinstated or reconfirmed the rational basis paradigm that *Cleburne* had at least arguably

---

unsettled. Here, a return to the gay rights area again proves instructive. An analysis of gay rights cases decided after *Heller* strongly suggests that *Heller* has inflicted severe damage to any *Cleburne*-esque strategy for infusing into rational basis review any meaningful constraining force. Part VI takes stock of the rational basis standard in the post-*Heller* era. While *Heller* leaves open at least the theoretical possibility for a successful equal protection challenge to run-of-the-mill legislative classifications, today a lawyer who mounts an equal protection challenge on the assumption that a court will find such classifications constitutionally irrational is being, at best, unrealistic.²⁹

In this Article, I do not take a position on whether the death of *Cleburne* as a source of serious rational basis scrutiny is a good or bad thing. As I note in the Conclusion, the notion that the Equal Protection Clause *should* stand as a meaningful barrier to the government’s general power to classify is not unproblematic. The Supreme Court has never articulated a general theory of equal protection that would justify the application of serious judicial scrutiny outside of the areas in which it has found intermediate or strict scrutiny properly applicable.³⁰ It is quite mysterious why the Court, even after *Heller*, continues to maintain that the Equal Protection Clause limits the government’s power to classify across the entire field of its regulatory authority when its rational basis standard has so little constraining force.

II. THE MODERN EQUAL PROTECTION FRAMEWORK 
AND THE RATIONALITY REQUIREMENT

A. *The* Lee Optical *Paradigm*

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying “to any person within its jurisdiction the equal

²⁹ Of course, reliance on rational basis review under state equal protection clauses may prove both more realistic and more promising. *See, e.g.*, Warden *v.* State Bar, 982 P.2d 154, 175-79 (Cal. 1999) (Brown, J., dissenting) (rejecting extreme deference under the equal protection component of the California Constitution).

³⁰ Whether the Court has advanced a persuasive theory of the Fourteenth Amendment that justifies the application of heightened scrutiny (at least outside of racial classifications) in cases where it is officially operative is also an open question. For a prominent argument that it has not, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1989).
protection of the laws." The clause has long been understood as embodying the Constitution's principal and most general expression of the requirement of equality under law. And while the core content of the clause has been understood to embody a special concern for racial equality, it has not been confined to matters of race.

The notion that the Equal Protection Clause is not limited to racial discrimination, and that it applies to legislative classifications generally raises a number of problems. Perhaps the most significant problem arises from the realization that all (or at least practically all) legislation classifies. Thus, no laws would be immune from potential constitutional challenge. Perhaps that possibility would be less remarkable if the constitutional materials provided some clear standard of equality according to which laws must be evaluated. But efforts to discover such a standard have been notoriously elusive. The task of identifying or constructing a

\[\text{\[\text{[VOL. 88}\]}}\]

---

31 U.S. CONST. amend. XIV, § 1.
32 Whether this understanding is correct has been the subject of a good deal of recent scholarly attention, with some scholars suggesting that while the Equal Protection Clause embodies a particular concern for specific kinds of unequal treatment, the Privileges and Immunities Clause is the proper locus in the Fourteenth Amendment for a more general antidiscrimination principle. See Michael J. Perry, We the People: The Fourteenth Amendment and the Supreme Court 71-77 (1999); John C. Harrison, Restructuring the Privileges or Immunities Clause, 101 Yale L.J. 1385 (1992).
33 See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
34 Equal protection analysis is not confined to formal legislation. All government action, whether legislative, executive or judicial, is potentially subject to the constraints, whatever they are, imposed by the principle of equal protection. In this regard, it is interesting to note that, until recently, there was some degree of uncertainty as to whether the Equal Protection Clause applied in cases where the plaintiff did not allege membership in a class or group. This issue was settled in Village of Willowbrook v. Olech, 120 S. Ct. 1073, 1074 (2000), where the Court, in a per curiam opinion, held that the clause applies to a cause of action on behalf of a "class of one."
35 On this point, see, e.g., John Hart Ely, Democracy and Distrust 30-32 (1980); Klarman, supra note 18, at 228 ("The Equal Protection Clause does not, as the Court has so often announced, require universally equal treatment. Nor could any practicable theory of equal protection do so, given that laws, by their very nature, seek to differentiate.") (citation omitted).
36 See, e.g., Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982) (arguing that equality is an intrinsically empty concept and that the meaning of the Equal Protection Clause can be ascertained only by reference to sources external to the clause itself).
standard generally has been left to the courts, and the judicial creation and application of standards almost inevitably entails questions about the political accountability of judges and the proper judicial role. If the courts developed a general standard of equality that had meaningful bite, concern would surely arise about the prospect of judges meddling uncontrollably in the legislative process and "usurping" political prerogatives.\(^3^7\)

Against this background, the courts, and particularly the United States Supreme Court, have had to respond to a dilemma: how to take seriously the constitutional injunction of equal protection without eviscerating some meaningful distinction between judicial and legislative functions. The response has been to separate equal protection problems into different categories, and to calibrate the degree of judicial scrutiny (and the degree of legislative accountability) accordingly. With respect to classifications which seem to have been of most concern to the creators of the Fourteenth Amendment—those based on race—\(^3^8\) the Supreme Court has been especially demanding. Racial classifications are subject to "strict scrutiny"; they are presumed unconstitutional and can be sustained only where the state can demonstrate that they are necessary to further a compelling government interest.\(^3^9\) In addition, the Court has extended strict scrutiny to classifications that implicate so-called "fundamental interests."\(^4^0\)

In recent times, the Court has indicated its willingness to apply meaningful scrutiny to at least some classifications that are based neither upon race nor some other "suspect" trait and that do not implicate fundamental interests. The paradigm for this category of equal protection


\(^{38}\) Whether the Fourteenth Amendment was directed at all forms of racial discrimination or only selected instances has been the subject of a longstanding, ongoing, and probably interminable debate. See, e.g., RAOUl BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Harrison, supra note 32; PERRY, supra note 32.

\(^{39}\) See McLaughlin v. Florida, 379 U.S. 184 (1964). But see Klarman, supra note 18 (indicating that this has not always been the case). Classifications that are viewed as functionally equivalent to racial classifications—those that the Court concludes are "suspect," according to a methodology first suggested in the famous "footnote four" of United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)—may, in theory, also be subject to strict scrutiny. See, e.g., Sugarman v. Dougall, 413 U.S. 634 (1973) (addressing alienage).

cases is gender discrimination. Where laws classify on the basis of gender, the Court has applied what has been called “intermediate scrutiny.” The most common formulation of this standard carries with it a presumption of the law’s unconstitutionality that can be rebutted only if the government can establish that the classification is “substantially” related to an “important” (and, of course, an otherwise constitutionally legitimate) government interest. While the Court has shown little inclination to formally expand the area in which intermediate scrutiny operates, it has not expressed any intention to abandon it as a distinct element of equal protection methodology.

Of course, statutes that classify on the basis of race, gender, or other traits which might formally trigger strict or intermediate scrutiny constitute a quite small percentage of the universe of laws to be found in state and federal codes. The vast majority of legislation operates in an area that has been referred to as social and economic welfare or policy. And social or

41 This standard, or at least something close to it, has been applied, at least on occasion, in other, limited equal protection contexts. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U. S. 265, 361-62 (1978) (Brennan, J., concurring in part and dissenting in part) (discussing affirmative action); Trimble v. Gordon, 430 U.S. 762 (1977) (addressing illegitimacy).


43 See Craig, 429 U.S. at 197.

44 In Cleburne, the Court rejected the court of appeals’s conclusion that classifications based upon mental retardation were “quasi-suspect,” and thus, like gender, subject to intermediate scrutiny. See Cleburne, 473 U.S. at 442. Since then, no Court majority has formally applied intermediate scrutiny in an equal protection case outside of gender.

This is not to say that selected equal protection cases cannot plausibly be understood as surreptitious applications of intermediate scrutiny. For example, in Plyler v. Doe, 457 U.S. 202 (1982), the Court invalidated Texas laws denying free public education to the noncitizen children of undocumented aliens. While the majority formally rejected arguments that the challenged classification was either suspect or that it implicated a fundamental interest and should therefore be seriously scrutinized, the case sometimes has been taken to represent a de facto application of intermediate scrutiny. See Dennis J. Hutchinson, More Substantive Equal Protection?, 1982 SUP. CT. REV. 167.

45 See, e.g., FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) (discussing the standard to be applied in “areas of social and economic policy”); Sullivan, supra note 1, at 60 (arguing that rational basis review is applicable to
economic legislation does not warrant the formal application of strict or intermediate scrutiny. Instead, the Court will apply what is commonly called the "rational basis" standard.

The rational basis standard has been the most durable component of equal protection analysis. It traces its modern origin to the Court's decision during the mid-1930s to withdraw from the highly interventionist posture taken in \textit{Lochner v. New York}. It has come to embody the notion that most legislation is entitled to a strong presumption of constitutionality and that, all things considered, the judicial invalidation of social and economic legislation should be an exceptional event.

An influential case symbolizing the degree of deference to legislative judgments embodied in the rational basis standard is \textit{Williamson v. Lee}

\textit{"garden-variety socioeconomic legislation")}.

46 The rationales for deciding the proper standard of review to apply in a given case are often complex and still subject to considerable dispute. In the case of racial discrimination, no one today seriously disputes the appropriateness of strict scrutiny. Given general agreement that a concern for race lies at the historical core of the Fourteenth Amendment, few believe that strictly scrutinizing most racial classifications requires any deep theoretical justification. In the case of nonracial classifications, however, the grounds for deciding which standard to apply have been, and remain, the subject of considerable theoretical debate. The theories that probably have had the greatest influence on the development of modern equal protection doctrine and methodology have been derived from the famous "footnote four" of \textit{United States v. Carolene Products Co.}, 304 U.S. 144, 152 n.4 (1938). For the most notable and influential analysis, see ELY, \textit{supra} note 35.

47 See Bennett, \textit{supra} note 24, at 1052. Robert Bennett traced the rationality requirement to 1897.


At issue in *Lee Optical* was the constitutionality of an Oklahoma statute that regulated the eye care industry. The law required that, of all eye care professionals who fitted or duplicated glasses, only opticians (and not, for example, ophthalmologists, optometrists, and the sellers of ready-to-wear glasses) were required to have a prescription. In rejecting the opticians' equal protection and due process challenges to the law, the Court said "it is for the legislature, not the courts, to balance the advantages and disadvantages" of the law's requirements. The Court dismissed the claim that the law's distinction was impermissibly discriminatory by noting that "[t]he problem of legislative classification is a perennial one" and that legislative "reform may take one step at a time." It concluded that "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination," which it "cannot say . . . [had] been reached here." In essence, the Court took the position that it would tolerate significant imperfections in legislative classification.

In the portion of its opinion devoted to the analysis (and rejection) of the opticians' due process challenge, the Court gave further notice of the deference owed the legislature in Fourteenth Amendment challenges to social and economic legislation. If a rationality requirement entails an

---


51 *Lee Optical*, 348 U.S. at 487.

52 Id. at 489.

53 Id.

54 Id.

55 Id.

56 Professor Irons has recently emphasized that *Lee Optical* itself spoke of judicial deference to legislative judgments in the areas of "business and industrial conditions." Irons, *supra* note 50, at 700. It was apparently not until 1970 that the Court redefined and expanded the area of judicial deference to "social and economic" legislation. See *id.* at 700-02 (describing the expansion of *Lee Optical*'s zone of deference in *Dandridge v. Williams*, 397 U.S. 471 (1970)).
assessment of the relationship of a classification to a legislative goal, then the rationality of a particular statute cannot be evaluated without at least some sense of the goal that it was thought to further. In *Lee Optical*, the Court felt obliged to address the opticians’ argument that the Oklahoma law requiring the production of a prescription for fitting glasses or replacing old prescriptions could not be explained by reference to a number of purposes it might have been reasonable to suppose the law was enacted to further. If the Court was concerned with whether the law was in fact a rational way to further one or more of the purposes for which it was enacted, one might have expected it to determine what those purposes actually were and to evaluate the law in light of them. But instead of attempting to discern the actual goals that led the legislature to enact the law, the Court engaged in unsupported speculation about what those goals might have been. Since every classification is likely to be at least plausibly (if only imperfectly) related to some goal that a legislature legitimately might seek to further, the Court’s willingness to hypothesize one or more such goals drained the rationality requirement of much, and perhaps of any, meaningful content.

It is difficult to overstate but, for purposes of this Article important to emphasize, the degree of judicial deference entailed in *Lee Optical*-style rational basis review. First, it might be helpful to understand the sort of questions that a court applying the standard should not ask. These include: (1) whether the classification represented a good, wise, or sensible way to further a legislative goal; (2) whether the statute was an effective or efficient way to further a legislative goal, or whether, in a qualitative or


58 See *Lee Optical*, 348 U.S. at 487. For example, the Court noted that “the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert.” *Id.* (emphasis added).

59 The Court’s willingness to hypothesize legislative goals has been the subject of a good deal of criticism. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 182 (1980) (Brennan, J., dissenting).


quantitative sense, the statute was "reasonable";\(^{62}\) (3) whether there were other ways to further relevant legislative goals that would have imposed less restriction on the individual interests implicated by the statute;\(^{63}\) and (4) whether, given the information available to the court, the judge could conclude independently that the statute was a rational way to further a legislative goal.\(^{64}\) What the judge does ask is something like this: Given the information that was actually before the legislature, or information that might have been available to the legislature, or information which the legislature reasonably might have thought existed, or information of which the court can take judicial notice, could the legislature conceivably have believed (not did it actually believe) that this statute would or might, even if only in the most remote or tenuous way, further or promote a legitimate actual or hypothetical goal? If the answer is yes, the statute stands. And, not surprisingly, in a long line of cases applying the standard,\(^{65}\) the answer has been yes.

The extreme judicial deference represented by this standard has been noted both within and outside the Court. Justice Brennan once referred pejoratively to the standard as "tautological."\(^{66}\) Recently, a majority of the Court referred to the standard as a "paradigm of judicial restraint."\(^{67}\) And even more recently, Justice Breyer referred to it as "specially lenient."\(^{68}\)

\(^{62}\) One can find equal protection cases where the standard is formulated in terms of the "reasonableness," as opposed to the rationality, of a classification. See Bennett, supra note 24, at 1049 n.2. But the Court has been quite clear that it is not using reasonableness in the qualitative, all-things-considered sense. See, e.g., Schweiker, 450 U.S. at 234.

\(^{63}\) The inquiry into the existence of so-called "less restrictive alternatives" is reserved for strict scrutiny. See Fullilove v. Klutznick, 448 U.S. 448, 518 (1980) (Marshall, J., concurring).

\(^{64}\) See, e.g., Schweiker, 450 U.S. at 235 ("As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, [the Court] must disregard the existence of other methods of allocation that [the Justices], as individuals, perhaps would have preferred.").


\(^{66}\) Fritz, 449 U.S. at 186.


\(^{68}\) Miller v. Albright, 523 U.S. 420, 481 (1998) (Breyer, J., dissenting). On a somewhat more colorful note, one judge recently referred to the rational basis
Scholars have also commented on its softness. In one of the most influential discussions of modern equal protection, Professor Gunther observed that the "'mere rationality' requirement symbolized virtual judicial abdication." Writing in the same forum, Professor Fallon opined that "judicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp."

But a "virtual" rubber stamp is not necessarily the same as the real thing. If the rational basis standard always operated in a true *Lee Optical* way, one might think that it would belie the conventional understanding that the Equal Protection Clause is not limited to race but applies to the entire universe of legislative classifications. For if the rationality standard were always outcome-determinative—if its invocation and application always led to the validation of classifications—it would make the clause, in areas where the standard applied, legally superfluous. And this would have important practical consequences. If lawyers believed that a rational basis test could never be successfully invoked to strike down classifications, assertion of an equal protection claim where there were no reasonable grounds for triggering some form of heightened judicial scrutiny might well amount to legal malpractice.

**B. Deviations from the Rationality Paradigm**

If there were no reason to believe that rational basis review could ever lead to the invalidation of legislative action, then one might say the area in

---


70 Fallon, *supra* note 9, at 79. *See also* Irons, *supra* note 50, at 700 (observing that the *Lee Optical*-style rational basis test "is virtually impossible to flunk").

71 Of course, there is always the possibility that legislatures would treat the Court’s deferential rational basis as an example of an "underenforced constitutional norm," and that, in the process of exercising their responsibility to act constitutionally, they would apply it more rigorously than would the Supreme Court. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1977-78). *But see* City of Boerne v. Flores, 521 U.S. 507 (1997) (adopting a restrictive view of Congress's power to implement the Fourteenth Amendment).
which it operated was essentially an equal protection free zone. But while the vast majority of cases still reflect the *Lee Optical* paradigm, the Supreme Court occasionally has invalidated classifications notwithstanding its formal invocation of the rationality standard. And the cases that appear to have deviated from the rationality paradigm have arisen frequently enough to cause a stir in constitutional circles.\(^2\)

The principal exceptions to the rationality paradigm might loosely be categorized in the following way: one type consists of the case that turns out to be a forerunner for the formal establishment of a new standard of review, or for the extension of an existing standard to a new context;\(^3\) a second type consists of a series of cases which, in addition to implicating the equality concerns of the Fourteenth Amendment, also implicate other constitutional values;\(^4\) a third, and perhaps the most prominent, type consists of cases where the Court has concluded that the challenged classification could not fairly be thought to serve a legitimate public purpose. In the third type of case, the Court has found that the only plausible way to characterize the challenged statute was as an effort to disadvantage a group because of prejudice toward its members.\(^5\)

\(^2\) While Supreme Court cases that seem to deviate from the *Lee Optical* model generally have been widely scattered, Professor Gunther’s analysis discussed seven such cases decided within a single Term (1971). See Gunther, *supra* note 69, at 18 n.88.

\(^3\) As it turns out, there may be only one case that clearly meets this description. See Reed v. Reed, 404 U.S. 71 (1971). *Reed* invalidated an Idaho policy preferring men over women in the appointment of administrators of estates. *Reed* is widely viewed as a precursor to *Craig v. Boren*, 429 U.S. 190 (1976), in which the Court first articulated the intermediate standard of review applicable to gender discrimination.

\(^4\) The Court has, while applying rational basis review, invalidated classifications that have implicated the values of federalism. See, e.g., Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Zobel v. Williams, 457 U.S. 55 (1982). It has been suggested that the Court’s departure from the *Lee Optical* paradigm in these cases can be explained by the presence of the sort of antidiscrimination concerns that have led it to employ vigorous means-ends scrutiny in so-called dormant Commerce Clause cases. See Sunstein, *supra* note 23, at 59.

\(^5\) A leading case here is *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), where the Court struck down the so-called “anti-hippie” amendment to the federal food stamp program, and where it announced the principle “that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* at 534 (emphasis in original). The Court’s recent decision in *Romer v. Evans*, 517 U.S. 620 (1996), where it
Some have taken these nonparadigmatic cases to reflect nothing more or less than the give-and-take that is often said to characterize the common law nature of constitutional decision making within the Supreme Court. Others have suggested the possibility that some fluctuation in the application of standards like the rational basis requirement reflects the inevitable consequence of camouflaged disagreements entailed in the Justices’ acceptance of “doctrinal structures that they regard as less than optimal.” Still others have seen in these cases the possibility of serious dissatisfaction with the entire three-tiered equal protection framework and the suggestion that the framework is in danger of serious erosion or collapse.

Whether these exceptions to the highly deferential *Lee Optical* rational basis standard represent more than unexplainable aberrations is, for present purposes, less important than what they signify for the practical realities facing lawyers and judges who must employ and apply equal protection doctrine. As will be noted later, the Court has left little doubt that *Lee Optical* lives, and that where it applies, real deference is the order of the day. But the dominance of *Lee Optical* has, on occasion, been placed in question. The next Part considers one of the most important of these occasions: the Supreme Court’s decision in *City of Cleburne v. Cleburne Living Center, Inc.*

### III. RATIONALITY REVIEW AND CLEBURNE

*Cleburne* involved a challenge to the refusal of the City of Cleburne, Texas to permit the owners of land to use it for the purpose of operating a

---

76 See Gunther, *supra* note 69, at 36 (referring to the Court’s application of “intensified rationality scrutiny” in the 1971 Term as “inchoate and fragmentary”).

77 Fallon, *supra* note 9, at 59. The point here seems to be that the Justices, for strategic or institutional reasons, will sometimes settle on doctrinal formulations that they regard as suboptimal. These formulations may be seen as working well enough in most cases to which they are likely to be applied, but are subject to some manipulation where their consistent application would lead to clearly unacceptable results.

78 I do not mean to suggest that the *Lee Optical* case itself is still regarded as the most compelling precedent for rational basis review. Indeed, it is possible that *Lee Optical* has been superseded or supplanted by more recent precedent embodying the same or closely analogous concept of judicial deference. *See infra* Part VI.

group home for the mentally retarded. Pointing to the fact that other
multiresident uses of property in the area were permitted, the landowners
claimed that the refusal to permit their intended multiresidential use
violated their rights to equal protection. The federal district court found that
permission to use the land would have been granted but for the fact that the
potential residents were mentally retarded. But since it concluded that
there was no basis for applying any sort of heightened judicial scrutiny to
a law that classified on the basis of mental retardation, the court felt
compelled to apply rational basis scrutiny and upheld the city's action.

The United States Court of Appeals for the Fifth Circuit, in a unani-
mous decision, reversed. The court agreed with the district court that
classifications based on mental retardation were not “suspect”; therefore,
the fact that the excluded use would house mentally retarded persons
provided no basis for evaluating the city’s action under full-blown strict
scrutiny. But the court “conclude[d] that although mental retardates are
not a suspect class, they do share enough of the characteristics of a suspect
class to warrant heightened scrutiny.” Applying an intermediate standard
of review, the court found that the restriction of group homes for the
mentally retarded did “not substantially further any important governmen-
tal interests,” and that it was therefore unconstitutional.

The Supreme Court agreed that the application of the Cleburne
ordinance was unconstitutional. It disagreed, however, with much of the
court of appeals’s reasoning. In particular, the Court disagreed with the
Fifth Circuit concerning the applicability of heightened scrutiny. It found
that the factors that had led it to apply strict scrutiny to other classifications
were not present in the case of mental retardation. Moreover, the Court
expressed concern that, were it to attach “quasi-suspect” status to laws that
disadvantaged the mentally retarded, it would be hard-pressed to find a
principled basis for refusing to extend the same status, and the heightened
scrutiny it entailed, to a wide range of other classifications.

80 See id. at 437.
81 See Cleburne Living Ctr., Inc. v. Cleburne, 726 F.2d 191 (5th Cir. 1984).
82 See id. at 195-200. The Fifth Circuit concluded that, under the Supreme
Court’s “formulaic analysis,” mental retardation did not qualify as a suspect
classifying trait.
83 Id. at 197. The court held that “mentally retarded persons are only a ‘quasi-
suspect’ class.” Id. at 198.
84 Id. at 200. The court also found that some of the interests asserted by the City
of Cleburne were not constitutionally legitimate. See id. at 202.
85 See Cleburne, 473 U.S. at 442-47.
86 See id. at 446 (“We are reluctant to set out on that course, and we decline to
do so.”).
According to the Court's established equal protection methodology, the rejection of heightened scrutiny left only the rational basis standard to apply. And this is what the Court purported to do. The central issue posed, according to the Court, was whether the city may "require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?" But, contrary to what one might have expected had it applied the sort of scrutiny suggested by the Lee Optical notion of rationality, the Court concluded that the City of Cleburne's exclusion of the group home (while permitting other similar facilities) was not supported by a rational basis. The Court reached this conclusion on two grounds.

First, the city defended its action, in part, on the basis of objections of some people in the area to having mentally retarded people living in their midst. The Court found that, to the extent the city's action was based upon naked prejudice, fear, or ill will toward the mentally retarded, it did not further a legitimate governmental interest. As noted earlier, the Court had already held that it would not uphold classifications of this sort, regardless of how "rational" they might otherwise appear to be.

The Court then turned to several other interests advanced by the city. Although it did not question the legitimacy of these interests, it found that

---

87 See id. ("To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.").
88 Id. at 448.
89 See id. ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)). The Court's reasoning applied to the city's claims that the denial of the permit was justified by reference to the "negative attitudes" of nearby property owners and to the fear that students in a nearby junior high school might harass the mentally retarded occupants of the group home.
90 See supra note 75. The vitality of this exception to the "normal" application of rational basis review was more recently reflected in Romer v. Evans, 517 U.S. 620 (1996). In Romer, the Court struck down an amendment to the Colorado Constitution that denied gays the right to invoke normal lawmaking processes to obtain protection against various forms of discrimination. Its decision rested, in part, on its conclusion that the provision was based on animosity towards gays, and thus was not supported by a legitimate purpose. For general discussions of Romer, see Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 137-62 (1999); Larry Alexander, Sometimes Better Boring and Correct: Romer v. Evans as an Exercise of Ordinary Equal Protection Analysis, 68 U. Colo. L. Rev. 335 (1997); Toni M. Massaro, Gay Rights, Thick and Thin, 49 Stan. L. Rev. 45 (1996).
the exclusion of the group home was not a rational way to further any of them. For example, the city claimed that the exclusion of the group home was justified because of its concern that the home would be "located on 'a five hundred year flood plain.'"\(^9\) It also sought to defend its action based on its concern "about the legal responsibility for actions which the mentally retarded might take."\(^9\) In addition, the city tried to justify its action based on a concern about the number of people that might occupy the dwelling, and because of its desire to avoid a "concentration of population" and "congestion of the streets."\(^9\)

Under *Lee Optical*, one might well have expected the Court to find these arguments sufficient to uphold the city's action. Initially, it is important to recall that true rational basis review entails a strong presumption of constitutionality and places a heavy burden on the challenger to demonstrate the "irrationality" of the classification.\(^9\) Since the classification is presumed to be rational, the courts assume that the challenged classification is, in fact, supported by a legitimate purpose and that the legislature might have concluded that the classification bears some relationship to the accomplishment of that purpose. Thus, in the ordinary case, the Court has not required, and there is no need for, the defenders of a classification to identify or articulate purposes, whether actual or possible, that a classification might have been thought to further.\(^9\) In

---

\(^9\) *Cleburne*, 473 U.S. at 449.

\(^9\) *Id.*

\(^9\) *Id.* at 450.


\(^9\) While the defenders of a classification subject to rational basis review are not required, in the record or otherwise, to establish the actual purpose(s) the classification was enacted to further, they are not precluded from doing so. There are many reasons why lawyers defending legislation might feel inclined, even if not obliged, to establish the existence of purposes that might have prompted a rational legislative body (and rational legislators) to act the way it did. After all, a legislature enacting a law for *no* reason might fairly be accused of acting irresponsibly, and who would freely want to concede or admit to *that*? Moreover, the Court's rational basis review has been so deferential that, in theory, it is almost always possible to point to *some* legitimate purpose that a statute might in *some* way have been thought to further. Thus, there seems to be no real downside to defending a statute by arguing that it actually did further some purpose that some legislators might have had in mind, as opposed to simply leaving it up to the court to hypothesize a purpose. It should therefore not be surprising that there are few, if any, equal protection cases where the state has offered *no* (at least arguably)
addition, *Lee Optical* contemplates that the government can address problems "one step at a time." Consequently, not every person or group who otherwise might be viewed as "similarly situated" with respect to a given problem—say, exposure to the risks of living near a flood plain, or contributing to population density—must be treated in the same way. The theory seems to be that the government need not approach regulation on an all-or-nothing basis, that it has to start someplace, and that (at least where rational basis review applies) no group can complain that the government started with that group.

It was therefore odd for the Court to conclude that "[b]ecause in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests," the city's action violated equal protection. First, the failure of the city to establish in the record a basis for treating the owners of property designated to house the mentally retarded differently from the owners of other property should have been irrelevant. As the Court has recently noted, a state "has no obligation to produce evidence to sustain the rationality of a statutory classification." Second, the Court's suggestion that it was incumbent on the city to establish that the proposed group home would present a special threat to the city's interests—a threat not posed by other

plausible explanation for a challenged classification.


97 *Cleburne*, 473 U.S. at 448 (emphasis added).

98 *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see also* FCC v. Beach Communications, 508 U.S. 307, 315 (1993) (noting that "the absence of 'legislative facts' explaining the distinction 'on the record'... has no significance in rational-basis analysis") (citation omitted). This is not to say that where the state has introduced evidence to support the rationality of a classification, the Court will refuse to consider the record. Indeed, in *Lee Optical* itself, the Court noted that "[f]or all this record shows, the ready-to-wear branch of [the eyeglass] business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch." *Lee Optical*, 348 U.S. at 489. But the Court's emphasis that the rationality of the Oklahoma statute might be supported by reasons the Court itself was apparently willing to hypothesize belied the notion that the existence of a record (either legislative or evidentiary) from which the rationality of a classification could actually be established was a prerequisite to the classification's successful defense.
permitted property uses in the area—was also difficult to square with the prevailing understanding of rational basis review. The “one step at a time” approach of *Lee Optical* was based on the notion that “[t]he problem of legislative classification is a perennial one, admitting of no doctrinaire definition,” and that the legislature could assume that even “[e]vils in the same field” could properly be treated differently.

That the *Cleburne* Court’s application of rational basis review represented a marked deviation from the deferential paradigm was the principal theme of Justice Marshall’s separate opinion. Marshall argued that “Cleburne’s ordinance [had been] invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny.” Marshall continued:

To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called “second order” rational-basis review rather than “heightened scrutiny.” But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical*...

After noting some of the ways in which the Court’s analysis deviated from true rational basis review, Marshall identified problems he thought might be caused by the Court’s lack of candor. First, it “create[d] precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching ‘ordinary’ rational basis review.”Second, Marshall argued that “by failing to articulate the factors that justify [its] ‘second order’ rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked.” According to Marshall, lower courts would be “left in the dark” about these questions; “the Court’s freewheeling, and potentially

99 *Lee Optical*, 348 U.S. at 489.
100 Id.
102 Id. at 458 (Marshall, J., concurring in part and dissenting in part).
103 Id. (Marshall, J., concurring in part and dissenting in part).
104 Id. at 460 (Marshall, J., concurring in part and dissenting in part). Marshall described this prospect as “a small and regrettable step back toward the days of *Lochner v. New York.*” Id.
105 Id. (Marshall, J., concurring in part and dissenting in part).
106 Id. (Marshall, J., concurring in part and dissenting in part).
dangerous, rational-basis standard"\textsuperscript{107} essentially provided little guidance to those charged with applying it, thus undermining a major reason for its "focusing obsessively on the appropriate label to give its standard of review."\textsuperscript{108}

Most commentators have generally agreed with Marshall's characterization of Cleburne's version of rational basis review. In a recent, extensive analysis of intermediate equal protection scrutiny, Professor Wexler referred to Cleburne-style scrutiny as "a very heightened form of rationality review, which scholars have likened to a de facto intermediate scrutiny standard."\textsuperscript{109} Dean Sullivan characterized it as an "escalate[d]" version of "nominal rationality review,"\textsuperscript{110} while Professor Klarman called Cleburne a case "in which the Court mouthed rationality language while surreptitiously substituting a heightened review standard."\textsuperscript{111}

But while there seems to be a consensus that Cleburne-style rationality review really does entail some meaningful degree of judicial scrutiny, there is less certainty about what role, if any, it has played in the subsequent development of equal protection doctrine. Justice Marshall's concern was that the Court's infusion of real bite into the rational basis standard might have the effect of destabilizing equal protection doctrine.\textsuperscript{112} Lower court judges and lawyers would be uncertain whether the "ordinary" ("first order") rationality was required in a given situation, or whether "heightened" ("second order") rationality was appropriate. And even worse, Marshall warned the doctrinal fluidity associated with this situation might embolden activist judges to selectively invoke heightened rationality to strike down government action of which they personally disapproved.\textsuperscript{113}

Have Justice Marshall's fears materialized? Has Cleburne destabilized equal protection doctrine, either by altering its structure or creating significant uncertainties and inconsistencies in its application? And in more
practical terms, has *Cleburne* altered the landscape of equal protection law facing lawyers contemplating challenges to government action where there is little or no hope of successfully triggering anything more than rational basis review? It is to these questions that I now turn.

IV. THE FATE OF *CLEBURNE*

A. *First Impressions*

Before assessing *Cleburne*'s impact, it is important to recall the two ways in which the case departed from the *Lee Optical* rational basis paradigm. First, the Court concluded that even where rational basis is applicable, a classification will violate equal protection where the disadvantage imposed on the disfavored class can be explained only by prejudice. That is, where a court is convinced that the legislature disadvantaged a group because it desired to harm its members, it will always invalidate. Such a legislative purpose is per se unconstitutional.  

Second, even accepting that the classification served some legitimate legislative purpose, the Court was willing to question its instrumental rationality. It was not willing to assume or accept at face value the government's representations that the classification actually furthered those purposes in some "rational" way.  

There is little question that *Cleburne*, understood as a prohibition against classifications explainable by prejudice alone, is alive and well. *Cleburne* frequently has been cited by lower courts as authority for striking down classifications found to be explainable only in terms of the prejudice

---

114 *See supra* notes 90-91 and accompanying text. Whether this represented a true departure from *Lee Optical* may be open to question. There, the Court had no reason to conclude that the Oklahoma legislature intended to disadvantage the disfavored opticians out of pure animosity or prejudice. Even if the Court had concluded that the Oklahoma statute was nothing but "special interest" legislation, the result of a political battle between "rent seeking" groups in economic competition with each other, there is little reason to believe it would have struck it down. *See* Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 Sup. Ct. Rev. 397. But to the extent that the *Lee Optical* paradigm has been understood as an effective abdication of judicial power, the *Cleburne* Court's willingness to even engage in serious scrutiny of legislative ends can be viewed as remarkable.  

115 *See supra* notes 98-99.  

116 Indeed, the Court had already established this principle in the *Moreno* case, which it cited in *Cleburne*, 473 U.S. at 446 (citing U.S. Dept. of Agric. v. Moreno, 413 U.S. 528 (1973)).
or animosity of the enacting body. As Judge Posner recently explained, citing Cleburne:

If a law is challenged as a denial of equal protection, and all that the
government can come up with in defense of the law is that the people who
are hurt by it happen to be irrationally hated or irrationally feared by a
majority of voters, it is difficult to argue that the law is rational if
"rational" in this setting is to mean anything more than democratic
preference. And it must mean something more if the concept of equal
protection is to operate, in accordance with its modern interpretations, as
a check on majoritarianism.

It is with respect to Cleburne's second departure from Lee Optical—the
infusion of meaningful scrutiny into the rational basis test's means-ends
analysis—that its legacy is less certain. As Justice Marshall’s dissent
predicted, in the years immediately following Cleburne, some lower federal
courts clearly understood the case as infusing the rational basis standard
with real content. For example, one court referred to Cleburne as evincing
"a trend of the court to go beyond the asserted justifications [offered in
defense of a classification] and to carefully focus on the relationship
between the legislative ends and means."

---

117 See, e.g., Sullivan v. Pittsburgh, 811 F.2d 171 (3d Cir. 1987) (invalidating
a denial of a conditional use permit for a home for recovering alcoholics found to
have been motivated by fear); United States v. Then, 56 F.3d 464, 468 (2d Cir.
1995) (Calabresi, J., concurring) (citing Cleburne for the proposition that the
"usually deferential 'rational basis' test has been applied with greater rigor in some
contexts, particularly those in which courts have had reason to be concerned about
possible discrimination"); Oxford House v. Plainfield, 769 F. Supp. 1329, 1343
n.19 (D.N.J. 1991) (noting that the justifications for the zoning ordinance and its
application could be found "irrational" under Cleburne); Casa Marie, Inc. v.
Superior Court, 752 F. Supp. 1152 (D.P.R. 1990) (invalidating the application of
a zoning ordinance to a group home for the mentally disabled found to have been
motivated by prejudice), vacated by 988 F.2d 252 (1st Cir. 1993); Burstyn v.
Miami Beach, 663 F. Supp. 528 (S.D. Fla. 1987) (invalidating a city zoning
ordinance placing restrictions on adult congregate living facilities, in part because
of a finding that it was enacted out of fear and prejudice); Marks v. City Council
of Chesapeake, 723 F. Supp. 1155 (E.D. Va. 1988) (invalidating a denial of a
conditional use permit sought by a palm reader, in part because of a finding that the
denial was motivated by fear).

118 Milner v. Apfel, 148 F.3d 812, 817 (7th Cir. 1998).
indications of "an alteration of the rational basis test" and viewed it as precedent for the proposition that "[t]he Supreme Court is now applying the rational basis test more stringently than in the past." Yet another court, while refusing an invitation to apply a true "second order" rational basis review as suggested by Justice Marshall's dissent, nonetheless saw Cleburne as endorsing a more "modest proposition that the simple articulation of a justification for a challenged classification does not conclude the judicial inquiry." One case decided shortly after Cleburne nicely illustrates the extent to which Cleburne was viewed as unsettling preexisting equal protection doctrine. In Long Island Lighting Co. v. Cuomo, a public utility challenged the constitutionality of New York legislation governing its operations. In assessing the utility's equal protection claims, the court undertook an extensive and scholarly review of the evolution of Supreme Court doctrine. It began by observing that Supreme Court doctrine was "presently in a state of confusion," and it referred to the history of the rational basis test as "tumultuous." Citing Lee Optical, among other cases, the court noted that, at least "until the early 1970s," the rational basis test was applied with great deference to legislative classifications. After tracing the emergence of intermediate scrutiny in the mid-1970s, the court considered the impact of Cleburne. It characterized Cleburne as part of a "wave of cases utilizing rational basis rhetoric but employing noticeably greater scrutiny than was evident in cases" like Lee Optical. And while the court found that the "significance of these cases to the application of the rational basis standard in equal protection challenges to purely social and economic legislation, however, [is] unclear," it

---

121 Id. at 990. The court also cited Cleburne (as well as other cases) for the proposition that "a court's genuine inquiry may test the rationality of the classification." Id.
122 Phan v. Virginia, 806 F.2d 516, 521 n.6 (4th Cir. 1986).
124 Id. at 409.
125 Id. at 410. This reference came in the context of contrasting equal protection with the perceived "doctrinal tranquility" of "minimal scrutiny" in the due process context. Id.
126 Id. at 411.
127 Id. at 414.
128 Id. at 417. In a footnote, the court discussed a split in post-Cleburne lower court decisions concerning the proper degree of scrutiny to give to legislation. See id. at n.23.
understood *Cleburne* to alter preexisting doctrine. It noted: "[t]he application of the rational basis test applied in *Williamson v. Lee Optical* and its progeny to the legislation in question would yield a different result than would the application of the approach utilized in *Cleburne*."

Cases such as these seem to have borne out Justice Marshall’s concerns. However, an assessment of a wider range of equal protection cases decided in the years following *Cleburne* paints a more equivocal picture. While some courts saw in *Cleburne* evidence of the "flexibility" of the rational basis standard, others openly rejected such an interpretation. Entering the 1990s, there was little evidence that anything like a consensus had developed in the lower federal or state courts for a Marshall-esque understanding of *Cleburne*. Such an understanding, however, was reflected in enough cases to suggest the existence of at least a moderate degree of doctrinal confusion and instability.

**B. The Gay Rights Cases**

An important test of the way in which *Cleburne* was to be interpreted came in a series of cases involving challenges to the military’s policies of discrimination against homosexuals. Beginning in the mid-to-late-1980s, suits were brought in the federal courts seeking to overturn the military’s policy of exclusion and discharge of gays and lesbians. Efforts were made to convince the courts to find classifications based on sexual preference suspect and thus subject to strict judicial scrutiny. As a general
matter, these efforts proved unsuccessful. However, the plaintiffs in these cases had some (although mixed) success in arguing that discrimination on the grounds of homosexuality failed even the rational basis test.

One such case was Pruitt v. Cheney. Pruitt involved a suit brought by an Army Reserve officer with an exemplary service record challenging the military's decision to discharge her on grounds of her homosexuality, which was first disclosed in a published interview she gave to the Los Angeles Times. The military's action was based solely on Pruitt's own self-identification as a lesbian; there was no evidence in the record that she had engaged in homosexual acts. Pruitt claimed that the act of discharging her solely because of her publicly self-acknowledged status as a lesbian violated the equal protection component of the Fifth Amendment.

The government tried to fend off this claim by relying upon High Tech Gays v. Defense Industry Security Clearance Office, an earlier Ninth Circuit case in which the court, applying a rational basis standard, upheld against an equal protection challenge a Department of Defense policy subjecting homosexuals to a more rigorous security clearance standard than was applicable to others. The court concluded that "High Tech Gays will not, however, do the service the government asks of it." It proceeded to

---

133 See, e.g., Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (concluding that a gay naval reserve officer discharged on grounds of homosexuality was "not a member of a class to which heightened scrutiny must be afforded"), cert. denied, 494 U.S. 1003 (1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (refusing to apply strict scrutiny and upholding the discharge of an avowed lesbian from the Army Reserve), cert. denied, 494 U.S. 1004 (1990). But cf. Watkins v. United States Army, 875 F.2d 699, 711 (9th Cir. 1989) (Norris, J., concurring) (concluding that homosexuals are a suspect class for equal protection purposes), cert. denied, 498 U.S. 957 (1990); Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991) (concluding, in a case involving the rejection of plaintiff's application for a position as public school teacher, that discrimination based on homosexuality is inherently suspect), rev'd on other grounds, 976 F.2d 623 (10th Cir. 1992).


135 See id. at 1161.

136 Pruitt did not explicitly articulate an equal protection claim in her complaint, but the court of appeals considered it nonetheless. See id. at 1164. Pruitt also alleged that her discharge violated rights secured to her under the First Amendment. The Ninth Circuit rejected this claim. See id. at 1163.


138 Pruitt, 963 F.2d at 1165.
characterize its analysis in *High Tech Gays* in the following way: "[i]t is true that we found the discrimination against homosexuals in that case to have a rational basis, but it is clear that we applied the type of 'active' rational basis review employed by the Supreme Court in [*Cleburne*]..."\(^{139}\)

The court interpreted *Cleburne*'s rational basis standard (as applied in *High Tech Gays*) to require that the government establish *on the record* that it, in fact, *had* a rational basis for the challenged discrimination.\(^{140}\) The court had before it only a complaint that had been dismissed without the government having had an opportunity to establish such a record. The court therefore concluded that on remand, "[a]ssuming that Pruitt supports her allegations with evidence, we will not spare the Army the task... of offering a rational basis for its regulation, nor will we deprive Pruitt of the opportunity to contest that basis."\(^{141}\)

The *Pruitt* court's interpretation of *Cleburne* was unmistakably at odds with the *Lee Optical* paradigm for rational basis review. By requiring the military to provide a record sufficient to convince a reviewing court that it *actually had* a rational basis for discriminating against homosexuals, the court was, in effect, allocating to the government the burden of establishing the rationality of its policy. The heavy presumption of rationality associated with truly deferential review was simply not in play. Moreover, the notion that a reviewing court would accept at face value any plausibly legitimate justification for a legislative classification—indeed, that a court would *even hypothesize* a legitimate justification where the government offered none or where none was apparent from the legislative materials—was completely absent from the *Pruitt* court's opinion.

*Pruitt*'s application of an "active" rational basis review illustrates the sort of muddying of the equal protection waters predicted by Justice Marshall's separate opinion in *Cleburne*.\(^{142}\) And while other courts have applied truly deferential rational basis scrutiny in the course of upholding

---

139. *Id.*

140. *Id.* Thus, the court rejected the government’s argument, which might have had some plausibility had the court applied the *Lee Optical* rational basis paradigm, that the military’s "discrimination against homosexuals should be held to be rational as a matter of law, without any justification in the record at all." *Id.* at 1166.

141. *Id.*

142. *See supra* note 104. Of course, it is open to conjecture whether Marshall would have found the application of active rational basis review in *Pruitt* to be an abuse of judicial power. *See Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan and Marshall, JJ, dissenting from the denial of certiorari) (suggesting that classifications based on homosexuality should be subject to heightened scrutiny).
the military’s discrimination against homosexuals,\textsuperscript{143} Pruitt at least suggested that a litigation strategy seeking to invoke Cleburne to infuse rational basis review with real content might prove successful. However, subsequent developments in the Supreme Court soon challenged this conception of Cleburne.

\section*{V. RATIONAL BASIS REVIEW REVISITED}

Whether or not the Supreme Court actually saw a need to clarify or shore up the deferential nature of its rational basis standard, it handed down several decisions in the early 1990s which arguably did just that. \textit{Heller v. Doe}\textsuperscript{144} was probably the most important of these cases.\textsuperscript{145} \textit{Heller} involved an equal protection challenge to Kentucky’s statutory scheme governing the involuntary commitment of mentally disabled persons to state institutions. The statutes provided that the applicable burden of proof for commitment of the mentally retarded was the clear and convincing evidence standard, while commitment of the mentally ill was to be governed by the more stringent standard of beyond a reasonable doubt. In addition, relatives and guardians of allegedly mentally retarded persons were accorded rights to participate in commitment proceedings, while no such rights were accorded relatives of the allegedly mentally ill. Both the

\begin{footnotesize}
\begin{enumerate}
\item As indicated earlier, the record in cases applying rational basis review to the military’s discrimination against homosexuals is mixed. \textit{Compare} Meinhold v. United States Dep’t of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993) (following Pruitt and enjoining the Navy from discharging a serviceman on the basis of his homosexual status), \textit{aff’d in part and rev’d in part}, 34 F.3d 1469 (9th Cir. 1994), \textit{with} Holmes v. California Army Nat’l Guard, 124 F. 3d 1126 (9th Cir. 1997) (applying rational basis review and rejecting a challenge to the military’s “don’t ask/don’t tell” policy on homosexuals), \textit{cert. denied}, 119 S. Ct. 794 (1999); Able v. United States, 155 F.3d 628 (2d Cir. 1998) (same). For a discussion of post-Pruitt developments in this area, see infra Part V.
\item Heller v. Doe, 509 U.S. 312 (1993).
\item Two other cases decided in the early 1990s reflect the same approach to rational basis review as Heller. \textit{See} FCC v. Beach Communications, Inc., 508 U.S. 307 (1993); Nordlinger v. Hahn, 505 U.S. 1 (1992). The three cases are now often cited together as exemplifying the requirements of rational basis review. \textit{See, e.g.,} Central State Univ. v. American Ass’n of Univ. Professors, 526 U.S. 124, 125-26 (1999) (per curiam); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir.), \textit{cert. denied}, 519 U.S. 948 (1996). I focus on Heller because it presents the Supreme Court’s clearest and most careful recent elaboration of the rational basis test, and because I believe it has become the standard citation for that test.
\end{enumerate}
\end{footnotesize}
federal district court and United States Court of Appeals for the Sixth Circuit applied a rational basis standard and held these distinctions unconstitutional.

The Supreme Court reversed, applying the rational basis standard to the Kentucky statutes. The respondents had argued in their brief that the rational basis standard contemplated by Cleburne required Kentucky "to demonstrate how the differences it alleges are relevant to the classification it seeks to defend," and that the state had failed to do so. Respondents also argued that Cleburne stood for the need to give "careful attention" to the sort of interests asserted by the mentally retarded in Heller, and that Kentucky's differential treatment of the mentally retarded and the mentally ill could not survive such "attention."

The Court was not persuaded. While it did not rely upon or even cite Lee Optical, the tone and tenor of its analysis left little doubt that it saw

---

148 The respondents, in their brief, had argued for the applicability of "some form of heightened scrutiny." Since they had contended in the lower courts that rational basis review was applicable, and since the lower courts had in fact applied rational basis review, the Court found that the question of whether or not some form of heightened scrutiny was applicable was not properly presented. See Heller, 509 U.S. at 318-19. The respondents' decision to rely upon the rational basis standard in the lower courts apparently was attributable to at least two factors. First, respondents claimed that there was no reason for them to argue for heightened scrutiny since, in an earlier round of proceedings, "the Sixth Circuit had already upheld respondents' equal protection arguments on the basis of the rational basis analysis set forth" in Cleburne. Respondent's Brief, 1993 WL 290154, at *23. In fact, the Sixth Circuit had cited Cleburne in its initial opinion. See Doe v. Austin, 848 F.2d 1386, 1394 (6th Cir. 1987). But while it is possible to construe the court's rational basis analysis as entailing more meaningful scrutiny than might have been called for had it been applying the Lee Optical paradigm, there is no evidence from its opinion that the Sixth Circuit understood Cleburne as either requiring or justifying any sort of heightened scrutiny under the rational basis label. Second, the respondents argued that Fouche v. Louisiana, 504 U.S. 71 (1992), decided after the Sixth Circuit decision that was then before the Court, "strongly suggested" the appropriateness of applying "a higher level of scrutiny" to the Kentucky legislation challenged in Heller. Respondent's Brief, 1993 WL 290154, at *24.
149 Respondent's Brief, 1993 WL 290154, at *15.
150 See id. at *17 ("[Kentucky] has not begun to demonstrate how such differences would justify lowering the standard of proof for committing allegedly mentally retarded persons or permitting third persons, with potentially adverse interests, to participate as parties in the commitment proceedings.").
151 Id. at *26.
rational basis review to be every bit as deferential as the review contemplated by Lee Optical. For example, Justice Kennedy’s majority opinion noted that “rational-basis review in equal protection analysis ‘is not a license for courts to judge the wisdom, fairness, or logic of legislative choices’”; that “a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity”; that where rational basis review is applicable the government “need not ‘actually articulate at any time the purpose or rationale supporting its classification’”; and that a classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”

While Justice Kennedy did not cite Cleburne directly in his discussion of the requirements of rational basis review, the question of its proper interpretation was raised explicitly in Justice Souter’s dissenting opinion. Justice Souter initially addressed the respondent’s argument, which the majority had found not properly presented, that heightened scrutiny should be applied to the Kentucky statutes at issue. He concluded, citing Cleburne, that “the distinctions wrought by the Kentucky scheme cannot survive even that rational-basis scrutiny, requiring a rational relationship between the disparity of treatment and some legitimate governmental purpose, which we have previously applied to a classification on the basis of mental disability.” Thus, he continued, “I need not reach the question whether scrutiny more searching than Cleburne’s should be applied.” Souter went on to observe:

Cleburne was the most recent instance in which we addressed a classification on the basis of mental disability, as we did by enquiring into record

152 Although the Heller Court did not rely upon Lee Optical, another equal protection case, FCC v. Beach Communications, Inc., 508 U.S. 307 (1993), decided several weeks before Heller, did prominently cite Lee Optical in the course of articulating and applying a very deferential rational basis standard. See id. at 316.
153 Heller, 509 U.S. at 319.
154 Id.
155 Id. at 320 (citing Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)).
156 Id. (citing FCC v. Beach Communication, Inc., 508 U.S. 307, 313 (1993)).
The Court also noted that “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” Id. (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).
157 See id. at 335 (Souter, J., dissenting).
158 Id. at 336-37 (Souter, J., dissenting).
159 Id. at 337 (Souter, J., dissenting).
support for the State's proffered justifications, and examining the distinction in treatment in light of the purposes put forward to support it. While the Court cites Cleburne once, and does not purport to overrule it, neither does the Court apply it, and at the end of the day Cleburne's status is left uncertain. I would follow [it] here. 160

As this passage suggests, Justice Souter, speaking for three members of the Court, saw Cleburne as establishing a true alternative to the most deferential model of rational basis review. And while Justice Souter's concerns about the status of Cleburne may not have been answered directly by the Heller majority, they did not go without comment. Thus, Justice Kennedy noted: "We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill. . . . In neither case did we purport to apply a different standard of rational basis review from that just described." 162

VI. DOES CLEBURNE SURVIVE HELLER?

Whether or not Heller constitutes a reaffirmation of true Lee Optical deference is a question to which I will return shortly. But, whether or not the Court intended to make clear its intention to recommit itself to a "virtual rubber stamp"163 rational basis review, did it put to rest any suggestion that Cleburne properly could be construed to infuse means-ends scrutiny with any meaningful content?

With respect to this question, an examination of recent gay rights litigation may again prove instructive. Recall that in its decision in Pruitt, the Ninth Circuit interpreted Cleburne, contra Lee Optical, to endorse an "active" rational basis review, one which required the government "to establish on the record that its policy had a rational basis." 164 Shortly after the Supreme Court decided Heller, Margarethe Cammermeyer challenged the National Guard's action discharging her from military service based on

160 Id. (Souter, J., dissenting) (citation omitted).
161 Justice Souter's dissent was joined in full by Justices Blackmun and Stevens.
162 Heller, 509 U.S. at 321 (citation omitted). In addition to Cleburne, Justice Kennedy cited Schweiker v. Wilson, 450 U.S. 221 (1981). The reference to the rational basis review "just described" was, of course, to its most deferential form.
163 Fallon, supra note 9, at 79.
164 Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir. 1991). The Ninth Circuit has not been alone in characterizing Cleburne as establishing an "active" form of rational basis review. See Milner v. Apfel, 148 F.3d 812, 816 (7th Cir. 1998.) For a discussion of Pruitt, see supra Part IV.B.
her admission that she was a lesbian. The district court held that her discharge violated her rights to equal protection.165 Prior to applying the rational basis standard, the court found it necessary to decide "the viability of the standard of review"166 applied in Pruitt in light of Heller. The defendants argued that "the continuing validity of Pruitt is undercut" by Heller,167 and that "Pruitt was 'superseded' and 'rendered moot' by Heller."168 The court concluded, however, that the "contention that Pruitt's vitality has been extinguished by Heller is without merit."169 While it acknowledged that Heller made clear that "the government policymaker is not required to submit evidence to justify its policy, and may offer only 'rational speculation' to explain the discriminating classification,"170 the court found that it "remains obligated to determine whether there is a rational basis for the policy."171 In the court's view, the fact that Heller did not simply uphold the Kentucky statute "as a matter of law, without any inquiry into its rationality,"172 and that it "closely examined the State's asserted bases for the differential treatment of the two classes and found that there were plausible rationales for each of the statutory distinctions challenged in the case,"173 required the conclusion that the court "remains obligated to determine whether there is a rational basis for the policy."174

While Cammermeyer might be understood to have construed Heller not to have eviscerated the active rational basis review that Pruitt had derived from Cleburne, subsequent post-Pruitt gay rights cases suggest a different view of Heller's impact.175 In a series of cases decided by the federal courts

---

165 See Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994), appeal dismissed as moot, 97 F.3d 1235 (9th Cir. 1996). The district court also concluded that Cammermeyer's discharge violated her substantive due process rights.

166 Id. at 915.

167 Id. at 916.

168 Id.

169 Id. at 917.

170 Id.

171 Id.

172 Id.

173 Id.

174 Id. The court also based its conclusion concerning the continuing vitality of Pruitt on another recently decided Ninth Circuit case in which the circuit court had observed that Pruitt stood for the proposition "that if the Government discriminates against an individual on the basis of homosexuality and does not demonstrate a rational basis for doing so, it will have violated that individual's constitutional rights." Id. (quoting Jackson v. Brigle, 17 F.3d 280, 284 (9th Cir. 1994)).

175 This equivocal description of Cammermeyer is intentional. Although the district court clearly believed that rational basis review had some bite, it noted that
of appeals, *Heller* has provided the touchstone for determining the requirements of rationality review.\textsuperscript{176} For example, the Court of Appeals for the District of Columbia, in an en banc opinion, upheld the Naval Academy’s discharge of Joseph Steffen, a homosexual midshipman who had admitted to being a homosexual.\textsuperscript{177} The government argued that it was rational for it to presume that a person who conceded being a homosexual would engage in homosexual conduct, which its regulations prohibited.\textsuperscript{178} Steffen claimed that the rationality of the classification drawn by the military was undermined by the possibility that not all admitted homosexuals would engage in the prohibited conduct.\textsuperscript{179} Citing *Heller*, the court said that it was compelled to accept the generalization underlying the classification concerning the relationship between the acknowledgment of homosexual status and the propensity to engage in homosexual conduct.\textsuperscript{180} In response to the dissent, the court felt obliged to clarify its understanding of *Heller*. The dissent, it contended, maintained that the rationality of the classification was belied by the fact that the government

\begin{quote}
"*Heller* did not address the proper scope of a court’s rational basis review where, as here, the plaintiff alleges the governmental policy at issue is based solely on prejudice." \textit{Id.} As I have noted earlier, the Supreme Court has held that prejudice alone can never provide a legitimate basis for discrimination, irrespective of whether the classification in question is "rationally related" to the goal of prejudice. See supra note 75. Whether or not the district court in \textit{Cammermeyer} believed that *Heller* contemplated meaningful rational basis review \textit{absent} a claim of prejudice was left unclear.
\end{quote}

\textsuperscript{176} See, e.g., Steffen v. Perry, 41 F.3d 677, 684 (D.C. Cir. 1994) (en banc) (beginning its discussion of the equal protection analysis of the Naval Academy’s discharge of a homosexual midshipman with extensive quotations from *Heller*); Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996), \textit{cert. denied}, 522 U.S. 807 (1997) (citing *Heller* in its equal protection analysis of the Air Force’s discharge of a homosexual servicemember); Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998) (beginning a discussion of a "long series of cases" defining the requirements of rational basis review with quotations from *Heller*); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir.), \textit{cert. denied}, 519 U.S. 948 (1996) (featuring quotations from *Heller* in a discussion of rational basis review); \textit{id.} at 954 n.9 (Hall, J., dissenting) (citing *Heller* as "stating constitutional minimum for legislative findings underlying a classification").

\textsuperscript{177} See \textit{id.} at 677.

\textsuperscript{178} See \textit{id.} at 685. Steffen did not challenge the military’s prohibition of homosexual conduct.

\textsuperscript{179} See \textit{id.} at 687.

\textsuperscript{180} See \textit{id.}
failed to "demonstrate" a factual basis supporting it. According to the court, the dissent "miscited" *Heller* for this proposition; the court restated *Heller*’s admonition that "the theory of rational basis review . . . does not require the [government] to place any evidence in the record."' \(^{182}\)

Other cases in the gay rights area have reflected the same understanding of *Heller*. \(^{183}\) No recent equal protection challenge to the military’s anti-gay policies has been successful; in the recent cases, the courts have shown no inclination to see in *Cleburne* any warrant for serious rational basis review. If there had been any doubt whether *Heller* should be construed to reconfirm the *Lee Optical* paradigm, these cases would seem to have put such doubt to rest. \(^{184}\)

**VII. RATIONAL BASIS REVIEW TODAY**

If *Heller* represents the prevailing standard for rational basis review, does it truly command the near-total abdication of the *Lee Optical* paradigm? Or put somewhat differently, does *Heller* instruct lawyers that unless there are grounds for triggering strict or intermediate scrutiny, any effort to challenge governmental regulations on equal protection grounds is destined for failure? Although the general prospects for successful rational basis challenges would seem extraordinarily poor, there may

---

181 See id. at 689. The dissent disagreed with the majority’s characterization of its interpretation of rational basis review under *Heller*, claiming that it did not "rely on any argument that the government has failed to support [the inferences drawn in the regulations] with evidence." *Id.* at 709 (Wald, J., dissenting).

182 *Id.* at 690 (citing *Heller*, 509 U.S. 312 (1993)).

183 See, e.g., *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997).

184 This is not to say that the application of truly deferential rational basis review to uphold discipline of gays in the military has not gone without challenge or criticism. Illustratively, Judge Reinhardt, in his dissent from a recent Ninth Circuit decision upholding the Navy’s and the National Guard’s discharges of gay serviceman under the military’s “don’t ask/don’t tell” policy, concluded that the presumption that a serviceman who acknowledges his homosexual status is more likely to engage in homosexual acts than one who remains silent about his homosexuality had “no rational basis.” *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126, 1139 (9th Cir. 1997) (Reinhardt, J., dissenting), *cert. denied*, 119 S. Ct. 794 (1999). Similarly, Judge Fletcher, dissenting from a decision upholding the Navy’s discharge of another serviceman for acknowledging his homosexuality, found in the Supreme Court’s cases, including *Cleburne* and *Heller*, a requirement of meaningful rational basis scrutiny. *Phillips v. Perry*, 106 F.3d 1420, 1432 (9th Cir. 1997) (Fletcher, J., dissenting).
remain limited circumstances in which rational basis review can be invoked to invalidate classifications.

First, Heller does not disturb the principle that even where there are no grounds for the formal application of heightened scrutiny, classifications whose only explanation or justification is prejudice will be invalidated. As noted earlier, even prior to Cleburne the Court had made clear that all classifications had to be supported by legitimate interests, and that the goal of singling out any class of persons solely for the purpose of disadvantaging members of the class is not constitutionally legitimate.\[8\] Cleburne itself reiterated and applied this principle, and nothing in Heller or any subsequent Supreme Court decision questions its continued vitality.\[186\]

Moreover, even after Heller, the mere allegation that a classification is motivated by prejudice may be sufficient to provoke a court to engage in a more searching inquiry than that contemplated by Lee Optical. Once again, a gay rights case is instructive. In Able v. United States,\[187\] military personnel challenged the military's “don't ask/don't tell” policy toward homosexuals. The policy requires discharge, subject to some exceptions, of those who either engage in homosexual conduct or who acknowledge their homosexuality. The plaintiffs, relying on Cleburne, argued that the policy violated equal protection because it was animated by prejudice against homosexuals.\[188\] They argued that, under Cleburne and other cases,\[189\] the court was required to do something that cases like Lee Optical and even Heller almost certainly would not require: scrutinize “the justifications offered by the government to determine whether they were rational.”\[190\] The court rejected this argument. While it acknowledged that Cleburne contemplated a judicial examination of “the benign reasons advanced by the government to consider whether they masked an impermissible underlying purpose,”\[191\] the court concluded that this sort of

\[185\] See supra notes 90-91 and accompanying text.
\[186\] As noted earlier, this principle was recently reaffirmed and applied by the Supreme Court in Romer v. Evans, 517 U.S. 620 (1996).
\[187\] Able v. United States, 155 F.3d 628 (2d Cir. 1998).
\[188\] See id. at 634.
\[190\] Able, 155 F.3d at 634. By referring to the need to “scrutinize” the government's proffered justifications for the discrimination, the court clearly was contemplating imposing on the government a burden not required by truly deferential rational basis review.
\[191\] Id.
scrutiny, while called for in "the civilian context," was inappropriate in the "military setting," where special judicial deference was required. Nonetheless, the court felt obliged to observe that "the rationales provided by the United States, grounded in the extensive findings set forth in the Act itself, are sufficient to withstand . . . the plaintiffs' equal protection challenge." Truly deferential rational basis review would not have required the government to "ground" its rationales for a classification in legislative "findings," extensive or otherwise.

The notion that an allegation of prejudice imposes a burden on the government to convince a court that a classification was actually supported by legitimate purposes is, of course, not free from problems. In the gay rights cases, the claim that prejudice underlies discrimination against homosexuals, even if ultimately found unpersuasive, is surely plausible. In other contexts, the plausibility of a claim of prejudice may be more

192 See id.

193 Id. The court noted that the military's "don't ask/don't tell" regulations were "supported by extensive Congressional hearings and deliberation." Id. at 635. Only after it referred to "this extensive legislative examination, embodied in numerous findings," did the court conclude that "we cannot say that the reliance by Congress on the professional judgment and testimony of military experts and personnel that those who engage in homosexual acts would compromise the effectiveness of the military was irrational." Id.

194 Another gay rights case is instructive on this point. In Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994), appeal dismissed as moot, 97 F.3d 1235 (9th Cir. 1996), the district court held that the discharge of a National Guard officer who acknowledged that she was a lesbian violated equal protection. The plaintiff claimed that the policy was based on prejudice toward homosexuals. The court noted that Heller "did not address the proper scope of a court's rational basis review where, as here, the plaintiff alleges the governmental policy at issue is based solely on prejudice." Id. at 917. The court then considered the relationship between the military's anti-gay policy and the purposes or goals which the government actually advanced in its defense. I have discussed other aspects of the court's analysis earlier. See supra notes 165-175. What is interesting to note here is that the court seemed to proceed under the theory that the plaintiff's allegation of prejudice required it to engage in more meaningful scrutiny than would otherwise have been appropriate. Thus, the court concluded that "[u]nder these circumstances, the Court should review the entire record to determine whether the proffered bases for the Government's policy are rational or motivated solely by prejudice against homosexuals." Id. at 921 (emphasis added).

195 See, e.g., Philips v. Perry, 106 F.3d 1420, 1432 (9th Cir. 1997) (Fletcher, J., dissenting) (arguing that the military's "don't ask/don't tell" policy is impermissibly based on prejudice).
difficult to evaluate, and it is likely that courts will be reluctant to accord it burden-shifting effect.\textsuperscript{196}

\textit{Heller} also leaves open the possibility that some classifications, even if not based on prejudice, may be found irrational in the constitutional sense. In \textit{Heller}, the Court acknowledged that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."\textsuperscript{197} \textit{Heller} itself did not explain what this "requirement" might entail, nor did it provide guidance for determining how it might affect the litigation burdens or requirements of the parties.\textsuperscript{198} While some judges might find in this requirement a meaningful (or, in any event, not wholly illusory) restraint on the government's power to classify,\textsuperscript{199} such an interpretation would seem difficult to square with the extraordinary deference that permeated the majority's opinion in \textit{Heller}.\textsuperscript{200}

\begin{footnotesize}
\begin{enumerate}
\setcounter{footnote}{195}
\item A claim of prejudice, if credited, is likely only to have the limited effect, as I believe was suggested by the Second Circuit in \textit{Able}, of requiring the government to advance some legitimate interest which it plausibly could claim is served by the classification in question. \textit{See} Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998). To be sure, this should usually be a very easy burden for the government to satisfy. But it is still more than truly deferential rational basis review would require. \textit{See} Heller v. Doe, 509 U.S. 312, 320 (1993) (holding that the government was not required to actually articulate a purpose or rationale supporting a classification).

\item \textit{Heller}, 509 U.S. at 321.

\item The requirement that a classification have "some footing" in the realities of the subject it addresses may simply represent a restatement of the notion, reiterated in \textit{Heller}, that it cannot be "wholly irrelevant" to the achievement of the government's objective. \textit{Id.} at 324. But since the government need not articulate its actual objectives, and since a court is required to hypothesize any "conceivable" objective which the classification could have been enacted to further, any "footing" a classification might have in the \textit{actual} realities of any subject to which it might pertain would be wholly fortuitous. In addition, the Court made clear that a classification could be supported by any "reasonably conceivable state of facts" which might make it appear rational. \textit{Id.} at 323. This is hardly a standard that provides much bite to the "footing in the realities of the subject [matter]" idea. \textit{Id.} at 321.

\item In her dissent from an opinion upholding the military's "don't ask/don't tell" policy, Judge Fletcher, relying in part on the failure of the Navy to establish that its differential treatment of homosexuals and heterosexuals has some footing in reality, concluded that the classification failed rational basis review. \textit{See} Philips, 106 F.3d at 1434 (Fletcher, J., dissenting) (citing \textit{Heller}).

\item The likelihood that \textit{Heller}'s reference to the need to justify a classification in the "realities" of the subject matter will not be taken very seriously is illustrated
\end{enumerate}
\end{footnotesize}
One of the Supreme Court’s most recent equal protection cases suggests the degree of deference that post-Heller rational basis review entails. In Central State University v. American Association of University Professors, the Court considered an equal protection challenge to an Ohio statute that restricted the ability of state university faculty members, but no other public employees, to collectively bargain over their workload.

In a 4-3 decision, the Ohio Supreme Court, applying rational basis review, concluded that it could not “find any rational basis for singling out university faculty members as the only public employees as defined in [the statute] precluded from bargaining over their workload.” It reached this conclusion only after carefully reviewing evidence introduced in the trial court by the defendants in support of their assertion that the restraint imposed on university faculty actually furthered the goal of quality undergraduate education.

by Judge Wald’s dissenting opinion in Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc), a leading gay rights case in which the court upheld the Naval Academy’s policy of discharging those who acknowledged their homosexuality. Judge Wald took pains to note that her belief in the irrationality of the Academy’s policy was not premised directly on the government’s failure to demonstrate that its policy was “rooted in ‘reality’.” Id. at 709 (Wald, J., dissenting) (citing Heller). Instead, she claimed that the government’s failure to do so “serves only to reinforce our view of its basic irrationality.” Id.


202 The plaintiffs asserted claims under both the Fourteenth Amendment and the equal protection component of the Ohio Constitution.


204 The parties stipulated that the object of the legislation was “to effect a change in the ratio between faculty activities in order to correct the imbalance between research and teaching at four-year undergraduate state institutions created by a faculty reward system which prizes research over teaching.” Id. at 468. The Ohio Supreme Court found that “[i]ntrinsically, this is a concern over the quality of undergraduate education and, therefore, is a legitimate governmental interest.” Id.

True rational basis review, of course, does not require the government to articulate, nor does it require a court even to identify, the actual interest or purpose that underlies a classification; even a “reasonably conceivable” purpose will suffice. Heller v. Doe, 509 U.S. 312, 320 (1993). Thus, in defending against an equal protection challenge, in theory the government is not obliged to proffer, or for that matter even to speculate about, a (legitimate) purpose against which the
This review led the court to conclude with confidence that there is not a shred of evidence in the entire record which links collective bargaining with the decline in teaching over the last decade, or in any way purports to establish that collective bargaining contributed in the slightest to the lost faculty time devoted to undergraduate teaching.\textsuperscript{205}

By now, of course, it should be apparent that this approach to rational basis review looks much more like the one suggested by \textit{Cleburne} than by \textit{Heller}.\textsuperscript{206} As Justice Cook’s dissent noted, “[r]ational-basis scrutiny is intended to be a paradigm of judicial restraint, and where there are plausible reasons for the General Assembly’s action, a court’s inquiry must end.”\textsuperscript{207} The dissent was clearly correct in noting that the state had “no obligation to produce evidence to sustain the rationality of a statutory classification,”\textsuperscript{208} and that the plaintiffs had the burden “to negative every conceivable basis which might support it.”\textsuperscript{209} Thus, the only question was “whether the General Assembly rationally could have believed that imposing uniform workload standards would promote its objective.”\textsuperscript{210}

That it clearly was rational—or that it at least might have been perceived as rational—for the Ohio General Assembly to prohibit only rationality of a classification is to be assessed. Presumably, the government’s lawyers could concede that they had no clue why the classification was enacted and invite the court to imagine possible reasons why a legislature might have enacted the statute in question, reasons which might make the classification plausibly appear rational. For fairly obvious political, tactical, and even psychological reasons, however, government lawyers might be understandably reluctant to default completely in assisting a court in identifying actual or potential reasons why the legislature enacted a classification, especially since there will almost always be some legitimate purpose which will make the classification seem rational. One is seldom likely to encounter cases in which a court will be left completely on its own in conducting rational basis ends scrutiny. For further discussion of this point, see supra note 95.

\textsuperscript{205} \textit{Central State}, 699 N.E.2d at 469. The court went on to note that the evidentiary record appeared “to indicate that factors other than collective bargaining are responsible for the decline in teaching activity.” \textit{Id}.

\textsuperscript{206} The Ohio Supreme Court majority cited neither \textit{Cleburne} nor \textit{Heller} in its opinion. Instead, it relied exclusively on its own precedents in discussing the applicable equal protection analysis.

\textsuperscript{207} \textit{Central State}, 699 N.E.2d at 471 (Cook, J., dissenting).

\textsuperscript{208} \textit{Id} at 472 (Cook, J., dissenting).

\textsuperscript{209} \textit{Id}. (Cook, J., dissenting).

\textsuperscript{210} \textit{Id}. (Cook, J., dissenting).
university faculty members from engaging in collective bargaining over their workload was signified by the United States Supreme Court's summary disposition of the case. Without even providing the parties an opportunity to brief the issues on the merits, and in a per curiam opinion, the Court granted the writ of certiorari and reversed and remanded. The Court relied on a string citation of recent equal protection cases beginning with *Heller,* and agreed with the Ohio Supreme Court dissent’s conclusion that the failure of the state to show that its treatment of faculty members actually furthered the law’s objectives was irrelevant to its rationality. It is difficult to imagine judicial review more deferential than this.


212 Only Justice Stevens’ dissent questioned the propriety of the Court’s “mechanistic” equal protection analysis. *Id.* at 1166 (Stevens, J., dissenting). Justice Ginsburg, joined by Justice Breyer, wrote a brief concurring opinion noting that a “summary disposition is not a fit occasion for elaborate discussion of our rational basis standards of review.” *Id.* at 1164 (Ginsburg, J., concurring). Justices Ginsburg and Breyer also noted the prerogative of the Ohio Supreme Court to alter the outcome of the case by explicitly reconsidering the matter under the Ohio Constitution. *See id.* (Ginsburg, J., concurring).

Justice Ginsburg’s somewhat enigmatic reference to rational basis “standards” of review was echoed in Justice Stevens’ dissent. Stevens argued against summary disposition of the case, in part because the Court has not been entirely consistent in the way it has articulated the rational basis standard. *See id.* at 1166 (Stevens, J., dissenting). The tenor of Stevens’ dissent indicated that, unlike the majority, he was prepared to view the rational basis standard as imposing at least some non-trivial degree of restriction on the state’s power to classify:

Indeed, I would suppose that the interest in protecting the academic freedom of university faculty members might provide a rational basis for giving them more bargaining assistance than other public employees. In any event, no one has explained why there is a rational basis for concluding that they should receive less.

*Id.* (Stevens, J., dissenting).

213 On remand from the United States Supreme Court, the Ohio Supreme Court considered whether the Ohio statute “rationally relates to a legitimate interest under our interpretation of Ohio’s Equal Protection Clause.” *American Ass’n of Univ. Professors v. Central State Univ.,* 717 N.E.2d 286, 289 (Ohio 1999). Describing the federal rational basis standard as part of a “carefully conceived structure of equal protection review,” the Ohio Supreme Court refused to accept the plaintiff’s invitation to apply the state standard more vigorously than its federal counterpart: “We affirm, therefore, that the federal and Ohio Equal Protection Clauses are to be construed and analyzed identically.” *Id.* at 291.
Of course, every activity, even scratching one’s head, can be called a “constitutional right” if one means by that term nothing more than the fact that the activity is covered (as all are) by the Equal Protection Clause, so that those who engage in it cannot be singled out without “rational basis” . . . . But using the term in that sense utterly impoverishes our constitutional discourse.\(^{214}\)

Recently, a distinguished federal judge observed that “[t]he limited role that the courts continue to exercise under rationality review . . . remains a significant bulwark against unreasonable and illegitimate classifications.”\(^{215}\) Cleburne’s suggestion of a rational basis standard that actually required the government to demonstrate that a classification rationally furthered legitimate interests might have made this observation a fair one.\(^{216}\) But despite early, if not entirely clear and consistent signals from the lower courts, this understanding of Cleburne no longer seems tenable. Thus, one scholar’s reference to Cleburne as “a narrow, perhaps vanishing, exception to the post-Lochner Court’s extreme deference to government action outside of the fundamental right or ‘suspect class’ scenarios,”\(^{217}\) accords the case even greater doctrinal significance than it is due.

After Heller, the conception of rational basis review as a “bulwark” against significant, and even unreasonable, discrimination seems more to reflect wishful thinking than a candid assessment of Supreme Court doctrine. Heller fully reinstated the Lee Optical paradigm of rational basis review and left little doubt that, except where pure prejudice is involved, Cleburne cannot be counted on by lawyers to persuade a court to scrutinize seriously any classification to which heightened equal protection review would not properly be applicable. And any court which put the rationality


\(^{215}\) Steffan v. Perry, 41 F.3d 677, 708 (D.C. Cir. 1994) (Wald, J., dissenting). The quoted passage was also essentially contained in the original panel’s opinion written by Judge Mikva. See Steffan v. Aspin, 8 F.3d 57, 63 (D.C. Cir. 1993), vacated en banc, 41 F.3d 677 (D.C. Cir. 1994).

\(^{216}\) I take it as no coincidence that Judge Wald’s reference to rationality review as a “bulwark” was followed immediately by a citation to Cleburne. See Steffan, 41 F.3d at 708.

\(^{217}\) Massaro, supra note 90, at 93 n.227. The reference to “Lochner,” of course, is to Lochner v. New York, 198 U.S. 45 (1905), the notorious substantive due process case which stands for illegitimate judicial activism.
of a classification to any meaningful test—say, by requiring the government to present evidence showing that the classification actually does further any legitimate goals (real or imagined)—could fairly be accused of participating in, as one court put it, "an undisciplined rebellion against the governing constitutional doctrine."218

From one perspective, of course, this state of affairs may be unproblematic. After all, the Supreme Court has never really developed a coherent theory of the Constitution or of equal protection which would explain why any sort of judicial supervision, "meaningful" or otherwise, of classifications embodied in the run of economic and social welfare is required, or even justified.219 If the Court were to conclude that no such theory exists, one might expect that it would simply say so, in which event it might announce that challenges to classifications to which heightened scrutiny is inapplicable are not justiciable.220 To continue to speak as if the "requirement" that a classification be rationally related to a legitimate interest still means something when it so seldom does is not cost-free. It encourages lawyers and clients to believe that every official act of unequal treatment can be converted into a federal constitutional case, resulting potentially in

218 Steffan, 41 F.3d at 689.

219 This is not to say that efforts to construct such a theory have not been undertaken. For example, Michael Perry has argued for an originalist account of the Fourteenth Amendment according to which the Amendment was understood by the founders to incorporate a general prohibition against "'arbitrary' as distinct from 'reasonable' exercises by a state of its 'police power.'" PERRY, supra note 32, at 75. This principle, which Perry traces to the Privileges and Immunities Clause, would require the courts to invalidate any official discrimination which is "not reasonably designed to accomplish a legitimate governmental purpose." Id. at 76. As part of this inquiry, a court should determine whether a legislature could reasonably or plausibly conclude that the benefit secured by a classification is proportionate to its costs. See id. at 156. As Perry conceives it, this standard would appear to entail a degree of judicial deference as substantial as that required by Heller. For an earlier scholarly effort to construct a theoretical defense of the rationality requirement, see Bennett, supra note 24. For general criticism of the search for "rationalism" in constitutional law, including equal protection, see Robert F. Nagel, Rationalism in Constitutional Law, 4 CONST. COMMENTARY 9 (1987).

220 As an alternative to invoking justiciability, such equal protection claims might be found to raise no substantial federal question and thus, at least in the federal courts, be subject to dismissal under the federal rules of civil procedure. See FED. R. CIV. P. 12(b)(6).
the sort of systemic inefficiencies that Supreme Court Justices and others are so fond of condemning.221

221 Promising even the possibility of successful rational basis challenges to legislative classifications—when the prospects of winning are nearly negligible—may also risk erosion of public respect for the legal system. Moreover, uncertainty or misunderstanding concerning the real nature of rational basis review can have troublesome implications beyond the world of litigation.

For example, in recent decisions, the Supreme Court has limited the power of Congress to legislate under Section 5 of the Fourteenth Amendment. See, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the exercise of Congress’s Section 5 power is limited to remedying or preventing the violation of the Constitution as interpreted by the Supreme Court); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999) (same). In light of these decisions, some lower courts have held that Congress’s Section 5 power does not permit it to expand the protections of the Equal Protection Clause beyond those recognized by Supreme Court decisions. See, e.g., Humenansky v. Regents of the Univ. of Minnesota, 152 F.3d 822 (8th Cir. 1998), cert. denied, No. 98-1235, 2000 WL 29320 (U.S. Jan. 18, 2000). Were Congress to enact legislation under Section 5 to remedy or prevent state action that it believed violated (or would violate) the Equal Protection Clause, a defense of that legislation would be dependent on a showing that the state action to which the legislation was directed would fail the standard of review that would be applicable were the state action challenged directly in court. If there were no basis for the application of heightened equal protection scrutiny, Congress would have to conclude, and then be prepared to establish in court, in the event that its legislation were challenged as exceeding its Section 5 powers, that the state action it had targeted would not survive rational basis scrutiny. See Alsbrook v. Maumelle, 184 F.3d 999 (8th Cir. 1999), cert. granted in part sub nom. Alsbrook v. Arkansas, No. 99-423, 2000 WL 63302 (U.S. Jan. 25, 2000) (holding that Congress’s effort, in the American with Disabilities Act, to abrogate the states’ Eleventh Amendment immunity was invalid since the Act purported to prohibit state action that would not fail rational basis scrutiny under Cleburne); Bradley v. Arkansas Dep’t of Educ., 189 F.3d 745, vacated in part sub nom. Jim C. v. Arkansas Dep’t of Educ., 197 F.3d 958 (8th Cir. 1999) (reaching the same conclusion concerning Congress’s effort to abrogate Eleventh Amendment immunity under the Individuals with Disabilities Education Act). Thus, where Congress purports to legislate to remedy or prevent discrimination, a determination of the proper scope of rational basis scrutiny may well be crucial to the constitutional validity of its efforts.

As this Article was about to go to press, the Supreme Court handed down a decision that provides a striking example of this. In Kimel v. Florida Board of Regents, Nos. 98-791 & 98-796, 2000 U.S. LEXIS 498 (U.S. Jan. 11, 2000), the Court was presented with the question whether Congress’s effort, in the Age Discrimination in Employment Act of 1967 (“ADEA”), to subject the states to suit
Why the Court continues, in the rather colorful words of one observer, to “mouth”\textsuperscript{222} rational basis review when it so infrequently has any real meaning is anyone’s guess. Perhaps the rationality requirement represents an example of what Professor Sunstein has called an “incompletely theorized agreement” about the meaning of constitutional equality, an agreement among Justices, perhaps for reasons that are only inchoate and not widely shared, that some forms of legislative classification are simply too “arbitrary” or senseless to be squared with any plausible meaning of the concept of “equal protection of the laws.”\textsuperscript{223} Moreover, holding open even the theoretical possibility that an ordinary classification might be invalidated while simultaneously insisting that such occasions will be extremely rare may accord with the prudentially informed values of “decisional minimalism.”\textsuperscript{224} On this view, even without a general theory of equality which might justify a more general policy of judicial intervention, the Court may wish to maintain the prerogative for limited engagement in the political process where important political or moral values are at stake.\textsuperscript{225}

in federal court exceeded its power, under Section 5 of the Fourteenth Amendment, to abrogate the states’ Eleventh Amendment immunity from suit. In seeking to effect such an abrogation, Congress relied upon its assessment that the remedies provided under the ADEA were necessary to address unconstitutional age discrimination in which the states had been, or might, be engaged.

Testing this congressional judgment under the principles it had announced in \textit{City of Boerne}, the Court considered whether the ADEA was a “congruent” and “proportional” congressional response to age discrimination that would violate the Equal Protection Clause. The Court concluded that the rational basis test was the appropriate equal protection standard for age discrimination. It then found that the record upon which Congress relied was insufficient to establish the requisite scope or degree of unconstitutional age discrimination—that is, discrimination that would not survive rational basis scrutiny if challenged in court—and held that “Congress had no reason to believe that broad prophylactic legislation was necessary in this field.” \textit{Id.} at *53.

\textsuperscript{222} Klarman, \textit{supra} note 18, at 248.


\textsuperscript{224} For general discussion of minimalism, see Cass R. Sunstein, \textit{One Case at a Time} (1999).


Cleburne’s implicit challenge to the reigning equal protection paradigm proved to be short-lived. As things now stand, expecting that a court might invalidate a classification subject to rational basis scrutiny is like expecting to win the lottery. For, as Justice Stevens recently noted, rational basis review is indeed “tantamount to no review at all.”

Professor Sunstein notes that a judicial posture of unflagging deference is best understood as a “maximalist” position, and, as such, may unduly limit the Court’s power to promote important constitutional and democratic values. See SUNSTEIN, supra note 224, at 261 (noting that judicial restraint defines certain forms of maximalism).

The engagement promoted by retaining the “trump card” of rational basis review might be effectuated indirectly. A legislature acting with knowledge that highly imperfect classifications may ultimately be exposed to judicial scrutiny and, in the extreme case, even invalidation, might be more attentive to the discriminatory consequences of its action than one which believes itself to be completely immune from judicial review. For an example of an approach to rationality review that would, in the service of democratic principles, leave room for at least a degree of judicial engagement in scrutinizing classifications, see Schweiker v. Wilson, 450 U.S. 221, 239 (1981) (Powell, J., dissenting).

It is important to make a distinction between expectations that are reasonable in light of actual Supreme Court doctrine, and expectations that are premised in an attorney’s hope of convincing a judge that a classification is so imperfect, so unjust, or even so silly that it must be “irrational” in the equal protection sense. I do not doubt, indeed I know for a fact, that some judges who are not fully versed in the intricacies of Fourteenth Amendment jurisprudence—say, a state trial judge who only infrequently encounters federal constitutional issues—might be persuaded to strike down as “unreasonable” a classification that should be viewed as “rational” in the Lee Optical-Heller sense. Indeed, even judges whom one would expect to know better sometimes succumb to such an inclination. See, e.g., Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996) (applying rational basis scrutiny to invalidate New York’s ban on physician-assisted suicide), rev’d, 521 U.S. 793 (1997) (reversing the court of appeals; no Justice found New York’s statute irrational). Nonetheless, any attorney who advised a client that an equal protection challenge to a social welfare or economic regulation had anything more than an outside chance of success would, in my judgment, be flirting with malpractice.
