Rationality-and the Irrational Underinclusiveness of the Civil Rights Laws

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RATIONALITY—AND THE IRRATIONAL UNDERINCLUSIVENESS OF THE CIVIL RIGHTS LAWS

PETER BRANDON BAYER

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I. INTRODUCTION TO THE PROBLEM

A story often told by law teachers concerns a famous judge—perhaps it was Learned Hand—who while walking to the courthouse passed a hopscotch board drawn in chalk on the sidewalk. Below the board was written: “Rules: (1) No cheating.” That was the only instruction for the game. The judge mused to himself about the hidden sophistication of a rules system whose only command was not to cheat. Indeed, there is something compelling about the idea that a phrase like “no cheating” may, over time, express a host of concepts, understandable to all, conveying accepted substantive standards of social behavior.

In a similar manner, the United States Constitution, employing vague and broadly drafted phrases, seeks to define an entire system of social order. That document establishes the process of government, describes the powers of governmental entities, and establishes the authority of individuals, under certain circumstances, to affect, alter, use, and command the political system.

As has been verified by two hundred years of constitutional adjudication and interpretation, the precise meanings of even the most specific portions are unclear. Certainly, the particularly broad based, vaguely worded passages are subject to any number of alternative, often conflicting, interpretations, none more so than the Equal Protection and Due Process clauses of the Fifth and Fourteenth Amendments. Those grand passages have been the source of much legal concern, for their commands require us to conceive
and design a social system predicated on fairness.\textsuperscript{1} Even if "fairness" was concrete, objective, and discerned through \textit{a priori} rules, rather than defined by political interactions of judges, lawmakers, lawyers, and other actors, we would not know, nor are we likely to ever fully understand, the complete dynamic of due process and equal protection.

We know from historical insight that these concepts assumed particularly complex meanings shortly after the Civil War. Yet, as detailed below, our notions of due process and equal protection have taken on meanings much more profound than the immediacy of their historical origins.\textsuperscript{2} Indeed, the Civil War aftermath, and its implications for the struggle of human dignity and freedom as defined by law, was the starting point of a legal process to rid society of myriad forms of discrimination which, although closely held and valued by many, served no purpose other than demeaning individuals for the aggrandizement of powerful classes.

The commands of the Fifth and Fourteenth Amendments became, in large part, the supplement to the more specific proscriptions of the Bill of Rights and other portions of the Constitution which set forth particular forms of treatment to which every individual is entitled. What the Framers failed to include specifically was subsumed by the commands for due process and equal protection. Like some sort of constitutional residuary clause, these two concepts protect individuals from treatment so demeaning and dehumanizing that it offends our notions of fair treatment.\textsuperscript{3}

To energize the constitutional system, Congress has enacted a series of civil rights laws designed to protect individuals from public and private forms of irrational discrimination.\textsuperscript{4} To be lawful, such civil rights statutes must conform with the definition of rationality required by the Fifth and Fourteenth Amendments. Yet, in one fashion, these statutes are as irrational as the behavior they seek to control. The statutes protect only certain classes of individuals in limited instances. This article argues that the existing civil rights laws, although integral to a free society, are but a first step. The statutes will never be fully rational, never completely fair, until all persons

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\textsuperscript{1} See \textit{infra} notes 8-18 and accompanying text (establishing that the constitutional command for rationality requires, at a minimum, that all governmental entities accord individual and groups fair treatment).

\textsuperscript{2} See \textit{infra} note 59 (citing proposition that Constitution is to expand and grow); see also, e.g., \textit{Runyon v. McCrary}, 427 U.S. 160, 189-192 (1976) (Stevens, J., concurring). Commenting on \textit{Jones v. Alfred H. Mayer Co.}, which he found controlling in \textit{Runyon}, Justice Stevens observed that \textit{Jones'} holding, applying 42 U.S.C. § 1982's prohibition against certain forms of racial discrimination to private real property transactions, was probably not within the contemplation of the enacting Congress. Nevertheless, "... even if \textit{Jones} did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today." \textit{Id.} at 191. See \textit{Jones v. Alfred H. Mayer Co.}, 392 U.S. 409 (1968).

\textsuperscript{3} See \textit{infra} notes 62-76 and accompanying text.

\textsuperscript{4} See \textit{infra} notes 177-278 and accompanying text. For example, 42 U.S.C. § 1981 proscribes racial discrimination in contractual transactions because race is irrelevant—has nothing legitimate to do with—the actual ability of an individual to make and enforce a contract.
are protected from arbitrary discrimination. For instance, a statute which protects individuals from racial discrimination in contractual transactions serves a valued social function. Yet, the same statute reformed to protect all persons from the imposition of irrational discrimination in the realm of contracts would be better. This article shows that limiting the coverage of civil rights statutes to a handful of selected classes unduly limits the protections which should be accorded to every person.

The proof of this thesis begins by addressing equal protection analysis to devise a general definition of "rationality". The investigation reveals that governmental action is "rational" when it is designed to achieve a legitimate goal through legitimate means. The determination of legitimacy stems from a complex analysis of benefits versus costs establishing the overall utility of the governmental action in question. This analysis, however, does not rely solely on accustomed cost/benefit measures sounding in economic efficiency. Instead, the factors for consideration involve notions of dignity, fairness, selfhood, and personal integrity.

The general definition of rationality serves to reveal three specific situations wherein government actions are by definition unconstitutionally irrational: (1) when they are totally random and, thus, no better than a coin flip; (2) when they threaten to create useless caste systems; and (3) when they are designed to promote outmoded stereotypes or to disadvantage an unpopular group solely because of the group's unpopularity.5

After establishing analytical tools under equal protection analysis, the article then reviews selected federal civil rights enactments to discern their purposes and assess their rationality. We find that these laws, joining the equal protection precedents, form a national project of equality and dignity designed to allow each individual the opportunity to achieve ends and pursue chosen goals free from certain forms of irrational discrimination.6 Thus, the very project of devising both civil rights statutes and constitutional standards of rationality to proscribe certain forms of irrational discrimination plants the seeds for a more pervasive and important social endeavor, specifically the vindication of the individual dignity of all persons engaging in social interactions and projects such as employment, housing, and contractual negotiations. Legislatures, therefore, must sculpt the civil rights laws to protect all individuals who engage in the particular type of activities

5. See infra notes 87-157 and accompanying text (discussing rationality). The analysis tells us, in great measure, what is "good" about rational governmental actions and "bad" about irrational ones.

The three situations, of course, are not talismanic. They are simply convenient referents to help order the concepts under rationality analysis discussed herein.

6. Admittedly, case law reveals that the "national project of equality and dignity" is not enforced perfectly. Arguably, many precedents restrict or distort the process. See General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) (stating that section 1981, unlike the Fair Employment Act, 42 U.S.C. § 2000e et seq., does not recognize a cause of action in unintentional racial discrimination). Still, the fact that the project is imperfectly applied does not negate the existence of the project or its many important successes.
encompassed by the statute. The thesis holds that any coverage less complete or coverage that fails to protect individuals from arbitrary infringements of their civil rights renders the statute itself partially arbitrary and irrational.7

II. "Defining "Rationality" Under Equal Protection Analysis

A. Rationality and Political Morality

1. Introduction

Clearly, the starting point to support the thesis requires a usable definition of "rationality". A definition is available to us from the commands of the Fifth and Fourteenth Amendments of the Constitution as explicated by judicial opinions and scholarly commentary. This section of the paper, then, analyzes the meaning of "rationality" pursuant to the interpreted concepts of "equal protection of the laws" as set forth in the Constitution. These interpretations reveal that the Constitution protects every individual from arbitrary and irrational governmental action regardless of its source or purposes. It is not too much to say, in fact, that every member of American society has a Constitutional right to be free from irrational governmental behavior.8 If we can cull a definition from the

7. If the thesis of this article were accepted, the courts would be required to take one of two steps. The least preferable would be to invalidate the civil rights acts leaving it to Congress and other official actors to re-enact the statutes to protect all individuals from arbitrary treatment in given projects.

The preferable course would be for the courts to declare the statutes underinclusive and expand them to conform with the equal protection requisites. See infra notes 160-176 and accompanying text. It would be hoped that the affected legislatures would not contravene the courts by attempting to amend or revoke the affected laws.

Some who have read drafts of this article have asked me where does my theory end. For instance, under the proposed theory of rationality, must legislatures enact civil rights laws in the first place? Perhaps so. My project, however, is to explore one important aspect of the interrelationship of Constitutional law and statutory enactment. I am not prepared at this time to give a complete detailing of every possible effect or manifestation of my theory; nor, do I feel I must. No idea could withstand scrutiny if it is a valid critique to assert that the proponent has not addressed every possible nuance and ramification of her idea. Nobody can know that much—I certainly don't.

I attempt to establish that the theory of rationality presented herein demonstrates that civil rights statutes are too narrow. I accept criticisms that my interpretation of Constitutional law and statutory law are infirm and that my application of the former to the latter is flawed. I also accept criticism that the society I would construct under the proposed legal standards is unfortunate. That I have not accounted for every planet and comet in the proposed constitutional universe is not, to my mind, a legitimate objection.

8. For instance, the Supreme Court has noted that all governmental action makes distinctions and classifications among individuals, groups, or both. "[T]he Equal Protection Clause "imposes a requirement of some rationality in the nature of the class singled out."" James v. Strange, 407 U.S. 128, 140 (1972) (emphasis added; quoting Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1966)). See also Bankers Life and Casualty Co. v. Crenshaw, 108 S. Ct. 1645, 1653 (1988); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985).
opinions and commentaries addressing "rationality" under the Fifth and Fourteenth Amendments, we will possess a useful tool with which to test the basic rationality of civil rights statutes.9

2. All is Rationality—A Threshold Review of Fourteenth Amendment Equal Protection Analysis.

a. The General Guarantee of Rationality.

The Fourteenth Amendment states, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.10

It is well settled that the Equal Protection Clause does not forbid governmental bodies from classifying and differentiating among individuals. Indeed, all persons need not be treated identically under the Constitution. As explicated by the Supreme Court,

"All persons similarly circumstanced shall be treated alike," [nevertheless] "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."11

It is equally settled, however, that governmental bodies may not devise classifications subjecting individuals to arbitrary or irrational treatment.12 Thus, the Fourteenth amendment's equal protection component, "... does

9. As a final introductory caution, it must be added that even if the reader agrees with the definition of "rationality" offered herein, the specific applications of that definition may be disputed. Reasonable persons may embrace a generally agreed upon definition while differing regarding whether given governmental acts are even minimally rational in discrete factual situations. Indeed, dissenting justices demonstrate that the courts themselves may split regarding application of concepts of "rationality." Such ad hoc disagreements, of course, do not challenge the viability of the proposed definition of "rationality." Rather, they reaffirm that, no matter how sound a definition may be, its specific applications—bringing the definition down to earth—are functions of the personal assessments of individual decision makers.


not prevent States from making *reasonable* classifications among [covered] persons.\(^{13}\)

Although courts often accept legislative determinations that legislative classifications are reasonable,\(^{14}\) the legislative classification must be bottomed on some judicially determined rational basis. As a general matter, then, the Constitution protects individuals' liberty from arbitrary intrusions perpetuated through irrational official actions.\(^{15}\)

Historical surveys demonstrate the persistence of rationality analysis in American constitutional law.\(^{16}\) For nearly a century the courts have noted that:

 [...]he mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment . . . it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relationship to the attempted classification—and it not a mere arbitrary selection.\(^{17}\)

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13. Western & Southern Life Ins. Co. v. State Bd. of Equilization of California, 451 U.S. 648, 657 (1981) (emphasis added, citations omitted). This article will focus primarily on equal protection analysis to investigate the concept of "rationality." It may be noted, however, that irrationality is identically forbidden under the due process clauses of the Fifth and Fourteenth Amendments. *See* Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

14. The Supreme Court reaffirmed that legislatures enjoy:

- initial discretion . . . to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.


- Similarly, addressing an equal protection challenge to provisions of the Social Security Act, the court has held consistently that "Governmental decisions to spend money to improve the general public welfare in one way and not another are not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Mathews v. deCastro, 429 U.S. 181, 185 (1976) (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937)); *see also* Bowen v. Owens, 106 S. Ct. 1881, 1885 (1986).

15. The equal protection analysis applicable to states under the Fourteenth Amendment has been extended to restrict Federal governmental actions as well. In *Bolling v. Sharpe*, the Supreme Court held that the constitutional prohibition against racially segregated state public schools, recognized in *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) as emanating from the Equal Protection Clause of the Fourteenth Amendment, is applicable under the Due Process Clause of the Fifth Amendment to federally regulated public schools in the District of Columbia. Bolling v. Sharpe, 347 U.S. 497 (1954). Subsequent precedent clarified that the due process component of the Fifth Amendment includes an equal protection command constraining all actions taken by the Federal Government. The federal level, no less than state and local governments, must obey the edicts of equal protection. *See* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 542 n.2 (1983).


17. *Id. at* 1052 (quoting Gulf Colorado & Sante Fe Ry. v. Ellis, 165 U.S. 150, 165-166 (1897)). Interestingly, the Supreme Court initially viewed rationality analysis in a most limited
Although the specific words and phrases used to describe "rational" have often differed slightly from case to case, the Supreme Court has never retreated from its position that irrational governmental action violates the Constitution.

b. The Purported "Levels of Scrutiny"

Over the decades, equal protection analysis has become increasingly complex. A significant example of the complexity is found in the various "levels of scrutiny" against which legislative actions may be analyzed. It is necessary, therefore, as a threshold consideration, to review briefly these purported analytical constructs. The interesting conclusion derived from this review is that all forms of equal protection analysis are predicated on underlying conceptions of "rationality." Indeed, rationality constructs vitalize and define every level of equal protection analysis. Thus, understanding "rationality" is integral to understanding the entire equal protection sphere.

At one end of the analytical spectrum is the popularly known "strict scrutiny" level of analysis. As explained by the Supreme Court:

The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class" or that impinge upon the exercise of a "fundamental right." With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that the classification has been precisely tailored to serve a compelling governmental interest.

fashion holding that regulation is rational so long as it "places under the same restrictions, and subjects to like penalties and burdens, all who . . . are embraced by its prohibitions. . . ." Powell v. Pennsylvania, 127 U.S. 678, 687 (1888). But, as the quote from Ellis in the text above illustrates, less than a decade later, the Court abandoned Powell's tautological definition of "rationality" in favor of one applying an independent, extra-statutory measure of analysis. See Trub, American Constitutional Law, 994, 991-1000 (1978); see generally Note, A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in City of Cleburne v. Cleburne Living Center, 20 Loyola L.A. L. Rev. 921, 922-926 (1987).

Of course, the fact that rationality analysis has been persistent does not infer that it has been consistent. Indeed, commentators have noted unsubtle shifts in the courts' purported willingness to defer to legislative classifications. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 458-460 (1985) (Marshall, J., with two justices, concurring). One may argue, that, in many cases, supposed presumptions that legislative classifications are rational are accorded more than lip service as the courts subject the classifications to thorough and exacting analysis to determine rationality vel non. See infra notes 98-152 (discussing cases in which Supreme Court analyzes rationality).

18. Bennett, supra note 16 at 1054 and n.34.

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Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28, 36 L. Ed.2d 16, 93 S. Ct. 1278, 1293 (1973). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

In determining whether a class-based denial of a particular right is deserving a strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," Dunn v. Blumstein, 405 U.S. 330, 336 L. Ed.2d 274, 92 S. Ct. 995 (1972), even though "the right to vote, per se, is not a constitutionally protected right." San Antonio Independent School Dist., supra, at 35, n. 78, 29 L. Ed.2d 534, 85 S. Ct. 283.

Statutes reviewed under "strict scrutiny" analysis, therefore, are presumptively invalid.

In addition the Court has established a level of review less rigorous than "strict scrutiny" but which likewise does not presume the validity of the challenged enactment. As noted by the Supreme Court:

... we have recognized that certain forms of legislative classification, while not invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances, we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether

it may fairly be viewed as of the state furthering a substantial interest.21

This "middle level" of scrutiny has been applied, *inter alia*, to test the constitutionality of enactments which made sex-based distinctions22 or classifications predicated on illegitimacy of childbirth.23 Governmental classifications are subjected to "middle level scrutiny" when they appear to jeopardize:

... principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.24

By contrast, "rational" basis analysis, often referred to somewhat unkindly as "mere rationality," is considered the least exacting standard with which to evaluate the constitutional validity of a governmental action. Unlike the "strict scrutiny" or "middle level" standards, the governmental classifications reviewed for "mere rationality" are presumed to be valid unless the challenger can establish otherwise. "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."25 The Court has held that:

"we do not inquire whether ... (a) statute is wise or desirable. ... Misguided laws may nonetheless be constitutional" (James v. Strange,) 407 U.S. (128) at 133 (1972). ... Our task is merely to determine whether there is "some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305. ...26

Indeed, even challenges predicated on empiricism—challenges attacking the factual bases underlying legislative classifications—cannot succeed unless the challengers demonstrate that, "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true to the governmental decisionmaker."27

The existence of these levels of analysis, then, provides the appearance of an established, orderly, and objective analytical tool enabling the courts to discover rather than create the validity or invalidity of the governmental action under scrutiny. It must be recalled, however, that these levels of scrutiny are judicial constructs predicated on courts' best assessments of how to interpret the vague and broadly phrased provisions of the Fifth and Fourteenth Amendments. The ultimate choices regarding both the establishment of levels of scrutiny and the choice of under which level particular fact patterns fall, are decisions requiring the courts to review precedent, history, sociology, economics, and politics. They are, in short, nothing more or less than political and moral choices.

Moreover, the three levels mask the reality of equal protection analysis, namely, that all equal protection challenges require the courts to make one basic determination: whether the challenged action is or is not rational. Strict scrutiny, middle level, and "mere rationality" analysis are simply convenient labels to describe certain constructs, the contents of which are set by the courts' subjective determinations regarding what types of governmental classifications deserve very serious, serious, or not-so-serious concern.  

That is not to imply that judicial analysis is made solely through political fiat, rather, judges do try to render reasoned judgments, constrained by such traditions as stare decisis, deference to the will of the legislature, and Federalism. Nevertheless, equal protection analysis covers cases arising from an immense variety of social settings; and, the social, moral, political, and economic implications of those settings must be considered by the courts.

Bradley, 400 U.S. 91, 111 (1979)). The Court went on to hold that where the legislature had evidence "reasonably supporting the classification" challengers cannot invalidate the enactment merely with evidence that the legislature was incorrect. Similarly, as noted by Professor Bennett, the court has gone so far as to hold that legislation may be valid if any possible legitimating purpose could be envisioned to support the legislative classification regardless of whether the legislature had ever actually considered, much less embraced, such a purpose. Bennett, supra note 16, at 1057 (discussing Justice Harlan's opinion in Fleming v. Nestor, 363 U.S. 603, 612 (1960)). But see Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982).

As will be demonstrated later in the text, but worth a brief mention at this juncture, the foregoing judicial standards must be read with a critical eye. The mere articulation of arguably legitimate purposes, whether expressly recognized by the legislature or suggested during judicial review, will not revitalize otherwise irrational legislation if, in its analysis, the Court concludes that the harm engendered by the statute outweighs the benefits promoted by the legitimate legislative aims. See infra notes 62-76 and accompanying text.

28. Many commentators dispute the clarity supposed to exist among the foregoing three levels of scrutiny. Some argue that fine, but material, distinctions are made within each level of scrutiny depending on both the particular facts of each case and the legislative policies at stake. See generally Gunther, The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model For Newer Equal Protection, 86 Harv. L. Rev. 1, 12-20 (1972); Note, supra note 17, at 932-933. Thus, each level of scrutiny contains any possible number of sub-levels. See United States R.R. Bd. v. Fritz, 449 U.S. 166, 176-77 n.10 (1980). If this is so, and it likely is, we have further fortified the point that all purportedly different levels of scrutiny collapse into rationality analysis.
to determine if the classification is lawful. Similarly, equal protection cases concern whether classes of individuals are being accorded such minimal respect, dignity, and fair treatment as is incumbent upon a just society. The courts cannot easily ignore the troubling and difficult analysis required to reach the conclusion whether a given classification or policy is rational and, thus, fair under the Constitution. The courts must determine if the given political system, such as a legislature, an agency, or judicial body, has acted properly in the distribution or withholding of rights, largesse, and other scarce resources. Such review of regulation is what is meant when it is said that equal protection analysis by courts is a political process.

The analytical factors and considerations underlying judicial determination, in a given case, to apply one level of equal protection analysis over another are identical regardless of the particular level ultimately chosen. Thus, in the first instance when the level of equal protection scrutiny is selected, the court utilizes but one mode of analysis. Moreover, once the "level of analysis" is chosen, the court still must weigh political and moral concerns that the given case raises to finally determine which party will prevail. Thus, in the last analysis, all levels of scrutiny require such similar considerations that they dissolve into one mode.

Brief illustrations demonstrate the foregoing. As discussed earlier, legislation which classifies by creating a "suspect class" of individuals is subjected to "strict scrutiny" which, ipso facto, renders the classificatory


30. Justice Stevens has been a leading and vocal critic of the "levels of scrutiny" analysis. In his most recent and thorough discussion of the issue, Justice Stevens unequivocally stated, "I have never been persuaded that these so called standards [levels of scrutiny] adequately explain the decisional process." Cleburne, 473 U.S. at 451 (1985) (Stevens, J., concurring) (footnote omitted). For Justice Stevens, equal protection involves the inquiry: whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus the word "rational" . . . includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially. Id. at 452 (footnote omitted).

Thus, according to Justice Stevens, every review under equal protection analysis is, in fact, a judicial determination whether the challenged governmental act is rational. See Justice Stevens', supra note 19, at 1153-64. It is not apparent, however, what Justice Stevens means by his assertion that rationality vel non includes considerations whether the "sovereign[]" has "govern[ed] impartially." Indeed, the concept of impartiality seems counterintuitive under equal protection law which requires a court to determine whether a governmental classification—a governmental action differentiating some from others—is rational. The very act of creating the classification betrays the concept of impartiality, at least in the broadest sense of the word. What presumably is meant by "impartially" is that the governmental actor did not rely on impermissible considerations when designing the given classification. That, in turn, is determined through a special type of cost-benefit analysis. See infra notes 62-76 and accompanying text. Indeed, Justice Stevens embraces the concept of a cost-benefit analysis to operationalize rationality analysis. See Cleburne at 452 n.4.
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scheme presumptively unconstitutional. But choosing what classes will be "suspect" is a political endeavor. In San Antonio School District v. Rodriguez, the court upheld Texas' system of financing public education by means of, inter alia, an ad valorem tax on property within discrete school districts even though the system resulted in disparate per capita funding for each pupil depending on the district. Speaking for the Court, Justice Powell rejected the challengers' contention that the judiciary must apply a strict scrutiny standard when reviewing governmental classifications predicated on wealth. Justice Powell argued:

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

Certainly, one may choose to agree with Justice Powell's analysis, although there is definitely a case to be made that the poor have been more victimized than protected by our political system. Partisanship notwithstanding, it seems obvious from reading the foregoing passage that the Court decided rather than discovered that wealth based classifications should receive no special degree of scrutiny. This decision may have been predicated on the majority's best assessment of the origins and purposes of the Fourteenth Amendment, but none can truly say that the Court's holding was mandated by the Fourteenth Amendment.

If the foregoing is correct in asserting that the devising of levels of equal protection scrutiny and the application thereto of discrete cases are

33. The Court applied a similar formula to withhold heightened scrutiny from cases involving age discrimination. The Court reasoned:
While the treatment of the aged in this nation has not been wholly free of discrimination, such persons, unlike, say those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).
Pursuing identical lines, the Court declined to apply heightened scrutiny when reviewing a zoning ordinance imposing on proposed homes for the mentally retarded the unique obligation to secure a special use permit. Cleburne, 473 U.S. 432, 442-47 (1985). See infra note 121 (discussing specific analysis leading the majority to deny special scrutiny to classifications based on mental health). The Court, nevertheless, invalidated the special permit requirement as lacking a rational basis. See infra notes 119-125 and accompanying text.
34. One commentator, reflecting a widely shared view, argues that phrases such as "due process" and "equal protection" were drafted with deliberate ambiguity and uncertain scope "to repose in the courts the authority to resolve multiple disputes in unobvious ways in the distant future." Bennett, supra note 16, at 1091; see also Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U. of Pa. L. Rev. 933, 948 (1983).
political and moral judgments, then all equal protection analysis is really a matter of the courts' subjective concepts of rationality. Thus, in our example from Rodriguez, when a court calls X a "suspect class," it is simply asserting that, with the exception of a small handful of special instances, there are no rational bases which the legislature can purport and which the courts will accept to justify statutory classifications predicated on X. When a court, by contrast, applies rational basis analysis to class Y, it is saying that, based on knowledge and experience, there are few instances when classification on the basis of Y is irrational.\(^{35}\)

The same holds true both for "strict scrutiny" analysis predicated on the deprivation of fundamental rights and for middle level scrutiny. In Harper v. Virginia State Board of Elections,\(^{36}\) for example, the Court invalidated Virginia's imposition of a poll tax holding, "[A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it

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35. Indeed, the Supreme Court acknowledged as much in a thorough review of Equal Protection analysis:

Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as compatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal.


Three years later, Justice Stevens explained rationality analysis as follows:

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?" In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, gender, or illegitimacy. But that is not because we apply an "intermediate standard of review" in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve.

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 453-454 (1985) (Stevens, J., concurring. Emphasis added, footnotes omitted). Indeed, the majority, speaking through Justice White, tacitly accepted Justice Stevens' conclusions:

The general rule gives way, however, when a statute classifies by race, alienage or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. at 440 (emphasis added, citations omitted).

IRRATIONAL UNDERINCLUSIVENESS

makes the affluence of the voter or payment of any fee an electoral standard." 37 Justice Douglas, speaking for the majority, noted that "strict scrutiny" was the appropriate standard since the challenged legislation infringed on the fundamental right to vote. 38

The Court further noted that a poll tax is irrelevant and serves no rational interest related to voting. "Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." 39 Accepting that the ability to pay a tax is as irrelevant to qualifications for voting as are race, creed and color, Justice Douglas concluded, "(such factors are) not germane to one's ability to participate intelligently in the electoral process . . . (wealth is a) capricious or irrelevant factor." 40 The poll tax was constitutionally infirm not simply because the Court applied the condemning "strict scrutiny" analysis but because the Court could discern no rationale, that is, no legitimate purpose for the tax.

Similarly, in Plyer v. Doe, 41 the court defined the essence of "middle level scrutiny" as, "the rationality of the legislative judgment with reference to well-settled constitutional principles." 42 Having defined the applicable analytical standard, the Court held that states may not grant free public education to the children of citizens and of legal aliens but deny such education to offspring of illegal aliens. The Court accented that, under "middle level scrutiny" a state does not act rationally unless the classifi-

38. Id. at 670. The franchise is a "fundamental political right" because it helps to preserve all rights. Id. at 657 (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
39. Harper at 666 (footnote omitted, emphasis added).
40. Id. at 668 (emphasis added). Cf., id. at 676-677 (Black, J., dissenting). In an identical vein, Justice Stevens observed two decades later:

The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny," to decide such cases.


42. Plyer v. Doe, 457 U.S. 202, 218 n.16 (emphasis added). Referring once again to the more recent Cleburne v. Cleburne Living Center, Inc., the Court recalled the rationale for subjecting gender based classifications to purported "middle level" review:

[Gender] generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 677, 686 (1973) . . . (plurality opinion). Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.

cation promotes a substantial state goal—goals which were not demonstrated under the challenged educational scheme. 43
The foregoing sampling shows that creation and application of each level of scrutiny really revolves around courts' determinations of what is and is not rational. Further, as the earlier discussion indicated, the determination of rationality must be a political and moral choice. A practical and meaningful understanding of the entirety of equal protection, therefore, requires thorough analysis of the process whereby official acts are deemed rational or irrational. 44

3. Judicial Policy Making, the Concept of "Rationality" and the Threat to the Majoritarian System

The political and moral value judgments integral to the resolution of any equal protection issue have been the source of particularly acute concern

43. Plyler, 457 U.S. at 224. A similar analysis is found in Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) which overturned Missouri's workman's compensation provision permitting widows to collect benefits for the death of a spouse while only allowing widowers to collect if they are mentally or physically unable to earn their own wages or if they "prove[] actual dependence on . . . [their] wife's earnings." 446 U.S. 142, 144 (1980). The Court, applying middle level scrutiny, found that the classification bore no relationship to an important government objective. Id. at 150-151. The Court questioned why the statutory scheme neither provided equally for all surviving spouses nor limited recovery only to needy spouses regardless of gender. Id. at 151.

44. As has been accented in this portion of the discussion, Justice Stevens has openly repudiated the utility of a level of analysis approach to resolving equal protection questions. See supra notes 30 and 35. The majority opinion in Cleburne, to which Justice Stevens focuses the thrust of his disagreement regarding setting and explicating appropriate equal protection standards, impliedly embraces the conclusion that all equal protection analysis is predicated on concepts of rational—fair—treatment. See supra notes 35 and 42. Speaking for the majority, Justice White concluded:

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


Implicated by contrast, when the State focuses on irrelevant characteristics or creates relevant classifications but applies them to interests over which the State has no authority to regulate, the State has acted in an unlawfully irrational manner. Even the Cleburne majority's approach implies that a single rational basis framework controls equal protection analysis.

As accented at infra notes 280-90 and accompanying text, collapsing all civil rights analysis into rationality analysis does not homogenize or sanitize civil rights theory as some commentators fear. Cf., Parker, The Past of Constitutional Theory—And Its Future 42 Omo St. L. J. 223 (1981).

Recognizing that rationality is the underpinning of our civil and constitutional rights does not require us to forget those specific classifications that, to our satisfaction, history and experience demonstrate to be presumptively irrational. To the contrary, such classifications provide ease of analysis because we can immediately and easily draw upon a rich body of scholarship to establish whether they are irrational and unlawful as applied in discrete instances. Moreover, we may logically refer to such time established classifications as guideposts and analogies to evaluate whether other classifications, newly brought to our attention, are likewise irrational.
in the area of "rational basis" analysis. Some commentators argue that the
courts should have no authority in our system of government to weigh the
basic rationality, and, by implication, the social utility, of legislation.45
Judge Linde, for instance, disapproves of court action invalidating legislation
even when the goals of the legislation are "merely sentimental, or parochial,
or old fashioned. . . ."46
Linde argues that it is the essence of legislation "to favor one interest
at the expense of another,"47 favoritism which often serves no purpose
other than to convey the legislature's notion of "the fitness of things."48
For Judge Linde, judicial assessment of the subjective rationality of legis-
lation offends notions of majoritarian rule which underlie the American
system of government. He believes that rational basis analysis is judicial
usurpation of legislative functions.
Yet, Judge Linde is not troubled by the similar anti-majoritarian pros-
pects of "strict scrutiny" analysis. For instance, commenting on the concept
of "suspect class" as a basis to establish presumptive illegitimacy of
governmental action, Judge Linde observed:

For what it is that "suspect classifications" are suspected of? The
suspicion, in that phrase, is suspicion of prejudice—not simply
prejudgment based on ignorance and mistaken notions of fact, but
invidious prejudgment, grounded in notions of superiority and
inferiority, in beliefs about relative worth, attitudes that deny the
premise of human equality and that will not be readily sacrificed
to mere facts. The suspicion of prejudice focuses on the lawmaker's
sense of values, not on his rationality.49

Judge Linde's attempt to differentiate the judicial role in assessing
"suspect classes" as contrasted with determining rationality is based on his
attempt at the close of the above quote to divorce "rationality" from "sense
of values." As the latter is impossible, the former likewise fails. It has been
shown that (1) all equal protection analysis is based on concepts of rationality50
and (2) that a judicial determination of rationality vel non is based on the
attendant determination whether the given classification or act is fair.51 The
general framework to assess fairness,52 requires courts to determine the
comparative costs and benefits of the classifications. The cost/benefit anal-
ysis is predicated on the identification, application and weighing of the

46. Id. at 221.
47. Id. at 212.
48. Id. at 211.
49. Id. at 201-202 (emphasis supplied except for final line).
50. See supra notes 8-44 and accompanying text (discussing rationality under equal
protection analysis).
51. See id.
52. See infra notes 62-152 and accompanying text (describing framework to discuss
fairness).
relevant, often conflicting, values involved. If, as this article asserts, a "sense of values" is a "sense of" rationality, then Judge Linde must be incorrect when asserting that strict scrutiny involves "values" but other forms of analysis involve a concept unrelated to "values" which, according to Linde, is "rationality."

Similarly, Professor Bennett observed:

The distinction that Linde advances between legislation founded in "prejudice" and that based on a "sense of fitness of things" or on "merely sentimental, or parochial, or old-fashioned" concerns is certainly not based on constitutional text, nor is it otherwise self-defining. His elaboration of what constitutes prejudice is not in itself revealing. Yesterday's sense of fitness may be today's prejudice. ...53

And, indeed one might supplement Professor Bennett's well placed criticism by noting that Judge Linde's formulation, permitting "sentimental" and "parochial" legislation, promises to become apologetic for the persistence of prejudices afflicting weak and unpopular groups justified simply on the basis that these victims have been unable to amass sufficient political support to protect themselves from the unjust effects of influencing the majoritarian system.

It is this propensity for apology which demonstrates why judicial scrutiny of the rational bases of legislation is both integral and legitimate in our constitutional system. As Professor Bennett argues, "judicial value judgments at some level are unavoidable even when applying this most minimal of constitutional standards,"54 for legislatures may exercise their powers in an illegitimately selfish, vindictive, or otherwise improper fashion to harm or subjugate politically powerless individuals. Or, legislatures, either through deliberate defiance of their duties or by inadvertence, may fail to anticipate the adverse consequences their actions will have on all affected persons and groups.55 The judiciary stands as the final arbiter of rationality because the legislative mechanism still leaves the real possibility that legislation will fail to account for its effects on any minority that remains unreconciled to it. If the net cost to the minority is substantially greater than the net benefit to the majority, a spectator outside the process might well conclude that the result was an irrational balance of costs and benefits.56

53. Bennett, supra note 16, at 1080; see also supra notes 22-23, 33-42 and accompanying text (discussing "suspect classifications").
55. Id. at 1066-1067.
56. Id. at 1067; see also Michelman, Politics and Values or What's Really Wrong with Rationality Review?, 13 CREIGHTON L. REV. 487, 501 (1979). The courts have recognized the failings of the majoritarian process. In unambiguous terms, for instance, the Supreme Court
To be sure, our judicial system ultimately links much of our destinies to the personal morality of a majority of Supreme Court justices. But, as has been argued so often in this unending debate, a body of judges reviewing legislation seems to be the only workable counterweight against legislative acts that debase, humiliate or unduly dominate individuals and groups. For these individuals and groups, the majoritarian system has failed to provide even a minimally acceptable modicum of protection from arbitrary discriminatory treatment. This is not simply a reflection of the usual consequences of a competitive political system, that disappointed actors perceive themselves to be less well off than they would have been had they prevailed. Rather, application of rationality analysis concerns the possible failure of the political system to maintain some rudimentary standard of decent treatment.

Furthermore, it may be highly unlikely that the already partially perverted majoritarian system will right itself in the near future. Those holding power surely are not likely to alter their irrational behavior merely at the behest of those whom they deliberately sought to harm. Therefore, in the absence of a judiciary with power of review, individuals opposing the irrational acts must try to activate the majoritarian system to shift the power balance to other hands.

Naturally, the influencing process, even if successful, takes years, perhaps decades, during which one sector of society continually suffers the ravages of treatment that fails to comport with concepts of minimal decency. Indeed, since it is problematic whether the downtrodden ones can amass

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has noted that strict judicial scrutiny is accorded certain legislative classifications, such as race, not only because of such classifications' presumptive arbitrariness but also "because such discrimination is unlikely to be soon rectified by legislative means." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). See supra notes 34-35 and accompanying text (discussing equal protection analysis). Limiting that observed political reality only to "strict scrutiny" cases is unavailing. Surely, legislatures are not significantly more inclined to spontaneously and volitionally amend or revoke irrational classifications falling without the ambit of "strict scrutiny" than they would be regarding "strict scrutiny" classifications. For example, given contemporary precedents, a legislature may be more inclined to self-correct a law predicated on an irrational racial classification (a "suspect" class) than on an arbitrary wealth, age, or handicap classification.

57. Of course, the term "majoritarian process" is used broadly to encompass the full panoply of possible processes and outcomes associated with our electoral system. It is widely recognized, for instance, that elected officials do not—and ought not—always represent the wishes of the voters who put them in office. Their special knowledge and experience influence legislators to temper political pressure with independent judgment—at least, such is the theory. Moreover, the "majoritarian process" includes the formation of shifting majorities through *ad hoc* alliances of various political groups. Thus, it is not always simple for a legislator to determine where the majority lies if there is a majority position, and what the majority's interests are.

The foregoing presupposes that there is a "majority" whose wishes are reflected in the results of the "majoritarian process." History is replete with instances where minority interests—made powerful by wealth and position—have controlled over the will of a majority. Under such circumstances, application of rationality analysis may vindicate, rather than contravene, majoritarian rule.
sufficient political clout to halt the irrational acts, they may be reduced to waiting for any of three events: (1) that some intervening circumstances will prompt those in power to reconsider their irrational acts; (2) that more sensitive and caring others will be moved to use their power to fight the irrational acts; or, (3) that a judicial body, presumably not seriously tainted by the partisan politics underlying the irrational acts, will bring a more speedy resolution to the problem. Thus, we create a class of professional judges, give many of them life tenure, accord them the myriad trappings of respect, pay them decently, empower them broadly and hope that they will act with fairness and justice.

58. None of the foregoing is intended to infer that judicial review is not susceptible to co-option and misuse. Certainly, the judicial process is subject to its own forms of abuse, delay, and error. That reality, however, simply leads to the venerated supposition upon which our entire constitutional system is based: the hope that the judiciary may cure the abuses of the majoritarian system while the elected branches and levels may correct the perceived missteps of the judiciary. For instance, just as the judiciary, in Brown v. Board of Education, addressed the failure of the majoritarian process by invalidating legislation mandating racially segregated public schools, the Congress statutorily overturned General Electric Co. v. Gilbert, 429 U.S. 125 (1976), through the Pregnancy Discrimination Act which declared that discrimination on the basis of pregnancy is per se sex based discrimination under the Fair Employment Act of 1964, 42 U.S.C. § 2000e et seq. Any study of history or law can supplement these examples with numerous others to demonstrate that the "checks and balances" of our constitutional system can work.

An additional noteworthy criticism of broad judicial review holds that the threat to the majoritarian process by the judiciary is so overwhelming that it is worth suffering instances of legislative irrationality as a necessary cost to preserve the overall system. (Let us assume that the argument is not made solely by those who are so content with things as they are that they do not personally feel the impact of majoritarian abuses and, thus, are unconcerned with the plight of others. Rather, the response will address the argument on its own merits.)

It seems cruel and narrow to assert that the extant system must be bedrocked on the unearned suffering of those who are too powerless to relieve effectively their conditions. While arbitrariness and undeserved injury may be commonplace in even the most uncorrupt and efficient systems, such persistence is no reason to retreat from measures to alleviate the irrationality. I would rather trust the "checks and balances" to arrest the excesses of the judicial process than to sentence individuals to unfair treatment, without hope of reprieve, under the theory that the rest of us are better off if we do not challenge the status quo any further. Perhaps humanity can never devise a fully fair political system even if it cared to; however, to resign the quest would result not only in an apology for such existing unfairness that could be remedied, but also would threaten to erode the fairness we have achieved. Complacency makes those who are comfortable much less vigilant regarding both eliminating injustice and preserving the justice already gained.

Finally, it is hardly clear that less judicial review would protect the majoritarian system through less judicial activism. The decision to uphold legislative action often involves judicial interpretation and analysis no less searching—no less political—than decisions to invalidate acts. See Bowers v. Hardwick, 478 U.S. 186 (1986) (right to privacy does not include protection against state enactments criminalizing privately performed consensual homosexual acts between adults); infra note 127 (discussing Court's holding in Bowers). Complete analysis to uphold governmental behavior is often absolutely necessary to support a court's holding lest the court abdicate its responsibility to deliver a meaningful decision which may be subject to review and critique.
The foregoing discussion is fortified by recognizing that our Constitution was designed to expand and grow over time. The original words and purposes of the drafters of the Constitution are only the starting point from which American society makes its moral stands. It is paradigmatic in our jurisprudence that our past legal and social experiences do not constitute the climax, but only midpoints, in what will be an ever-enlarging awareness of freedom, dignity and rationality. Indeed, it is not too much to argue that the framers of the Constitution anticipated the time when the broad implications of doctrines such as "due process" and "equal protection" would encompass and invalidate even those prejudices that premised acceptable acts of daily living in colonial and early post-bellum America. Judicial determinations of an expanding constitutional conception of rationality are consistent with our belief in an expanding constitution.

59. This proposition has become a foundation of our jurisprudence. See Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). Holding that States may not mandate racial segregation in public education, the Court stated, "In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson, [163 U.S. 537 (1896) (the rule of which, permitting publicly mandated racial segregation, was overruled with regard to public education)] was written." Id. at 492; see also Harper v. Virginia State Board of Elections, 383 U.S. 663, 669-670 (1966) (invalidating polltaxes). See also, e.g., Bennett, supra note 16, at 1096-1097; Baker, supra note 36, at 948.

60. See Bennett, supra note 16, at 1092; and accord, Brown v. Board of Education, 347 U.S. 483 (1954) (invalidating state practice of mandatory racially segregated public education despite the fact that such segregation was commonplace shortly after the civil war and throughout the formative years of equal protection analysis).

This same point will be reaccented in our discussion of civil rights statutes and rationality. For instance, in Jones v. Alfred H. Mayer Co. the Court held that section 1982's prohibition against racial discrimination in property transactions forbids a private realty firm from refusing to sell a home because of the willing purchaser's race. Jones v. Alfred H. Mayer, 392 U.S. 409 (1968). The majority was unpersuaded by Justice Harlan's dissent which argued that the Frainers of the 1866 Civil Rights Act, the precursor of section 1982, recognized and prized the right of private persons to dispose of property as they see fit, including the commonplace practice of racially discriminatory refusals to deal. See Jones at 473-475 (Harland, J., dissenting); infra notes 197-210 and accompanying text (discussing Court's holding in Jones); see also Runyon v. McCrary, 427 U.S. 160, 189-192 (1976) (Stevens, J., concurring); supra note 2 (discussing Court's holding in Runyan).

61. Interestingly, Professor Bennett would not extend his rationality analysis to cover "disparate impact" cases. Bennett, supra note 16 at 1075-1076. Disparate impact occurs when a legislative classification results in an unintended—often wholly unanticipated—damaging effect upon another classification not explicitly encompassed by the terms of the first classification. Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2784-85 (1988). For instance, in Washington v. Davis the District of Columbia classified applicants for positions on the police force pursuant to whether they passed or failed a written examination. Washington v. Davis, 426 U.S. 229 (1976). Those who failed the examination were excluded from further consideration in the application process. Davis at 234-235. It happened, however, that a disproportionate percentage of black applicants failed the examination as contrasted with the percentage of white applicants who failed. Id. Thus, although the original classification—based on the seemingly neutral test—made no express racial distinctions, the effect of the classification was racially felt.

Although acknowledging that disparate impact may be unlawful pursuant to express statutory prohibition, the Court ruled that the Equal Protection Clause of the Fourteenth
B. Defining Rationality on a Social Scale of Costs and Benefits

The foregoing analysis has established long-held and basic propositions related to the value laden methods by which the judiciary applies "mere rationality" analysis. The next step, then, is to devise some general, abstract definition that will be both the starting point and major expression of the moral imperative associated with the constitutional command that legislative acts must be at least rational.

Amendment does not recognize a cause of action sounding solely in the disparate effects of legislative classifications. Id. at 239-248. Rather, the challenger must demonstrate that the racially disparate effects were deliberately intended by the legislature. Id. Thus, had the District of Columbia purposefully utilized the written examination with the intention of discriminating on the impermissible basis of race, the challengers could have established a violation of the Fourteenth Amendment.

Bennett argues that disparate impact analysis has no place in rationality theory particularly because impact theory is purportedly too unwieldy and standardless. See Blumstein, Defining and Proving Racial Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act, 69 Va. L. Rev. 633 (1983). Bennett's criticism of impact analysis, like his own critique of Judge Linde, does not flow naturally from his theory of rationality and judicial decision making. Bennett argues that it is necessary and legitimate for the courts to examine governmental actions to determine whether they are rational. Surely, as part of that examination, a court may assess the rationality of a statute's disparate impact along with the constitutionality of the statute's facial classifications. Indeed, the Davis Court recognized as much by basing its analysis on a brief review of equal protection precedent, coupled with its reluctance to open a floodgate of litigation involving impact challenges to every form of governmental action. Davis at 239-248. Nowhere does the Court imply that the judiciary is unable to actually perform disparate impact analysis; nor, could the Court make that assertion in light of the fact that the judiciary is called upon routinely to review disparate impact cases under certain civil rights statutes. See Watson, supra, at 2786-88. Connecticut v. Teal, 457 U.S. 440 (1982) (invalidating under the Fair Employment Act of 1964, defendant-employer's use of a written examination as part of its promotion process because of the examination's unlawful disparate racial impact). In light of the judiciary's ability to perform disparate impact analysis—an ability which it puts into practice on a regular basis—Professor Bennett's aversion to incorporating disparate impact theory into rationality analysis seems hasty.

Possibly, the critics of impact analysis believe that discrimination must include an intent requisite and feel that discriminators cannot discriminate by accident or that it is unfair to hold individuals civilly liable for the unintentional discriminatory impact of their actions. However, a significant purpose underlying many of our antidiscrimination laws is to eradicate the effects of practices that harm and demean individuals on the basis of irrational criteria such as race and gender. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (Fair Employment Act of 1964). As such, facially neutral practices that inadvertently promote cultural, economic, social, and educational differences associated with such irrational discrimination are as detrimental to affected individuals, and therefore as destructive to a society predicated on fairness and rationality, as are purposefully discriminatory actions. See infra notes 358-65 and accompanying text (additional detailed discussion of this point). No serious scheme of societal rationality may reject impact analysis. Cf. Rogers v. Lodge, 458 U.S. 613, 642-653 (1982) (Stevens, J., dissenting).

In fact, even Professor Bennett seems to accept the utility of impact analysis at least in civil rights cases. "Even if we could figure out what . . . [disparate impact] would mean, there is no particular reason to think that we would want to pursue it, except perhaps in matters fundamental to civilized existence or to Democratic Society." Bennett, supra note 16, at 1076 (emphasis added).
The Supreme Court has adopted the following two-part probe to determine the underlying rationality of a statute: the statutory classification cannot (1) be totally unrelated to attaining (2) legitimate governmental objectives.62

At the minimum level . . . the Court "consistently has required that legislation classify persons it affects in a manner rationally related to legitimate governmental objectives."63

Similarly, Prof. Michelman suggests that rationality review consists of "nullifying legislative acts . . . found to be irrational, meaning patently useless in the service of any goal apart from whim or favoritism."64

In essence, irrational acts are those that concern some sort of illegitimate governmental project. As will be explicated through examples in Part II-C, the illegitimate project need not have been devised with an evil mind. The legislature does not have to espouse, expect, or even anticipate those effects which will render the project irrational. Rather, the only necessary purposeful project under rationality analysis is that the legislature create a classification which has, in some manner, affected society in an impermissible degree.65

We may posit, then, that something is irrational when the classification employed has nothing to do with the advancement of a legitimate goal or purpose. For instance, racial discrimination in employment is irrational because skin color and racial heritage, except in the rarest circumstances, reveal nothing about the actual ability of an individual to perform work. It is true that, over time, prejudice has created a social reality in which


64. Michelman, supra note 56, at 499.

65. Zobel v. Williams, 457 U.S. 55 (1982). See supra notes 130-45 and accompanying text (discussing the Court's holding in Zobel). Therein, a legislative classification differentiating residents of the State of Alaska prior to 1980 from individuals who commenced residence after 1980 was declared irrational by the U.S. Supreme Court. The classification was created for the seemingly altruistic purpose of disbursing state money gifts in gratitude to residents who, through their length of residence, had contributed tangible and intangible benefits to the State.

Fearing that such a dichotomy would lead to the illegitimate linking of state largess to duration of residency, the Court invalidated the classification even though it was drawn neither to harm deliberately individuals nor to devise a caste system. Nevertheless, the potential harm rendered the classification unconstitutional. Indeed, one might argue that Zobel reflects a species of the "disparate impact" analysis which Prof. Bennett contends is inappropriate under rational basis scrutiny. See supra note 61.
race does affect a person's ability to work. But, if we look at the actual qualifications mandated by the nature of the labor itself, we find that race is totally irrelevant. Thus, equal protection analysis—in a manner similar to civil rights laws—restructures those aspects of society which have imposed needless, humiliating—indeed, irrational—restrictions on social projects like employment.

Profs. Bennett and Michelman recognize, however, that our definition of rationality is far from complete for we have heuristically presumed that legislative action usually serves only one purpose. Legislative classifications do not perform but a single function nor do they have only one effect on society. Classifications affect many groups differently through direct and indirect effects some of which are intended by the legislature, some of which are anticipated but unrelated to the express purpose of the enactment, and some which are totally unforeseen. For instance, even if the fifty-five mile per hour highway speed limit, originally designed to conserve gasoline, is proved unable to achieve significantly that end, it may still be rational because we realize that it unexpectedly saves lives and reduces traffic accidents. Furthermore, governmental actions may be irrational if legitimate goals are pursued through illegitimate means. To offer an extreme example, a statute designed to promote gasoline conservation by shooting every third motorist would clearly be irrational. The goal is not a problem, but the too-extreme means renders the acts untenable.

Recognizing the multiplicity of purposes and effects a given governmental classification may produce, Profs. Michelman and Bennett supply the needed social dynamic to energize our definition of rationality—that is, an explanation of how rationality works in society. The heart of the dynamic stems from the realization that the judiciary must sift through and evaluate the multitude of purposes and effects emanating from each governmental classification to discern if the social utility of the classification, as applied in each case, outweighs its social dysfunction. If, after making this subjective determination—a societal cost/benefit analysis—the court finds that the legislative classification is predominately dysfunctional, it is labeled "irrational" and hence, a violation of the "due process" or "equal protection" components of our Constitution. Otherwise, the classification is sustained as "rational."
Prof. Bennett demonstrates that rationality is a question of interrelationships through a clever hypothetical: the case of fluoridating drinking water. If a fluoridation project is enforced, all individuals, unless they purchase it elsewhere, must drink, cook with, clean with and bathe in water permeated with fluoride. Generally, water is fluoridated to strengthen children's teeth, which are particularly susceptible to tooth decay. If the fluoridation (1) significantly reduces cavities in children, and (2) costs relatively few tax dollars, and (3) creates very slight inconvenience, discomfort or danger we can say that the classification—fluoridated water—is rationally related to achieving a legitimate governmental goal—protecting the health of children. The benefits clearly overwhelm whatever minor costs the program engenders.

Suppose, by contrast, that fluoride affects all persons' teeth—both children's and adults—but is very expensive, reduces cavities a noticeable but insignificant amount, and poisons one out of every 500 newborn babies. As Prof. Bennett notes, the classification may be technically perfect since fluoridation benefits in some small measure almost every individual in society, yet its costs clearly outstrip its benefits. Since the means—the fluoridation—is weakly related to a valid state project—protecting health—and the illegitimate effect—harming the health of infants—is substantial, the classification is irrational. If the legitimate state goal was to protect the teeth of its citizens, that purpose has been overwhelmed by the unintended yet destructive effects of the fluoridation project on society. If the goal was to harm infants, then the legislature acted irresponsibly. Either way the legislative act is irrational.

A final element implicit in this social dynamic of rationality must now be added. The cost/benefit analysis, although sounding in economic theory, is not limited to concepts such as profit, loss or economic efficiency. To the contrary, fundamental rights which include the right to be free from irrational governmental actions include certain intangible, moral values as part of the calculus. Dignity, freedom, self-worth, self-respect, fairness, and other integral aspects of sense-of-self play a large role in assessing the...
rationality of a statute. In this manner, the applicable cost/benefit analysis goes beyond dollars and cents. We imbue the political process—legislative and judicial—with our "search for good and right answers to the questions of directions for our evolving selves." Clearly, then, the economic analogy is heuristic and we intuitively eschew unabashed economics when addressing sensitive social situations impregnated with moral issues.

The observation that the cost/benefit analysis associated with rationality analysis includes assessing normative concepts such as dignity and self-worth is not limited to scholarly commentary. Judicial opinion recognizes that the consideration of personal individuality and integrity is an indispensable part of constitutional adjudication. The United States Supreme Court, for example, has noted that denial of equal protection in the realm of education offends individual integrity, "(posing) an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." The Plyer Court, holding that states must provide otherwise available publicly funded education to the children of illegal aliens, noted that a lack of education would prevent such children from achieving social esteem, reduce their self-sufficiency through resulting illiteracy, and extract a heavy toll on the "social, economic, intellectual and psychological well-being of the individual." Similarly, in Zobel v. Williams, Justice Brennan wrote:

While some imprecision is unavoidable in the process of legislative classification, the ideal of equal protection requires attention to individual merit, to individual need. In almost all instances, the business of the State is not with the past, but with the present: to remedy continuing injustices, to fill current needs, to build on the present in order to better the future.

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71. See infra notes 220-43, 270 and accompanying text (the notion that statutory civil rights transcend pure economic considerations is likewise integral to our analysis). Rivers of ink have flowed to describe and debate the application of various forms of economic theory to law. See 8 Hofstra L. Rev. 485 (1980) (symposium on law and economics). Some have argued that economic efficiency should be the basic criterion to resolve legal issues. See Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Association, 8 Hofstra L. Rev. 487 (1980). Others argue that an efficiency paradigm must be modified by reference to concepts of fairness. See, e.g., Markovits, Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements, 36 St. L. Rev. 1169 (1984). And other critics dispute the very viability of cost-benefit theory. See Kennedy, Cost-Benefit Analysis of Entitlement Programs: A Critique, 33 St. L. Rev. 387 (1981).

72. Michelman, supra note 56, at 509.


74. Id. "The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation." Id. at 213.

75. Zobel v. Williams, 457 U.S. 55, 70 (1982) (Brennan, J., concurring). Similarly, Justice Stevens has observed, The federal interest vindicated by ... [equal protection] requires every State to respect the individuality and the essential equality of every person subjected to its
In brief, an irrational governmental act is one that is unrelated to—has nothing to do with—a legitimate governmental project or goal. Moreover, we have seen that, given the multitude of purposes and effects which an action may purport to advance, determination of rationality requires analysis of the relationship between the costs of the challenged action as compared with its benefits.  

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jurisdiction.

Naturally, the foregoing proposition holds equally firm in the area of statutory civil rights. For example, as Justice Goldberg noted, “The primary purpose of the Civil Rights Act of 1964 . . . as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics.” Heart of Atlanta Motel v. United States, 379 U.S. 241, 291-292 (1964) (Goldberg, J., concurring) (emphasis added).

76. One irony is noteworthy. The foregoing discussion argues as though legislation is rational except for one flaw, the isolation of which either leads to the salvaging of the rationality of the statute or requires its total invalidation. Sometimes, legislation consists of a series of arguably irrational premises, only one of which is subject to a particular constitutional challenge. Thus, the courts may isolate a discrete instance of irrationality and rectify it while preserving—or at least leaving unaddressed—the other irrational components.

In *Glona v. American Guarantee and Liability Insurance Co.* the Court invalidated that portion of the Louisiana “wrongful death” statute which prohibited surviving parents of deceased illegitimate children from suing for damages. *Glona*, 391 U.S. 73 (1968). The majority rejected the State’s averred justification that permitting wrongful death recovery would reward or condone the “sin” of bearing illegitimate children. There is no rational basis, the Court retorted, “for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served.” *Id.* at 75.

Justice Harlan, with whom Justice Black and Justice Stewart joined, dissented on the ground that a court should not inject its subjective concepts of rationality into a statutory scheme that consists of nothing but arbitrary assumptions. Specifically, Justice Harlan observed that wrongful death enactments must accord recovery to certain classifications of individuals. By necessity, these classifications are predicated on arbitrary assumptions. *Id.* at 77-80 (Harlan, J., dissenting). For instance, under the Louisiana Law, a child may always sue for the wrongful death of a parent; but, a surviving parent cannot sue unless the deceased has no surviving offspring. Thus, Justice Harlan concluded, a wealthy child, heir to the parent’s fortune, may sue for wrongful death recovery even if she/he hated the parent. By contrast, the surviving parent of the hypothetical deceased may not sue instead of the surviving child even though the parent was financially dependent upon and greatly adored the deceased. The thrust of Justice Harlan’s argument seems to be that, in our system of government, the judiciary may not legitimately seek to salvage portions of a law which, by its very need to classify, makes arbitrary assumptions about the relationships among individuals. *See id.* at 80 (Justice Harlan additionally argued that the legitimacy-of-birth classification was not irrational).

Even if one agreed that all the classifications of the Louisiana wrongful death statute were irrational, it hardly follows that litigants must willingly capitulate to be victims of such wholesale irrationality. It is incongruous to argue that the enormity and complexity of the irrationality insulates it from any form of attack, in whole or piecemeal. Indeed, the island of rationality carved by the *Glona* Court in the sea of irrationality which characterized the wrongful death scheme might be the first restorative step. Subsequent litigation might identify the additional anomalies in the law until, at some point, the law was fully restructured to be rational or returned to the legislature—neither of which would be terrible outcomes.

Justice Harlan, however, might have meant that it is impossible to construct a perfectly rational wrongful death act because the presumptions underlying the various classifications
C. The Theory in Practice—Explication of Our Definition of Rationality Through Review of Supreme Court Precedent

We are now ready to see how the cost/benefit calculus, permeated as it is with normative principles, has been defined in modern constitutional law. These examples will provide "operational definitions" through which we can uncover more specific concepts to explicate our definition of rationality.

Professor Baker provides a useful set of ideas with which to evaluate how the courts have applied the definition of rationality. Prof. Baker's suggestions are particularly applicable because of his heavy emphasis on the social and moral questions posed by rationality analysis—questions which are the heart of Supreme Court analysis.

Taking his cue from the philosophy of Rawls and Kant, Prof. Baker argues that the normative basis for all equal protection analysis—and, will not hold true in all instances: Since it is probably more socially useful to enact wrongful death legislation than to forego coverage altogether, the legislation should not be subjected to challenge on the basis of "mere rationality."

At times lawmakers must draw seemingly irrational lines to enact legitimate legislation. See infra notes 93-97 and accompanying text (demonstrating that at times lawmakers must draw seemingly arbitrary lines among classes of individuals). Although appearing arbitrary, the classifications are rational because, under the given situation, there is simply no better way to design the statute. For instance, it is rational, perhaps integral, to set a minimum age requisite in many voting statutes. We may sense a general range of ages about which individuals, more often than not, may be deemed qualified to vote; however, the setting of the particular age limit is somewhat arbitrary since choosing one or two years difference might be just as useful. Yet, since an age must be chosen, any reasonable choice will be satisfactory.

The fact that lines must be drawn, however, cannot mean that every line drawn is rational. As we have seen, the social utility of the classification determines its rationality, not the objective fact that the legislature might have drawn its line in a slightly different manner.

Thus, one may argue that the classification giving surviving children preference over surviving parents is rational because the purpose of the statute is to alleviate, to the fullest possible degree, the financial hardship resulting from tortuous deaths. The underlying rationale presumes that, more often than not, the child rather than the grandparent was financially dependent on the deceased. The preferential classification, therefore, furthers the legitimate legislative goal. (Of course, a classification permitting any person demonstrably dependent upon the deceased to sue in wrongful death might be more logical and just.) Recall, however, under our analysis, a court may not invalidate the preference favoring offspring and attempt to interpose such a substitute classification unless it believed that the social good of the challenged classification was outweighed by its dysfunction. The court might render that holding if a sufficient number of dependents were systematically excluded from recovery merely through the fortuity of their particular relationship to the deceased. But, for the purpose of this discussion, we can see how the preference for offspring is arguably rational.

The statutory classification based on legitimacy of childbirth, by contrast, serves no useful function. Through punishing the offspring, the statute strives to demean, disadvantage and humiliate couples for having brought illegitimate children into the world. The challenged provision is not related to the rational purposes of compensation for wrongful death.

77. "Operational definitions" define concepts not in the abstract but through reference to how they operate or affect someone or something. For instance, an operational definition of "temperature" would refer to mercury rising or falling in a thermometer.

therefore, the basis for all rationality analysis—is the "equality of respect principle:"

[all people (or, at least, all members of the relevant community) rightfully can demand that the community treat them with full and equal respect and concern as autonomous persons. Such treatment is a necessary part of the justification for the community's claim that all members have an obligation to abide by the rules or mandatory norms of the community.]

Baker suggests that the "equality of respect principle" yields three secondary principles explicating how society can accord individuals their due. The first is the "Political Participation Principle" which allows individuals the opportunity to participate in the policy making process, especially as performed by various legislatures. However, as noted earlier, many commentators are skeptical regarding the fairness of the majoritarian system if left to its own devices. Baker, numbering himself among such critics, lists two additional principles which, in the name of preserving individual autonomy and dignity, act to limit the unbridled power of the legislative process. Baker's second principle holds that:

the state must not pursue purposes, and the political process must not further individual's preferences, to subordinate or to denigrate the inherent worth of any category of citizens.

Baker's third principle states, "the state must guarantee to everyone those resources and opportunities that the existing community treats as necessary for full life and participation in that community."

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79. Id. at 938 (footnotes omitted).
80. Id. at 959.
81. Id. Consistent with his framework, one may presume that a single individual may constitute a "category of citizens." If that is not implicit in Professor Baker's analysis, I would suggest accommodating the analysis to permit such individual consideration.
82. Id. It is worth noting that Professor Baker drafted his model of analysis not only to suggest a social dynamic of judicial decision making, but also to respond to certain constructs offered by Professor Rawls. While he agrees with many of Rawls' basic premises, particularly the concept of the "original position," Baker quarrels with some of Rawls' suggestions concerning constituent elements of the "good" social order. Id.

Under the "original position," individuals exist without extant prejudices or interests other than devising what they feel to be the best social order possible. Without vested, selfish interests to distract them, Rawls suggests, people would be inclined to devise a fair and equitable social system. If we try to create or conceive the "original position," therefore, we may be able to divine applicable truths about fairness and social order. See id. at 939 n.16.

Baker is concerned with what he perceives to be Rawls' insensitivity to the inherent worth and effects of the political structures which energize the distribution, redistribution, and reproduction of social resources. Id. at 950-953. Because, according to Baker, Rawls' project is to equitably distribute the social pie, the optimal government is the one that divides the pie most fairly and efficiently. If a computer could be programmed to do that, Baker says, government by floppy disk would be preferable to government by election. Id.

An additional infirmity in Rawls' theory, Baker asserts, stems from the list of goods
As Baker admits, these principles, like all philosophical constructs, cannot give us set answers, but they greatly inform judgments by directing viewpoints "to society's responsibility to guarantee the goods and opportunities needed for full life and participation. Both directives, however, become indeterminate at some point." Nevertheless, Baker's ideas, particularly those dealing with the limits on governmental actions, seem to reflect those considerations used by courts to perform the societal cost/benefit calculus in rationality analysis. Indeed, to borrow Baker's formulations, judicial considerations address whether governmental actions "subordinate or . . . denigrate the inherent worth of any category of" individuals and whether the community has deprived some one or some group of "those resources and opportunities that the existing community treats as necessary for full life and participation."

The number of cases in which the Supreme Court has invalidated governmental action on the ground that it utterly lacks rational basis is understandably small. Still, the cases in which no rational basis was discerned provide insights into how the courts envision the outmost limits of dignity, respect, and selfhood in American society. These unusual cases, then, help mark the present parameters of acceptable governmental behavior—parameters that will refine our notion of rationality.

For convenience sake, we may discern three distinct although interrelated situations emanating from Supreme Court cases that apply our general definition of rationality:

(1) Governmental actions are irrational if the decisions to establish the classifications under scrutiny are as totally random as if the government has decided on the classifications by flipping coins;

(2) Isolating and deliberately inflicting harm on downtrodden or politically unpopular groups is irrational; and

which persons in the "original position" may consider for social disbursement. Baker argues that individuals in the "original position" cannot make truly rational distributions, for the perceptions gleaned in that nonsocial situation may not account for the actual interplay of doled resources in society. Had they known how the resources would actually interrelate, they might have chosen a different distribution. Thus, carving the pie from the "original position" may be neither the most rational nor the most beneficial construct upon which to form a social order.

To remedy the foregoing two anomalies, Baker suggests that a more reasonable operation to perform in the "original position" is to devise the system with which to distribute the social goods. Thus, Baker's article, focusing on equal protection analysis, seeks to provide the insights and tools to structure a fair societal system for the routine and continuous distribution of resources. Id. at 961-970.

83. Id. at 971.

84. As will be shown at Part III, identical considerations explain the unique and vital nature of civil rights statutes.

85. It is common to examine the most extreme or unusual cases to determine the limits of socially acceptable actions. For instance, to comprehend what behavior society will tolerate, investigators often review criminal laws and societal standards determining insanity. See, e.g., ERIKSON, WAYWARD PURITANS, chapter 1 (J. Weiley & Sons, 1966).
(3) Governmental action may be unlawful if it creates or threatens to create a caste system.86

86. Of course, the choice of three general categories is illustrative only, designed to demonstrate certain overall concepts which have energized Supreme Court rationality analysis, especially in recent years. Some cases defy easy categorization except if one were to include them simply under the overall heading "the State failed to play the game fairly." Consider, for instance, Metropolitan Life Ins. Co. v. Ward, which invalidated an Alabama statute which "granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state (foreign) companies." Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 870 (footnote omitted). Foreign companies could reduce their tax rates by investing in certain Alabama assets and securities, although the tax rate on foreign companies could never be reduced to that of domestic enterprises. Id. at 872.

Speaking for the majority, Justice Powell asserted that, "this Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'" Id. at 878 (quoting Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 533 (1959)). The Court, thus, rejected Alabama's assertions that the statute's rational base was to promote domestic industry. Justice Powell contrasted the Ward legislation with a seemingly similar California tax scheme upheld in Western & Southern Life Insurance Co. v. State Board of Equalization. Ward, 470 U.S. at 876-880. See W. & S. Life Ins. Co. v. State of Equalization, 451 U.S. 648 (1981). The California tax, the Court noted, only disadvantaged foreign corporations from states which themselves had enacted retaliatory taxes. The California plan, therefore, was designed to promote competitive equality rather than "seek[ing] to benefit domestic industry within the State only by grossly discriminating against foreign competitor." Id. at 878.

The Court additionally rejected Alabama's second averred premise, that the tax scheme promotes investment in Alabama. While foreign companies could reduce their tax burdens by purchasing specified Alabama assets and securities, no amount of investment could reduce the foreign tax rate to the level of domestic corporations. Id. at 882-83. "Moreover, the investment incentive provision of the Alabama statute does not enable foreign insurance companies to eliminate the discriminatory effect of the statute." Id. at 882.

An interesting coalition of justices dissented. Justice O'Connor, joined by Justice (now Chief Justice) Rehnquist and Justices Brennan and Marshall, argued that the Court abandoned established rationality analysis by examining whether the means were legitimate rather than the ends: Id. at 893-902.

Justice Powell concluded that "encouraging investment in Alabama assets and securities in this plainly discriminatory manner serves no legitimate state purpose." Id. at 883. It is obvious that promoting the State goal did serve a legitimate purpose. Clearly, encouraging domestic enterprise is a legitimate goal. The Ward majority recognized, however, that even this understandable desire may be implemented in an arbitrary and destructive fashion. The majority identified a countervailing and overwhelming detrimental effect which could not be sustained constitutionally. The promotion of state enterprise must meet some level of fairness lest competition among the states become too bitter and hostile. The Court, as referee, determined that Alabama committed a "foul" by attempting to close itself to out-of-state competition or, in the alternative, to extract an unreasonable premium on those states wishing to do business in Alabama. See generally Andersen, Equal Protection During the 1984 Term: Revitalized Rational Basis Examination in the Economic Sphere, 36 Drake L. Rev. 25, 40-43 (1986-87).

Similarly, Williams v. Vermont invalidated a tax scheme that imposed a "use tax" on automobiles registered but not purchased in Vermont, but allotted a tax credit for "the amount of any sales or use tax paid to another State if that State would afford a credit for taxes paid to Vermont in similar circumstances. Williams v. Vermont, 472 U.S. 14 (1985). The credit is available, however, only if the registrant was a Vermont resident at the time he paid the
1. Rationality Cannot Be Derived From Flipping a Coin

In Reed v. Reed, the Supreme Court overturned an Idaho statute which mandated that among individuals equally entitled to administer intestate estates, men would be favored over women with the latter having no opportunity to establish individual superior qualifications. Noting that the Fourteenth Amendment prohibits states from according "(d)ifferent treatment . . . to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute," the Court found that the classification failed to further the legitimate state goal to efficiently choose among two or more equally qualified applicants who seek to administer an estate. Although gender based selection might be an efficacious manner to speedily select an administrator, the fatal flaw was singling out a particular gender for preference. The goal of efficiency would have been enhanced just as well by favoring women over men. Idaho's choice to favor men, therefore, was arbitrary.

The Court explicated Reed in the following way: the offending statute was arbitrary because the State's articulated goal could have been completely served by requiring a coin flip. . . . Such legislative decisions are inimical to the norm of impartial government.
The legislation was infirm because it failed the basic definition of rationality. The special favoritism accorded to males was unrelated to—had nothing to do with—a legitimate Governmental project. Thus, the classification was either arbitrary in its own right, or promoted an unspoken, irrational governmental goal to demean women. Either way, it failed “rational basis” scrutiny.

The argument that it is irrational to draw arbitrary limitations or classifications particularly when they could have been as well achieved by flipping a coin does not—indeed cannot—mean that every limitation or classification in a statute is by definition arbitrary. There are times when, to accomplish a legitimate governmental end, lawmakers must draw seemingly arbitrary lines among classes of individuals. Over half a century ago, Justice Holmes explained the necessity of such apparently irrational lines:

When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.93

Justice Holmes' observations seem complete. A seemingly arbitrary line may not be unreasonable if one can demonstrate that (1) it was impossible to draw a more reasonable or rational line and (2) drawing some sort of classification was indispensable to completion of a legitimate governmental goal. For example, the Supreme Court overturned an act of Congress setting the minimum voting age in state elections at 18.94 It would seem that one cannot challenge a state law setting the voting age at 21 on the basis that choosing twenty-one over eighteen is as arbitrary as flipping a coin.95 While it cannot be said that, invariably, there is a given age at which individuals are competent to vote and prior to which they physically, intellectually or emotionally are not, it is nonetheless equally clear that some age limitation on voting is required. As a general matter, children do not demonstrate the required maturity to vote. Furthermore, there is no objective test to determine when discrete individuals attain the necessary state-of-mind to cast a

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95. Cf. id. at 294-95 (per Stewart, J.). “Obviously, the power to establish an age qualification must carry with it the power to choose 21 as a reasonable voting age, as the vast majority of the states have done.” Id. (footnote omitted).
minimally intelligent vote. Indeed, even if such a test were available, it is hardly certain that it would be an attractive alternative to setting a voting age. After all, standardized tests attempting to measure minimal intellectual qualifications for voters threatens to impose—by accident or design—restrictions based on political, cultural, religious, racial and similar prejudices.96 These are factors which have no legitimate place in a free electoral system. Thus, to establish a reasonable pool of voters by eliminating those who are presumably too young to understand the voting process, some age limit must be set. It will be imperfect, but setting an age limit seems preferable to the alternatives.97

By contrast, the statute invalidated in Reed was purely arbitrary. The goals of efficiency could have been easily accomplished through alternative measures such as a brief hearing to establish by relevant standards, divorced from gender, which applicant would be the best administrator for the given estate. Or, they could flip a coin.

2. The Government May Not Single Out Politically Weak or Unpopular Groups for the Purpose of Harming or Punishing Them Because of Their Unpopularity or Politically Impotent Status.

As the foregoing has emphasized, one primary purpose of rationality analysis is to preserve and promote dignity, individuality and selfhood of all social actors through the guarantee that their government will act rationally. Certainly, rationality analysis will not tolerate governmental action which serves no better purpose than to demean and humiliate the powerless of society.

United States Department of Agriculture v. Moreno98 concerned the 1971 amendments to the Food stamp Act of 1964. Formerly, food stamps—a Federal program designed to help poor people purchase food—were available to economically eligible “households” regardless of whether the occupants therein were related to one-another. Under the 1971 amendments, an eligible “household” could only consist of “related” individuals.99

As it happened, plaintiffs were members of various households each consisting of themselves, their poor relations, and one unrelated friend—also poor and in some cases old and crippled. The fact that these households had selflessly taken in a needy nonrelative resulted in depriving all members of the benefits of food stamps.100 Under these grim facts, the Court could

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96. Cf. id. at 131-134 (Black, J.).
97. Of course, a voting age may be so contrary to logic or necessity that it is unrelated to any rational bases. Setting the age at 50, for instance, seems totally arbitrary.
98. 413 U.S. 528 (1973).
100. Id. at 531-532. "Appellee Jacinta Moreno, for example, is a 56-year-old diabetic who lives with Ermina Sanchez and the latter's three children. They share common living expenses, and Mrs. Sanchez helps care for appellee." Id. at 531. Their combined monthly income was $208.00 of which, after other expenses, approximately $10.00 remained for food. Id.
have premised its holding by implying a limited statutory exception to the “no non-related individuals” rule covering households consisting of a family plus one unrelated occupant.

The Court, however, forthrightly held that the new statutory restrictions in no manner promoted any of the three purported goals of the food stamp program, namely to: (1) safeguard the health and well being of the population; (2) “raise levels of nutrition among low income households;” and, (3) “promote the distribution in a beneficial manner of our agricultural abundances and... strengthen our agricultural economy. . . .” 101 The Court did not strike down the 1971 amendments as they applied to the facts of the particular litigants, for the Court understood that the 1971 amendments were founded on a greater irrationality than overinclusiveness of coverage. The infirmity—the irrationality—of the amendments was not that some needy individuals would suffer; rather, the flaw was that “[the] Amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program.” 102 Striking out at “hippies” proved an insufficient justification for the amendment,

For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. 103

101. Id. at 533.
102. Id. at 534.
103. Id. (emphasis supplied). A year later in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the Court upheld a local zoning ordinance limiting land use to one-family dwellings. “Families,” under the enactment, were divided into two classes: (1) any sized groups of related individuals, and, (2) groups of no more than two unrelated persons. The Court distinguished Moreno, accenting that the Boraas ruling did not undermine the law in the former case, id. at 8 n.6, for the latter case merely recognized a community's legitimate interest in preserving traditional family values. Yet, a community may not legislate to limit the number of related, co-habiting individuals to the traditional nuclear family because a government has little legitimate interest in sculpting family living arrangements. See Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977). Arguably, however, the Boraas ordinance imposed a burden on households of unrelated individuals no less severe than the economic harm invalidated in Moreno. Boraas, then, may reflect a retreat from Moreno in the limited instance of residential planning.

In Lyng v. Castillo the Court upheld certain amendments to the Food Stamp Program which, inter alia, require that to be a “household” eligible to receive food stamps, co-habiting individuals who are either unrelated or distantly related must “customarily purchase food and prepare meals together.” 106 S. Ct. 2727, 2728 (1986). Speaking for the Court, Justice Stevens held that the classificatory scheme was rational because it promotes “economies of scale” allowing group purchases of food while limiting the potential for fraud, abuse and mistake in acquiring food stamps. Id. at 2730-31. Moreover, the amendments promoted program efficiency by reducing the instances in which the Department of Agriculture would have to make discrete determinations. Families consisting of parents, children and siblings rationally may be presumed to purchase and prepare meals together, even if the presumption is imperfect. Id. at 2731-32.

The Court was careful to distinguish Moreno, noting that:

Unlike the present statute, the 1971 definition completely disqualified all households
In a similar vein, the Court has been particularly sensitive to penalties in the latter category. Not only were all groups of unrelated persons ineligible for benefits, but even groups of related persons would lose their benefits if they admitted one nonrelative to their household. We concluded that this definition did not further the interest in preventing fraud, or any other legitimate purpose of the Food Stamp Program.

Id. at 2730 n.3.

The Lyng Court purported not to retreat from the general holding of Moreno prohibiting governmental action motivated to disadvantage unpopular groups. Indeed, the Court observed that

The House Committee Report on the Food Stamp Act of 1977 made this reference to the 1971 amendment invalidated in Moreno: "This proviso was essentially an attempt to ban food stamp participation by communal households (so-called 'hippie communes'). In 1973 the Supreme Court in Moreno v. U.S. Department of Agriculture, 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed.2d 782, upheld an earlier ruling by a lower court to the effect that this provision was unconstitutional. It had been implemented for only a brief period in a few states." H.R. Rep. No. 95-464, p. 140 (1977), U.S. Code Cong. & Admin. News 1977, p. 2110. The 1971 definition was, therefore, "wholly without any rational basis" and "invalid under the Due Process Clause of the Fifth Amendment." 413 U.S., at 538, 93 S. Ct. 2821, 37 L. Ed.2d 782.

Id.

The amendments challenged in Lyng, by contrast, were not designed to politically disadvantage weak or unpopular groups. Rather, the amendments, according to the Court, promoted the beneficient purposes of the Food Stamp Program in a rational, orderly and efficient manner.

In dissent, Justice Marshall, joined by Justice White, argued that Congress had presented "no hard evidence" that distantly related or unrelated "persons living together were in fact significant sources of fraud . . ." Id. at 2734 (Marshall, J., dissenting).

Justice Marshall further observed:

The food stamp benefits at issue are necessary for the affected families' very survival, and the Federal Government denies that benefit to families who do not, by preparing their meals together, structure themselves in a manner that the Government believes will minimize unnecessary expenditures. The importance of that benefit belies any suggestion that the Government is not directly and substantially influencing the living arrangements of families whose resources are so low that they must rely on their relatives for shelter.

Id. at 2733.

The spirit of Moreno further was weakened by Lyng v. International Union, 108 S. Ct. 1184 (1988), which upheld "[a] 1981 amendment to the Food Stamp Act stat[ing] that no household shall become eligible to participate in the food stamp program during the time that any member of the household is on strike. . ." 108 S. Ct. at 1187. Noting that the amendment, which was part of a series of cuts of the entire national budget, "would save a total of about $165 million in fiscal years 1982, 1983, and 1984," Justice White ruled that denying food stamps to households harboring striking workers is rationally related to the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes.

Id. at 1188, 1192.

In dissent, Justice Marshall, joined by Justices Brennan and Blackmun, noted that, unlike strikers, others who quit their jobs may continue to receive food stamps; therefore, the challenged policy was not designed to promote the legitimate goal of encouraging the able to work. Id. at 1196-97 (Marshall, J., dissenting). Rather, the amendment was designed to discourage workers from exercising their right to strike. Thus, Justice Marshall concluded, the amendment contravenes the clear lesson of Moreno. Id. at 1198-99 (Marshall, J., dissenting).
imposed on groups who, through no fault of their own, are despised by portions of society. For example, the Court has held that a state must provide public education to children of illegal aliens to the same extent that it provides education to the children of state citizens and resident aliens.\textsuperscript{104}

As part of its rationale the Court held,

Legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.\ldots Legal burdens should bear \textit{some relationship} to individual responsibility or wrongdoing.\ldots It is\ldots difficult to conceive of a rational justification for penalizing these children for their presence within the United States.\textsuperscript{105}

Not surprisingly, the foregoing considerations likewise play an integral part of analysis addressing classifications predicated on legitimacy of birth. In \textit{Levy v. Louisiana},\textsuperscript{106} for example, the Court found no rational basis to support a statute which prohibited an illegitimate child from suing over the wrongful death of a parent. Noting first that illegitimates are “persons” under the terms of the Equal Protection Clause,\textsuperscript{107} Justice Douglas, speaking for the Court, stated that since the situation under review involved “intimate, familial relations between a child and his own mother,” it was wholly unclear "why, in terms of 'equal protection,' the tortfeasors should go free merely because the child is illegitimate\ldots especially when the child is nonetheless subject to all the responsibilities of a citizen\ldots”\textsuperscript{108}

The Court fortified its distaste for the classification by adding that “These children\ldots were indeed hers [the mother’s] in the biological and in the spiritual sense.\ldots”\textsuperscript{109} The mother nurtured the children who, therefore, suffered when she died. “We conclude that it is invidious to discriminate against them [illegitimates] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.”\textsuperscript{110}

Almost a decade later, relying on a similar rationale, the Court struck down that portion of the Illinois probate code which permitted legitimate children to inherit through intestacy from either parent, but which limited an illegitimate’s right to intestate inheritance from the mother’s estate.\textsuperscript{111} Interestingly, the State attempted to justify the statute by characterizing it as a progressive or remedial act. The law, Illinois argued, was designed “to ameliorate the harsh common-law rule under which an illegitimate child was

\textsuperscript{104} Plyler v. Doe, 457 U.S. 202 (1982).
\textsuperscript{105} Id. at 220 (emphasis added). \textit{See also} Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972).
\textsuperscript{106} 391 U.S. 68 (1968), \textit{reh. den.}, 393 U.S. 898 (1968).
\textsuperscript{107} Id. at 71.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 72.
\textsuperscript{110} Id. (footnotes omitted).
filius nullius and incapable of inheriting from anyone." To be sure, the statute did partially achieve that goal, although it did not place illegitimates on parity with the rights of legitimate children. Nevertheless, Justice Powell, speaking for the Court, ruled that the statute offended the judicially established policy that:

a State may [not] attempt to influence the action of men or women by imposing sanctions on the children born of their illegitimate relationships . . . (the parents may) conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.\(^{113}\)

The Court reasoned that penalizing children is inconsistent with the purported purpose of reforming the law of illegitimacy to render it just and fair.\(^{114}\)

In *Eisenstadt v. Baird*,\(^{115}\) the Court struck as lacking rational basis a Massachusetts statute which, *inter alia*, made it a criminal offense to distribute contraceptive devices to unmarried persons except to prevent the spread of disease.\(^{116}\) One purported basis was to control fornication—sex between unmarried persons. Even assuming, however, that the state had a legitimate interest in limiting premarital sex, the Court noted too many exceptions to link the offending statute to that goal. For instance, the state

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112. *Id.* at 768. Illinois additionally contended that the limitation was designed to promote family relationships—a contention the logic of which even the State's advocate could not explain. *Id.*

113. *Id.* at 769-770. In *Matthews v. Lucas*, the Court observed, "... the legal status of illegitimacy, however defined, is like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society." *Matthews v. Lucas*, 427 U.S. 495, 505 (1976) (emphasis added); accord, *Reed v. Campbell*, 106 S. Ct. 2234, 2237 n.5 (1986).

114. *Trimble*, 430 U.S. at 770. The courts now apply the so-called "middle level" of scrutiny to classifications predicated on legitimacy. See *Pickett v. Brown*, 462 U.S. 1, 8 (1983). As has been earlier discussed, one may cogently argue that "middle level" and "strict scrutiny" are no more than convenient classifications which are actually forms of rationality analysis. See *supra* notes 19-44 and accompanying text.


116. *Eisenstadt*, 405 U.S. at 440-443. While deprivation of access to contraception implicates the fundamental right to privacy, the Court declined to apply the purportedly more exacting "strict scrutiny" analysis because it perceived the statute to be devoid of rationality. *Id.* at 447 n.7. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).
placed no controls over access to contraception by unmarrieds to prevent
disease. Neither did the state attempt to control contraception used during
adultery committed between a married and a single person. Moreover,
the Court argued, fornication itself was classified by Massachusetts as a
misdemeanor, while violation of the contraception provision was a felony.
It is anomalous, the Court concluded, to think that the state truly sought
to control a misdemeanor by creating a new class of felonies.

The Court, therefore, implied that the statute was not designed to
promote legitimate ends, but rather, to punish copulating single individuals
by forcing them to run the risk that the female will become pregnant. One
might quibble whether the statute was really unrelated to promoting the
arguably legitimate goal of deterring premarital or extramarital sex. After
all, recalling that statutory classifications are necessarily imperfect and,
under rationality analysis, need not even be particularly well conceived, it
is possible that some unmarried individuals might forego sex because they
are neither clever nor persistent enough to obtain contraception. However,
recall that our definition of rationality weighs competing effects of statutes
to determine their societal worth. One senses, therefore, that the offending
enactment was irrational because of a hidden purpose sounding like, but
actually unrelated to, a legitimate state end. The statute did not, according
to the Court, actually deter sex between unmarried persons, nor was it
designed to. Rather, the statute was a harsh measure to extract an unrea-
sonable and irrational penalty from unmarried individuals who engage in
intercourse. We may reasonably interpret Eisenstadt v. Baird to mean,
therefore, that the classification's purported social utility—the handful of
single persons who do refrain from having sex—was overwhelmed by social
disutility—the number of resulting unwanted pregnancies coupled with the
vindictive and harsh manner with which the State attempted to control
sexual behavior.

A recent opinion accents the Court's distaste for statutory classifications
designed with no purpose better than to demean, humiliate and otherwise
disadvantage a politically unpopular group. Applying the rational basis
standard, an unanimous Court invalidated a zoning ordinance of Cleburne,
Texas requiring that proposed group homes for the mentally retarded obtain
a special use permit. Special permits were required exclusively to authorize
"[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug
addicts, or penal or correctional institutions."

117. Eisenstadt, 405 U.S. at 448-449.
118. Id. at 449-450. In addition, the Court rejected the state's claims that the statute
protected the health of the citizenry. The Court held that discriminating between married and
unmarried persons regarding access to contraception did not address health problems which
were shared identically by both classes of people. Id. at 450-452. Finally, the Court held that
"viewed as a prohibition on contraception per se, [the statute] violates the rights of single
persons under the Equal Protection Clause of the Fourteenth Amendment." Id. at 443.
120. Id. at 436.
The majority declined to apply equal protection scrutiny more heightened than rational basis, yet found the ordinance lacking sufficient rationality to survive constitutional review.21 Specifically, the Court found that

121. Id. at 442-47. The Cleburne majority opinion has been subject to much analysis regarding the rational basis standard it applied. For instance, Justice Marshall regarded the majority's approach to be a form of heightened scrutiny clothed as rational basis. Id. at 458-60 (opinion of Marshall, J.). Justice Stevens used the majority opinion as the point of departure to renew his continued opposition to assigning challenged classification schemes purported levels of scrutiny. Id. at 451-455 (Stevens, J., concurring). See also Justice Stevens', supra note 19, at 162-63; supra notes 30, 35 and accompanying text.

Lower courts have likewise noted that rational basis analysis under cases such as Cleburne sounds more in concepts of middle level or strict scrutiny than in the traditional rational basis framework. See, e.g., Phan v. Virginia, 806 F.2d 516, 521 n.6 (4th Cir. 1986); Knutzen v. Eben Ezer Lutheran Housing Center, 815 F.2d 1343, 1354 (10th Cir. 1987). Naturally, the Cleburne opinion has inspired much scholarly commentary. See, e.g., Note, 20 Loy. L. A. L. Rev. 921 (1987); Note, Equal Protection, 36 Drake L. Rev. 201 (1986-87).

As earlier documented, every purported level of equal protection scrutiny always devolves into rational basis analysis. See supra notes 19-44 and accompanying text. To be sure, the Court has addressed new issues and expanded concepts of rationality since the tiers of equal protection analysis were first established. The interesting question, however, has always been "why did the Court decide that X was rational and Y irrational" rather than "how many levels of scrutiny can dance on the head of a pin?"

The Cleburne majority's determination to apply rationality analysis merits a brief word. The Court identified four reasons explaining why as a matter of course, discrimination predicated on mental impairment is not presumptively irrational. It is interesting to contrast these arguments to strict scrutiny as applied to racial discrimination.

First, the Court noted, "it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have reduced ability to cope with and function in the everyday world. . . . They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one." Cleburne, 473 U.S. at 442 (footnote omitted). In this regard, race and mental handicap are fundamentally different. As the Cleburne majority analysis accents, however, reviewing classifications on the basis of mental impairment under a rational basis test in no wise signals abdication of a court's duty to carefully evaluate and consider the purposes and means—costs and benefits—imposed by enforcement of the classification. As accented by subsequent judicial opinion, "the simple articulation of a justification for a challenged classification does not conclude the judicial inquiry." Phan v. Virginia, 806 F.2d 516, 521 n.6 (4th Cir. 1986) (citing Cleburne and Moreno). To the contrary, "the minimum rationality analysis calls upon the judge's personal understanding of the needs of society." Deible v. City of Rehoboth Beach, 790 F.2d 328, 334 n.1 (3d Cir. 1986) (Ziegler, J.). Thus, fulfillment of the requirements of rational basis analysis mandates a thorough and thoughtful review of the relevant purposes and effects of the challenged action.

Secondly, the Court denied heightened scrutiny for the mentally handicapped because, "lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." Cleburne, 473 U.S. at 443. The existence of the Cleburne ordinance itself, and the extensive history of discrimination against the mentally handicapped belie the simple premise that, in certain instances, contemporary legislation evinces sensitivity to the plight of the mentally impaired. Id. at 461-65 (Marshall, J.).

Moreover, the fact that law is less hostile to the classification than it once was seems sparse reason to deny heightened scrutiny. Certainly, contemporary law is significantly more friendly to blacks and other racial minorities than it was 100 or 25 years ago. Nevertheless, it seems unlikely that the Court, therefore, would determine to lessen judicial scrutiny of racial
"the record does not reveal any rational basis for believing that the Featherston home would pose any threats to the city's legitimate interests... [sufficient to justify the singular requisite for a special use] permit for this facility when other care and multiple-dwelling facilities are freely permitted".122

The Court advanced several reasons underlying its holding.123 Of particular concern to the inquiry of this article is the first and primary standard: unfounded prejudice and distaste are not constitutionally valid reasons to impose disparate or special requisites upon a given group or individual. The Court addressed the question in clear and unequivocal terms:

First, the [City] Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, classifications. The reason is obvious. While a history of discrimination is an index signaling the need for protection, the underlying question in any equal protection case is whether the particular classification as applied in the given case is rational. See id. at 452-455 (Stevens, J., concurring). Racial classifications, as logic and experience teach, are rarely fair, thus, rarely rational. By contrast, certain classifications based on mental impairment may be rational more often.

Third, the Court opined that the existence of legislation protecting the mentally handicapped "negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." Id. at 445. The response to the Court's third argument is identical to that of the second argument. Surely, blacks and other racial minorities enjoy greater political power than do the mentally impaired; yet, the Court should not retreat from applying strict scrutiny. Again, the reason is political power vel non offers clues regarding the rationality of classifications, but it does not provide a sufficient basis alone to draw a legal conclusion whether an action is rational.

Finally, the Court revived the floodgate concern:

If the large and amorphous class of the mentally retarded were deemed quasi-suspect... it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.

Id. at 445.

The Court is absolutely right. There is no "principled way to distinguish a variety of other groups who have perhaps immutable" [and, I would add mutable] characteristics which have subjected them to a demeaned and debilitated social status. As quasi-suspectness is rational basis analysis, see supra notes 19-44 and accompanying text, there is no "principled way to distinguish" between the irrational treatment accorded many groups. That is precisely the thesis of this article. The answer, however, is not to turn a blind eye to the plight of such groups. Rather, using rational basis analysis, all such classifications must be carefully scrutinized and, if necessary, invalidated to restore lost dignity and freedom.

122. Id. at 448.

123. Id. at 448-49. The Court quickly rejected two proposed justifications. The City asserted that the home would be located on "a five hundred year flood plain." Additionally, the City expressed concern over the size of the home and the number of occupants. These concerns, however, did not explain why other types of dwellings in the same area involving possible multiple occupancy were not required to obtain a special use permit. Id. at 449.
are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . . and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some faction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 433 (1984).124

Similarly, rejecting the City's justification that local high-school students might harass the occupants of the home, the Court replied, "But, the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation."125 Thus, echoing, although not directly citing, Moreno, Eisenstadt, Plyler, Levy and Trimble, the Court held that bald fear, prejudice, traditional distaste and unsubstantiated stereotypical beliefs are not cognizable under the Equal Protection Clause as rational bases upon which to substantiate governmental action.

The cases involving a state's attempt to take disparate actions against unpopular or innocent groups enrich our notions of rationality. First, these cases, particularly Trimble, reaffirm that rationality analysis is a function of balancing competing concepts and interests. In Trimble, the statutory goal to modify the harsh effects of the prior intestate succession law was legitimate and the provision in question indisputably furthered the legitimate purpose. Yet, the harm it inflicted against innocent illegitimate offspring was intolerable. Secondly, the Court has recognized the injustice of penalizing individuals because of characteristics over which they have little or no control. Society has little right to debase and demean illegitimates, children of illegal aliens, the mentally impaired, and others who, through no fault of their own, are made to suffer the stamp of social stigma. Thus, rationality analysis takes an active role in defining social perceptions or, at least, in reordering the way social perceptions may be acted upon.

However, as the food stamp and contraception cases show, the constitutional inquiry is not limited to immutable or difficult-to-alter characteristics—that is, characteristics either beyond the control of the individual such as race, gender or illegitimacy of birth or which cannot be changed without great cost or difficulty.126 Clearly, premarital sex is mutable because

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124. Id. at 448 (emphasis added, citation omitted).


126. Many courts have argued that discrimination cannot occur when classifications are predicated on mutable characteristics. See, e.g., Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc) (employer does not violate the Fair Employment
individuals may choose to forego that pleasure. Similarly, adopting the "hippie" lifestyle is mutable, reflecting individuals' personal choices regarding how to live and what to believe. Thus, the foregoing opinions recognize that constitutional protections are designed to foster and encourage diversity. Differences in attitudes, appearances, lifestyles, and perspectives are not simply enriching, but are integral to any society predicated on promoting the optimal fulfillment of each individual's sense of self, dignity and individuality. The characteristics a person embraces to assume a particular identity in society surely are not limited to immutable traits such as race, sex or status of birth. Indeed, our personalities and identities are based on a host of choices involving mutable—easily changed—characteristics. Political persuasions, modes of entertainment, taste in decor, clothes and personal appearance are integral aspects establishing our singular identities both as individuals and as components of a variety of groups, organizations and structures. Rationality analysis, joining judicial review under the Bill of Rights, particularly under the First Amendment, stands as a primary tool to prevent the suppression of the identities, dignity and individuality of social actors.

Furthermore, consistent with the foregoing, the Court, particularly in *Cleburne* and *Moreno*, flatly rejected recourse to fear, prejudice and political unpopularity as legitimate bases to disadvantage groups of individuals. Simple concepts of fairness counsel that the protections accorded by due process and equal protection of the laws become meaningless if the political system may freely condemn the weak, helpless or politically ostracized


The distinction between mutable and immutable characteristics, although widely followed by the courts, is spurious. *See, e.g.*, Bayer, *The Definition of Discrimination Under Title VII and the Problem of Mutable Characteristics*, 20 U.C. DAVIS L. REV. 769 (1987). Consider, for example, a hypothetical case offered by Prof. Laurence Tribe: suppose a clever scientist perfects a completely safe concoction which turns black persons' skin white and back again at will. Suppose, further, that an employer says to black applicants that he will not hire blacks unless they agree to turn white during working hours. As Prof. Tribe intuits, it seems inconceivable that a court would find no unlawful racial discrimination if the employer rejected black applicants who proudly refused to alter their skin color even temporarily. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073-74 n.52 (1980).

Racial discrimination, under the foregoing hypothetical, is no longer immutable. In fact it is extremely mutable. But, what have not changed are those moral considerations which premise the true reasons why racial discrimination is reprehensible. Racial discrimination offends discriminatees' sense of self and personal identity. Similarly, it insults the history and heritage associated with the racial class. Indeed, the debasing of the individual, through denial of some opportunity, is purely vindictive, for race has nothing to do with the actual ability of the applicant to perform a job.

Thus we see that appealing to the immutability of characteristics offers no logical or moral basis to discern rational from irrational discrimination.
elements to suffer disadvantageous treatment for reasons no better than the very helplessness which give rise to that disparate treatment. Vindictiveness, insensitivity and stereotyped assumptions are not good enough to justify governmental action, even if supported by a majority of the electorate.\textsuperscript{127}

\textsuperscript{127} It cannot be said that the constitutional command of fairness has been flawlessly applied. A recent opinion underscores this point. Although dealing with the Fourteenth Amendment's Due Process Clause, rather than equal protection, the decision implicates basic notions of fairness, dignity and rationality. Thus, it should be mentioned in this article.

In \textit{Bowers v. Hardwick}, the Court held that the Constitution's guarantee of privacy does not invalidate state criminalization of privately performed acts of homosexual sodomy between consenting adults. \textit{Bowers v. Hardwick}, 106 S. Ct. 2841 (1986). Justice White, speaking for the majority, stated that homosexual sodomy is not among those "fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" \textit{Id.} at 2844 (quoting \textit{Palko v. Connecticut}, 302 U.S. 319, 325-26 (1937)). In support of his conclusion, Justice White noted the history of the criminalization of homosexual acts from the statutes of Henry III to date. \textit{Bowers}, 106 S. Ct. at 2844-2846.

Refusing "to discover new fundamental rights embedded in the Due Process Clause," \textit{Bowers}, 106 S. Ct. at 2846, the majority rejected analogizing private homosexual conduct to the private possession of otherwise unlawful obscene materials permitted in \textit{Stanley}. See \textit{Stanley v. Georgia}, 394 U.S. 557 (1969). The Court ruled that \textit{Stanley's} holding was predicated on the First Amendment while the proposed "right pressed upon us here has no similar support in the text of the Constitution . . ." \textit{Bowers}, 106 S. Ct. at 2846. The Court asserted further that applying the privacy concepts of \textit{Stanley} would remove any principled basis to uphold state laws prohibiting "adultery, incest, and other sexual crimes even though they are committed in the home." \textit{Id.}

Finally, the Court addressed the argument that a law banning homosexual conduct has no rational basis:

\textit{...} respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis. \textit{Id.} (footnote omitted).

Writing with humanity and sensitivity, Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, dissented. Justice Blackmun opened his opinion by attacking the definition of privacy which premised the majority opinion:

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, ante, at 2844, than \textit{Stanley v. Georgia}, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed.2d 542 (1969), was about a fundamental right to watch obscene movies, or \textit{Katz v. United States}, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." \textit{Olmstead v. United States}, 277 U.S. 438, 478, 48 S. Ct. 564, 572, 72 L. Ed. 444 (1928) (Brandeis, J., dissenting).

\textit{Bowers}, 106 S. Ct. at 2848 (Blackmun, J., dissenting).

Justice Blackmun noted that previously recognized privacy rights are part of a larger constitutional fabric. Protections addressing the right to marry, procreate and raise a family
Writing in *Railway Express Agency v. New York*, Justice Jackson expressed the foregoing this way:

emanate from the broad premise that:

We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the moral fact that a person belong to himself and not to others nor to society as a whole."


Thus, privacy rights are recognized because they:

so dramatically alter an individual's self-definition . . . contribute[] so powerfully to happiness of individuals . . . [and because] the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment of close ties with others."

*Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)).

With the foregoing as his backdrop, Justice Blackmun next emphasized that "Only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'" *Bowers*, 106 S. Ct. at 2151 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (emphasis added)).

Concluding his line of reasoning, Justice Blackmun spoke of a constitution and a nation enriched by diversity and strengthened by tolerance, if not appreciation, for such diversity:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. . . .

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.

*Bowers*, 106 S. Ct. at 2851-52 (emphasis supplied).

Justice Blackmun additionally disagreed with the majority's interpretation of *Stanley v. Georgia*, which, Justice Blackmun argued, was predicated firmly on the general constitutional guarantee of privacy, particularly the security of the home. *Id.* at 2852-53. See infra notes 324-30 and accompanying text (discussing Supreme Court's opinion in *Stanley*).

The Blackmun dissent devastates the static and intolerant majority opinion. Neither the historical persistence of statutes outlawing homosexual conduct nor the distaste certain segments of the population may have for the practice are sufficient bases to determine whether the right to privacy attaches. *Bowers*, 106 S. Ct. at 2854-56 (Blackmun, J., dissenting). Rather, as Justice Blackmun demonstrated, the relevant inquiries are whether the State has limited a mode of expression integral to an individual's self-conception, autonomy and dignity, and, if so, whether the state has demonstrated sufficient justification to sustain the restriction.

The discussion of rationality herein shows that the Constitution promotes personal freedom and dignity by protecting individual expressions of self-identity even if politically unpopular and divergent from the mainstream. Privately performed homosexual acts between consenting adults constitutes such expression. The conclusory analysis of the majority opinion—premised almost entirely on the history of intolerance without discussing the merits thereof—stands as its own worst critic, demonstrating the intellectual dishonesty and cruel conservatism of the majority holding.

For example, contrary to the assertions of the majority, it seems clear that according protection to homosexual acts between adults hardly precludes the criminalization of "... incest and other sexual crimes . . . committed in the home." *Id.* at 2848. Surely, the right to privacy can accommodate consensual sexual acts between adults without protecting rape, incest
"The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

3. Governmental Action May Be Unlawful If It Creates Or Threatens To Create A Caste System

The discussion of "rationality" ends by reviewing Supreme Court opinions which reaffirm and revitalize the developing conceptions defining when legislative actions are rational. The pivotal case, *Zobel v. Williams*, 130 has previously been mentioned in footnotes to this work. To wisely use the unexpected windfall of profits the State of Alaska earned from the sale of minerals, a state constitutional amendment mandated that 25% of the annual income from minerals sales be placed in a permanent fund the principal of which could not be touched. The earnings generated from the principle, however, could be spent for general governmental purposes. 131

In 1980, the Alaska legislature enacted a dividend program allotting annual monetary distributions from the earnings of the fund directly to adult residents of the State. Residents received one dividend share—the value of which was legislatively established on an annual basis—for each year of their residency retroactive to 1959, the year of statehood. 132 For instance, a person who had resided in Alaska since 1959 would receive twenty more dividend shares than a person whose residency commenced in

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and other acts perpetuated against either unwilling others or those too young to make an informed choice to engage in sexual conduct. The very lack of substance and depth of the majority rationale encourages the fulfillment of Justice Blackmun's closing observation:

I can only hope that . . . the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.

*Id.* at 2856 (Blackmun, J., dissenting).


132. *Id.* at 57.
1979. Constitutional challenge was not brought against the entire design to link dividends to length of residency. Instead, the attack centered on the provisions allowing qualified residents to collect dividends from the year of the statutory enactment in 1980 retroactive to 1959 which was a two decade windfall.\footnote{Id. at 59.}

Although the residency provisions implicated infringement of the fundamental "right to travel," and therefore suggested the use of "strict scrutiny analysis," the Court refrained from interpreting that fundamental right, finding instead that the statutory classification lacked rational basis.\footnote{Id. at 60.}

The State espoused three justifications for the classification. First, the scheme was designed to encourage the establishment and maintenance of residency in Alaska. Secondly, the scheme was drafted to promote prudent management of the fund. Finally, the classification served to convey the State's gratitude to long-time residents for their various contributions both tangible and intangible.\footnote{Id. at 61.}

The majority, speaking through Chief Justice Burger, quickly brushed aside the first two justifications arguing that the retroactive award of dividends bore no real relationship either to encourage residency or to promote prudent management of the fund.\footnote{Id. at 61-62 & n.9.} Turning to the final justification, the Chief Justice agreed that the classification advanced the attainment of the goal; however, the goal was impermissible and irrational.\footnote{Id. at 63.} Precedent clearly established that a state may not link the apportionment of services or the distribution of largess to either previous tax payments or the intangible contributions made by residents.\footnote{Id. citing Shapiro and Vlandis. See Shapiro v. Thompson, 394 U.S. 618, 632-633 (1969); Vlandis v. Kline, 412 U.S. 441, 449-450 (1973).}

As explained by the Court:

If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residence(11).
It would permit the states to divide citizens into expanding numbers of permanent classes. (12) Such a result would be clearly impermissible.

11. Apportionment would thus be prohibited only when it involves “fundamental rights” and services deemed to involve “basic necessities of life.” See Memorial Hospital v. Maricopa County, 415 U.S. at 259, 39 L. Ed. 2d 306, 94 S. Ct. 1076.

12. “Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.” Passenger Cases, 7 How. 283, 492, 12 L. Ed. 702 (1849) (Taney, C.J., dissenting). 139

Justice Brennan, along with Justices Marshall, Blackmun and Powell, joined the Chief Justice's opinion, but wrote separately to explicate the majority's rationale. 140 Justice Brennan accented that under the “idea of constitutionality protected equality” a state may not discriminate “against the recently naturalized citizen in favor of the Alaskan citizen of longer duration.” 141 Specifically, since the dole of funds is unavailable to minors, a resident may be penalized because of age. The statute “discriminates against the eighteen year old native resident, in favor of all residents of longer duration.” 142

The fourteenth amendment confers equal protection of the laws to persons within the jurisdiction of a state regardless of the amount of time they have so resided. Sometimes incidents of citizenship may be reasonably linked to duration of residence. For instance, a state may require a certain minimum duration before conferring citizenship or allowing persons to run for public office. 143 Such instances of discrimination based on length of residency are “rational as they are supported by a valid state interest independent of the discrimination itself.” 144

Joining the rationale of the majority opinion, Justice Brennan concluded:

In effect, then, the past-contribution rationale is so far-reaching in its potential application, and the relationship between residence and contribution to the State so vague and insupportable, that it amounts to little more than a restatement of the criterion for discrimination

139. Zobel, 457 U.S. at 64 and n.11-12 (emphasis added).
140. Id. at 65-66 (Brennan, J., concurring). The concurring justices also agreed with Justice O'Connor that the “right to travel” provided an independent basis upon which to invalidate the statute. Id. at 66. Justice (now Chief Justice) Rehnquist dissented alone. Id. at 81-84 (Rehnquist, J., dissenting).
141. Id. at 68-69 (Brennan, J., concurring).
142. Id. at 69 (Brennan, J., concurring).
143. Id. at 70 (Brennan, J., concurring).
144. Id.
that it purports to justify. But while duration of residence has minimal utility as a measure of things that are, in fact, constitutionally relevant, resort to duration of residence as the basis for a distribution of state largess does closely track the constitutionally untenable position that the longer one's residence, the worthier one is of the State's favor. In my view, it is difficult to escape from the recognition that underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that "some citizens are more equal than others." We rejected that premise and, I believe, implicitly rejected most forms of discrimination based upon length of residence when we adopted the Equal Protection Clause. 145

Three terms later, Chief Justice Burger applied the rationale of Zobel to invalidate a New Mexico statute which bestowed a $2,000 property tax exemption on veterans of the Vietnam War if they had been residents of the state prior to May 8, 1976. 146

Speaking for the majority, the Chief Justice rejected the state's two averred rational bases to support a tax preference discriminating between classes of Vietnam veterans. The state could not rationally assert that a purpose of the tax scheme was to encourage veterans to settle in New Mexico when the statutory eligibility date of May 1976 was enacted seven years later in 1983. 147 It is hardly controversial to argue that a state cannot in 1983 attempt to encourage migration prior to June 1976.

Next, the Chief Justice acknowledged that while governmental preferences for veterans may be legitimate, there was no legitimate basis for New Mexico to discriminate between classes of Vietnam veterans:

Appellee and the State's evaluation of this legislative judgment may be questioned on its own terms. Those who serve in the military during wartime inevitably have their lives disrupted; but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service. Moreover, the legislature provided this economic boon years after the dislocation occurred. Established state residents, by this time, presumably had become resettled in the community and the modest tax exemption hardly bears directly on the transition to civilian life long after the war's end. Finally, the benefit of the tax exemption continues for the recipient's life. The annual exemption, which will benefit this limited group of resident veterans long after

145. Id. at 71 (emphasis added). A similar sentiment, expressed by Justice Jackson, was discussed in the previous section of this work dealing with classifications which harm powerless groups. See supra notes 128-129 and accompanying text.
147. Id. at 618-619.
the wartime disruption dissipated, is a continuing bounty for one group of residents rather than simply an attempt to ease the veteran's return to civilian life. 148

Citing Zobel, Burger concluded:

The State may not favor established residents over new residents based on the view that the State may take care of "its own," if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's "own" and may not be discriminated against solely on the basis of their arrival in the state after May 8, 1976. 149

The links of Zobel and Hooper to our definition of rationality are clear. As Justice Brennan accented in Zobel, creating classes for the sake of creating classes threatens to impair the sense of individuality, dignity and self-worth implicated by the equal protection components of the Constitution. The creation of such classes forces the individual to alter chosen behavior or forgo state largess, if indeed the classification even affords the individual the opportunity to deliberately plan in advance whether or not to perform certain acts or accept state services.

Moreover, as the Chief Justice's Zobel opinion clarified, the ability to legislate classes is the ability to greatly control behavior. Societal resources, rewards, and detriments are dispensed through governmental classifications, thus the power to discriminate must be wielded carefully, permitting only classes clearly linked to legitimate state ends. As the Chief Justice emphasized, irrational classifications, if unchecked, threaten to spread, possibly covering the entire panoply of state services and jeopardizing all but the most fundamental civil rights.

Chief Justice Burger's rationale in Hooper identified an additional and related consideration underlying the rationality, or lack thereof, of govern-

148. Id. at 621 (emphasis added).
149. Id. at 623 (citations omitted). During the following term, the Court similarly struck as unconstitutional New York's civil service employment preference for resident veterans limited to those who entered the service after commencing residency in New York. See Attorney General of New York v. Soto-Lopez, 106 S. Ct. 2317 (1986). A plurality, per Justice Brennan, held that the preference infringed upon the fundamental right to travel. Under a heightened scrutiny standard, the state failed to demonstrate that its purposes for enacting the preference could not be served as well without discriminating among classes of veterans on the basis of date of initial residency in the state. Id. at 2320-24. Justice Brennan reasoned:

All four justifications fail to withstand heightened scrutiny on a common ground—each of the State's asserted interests could be promoted fully by granting bonus points to all otherwise qualified veterans. New York residents would still be encouraged to join the services. Veterans who served in time of war would be compensated. And, both former New Yorkers and prior residents of other States would be drawn to New York after serving the Nation, thus providing the State with an even larger pool of potentially valuable public servants.

Id. at 2324 (emphasis supplied). Chief Justice Burger, providing the fifth vote, found the preference invalid pursuant to Zobel and Hooper. Id. at 2323-28.
mental action. The Court could not discern a legitimate purpose in rewarding only those Vietnam veterans who established State residency on or before May 8, 1976. As the Chief Justice observed, "Those who serve in the military during wartime inevitably have their lives disrupted; but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other states who served, so that the latter would not deserve the benefits a state bestows for national military service." By singling out veterans who had resided in New Mexico, the State, either deliberately or inadvertently, insulted, belittled, demeaned and economically disadvantaged similarly situated veterans not on the basis of their military records or some reasonable measure related to their status as veterans, but rather, because they happened to have resided elsewhere prior to May 8, 1976. The societal cost/benefit analysis linked with rationality analysis revealed, according to the Court, that the date of residency has nothing legitimate to do with expressing gratitude and extending aid to those who fought and served for an entire nation, not for a particular state:

It is similarly noteworthy that the classifications in *Zobel* and *Hooper* were not drafted for invidious purposes. The Court's opinions do not intimate that the Alaska and New Mexico legislatures deliberately sought to create hostile and conflicting castes in society. Nevertheless, the disparate effects and potential disparate effects overshadowed any arguable benefits arising from the statutory scheme.

*Zobel* and *Hooper*, then, reaffirm that the constitutional guarantee against irrational governmental action requires the state to demonstrate with clarity the utility of its classifications. Any discrimination which appears to create a caste or disadvantaged group in society with regard to the receipt not only of fundamental rights but also of state largess, will be reviewed most carefully.

To summarize, the analysis in Section II has shown that the definition of "rationality" and ideas and concepts derived therefrom have been put into operation by a series of expanding judicial precedents. Rationality is measured by comparing classifications in relationships to the goals promoted and effects engendered. This cost-benefit calculus is energized not so much by economic constructs, but by a sense of right and wrong—by political and moral ideology.

We have seen further that Supreme Court opinions yield a strong body of law illustrating and guiding our investigations concerning new questions about the rationality of discrete governmental actions. The cases encourage us to uncover irrationality wherever it may be. All the opinions demonstrate a judicial intolerance for governmental classifications which demean, harm, humiliate, or debase individuals.

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150. *Hooper*, 472 U.S. at 621.

151. *Zobel* and *Hooper*, arguably, are examples of disparate impact analysis applied under the rational basis standard. See *supra* note 61.
We now have the analytical tools to evaluate the coverage of modern civil rights enactments. In so doing, we must be mindful of one astute commentator's observations regarding rationality analysis:

In the end, the rationality requirement cannot be judged against some *a priori* standard of "democracy" or "law." It must be judged largely by the uses to which it is put, and the success with which it is put to those uses.152

III. THE IRRATIONAL UNDERINCLUSIVENESS OF CIVIL RIGHTS STATUTES

A. A General Introduction

Section II developed a detailed set of propositions defining and explicating the concept of "rationality" as applied in equal protection analysis. That discussion provided perceptions and viewpoints with which to assess the operations of statutes designed to identify, describe, protect, and enforce a variety of civil rights. Using the definition of "rationality" as our guide, this article argues that such statutes are irrational in their decidedly limited coverage. Rather than according civil rights protection to all individuals under all applicable circumstances, the statutes protect limited groups of individuals.

Although limited, the coverage of many laws addresses several of the most serious and most widespread types of civil rights deprivations. Thus, this writing in no manner calls for a retreat from existing civil rights programs. To the contrary, this work concludes that existing civil rights laws are only the first step. To be rational under our constitutional definition, however, the statutes must be redrafted to meet their true promise and potential—the protection of every individual from arbitrary and unreasonable deprivations of civil rights by private as well as public offenders. Only then will our civil rights laws obey the commands of the rationality analysis under the fifth and fourteenth amendments, for not until then will individual integrity, personal dignity, and selfhood be protected to the fullest.

Reviewing the underlying ideology of civil rights laws, one is immediately struck by the similar perspective such statutes share with the rationality analysis. These shared characteristics, of course, are hardly surprising given that civil rights law, no less than equal protection and due process, concern protecting basic personal freedom, individuality and economic integrity from the onslaught of unreasonable governmental or interest group intrusions.

First and foremost, civil rights statutes are drafted to protect individual dignity. Fairness and preservation of personal integrity are the hallmark of civil rights laws. For instance, in a pivotal case upholding the constitution-

ality of Title II of the Civil Rights Act of 1964, the provision prohibiting racial discrimination in access to public accommodations, the Supreme Court observed that the statute was designed to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."  

Similarly, the courts have held that an underlying purpose of the Fair Employment Act, Title VII of the Civil Rights Act of 1964, is the eradication of useless stereotypes which serve no purposes better than degrading persons and depriving them of employment opportunities for reasons unrelated to their actual abilities to work. As the Supreme Court observed, for instance,

... the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful.

Identically, writing for a unanimous Court that Title VII prohibits sexual harassment, Chief Justice Rehnquist stated, "[T]here is] a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." And, addressing the right to purchase property free from racial discrimination, the Supreme Court held:

At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

As the foregoing excerpts, reflecting as well the sentiments of a huge host of similar precedents, indicate, legislatures may use their powers to

154. Heart of Atlanta Motel v. U.S., 379 U.S. 241, 250 (1964) (quoting Senate Report No. 872 at 16-17). Justice Goldberg, likewise citing the Senate Report, echoed that "[t]he primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes . . . is the vindication of human dignity and not mere economics." Id. at 291 (Goldberg, J., concurring, emphasis added).
157. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399, 2405 (1986). Quoting the Eleventh Circuit, the Court added, "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." Id. at 2406 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).
legislate against moral wrongs in society.\footnote{Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964).} Civil rights statutes, then, are different from other legislation in one significant respect: civil rights laws address areas—projects—uniquely important to personal autonomy and dignity. Statutes covering the ability to form contracts, to acquire and use property, to compete for employment and housing, and to enjoy public accommodations concern basic elements of social intercourse. Individuals who are unable to perform these projects cannot achieve freedom and autonomy. Looked at from a slightly different perspective, contemporary civil rights enactments represent the legislatively determined minimum quality of life that must be accorded to individuals, not because such individuals necessarily have earned the protection, but because respect for human decency demands such protection. Certainly, the same observation may be made regarding judicial opinions striking down legislation which violates due process and equal protection of the law. This is hardly surprising because both civil rights statutes and rationality analysis focus on the quest for fairness and decency in American society.

B. Underinclusiveness and Incrementalism

Before proceeding with a detailed explication of the nature of civil rights statutes, some additional threshold considerations should be addressed. As noted earlier, this article argues that civil rights statutes are unconstitutionally underinclusive. Rotunda, Nowak and Young assert that “[a]n under-inclusive classification contains all similarly situated people but excludes some people who are similar to them in terms of the purpose of the law.”\footnote{Rotunda, Nowak and Young, \textit{2 Constitutional Law: Substance and Procedure}, § 18.2 at 320 (1986).} Professor Tribe argues that “underinclusive classifications do not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government end.”\footnote{Tribe, \textit{supra} note 17, at 997.} We have seen, however, another species of underinclusiveness: a classification may be unconstitutionally underinclusive if omitting similarly situated others from coverage is not integral to attainment of legitimate governmental ends and if such omissions unduly demean, humiliate or otherwise disadvantage the excluded individuals. This type of underinclusiveness withholds benefits from deserving, similarly situated others rather than withholding burdens as in Professor Tribe’s formulation.

\footnote{Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964).} Certainly, civil rights statutes are motivated by considerations other than sociology and morality. Politicians may feel pressured by various interests groups to support such laws. The fear of losing a constituency and bowing to political expediency may prompt otherwise recalcitrant law makers to propose and enact progressive civil rights measures. Partisan politics and other selfish interests, then, may play strong roles in the conception, birth and growth of civil rights laws.

Nevertheless, even the most cursory review of legislative history reveals that legislative desire to promote fairness, alleviate injustice and improve society have been prime motivating factors for civil rights legislation. It is not quixotic, therefore, to accent the moral and social imperatives underlying civil rights laws.

\footnote{Tribe, \textit{supra} note 17, at 997.}
Certainly, it is well established that "[s]tates are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude," and that "mere underinclusiveness is not fatal to the validity of the law." Indeed, it is commonly accepted that all classifications, to some degree, are imperfect. Nevertheless, it is equally true that a given classification may be so imperfect that it is fatally flawed. Such determinations, of course, are judicial.

The discussion of rationality analysis revealed several cases exemplifying the third type of fatally flawed underinclusiveness—where the exclusion, although promoting legitimate state ends, irrationally demeans and disadvantages similarly situated others. In *Trimble v. Gordon*, the statute prohibiting illegitimates from inheriting from the fathers' estates ameliorated the common law rule forbidding any form of intestate inheritance in favor of illegitimates. Regardless, the statute was infirm, for denying illegitimates the right to inherit from their fathers served no valid state purpose. To the contrary, the limitation demeaned and economically harmed persons who were innocent of any wrongdoing. The statute then had to be reformed to expunge the irrationality.

Similarly, the limited classifications in *Zobel v. Williams* and *Hooper v. Bernalillo County Assessor* were struck because of their propensity to create useless caste systems. By allotting a monetary windfall to citizens solely on the basis of the date they established residency, Alaska and New Mexico arbitrarily withheld benefits from individuals who, the Court discerned, should have been covered to promote the legitimate goals of the particular program. The property tax abatement to Vietnam veterans in *Hooper* exemplifies the irrationality of the "date of residence" classification. As the Court noted, the purposes of the tax preference—to express gratitude to those who served in the armed forces during the Vietnam War and to help their readjustment to civilian life—could be advanced by according the preference to all Vietnam veterans who reside in New Mexico regardless of the commencement date of residence. By limiting the preference only to those veterans who had been residents as of May 8, 1976, the State impliedly asserted that long-term residents of New Mexico who served in Vietnam were more worthy of largess than veterans who had recently moved to the State. This unduly insulted, degraded and economically disadvantaged veterans who had been New Mexicans in mid-1976. The statute had to be reformed either to cover all Vietnam veterans or none at all.

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165. 430 U.S. 762 (1977). See *supra* notes 111-14 and accompanying text (discussing *Trimble*).
166. 457 U.S. 55 (1982). See *supra* notes 130-45 and accompanying text (discussing *Zobel*).
Along identical lines, this article calls for a judicial determination that similarly situated others—people suffering irrational discrimination concerning certain social projects—are wrongfully excluded from statutory protection. As will be demonstrated below, there is no rational basis to protect certain classes from arbitrary discrimination in areas such as employment and housing, while withholding protection from those who are treated equally irrationally but on the basis of classifications different from those set forth in the statutes as unlawful. As such, the statutes must be reformed. Either the statutes must be struck, which would serve no good cause at all, or the statutes must be extended to cover all forms of irrational discrimination.

A related threshold point helps set the stage for our detailed consideration of civil rights statutes. It is beyond dispute in constitutional jurisprudence that Congress and other legislative bodies enjoy broad discretionary power to determine the scope and extent of appropriate legislation.\(^6\) The usual rule holds that legislatures may deal with a perceived problem or project in its entirety or in such incremental steps as the legislature sees fit.

... [I]n deciding ... [questions of] constitutional propriety ... we are guided by the familiar principles that a “statute is not invalid under the Constitution because it might have gone further than it did,” \(\text{Roschen v. Ward, 279 U.S. 337, 339. . . . , that a legislature need not “strike at all evils at the same time,” \text{Semler v. Dental Examiners, 294 U.S. 608, 610 and that “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” \text{Williamson v. Lee Optical Co., 348 U.S. 4831 489.}}\(170\)

Nevertheless, constitutional jurisprudence has clarified in equally explicit terms the common sense concept that legislatures cannot act beyond their powers as limited by the Constitution.\(^7\) Lawmakers do not have the power “to restrict, abrogate, or dilute” the protections accorded to individuals under the Constitution.\(^8\) Therefore, even Congress’ presumed authority to legislate in a piecemeal fashion is tempered by the overriding constitutional command that legislative acts must be at least minimally rational.

Most enactments concern legislative projects not directly related to individual civil rights. As such, the primary concerns of civil rights protection—personal dignity, individuality and the appropriate social autonomy

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of the person—are not implicated if the particular legislative scheme fails to provide complete coverage. By contrast, civil rights laws express contemporary standards of the basic dignity to be accorded to each person. In this regard, civil rights laws occupy a special niche in the United States Code. The usual prerogative to legislate piecemeal does not apply when the legislation promotes and protects those rights without which individuals cannot fully function in American society.

Trimble v. Gordon, where the Court invalidated so much of Illinois' probate code which allowed legitimate children to inherit through intestacy from either parent but limited intestate inheritances of illegitimates to the mother's estate, again provides an example. The Court, speaking through Justice Powell, acknowledged that the statute in question was designed to reform the common-law rule which forbade illegitimates from intestate inheritance from either parent. Thus the statute was something of a reformation addressing one portion of a serious social injustice. The legislature's presumed power to enact piecemeal laws, however, did not save the Illinois statute which irrationally penalized illegitimate children by prohibiting them from inheriting from their fathers.

Identically, the Court struck New Mexico's Property Tax Preference benefiting only those Vietnam veterans who were residents of the state as of May 1976. The state could not have salvaged the classification by asserting that it had decided to address the needs of resident Vietnam veterans incrementally, first by benefiting those who were long-term residents and, perhaps later, legislating in favor of the remaining veterans. Rather, the "commencement of residence" classification was so irrational—the burdens so outweighed the benefits—that the accustomed power to legislate piecemeal was inapplicable.

Thus, the latitude generally accorded legislatures as they address the complex, perplexing problems of the day is limited by the strictures of the Constitution, prominent among which is the requirement that governmental actions be rational. Clearly, then, a statute is not rational because Congress may legislate in increments; rather, Congress may legislate incrementally if it does so rationally.

175. Id. at 768-770. Similarly, in Eisenstadt v. Baird, the Court, overturning Massachusetts' statutory prohibition limiting access to contraception by unmarried persons, accented that the serious gaps in statutory coverage demonstrated that the discrimination against unmarried persons was unrelated to legitimate governmental purposes. Eisenstadt, 405 U.S. 438 (1972). The Eisenstadt Court apparently did not regard the gaps as reflecting a legitimate use of the state's power to address a social problem in a step-by-step fashion. Rather, the incomplete nature of the statutory scheme revealed the irrationality of the enactment—the apparent desire to punish single persons who wish to have sexual intercourse. Id. at 448-449. See supra notes 117-20 and accompanying text (discussing Court's holding in Eisenstadt).
C. The Rationality of Civil Rights Statutes

Precedent informs us that congressional civil rights statutes are constitutional because at the very least, they are rational. A particularly fascinating aspect explaining their rationality is that rational civil rights statutes control some form of irrational behavior. Civil rights statutes are rational because the bigoted behavior they outlaw is irrational. Furthermore, consistent with our definition of "rationality," the main considerations used to perform the societal cost/benefits calculus are moral ones such as human dignity, self-worth, individuality and self-respect along with protecting opportunities to attain individual integrity in which all social actors must participate. These statutes, then, present a grand experiment to reinvent social reality, expunging certain large segments of irrational discrimination. This section of the article, therefore, describes the basic structure of certain civil rights enactments and traces remarkable opinions sustaining the validity of the laws.

The structure and operation of civil rights enactments are familiar. Such statutes often contain provisions (1) setting forth specific definitions of terms and concepts; (2) establishing procedural regulations or limitations; (3) enumerating appropriate recovery; and (4) listing exemptions and defenses. But the core sections of a civil rights enactment, of course, are those which express the particular prohibitions or limitations on behavior—the sections defining unlawful discriminatory conduct.

These core provisions contain two key elements. First, the sections will list certain social projects—modes of behavior and action—which the statute will govern. Second, the key provisions will list certain characteristics or criteria which may no longer play a role in the project, behavior, or action. Consider, for example, 42 U.S.C. § 1981 which states, in relevant part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

As the above quoted portion indicates, Section 1981 addresses a particular project—making and enforcing contracts—and lists a criterion or characteristic—racial discrimination—which has been statutorily declared no longer legitimate to the project. Race, then, is the criterion of irrationality under Section 1981.

Similar examples abound in our civil rights regulatory scheme. The Fair Employment Act of 1964 makes the same two-pronged distinction in such provisions as:

178. See Heart of Atlanta Motel, 379 U.S. at 250.
It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...181

Once again we see a covered social project—employment and incidents thereto—and, this time, a small set of prohibited criteria—race, sex, national origin, religion, and color—declared irrational under the Act.

The statutes just quoted and other similar enactments address issues involving basic human dignity, individuality and self-respect. Intrusion into the particular project—housing, employment and the like—of an arbitrary consideration, such a race or sex, offends our deeply held beliefs in the inherent dignity which our society must accord to each individual. We understand that discrimination based on race, sex, color, religion and national origin is most often arbitrary because, such criteria seem to be unrelated to the particular project. Racial discrimination, for example, tells us nothing about an individual's ability to perform work or to act as a responsible property owner. Refusals to hire incompetent applicants or rejections of rowdy persons' applications to lease apartments, by contrast, seem rational since the former is clearly related to the ability to perform work and the latter is relevant to whether the individuals will be peaceful, respectable tenants.182 Furthermore, such discrimination severely impedes
the ability of deserving and qualified individuals to compete for certain goals—jobs, houses and the like—on a fair and reasonable basis. Irrational discrimination robs individuals and groups of economic integrity, personal dignity and social status. Whatever arguable benefits derive from the practice of certain forms of bigotry are dwarfed by the enormity of the damage prejudice engenders.

Clearly, the underlying rationality of civil rights enactments mirrors concepts of rationality under equal protection analysis. Both look to projects, goals, means, and effects to determine whether certain classifications are rational. The determination of rationality is predicated on a cost/benefit analysis vitalized by concepts of dignity, self-respect, and protection of individuality. Indeed, as the following precedents emphasize, civil rights laws are properly within Congress' legislative authority because such statutes are, at the very least, rational enactments offending no constitutional provisions limiting Congress' powers.

1. Public Accommodations—The Revitalization of Statutory Civil Rights

In 1883, the Supreme Court struck down the public accommodations portion of the Civil Rights Act of 1875, holding that it was an improper attempt to regulate "social rights" and social interaction not subject to congressional control even under that body's broad thirteenth amendment powers to proscribe "badges and incidents of slavery." Nearly a century later, Congress again attempted to regulate racial, color, religion, and national origin discrimination in access to public accommodations, this time with greater success. The intervening century's lessons on racial tolerance—accented, perhaps most heavily, by the anti-segregation decisions of the mid 1950s—did not prompt Congress to reenact the public accommodations provisions under the thirteenth amendment, the constitutional provision banning slavery and its vestiges. Rather, Congress premised the Public

of discrimination would shield the discrimination from remedy. The self-perpetuation of irrationality cannot render the arbitrary classifications rational and untouchable. See, e.g., infra notes 331-57 and accompanying text regarding affirmative action.

183. The Thirteenth Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII.

184. The Civil Rights Cases, 109 U.S. 3, 22-25 (1883). The majority averred:

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater or deal with in other matters of intercourse or business.

Id. at 24-25.

Accommodations Act\textsuperscript{186} on its authority to regulate interstate commerce.\textsuperscript{187} Recognizing both Congress' expansive discretion to isolate and correct burdens on commerce and the attendant authority to use that power to legislate against immoral conduct, the Supreme Court upheld the constitutionality of Title II.\textsuperscript{188}

Speaking for the Court, Justice Clark established the standards for review which are echoed whenever civil rights legislation is subjected to constitutional scrutiny. First, Congress need only show that it had some "rational basis" to discern that the statutorily prohibited behavior falls within an area over which the Constitution grants the legislature regulatory supervision, which in the case of the Public Accommodations Act, was the commerce power.\textsuperscript{189} Second, Congress must demonstrate that the classificatory means chosen reasonably and appropriately address the goal, problem or project.\textsuperscript{190} Thus, the general tenor of the rationality analysis under civil rights legislation is strikingly similar to that discussed under equal protection analysis.

The Government had little trouble demonstrating to the Court that the Public Accommodations Act addressed a serious problem regarding burdens on interstate commerce. The carefully prepared legislative record, culled from hearings and testimony, established that millions of individuals travel on the nation's roadways and airways. These travelers, through both their physical presence and the money they spend, affect the flow of interstate commerce. Racial and ethnic discrimination, however, severely affected the ability of many individuals to travel. Refusals of service in hotels and restaurants compelled discriminatees to travel undue distances to find basic sustenance or lodging. Such discrimination, Congress determined, was nationwide.\textsuperscript{191}

Interestingly, Congress' project to regulate racial, religious, and national origin discrimination in public accommodations was rational, because the prohibited behavior was irrational. Running a hotel or a restaurant, Congress determined, involves any number of legitimate, rational considerations but the race of a customer is not numbered among them. Race and ethnicity clearly are irrational considerations since skin color and ancestry in no manner indicate whether the individual will be a peaceful, orderly, paying customer. Similarly, the burdens on commerce engendered by such discrimin-

\textsuperscript{186} Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq. (hereinafter referred to as "The Public Accommodations Act" or "Title II").

\textsuperscript{187} U.S. Const. art. I, §§ 8(3), (18).


\textsuperscript{189} Heart of Atlanta Motel, 379 U.S. at 258-259.

\textsuperscript{190} Id.

\textsuperscript{191} Id. at 253. Earlier cases had established that the concept "commerce" covers "every specie of commercial intercourse" including permanent or temporary migration of individuals. Id. at 254-256. See also McClung, 379 U.S. at 299 (Congress properly regulated racial discrimination in eateries which affect commerce by either catering to interstate travelers or by purchasing food in interstate commerce).
ination outweigh the arguable benefits enjoyed by the discriminators. *Heart of Atlanta Motel* and *McClung* sounded a principle that would become a hallmark of the rationality underlying civil rights laws: the behavior under prohibition is itself *irrational*.

Had the Court ended its discussion at this point, we would nonetheless have strong evidence to link our definition of equal protection rationality to that of civil rights laws. The Court, however, said more. It was clear to the Court, as it was to all concerned, that while the impact on commerce was genuine, triggering constitutional remedial legislation by Congress, the social morality of the Public Accommodations Act in particular, and the entire Civil Rights Act of 1964 more generally, emphasized that certain discrimination would no longer be acceptable social conduct under certain circumstances. Racial, ethnic, and religious discrimination limiting access to public accommodations was legislatively declared to be unlawful, not simply because of its manifest economic burdens on the stream of national commerce, but also because such discrimination offends the newly revived, communal sense that people should not be judged by criteria as arbitrary as race and color. The legislation, then, was profoundly moral, regulating discriminators for acting out their discriminatory impulses. Indeed, rejecting arguments that Congress acted illegitimately when applying a constitutional power implicating economic considerations, such as commerce, to delineate moral conduct, the Court embraced the moral thrust of the statute, citing with approval the Senate Committee report which acknowledged that the main purpose of Title II was "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public accommodations.'"193

Identically, in *Daniel v. Paul*, the Court held that the Title covers amusement parks which cater to interstate travelers or which receive supplies through interstate commerce. Addressing whether the statutory definition of "public accommodation" includes places where individuals entertain themselves, such as amusement parks, the Court concluded:

Admittedly, most of the discussion in Congress regarding the coverage of Title II focused on places of spectator entertainment rather

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192. *Heart of Atlanta Motel*, 379 U.S. at 257.
193. *Id.* at 250 (citing Senate Report No. 872 at 16-17). In his concurring opinion, Justice Goldberg reemphasized the integral concept of personal dignity jeopardized through denials of access to public accommodations. "The primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics." *Id.* at 291-292 (Goldberg, J., concurring).
195. Section 201(b) of 42 U.S.C. § 2000a(b) states in pertinent part:
Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce.

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment.
than recreational areas. But it does not follow that the scope of § 201(b)(3) should be restricted to the primary objects of Congress’ concern when a natural reading of its language would call for broader coverage. In light of the overriding purpose of Title II “to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public, H.R. Rep. no. 914, 88th Cong. 1st Sess., 18, we agree with the en banc decision of the Court of Appeals for the Fifth Circuit in Miller v. Amusement Enterprises, Inc., 394 F.2d 342 (1968), that the statutory language “place of entertainment” should be given full effect according to its generally accepted meaning and applied to recreational areas.\footnote{196}

Title II, then, conforms with the basic definition of a civil rights statute: 
(1) there is a social project of fundamental importance to preservation of individual dignity, economic integrity and social status; 
(2) there is a set of protected classes; and, 
(3) a social cost/benefit analysis shows the harm of the discrimination outweighs the harm of outlawing the discrimination.

2. Racial Discrimination in Property—A Rebirth of the Thirteenth Amendment

Jones v. Alfred H. Mayer Co.\footnote{197} set forth the dual holding that 42 U.S.C. § 1982, Congress’ statutory proscription against racial discrimination in property transactions,\footnote{198} applies to private as well as governmental discriminators and that Congress’ regulation of private discrimination under section 1982 is within its scope of powers to enforce the anti-slavery mandate of the thirteenth amendment.\footnote{199}

Reviewing both the plain language and complex legislative history of section 1982,\footnote{200} the Court in Jones concluded:

\footnotetext{197}{392 U.S. 409 (1968).}
\footnotetext{198}{“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982.}
\footnotetext{199}{See supra note 183 (quoting text of thirteenth amendment).}
\footnotetext{200}{The majority engaged in a lengthy review of section 1982's predecessor statute, the Civil Rights Act of 1866, to determine if the original empowering Congress intended the 1866 Act’s property provisions to reach private as well as official acts of discrimination. The Court found convincing evidence to answer that inquiry in the affirmative from the statements of representatives and senators, and studies used by those legislators, accenting the pervasive problem of private discrimination. Jones v. Alfred Mayer Co., 392 U.S. 409, 422-429 (1968).}
Whenever property is placed on the market for whites only, whites have a right denied to Negroes. . . . [§ 1982] must encompass every racially motivated refusal to sell or rent. . . .

Next, addressing the constitutionality of section 1982 and its predecessor, the Civil Rights Act of 1866, the Court held that section 2 of the thirteenth amendment bestows upon Congress the power to eradicate, through the passage of necessary and proper legislation, all badges and incidents reminiscent of the institution of slavery. Only by reaching such badges and incidents, both public and private, can the full force of the thirteenth amendment’s purpose as “an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States” be fulfilled.

Court held that the 1870 recodification in no manner reflected a retreat from the thirteenth amendment underpinnings of the 1866 Act. To the contrary, the additional reference to the fourteenth amendment was, at most, an attempt to fortify, not to reject, the 1866’s Act constitutional premises. Alfred Mayer, 392 U.S. at 436-437.

Justice Harlan, joined by Justice White, dissented from this interpretation of legislative history finding that in both its original form and as recodified in 1870, the 1866 Civil Rights Act was not designed to reach purely private discrimination. Id. at 451-475 (Harlan, J., dissenting).

As mentioned infra at note 224, as of this writing the Supreme Court has decided to review its earlier determination that the 1866 Act’s prohibition of racial discrimination in contracts, now codified at 42 U.S.C. § 1981, likewise reaches private conduct. A reversal of interpretation regarding section 1981 would portend a similar reversal of interpretation of section 1982.

200. Id. at 421 (footnote omitted, emphasis added).

202. Id. at 439.

203. Id. at 438 (quoting the Civil Rights Cases, 109 U.S. (16 Wall.) 3, 20 (1883)). The Court explained that section 1 of the thirteenth amendment by its own force eliminates slavery and involuntary servitude. No act of Congress is required to proscribe public or private slavery of individuals. Congress, however, has legislated in this area. See 42 U.S.C. § 1994 (“Peonage Abolished”); 18 U.S.C. §§ 1581-88 (Criminalization of Slavery and Peonage). Section 2 of the amendment, by contrast, invites Congress to legislate against “badges and incidents” of slavery—those forms of treatment foisted upon individuals which recall the deprivations of rights, dignity and freedom which were the hallmarks of slavery as an institution.

It appears to be an unsettled question whether private persons, without recourse to specific congressional enactments, may articulate and litigate privately felt badges and incidents of slavery under the thirteenth amendment in a manner similar to individual challenges against governmental action pursuant to the Constitution’s due process and equal protection clauses. Formerly, the answer seemed to be an unequivocal “no.” See Palmer v. Thompson, 403 U.S. 217, 226-227 (1970); Alma Soc’y Inc. v. Mellon, 601 F.2d 1225, 1236-1238 (2d Cir.), cert. denied, 444 U.S. 995 (1979). However, the Court, in City of Memphis v. Green [451 U.S. 100 (1981)] permitted private individuals to challenge the erection of a barrier across a public street which, plaintiffs asserted, deliberately and invidiously divided the community along racial residential patterns in an effort to segregate black and white residents. City of Memphis v. Green, 451 U.S. 100 (1981). The challengers premised their arguments on both 42 U.S.C. section 1982 and section 1 of the thirteenth amendment. The Court reserved the question whether section 1 of the thirteenth amendment permits private individuals to file claims of discrimination absent an enabling Congressional statute finding that the plaintiffs’ claims did not possibly amount to a badge of slavery. City of Memphis, 451 U.S. at 125-26. The fact that the Court entertained the question whether the street closing alone was a violation of the thirteenth amendment indicates that individuals may be able to press privately conceived legal theories of badges and incidents of slavery at least when challenging governmental action.
As further emphasized by the Court, the legislative history surrounding the passage of the thirteenth amendment accented that the anti-slavery provision in the Constitution could indeed "destroy all these discriminations in civil rights against the black male; and if . . . [it] cannot, our constitutional amendment amounts to nothing."\(^{204}\)

With the foregoing as the backdrop, the Court described in clear and unequivocal terms the threshold Congress must satisfy to establish the constitutionality of civil rights enactments passed pursuant to the thirteenth amendment. Identical to its powers to regulate interstate commerce:

[Congress has the power] *rationally to determine* what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.\(^{205}\)

Section 1982, the Court concluded, is rational since a century of precedent established that the rights to acquire, use and dispose of property are fundamental.\(^{206}\) The Court accented the indignity and humiliation associated

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\(^{205}\) *Id.* (emphasis added).

\(^{206}\) *Id.* at 441-443. The Court additionally attempted to assert that the underlying premises of the Civil Rights Cases were unquestioned by the Jones rationale. *Id.;* Civil Rights Cases, 109 U.S. 3 (1883). In the former case, the court held that the Civil Rights Act of 1875's prohibition against racial discrimination in public accommodations could not be premised upon Congress' thirteenth amendment powers. Access to public accommodations, the Court argued, involved not "fundamental rights," but "social rights." The thirteenth amendment only enables Congress to legislate in fundamental rights areas, meaning realms such as property and contract. *See supra* note 184 and accompanying text.

The dichotomy between "social" and "fundamental" rights appears unclear. Although the Jones Court purported to leave this distinction untouched, particularly noting that the question of congressional regulation pursuant to the thirteenth amendment of discrimination in public accommodations had been rendered academic by the Public Accommodations Act of 1964, it seems clear that the underlying concept of the "social-fundamental" rights distinction was severely undermined. The impression emanating from the Civil Rights Cases is that the judiciary will rely primarily on its own best judgment to determine "fundamental" from "social" rights. The tenor of Jones is distinctly different, holding that the judiciary will not undercut Congress' rational determination that some form of discrimination amounts to a badge or incident of slavery. As Professor Tribe observed:

If Jones is read literally, Congress possesses a power to protect individual rights under the thirteenth amendment which is as open-ended as its power to regulate interstate commerce. Seemingly, Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination and thus an aspect of slavery, and proscribe such infringement as a violation of the thirteenth amendment. On this view, Congress would possess plenary authority under the thirteenth amendment to protect all but the most trivial individual rights from both governmental and private invasion.

The Supreme Court, however, has had no occasion to consider whether Jones means what it says.

*Tribe, American Constitutional Law, supra* note 17, at 259 (1978). To be sure, the courts have the last word regarding the legality of a congressional determination that a certain classification or action does indeed amount to a badge of slavery. *See Washington v. Finlay, 664 F.2d 913, 927 (4th Cir. 1981), cert. denied, 457 U.S. 1120 (1982); cases cited at infra* note
with racial discrimination in property. The exclusion of blacks from a
community, the Court argued, becomes a privately performed substitution
for the infamous Black Codes. Indeed, "when racial discrimination herds
men into ghettos and makes their ability to buy property turn on the color
of their skin, then it too is a relic of slavery." The underlying rational
basis sustaining civil rights enactments that proscribe racial discrimination
in property transactions mirrors the definitions of rationality under Equal
Protection analysis. Nothing less than basic human dignity, self-respect and
the ability to function in society as full persons underlie the rationality of
section 1982. As the Supreme Court emphasizes, the ability to compete for
and to use property without the imposition of irrational criteria such as
race is integral to freedom in society.

Furthermore, as we saw in the realm of public accommodations, the
essence of the rationality of the civil rights enactment stems from the
irrationality of the very discrimination that the rational statute seeks to
control. The Court's analysis supports the argument that, as a matter of
societal morality, race is irrelevant to—has nothing legitimate to do with—
those projects associated with property transactions. When the sellers impose
a racially based requirement, unlike setting a price, they introduce an
irrelevant, irrational criterion into the transaction.

In dissenting from the majority in Jones, Justice Harlan argued that
section 1982 is more humble, simply removing governmental barriers that
promote or permit private discrimination. But, the majority totally rejected

the courts will rely on the moral-political cost/benefit constructs discussed in earlier sections
of this article. Nevertheless, Jones instructs that courts must not substitute their concepts of
rationality unless the congressional enactment is utterly devoid of any rational content. The
defense to Congress—indeed, the seeming thrust of Jones, encouraging Congress to unearth
and legislate against badges of slavery—stands in sharp contradistinction to the inflexible,
stasis-oriented holding of the Civil Rights Cases.

207. Jones, 392 U.S. at 442-443.
208. See id. at 445. Justice Douglas offered an interesting inversion of the foregoing
discussion of rationality. He emphasized that racial discrimination harms whites as well as
blacks:

The true curse of slavery is not what it did to the black man, but what it has done
to the white man. [For slavery made whites feel superior in] character, intelligence
and morality. [And it increased the cruelty of whites towards their fellows].
Jones, 392 U.S. at 445 (Douglas, J., concurring).

Now, there is a certain unseemly arrogance in arguing that the "true curse of slavery"
was felt by the slave-owning race rather than by those who, through no fault of their own,
were treated in unspeakable ways both prior to and after the purported emancipation. Perhaps
Justice Douglas, a noted and concerned humanitarian, meant something else. His argument
that discrimination and bigotry demeans, harms and humiliates the bigot as well as the victim
is profound and demonstrates that irrational prejudice hurts and degrades every societal
member which adds impetus to eliminate this most repulsive form of human behavior.

209. Id. at 452-453, especially n.9 (Harlan, J., dissenting). This has become known as
the "legal capacity" concept which argues that statutes such as section 1982 were not designed
to forbid private discrimination. Rather, such laws remove official supports or barriers thereby
bestowing upon the formerly downtrodden group the "legal capacity" to buy property or
negotiate contracts if they can find a willing party with which to transact such business.
Justice Harlan's interpretation. Section 1982, the Court reasoned, confers an affirmative right to be free from racially discriminatory behavior in property transactions, and not the mere ability to attempt to find a private owner willing to sell to minorities. Indeed, the Court noted that the thirteenth amendment would be but a paper guarantee if:

Congress were powerless to assure that a dollar in the hands of the Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.\textsuperscript{210}

3. Fair Housing Legislation—A New Dimension in Thirteenth Amendment Law

The foregoing discussion of general property transactions holds equally true for rental, sale, and the provision of housing under the Fair Housing Act of 1968,\textsuperscript{211} which Congress specifically enacted to address the singular problems of discrimination within the housing market.

The Fair Housing Act generally forbids not only racial and color premised actions but also ethnic, religious, and gender based discrimination affecting an individual’s opportunities to compete for and enjoy housing.\textsuperscript{212} Moreover, The Fair Housing Act reaches private as well as public conduct. The constitutional basis for this breadth of coverage is not the Commerce Clause, but, as with section 1982 of the United States Code, the thirteenth amendment. Every court addressing the question has agreed that Title VIII is a valid thirteenth amendment enactment.\textsuperscript{213} Therefore, concepts of rationality extend beyond the questions of race that underlay the passage of the anti-slavery amendment and allow Congress to protect various groups and individuals from deprivation of access to housing on an irrational basis such as national origin, color, religion or sex.\textsuperscript{214}

\begin{footnotes}
\item[210.] Id. at 443.
\item[211.] Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601.
\item[212.] See 42 U.S.C. § 3604(a)-(e).
\item[214.] See Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, 12 Houston L. Rev. 1, 7-15 (1974); Calhoun, The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination, 61 Minn. L. Rev. 313, 349-362 (1977). Although the cases concern racial discrimination, there is no suitable basis to restrict Congress' powers under section 2 of the thirteenth amendment to address only racial and national origin discrimination. See supra note 213 (citing cases that concern racial discrimination). As a threshold point, the due process and equal protection components of the fourteenth amendment, by their own force, cover gender discrimination in particular and all forms of arbitrary discrimination against all groups and individuals in
\end{footnotes}
To illustrate this new direction in thirteenth amendment law, the Supreme Court has enforced Congress’ mandate against housing discrimination by recognizing the broadest standing to sue permitted by Article III of the Constitution. Indeed, the Court has recognized that housing discrimination is so dysfunctional in our society that individuals may bring suit and claim general. See supra notes 8-44 and accompanying text. It is unclear why the thirteenth amendment, the historical origins of which show it protects interests as fundamental as those contained in the fourteenth amendment, should be read less generously.

Secondly, it is long established that section 1 of the thirteenth amendment “[f]orbids any . . . kind of slavery, now or hereafter.” Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72 (1872) (emphasis added). Thus, the thirteenth amendment’s protection is not limited to racially based seritude.

Third, both proponents and opponents saw the thirteenth amendment reaching beyond slavery issues. Speaking in opposition, Senator Howard stated, “I suppose before the law a woman would be equal to a man, would be as free as a man.” Buchanan, supra at 9 (quoting Cong. Globe, 38th Cong., 1st Sess. at 1488 (1864)). Similarly, according to Professor Buchanan, “the proponents of the amendment wanted to protect the civil liberties of all persons, whites as well as emancipated blacks. Here, the pro-amendment faction was basing its arguments on the Lockean presupposition of natural rights and the protective function of government.” Id. Congress, then, saw an expansive and vibrant thirteenth amendment.

Finally, and most important, the thirteenth amendment is “a denunciation of a condition and not a declaration in favor of a particular people.” Hodges v. U.S., 203 U.S. 1, 16-17 (1906); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); see also Calhoun, supra at 346-47. The amendment makes no specific reference to race. Moreover, insofar as it protects whites as well as blacks, the amendment does not appear to require that a protected class has actually experienced consistent treatment similar to black slavery in ante bellum America. See McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 285-96 (1976). This implies Congressional authority as broad as the previously discussed language of Jones would allow. See supra notes 200-13 and accompanying text; see also Calhoun, supra at 355-362; Buchanan, supra at 1076-77.

Certainly, deprivation of rights on bases distinct from, but analogous to, race may place individuals in a status of quasi-servitude. The person who is denied housing or the opportunity to form contract because of gender or religion is no less disadvantage than if the opportunity was withheld on the basis of race. The experience of slavery should sensitize Congress and the states to legislate against numerous forms of discrimination perpetuated against myriad groups. Slavery’s shameful history should not become the excuse to limit Congress’ authority to protect all individuals from arbitrary treatment.

If the enacting Congress had wished to limit the thirteenth amendment to address only racial discrimination it could have done so, as it did with the fifteenth amendment prohibiting racial discrimination in voting. That Congress chose not to so limit speaks forcefully for full coverage of the thirteenth amendment.

215. See, e.g., Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 (1979). The requisites a litigant must satisfy to demonstrate standing to sue are implicated in Article III of the Constitution which establishes the judicial branch of the Federal government. In addition to the “Article III minima,” requiring a plaintiff both to present an actual case or controversy and to allege some form of personally felt injury suitable for judicial redress, the federal courts have often applied a set of so-called “prudential considerations” which must be satisfied before a court will hear the plaintiff’s case. See Warth v. Seldin, 422 U.S. 490, 498-499 (1975). Congress, however, by direct enactment or by necessary implications stemming therefrom, may eliminate the prudential considerations leaving only the Article III requirements. As Title VIII demonstrates, statutory waiver of prudential standing considerations is common in civil rights cases.
damage stemming from discrimination committed against others. In Trafficante v. Metropolitan Life Insurance Co.,\textsuperscript{216} the Supreme Court held that both a black and a white resident of a large apartment complex in San Francisco stated claims under Title VIII alleging that the landlord's racially discriminatory practices resulted in the creation of a "white ghetto." The plaintiffs averred stigmatization resulting from the discriminatory environment, as well as denial of the social, economic, and professional advantages of living in a nondiscriminatory housing complex.\textsuperscript{217}

Extending these arguments further, the Court held that Title VIII affords a cause of action to "testers" who, because of their race, are given false or misleading information regarding housing.\textsuperscript{218} "Testers" are individuals who approach a landlord or realty agency pretending to be interested in renting or buying homes for the purpose of discovering—testing—whether the landlord or agent will discriminate on an impermissible basis.

After the encounters with the realty agents, the testers compare experiences particularly with regard to the location and type of dwellings made available for inspection. Often, testing reveals that otherwise similarly situated testers are sent to inspect dwellings in mostly minority, mostly white or racially mixed neighborhoods depending on the tester's race. Such race conscious manipulation, known as "racial steering," constitutes not only evidence of discrimination which bolster the case of a \textit{bona fide} customer, but also actionable damage to the testers themselves. Testers, 

\begin{footnotes}
\item[216] 409 U.S. 205 (1972).
\item[217] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972). \textit{Id.} at 210. \textit{See also} Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 111 (1979) (federal court may entertain properly pled action alleging that "transformation of a . . . neighborhood from an integrated to a predominantly Negro community is depriving [plaintiffs] . . . of the social and professional benefits of living in an integrated society").

Such allegations underscore the fundamental policy of the Fair Housing Act "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. One court defined the purpose of the Act to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." Opeto v. New York City Housing Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

The Supreme Court has similarly noted that black individuals denied membership, as well as white individuals adversely affected thereby, may sue a purportedly private club for engaging in unlawful racial discrimination under 42 U.S.C. § 1982 if membership in or use of the club are incidents of property ownership or residency in a given community. \textit{See, e.g.}, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969); Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431, 437 (1973).


When a plaintiff brings an action under that Title II, the Public Accommodations Act, he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a "private attorney general" vindicating a policy that Congress considered of the highest priority Newman, 390 U.S. at 402 (footnote omitted).
\end{footnotes}
therefore, have standing to sue in their own right, alleging that they received false or misleading information about available housing. In this way, any concerned individuals may participate in the social project, established by Title VIII, to restructure acceptable behavior in the realty market by ferreting out unlawful discrimination.

The housing discrimination cases reaffirm and enrich the definition of rationality. Under Title VIII, Congress enlarged the protective power of the thirteenth amendment to cover badges and incidents of slavery affecting not only race, but other arbitrary criteria as well. It is a badge of slavery, and therefore an irrational act, to discriminate in housing transactions on the basis of race, sex, color, national origin, and religion. A statute that proscribes such irrational behavior is, therefore, a rational enactment.

In keeping with this expanded concept of "rationality," courts have accorded the most lenient standing requisites permitted under the Constitution. Any person may become active in promoting the new regime of equality and dignity promised by the Act.

These measures that give vigor and vitality to The Fair Housing Act reflect and underscore the fact that Title VIII's purpose is to ensure that all persons will be free from the humiliations, inconvenience, and indignity of housing discrimination based on race, sex, and national origin.

4. Racial Discrimination in Contracts—Rationality Theory Extends Beyond Mere Economic Issues to Promote a More General Project of Equality

A noteworthy holding, issued eight years after Jones, reaffirmed both Congress' broad powers under the thirteenth amendment and the irrationality of racially based discrimination. Runyon v. McCary held that section 1981 of Title 42 of the United States Code's proscription against racial discrimination in contractual transactions prohibits a private, secular school from excluding qualified students on the basis of race.

219. Coleman, 455 U.S. at 373-378. Specifically, the tester's cause of action emanates from section 3604(d) of title 42 of the United States Code which prohibits realtors from giving racially premised false or misleading information. Under the Coleman facts, for instance, the white testers were given no racially based misinformation regarding the availability of dwellings while black testers were falsely told that no dwellings in predominately white neighborhoods were available for rent. Thus, the white testers, who received only accurate information were not victims of discrimination while the black testers victimized by the receipt of misleading information, had standing to sue despite the fact that they never intended to purchase or rent.

Id.

Testers may have alternative routes to sue if discriminated against on an impermissible basis. See, e.g., Watts v. Boyd Properties, Inc., 758 F.2d 1482, 1485 (11th Cir. 1985) (tester may sue under 42 U.S.C. § 1982).


221. The pertinent text of 42 U.S.C. § 1981 reads: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens."
Similar to section 1982, Congress originally included the proscription of section 1981 in the Civil Rights Act of 1866. The Court, therefore, examined the legislative history and express wording of the earlier statute to determine whether section 1981 reaches the allegedly offensive conduct in Runyon. The Court concluded that, like section 1982, section 1981’s proscription only covers race, however, the coverage applies to both private and official discrimination. Recalling the discussion in Jones, the Runyon majority reasoned:

Just as in Jones a Negro’s § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro’s § 1 right to “make and enforce contracts” is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.

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222. See supra notes 198-211 and accompanying text.


224. Runyon, 427 U.S. at 168-171. Commenting on the various revision of the United States Code that re-enacted the Civil Rights Act of 1866, the Court held that the revisers intended to link Congressional authority to enact what eventually was codified as section 1981 of Title 42 of the United States Code to both the thirteenth and fourteenth amendments. Thus § 1981, predicated in part on the thirteenth amendment, was intended to reach private conduct. Id. at 168 n.8. See also supra note 200.

In his dissenting opinion, Justice White argued that the legislative history demonstrates that while section 1981 was originally part of the Civil Rights Act of 1866 and, therefore, a thirteenth amendment enactment, it was shortly thereafter recodified under first the Voting Rights Act of 1870 and later the Revised Statutes of 1874, both premises solely on the fourteenth amendment. Accordingly, Justice White contended that the Voting Rights Act and its progeny addressed only governmental actions.

As of this writing, the Court sua sponte has ordered a re-examination of its determination that section 1981 reaches private conduct. Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988) (per curiam). As accented by the following discussion, a reversal of Runyon would constitute a devastating backwards turn in the otherwise expanding judicial and congressional sensitivity to promoting dignity, selfhood, and economic integrity through civil rights law. See Patterson, supra at 1421-23 (Blackmun, J., Stevens, J., dissenting).

225. Id. at 170-171 (footnote omitted). The Runyon Court noted that the “private school” in question advertised and otherwise offered opportunities to apply for admission “to members of the general public.” Id. at 172. Thus, the Court observed that although the schools were privately run and received no government money, “their actual and potential constituency . . . is more public than private.” Id. at 172 n.10 (quoting McCrary v. Runyon, 515 F.2d 1082, 1089 (4th Cir. 1975) (en banc)). It must be emphasized, however, that these clarifications were not intended to modify the general holding that section 1981 covers private as well as official
Once again, the definition of a rationality is reiterated, this time in the context of racial discrimination in contracts. The majority in Runyon rejected Justice White's dissenting views that essentially repeated the "legal capacity" argument that Justice Harlan offered in Jones. In Runyon Justice White argued that at the heart of traditional contract law rests the dual notion that all individuals must have the opportunity—the capacity—to compete in society to negotiate contracts. Justice White continued, however, that no individuals in a free society should be forced to contract with a party against their will.

Yet, the right to make and enforce contracts is not absolute now, nor was it ever intended to be. Indeed, contract law is fraught with rules and limitations affecting individuals' absolute liberty to make any contract they want at any time under any terms with any party. It is surely true that, as a general matter, individuals are not compelled to contract with others, yet, under the limited circumstances covered by section 1981, Congress, exercising its powers under the Thirteenth Amendment, recognized a greater priority. Although not mandating that any given individual must contract with another given individual, section 1981 informs that refusals to contract solely because of race places those discriminatees in a slave-like status. Not even the usual cherished belief in freedom of contract permits society to condemn classes of individuals to badges of slavery and commercial impotency.

Several commentators have accented heavily the fact that the defendant schools "regularly and widely advertised for applicants..." See Rotunda, Nowak & Young, supra note 160, at 748. Yet, aside from the limitation on the Runyon holding stated in the paragraph above, it is doubtful that the advertising played a very important role in the Court's determination. Presume that section 1981 excepts truly private clubs and that the schools in question qualify as such organizations. Under those circumstances, certainly, the private groups have the right to advertise for members. The only infirmity, then, was that the advertising was a bit misleading as it failed to mention the racial restriction. The appropriate remedy would be to rewrite the ad copy.

Suppose, by contrast, that the schools are not truly private clubs. The nonprivate nature of the schools brings them under the ambit of section 1981 regardless of whether they advertise or not. It appears immaterial whether the schools advertise extensively, a little bit, or not at all. If the schools cannot come under a "private club" or "right of privacy" exception, the civil rights laws attach. Indeed, under such circumstances, it would make no difference if the schools declared in their advertisement that: "Blacks Need Not Apply." Boldly announcing unlawful prejudices does not make them legitimate. The fact that the schools advertised extensively, therefore, was hardly dispositive of the holding, although it certainly indicates that the schools are not private clubs.


The underlying rationale for section 1981—the rational basis that rendered it constitutional under the thirteenth amendment—accented why racially based refusals to contract are both abhorrent and socially immoral. As the Runyon Court explained, the ability to make and enforce contracts is integral to the personal, social, and economic integrity of individuals. Additionally, a rational Congress could legislate that race is unrelated to the projects of making and enforcing contracts.

Thus far, the Runyon opinion demonstrates that contracts, as other transactions, may be regulated by rational civil rights enactments. The opinion, however, offers considerably more for analysis. After establishing the bedrock holding that section 1981 proscribes private as well as governmental discrimination, the Runyon majority addressed three constitutional challenges brought against the application of section 1981 to enrollment contracts in private schools.

First, the defendants asserted their first amendment right to freedom of association, that is the right to engage in association for the advancement of beliefs and ideas . . . [which may be integral to] effective advocacy of both public and private points of view, particularly controversial ones. . . . 228

The Court replied that the right of free association permits parents:

to send their children to educational institutions that promote the belief that racial segregation is desirable. . . . But, it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. 229

Therefore, the Court determined that while invidious private discrimination may be a form of freedom of association, it enjoys no affirmative constitutional protection and may be subject to remedial legislation under the thirteenth amendment. 230 Moreover, the Runyon Court accented, the school remains free to preach racial separatism. 231
The Court similarly rejected the parents' claim that applying section 1981 to private schools infringes on their constitutional right to parenting.\textsuperscript{232} The majority in \textit{Runyon} acknowledged that the Constitution accords parents the freedom to beget and raise children as they see fit with minimal governmental intrusions. For this reason, parents are free to reject the state school system, opting instead to enroll their offspring in private schools that accent certain educational themes and preach chosen social ideology.\textsuperscript{233}

These freedoms, however, are not without limits. For example, while the states may not prohibit the very existence of private schooling, they may set reasonable minimum educational requisites that states deem necessary to permit students to function in society. A similar imperative, the \textit{Runyon} Court decided, arises if Congress prohibits a school from imposing a badge of slavery upon innocent children and their parents. Recalling its conclusions regarding freedom of association, the Court stated that a school may teach racial separatism but it can not limit its enrollment on racial grounds.\textsuperscript{234}

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\item The Court in \textit{Bob Jones} considered whether the withholding of a governmentally granted tax advantage is a political decision uniquely within the policy-making powers of Congress. The question whether a private, sectarian school must violate deeply held and integral religious tenets by enrolling minority children is a different issue. Still, as the Court in \textit{Bob Jones}
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The defendants articulated similar concerns under more general notions of the right to privacy emanating from the Constitution, particularly from the fourteenth amendment. Again the majority rejected the parents' assertions, noting that the usual freedom from governmental interference in rearing children may give way to certain important regulations affecting the "implementation of parental decisions concerning a child's education." The Court discerned no undue intrusion undermining a parent's right to educate their children. Indeed, the Court's rationale implies that section 1981, in conjunction with section 1982 and other civil rights statutes, reflects a congressional desire to achieve racial equality. The purported privacy interests asserted by the parents would substantially hinder fulfillment of this important national goal. The Court, although not saying so directly, envisioned the elimination of racial discrimination in contracts as a tremendous social project that includes, to some degree, the compelled interrelations and interactions of different races.

Despite the adamant tone of the Runyon opinion, it is not clear that the right to control the education and upbringing of one's children coupled with the right to private schooling should not include an attendant right to limit the social contacts one's children will need, including contact with children of other races. Bigoted parents might cogently argue that forcing their young and impressionable children to attend school with an interracial student body severely undermines the discriminatory teachings of home and school, which, according to the Runyon opinion, both parents and teachers have the constitutional right to promote.

Moreover, it is quite possible that the very presence of children of different races will chill the message of discrimination that the school may wish to promote. To begin with, certainly a private school cannot racially segregate minority students into separate facilities or specially demarcated portions of classrooms, gyms, and dining halls. To engage in such segre-

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235. Runyon, 427 U.S. at 177-179. See generally Tymas, supra note 17, at Chapter 15.
236. Runyon, 427 U.S. at 178.
238. Cf. Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that state could not compel Amish families to send their children for further schooling after completion of the eighth grade). In Wisconsin v. Yoder, the Supreme Court noted that:

The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

Id. at 218.
gation would impose different contractual terms on students solely because of their race in violation of section 1981.239

Secondly, it is possible that the presence of minority children will affect the separatist teachings purportedly protected in Runyon. Preaching white superiority or black inferiority may cause tremendous mental anguish for minority and majority students alike. This, in turn, may lead to fights, disruptions, and a general decline in the ability of students, especially minority students, to study effectively. Such disruptions of both study and social intercourse may amount to racially based breaches of contract presumably proscribed by section 1981.

Accordingly, it appears as though the Runyon Court's assertion that the rights under section 1981 may be easily reconciled with competing privacy, parenting, and associational rights is too glib. The Court should have recognized the problems inherent in attempting to facilitate the contrasting rights of racial minorities and parents who wish to send their children to private school. By opting for the solution it did, the Runyon Court boldly joined Congress in promoting a broad project of equality implicated by the passage of section 1981 and section 1982. Such a project, as the natural ramifications of the Runyon opinion imply, involves considerable restructuring of certain social relations.

Under the project of equality which was virtually mandated by the Runyon opinion, children of all races may be compelled to socially interact in school. Of course, no court order can compel recalcitrant children to play with, study with, or even speak with one another. Nevertheless, after Runyon, no individual in the United States will have a right to study in a racially homogeneous secular school environment. At the very least—assuming that a private school receives qualified minority applicants—white and black children will see each other, sit near each other, and be aware of one

239. The foregoing argument is not diminished by arguing that the facilities, although racial segregated, are nonetheless equal thereby providing each student with the same contractual terms. First, even if the facilities were equal, the very act of dividing the facilities along racial lines imposes per se racial considerations impermissible under section 1981. Cf., Brown v. Bd. of Educ., 374 U.S. 483 (1954) (compelled racial segregation of public schools is unlawful per se under fourteenth amendment). Secondly, it seems difficult to imagine that the facilities would be equal in a meaningful sense. Let us suppose that black children were made to sit in the back of an otherwise integrated classroom. Even if visual and acoustic access was not at all impaired for those in the back of the room, the very mandate requiring the black students into the back would be demeaning, affecting the contract of racially nondiscriminatory education that section 1981 guarantees. In fact, if blacks were made to sit in the front of the classroom, the discrimination would likely be no less humiliating because the white and black students would not be permitted to intermingle. At any rate, the use of a racial basis to determine which students will sit in the front or rear of the classroom is, at the very least, arbitrary.

Finally, as indicated above, the act of segregation would itself be humiliating because it would clearly be an index of the school's attitude regarding the alleged inferiority of black children. The imposition of a racially based term of a contract imposing humiliation and degradation upon the psyches of young children likely would invoke the prohibitions of § 1981. Cf. Brown v. Board of Educ., 347 U.S. 483 (1954).
another. Perhaps such compelled mingling may become a tentative, additional step towards promoting greater racial tolerance, if not appreciation and friendship.

Similar projects of equality abound in civil rights laws. While no statute can require individuals to integrate their circle of friends and lovers, Title II denies bigots the opportunity to patronize racially segregated public accommodations. Title VIII and section 1982 similarly proscribe the purported privilege to live in segregated apartment buildings or neighborhoods. Moreover, the Fair Employment Act prohibits racially segregated work environments. In many walks of life, the desire for segregation and the right to advocate segregation and to practice discrimination in private is mitigated and contradicted by legislatively and judicially mandated interfact of races.

The point of the foregoing is simply this: Runyon cannot be viewed merely as a case arguing that civil rights involves equalizing objective social functions such as making contracts to ensure that black dollars buy what white dollars buy. Much more is at issue than the simple formation of a garden variety contract in which “the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments.” The Court recognized a strong underlying social dynamic which holds that with such rights comes a certain amount of racial interaction, compelling prejudiced individuals to tolerate racial variety in society. Even young school children will not be immune from the opportunity to experience racially mixed social environments. Accordingly, the rationality of civil rights legislation involves a significant social experiment with all social actors as willing or unwilling participants, whose prejudices are tested as the insulations that we erect against social diversity are slowly chipped away. The rationality that supports our civil

240. See infra notes 244-72 and accompanying text.

241. Runyon, 427 U.S. at 172. Indeed, the Runyon Court was disingenuous by asserting that the contract at issue was simply an archetypal contractual transaction. The parents in Runyon were not buying cars, dishwashers, theater tickets or engaging in the usual commercial enterprises that are commonly acknowledged. The school experience represents the first time most children are separated from their parents for any length of time. It is at school that children first experience a world of other children—a world in which there are new rules, new demands, new experiences, new social structures—a world in which the individual child is no longer absolutely unique.

Surely responsible parents are not oblivious to the many and integral effects elementary education likely will have on their children. The choice of schools, then, is significantly important and cannot cogently be equated with such routine ventures as buying appliances, clothes, and the like.

As the foregoing discussion has shown, the Runyon opinion is extremely important in the realm of civil rights. The Runyon opinion’s viability and worth, however, cannot be supported by stating that all the Court did was to apply a statute on contracts to a simple contractual transaction.

rights laws includes a goal—a project—of reinventing social relationships to help create a society more free from irrational discrimination.\textsuperscript{243}

\textsuperscript{243} 457 (1982).

Clearly, the foregoing has a quixotic touch for statutes and legal holdings often fail to either comport with or to alter social realities. Many contemporary workforces are not free from unlawful discrimination, neither is housing or accesses to public accommodations. Moreover, admission and access to costly institutions such as private schools, country clubs are limited by the economic deprivations inextricably linked to discrimination. \textit{Cf.} Harris v. McRae, 448 U.S. 297 (1980) (holding that Congress may limit funding for abortions). The right to equal opportunity to compete for slots in a private school may hold little meaning if there are comparatively few minority families to enter into the competition. And, of course, the hatred and intolerance that emanates from bigotry may serve as disincentives for individuals to attempt to exercise their rights.

Nevertheless, the extant system of civil rights laws holds potential to eradicate large quantities of discrimination from society. Yet, as discrimination is uncovered and dealt with, other forms of discrimination arise or are discovered. Progressive steps towards a more tolerant and enlightened society must be considered as only the beginning.

243. The discussion thus far in Part III has presented a line of precedents covering a number of civil rights topics. The distinct impression left by the discussion may be that Congress and courts continually have evolved and expanded their notions of impermissible discrimination, which, to a large measure is true. The foregoing discussion and the following discussion addressing the Fair Employment Act present strong evidence of our federal government's ever growing intolerance of irrational discrimination.

It is necessary, however, to note cases that have limited, in some measure, the upward spiral of legal theory. In \textit{City of Memphis v. Green}, the Court held that a governmental act closing a street to vehicle traffic did not constitute a violation of either the Thirteenth Amendment or 42 U.S.C. § 1982 even though the closing resulted in an arguable line of demarcation separating a black from a white neighborhood which caused some traffic disruptions in the black area. 451 U.S. 100 (1981).

\textit{Green} was a remarkable case because the Court acted more like a finder of fact, analyzing the particular details of the Memphis street closing, than a court of appellate law that establishes legal standards for general applicability. \textit{See Green}, 451 U.S. 100, 130 (White, J., concurring). The \textit{Green} Court concluded that neither the thirteenth amendment nor section 1982 controlled the particular situation because the street closing did not result in any arguable disparate treatment affecting property on the basis of race. Specifically the Court found that the street closings did not violate section 1982 because (1) black residents would have been given the opportunity to petition for a street closing on terms equal to white residents had they so desired, (2) the closing resulted in no significant depreciation of property values, and (3) the closing did not significantly impede, hamper, or delay the flow of traffic into and out of the black neighborhood. \textit{Id.} at 120-124.

In a similar fashion, the \textit{Green} Court determined that no thirteenth amendment violation occurred. The Court reasoned that the street closing was predicated on genuine health and safety issues centering around noise and a continuous flow of fast moving traffic that endangered children as they moved to and from school. Indeed, the Court noted on several occasions that children have been struck by fast moving cars. The closing of the particular street, the Court concluded, stemmed the pace of dangerous traffic. \textit{Id.} at 124-129.

Moreover, the \textit{Green} Court discerned no racial discriminatory symbolism either from the street closing itself or from the manifest inconvenient rerouting of traffic into the black neighborhood. Any such impact, the Court concluded, had but a tangential relation to race. Because city neighborhoods often tend to become racial or ethnic, affecting the flow of traffic in neighborhoods unavoidably results in some racial or ethnic impact. The Court in \textit{Green}, however determined that this minor impact alone did not give rise to a badge of slavery but
rather exemplified "a routine burden of citizenship." *Id.* at 129.

Justice Marshall, joined by Justices Brennan and Blackmun, dissented in *Green*, finding that the street closing was patently discriminatory and unlawful. *Id.* at 135-155. Although acknowledging that before the street closing the heavy traffic on the street had posed a danger to school children, Justice Marshall accented additional factors indicating that the safety issue was facade to hide the true discriminatory intent of the city. He noted that the procedures through which the citizens of the white neighborhood petitioned the city to close the street were highly unusual, especially because no prior notice was given to black property owners. *Id.* at 141-144.

Additionally Justice Marshall disputed the majority's holding in *Green* that the economic damage and social stigma were *de minimis*. *Id.* at 145-146. These factors, coupled with the tradition of racial discrimination in Memphis in general, and particularly in the litigated areas, prompted the dissenters to conclude that the city's conduct in closing the street violated both section 1982 and the thirteenth amendment.

Although *Green* is one of the most recent statements on section 1982, its place in our litany of cases is unclear. As Justice White's observation regarding the *Green* Court's emphasis on factual detail underscores, so much of the law of *Green* seems tied to the very unique facts of that controversy that its use as guiding precedent is problematic. Indeed the majority does not purport to retreat from any of its previous decisions according an expansive interpretation to section 1982. See *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523, 1533-36 (11th Cir. 1986) (no evidence of purposeful racial discrimination and no loss of interests protected under section 1982 and the thirteenth amendment arise from construction of an industrial plant and rerouting of road adjacent to property owned by black businessmen).

The Court in *Green* potentially opened a broad legal channel to protect individuals by intimating that the thirteenth amendment permits private parties to bring discrete actions claiming constitutional violations not premised on existing federal statutes. See supra note 203. The Court in *Green* postponed the opportunity to take certain civil rights concepts to new levels of analysis. For instance, the court did not resolve the issue upon which it had granted review—whether section 1982 covers only purposeful discriminatory conduct. *Id.* at 129-135 (White, J., concurring). Accordingly, it appears as though *Green* raised more issues than it resolved.

Not so with *General Building Contractors v. Pennsylvania* which definitively resolved in the affirmative whether § 1981 limits its coverage solely to purposeful racial discrimination. 458 U.S. 375 (1982). (This holding and the strong historic interrelationship between the statutes may limit section 1982 to cases of purposeful discriminatory conduct. But cf., *id.* at 386.)

Reviewing the extensive legislative history of the Civil Rights Act of 1866 and the various reformulations which culminated in section 1981, the Court in *General Building Contractors* determined that the statute was designed to reach only purposeful discrimination, not cases of disparate discriminatory effect, as the former describes the sort of immediate problems that concerned framers of early post bellum civil rights legislation. *Id.* at 384-391.

Justice Marshall, joined by Justice Brennan, vigorously dissented in *General Business Contractors*, arguing that the core purpose of the early post Civil War enactments was to grant individuals rights "in fact" as well as rights in theory. *Id.* at 409, 407-414 (Marshall, J., dissenting). Thus, withholding coverage in disparate impact cases severely limits section 1981 from achieving its liberating purposes. See supra note 61 and infra notes 368-376 (discussing concept of disparate impact). The Court in *General Building Contractors* did limit otherwise expansive Federal court interpretation of civil rights. It must be accented, however, that although intent is a required element of a section 1981 action, intent may be established with relative ease by inferential evidence raising a rebuttable presumption of discriminatory animus. See, e.g., *Williams v. Edward Apffels Coffee Co.*, 792 F.2d 1482, 1484 (9th Cir. 1986); *Monroe v. Burlington Industries, Inc.*, 784 F.2d 568, 570-72 (4th Cir. 1986).
The theme that civil rights statutes are rational because they prohibit irrational behavior is fortified when considering federal law proscribing discrimination in employment. As with other civil rights enactments, the Fair Employment Practices Act of 1964\footnote{The Fair Employment Practices Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000 et seq. (1982)) (hereinafter The Fair Employment Act or Title VII).} prohibits certain discriminatory conduct because such behavior has nothing legitimate to do with the particular projects of work and employment. Thus, Title VII's prohibitions against discrimination on the basis of race, sex, national origin, color, and religion are rational because such extraneous considerations humiliate, demean, and offend individuals and unduly restrict their ability ability to earn a livelihood rather than revealing the true qualifications that applicants and employees possess to perform certain work.\footnote{Consistent with the definition of rationality, a clear and primary concern of Title VII is to protect individuals from unlawful employment practices. Indeed, the term “individual” is used no less than four times in section 2000e-2(a), accenting congressional recognition that discrimination hurts every person against whom it is directed.\footnote{See generally Bayer,Mutable Characteristics and the Definition of Discrimination Under Title VII, 20 U.C. DAvis L. REv. 769 (1987) (discussing Title VII’s protection from racial and gender discrimination). Much of the following discussion of Title VII is drawn from this earlier work.} Little wonder, then, that the} Supreme Court consistently has held that “the principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.”\footnote{Connecticut v. Teal, 457 U.S. 440, 453-454 (1982) (speaking for the Court, Justice Brennan recounted numerous remarks in the legislative history emphasizing that Title VII}
Title VII's focus on the individual has prompted courts to apply a broad definition of discrimination. For instance, the prohibition against discrimination towards any individual means that Title VII protects whites as well as non-whites. Moreover, an individual may assert a Title VII claim even if a defendant employer can demonstrate that, as a general matter, the employer's policies or procedures do not discriminate against the protected group of which the individual is a member. As one district court has noted, anything less would fail to comport with the "respect and dignity" that Title VII accords to every person.

Along similar lines, we have seen that governmental action may be rational if it is designed to eradicate outmoded concepts of group roles and norms in society. Indeed, the commitment of a civil rights statute towards eliminating unlawful discrimination may be measured, in large part, by its effect on prevailing stereotypes associated with forbidden criteria such as race or sex. Clearly, stereotypical assumptions such as blacks and whites cannot work in harmony or a woman's proper role is as a housewife/mother may play no part in an employer's employment decisions under title VII's proscriptions of racial and sexual discrimination.

The statute, however, goes beyond invalidating the most blatant forms of discrimination based on stereotype in the workforce. Indeed, courts have consistently applied Title VII in a wide variety of situations, defining employer use of virtually any racial or sexual stereotype as unlawfully discriminatory. Thus, for example, in an early decision invalidating a policy requiring that female, but not male, flight attendants be unmarried, the Seventh Circuit held, The scope of [Title VII] is not confined to explicit discrimination based solely on sex ... [the statute was] intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

protects all individual discriminatees). Identically, Justice Stevens wrote for the Court, "Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." Dept. of Water and Power v. Manhart, 435 U.S. 702 709 (1978); see also Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567, 579 (1978) ("it is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionally represented in the workforce") (citations omitted, emphasis supplied). 248. See McDonald v. Santa Fe Trail Transportation Co., 437 U.S. 273, 278 (1976). The Court in McDonald also held that section 1981 protects whites. Id. at 285-96.

249. See Furnco Construction Co. v. Waters, 438 U.S. 567, 579 (1978) (employer's policy of only hiring bricklayers previously known to employer may result in discriminatory denial of employment opportunity to "at the gate" unfamiliar minority applicants even if minority group is well represented in bricklayer workforce); Connecticut v. Teal, 457 U.S. 440 (1982) (individual may challenge a sub-portion of employer's hiring process even if the final hiring statistics reveal no unlawful discrimination).


251. Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404
The Supreme Court has totally rejected reliance upon stereotypical assumptions regarding gender and race to justify discriminatory employment policies. The leading precedents are particularly instructive regarding understanding the rationality of the statute because the stereotypes invalidated in *Los Angeles Department of Water and Power v. Manhart*, and *Arizona Governing Committee v. Norris* were factually valid. Indeed, the court directly stated:

The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class. . . . *Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.*

"As a class, women live longer than men. For this reason, the Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees." Nevertheless, the Court held that an employer may not compel individual women to contribute more money to their pension accounts during the terms of their employment than similarly situated men.

Justice Stevens, speaking for the majority, began his analysis by noting:

Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.

It is now well-recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females.
Justice Stevens next noted that although the stereotype upon which the pension plan was bottomed—the greater longevity of women as compared with men—is generally accurate, the classwide longevity is not shared by every woman within the group. Thus, some women will be forced to pay more money than men into the pension plan—and thereby receive smaller monthly salaries—without collecting greater net pension payments than similarly situated males. Justice Stevens concluded that Title VII’s protection of each individual from unlawful discrimination stops an employer from charging female employees more money on the presumption that, as a class, the pension program will subsidize women to a greater extent than men.

Manhart concerned a mandatory pension plan designed and administered by the employer charging female employees more in monthly contributions than similarly situated men to receive equal pension benefits. Hinting that the opinion may be limited to its facts, the Court cautioned that Title VII does not “revolutionize the insurance and pension industries.”

Whatever doubt existed concerning the application of Manhart to the full range of employment situations was ended by the Court’s opinion in Arizona Governing Committee v. Norris holding that Title VII, “prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly benefits than a man who has made the same contributions. . . .”

The pension program under challenge was neither designed nor operated by the defendant-employer. Rather, wishing to offer its employees a pension

assumptions about a woman’s inability to perform certain kinds of work are no longer acceptable response for refusing to employ qualified individuals, or for paying them less.” Id. at 708-710. The Court rejected the employer’s argument that the policy discriminated on the basis of longevity rather than sex. “Such a practice does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’” Id. at 711 (quoting Developments in the Law, Employment Discrimination and Title VIII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1170 (1971)).

Manhart, 435 U.S at 717. The Manhart Court clarified further that while an employer cannot relegate the administration of the plan to a corporate shell in order to avoid liability an employer does not violate Title VII by giving all similarly situated employees an equal sum of money to purchase their own pension plans on the open market even if such plans may be sexually discriminatory. Id. at 717 n.33.

Arizona Governing Committee v. Norris, 463 U.S. 1073, 1075 (emphasis added). The per curiam holding declined to award retroactive relief. Id. The majority rationale in Norris that supports the pension plan’s invalidation was written by Justice Marshall with whom Justices Brennan, White, Stevens and O’Connor joined. Id. at 1075-1091 (hereinafter Marshall Opinion). Additionally, Justice Marshall, with Justices Brennan, White and Stevens, dissented from the denial of retroactive relief. Id. at 1091-1095. Justice Powell wrote for a majority consisting of himself, Chief Justice Burger and Justices Blackmun, Rehnquist and O’Connor regarding the issue of relief. Id. at 1105-1107. In addition, Justice Powell, joined by the Chief Justice and Justices Blackmun and Rehnquist, dissented from the finding of liability under the statute. Id. at 1095-1105. Finally, Justice O’Connor, who supplied the “swing” vote for both issues, clarified her position at 1107-1111.
plan, the employer contracted for a plan designed and administered by a third party. Employee participation in the program was strictly voluntary, with deductions calculated from participating workers' monthly salaries without regard to gender. Upon retirement, employees could choose from three options, one of which, the pension annuity plan, was predicated on sexually-based actuarial tables disbursing lower monthly income to female retirees than to similarly situated males.

The Court found the employer's scheme indistinguishable from the plan invalidated in Manhart so far as discrimination under Title VII was concerned. Recalling Manhart's admonitions against the use of any stereotype which effectively discriminates against individuals on the basis of a forbidden criterion, the Court rejected the justification that the pension plan's actuarial value for the group of female retirees would equal the value for the group of male retirees. Rather, the plan was unlawful since individual female retirees may predecease similarly situated males and thereby receive less in benefits despite their equal contributions.

Expanding earlier concepts of discrimination, the Court found factual distinctions between Norris and Manhart immaterial. Specifically, neither the fact that participation in the plan was voluntary nor the existence of non-gender based retirement options rendered the sexually premissed annuities plan nondiscriminatory. The Court unequivocally stated:

Title VII forbids all discrimination concerning "compensation, terms, conditions, or privileges of employment," not just discrimination concerning those aspects of employment relationships as to which the employee has no choice. . . . An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis.

The Norris and Manhart precedents accept Congress' determination that, with very limited exceptions, race and gender are irrelevant considerations in the labor market.

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262. Marshall Opinion, supra note 261 at 1075-1078. Regarding the technical operation of the plan, the defendant-employer's role was limited to deducting contributions from participating employees and channeling the money to the pension company which invested the funds in a diversified portfolio. The employer made no contributions itself. Id.

263. Two options were nondiscriminatory. Employees could simply retrieve their entire funds of contributions and accumulated interest or could have funds divided over a set of periodic payments. Id. at 1076.

264. Id. at 1076-1078. Sex was the major discriminatory factor. No other considerations which might affect longevity, such as alcohol or cigarette consumption, were utilized. Nevertheless, the annuity option was the most popular choice among retirement benefits for it guaranteed a set income for the remainder of the retiree's life. Additionally, it was more tax advantageous than receiving a lump-sum type payment.

265. "We have no hesitation in holding . . . that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." Id. at 1081.

266. Id. at 1081-1086.

267. Id. at 1081, n.10 (emphasis added).

268. Manhart, 435 U.S. at 709; Norris, 463 U.S. at 1084 (1983). However, application of
The brief discussion accenting major philosophical underpinnings of Title VII shows that the statute, joining the other reviewed enactments, is rational under our definition of "rationality." The behavior Title VII proscribes does not concern qualifications, attitude, or other considerations truly related to the issue whether a person can or cannot perform given work. Rather, discrimination under the Act serves no function other than to demean, humble and debase individuals regarding criteria and considerations wholly unrelated to rational terms and conditions of employment.

As Manhart and Norris emphasize, it is not necessary that the defendant intended to disadvantage and humiliate the plaintiffs. Apparently, the pension programs invalidated therein were neither designed nor administered to harm or demean women. Rather, they were based on accurate predictions that, as a happenstance, the class of women will likely outlive the class of men. Nevertheless, Title VII's proscriptions invalidate reliance on any condition, standard, test or policy which disadvantages any individual on the basis of race, color, sex, national origin or religion. The scientific accuracy and economic convenience of the gender-based annuity schemes were not availing. Whatever their worth or logic in other realms, the introduction of sexually disparate pension plans contravened Congress' unabashed reinvention of the workplace into a setting wherein race and gender discrimination are simply intolerable.269

Moreover, Manhart and Norris accent that discrimination is not limited to considerations of economics. Rather, discrimination, although undeniably intertwined with economic issues, relates first and foremost to the basic dignity and integrity to which every individual is entitled. In Norris, particularly, we see that the availability of non-discriminatory options concerning a term of employment in no manner relieved the employer from responsibility for engaging in discriminatory practices. This indicates that it is the very act of discrimination—regardless of the severity of its consequences—which offends Title VII and that statute's underlying social philosophy protecting individuality and self-worth.270

Furthermore, Title VII, joining the previously discussed statutes, seeks to boldly create a new social reality free from arbitrary discrimination. This is clear in every instance of Title VII liability; however, it is particularly

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270. See Meritor Savings Bank v. Vinson, 106 S. Ct. 2399, 2406 (1986) (sexual harassment is unlawful regardless whether it results in economic detriment to the victim). The courts have likewise recognized causes of action sounding in other forms such as national origin harassment. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977).
emphasized and clarified in Manhart and Norris. The defendants argued that to restructure the existing employment pension plans would contradict the prevailing insurance systems, predicated, inter alia, on sexually segregated actuarial tables.271 The Court responded that whatever may be the reality in other areas, Congress’ decree making unlawful sex discrimination in employment means that, so far as that area is concerned, gender conscious terms and conditions of employment are uniformly proscribed.272 Thus the employment realm could no longer mimic the prejudices of other sectors.

In this way, the Manhart and Norris opinions show that Title VII serves not merely to grant a legal capacity to be free from discrimination, but also forcefully restructures large segments of the employment system to fulfill the promise of equality.

6. Conclusions Regarding Rationality in Civil Rights and Constitutional Law

Having perused significant civil rights schemes, we may now summarize comparisons between the definition of rationality under equal protection analysis and rationality concerning civil rights statutes.

The crux of the equal protection definition of ‘rationality’ states that a governmental entity acts irrationally when it creates a classification which does not promote a legitimate goal or which pursues a goal through illegitimate means. Similarly, the underlying rationality of civil rights statutes is premised on the fact that the behavior they control concerns governmental and private actions premised on classifications either unrelated to legitimate goals or utilizing illegitimate means. Racial or sexual discrimination in such projects as housing and employment, for example, in no wise promote any valid aim or goal associated with those projects.

Honing the definition of rationality to make it more easily applicable to specific factual settings, we determined that governmental classifications violate the equal protection clauses’ mandate of minimal rationality if a societal cost/benefit analysis reveals that the classifications are more socially dysfunctional than useful. We determined that individuals are entitled to a minimal level of dignity and respect.273 Although not easily susceptible to abstract definitions, denial of such different treatment can be recognized on a case-by-case basis informed by general notion of fairness and rationality. Clearly, each civil right enactment discussed herein concerns denial of rudimentary fair treatment, dignity and respect to individuals.

Explicating the definition even further, we culled certain operative measures with which to assess the rationality of governmental actions. Each one is applicable in the civil rights statutory context as well.

272. Id. ‘‘... there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage.’’ Id. at 710; see also id. at 716-717.
273. See supra notes 62-84 and accompanying text.
First, we determined that governmental action violates equal protection standards if the choice of classifications is so random that a coin flip would serve as well to decide which classes would promote the governmental purposes or ends.\textsuperscript{274} Under our civil rights analysis we have seen that much discrimination is purposeful; but, even assuming that these racial or sexual classifications were neither invidious nor based on misplaced paternalism, the decision to classify under such criteria are not better than a flip of a coin. Were we to posit a racial classification in employment, for instance, which was designed not to harm individuals but to promote efficiency, we would still be forced to conclude that such racial distinctions are irrational. Why require whites to perform some act or receive some sort of treatment—beneficial or detrimental—which blacks do not? Even if the ultimate result does enhance efficiency or promote some other legitimate goal, and even if race is an easy way to classify for efficiency purposes, the ultimate choice imposing benefits or burdens on one particular race over another would be no more reasonable than the sex based decision favoring males in Reed v. Reed.\textsuperscript{275}

The second concept of rationality holds that the government may not use its powers to deliberately harm and punish downtrodden or unpopular groups due solely to their downtrodden or unpopular statuses.\textsuperscript{276} Surely, no greater reason explains the emergence of our complex statutory scheme of civil rights than the persistent efforts of official and private organs to demean, humiliate, control, punish and harm politically weak and unpopular groups. Discrimination based on race and national origin clearly recall these considerations of rationality. Discrimination on the basis of gender is no different. Even if it may be debated whether women constitute an "unpopular" group, the roles and goals upon which sexual discrimination is premised define certain concepts of what women may or may not do in society.\textsuperscript{277} Thus, for women to seek equality of opportunity in employment and housing represents endeavors unpopular to those who fear to live in a society where all individuals may be judged on their individual merits.

The third consideration, as the discussion of Zobel v. Williams highlighted,\textsuperscript{278} establishes that equal protection rationality analysis prohibits official actions which create useless castes in society. Similarly, racially restricted public accommodations, segregated work forces and ghetto communities perpetuate destructive, irrational caste systems inimicable to a society dedicated to preserving the integrity and dignity of all its members. Civil rights statutes which prohibit caste creating forms of discrimination are surely rational.

\textsuperscript{274} See supra notes 87-97 and accompanying text.
\textsuperscript{275} 404 U.S. 71 (1971). See supra notes 87-92 and accompanying text (discussing U.S. Supreme Court's opinion in Reed).
\textsuperscript{276} See supra notes 98-129 and accompanying text.
\textsuperscript{278} See supra notes 130-145 (discussing Supreme Court's holding in Zobel).
Finally, we have noted in our statutory analysis a vigorous trend reflecting a national imperative to eradicate recognized forms of arbitrary discrimination in many aspects of social interaction. This imperative—or project of equality—involves a serious reordering of power relations among corporate and private individuals and between individuals and their governments. One might go so far to assert that our earlier discussed equal protection analysis coupled with the civil rights statutory scheme present a reinvention of fundamental customs, perceptions, and presumptions affecting all social actors from realtors to restauranteurs—corporations to school children. It is truly a national endeavor to attain a greater moral authority for our society. Yet, the endeavor falls short of the mark.

D. The Unconstitutional Underinclusiveness of the Civil Rights Statutes

The rules of rationality which energize and inform equal protection analysis concern our most basic, yet most enlightened, precepts addressing our worth both as individuals and as a collective. The promise of equal protection lies in the predominate goal of securing a society which protects and preserves to the fullest the individual dignity and integrity of each social actor.

Of course, this interpretation may be severely criticized by those who, amassing considerable legal, historical and sociological evidence, point to the myriad ways governmental bodies and private groups alike have persistently sought to trample many forms of individuality with which they could not abide.279 Undoubtedly, history and law are marred by actions reflecting the worst instincts of our nature. Nevertheless, much of the foregoing analysis attests to the progress that has occurred regarding sensitivity to civil rights.

It is apparent that we have reached a major turning point in fulfilling the promise of our constitutional system, for more and more persons in our society are demanding that the various governmental entities in society protect them from myriad forms of irrational discrimination. Therefore, can we and should we stop the progress of civil rights, declaring that we have reached some arbitrary satiation point from which society will budge no further regarding pleas to eradicate irrational discrimination? To stop now would stem the legitimate hope and expectations of persons who wait with ever growing impatience for the time when they too will be protected from the humiliation, domination, and loss of opportunities resulting from arbitrary discrimination. If corrective legislation is not forthcoming, these disadvantaged individuals' protection must arise from another source. The theory is brief: so far as they go, the civil rights statutes are rational and worthwhile. But they are underinclusive because they do not protect every individual from all arbitrary treatment in such realms as housing, employ-

279. See Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (state may criminalize privately performed acts of homosexual intercourse between consenting adults); supra note 127 (discussing Bowers).
ment and public accommodations. It is the thesis of this work that not only does a full reading of our rationality analysis require the reformation of existing civil rights statutes to cover all applicable individuals, but also, we are capable of passing, enforcing, and living with such laws.

1. Reforming Civil Rights Law to Meet Our Definitions of "Rationality"

Recall that we divided civil rights statutory schemes into two parts: the first conceives a social project such as employment, housing, or contracting while the second part consists of a discrete list of protected classes.

The second part of the statutory scheme is problematic under the definition of "rationality" for one must ask for what purposes and under what authority does Congress limit the protection of civil rights laws to but a handful—albeit a vital handful—of protected classes? Why is the protection concerning social projects such as employment or housing not offered to all who suffer from irrational discrimination?

From the statutory scheme itself we glean a possible answer: the statutes are designed to protect favored groups which, because of a recognized history of discrimination coupled with their political power, have been able to secure much deserved protection without regard to others who might suffer equally felt but less popularly acknowledged irrational discrimination. If the project of civil rights laws is to favor some downtrodden groups or individuals over others, then the project fails to conform with even minimal rationality under our definition.

For example, consider the civil rights to three groups of individuals: (1) those who practice alternative sexual preferences, particularly homosexuals; (2) those who suffer discrimination because of personal appearance; and, (3) those who cohabitate although unmarried. Addressing the first category, homosexuals present an example of a group battling for nothing more than those rights which we have discerned to be the very essence of minimal dignity, humanity, and individuality. To date, for instance, no federal fair employment statute protects homosexuals[280] neither do most state laws[282]. Yet, given the logic of such statutes, as detailed in the last sections, it seems simple to prove that sexual preference discrimination is no more justifiable than other covered criteria such as race or gender.

Applying our definition of rationality as derived from statutes proscribing racial, gender, and ethnic discrimination we discover that individuals'
sexual preferences have nothing to do with—their ability to perform a given job, be a peaceful and orderly tenant, fulfill a contract or enjoy a public accommodation. Indeed, sexual preference is as useless as sex, race, national origin, color or religion to predict given persons' levels of skill, talent, attitude, or inherent worth. The exclusion of sexual preference from the myriad statutes discussed in this work betrays the very notion of a civil rights enactment because it permits a virulent form of irrational discrimination to exist unremedied.

Subjecting sexual preference to the sub-classifications of rationality under equal protection analysis fortifies the foregoing conclusion. Suppose Congress argues that it has not covered sexual preference because it decided that it would be too difficult or confusing to protect all deserving parties under a single statute through one sweep of the legislative hand. Thus, the argument would go, something had to be excluded, protection for sexual preference just happened to be it. Such a rationale violates the first sub-tenet of rationality which forbids classifications to be derived through processes little better than a throw of dice. Just as the male preference classification of Reed v. Reed, although containing a surface form of seeming rationality, was struck as irrational, so too would the decision to exclude homosexual preference in favor of other forms of protections. It is not at all clear—in light of our definition of rationality—that those who suffer from sexual preference discrimination are hurt any less deeply, humiliated any less greatly, or disadvantaged any less gravely than a person discriminated against on the basis of race, gender or religion. Certainly, homosexuals endure severe economic harm through myriad forms of discrimination. Thus, the decision to protect those latter forms of discrimination over other forms, such as sexual preference, is as irrational as flipping a coin to decide classifications.

Of course, there is the long-standing argument that some groups have suffered such historic and persistent discrimination that the unfairness became too blatant to be denied, finally triggering in the hearts of legislators and judges the basic decency and humanity to establish some forms of relief. According to this theory, when a group satisfies certain judicially created requisites of suffering they are accorded special protections by our Constitution. While this concept of "suspect class" has enjoyed considerable success as controlling doctrine, it is unclear why any group or individual should be made to wait some arbitrary time limit or forced to endure some socially designated "right of passage" from ignored, downtroddenness to elevation to status of societal concern before their victimization

283. Perhaps the most quoted formulation of the "suspect classification" concept is Justice Stone's observation that governments must not act in manner reflecting "prejudice against discrete and insular minorities ... which tends ... to curtail the operation of those political processes ordinarily relied upon to protect minorities." U.S. v. Carolene Products Co., 304 U.S. 144, 159-163 n.4 (1938). Recently, speaking for the Court, Justice Powell explicated those factors judicially recognized as indispensable to demonstrating the suspectness of a classification. See supra notes 19-21 and accompanying text.
from arbitrary treatment is remedied. The very existence of arbitrary treatment is sufficient reason to generate official protection and relief as, indeed, much of the earlier explicated equal protection precedent demonstrates. Furthermore, while it is undeniable that provisions such as the thirteenth and fourteenth amendments were adopted initially in response to the needs of the newly freed slave race, those provisions have been expanded far beyond considerations of race. The foregoing discussions have shown that concepts of equal protection of the laws inures to every group and each individual in society. Identically, the thirteenth amendment’s proscriptions protect any individual against slavery and involuntary servitude, not simply those enslaved on the basis of race. Similarly, exercising its powers under section 2 of that amendment, Congress has legislated against gender, national origin, and religious discrimination in housing as well as treatment based on race and color. Congress and the courts have correctly reasoned that many groups may suffer ill effects of discrimination so reminiscent of race that they too must be protected. It is far too late, therefore, to stem this tide by reference to the historical events which gave rise to our broad-based constitutional and statutory protections.

Naturally, the fact that society will condemn all forms of arbitrary discrimination does not imply that the same amount or type of societal resources must be expended regardless of the form of discrimination. It seems rational and appropriate to spend more of society’s resources to fight the most pervasive and persistent forms of discrimination while according necessarily smaller amounts of such resources to handle correspondingly less widespread discrimination. Such logical disbursement of money, time and other societal goods to handle irrational discrimination is much different from simply ignoring discrimination and, thereby, allowing its harm to thrive. At the very least, private causes of action should be permitted to those who wish to vindicate their rights.

Considering, next, the second sub-tenet, it seems clear that any action by governmental entities to punish or degrade homosexuals simply because of their political powerlessness or unpopularity among certain factions constitutes an irrational and wholly impermissible purpose. Numerous cases, previously discussed, involving illegitimate children, the mentally impaired, political nonconformists, sexually active singles, and other groups demonstrate that the Constitution protects those who are too weak to face alone the wrath of irrational and selfish power elites. Thus, going back to our specific example, Congress cannot justify its exclusion of homosexuals from civil rights protection by casually asserting that they are not worthy of protection, that such groups because of their nonconformity to so-called

284. Commenting on Jones v. Alfred H. Meyer Co., Justice Stevens observed, “... even if Jones did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.” Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurrence). See also Jones, 392 U.S. 409 (1967), supra notes 197-210 and accompanying text. Stevens stated that the Jones opinion has become “an important part of the fabric of our law.” Runyon, 427 U.S. at 190 (Stevens, J., concurring).
norms are to be more despised than protected, or because the members of Congress fear that it will be politically dangerous to protect that group. As the equal protection cases show, the rights of individuals ought not be trampled by pure, partisan politics.\textsuperscript{285}

Finally, the third sub-tenet informs us that Congress, or any governmental body, cannot simply use the device of classification to tautologically assert that the classification must be rational. This is particularly important when, as in \textit{Zobel v. Williams}, the classification threatens, albeit inadvertently, to create a caste system through which innocent groups are subject to arbitrary treatment regarding the disbursement of governmental largess. Certainly, the standard is no less regarding important civil rights.

Segregating and isolating homosexuals from social projects such as housing and employment invites the creation of a hurtful and useless caste system. To be sure, there are many in society who would not care to work with, eat near, live along-side-of, or otherwise be reminded of the existence of homosexuals. These persons' wishes, should be accorded no greater deference than those who wish the same treatment for blacks, women, Jews, Asians, or any other of the seemingly inexhaustible lists of groups and individuals against whom arbitrary discrimination has become commonplace.\textsuperscript{286}

A similar analysis informs application of the proposed theory of rationality to classifications based on appearance and on marital status.\textsuperscript{287} As the Harvard Law Review recently noted:

Although our society professes a commitment to judge people by their inner worth, physically unattractive people often face differential and unequal treatment in situations in which their appearance is unrelated to their qualifications or abilities. In the employment

\textsuperscript{285} Moreover, it is not necessary to demonstrate that homosexuality is an immutable characteristic. Our equal protection analysis has demonstrated that the Constitution protects alternative life styles and advocates of unpopular political/social philosophies. \textit{See supra} notes 98-129 and accompanying text. Similarly, the fact that states may criminalize certain homosexual conduct does not mean that states may extract penalties, in the form of civil rights deprivations, for those who admit their homosexuality. \textit{Compare Bowers v. Hardwick}, 106 S. Ct. 2841 (1986), \textit{with Watkins v. United States Army}, 847 F.2d 1329 (9th Cir. 1988) (Army may not discharge soldier solely because soldier is acknowledged homosexual), \textit{reh'g granted}, 847 F.2d 1362 (1988). \textit{But see Watkins}, 837 F.2d at 1353-62 (Reinhardt, J., dissenting). As noted earlier, homosexuality, like race or gender, does not address the legitimate concerns associated with housing, employment and the like. Neither can it seriously be argued that a homosexual's mere presence could constitute a corrupting influence sufficient to justify discrimination. Certainly, unsolicited or disruptive homosexual overtures, like similar heterosexual overtures, may unduly disrupt workforces, apartment buildings, and public accommodations sufficiently to justify disciplinary action. The status of being homosexual, however, is no more relevant to projects such as housing and employment, than is the status of being heterosexual. Such statutes are not rational bases for discrimination.

\textsuperscript{286} Similarly, we might add sex, national origin, sexual preference, and religion to the protective coverage of section 1981 and section 1982.

\textsuperscript{287} \textit{See infra} note 295 for a discussion of one important distinction.
context [,for example,] appearance often functions as an illegitimate basis on which to deny people jobs for which they are otherwise qualified.\textsuperscript{288}

The Note documents that generally accepted standards defining physical attractiveness exist and are actively promoted within the various sectors of American society. These standards are applied in all walks of life, providing so-called attractive individuals with opportunities and expectations considerably more enhanced than those enjoyed by individuals perceived to be less physically attractive.\textsuperscript{289}

Based on the empirical investigation revealing the nature and effects of discrimination in the employment context,\textsuperscript{290} the author concluded, "... appearance, like race and gender, is almost always an illegitimate employment criterion ... it is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than actual merit."\textsuperscript{291}

Likewise, the third proposed criterion—marital status—is often an irrational basis upon which to classify and to affect the lives and livelihoods of individuals. One arguable instance, to illustrate the point concerns discrimination in housing. The previously discussed Federal Fair Housing Act\textsuperscript{292} permits landlords and vendors to refuse to sell and rent because of the perspective tenant's or vendee's marital status. Yet, it is not clear why single individuals or those who cohabitate but are unmarried should be denied housing. Certainly, the bold presumptions that such individuals are


\textsuperscript{289} Id. at 2036-2042. For instance, parents and teachers treat unattractive children more severely and presume them to be less capable than so-called attractive youngsters. This stigma follows such individuals throughout adulthood. "Ugly" persons are apt to receive harsher treatment from courts than are "beautiful" people. Strangers are less inclined to assist unattractive individuals and "... studies have shown that in general, attractive people are disproportionately likely to receive credit for good outcomes, whereas the good outcomes of unattractive people are more likely to be attributed to external factors, such as luck." Id. at 2039 (footnote omitted).

\textsuperscript{290} Focusing on the singular question of employment discrimination, the Author argues that The Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), should be read to protect individuals against discriminatory treatment based on personal appearance factors unrelated to qualification or merit. Id. at 2043-51.

Understandably, based on current precedent, the Note waives away recourse to the Constitution as a buttress against such irrational discrimination. Id. at 2042. "These victims could plausibly frame a constitutional equal protection challenge, although this appears unlikely given current restrictive interpretations of the clause's reach." Id. This article attempts to show that contemporary equal protection analysis, taken to its logical and worthwhile limits, requires that extant civil rights legislation specifically proscribe irrational instances of personal appearance discrimination.

\textsuperscript{291} Id. at 1035; cf. Bayer, Mutable Characteristics and the Definition of Discrimination Under Title VII, 20 U.C. Davis L. Rev. 769, 837-873 (1987) (arguing that the Fair Employment Act must cover discrimination based on factors such as grooming, dress, and physical appearance when such considerations are linked to prohibited criteria such as race and sex).

\textsuperscript{292} See supra notes 211-219 and accompanying text.
unworthy and will be poor neighbors are as irrational as basing similar conclusions on the bases of the individuals race, religion or gender. In all such instances, the classifications fail to adequately inform interested parties whether the affected persons will be peaceful homeowners or tenants. Rather, the discriminations are based on personal distaste, misinformed stereotyping or both.293

293. Indeed, even a statute which expressly prohibits discrimination on the basis of "marital status" may not protect individuals who are discriminated against because they are not married. For instance, Maryland's Fair Housing Act provides that:

because of . . . marital status . . . for any person having the right to sell, rent, lease, control, construct or manage any dwelling . . . (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith . . . (6) To include in any transfer, sale, rental or lease of housing any restrictive covenant that discriminates; or for any person to honor or exercise, or attempt to honor or exercise any discriminatory covenant pertaining to housing.

49B Md. ANN. CODE §§ 20(a)(2), (6).

In Maryland Comm'n on Human Rights v. Greenbelt Homes, Inc. an unmarried mother of a young boy, C. Lynn Kuhr, applied to purchase a co-operative apartment from the defendant. 300 Md. 75, 475 A.2d 1192 (1984). Her application was duly approved by the defendant subject to the co-op's bylaws that limited occupancy of any unit to members of the owner's "immediate family." Id. at 1193. The definition of "immediate family," however, included the unit owner's "husband" or "wife." Id. at 1195. Shortly after taking occupancy, one Richard Searight moved into the apartment with Ms. Kuhr and her son. Because male cohabitants were not listed in the by-law's definition of "immediate family," the defendants threatened to terminate Ms. Kuhr's contract.

Ruling for the defendant, the Maryland Court of Appeals held that the proscription against "marital status" discrimination in the state fair housing statute was not violated. The majority reasoned that the defendant opposed Mr. Searight's occupancy not because he and Ms. Kuhr were unmarried but because they were unrelated. The same result, the Court argued, would have applied if "Searight had been Kuhr's best girlfriend, her favorite aunt, her destitute cousin, or her infant nephew." Id. at 1196.

The dissent, however, noted that spouses are included in the bylaw's explication of "immediate family." Thus, had Mr. Searight been Ms. Kuhr's husband, he could have moved into the unit, utilized the parking and other facilities without any interference whatsoever. The dissent concluded:

Manifestly, under the applicable contractual convenant, Kuhr's right to reside in a Greenbelt housing unit with Searight depended upon whether she was "married or not married" and, therefore, depended upon her "marital status."

Id. at 1198 (Davidson, J., dissenting).

More remarkable was an earlier lower court decision, cited approvingly in the above discussed opinion, wherein the Court held that an unmarried couple's unsuccessful attempt to purchase a unit in Greenbelt Homes was not based on "marital status" discrimination even though the application was denied solely "because [the applicants] were not married." See Prince George's County v. Greenbelt Homes, Inc., 49 Md. App. 314, 315, 431 A.2d 745, 746 (1981). The Court reasoned that, "neither Mr. Hemphill nor Ms. Bradley were denied membership in Greenbelt Homes, Inc. because he or she was single. They were denied joint membership because neither Greenbelt nor the law of Maryland recognized their union as cloaking them with a 'marital status.'" Id. at 748 (emphasis supplied).

Surely, this rationale seems to owe more to Lewis Carroll or Joseph Heller than to Holmes or Frankfurter. The Greenbelt Homes Court concluded that because the plaintiffs were not married they had no marital status. Thus, it would seem that it was the lack of a
Identically, Federal civil rights laws do not proscribe marital status discrimination in such realms as employment, contracting, and the sale, use and disposition of property.

Personal appearance and marital status conform with the offered definition of irrational classification. As with race, gender, and other usually prohibited criteria, physical attractiveness and marital status are unrelated to—have no useful, legitimate nexus with—those projects to which the prejudice might be applied. Appearance and marriage do little to inform about an individual’s ability to work, desire to be a good neighbor, or willingness to faithfully fulfill the terms of a contract.

Applying our specific measures of rationality to the two examples emphasizes the strength of the foregoing conclusion. The omission of such classifications from civil rights laws cannot be adequately justified by arguing that it would be too cumbersome, inefficient, or administratively inconvenient to include marital status and personal appearance within the protection of the statute. As has been shown, convenience and efficiency are insufficient bases to compel powerless individuals to suffer the devastating effects of irrational discrimination. Surely, individuals who are refused employment or housing because of their marital status or appearance are demeaned, humiliated, and disadvantaged in a manner most similar to those who are denied such opportunities on the bases of classifications more generally acknowledged to be arbitrary.²⁹⁴

Moreover, pursuant to the second index of rationality, legislators are without authority under the Constitution to refuse legislative assistance to groups simply because the law-makers dislike those groups or deem it to be politically inexpedient to protect them from arbitrary discrimination. Legislators may be insensitive or hostile to the legitimate needs of the alleged physically unattractive or those who suffer marital status discrimination. Such motivations, however, may play no constitutionally legitimate role in the defining of rights or the doling of largess.

Looking to the third sub-tenet, legislatures may not create useless caste systems. The segregation and demeaning of the so-called ugly disgraces many areas of social intercourse. While such considerations may be rational

or useful in certain extremely personal decisions, such as the choice of friends and lovers,\footnote{295} discrimination on physical attractiveness threatens to form a caste of persons whose inherent worth is measured only by their surface appearance, with little if any consideration of the myriad other facets which combine to define the whole individual. Thus, the example of homosexuals, persons who are perceived to be unattractive, and those who are discriminated against on the basis of their marital status explicate the irrational underinclusiveness of the civil rights laws.

Now, the problem with the foregoing is simply this: we can add protection to cover sexual preferences discrimination and thus include another protected group to our civil rights laws.\footnote{296} But we could immediately find other groups which receive little or no protection. We might ask why the elderly are discriminated against in certain social projects, or why otherwise capable handicapped persons may be discriminated against in given situations. Similarly, we might ask why persons should be judged by the clothes they wear, the schools they went to, the politics they espouse or any other factor which can be demonstrated to be unrelated to the particular social project involved.\footnote{297} Indeed, we could devise an unending list of possible bases which constitute irrational discrimination. Our statutes, therefore, must be framed along the lines of our Equal Protection Clauses and Bill of Rights which set forth general protections, applicable to all, against any form of arbitrary discrimination arising during certain social projects.

Of course, it will be particularly useful to list certain classes within civil rights statutes as primary examples of irrational discrimination.\footnote{298} Racial, sexual, and ethnic discrimination, for instance, have been demonstrated to be irrational criteria in most social projects. Realization of that irrationality, and sensitivity to protect individuals from such historically egregious and persistent forms of discrimination, should in no manner be mitigated or

\footnote{295. It must be reiterated that this article calls only for protection against \textit{irrational} discrimination. Individuals must be accorded the opportunity to present to a court, an administrative agency, or other appropriate body a good faith claim that they were victims of arbitrary treatment. Certainly, one may envision many instances in which physical appearance discrimination is not irrational, although, perhaps, as our sensitivity to the evils of appearance discrimination deepens, so too may our determination to expunge even such discrimination as may now generally be considered not problematic.}

\footnote{296. \textit{See infra} notes 310-333 and accompanying text.}

\footnote{297. Recall that we are only looking to expunge irrationality from social projects. It is not argued, for instance, that employment decisions related to clothing styles are always irrational. It is irrational for an employer to mandate that its female employees choose their attire from a prescribed wardrobe, while making no such restriction upon male employees, on the assumption that women cannot be trusted to dress seriously or appropriately. \textit{See Carroll v. Talman Fed. S. & L. Ass'n of Chicago}, 604 F.2d 1028 (7th Cir. 1979), \textit{cert. denied}, 445 U.S. 929 (1980). By contrast, a restaurateur may require all his food servers to dress in costumes consistent with the historic or ethnic theme of the restaurant.}

\footnote{298. \textit{See}, \textit{e.g.}, \textit{CAL. CIV. CODE}, § 51 \textit{et seq.} (the \textit{Unruh Civil Rights Act}, discussed at \textit{infra} notes 305-309 and accompanying text).}
lost in the project to protect others whose victimization has thus far engendered less social outcry.\textsuperscript{299}

Thus, we may draft civil rights laws with lists of protected classes, and urge enforcement agencies to likewise list more protected classes, for two important reasons. First to reflect and preserve the societal realization that certain forms of discrimination are usually \textit{per se} irrational. Secondly, we may analogize to these already established groups to test newly conceived challenges asserting that other classifications are irrational as well.\textsuperscript{300}

2. Examples of Rational Enactments in our Legal System

Some may assert that the statutory system proposed cannot be accomplished because enforcement would be too cumbersome, too open to frivolous suits, and too unmanageable. Certainly, a system which took rights seriously would invite many new law suits as individuals actively attempted to vindicate civil rights which, heretofore, were left to atrophy through social indifference, intolerance, or ignorance. Yet, we can staff courts and agencies to handle the new cases. Moreover, the system may extract a penalty from those who bring truly frivolous or harassing suits without unduly chilling good-faith litigation.\textsuperscript{301} Moreover, it would not be surprising to find that the costs in dollars and cents of a truly liberating civil rights system is less than the costs in terms of loss of dignity, individuality, and economic opportunities tolerated by the system as presently operated.\textsuperscript{302} Similarly, the gains engendered by promoting a society in which individuals are judged on rational bases such as ability and experience are worth the time and money required to attain these ends. Human dignity and equal opportunities are certainly worth, at the very least, the costs associated with allowing plaintiffs to prosecute private law suits.

Indeed, in certain major areas, we do promote and finance the very type of system envisioned by this writing. First and most obvious is the equal protection analysis upon which the proposed rights system is bedrock. As has been established, the concept of "equal protection" and its source of vitality—"rationality"—are not limited to any particular class or element in society. To be sure, equal protection purports to apply differing standards of analysis to different groups, but no individual is deprived the opportunity to present to a court a specific claim of deprivation

\textsuperscript{299} Thus, similar concerns expressed by commentators such as Professor Parker, \textit{supra} note 44, easily can be addressed.

\textsuperscript{300} See Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, \textit{cert. denied}, 459 U.S. 838 (1982); \textit{infra} notes 307-309 and accompanying text (discussing \textit{Wolfson}).

\textsuperscript{301} For example, defendants have recovered attorneys' fees after demonstrating that the plaintiff's employment discrimination suit was frivolous. Jackson v. Color Tile, Inc, 803 F.2d 201 (5th Cir. 1986) (per \textit{curiam}); Faraci v. Hickey-Freeman Co., Inc., 607 F.2d 1025, 1028-1029 (2d Cir. 1979); Sek v. Bethlehem Steel Corp., 463 F. Supp. 144, 151 (E.D. Pa. 1979).

\textsuperscript{302} Moreover, as the public accommodation cases have established, discrimination engenders great economic burdens on both discriminatees and society in general. \textit{See supra} note 191 and accompanying text.
of “equal protection of the laws.” Every statute, ordinance, regulation, or other official action may be the subject of a colorable claim that some group has been subject arbitrary treatment. As a general matter, the claims fail, but courts nevertheless entertain them for each suit either vindicates the official action or reveals unlawful treatment.

Similarly, protection under the Bill of Rights is accorded to all, not solely to interest groups such as blacks, women, Jews or other classes. Deprivations under the Bill of Rights may be linked to—or stem from—racial, ethnic, religious, or gender based considerations; but, the nature of the protection of the Bill of Rights inures to all individuals regardless of the groups to which they belong. For instance, it would be ludicrous for a state’s attorney, addressing an alleged violation of the fourth amendment, to assert that the possible unreasonableness of a search is unimportant because the victim is homosexual, because the victim wore a grotesque hair style, or because the victim is white and white individuals traditionally have been subject to little fourth amendment deprivation thus an occasional misstep by the State against a white person is permissible. To the contrary, such extraneous considerations play no proper role in fourth amendment or general Bill of Rights analysis. The protections of the Bill of Rights involve social projects such as speech, press, police investigations, and the like. Protections from arbitrary actions under such projects are not limited to special, selected groups of individuals.

As the above shows, we can and have devised systems which set general protections from arbitrary treatment and which allow individuals to litigate specific cases seeking to enforce their rights. Extending similar protection in the realm of civil rights statutes is neither impossible nor unworkable. Indeed, the same general rights under the Constitution allowing individuals to bring private suits articulating personally conceived causes of action have been applied to specific statutory schemes with much success. An example is California’s Unruh Civil Rights Act which reads in pertinent part:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establish-

303. Similarly, individuals may articulate and prosecute actions under the fifth and fourteenth amendments’ guarantee of “due process of law.” See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (striking down school board’s requirement that every teacher must take unpaid maternity leave at end of fourth month of her pregnancy).

304. This does not mean that class status is always irrelevant in given instances. For example, consider the sixth amendment’s guarantee of right to counsel in criminal cases. The right to counsel inures to everyone regardless of race, religion, or other classifications. By contrast, the government enforces the right to counsel by providing cost-free legal assistance only to those who cannot afford such representation. This, of course, is discrimination on the status of wealth but the discrimination is not irrational. Those who can afford lawyers can acquire to their own legal assistance. To make the sixth amendment truly applicable to all, the government must provide attorneys to those too poor to afford a lawyer.
ment of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry or national origin.305

Recognizing, as its opening sentence explicitly states, that the statute protects all individuals, the California courts have declined to limit the coverage of the Unruh Act solely to the classifications listed in that statute’s text. Rather, as the California Supreme Court reaffirmed:

In [In re] Cox [3 Cal. 3d 205, 216 (1970)], after reviewing the origin, legislative evolution and prior judicial decisions construing the Unruh Act and its predecessors, our court concluded that the “identification of particular bases of discrimination—color, race, religion ancestry and national origin—... is illustrative rather than restrictive.”

Although we recognized that in recent years the act had been invoked most often “by persons alleging discrimination on racial grounds”, we emphasized that the act’s “language and its history compel the conclusion that the Legislature intended to prohibit all arbitrary discrimination in business establishments.306

Recognizing the broad interpretation accorded to the Unruh Act, the Court held that a landlord may not refuse to rent a dwelling to a family solely because the family has minor children. The Court rejected the landlord’s justification that the classificatory exclusion was rationally based on several incidents in which:

young tenants had engaged in annoying or potentially dangerous activities, ranging from acts of arson to roller skating and batting practice in the hallways to the attempted solicitation of snacks from the landlord’s office staff.307

While those incidents might make landlords justifiably wary about young children, the Court clarified that:

... the Unruh Act prohibits business establishments from withholding their services or goods from a broad class of individuals in order to “cleanse” their operations from the alleged characteristics of the members of an excluded class.

307. Wolfson, 30 Cal.3d at 727-278.
As our prior decisions teach, the Unruh act preserves the traditional broad authority of owners and proprietors of business establishments to adopt reasonable rules regulating the conduct of patrons or tenants; it imposes no inhibitions on an owner’s right to exclude any individual who violates such rules. Under the act, however, an individual who has committed no such misconduct cannot be excluded solely because he falls within a class of persons whom the owner believes is more likely to engage in misconduct than some other groups . . . the Unruh Act protects individuals from arbitrary discrimination.308

The Unruh Act precedents demonstrate that a civil rights statute which protects all individuals from arbitrary treatment concerning particular social projects is feasible. Our failure to construct such systems, then, is due to our reluctance to accord all persons full protection rather than a physical or economic reality rendering such a system impossible.309

IV. YES, BUT . . .

A. Introduction

The first three portions of this work set forth a general definition of rationality under the Constitution and certain civil rights enactments. Fur-
ther, these portions derived from the definitions a general proposition arguing that most modern day civil rights laws are irrationally underinclusive and that society would be improved by more comprehensive enactments.

These arguments promise to raise a host of objections some of which I have tried to anticipate and counter.

B. Privacy and Public Functions

The hallmark of the rationality of civil rights laws, as heretofore demonstrated, is that they proscribe irrational behavior. Yet, statutes are often written with limited exemptions excluding certain social actors on the basis of their size or impact on society. For instance, the Fair Employment Act of 1964 does not cover employers with workforces of less than 15 employees.\textsuperscript{310} Similarly, the Fair Housing Act of 1968 does not apply to all dwellings. The statute specifically exempts certain single-family homes including:

rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.\textsuperscript{311}

Congress may have believed that some good is engendered by exempting such employers or dwellings; or, perhaps, Congress envisioned a greater evil should these things be regulated by the civil rights laws.\textsuperscript{312}

Along similar lines, our constitutional and statutory system protects individuals who wish to form discriminatory but truly private clubs. For example, the Public Accommodations Act of 1964 specifically exempts private clubs from its prohibition against discrimination.\textsuperscript{313} And, at least one court has held that this exemption, to be meaningful, implies a similar limitation upon section 1981's proscription against racial discrimination.


\textsuperscript{311} See 42 U.S.C. § 3603(b)(2) (commonly referred to as the "Mrs. Murphy's boarding house provision").

\textsuperscript{312} It must be accented that these exemptions are very strictly construed to preserve the remedial effects of the statute as a whole. \textit{See, e.g.}, Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974) ("Mrs. Murphy" provision does not imply an exception to section 1982's prohibition against racial discrimination in property transactions); United States v. Mitchell, 327 F. Supp. 476 (N.D. Ga. 1971) ("Mrs. Murphy" provision does not apply to Fair Housing Act provision which prohibits blockbusting).

affecting the right to contract, although that statute contains no express privilege for private organizations.\textsuperscript{314}

While it seems clear that individuals may band together as a private club to exercise discriminatory impulses, consistent precedent establishes that such clubs are not truly private, and therefore, not beyond the reach of civil rights enactments, if, \textit{inter alia}, membership therein may be considered part of the privileges, expectations or "bundle of rights" attendant to owning or leasing property in a particular neighborhood.\textsuperscript{313}

Similarly, an organization may become so large, its general social impact may become so pervasive, and its predominant purposes so attenuated from promoting the exclusive nature of its membership requirements, that the states may regulate it as a public accommodation to proscribe membership restrictions based on considerations such as race and gender.\textsuperscript{316}

We may discern from these holdings a distinction recognized by both Congress and the Courts between private and public type transactions. In the former, the social actors engage in projects that are so personal and internalized that the law will not attempt to regulate. The touchstone of these projects may be that the actors do not hold themselves out to the public at large, inviting any and all comers to join them in the project. Thus, the law is loath to regulate concerning such personal decisions as choosing friends and lovers.

The situation is far different in public-type transactions for therein, as defined by law, the social actors are inviting all interested members of the public to join them in a social project, although particular actors may not have intended to engage in a public transaction, nor might they have known they were doing so as a matter of law.

Not surprisingly, the switch from one type of project to the other recalls our definition of rationality because in public-type transactions the imposition of personally held prejudices plays no necessary or meaningful role. By contrast, acting out otherwise impermissible discrimination may be the legitimate essence of a private project’s purpose. Thus, we allow people to indulge their prejudices—including racial, ethnic, sexual, and religious—when engaging in a truly private endeavor.

\textsuperscript{314} Cornelius, 382 F. Supp. at 1198-1203. The three judge court noted that the Constitutional right to privacy may compel an implied private club exception to section 1981. \textit{Id.} at 1202.

\textsuperscript{315} See, \textit{e.g.}, Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Wright v. Salisbury Club Ltd., 632 F.2d 309 (4th Cir. 1980).

\textsuperscript{316} See, \textit{e.g.}, Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (Minnesota Human Rights Act constitutionally forbids organizations such as Jaycees from discriminating on basis of sex); Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940 (1987) (same holding regarding California's regulations affecting \textit{Rotary International}); New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2232-35 (1988) (upholding facial constitutionality of New York City public accommodations code establishing that, with limited exceptions, an entity is not a private club if it has over 400 members, provides regular meals, and regularly receives payment for, \textit{inter alia}, dues, fees, services, meals, or beverages from or on behalf of nonmembers).
We must determine why we protect discrimination even for such ultra-personal choices. This article offers two discrete but interrelated explanations. First, we protect extremely intimate decisions in situations involving few individuals (small employers, very small apartment houses, small private clubs, and the like) to preserve and protect the very personhood of the decision makers. In other words, a society which regulates the choice of friends and lovers would ultimately threaten the development of individual character and identity. Thus, even if it is irrational to discriminate regarding intimate choices on the bases of race and ethnicity, the threat to personhood mitigates against regulating such decisions.

Secondly, protecting intimate choices concerns preserving the free flow of ideas in society. A basic constitutional tenet holds that the State has little legitimate role regulating the traffic in and content of concepts. One may argue, therefore, that prohibiting certain discriminatory action may violate this paradigmatic tenet when the action and the idea are virtually inextricably intertwined.317

Supreme Court opinions have upheld state regulation of large, private public service organization. The Court ruled that the States may designate such organization to be “public accommodations” and proscribe, inter alia, gender based discrimination in terms and conditions of membership despite any incidental infringement on members’ freedoms of expression and association.318 In so holding, the Court recognized two types of freedom of association of which, “intimate association” is relevant herein.319

317. A third reason may be briefly added. Sometimes the choice of friends, and certainly the choice of lovers, are affected by factors which are not susceptible to legislation. For example, to the effect that falling in love is a biological, chemical or otherwise natural phenomenon, attempting to draft a statute controlling such responses would be as availing as legislating the tides.

Even so, we must still inquire why legislatures should not outlaw certain types of discrimination insofar as intimate personal choices are intellectual decisions. In making this analysis one may presume that discrimination in certain personal projects is in fact arbitrary. For instance, the person who decides to reject a potential friend because of race has demeaned and humiliated the person in a manner similar to rejection by a potential employer or landlord. The economic and other ramifications may be different but the insult and hurt are comparable.

To be sure, one can make sociological and psychological arguments that discrimination in the choices of friends and lovers is rational. However, the discussion offered in this article will demonstrate that, under a societal cost/benefit analysis, the harm engendered by prescribing discrimination in certain personal projects significantly outweighs the benefits even if such discrimination is arguably irrational. Or, viewed slightly differently, the cost/benefit analysis will provide independent proof that such personal discrimination is rational.318. See supra note 316 (citing cases that forbid organizations to discriminate on basis of sex).

319. See infra notes 320-24 and accompanying text (describing “intimate association”). The second type of association discussed by the Court is “expressive association” and it encompasses “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” Roberts, 468 U.S. at 622. The Constitution protects expressive association to “preserve[] political and cultural diversity and [to shield] dissident expression from suppression
In careful detail, the Roberts Court defined "intimate association" as:
choices to enter into and maintain certain intimate human relationships . . . secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.320

Having established the general framework, Justice Brennan's majority opinion explained that "intimate associations":
cultivat[e] and transmit[] shared ideals and beliefs . . . foster diversity and act as critical buffers between the individual and the power of the State [and, protect the] emotional enrichment from close ties with others . . . therefore safeguard[ing] the ability independently to define one's identity that is central to any concept of liberty.321

These critical associations include marriage, family and other relationships characterized in part by:
such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. . . . Conversely, an

by the majority." Id.

"Expressive association," as with all rights, is not absolute. The state may impose necessary restrictions limited to promoting compelling state interests such as the eradication of irrational discrimination. The motive to regulate, however, must be "unrelated to the suppression of ideas. . . ." Id. at 623.

Applying the foregoing standards, the Roberts Court held that Minnesota's regulation of its chapters of the Jaycees by proscribing gender discrimination in membership, did not offend the first amendment. The Roberts Court noted that the organization's fundamental missions—to promote charity, to develop leadership skills among members, to aid members' employment opportunities and to better the community—are not related to its gender disparate membership policy. Thus, the pursuit and espousal of their main goals are not seriously threatened by Minnesota's regulations mandating gender neutral membership rules. Id. at 626-28. Indeed, the interests of the Jaycees, the Court in Roberts averred, pale before the goals of the state to "remov[e] the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." Id. at 626 (citations omitted).

Noting that the Jaycees allowed women to join as non-voting members, the Roberts Court was unable to discern how permitting women to vote would significantly jeopardize Jaycee policy and practice. Id. at 627-28. Similarly, the Court in Rotary Club of Duarte, supra note 316, determined that the civic and commercial purposes of the Rotary Clubs are not seriously disturbed by application of California's Unruh Civil Rights Act to forbid gender discrimination in membership. See Rotary Club, 95 L. Ed.2d at 486, supra notes 305-309 and accompanying text (discussing Unruh Civil Rights Act). The Court in Rotary Club accented that, as a general matter, Rotary Clubs do not publish positions on political issues of the day and nothing contained in the Unruh Act limits the clubs' right to advocate any stand they wish. Id.

321. Id. at 619 (citations omitted, emphasis added).
association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection.\textsuperscript{322}

[These associations include] deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life.\textsuperscript{323}

As the foregoing definition establishes, the Constitution protects private, intimate associations because they are integral components of individuality and personal identity. Regulating such personal interactions, except in the rarest instances, constrains individuals and seeks to control them on the basis of their most personal definitions. Clearly, the threat to individuality and freedom is manifest in societies where "intimate associations" are proper subjects for extensive and continual regulations resulting in the imposition of a societal norm restricting or obliterating those differences of attitude, demeanor, character, and appearance which define one person from another. While society may have a compelling interest in regulating intimate associations which threaten to harm innocent or unwilling others, there is no corresponding interest in routinely regulating intimate relationships.\textsuperscript{324}

Nevertheless, as the quotes from Roberts instruct, there comes a point—admittedly not easy to determine—when the usual limitations on regulation change. We have seen examples in the Fair Employment Act's application only to employers of greater than fourteen employees and the Fair Housing Act's "Mrs. Murphy" provision—examples which relate to size.\textsuperscript{325} The reason for the transformation of the States' powers to regulate cannot stem from the simple assertion that the larger an enterprise grows, the less intimate associations therein become. Neither can it be cogently argued that the founders and managers of large enterprises do not necessarily harbor the same emotional and personal ties that small entrepreneurs may feel toward their businesses. Such might be true in discrete instances, but one certainly can envision both a powerful manager of a large concern who feels genuine emotional attachment to the business and an owner of a small store whose connections to her business are strictly utilitarian.\textsuperscript{326}

\textsuperscript{322} Id. at 620 (emphasis added).
\textsuperscript{323} Id. at 619 (emphasis added); accord, New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2233-34 (1988); Rotary Club of Duarte, 95 L. Ed.2d 474, 484 (1987).
\textsuperscript{324} For example, it is no mystery why we permit individuals to define themselves through voluntary associations and choices of friends and lovers, but forbid rape, murder and other destructive acts committed against unwilling victims. But see Bowers v. Hardwick, 106 S. Ct. 2841 (1986); supra note 127 (discussing Bowers).
\textsuperscript{325} See supra notes 319-321 and accompanying text.
\textsuperscript{326} Looking at modern business, who can truly show that board chairman Lee Iacocca loves Chrysler Corporation any less than the proverbial "Mom and Pop" love their grocery store?
The answer, however, does stem from the "bigness" of the enterprise as the Court's consistent references to "relative smallness" as contrasted with "large business enterprise" indicate. For instance, the Jaycees failed the Court's definition of "intimate association" because, simply put, the organization had grown too big. As of August, 1981, the Jaycees boasted 295,000 members in 7,400 chapters located throughout the United States, prompting the Court to characterize them as "large and basically unselective groups." The Court further noted that the myriad purposes and projects of the Jaycees are apparently unrelated to any legitimate reasons to exclude women as full members. Indeed, gender, along with age, were the only bases upon which full membership was denied. The Court, therefore, discerned "no plan or purpose of exclusiveness" usually associated with legitimate private clubs. Sex discrimination practice by the Jaycees, then, served no purpose better than denying women opportunities both to perform charitable works and to establish contacts in the business and professional communities. While camaraderie measured by the absence of women may conceivably be legitimate within the confines of small, private clubs, the Court found gender discrimination unacceptable in a large, public-service organization.

The foregoing opinions establish that, at some indeterminate point, an organization becomes so large—and affects so many lives—that the owners' and managers' prerogative to set certain limitations on membership is outweighed by the States' legitimate interests in protecting individuals from arbitrary discrimination. The price of success as measured by size is that the enterprise must assume new social responsibilities. By attaining a certain size, the concern touches so many individuals that we will no longer allow the enterprise to arbitrarily discriminate. Or, discrimination, once rational, has become irrational due to the size of the discriminator. A very small

327. See supra text accompanying notes 325-327.
328. Roberts, 468 U.S. at 613.
329. Id. at 621.
330. See supra note 316 and accompanying text (prohibiting Jaycees from discriminating on basis of sex).
331. Roberts, 468 U.S. at 621.
332. Id. (quoting Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438 (1973)).
333. Three years later, applying the Roberts standards, the Court in Rotary Club of Duarte held that California constitutionally prohibited its chapters of the Rotary Club from practicing gender discrimination in terms and conditions of membership. Rotary Club, 95 L. Ed.2d at 486. The facts showed that Rotary International, as of the litigation, consisted of 907,750 members in 19,788 clubs located in 157 countries. Id. The Court held that the clubs' goals, to perform humanitarian works and to promote high standards of business ethics, are unrelated to their gender-based membership requisites. Id. at 485-86. As with the Jaycees, Rotary International became too large and engaged in too many civic functions—thus, no longer sufficiently personal in design and structure—to qualify under the First Amendment's protection for "intimate associations." Id. at 485. See also New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988) (holding that city's definition of "private club" acceptably balanced the constitutional protection of private clubs with interest in affording women access to clubs wherein business contacts routinely are established).
landlord, for example, may humiliate and disadvantage apartment applicants on the basis of gender, but when the landlord becomes too big, the quantity and attendant impact of her discrimination becomes too great. At that somewhat abstract point, preserving individual integrity through permitting discrimination falls in favor of preserving the personhood and opportunities of the discriminatees.

The second explanation regarding permissible arbitrary discrimination to establish personal relationships stems from the related premise that the Constitution fosters the free flow of ideas.

In *Stanley v. Georgia*, the Court held that "the mere private possession of obscene matter cannot constitutionally be made a crime." In support of this holding, Justice Marshall, speaking for the majority, noted:

> It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, is fundamental to our free society.

Justice Marshall accented these observations by reference to the famous dissent of Justice Brandeis in *Olmstead v. U.S.* Making that dissent part of the *Stanley* majority holding, Justice Marshall quoted as follows:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

With these concepts Justice Marshall concluded:

> If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds . . . [the State has no] right to control the moral content of a person’s thoughts.

336. Id. at 564 (citations omitted).
337. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
338. Id. (quoted in Stanley, 394 U.S. at 564).
339. Stanley, 394 U.S. at 565 (footnote omitted). While the U.S. Supreme Court has declined to extend *Stanley* by creating a right to provide or receive obscene materials, the privacy standard of *Stanley* was reaffirmed in *Board of Education v. Pico*. See *Pico*, 457 U.S. 853, 866-869 (1982) (plurality opinion holding generally that "the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library"). See also United States v. Anderson, 803 F.2d 903, 906-07 (7th Cir. 1986) (citing
Under *Stanley* the government has no more authority to regulate private, interpersonal associations than it does to control the flow of ideas. Preventing persons in a private setting from choosing friends and lovers, like preventing persons from reading books or viewing films, threatens to penalize individuals for their very thoughts. Certain private transactions are so intimately connected with the formation and consideration of ideas that to prohibit the acts amounts to punishing the ideas themselves.

However, public-type transactions, although predicated on concepts and ideas, are not subject to the same constitutional problems. For example, as discussed in *Runyon v. McCrary*, prohibiting a private school from engaging in racial discrimination does not prevent it from espousing and teaching ideas of white superiority and racial separatism. Similarly, compelling a public accommodation to refrain from racial discrimination does not prevent the owners of the accommodation, its employees or patrons from debating and promoting their closely-held personal concepts of prejudice. And, purportedly private clubs which actually link their membership to residency in a community, rather than solely to race or gender, evidence no genuine factors of exclusiveness of membership sufficient to invoke constitutional privacy protection.

Regulating truly private clubs, or interfering with the home and with personal social choices, by contrast, come uncomfortably close to prohibiting people from so much as thinking about, debating or discussing prejudice. This is intolerable, for we profess that the only cure for bad ideas is better ideas. If we compel reformation of thought, rather than *convince* others to change their minds, we cannot contend that our ideas are truly superior, more enlightened or more just. We can only say that we wielded sufficient political coercion to punish others for harboring contrary ideas. When the ideas and actions are virtually identical—as in privately practiced discrimination—we cannot take the chance of regulating conduct and thereby punish people for their thoughts. To do so, at the very least, would strip us of our moral authority to assert the ethical superiority of our ideas. However, once the ideas become sufficiently attenuated from action that we can control the action without unduly jeopardizing the ideas, we may regulate instances of irrational discrimination.

* C. Affirmative Action

Aside from initial discrimination itself, few civil rights issues have inspired such diverse and impassioned debate as the question of affirmative
action: the permissible reliance upon a usually irrational criterion—such as race or gender—as part of a program designed not to demean or debase usually downtrodden groups but to remedy the effects of past discrimination. 341

The Supreme Court has spoken on affirmative action several times in the last decade. Regents of the University of California v. Bakke, 342 concerned constitutional and statutory challenges against "a special admissions program at the ... Davis Medical School under which 16 out of the 100 places in each entering class were reserved exclusively for minority applicants." 343 The Court's holding invalidated the minority set-asides, but upheld the right of the university to consider race—and the attendant background factors—as part of the evaluation of applicants' qualifications. 344

Applying the strict scrutiny standard to the allegedly benign racial classification, 345 Justice Powell concluded that to promote academic freedom as well as to diversify the student body, a university may have a legitimate interest in considering the racial background of applicants. 346

United Steelworkers of America v. Weber, 347 addressed whether Title VII's proscription against racial discrimination forbids employers and unions from collectively bargaining employee training programs in which a certain percentage of the slots are reserved solely for minority applicants. The particular AAP, created to rectify a racial imbalance in certain skilled work forces, was designed to last only until the percentage of minorities in the given work forces matched their availability in the relevant labor market. 348 In a 5-2 opinion, the Court, speaking through Justice Brennan, upheld the program even though white applicants were denied slots in favor of less senior minority workers.

Justice Brennan noted that the employer, Kaiser Aluminum's Gramercy, Louisiana plant, had not been adjudged a discriminator under Title VII

343. Lavinsky, supra note 341, at 7.
344. Bakke, 438 U.S. at 281-320 (per Powell, J.). Justice Brennan, joined by Justices White, Marshall and Blackmun, would have upheld the program, arguing that a university may recognize and attempt to remedy the effects of general societal discrimination. Id. at 324-387. The Supreme Court has rejected the desire to alleviate generally felt discrimination as a permissible basis to establish an affirmative action program. Rather, the plan must address discrimination or imbalances actually experienced by the particular establishment. See Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1844-52 (1986) (plurality opinion per Powell, J.); id. at 1853-54 (O'Connor, J.)

The remaining Justices rejected the notion that race may be considered as a factor in such cases. Bakke, 438 U.S. at 408-21 (Stevens, J., dissenting).
346. Id. at 311-18.
prior to the creation of the affirmative action plan. Nevertheless, the extant, although unintentional, manifest racial imbalance in the work force rendered the affirmative action lawful. In essence, the Court recognized two Title VII's: a long-range enactment which foresees the day when discrimination in employment will be all but eliminated and a short-range statute which permits occasional and duly limited race or gender conscious measures to achieve the restructuring of the labor market promised by the long-range goal. To this end, voluntary affirmative action plans under Title VII may be implemented even if the extant conditions surrounding the adoption of the plan would not constitute a violation of the statute. The Court reasoned that to require otherwise would frustrate the policy of Title VII to encourage employers and unions voluntarily to ferret out and cure discrimination. After all, if an employer was required to admit committing a statutory violation in order to justify implementing an affirmative action plan, she would be extremely unlikely to adopt the plan and thereby incur costly liability through her admission.

Recently, in *Sheet Metal Workers' International Association v. EEOC*, a majority of the Supreme Court held that under appropriate circumstances, section 2000e-5(g), the remedial component of Title VII, "empowers a

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349. *Id.* at 197; *see also* *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S. Ct. 1442, 1452-53 (1987) (employer lawfully adopted a voluntary affirmative action plan in which gender of applicants for promotion was a factor considered during the promotion process).

350. The Court accented that the program did not "unnecessarily trammel the interests of the white employees" because (1) no incumbent workers were discharged to accommodate the affirmative action personnel, (2) only a portion of the slots in the training program were designated solely for minority applicants, and, (3) the program was designed to terminate once the racial hiring goal was attained. *Weber*, 433 U.S. at 208; *accord, Johnson*, 107 S. Ct. at 1451.

351. *Weber*, 443 U.S. at 204. Justice Brennan clarified the position of the Court by noting:

[it would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy. *Id.; accord, Johnson*, 107 S. Ct. at 1450.

352. *Weber*, 443 U.S. at 204; *Johnson*, 107 S. Ct. at 1451. *See also Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1844-52 (1986) (plurality opinion per Powell, J.) (under the fourteenth amendment of the United States Constitution, racially based affirmative action program is legitimate if predicated on compelling state interest and carefully designed to promote that interest); *id.* at 1857-58 (White, J., concurring); *id.* at 1853-54 (O'Connor, J., concurring in part and concurring in the judgment).

353. 92 L. Ed.2d 344 (1986).


if the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . ., the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative
district court to order race-conscious relief that may benefit individuals who are not identifiable victims of unlawful discrimination”.

The plurality supported its holding on a number of interpretive and policy grounds. Accenting that the language of section 2000e-5(g) “plainly expresses Congress’ intent to vest district courts with broad discretion to award ‘appropriate’ equitable relief to remedy unlawful discrimination,” Justice Brennan explained why race-conscious relief is lawful and appropriate action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate. ... No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin in violation of ... this title.

Id.

355. 92 L. Ed.2d at 357 (Brennan, J.) (emphasis added). Justice Brennan’s opinion, explaining why the challenged affirmative relief was viable under both Title VII and the United States Constitution, was joined by Justices Marshall, Blackmun and Stevens. See id. at 368-92 (hereafter Brennan or “Plurality” opinion). Two other justices, however, clarified in separate opinions their positions supporting the basic holding that section 2000e-5(g) does not forbid judicial creation of affirmative action programs which benefit nondiscriminates. Finding that the plain language section 2000e-5(g) does not apply solely to individual, actual victims of unlawful conduct, and concluding that the relevant legislative history does not clearly forbid application of that statutory provision to nondiscriminates, Justice Powell wrote “I ... agree [with Justice Brennan’s opinion] that section 706(g) [42 U.S.C. § 2000e-5(g) (1982)] does not limit a court in all cases to granting relief only to actual victims of discrimination.” Id. at 393 (Powell, J., concurring in the judgment and concurring in part).

Similarly, Justice White, in his separate opinion in Sheet Metal Workers, wrote:
As the Court observes, the general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination. But I agree that § 706(g) does not bar relief for nonvictims in all circumstances. Hence, I generally agree with Parts I through IV-D of the Court’s opinion.

Id. at 403 (White, J., dissenting) (emphasis added).

Justice White’s dissent in Sheet Metal Workers was predicated on his belief that the particular relief sustained in Sheet Metal Workers constituted a rigid quota rather than a temporary union membership goal.

356. Id. 92 L. Ed.2d at 369 (Plurality opinion). The plurality in Sheet Metal Workers rejected the too narrow interpretation of the remedial provision offered by both the petitioners and the Solicitor General. Justice Brennan stated:

The last sentence of § 706(g) prohibits a court from ordering a union to admit an individual who was “refused admission ... for any reason other than discrimination.” It does not, as petitioners and the Solicitor General suggest, say that a court may order relief only for the actual victims of past discrimination. The sentence on its face addresses only the situation where a plaintiff demonstrates that a union (or an employer) has engaged in unlawful discrimination, but the union can show that a particular individual would have been refused admission even in the absence of discrimination, for example because that individual was unqualified. In these circumstances, § 706(g) confirms that a court could not order the union to admit the unqualified individual.”

Id. at 369-70.
under a statute which strongly proscribes such considerations in most employment contexts. His opinion emphasized that the Act is designed to strip away those hurtful, irrational barriers which demean and denigrate individuals rather than distinguish employees and applicants on the basis of merit. While, under section 2000e-5(g), courts may not create unnecessary or unduly burdensome remedies, the clear command of that provision requires courts to formulate relief as expansive as is necessary to eradicate, as fully as possible, the vestiges and effects of a regime of discrimination. As Justice Brennan explained:

In most cases, the court need only order the employer or union to cease engaging in discriminatory practices, and award make-whole relief to the individuals victimized by those practices. In some instances, however, it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII. Where an employer or union has engaged in particularly long standing or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.

The Plurality fortified its logic by noting that, broad, affirmative relief may be necessary to thaw the "chill" engendered when a business' reputation for discrimination is so prevalent and long-standing that minority applicants are dissuaded from making any form of employment application at all. This "chill" may persist long after the employer has ceased performing direct, manifest acts of discrimination. Reputation alone often perpetuates the effects of a former discriminator's history of unlawful conduct.

Along interrelated lines, the Brennan opinion stated that strong, race-conscious relief constitutes a prompt and, often, immediately effective remedy. Eradicating the effects of persistent discrimination may be best effected through clear, pointed and potent measures the merits of which include their susceptibility to immediate enforcement.

As the foregoing explains, court ordered affirmative relief to remedy the consequences of given employers' proven history of continual unlawful discrimination reflects a clear instance in which race-consciousness furthers the letter and spirit of Title VII. Unlike irrational discrimination, the use of affirmative action is not designed to impede a traditionally discriminated

357. *Id.* at 370 (Plurality opinion).
358. *Id.* at 370-71 (Plurality opinion).
359. *Id.* at 371.
360. *Id.* at 372.
group’s entry into the labor market. Neither does such relief, either by accident or by design, unduly humiliate and demean individuals or preserve artificial, non-job related barriers to employment. To the contrary, the limited affirmative action plans break a persistent cycle of discrimination thereby allowing individuals to compete for employment opportunities on rational bases such as merit and seniority. As the Sheet Metal Workers opinion clarifies, a carefully drafted and constrained affirmative action program is a rational and legitimate use of race-consciousness intended to promote the goals of Title VII.

In Fullilove v. Klutznick, a bitterly divided Court upheld a provision of the Public Works Employment Act of 1977 which mandated that, absent administrative waiver, no less than ten percent of public work program grants be used—“set aside”—to retain minority contractors and firms. In one plurality opinion, Chief Justice Burger, joined by Justices White and Powell, accented that the program was devised by Congress to remedy past systematic discrimination. Deference to the legislature, accented by the limited and temporary nature of the set-aside program, validated the affirmative measure.

Justice Powell submitted a concurring opinion in which he applied the strict scrutiny standard, but noted that the elimination of both present discrimination and present effects of past discrimination may be compelling governmental interests supporting limited race explicit measures. Indeed, Powell indicated that a Congressionally enacted set-aside, designed to eliminate discrimination and then self-terminate need be only reasonable, rather than the most expeditious means to achieve those ends.

In the foregoing cases, the Court upheld some form of affirmative action because the race consciousness was at least rational. An arguable interpretation of the affirmative action cases applying our rationality analysis holds the following:

(1) because diversity of a student body is essential to many educational institutions, race, and the social factors often associated

361. The Sheet Metal Workers plurality accented that, while the given facts of each case will dictate the nature and extent of appropriate affirmative relief, if any, the “equitable considerations” informing “a court’s judgment would be guided by sound legal principles.” Id. at 388. The Plurality emphasized that affirmative relief cannot be implemented “simply to create a racially balanced work force.” Id. Rather, the trial court must determine if recourse to race-specific remedies are required to remedy the effects of past discrimination presented by the case-at-bar. Id. Guidelines include the considerations set forth at supra note 350 (considerations to be included in Sheet Metal Workers guidelines).

362. The Court has applied similar logic to uphold court ordered affirmative action in the face of a challenge predicated on the Fourteenth Amendment. See U.S. v. Paradise, 107 S. Ct. 1053, 1064-74 (1987) (Plurality opinion); id. at 1074-76 (Powell, J., concurring).


365. Fullilove, 448 U.S. at 475-83.

366. Id. at 497-517 (Powell, J., concurring).

367. Id. at 510, 513 (Powell, J., concurring).
therewith, may be rational considerations among the myriad criteria for deciding which candidates to accept;

(2) to eradicate the effects of discrimination in employment, and to afford the employer the opportunity to rectify racial imbalances prior to being sued, affirmative race conscious measures may be rational;

(3) Congress may determine that systematic discrimination has plagued a social realm so severely and for so long that strong, race explicit remedial measures are necessary, therefore, rational.

In each example, racial consciousness designed to reverse the demeaning and debilitating effects of persistent discrimination is rationally related—perhaps integral to—achieving our social project of equality. These measures do not demean, humiliate nor harm the majority race. Rather, they are necessary infusions of highly concentrated equality to energize the transformation of a social realm from its irrationally discriminatory practices. Thus, affirmative action, in carefully controlled doses is rational for it is relevant to the ultimate elimination of irrational discrimination.

D. The Unusual Case of Disparate Impact

A primary question raised by any civil rights law concerns what types of behavior are irrationally discriminatory. Clearly, actions deliberately utilizing a forbidden criterion will establish at least *prima facie* discrimination. Thus, for instance, the Fair Employment Act prohibits *per se* discrimination whereby an employer's policy, term, condition or practice is blatantly and unquestionably linked with one of the five statutorily forbidden criteria.

The courts have recognized, as well, that purposeful discrimination may be proven through circumstantial rather than direct evidence. Again using Title VII as our example, a plaintiff may present to a court a series of seemingly neutral facts and events which, when viewed *in toto* and contrasted with logic and experience, raises an inference that the acts could not have occurred when they did as they did absent impermissible discriminatory intent.368

In a third version of purposeful discrimination, a plaintiff may present a wide range of evidence including statistics, individual testimony and expert

368. See, e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Because a *prima facie* case is premised on a presumption of discrimination, the alleged discriminator may rebut the presumption through a mere evidentiary articulation of a non-discriminatory reason explaining the sequence of events. *Green*, 411 U.S. at 803; *Burdine*, 450 U.S. at 254. The plaintiff, however, has the opportunity to demonstrate that the defendant's rebuttal is either a pretext hiding intentional discrimination or too improbable, under the circumstances, to be believed. *Green*, 411 U.S. at 804-805; *Burdine*, 450 U.S. at 256.
witnesses, demonstrating a pattern and practice of discrimination on the part of the defendant.\footnote{369} Discrimination, however, need not always be intentionally perpetrated. Under certain statutory schemes, discrimination arises out of "policies and practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group."\footnote{370} This is known as "disparate impact". As clarified by the Court,

[Claims of disparate impact] involve . . . practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.\footnote{371}

Thus, for example, the Court has invalidated the use of racially neutral employment examinations which resulted in a significantly larger percentage of minority than white applicant failure.\footnote{372} Similarly, the Court held as violative of the Fair Employment Act, the use of certain minimum height and weight requirements for employment which disqualified a disparate percentage of female applicants.\footnote{373}

The interesting question about the "disparate impact" cause of action is whether it fits into our rationality analysis. After all, the unlawful practices under disparate impact do not seem to be irrational. An employment examination of height/weight requirement, for example, may not be terribly useful in differentiating among the most qualified, minimally qualified and unqualified individuals, but neither can it usually be shown that such devices are absolutely irrelevant to all aspects of applicant qualifications. Unlike purposeful discrimination which imposes a wholly irrational criterion onto a social project, devices invalidated under disparate impact often bear some


371. Id. at 335 n.15; see also Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988).

372. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Connecticut v. Teal, 457 U.S. 440 (1982) (Teal is particularly significant for those who were permitted to challenge that portion of the hiring process which discriminatorily eliminated them from competition despite the fact that sufficient numbers of minority applicants successfully completed the entire process allowing the employer to hire the same percentage of minorities as reflected by their representation in the applicant pool).

373. Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977) (general population data may be relevant to determination of disparate impact). The defendant may attempt to rebut the disparate impact case by demonstrating that the plaintiffs' statistics are infirm or that their interpretation of the data is faulty or inconclusive. Moreover, the defendant may defend by showing that the offending test, device or practice is necessary for the safe and efficient running of the business. See Dothard, 433 U.S. at 329. The plaintiffs may counter the defense by showing that these legitimate goals may be accomplished through less restrictive, non-discriminatory means. Id.; Teal, 457 U.S. at 447.
rational relationship to a legitimate social project such as culling acceptable from unacceptable employment candidates.

The clue to the application of impact analysis in our thesis comes from the courts' explanation of the utility of this cause of action. Speaking about employment discrimination, but arguably applicable in other contexts, the Supreme Court noted,

[T]he objective of Congress . . . is plain from the language of the statute . . . to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. . . . Congress directed the thrust of the Act to the consequences of employment practices, not merely to motivation.374

The Court recognized, therefore, that seemingly neutral practices might unintentionally isolate social, political, economic, cultural or physical differences among groups thereby perpetuating or inspiring decisions which exclude the group from employment opportunities. If the offending practices are integral to the operation of the enterprise, the employer may utilize them despite their disparate impact.375 But, when the practices, although convenient or traditional, are not important—or when the information gleaned from important practices may be obtained through alternative, nondiscriminatory means—the resultant disparate impact is sufficient to activate the protections of Title VII.

We see, therefore, two ways to reconcile disparate impact with our rationality analysis. First, under our societal cost/benefit analysis, the courts have instructed that the benefits gained—the good engendered—to the employer through the use of the devices or practices is outweighed by the harm suffered as large groups of individuals are excluded from the employment process on the basis of cultural or physical characteristics which are linked to a forbidden criterion and which serve no integral purposes for the employer.

The second argument, which may be joined with the first to form a solid basis to justify disparate impact analysis, views the impact cause of action as something akin to an affirmative action program. As explicated by the courts, the impact analysis is designed to eradicate the consequences of discrimination—consequences which may linger from decades of systemic social, cultural, educational, economic and physical discrimination.376 Enforcement of the statute—fulfillment of the goal to expunge arbitrary discrimination from the employment realm—requires certain social reconstruction, sometimes on a fairly large scale. We have seen, for instance, that affirmative action programs are often appropriate means to infuse a civil rights schema with the requisite energy to place discriminatees and

375. See supra note 373.
discriminators on more equal plateaus. Similarly, outlawing devices and standards which result in a racial or sexual disparate impact is a way of providing needed equality by eliminating practices which prevent downtrodden individuals and their constituent groups from attaining equality of opportunity resulting from the consequences of persistent societal discrimination.

A serious program against discrimination requires remedies for the harmful and continual effects resulting from the momentum of discrimination. The disparate impact action, therefore, like affirmative action, results in a major redistribution of power by forbidding employers from even unintentionally calling upon the specter of discrimination in the conduct of their businesses.

V. CONCLUSION

There are many reasons to explain the limited coverage of the civil rights laws. Some reasons are political, some economic, some sounding in morality, others sounding in fear, ignorance, intolerance, apathy, misplaced paternalism, or complacency. But, in our constitutional system, all of these reasons are beside the point. The Constitution commands that all persons within the jurisdiction of the United States be treated fairly by all organs of government. The primary inquiry, then, is whether the limits of our civil rights laws are fair. This article argues that they are not.

There is no sufficient principled base to recognize an area of fundamental social importance, such as property or contract, and limit the protection from irrational discrimination to only certain classes. Arguments appealing to history have no place in restraining a Constitution whose definition of "fairness" was intended to grow and build upon itself. Pleas addressing cold economics are unavailing in a constitutional system which places the highest value on protecting the integrity of those too weak to protect themselves. This is especially so when the legal system may create systems to handle additional case loads, if any, generated by the recognition of expanded civil rights.

Stands based on intolerance or personal distaste for certain groups or group practices are singularly inappropriate in a society energized by a constitution which promotes and protects diversity and the myriad ways in which the human imagination may express itself.

Of course, discrimination based on characteristics which genuinely relate to the legitimate conduct of a given business, action or project is not arbitrary and, thus, not unlawful under this Article's definition of "rationality". If, however, "the constitutional conception of 'equal protection of the laws' means ... that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," then the civil rights statutes may not be limited to express the legislatures' ill will or insensitivity towards unprotected groups.

If "mere negative attitudes, or fear, unsubstantiated by [relevant] factors . . ." 378 cannot pass muster under the Constitution to support governmental action, neither should such considerations justify governmental inaction—the purposeful or negligent limitation of civil rights laws.

If the Constitution does not allow official actors to create useless caste systems, 379 so too it must forbid those actors from perpetuating caste systems by demanding that civil rights coverage inure to all who suffer irrational, humiliating and disadvantageous treatment.

It may occur that applying the constitutional command for rationality—for fairness—will encourage some foolish or frivolous claims. But, no legal rights are so well defined that they forestall all misuse of the courts. Certainly, the vindication of personal dignity and freedom is worth such costs.

If we find, at some future date, that our society of fairness has legitimated and protected practices which, today, seem uncomfortable, even dangerous, we must remember that such has been the very history of the Constitution itself. The fact that, most likely, the framers of the civil rights codes of 1866 would not have applied those laws to invalidate behavior which they proscribe today demonstrates that a regime of rights must be allowed to thrive and develop, even to the point of invalidating the practices of which the framers themselves were fond. 380 The visions of the drafters of civil rights protection may be great, but the frontiers such protection covers stretches out many horizons beyond anyone’s view.

Adapting the observations of Justice Blackmun, "[w]e protect . . . rights not because they contribute, in some direct and material way, to the general public welfare, but because . . . ‘a person belongs to himself and not to others nor to society as a whole’. . . . The fact that individuals define themselves in significant [and varied ways] . . . suggests, in a Nation as diverse as ours, that there may be many 'right' ways of [defining oneself] . . . and that much of the richness of [our social order] will come from the freedom an individual has to choose the form and nature of [her personhood]." 381 These fundamental choices of personhood should be protected fully. Individuals ought not be compelled to choose between defining themselves and exercising their rights to engage in social projects unless their self-definition is truly and legitimately related to the conduct of the social project. Civil rights codes which go that far may be deemed fair and rational.

379. See supra notes 130-52 and accompanying text.
380. See supra note 2.