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Putting the 'Review' Back in Rational Basis Review

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INTRODUCTION

A primary role of the judiciary is to articulate the law.¹ The process of articulating law through judicial decisions defines the contours of our rights and gives them a more concrete meaning. Often, the judiciary is rather deferential to the legislative and executive branches, which are arguably more capable of making informed determinations within their areas of expertise.² However, there is a departure from that deferential standpoint when it comes to individual rights. That is, in order to

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¹ See, e.g., Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

² See, e.g., U.S. CONST. art. I-III (Separation of Powers).
uphold those individual rights guaranteed by the Constitution, courts take a much less
deverential stance, and require the government to demonstrate that its conduct is
justified. One prominent individual-rights exception to this is the Equal Protection
Clause. The judiciary’s duty in enforcing the Equal Protection Clause is to review
legislative classifications of people for constitutional justification. However, under the
current rational basis review standard the government “has no obligation to produce
evidence to sustain the rationality of a statutory classification,”3 which is an
extraordinarily deferential standard by any measure. By upholding laws when the
government fails to assert any reasonable justification for the classification, courts are
ostensibly substituting their own validations and are thus no longer “reviewing” in any
meaningful sense.

If the goal of judicial discourse is to articulate the law—or even if the goal is
simply to pick a winner from among adverse parties with legitimacy—then courts
should hold the government to a minimal evidentiary standard that requires the
government to submit some evidence to rationalize the legislative classification at
issue. In other words, when legislative classifications of people are challenged, the
government should be required to put its money where its mouth is and, at the very
least, submit some evidence supporting the connection between the purported
government interest and the challenged classification. However, under the current
rational basis review standard, because the challengers of laws have no way to
disprove the ridiculous, courts have been willing to accept speculative and
hypothetical reasons as sufficient justifications to uphold laws that make
classifications of people. But courts also offer their own speculative and hypothetical
bases of explanation where the government does not—often even submitting “well,
possibly . . .” type explanations that could (stochastically, with enough imagination) be
characterized as a rational reason for the classification.4 The result is a stunting of law
articulation and judicial discourse lacking in integrity. Judicial deference to the other
branches is meant to bolster judicial legitimacy, but ironically, traditional rational
basis does the opposite; and it produces bad law.

Under the current standard of rational basis review, courts do not require the
government to produce any evidence or articulate any argument.5 Rather, for the
challenger of a law to succeed, rational basis requires the challenger to disprove “every
conceivable basis” for the legislative classification, regardless of whether it was a
rationale upon which the legislature actually relied.6 When the court does not rely on
(or even require) the existence of any evidence to support a law that makes
classifications of people, the standard is more appropriately called a hypothetical or
speculative basis review. And, for reasons that will be outlined in this Article,
allowing those laws to be upheld for imaginary reasons is especially troublesome.
Instead, even under the most deferential standard of review for determining

4. See id.
5. Id.
6. Id. at 320-21.
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court's constitutional legitimacy, courts should be asking lawmakers to justify the law in question and to prove that the classification is—if not necessarily fair—justified in fact and constitutional in nature. Therefore, the government should appropriately carry the burden of proof when a law that makes classifications of people is challenged.

Accordingly, a new standard of rational basis review is warranted. Although the problems with the tiered doctrinal framework are a concern beyond the scope of this Article, the concern does help to illustrate why an improved form of rational basis review is necessary. The tiered equal protection structure is itself imperfect, and the Court also appears hostile to adding any new suspect or quasi-suspect classes. However, a radical restructuring of the current framework is unnecessary—or at least it is a step too drastic to reasonably be accepted. Instead, I argue in this Article that the rational basis standard should be reworked to allow for a more meaningful review of governmental justifications for laws that make classifications of people, regardless of whether those groups receive the magical status of having been deemed “suspect” or “quasi-suspect.”

This Article advocates for a standard of rational basis review that remains relatively deferential to the government, but that reincorporates what appears to have been forgotten: the review. This reimagined standard shifts the burden of proof to the government to show a reasonable, fact-based justification for laws that make classifications of people. Under this revised rational basis review standard, the government is still fully capable of making laws, including laws that make classifications of people, but the justifications of those laws would be put to the same test we currently apply to almost all other litigation. That is, those justifications would have to withstand minimally intrusive judicial review such that some iota of evidence would be required in order to accept them at face value. Although the revised, put-your-money-where-your-mouth-is, rational basis review would in some cases boil down to a battle of the experts, courts encounter this problem frequently and are well equipped to deal with it. In essence, this revised standard requires an actual look at (a review) of the justifications (the rationale) that link legislative classifications to legitimate government goals. Thus, throughout this Article I will refer to this new standard as “rationale review.”

The Article proceeds in four Parts. Part One provides a brief background on the Equal Protection Clause and its jurisprudence, demonstrating that we should be inherently uneasy about any law that makes classifications of people; it then turns to a

7. Because the tiered framework is an imperfect proxy for determining the level of (equal) protection, and because no new classes have been added to the list of “suspect” or “quasi-suspect” classes in a handful of decades (and thus none will receive heightened scrutiny) nearly all laws that make classifications of people are likely to be reviewed only under a rational basis standard. When that standard becomes too unpredictable or too diluted to actually protect rights, then the entire function of the Equal Protection Clause is lost. See, e.g., Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747 (2011).

8. It is notable that quite frequently the standard is referred to only as “rational basis,” leaving out the word “review.” See, e.g., United States v. King, 972 F.2d 1259 (11th Cir. 1992); Capili v. Shott, 620 F.2d 438 (4th Cir. 1980).
small sampling of contemporary equal protection cases that have applied rational basis review, noting the varying outcomes that can be reached by courts purporting to use the “same” standard. Part Two discusses the problematic nature of the current rational basis standard and highlights several specific concerns. Part Three introduces a new standard of rational basis review—rationale review—that advocates for an important change to the current standard: shifting the burden in equal protection's rational basis review onto the government. Part Four explores the probable effect of the proposed rationale review standard by examining existing cases, and notes that a standard similar to rationale review is already being employed by lower courts. The Article concludes that by applying rationale review, cases would be decided with more integrity embodied in the judicial decision making process, individual rights would be articulated more carefully, groups facing subordination would have a more realistic chance at being treated fairly in the eyes of the law, and the disruption to equal protection jurisprudence would be insignificant.

I. TRADITIONAL RATIONAL BASIS UNDERMINES EQUAL PROTECTION PRINCIPLES AND IS STANDARDLESS

The history of the Equal Protection Clause makes it clear that any law that makes classifications of people should be one that we are inherently uneasy about. By definition, a law that classifies people does not apply equally. The Constitution's Equal Protection Clause thus restricts the government from making classifications of people, and as such it should be the government’s burden in every case to show why it has made a classification and that such classification is constitutional. If that justification is not based in reason, then by definition it is irrational. Requiring that the government bear the burden of

9. See, e.g., Cong. Globe, 43d Cong., 2d Sess. 1793 (1875) (stating that the clause means “that all men shall be equals before the law” and “that no State shall deny to any man the equal advantage of the law, the equal benefit of the law, the equal protection of the law”); Cong. Globe, 43d Cong., 1st Sess. S. app. 360 (1874) (stating that the clause "prevents any State from making any odious discrimination against any class of people"); Cong. Globe, 43d Cong., 1st Sess. S. app. 359 (1874) (stating that the clause "denies to any State the power to make a discrimination against any class of men as a class"); Cong. Globe, 43d Cong., 1st Sess. S. app. 358 (1874) ("[W]hen the fourteenth amendment declares that every person shall be entitled to the equal protection of the laws, it means to the equal benefit of the laws of the land.").

10. U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). By definition, a law that classifies does not apply equally. See also, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding in part that separate is not equal). The Fourteenth Amendment applies to the federal government through the Fifth Amendment’s Due Process Clause incorporation. Thus, the Fifth Amendment applies the guarantee of equal protection to the federal government, prohibiting both the states and the federal government from denying equal protection to citizens within their jurisdictions. Because the analyses are identical, I will use “Equal Protection Clause” throughout this Article to include and refer to both. See U.S. Const. amend. V; Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (holding in part that the Fifth Amendment’s Due Process Clause prohibits the federal government from discrimination); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (similar).
proof under rational basis is a matter of common sense and is consistent with the principles the Equal Protection Clause is meant to uphold.

This Part begins in section A with a brief look at the history of the Equal Protection Clause to show that we are meant to be inherently suspect of any laws that make classifications of people. Next, this section focuses on the inconsistent application of the rational basis standard as it has existed in contemporary jurisprudence, demonstrating that even using the (allegedly) same rational basis standard, the outcomes of cases can vary greatly. Section B examines a case applying meaningful rational basis review, one in which the Court required the government to support its purported rationale with facts. Section C examines two cases in which courts applied an impotent standard of rational basis, demonstrating total deference to the government and even going so far as to assert speculative justifications on the government's behalf.

A. Development of Rational Basis and a Correct Reading of Carolene's Footnote Four

The Fourteenth Amendment, which includes the Equal Protection Clause, was enacted after the Civil War in an effort to end discrimination, specifically discrimination against former African-American slaves. It provides in part that, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Although initially passed to protect African-Americans from widespread discrimination, by 1886 the Equal Protection Clause was judicially expanded to provide protection against unequal enforcement of the law to non-African-Americans as well. In 1938, a landmark case, and "the most celebrated footnote in constitutional law," further expanded the protection available under the Equal Protection Clause. In United States v. Carolene Products Co., the Supreme Court held that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

Following Carolene, it was understood that socially disfavored groups classified by the law were entitled to judicial intervention, and the law in question

11. U.S. CONST. amend. XIV.
12. See, e.g., Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 VA. L. REV. 753, 784-87 (1985); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) (noting that "the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves").
17. Id. at 152 n.4.
subjected to some form of judicial inquiry. Thus, under equal protection doctrine, and relying on a proper understanding of *Carolene Products*' "discrete and insular minority" etymology, the fact that a law makes classifications of people at all is meant to be inherently suspicious and warrant some degree of judicial inquiry into its legitimacy. Although laws frequently make classifications of people, the level of judicial review varies depending on the nature of the classification.

As commentators have noted, "In the wake of *Carolene Products*, economic legislation would thereafter be judged by a standard of 'rational basis': so long as the law is a 'rational' way of furthering any 'legitimate' governmental purpose, it is valid." However, "[f]or laws touching upon fundamental rights or discriminating against racial minorities, *Carolene Products* suggested the possibility of a more vigorous judicial role—a more searching judicial scrutiny."

*Carolene Products* is thus noteworthy for having conceived a standard of rational basis review, but one that did not afford absolute deference to the government. Instead it required reliance on and judicial verification of actual facts. However, *Carolene Products* suggested that the rational basis standard was to be applied to review of *economic legislation*, and that where the individual rights of members of


20. Race, alienage, national origin, and religion are "suspect" classes and are reviewed under strict scrutiny, which requires the classification to be necessary to a compelling government interest. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944). Gender and non-marital children are "quasi-suspect" classes and receive intermediate scrutiny, which requires the classification to be "substantially related" to an "important" government interest. See, e.g., Craig v. Boren, 429 U.S. 190 (1976). Rational basis review, which applies to all other classes, merely requires the classification to be rationally related to a legitimate government interest. See, e.g., Cleburne, 473 U.S. 432. It should also be noted that the level of scrutiny applied to a particular case essentially determines the outcome: where rational basis is applied, the law is almost always upheld; where heightened scrutiny is applied, the legislation is almost automatically struck down. Gerald Gunther famously described the strict scrutiny standard as one that is "strict in theory and fatal in fact." See, e.g., United States v. Carolene Products Co., 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.")

21. Winkler, supra note 19, at 799. The rational basis standard thus requires that the government classification or action be "rationally related" to a "legitimate state interest." See, e.g., Schraub supra note 20, at 1443.

22. Winkler, supra note 19, at 799 (internal quotation marks omitted).

23. United States v. Carolene Products Co., 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.").
minority groups were implicated, a “more searching judicial inquiry” was required. Nevertheless, over time, that rational basis standard was applied to legislation that affected individual rights and was also “modulated to total deference, which led the Court to uphold governmental action that was not in actuality reasonably related to a legitimate state interest . . . .”

In my view, the correct understanding of Carolene’s footnote four is that it mandates a more thorough judicial review when individual rights of members of an identifiable group are implicated. Where prejudice actually ameliorates the ability of members in an identifiable group from utilizing the political process to protect themselves from discrimination, it qualifies as such a “special condition,” triggering the dependent clause and mandating a “more searching judicial inquiry.” A legislative classification that disadvantages an individual so classified, and which cannot be successfully challenged without disproving every imaginable rationale, is a clear example of a “prejudice . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . .”

Although laws that make classifications of people are inherently suspect (or should be), many laws require making such classifications and can be justified by some non-arbitrary or non-biased reasons. The paradigmatic example is a law requiring a minimum driving age to obtain a driver’s license. That law quite clearly makes classifications of persons over and under the legal driving age. But those laws are deemed necessary to public safety and are justified as such because young children driving automobiles are demonstrably an objective hazard to public safety. Accordingly, and particularly for laws that make classifications of people with less obvious legitimate justifications, the government should be required to justify the law and should be held to a consistent standard to justify the classification at issue, even under the most deferential standard. However, currently, that most-deferential standard has varying degrees of “bite,” and ranges from a (rarely) meaningful review to (consistently) entirely inconsequential one.

24. Id. at 152 n.4. It has been suggested to me that this is an alternative history of Carolene, one that deviates significantly from the commonly accepted understanding of Carolene. However, I believe my interpretation is the correct understanding, and I leave a more thorough explanation of this “alternative history” of Carolene’s footnote four for later work.


26. See infra section I.C.

27. Carolene, 304 U.S. at 152 n.4.

28. See generally Gayle Lynn Pettinga, Rational Basis With Bite: Intermediate Scrutiny By Any Other Name, 62 Ind. L.J. 779-80 (1987) (describing a more robust form of rational basis review, one with “bite” or “teeth,” that is closer to heightened scrutiny than it is to the traditional rational basis review standard).
The following cases demonstrate the inconsistency in the application of the current rational basis review standard. Some laws reviewed under rational basis are subjected to a meaningful review of the legislative rationale, one where the government is obligated to actually and practically justify the classification at issue with real evidence. Other laws are subjected to a far less meaningful rational basis standard (although technically still the same standard) and are met with a much less exacting "review." Often courts even go as far as to substitute their own possible reasons for why a law might be justified, thereby relieving the government of showing the justification at all.

B. Meaningful Rational Basis

City of Cleburne, Texas v. Cleburne Living Center represents a meaningful version of rational basis review, and demonstrates that at least some members of the Court have been open to broader application of such a standard. Further, Cleburne also suggests that a more meaningful standard of rational basis review is not only possible, but also that the Supreme Court has already applied it.

In Cleburne the Respondent purchased a building with the intention of leasing it to Cleburne Living Center (CLC) for the operation of a group home for the mentally retarded, only to be informed by the City of Cleburne that a new ordinance required a special use permit for the operation of such a home. CLC submitted an application for the special use permit and was denied by the City Council. CLC then filed suit
against the City alleging that the zoning ordinance was invalid because it discriminated against the mentally retarded.36

The Supreme Court held that mental retardation was not a class warranting any form of heightened scrutiny.37 Nevertheless, applying rational basis, the Court struck down the ordinance as violating the Equal Protection Clause because it appeared to rest on an irrational prejudice against the mentally retarded.38 In finding the ordinance unconstitutional, the Court reviewed the assertions proffered by the City: First, the court found the City Council’s concern regarding the negative attitude of nearby property owners to be “unsubstantiated by factors which are properly cognizable in a zoning proceeding,” and thus, an “[im]permissible bas[is] for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.”39

Second, the City Council raised two objections to the facility’s location.40 First, the City Council claimed that because the facility was across the street from a junior high school, “students might harass the occupants” of CLC.41 The Court summarily dismissed this argument because mentally retarded students attended the junior high and the fears of harassment were undifferentiated.42 The second objection was that CLC was located in a “five hundred year flood plain.”43 But the Court noted the concern could “hardly be based on a distinction between” CLC and other group homes which could be located on the same site without a special use permit.44 “If there [was] no concern about [the] legal responsibility with respect to other uses that would be permitted in the area . . . [the Court found it] difficult to believe that the groups [who would live at CLC] . . . would present any different or special hazard.”45

Finally, the City stressed concerns with the size of the group home and the number of people that would occupy it.46 But, given that “there would be no restrictions on the number of people who could occupy this home [for nearly all other

36. Id.
37. See id. at 442. The Court applied the four-factor test used to determine whether a group warrants some form of heightened scrutiny. Those four factors are history of prejudice, immutability, ability to contribute to society and political powerlessness. Id. at 442-47.
38. Id. at 448. Demonstrating the relatively unremarkable nature of the rationale review proposed in section III.B, in most of the cases striking down laws using rational basis because of a foundation in animus or prejudice, the Court is fundamentally engaging in a factual review of the rationale asserted by the government with a focus on that factual support underlying for the purported rationale linking the government goal and the classification. See, e.g., Romer, 517 U.S. 620; Moreno, 413 U.S. 528.
39. Cleburne, 473 U.S. at 448. With respect to negative attitudes, concerns, and fears of the nearby property owners, the Court noted that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” Id. (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).
40. Id. at 449.
41. Id.
42. Id.
43. Id.
44. Id.
45. Cleburne, 473 U.S. at 448.
46. Id. at 449.
the Court found no connection between the “characteristics of the intended occupants” and the density regulation. Thus, the Court held “[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice” and held the ordinance unconstitutional.

Notably, the Cleburne majority, in striking down the ordinance under rational basis, acknowledged that “the mentally retarded as a group are indeed different from others . . . and . . . different from those who would occupy other facilities that would be permitted . . . without a special permit,” and “they suffer [a] disability not shared by others.” But because the Court held that “this record does not clarify” the connection between the characteristic and the discriminatory legislation, and because “the record does not reveal any rational basis” to justify the City’s interest, the Court struck down the ordinance as unconstitutional. Justice Marshall, concurring in the judgment and dissenting in part, pointed out the obvious: “Cleburne’s ordinance surely would be valid under the traditional rational-basis test.”

In contrast to cases like Heller and Lofton, the Cleburne Court seemingly required an on-the-record, factual, and principled justification for the discriminatory law. But because the City of Cleburne could not produce perceptible support for their purported justifications, the ordinance failed rational basis. The City had asserted reasons that under traditional rational basis review would certainly have sufficed: “avoiding concentration of population,” “lessening [the] congestion of the streets,” “fire hazards,” “serenity of the neighborhood,” and “avoidance of danger.” Yet the Court held that these (seemingly legitimate) reasons “failed] rationally to justify” the ordinance requiring CLC to obtain a special use permit.

In his concurring opinion, Justice Stevens noted that equal protection jurisprudence up to that point had not reflected a clearly defined three-tiered standard for reviewing legislation under an equal protection challenge. “Rather, [the] cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from ‘strict scrutiny’ at one extreme to ‘rational basis’ at the other. [Stevens had] never been persuaded that these so-called ‘standards’ explain the decisional process.”

47. Id.
48. Id. at 450.
49. Id.
50. Id. at 448.
52. Id. at 450 (emphasis added).
53. Id. at 448 (emphasis added).
54. Id. at 450.
55. Id. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part).
57. Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004). Discussed in section II.C, infra.
58. Cleburne, 473 U.S. at 450.
59. Id.
60. Id.
61. Id. at 451 (Stevens, J., concurring).
62. Id.
Justice Stevens also pointed out that basic equal protection inquiries 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 [other] classifications.” He went on to explain his view that the rigid tiered framework often failed to actually take into account “the purpose that the challenged laws purportedly intended to serve,” thus leaving considerations, like rational laws that favor a group, out of the calculus.

C. Meaningless Rational Basis

In *Heller v. Doe*, the Supreme Court upheld a Kentucky state law that made distinctions between the mentally retarded and the mentally ill for the purposes of the procedure for involuntary commitment hearings. The differences at issue were that the applicable standard of proof for the mentally retarded was lower than for the mentally ill; and for proceedings for the mentally retarded, parents and guardians were permitted to participate in the proceedings as a party, including having the right to present evidence and appeal a ruling. Respondents, a class of mentally retarded individuals involuntarily committed to state institutions, brought an equal protection challenge, arguing that the distinctions between the mentally retarded and the mentally ill were irrational.

The legislation was reviewed using rational basis, and in addressing the appropriate standard to use, the Court noted at the outset the deferential nature of the rational basis standard. First, “the theory of rational-basis review . . . does not require the State to place any evidence in the record.” Furthermore, “a legislature that creates these categories need not ‘actually articulate at any time the purpose or rationale supporting its classification.’” Instead, a classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts

63. *Id.* at 453. As it relates to contemporary issues, groups like gays and lesbians facing discrimination in marriage equality or adoption laws, for example, do not fit into the three-tiered standard. Because of this, most laws discriminating against those groups are routinely upheld under the deferential rational basis. Conversely, for groups like the mentally ill or the mentally retarded, it is not hard to imagine a law restricting, say, driving commercial vehicles being rationally related to public safety and supportable with evidence. But laws that discriminate against those groups, such as involuntary commitment standards that have no factual foundation, are necessarily irrational when unsupported. But because those groups do not fit into the tiered framework, all of the laws classifying them are routinely upheld. The rare exception is a case like *Cleburne*, where the caprice of a court leads it to opt for a (rare) meaningful form of rational basis in order to strike down the classification.

64. *Id.* at 454.


66. *Id.* at 314-15.

67. *Id.* at 315. Respondents also brought a due process claim, but because it is beyond the scope of this Article it will not be discussed. *Id.*

68. *Id.* at 319.

69. *Id.*

70. *Id.* at 320 (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)). Indeed, it is difficult to discern from the opinion what Kentucky’s legitimate state interest actually was. It appears to be reducing the risk of error in misdiagnosis before an involuntary commitment, and protecting the public from dangerous mentally ill or mentally retarded individuals, and protecting those individuals from harming themselves.
that could provide a rational basis for the classification.’”71 Furthermore, the Court noted that a state “has no obligation to produce evidence to sustain the rationality of a statutory classification . . . and [the classification] may be based on rational speculation unsupported by evidence or empirical data.”72 Finally, the Court noted that

[a] statute is presumed constitutional and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” whether or not the basis has a foundation in the record. . . . A classification does not fail rational-basis review because it “is not made with mathematical nicety or because in practice it results in some inequality.”73

The State argued that the lower standard of proof in commitments for the mentally retarded was because mental retardation is easier to diagnose than mental illness.74 The Court surmised the following justifications for the law: the risk of erroneous commitment is equalized by a higher burden of proof for the mentally ill, past behavior is a better predictor of future dangerous behavior for the mentally retarded than for the mentally ill, and treatment for the mentally retarded is much less invasive than for the mentally ill.75 Although acknowledging “that the loss of liberty following commitment for mental illness and mental retardation may be similar . . . States are not required to convince the courts of the correctness of their legislative judgments.”76 Thus, having found the differences in commitment standards justified by the conjectural “differences in the ease of diagnosis and the accuracy of the prediction of future dangerousness and by the nature of the treatment received after commitment,” the Court found each of the rationales, on their own, sufficient “to establish a rational basis for the distinction in question.”77

However, the disparate standards of proof do not appear rationally related to reducing the risk of misdiagnosis; the standard of proof in this case was the required showing in court before one is stripped of one’s liberty and involuntarily committed to a state institution. As Justice Souter noted in his dissenting opinion (while pointing out the lack of any factual justification) the question was really “whether, in light of the State’s decision to provide that high burden of proof in involuntary commitment proceedings where illness is alleged, there is something about mental retardation that can rationally justify provision of less protection.”78 Where the competing interests are the government’s interest in public safety and the individual’s interest in liberty, whether the lower standard of proof is rationally justified turns on “whether there are

72. Id. (quoting Beach Communications, 508 U.S. at 315) (internal quotation marks omitted).
73. Id. at 320-21 (quoting first, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) and, second, Dandridge v. Williams, 397 U.S. 471, 485 (1970)).
74. Id. at 321.
75. Id. at 322-25.
76. Id. at 325-26.
77. Heller, 509 U.S. at 328.
78. Id. at 338-39 (Souter, J., dissenting).
differences in the respective interests of the public and the subjects of the commitment proceedings, such that the two groups subject to commitment can rationally be treated differently by imposing a lower standard of proof for commitment of the retarded.\textsuperscript{79} Because the State’s interest in public safety would be of equal strength with respect to either group, and because “[n]o one has or would argue that the value of liberty varies somehow depending on whether one is alleged to be ill or retarded,” the disparate treatment between the two groups did not appear rationally justified.\textsuperscript{80}

Justice Souter also pointed out that the Court’s reliance on its own less-invasive-treatment rationale as a justification for the differing standards of proof was contrary to the available evidence.\textsuperscript{81} He noted that, nothing the Court had cited “demonstrates that such a belief would have been plausible for the Kentucky Legislature, nor does the Court’s discussion render it plausible now.”\textsuperscript{82} Justice Souter then reviewed several studies on the subject, found the treatment of both groups to be equally invasive, and thus that neither group faced unequal invasiveness in treatment such as to justify the classifications.\textsuperscript{83}

Despite Justice Souter’s attempt to bring to the majority’s attention a wealth of scientific data disputing its personal and impulsively injected justifications, and despite the State not asserting any plausible justification of its own, the Court upheld the law under rational basis.\textsuperscript{84} Thus, “[w]ithout plausible justification, Kentucky [was] allowed to draw a distinction that is difficult to see as resting on anything other than the stereotypical assumption[s]” about the mentally retarded.\textsuperscript{85} Justice Souter’s dissent illustrates the issue with judicial reliance on unmitigated deference to the government in lieu of evidence: the evidence actually runs counter to the argument that the majority asserted in support of the State.\textsuperscript{86} Had there been an evidentiary requirement, the State would have had to produce reasonable support for depriving its citizens of liberty. And as it stood, that evidence did not exist.

A second case, \textit{Lofton v. Secretary of Dept. of Children and Family Services}\textsuperscript{87} also serves as a noteworthy example of the deficiency (and the often farcical nature) of the current standard of rational basis review. In \textit{Lofton}, the Eleventh Circuit upheld a Florida statute that prevented homosexuals, as a class, from adopting children.\textsuperscript{88} The plaintiffs challenged the law on equal protection grounds, asserting that a statute categorically prohibiting only homosexual persons from adopting children was

\begin{itemize}
\item \textsuperscript{79} \textit{Id.} at 340
\item \textsuperscript{80} \textit{Id.} at 341
\item \textsuperscript{81} \textit{Id.} at 341-42 (The majority “rest[ed] its conclusion on the view that ‘it would have been plausible for the Kentucky Legislature to believe that most mentally retarded individuals who are committed receive treatment, that is, ... less invasive tha[nn] that to which the mentally ill are subjected.’”).
\item \textsuperscript{82} \textit{Id.} at 342.
\item \textsuperscript{83} \textit{Heller}, 509 U.S. at 342-46.
\item \textsuperscript{84} \textit{Id.} at 315 (majority opinion).
\item \textsuperscript{85} \textit{Id.} at 348 (Souter, J., dissenting). \textit{See also} Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (noting that “the law cannot, directly or indirectly, give [private biases] effect”).
\item \textsuperscript{86} \textit{Id.} at 342-44.
\item \textsuperscript{87} \textit{Lofton v. Sec’y of Dept. of Children & Family Servs.}, 358 F.3d 804 (11th Cir. 2004).
\item \textsuperscript{88} \textit{Id.} at 827. The challengers brought both equal protection and due process claims; this Article will focus only on the equal protection claims.
\end{itemize}
There is no doubt that all of the challengers in this case were exemplary candidates for adoptive parents; but for their sexual orientation it seems unlikely the adoption process would have been at all onerous.

In *Lofton*, the named plaintiff was a registered pediatric nurse who had raised three HIV-positive foster children from birth. Because Lofton had "extensive experience treating HIV patients," John Doe, an HIV-infected cocaine baby, was placed in his foster care. When Lofton filed an application to adopt Doe, he refused to answer the application's inquiry about his sexuality and to disclose his cohabitating same-sex partner. Despite the fact that "Lofton's efforts in caring for these children ha[d] been exemplary," his "application was rejected pursuant to the homosexual adoption provision."

Similarly, Houghton, another plaintiff, was a clinical nurse specialist and legal guardian of a child who had been voluntarily left with Houghton when the biological father's alcohol abuse became unmanageable. Houghton attempted to adopt the child, but was denied because of his homosexuality. The remaining plaintiffs, an attorney and a real estate broker, were licensed foster parents who cared for several foster children. When they submitted their application to serve as adoptive parents, the two indicated on their application that they were homosexuals, and were subsequently denied because of their sexual orientation.

Florida argued that the adoption statute was rationally related to its interest of furthering the best interests of adopted children by placing the children in what the State considered an "optimal" household: one with a married mother and father. Florida considers homosexual households inferior because they are "necessarily motherless or fatherless and lack the stability that comes with marriage . . . ." Few would argue that the interest in providing the best homes to adoptive children is a legitimate state interest, but the *Lofton* court never required the State to actually assert a justification for its belief that a rational relationship existed between that legitimate

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89. *Id.* at 808. The appellants also asserted due process claims based on familial privacy, and the fundamental right to private sexual intimacy secured by *Lawrence v. Texas*, 539 U.S. 558 (2003). Because those claims are outside the scope of this Article, only the equal protection claim is addressed here.

90. The court conceded, "Lofton's efforts in caring for these children have been exemplary." *Lofton*, 358 F.3d at 807.

91. *Id.*

92. *Id.*

93. *Id.* at 807.

94. *Id.* at 807-08.

95. *Id.* at 807.

96. *Lofton*, 358 F.3d at 808.

97. *Id.*

98. *Id.*

99. *Id.* at 808.

100. *Id.*

101. *Id.* at 818.

102. *Lofton*, 358 F.3d at 819.
interest and the classification-based prohibition on homosexual adoptive parents.\textsuperscript{103} Instead the court accepted conclusory statements as acceptable justifications.\textsuperscript{104}

Additionally, the court acknowledged that “Florida law permits adoption by unmarried individuals,”\textsuperscript{105} but the court nevertheless found the disparate treatment of similarly situated non-married heterosexuals and homosexuals rationally related to Florida’s asserted interest in promoting adoption into married households.\textsuperscript{106} It did so by tautologically reasoning that the legislature could have found the two groups not similarly situated because the legislature could have found the two groups not similarly situated.\textsuperscript{107} The pretext is glaring. Lofton was obviously capable of caring for and parenting children. He was prevented from adopting solely because of his sexual orientation, which the State failed to (even attempt to) show was indicative of a lack of parenting quality.

In contrast to the State, the challengers in \textit{Lofton} introduced actual evidence demonstrating that no child welfare basis exists for excluding homosexuals from adoption.\textsuperscript{108} They cited “social science research and the opinion of mental health professionals and child welfare organizations.”\textsuperscript{109} But instead of considering the evidence as contradictory to finding a rational basis for the discriminatory classification, the court thought it best to ask not whether the research and expert opinion supported the legislative classification, but rather whether the research-based evidence asserted was “so well established and so far beyond dispute”\textsuperscript{110} that it would have been irrational for the State to believe its interests in the welfare of adoptive children were best served by prohibiting homosexuals from adopting.\textsuperscript{111} The court also noted its duty to “credit any conceivable rational reason that the legislature might have [had] for” disregarding the research and promulgating a discriminatory law.\textsuperscript{112}

The \textit{Lofton} court also stated that it “must assume, for example, that the legislature might be aware of the critiques of the studies . . . [or that] the legislature might consider [other studies] . . . . Or the legislature might consider, and even credit, the research cited by appellants, but [decline] to rely on [it].”\textsuperscript{113}

\textsuperscript{103} \textit{Id.} at 818-20.
\textsuperscript{104} For example, those conclusory statements included the “vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling” and that “the marital family structure is more stable than other household arrangements and that children benefit from the presence of both a father and mother in the home.” \textit{Id.} at 818-19. But the State never stated \textit{why} or \textit{how} dual-gender parenting was vital to shaping sexual and gender identity. Or, specifically, how it was any better than single-gender parenting. Similarly, the State never explained \textit{why} or \textit{how} children benefit from having a mother and a father in the home. Or, more importantly, why the State felt that having a single, heterosexual parent was an acceptable home situation for children in light of its belief that it was so important to have both a mother and a father.
\textsuperscript{105} \textit{Id.} at 820.
\textsuperscript{106} \textit{Id.} at 821-22.
\textsuperscript{107} \textit{Id.} at 821-23.
\textsuperscript{108} \textit{Lofton}, 358 F.3d at 824.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} at 825 (emphasis added).
\textsuperscript{111} \textit{Id.} at 825.
\textsuperscript{112} \textit{Id.} (emphasis added).
\textsuperscript{113} \textit{Id.} (emphasis added). Admittedly, had the State actually presented studies to show that harm in fact resulted from having same-sex parents that may have been enough to justify upholding the law. In
The Lofton court even went as far as to state “[r]ational-basis review [is] ‘a paradigm of judicial restraint,’ [and] does not provide a ‘license for courts to judge the wisdom, fairness, or logic of legislative choices.’”\textsuperscript{114} However, when interpreting the applicability of individual constitutional protections, the job of the courts is precisely to judge the wisdom of a justification that is non-existent. That is, when the State fails to provide a justification, does it seem a “paradigm of judicial restraint” for a court to inject its own reasoning for a party who fails to do so?

Lofton illustrates a court applying an exceptionally impotent standard of rational basis, even going as far as to reject, on its own impulse, research offered by the challengers of the law and assuming hypothetical and equivocal considerations that the legislature “might” have made.\textsuperscript{115} The State offered no evidence to rebut the research introduced by the challengers.\textsuperscript{116} In spite of that, and despite the fact that the Lofton court conceded, “even experts of good faith reasonably disagree” about the effects of homosexual parenting, the court held that the “proffered social science evidence does not disprove the rational basis of the Florida statute.”\textsuperscript{117}

When the question is \textit{could} Florida have reasonably believed its law would further the interest in providing children with optimal homes, and courts do not require states to show a factual rational basis, then the standard is more appropriately called a hypothetical basis. That question seems akin to asking: could Florida have believed that space aliens would travel to earth and destroy the state if homosexuals were allowed to adopt children? Because courts do not require any evidence to support the asserted justification, but do require the challenger to \textit{disprove all conceivable justifications}, the alien example—although admittedly silly—seems a useable plausible basis for the justification of a law. Sure, Florida legislators \textit{could} believe it, but in the absence of evidence, on what grounds do they do so? Are these the underlying (nonexistent) bases courts should accept to justify laws that make classifications of people? Since there is no evidence to disprove that hostile space aliens could invade, the rationale could theoretically withstand challenge under the current rational basis standard. But if the question on review instead required the State to demonstrate \textit{why} they held a certain belief—that is, if the State were required to

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that situation that court would have assessed the competing studies, evaluated expert testimony and so on to determine the reasonableness of the underlying rationale. That is, had the State presented studies that showed children raised in same sex households were actually harmed by being raised in that environment, the court would simply need to assess whether it was reasonable for the legislature to rely on those studies. The State would not necessarily have to prove that they were correct, or that the underlying research was infallible, just that the research they relied on was reasonable to be relied upon when legislating—that there was \textit{some} objective basis for passing the law. This “reasonable evidence” standard is discussed briefly in Part III infra, but the upshot is that it must be reasonably probative, and cannot be evidence that is fabricated for the purpose of litigation. Essentially, the standard I advocate for in this Article requires that the government assert an actual, reasonable basis for passing the law at issue; the standard being criticized is a standard that requires nothing more than the State showing up to court.
\end{quote}

\textsuperscript{114.} \textit{Lofton}, 358 F.3d at 818 (citing F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313-14 (1993)).
\textsuperscript{115.} \textit{Id.} at 824-25.
\textsuperscript{116.} \textit{Id.} at 818-20.
\textsuperscript{117.} \textit{Id.} at 826. Which is odd, because it did exactly that.
actually explain the rationale of an action—that would more appropriately be characterized as a "rational basis" review. Because if one is forced to provide support for the rationale for a law, that would require (by definition and quite literally) a showing of the rationale basis.

It is difficult to understand how the entirety of the evidence presented being on one side fails to result in a judgment for the presenting party in a judicial system such as ours. That is, it is difficult to comprehend how the court could have found the evidence—the only evidence introduced on the subject by either party—to have not defeated the other side's (non-) argument. If the court is meant to weigh the evidence in front of it, and to reach an outcome based on rational reasoning, then the absence of any evidence should prove fatal to the party failing to present it. Why even show up to court if you are the State?

The rational basis standard itself too often fails to account for the underlying rationale motivating legislation. Furthermore, the current tiered framework is too rigid to account for the subordination faced by those groups that do not fit neatly into it—for example classifications based on sexual orientation. Because no new groups are likely to be afforded heightened scrutiny, most laws are and will be reviewed only under a rational basis standard that often allows for speculative and imaginary reasons to be proffered by the courts themselves. Thus, because those laws are routinely upheld, groups facing unequal treatment of the laws—something the Equal Protection Clause explicitly proscribes—are left with no remedy. "A right is defined by its remedy; or at least one can tell how important the court thinks a particular right is by the remedy afforded when it has been violated." Accordingly, when those subordinated groups are afforded no recourse for violations of their Fourteenth Amendment rights, courts are sending a message to the individuals in those groups that they are somehow less deserving of constitutional protections—guaranteed protections—than are others.

II. THE FLAWS IN TRADITIONAL RATIONAL BASIS REVIEW

The current standard of rational basis review is flawed because it too often results in bad law. It skews the articulation of law by legitimizing discriminatory animus and preserving a discriminatory status quo. Moreover, it is inconsistent with both constitutional and evidentiary litigation principles. Furthermore, under the traditional standard of rational basis, courts apply divergent analyses while purporting to assert a common standard of review. This not only fails to impute consistency into equal protection doctrine, but also fails to take account of the actual motivations for laws. At a minimum, the traditional rational basis standard allows courts to willfully ignore the motivating factor in prejudiced legislation, leaving open the possibility that

118. See, e.g., parts I.B and I.C, supra.
laws made with a discriminatory motive (whether intentional or subconscious) can be upheld by a court of law.\textsuperscript{120}

By not requiring the government to support any rationale for discriminatory laws, courts are allowing stereotypes and animus to motivate legislation.\textsuperscript{121} Even if those harbored stereotypes are unconsciously motivating legislation, when no conversation takes place about the rationale for a law that makes classifications, and courts and governments can avoid the conversation by asserting speculative and hypothetical rationales (or letting the court assert those speculative rationales for them), those stereotypes are preserved by never being brought to light.\textsuperscript{122}

Additionally, when governments operate under constitutional principles meant to limit government power, the presumption is typically that the law is suspect and the government generally is the party who must overcome that presumption.\textsuperscript{123} But this is not the case under the current rational basis standard. It is inconsistent with other areas of the law to allow the government in equal protection cases to escape making rational justifications for a law that ostensibly originates with the government having surpassed the boundaries of an enumerated power, as is the case with laws that make classifications of people.

This Part will discuss the value-based concerns with those inconsistencies and with the current rational basis standard. Section A, acknowledging that our legal

\textsuperscript{120} Furthermore, although obviously not a private party doing the legislating, the upholding of discriminatory laws seems akin to violating the Entanglement Exception of the State Action doctrine. If courts uphold discriminatory laws so long as they can think of any (other) reason why it could be rationally related to any government interest, then courts are essentially coming up with excuses for discriminatory legislation to continue to be enforced, and finding novel reasons to uphold an otherwise invidious law. Thus, the judiciary is potentially exposed to the possibility of maintaining discriminatory laws, which is akin to a violation of the Entanglement Exception. Except instead of facilitating private party discrimination, the courts are facilitating state-sponsored discrimination, which is arguably worse given that it is expressly prohibited by the Constitution.

\textsuperscript{121} But see Pollvogt, supra note 33, at 930 (suggesting that "when the Court identifies evidence of animus, it discredits the other purported state interests, regardless of whether they are legitimate on a superficial level. Thus, animus acts as a doctrinal silver bullet" and the law is struck down). What amounts to sufficient evidence of animus, however, is still an unsettled question. See, e.g., id. at 927.


\[T\]he constitutional guarantee of equal protection forbids economic or social legislation that is in fact motivated by "negative attitudes, fear, or irrational prejudice." But this is not the test that courts directly or straightforwardly apply. Instead, "if any state of facts reasonably can be conceived that would sustain" challenged legislation, then "there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing that the action is arbitrary." That is to say, the party challenging a classification in court does not prevail by simply persuading the reviewing court that, more likely than not, the classification was in fact adopted because of irrational prejudice; instead, she must demonstrate that no "conceivable state of facts . . . could provide a rational basis for the classification." The consequence, Justice Breyer explains, is to increase the possibility (which, concededly, cannot be avoided) that a given classification would, because motivated only by irrational prejudice or because failing to promote any legitimate state interest, actually violate the Equal Protection Clause, yet not be judicially invalidated.

\textit{Id.} at 55-56.

\textsuperscript{123} See infra section II.C.
system values predictability in the law, shows that predictability in equal protection of the laws is also (or should be) a paramount concern, particularly where the availability of that protection is largely determined by the judiciary. Section B notes that no new classes are likely to receive heightened scrutiny, and thus nearly all equal protection challenges will be reviewed under a rational basis standard. Section C addresses the notion that the Equal Protection Clause is meant to be protective and prohibit governmental discrimination—beginning with the presumption that a discriminatory law is valid not only runs counter to the principles embodied in the Fourteenth Amendment but also is contrary to other areas of constitutional law. Section D examines why judges allowing or injecting their own speculative reasoning into the discourse of equal protection litigation is problematic; when courts are allowed to make justifications on behalf of the government, the law articulation function, and the integrity of the system in general, are called into question.

A. Unpredictability

The desirability of maintaining predictability in our laws is fundamental in our legal system. Predictability facilitates a citizenry that is informed and understands its rights. It also allows for parties to prepare efficiently and effectively for litigation. But, “[p]redictability should not guarantee that a specific party will generally prevail.” Yet, traditional rational basis violates the principle of predictability because it is essentially standardless, and allows the subjective speculation of a judge to be the tipping point in a case.

When challenging allegedly discriminatory laws, a requirement that the government assert actual, fact-based evidence to support a justification for a law that creates classifications, means that the parties seeking to challenge the law can investigate the purported justifications ahead of time to determine whether the government has a legitimate reason. Furthermore, the constitutionality of laws will be more readily apparent before litigation is even implicated. If legislatures and citizens alike know that a discriminatory law must be supported by some reasonable degree of evidence then those laws that cannot be upheld in court, will (usually) not be passed. And those laws that are passed will have been done so with a tangible amount of factual support with which the electorate can assure itself.


126. I would be remiss without acknowledging that traditional rational basis is predictable in at least one way: plaintiffs will lose if it is the standard of review applied in a case.

127. This improved ability for plaintiffs to predict whether an equal protection challenge might be viable will arguably counter any anticipated increase in equal protection litigation. Because plaintiffs
In addition to making a challenge to the validity of laws more predictable, an evidence-based requirement will also serve to instill additional integrity and public confidence into the law making process at a time when we need to bolster public confidence in such.\textsuperscript{128} Further, such a requirement will help to maintain the integrity of the judicial system by demonstrating that an impartial adjudicator is listening to parties on both sides, and is actually considering the facts when making important decisions about our constitutional rights.\textsuperscript{129}

\textbf{B. Rational Basis is Applied to Nearly All Equal Protection Claims}

The Supreme Court has not announced a new class necessitating heightened scrutiny since 1977.\textsuperscript{130} Additionally, the Court has "systematically denied constitutional protection to new groups . . . and limited Congress's capacity to protect groups through civil rights legislation."\textsuperscript{131} Thus, because no new classes are likely to be afforded heightened scrutiny, the rational basis standard will be applied to all equal protection challenges not involving a previously determined suspect or quasi-suspect class, which makes it a particularly relevant standard.\textsuperscript{132}

Reviewing nearly all equal protection challenges under a rational basis standard wholly deferential to the government is troubling because the government is

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\item would have the ability to examine the legislative motivations before actually filing suit and determine with some degree of certainty if a rational basis actually exists, the increase in judicial efficiency—as a result of cases not being brought in the first place—might offset any potential "flood of litigation," an anticipated rejoinder to the rationale review standard. \textit{See infra} section III.C.
\end{itemize}

\textsuperscript{128} \textit{See Incumbents, Beware: Just 29\% Think You Deserve Reelection to Congress, RASMUSSEN REPORTS, http://www.rasmussenreports.com/public_content/politics/mood_of_america/congressional_performance (last visited Apr. 20, 2014) (finding "that just six percent (6\%) of Likely U.S. Voters think Congress is doing a good or excellent job . . . . Sixty-three percent (63\%) rate Congress' job performance poorly. Still, that's down 12 points from an eight-year high of 75\% last November.").}


\textsuperscript{130} \textit{See Trimble v. Gordon, 430 U.S. 762 (1977) (affording heightened scrutiny to non-marital parenthood).}

\textsuperscript{131} \textit{See Yoshino, supra note 7, at 748. Yoshino further suggests that it is unlikely that any new class will be deemed as suspect or quasi-suspect, thus no new groups are going to be afforded heightened scrutiny under the tiered-equal protection framework currently in use.}

\textsuperscript{132} The possibility must be conceded that perhaps there really are only a handful of suspect and quasi-suspect classes. Although I am not convinced that is the case, the concession does not detract from this argument. Even if there are only a few classes warranting heightened scrutiny as a matter of semantics, those equal protection challenges only afforded rational basis should still serve the function courts are intended to be responsible for. That is, there should still be some meaning in courts' review of discriminatory laws. Courts should not be relieved of their function as a check on constitutional infringement simply because they have determined a particular class to fall in an arbitrary category for the purpose of equal protection review. Thus, whatever one thinks of the appropriateness of the suspect classifications and the tiered equal protection framework, the fact that most challenges will only receive a rational basis review means that the rational basis review should function to discern appropriate classifications from inappropriate classifications.
not actually required to assert a justification. When the government makes legislative classifications about economics or commerce, the total deference to the legislative body is less troubling, and is perhaps justified. Legislatures, after all, have the duty to regulate those things, and are generally savvier than courts when it comes to making decisions in those arenas. But when it comes to individual rights—constitutional guarantees—it is the courts that are charged with upholding our liberties and acting as a check on government encroachment. Thus, when the only standard applied to those encroachments is one in which the government need not even be present in the courtroom, the courts' constitutionally mandated duties go unfulfilled. By deferring completely to the government, even where the government has failed to assert a rationale, there is no check on the legislative branch, and we are left with no government body to protect our individual rights from the potential tyrannical overreaching from which the drafters designed our system to protect us.

C. Presuming Validity is Contradictory to Constitutional Principles

The Equal Protection Clause is intended to restrict the government’s power to draw distinctions among groups of people. Beginning from a presumption that a classificatory law is valid, as the current rational basis standard does, is antithetical to the fundamental purpose of the Clause. Moreover, starting from that presumption is contrary to other areas of constitutional law concerning individual rights, areas in which the government is required to overcome the presumption of unconstitutionality before a court will rule in its favor. That the current rational basis begins from a presumption of constitutionality is not only contrary to other areas of constitutional law, but also to the underlying principles of equal protection because it solidifies the legal status quo, denies protection to subordinated groups who do not fit into the rigid tiered system, and correspondingly stalls the articulation of equal protection doctrine.

The starting point under the current rational basis standard is a presumption that the government can constitutionally classify people (provided they are not already

133. "The Constitution was designed so that ... fundamental individual liberties [would remain protected. The judiciary's unique role under our governmental system [is] in protecting those liberties and upholding the rule of law. It is the judiciary's independent function to uphold the Constitution ... ."


in one of the few existing suspect classes). The presumption should be that the government cannot classify people. The history of the Equal Protection Clause (and general principles of fairness) requires that the government, when making classifications of people, should have a virtuous reason for doing so (a rational basis, even), and that we should be suspicious of any law that makes classifications. And, as a government of the people, our government should be required to demonstrate those justifications to the public.

However, under the current rational basis standard, legislative classifications are "accorded a strong presumption of validity" and "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." A state "has no obligation to produce evidence to sustain the rationality of a statutory classification. . . . [T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. In what other arena do courts require a party to disprove every conceivable basis against it in order to make its case, whether in the record or not? Imagine trying to prevail in a private civil suit by asserting a hypothetical rationale as your argument.

If the Equal Protection Clause is meant to prohibit the government from making arbitrary classifications of people, then the appropriate standard of review for such laws should be one that places a presumption of invalidity on laws that classify people and places the burden of overcoming that presumption on the government. Upholding laws because of "any reasonably conceivable state of facts" is tantamount to requiring nothing more than an imaginary state of facts; it defies the meaning of "rational" to allow for hypothetical reasons to be asserted in place of actual rationales that should be grounded in reason.

Aside from flouting the meaning of rational, a presumption of constitutionality halts the articulation of equal protection doctrine, and allows for a potentially discriminatory legal status quo to remain in place by willfully forgoing any meaningful

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138. See Nourse & Maguire, supra note 137 (discussing the history of "class legislation" and the evolution into equal protection doctrine).
140. Id. at 320 (emphasis added).
141. Id. at 320-21 (emphasis added) (citations omitted) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).
142. Id. at 320.
143. The definition of "rational" is: "(1) agreeable to reason; reasonable, sensible. (2) having or exercising reason, sound judgment, or good sense . . . " and the definition of "reason" is: "(1) a basis or cause, as for some belief, action, fact, event, etc. (2) a statement presented in justification or explanation of a belief or action . . . " Rational, DICTIONARY.COM, http://dictionary.reference.com/browse/rational?=&t (last visited Apr. 8, 2014); Reason, DICTIONARY.COM, http://dictionary.reference.com/browse/reason?=&t (last visited Apr. 8, 2014).
conversation of the justifications for laws that classify people. "[T]he meaning of the Equal Protection Clause, perhaps more than most constitutional guarantees, is tied in complex ways to evolving and contested social norms."  But because under rational basis the challenger of a law bears the burden of proving a negative, and the current doctrine requires the challenger to disprove all potential, hypothetical bases for the law, the status quo is almost always going to endure unaffected. Under the current standard, the challenger must negate every (even marginally imaginable) plausible rational connection; otherwise courts must uphold the law. This attention to disproving the imaginable distracts courts from actually analyzing the merits of cases and from focusing on the actualities behind parties' contentions. Moreover, because almost all equal protection cases are analyzed using rational basis, the law will rarely develop or evolve, and the contours of our rights will never expand to fully encompass values that society holds. Although "social understandings of equality have developed" alongside "the constitutional requirements of the [Equal Protection] Clause," those developments have largely been in the arenas of those classes already recognized by equal protection doctrine, such as race or gender.

This presumption of constitutionality, along with the relationship between equal protection doctrine and societal norms, leaves the rights of individuals belonging to marginalized groups stagnant under equal protection. The result is that even as society "evolves" to value the rights of individuals in particular classes—for example the rights of gay foster parents to adopt children, or for same-sex couples to enjoy equality in marriage laws—if the proponent of a law can conceive of any basis to uphold a discriminatory law, and can basically say it out loud, the rights we value as a society will never be expressed or given meaning in the eyes of the law, at least not by the courts.

That leaves legislation as the only avenue to expanding (or recognizing) our rights. But if the legislature is guilty of placing prohibitions on the rights we value, then that avenue is also effectively foreclosed, and our individual rights—in particular those that have taken some time for society to "evolve" and recognize—at best will

145. See, e.g., Heller, 509 U.S. at 320 (1993); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 820 (11th Cir. 2004).
146. See Yoshino, supra note 7.
147. That rights-expansion therefore, under the existing rational basis standard, can only take place by an evolution in societal values that are expressed through the listless political process of electing representatives who share those values. And although in theory that is a workable system of change it does not account for the requisite majority of voters and the requisite majority of legislators who must all share the same values. Thus, even utilizing the political process to give recognition to rights society has "evolved" to recognize, is a process that would take far longer than it should when the subject matter is something as critical as individual rights.
148. Post & Siegel, supra note 144, at 513. They note as an example, "the explosive growth of equal protection jurisprudence in the years after Brown[v. Bd. of Educ.], a growth that has produced doctrine that would have been unimaginable to the Framers of the Fourteenth Amendment, illustrates how thoroughly the Clause has absorbed altered understandings of equality." Id. at 514.
149. For example, the public approval of marriage equality has climbed from 27% in 1996, to 44% in 2010, to 53% in 2013. Jeffery M. Jones, Same-Sex Marriage Support Solidifies Above 50% in U.S.,
lag far behind social values in gaining legal recognition. Moreover, if indeed, "[i]n interpreting the Equal Protection Clause, the Court represents the nation's social understandings to the nation for adoption into the fabric of the nation's collective self-accountings," and that "practice of representation can sometimes help to form the very tradition, the very complex of social norms and values," then by deferring to the government in the absence of any rationale and upholding discriminatory laws courts may actually be influencing (or worse, encouraging) a national social norm of subordination.

Normative implications aside, most of the powers deliberated by the Constitution can be characterized either as "affirmative rights" or "negative rights." The Constitution either grants the federal government the power to do something, or it restricts the government from doing something. Affirmative rights are what the Constitution gives the federal government the affirmative "right" to do. Conversely, negative rights are those that prohibit the government from acting in a certain way, or phrased another way, when the "right" is reserved for the individual. That is, affirmative rights—for example, the Commerce Clause—are those constitutional rights that grant affirmative authority to the government to assert some power(s); negative rights on the other hand—for example, the Fourth Amendment—are those that aim to prohibit the government from engaging in particular conduct.

When a party challenges affirmative government action, they are, in a sense, trying to infringe on the government's right to act. In that situation it is fitting that the challenger to prove why the government should not be able to exercise that right. When a party challenges a negative government action, the claim is that the government has infringed on an individual right. Thus, in that situation, it is appropriate for the government to prove that it acted in accord with the Constitution, and was not infringing on the individual's right. Put another way, when a government right is challenged, the party trying to infringe on that right (the individual) bears the

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GALLUP (May 13, 2013), http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx. This is a paradigmatic example of society's values evolving. Ultimately, providing legal substantiation to those values can be hindered when, as is the case under the current rational basis standard, the status quo becomes locked in in the courts.

150. Post & Siegel, supra note 144, at 515. The authors suggest that this influence is bolstered when legislative branches participate. Again, citing Brown, they note, "The equal protection norms of Brown became 'more firmly law' only when ratified by a popular support and commitment that the Court by itself was unable to summon. The Court required the assistance of the representative branches of government to establish constitutional values of equality." Id. at 518. This notion actually highlights the concern with courts endorsing government action that is discriminatory. By doing so (particularly in the absence of any meaningful discourse about the rationale) two branches of the government are effectively influencing societal norms, something Post and Siegel suggest more firmly entrenches those norms in our society.

151. A similar description of negative rights is suggested in a substantial body of literature. See, e.g., David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986). However, the term "affirmative rights" as I use it here is slightly different than Currie and others' "positive rights," which generally refer to the rights of individuals (e.g., the right to vote) as opposed to the right of the government to assert a particular power.

152. See, e.g., District of Columbia v. Heller, 554 U.S. 570, 645-46 (2008) (explaining "the Fourth Amendment describes a right against governmental interference rather than an affirmative right to engage in protected conduct . . .").
Putting the “Review” Back in Rational Basis Review

burden of proof. When an individual right is infringed, it is up to the party infringing on that right (the government) to bear the burden of proof. Thus, the potentially infringing party always bears the burden. But this is not the case for Equal Protection Clause cases reviewed under the current rational basis standard, which is not only inconsistent but also wrong.

The government is generally granted wide deference when operating pursuant to an affirmative right. The Commerce Clause serves as an illustrative example of the Court’s deference to the legislature under the rational basis standard. Under affirmative rights, the challenger of a law bears the burden of showing why the law is unconstitutionally irrational. It is worth noting again that the deferential nature of rational basis in this context is less worrisome, because individual rights—constitutional guarantees—are typically not at stake.

But for negative rights, the government generally bears the burden of overcoming a presumption of unconstitutionality by showing some basis to justify the allegedly unconstitutional conduct. And the government must do so by offering evidence to illustrate that justification. For example, the Fourth Amendment prohibits warrantless searches. Under Fourth Amendment doctrine, there exists a presumption of unconstitutionality whenever the government conducts a search without a warrant. The government can (often quite easily) overcome that presumption by demonstrating the existence of an exception to the warrant requirement. Under negative rights, like the Fourth Amendment, the plaintiff does not bear the burden of proving unconstitutional government conduct, the government does. And it is never enough for the government to tender a hypothetical justification that is not grounded in an actual, observable fact.

What explains the difference in equal protection jurisprudence? The Fourteenth Amendment, like the Fourth Amendment, is a negative right that places prohibitions on government conduct. Why, then (with limited exceptions) do courts

153. See, e.g., Gonzales v. Raich, 545 U.S. 1 (2005).
155. See supra Part II.B.
156. U.S. Const. amend. IV.
158. See, e.g., Payton, 445 U.S. 573 (exigent circumstances); United States v. Robinson, 414 U.S. 218 (1973) (search incident to arrest). Notably, these exceptions rest largely on the idea that officers must make split second decisions in rapidly developing circumstances, where imminent danger is often a factor in the decision and there is danger associated with over-deterrence of police conduct. Equal Protection Challenges, on the other hand, generally stem from a deliberate legislative process. In light of this understanding, it makes the inconsistency more difficult to accept as justified.
159. But see Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2012) (holding that officers’ purported justification for warrantless entry of a home qualified as exigent circumstances even though those circumstances were questionable in establishing an exigency. However, the officers were at least able to produce some objective evidence that the court found reasonably justified the entry); Belzer, supra note 119, at 666-70 (discussing the circumstances upon which the officers justified their purported exigency determination). Although demonstrative of a standard of qualified immunity that is subject to the caprice of the presiding judge, the standard applied in Kerns also potentially illustrates the low evidentiary threshold that could be required of the government in “proving” its justification under rationale review. Belzer, supra note 119; Kerns, 663 F.3d 1173.
place the burden on the equal protection plaintiff to prove the government acted unconstitutionally? Moreover, why do courts further require the equal protection plaintiff to disprove "every conceivable basis which might support" the law? The fact that most classes are only afforded rational basis and are required to overcome (an often insurmountable) presumption of constitutionality under equal protection is inconsistent with the doctrine in other areas of constitutional negative rights. It simply does not make sense in equal protection law—where a prohibition on certain government actions exists—to put the burden on the plaintiff to prove the allegedly prohibited action is unconstitutional. Particularly where a presumption of unconstitutionality exists for most other prohibitive constitutional provisions. Furthermore, if you get arrested, you do not have to prove your innocence; the government has to prove your guilt before infringing on your liberty.\footnote{See U.S. Const. amend. V, XIV; Estelle v. Williams, 425 U.S. 501, 518 (1976) (noting that the due process guarantee requires presumption of innocence until proven guilty).} The government should be held to a similar standard when making laws that infringe on a constitutional guarantee by making classifications of people.

When the government acts in a way that is allegedly unconstitutional, that conduct is typically considered inherently suspect. The opposite should not be true under equal protection doctrine. The government should not be relieved of its duty to act constitutionally (or the responsibility, basically, to show up to court) simply because the action is challenged under equal protection principles rather than Fourth Amendment principles. As is the case with other negative-rights areas of constitutional law, the government should have to assert some justification for a law that makes a classification of people. Negative rights within the Constitution are about constraining government power. When the government asserts its power pursuant to one of those rights, courts should start from a presumption that the law is suspect and hold the government to some meaningful standard of justification in its rationalization of that law.

Ultimately, the Equal Protection Clause is designed to provide individuals protection from the government by prohibiting laws that apply unequally—laws that make legislative classifications. In similar areas of constitutional law, those prohibitive protections are given force by a judicial presumption that the government is acting unconstitutionally when it operates pursuant to those powers and is challenged by individuals. The current rational basis standard not only undermines the protection that the Equal Protection Clause affords to individuals, but it is also inconsistent with the principles of the Equal Protection Clause and the Constitution as a whole. Consequently, a change to rational basis is warranted in order to provide the standard of review consistency with its purpose and related constitutional rights.

Although it seems a lofty a characterization, it has been argued that a judicial proceeding is a quest for truth.\textsuperscript{162} I would suggest that even if the goal of judicial discourse in general is not necessarily about finding the empirical truth, the goal is to articulate and add definition to our rights. Particularly in constitutional judicial discourse, the goal is to define the contours of our rights, and to do so in a manner that evolves alongside the changes in society.\textsuperscript{163} The Constitution is meant to be a guide—a rights-making\textsuperscript{164} framework—for defining the nature of the important underlying rights embodied within.\textsuperscript{165} Those rights are intentionally broadly defined within the Constitution so that they can evolve along with changes in society, technology, economics, and so on.\textsuperscript{166} Whatever else, the framers were cognizant that they were

\textsuperscript{162} See, e.g., O'Connor v. Burningham, 165 P.3d 1214, 1222 (Utah 2007) (noting that in a judicial proceeding, it is the “quest for the ascertainment of truth that lies at its heart”). See also Daubert v. Merrell Dow Pharm., 509 U.S. 579, 596-97 (1993) (acknowledging the “quest for truth in the courtroom”); Brown v. United States, 356 U.S. 148, 156 (1958) (noting that the function of the courts is to ascertain the truth); MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt.10 (“[T]he truth-finding process which the adversary system is designed to implement.”).

\textsuperscript{163} Fourth Amendment doctrine again serves as an example of a constitutional right “evolving” with the changes in society. See, e.g., Kyllo v. United States, 533 U.S. 27 (2001) (declaring that the use of thermal imaging technology to measure heat emanating from a home is a “search” under the Fourth Amendment); United States v. Karo, 468 U.S. 705 (1984) (holding in part that the government is not free to use “beeper” technology in the absence of a warrant to obtain information from inside a home). See also Nancy Leong, Making Rights, 92 B.U. L. REV. 405 (2012) (discussing how judicial decision gives shape to our constitutional rights, thus “making” those rights through continuous decisions); Belzer, supra note 119 (similar); Post & Siegel, supra note 144 (discussing the normative evolution in society and the relationship to constitutional doctrine); Nancy Leong & Aaron Belzer, Enforcing Rights, 62 UCLA L. REV. (forthcoming 2015) (describing the normative desirability of holistic constitutional rights articulation).

\textsuperscript{164} See generally Leong, supra note 163 (positing that rights are “made” through judicial decisions that define the scope of the underlying right at issue).


The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. Those who framed, adopted, and ratified the Civil War amendments to the Constitution likewise used what have been aptly described as “majestic generalities” in composing the [Fourteenth Amendment]. Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.

See also Bruce Ackerman, The Living Constitution, 120 HARY. L. REV. 1737, 1741-42 (2007) (noting that the force of the Constitution is the Justices who write “landmark opinions that sweep away the law of the preceding era and create a brave new world for the constitutional future,” and that it is “judicial revolution, not formal amendment, that serves as one of the great pathways for fundamental change . . . ”); Berman, supra note 122, at 5 (2004) (“[I]dentifying the ‘meaning’ of the Constitution is not the Court’s only function. A crucial mission of the Court is to implement the Constitution successfully.”) (quoting Richard Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 HARY. L. REV. 54, 57 (1997)); Leong & Belzer, supra note 163 (discussing the intentional indeterminacy of constitutional principles as a strength).

\textsuperscript{166} See Leong & Belzer, supra note 163; Rehnquist, supra note 165, at 694; Gerald Torres, Social Movements and the Ethical Construction of Law, 37 CAP. U. L. REV. 535, 540 (2009) (discussing
unable to predict the future and thus designed the Constitution such that it embodied important principles, but they left the precise shape of those rights to be continually defined over time through judicial interpretation and iterative decisions. When no actual discourse takes place, and issues fail to be explored at all, our equal protection rights-articulation stalls and the status quo become cemented. Thus, in the absence of meaningful conversation, as society evolves on a normative axis, the law fails to keep pace; outdated norms and antiquated values remain embodied in the law and are routinely upheld by courts.

The function of litigation is to determine, in the fairest way, which of the adversarial parties has put forth the most convincing support for a particular position so as to equitablize the decision making process. Put another way, in the context of judicial discourse, the purpose of litigation is for two adversarial parties to take opposing viewpoints, each arguing that their elucidation is the correct one, and thus for courts (or fact finders) to be an impartial referee in weighing the veracity of each party’s argument. An effective, value-neutral or unbiased way to determine which is the better of those competing arguments is to weigh the evidence proffered by each party against the others.

In the absence of a requirement that the government assert some reasonable evidence to support its position, the government is effectively insulating itself from any debate and thus prohibiting a court from exploring all sides of an issue before ruling. Usually, though, this results in courts ruling for the side that presented evidence. But under rational basis, the absence of discourse on all sides of an issue (an issue related to constitutional rights, no less) most often results in courts ruling for the side insulated from review. In the context of litigating constitutional rights, the dialogue is a critical component of furthering the law. Because our jurisprudence relies on prior opinions, scholars, lawyers, the public, and most importantly judges, rely on the opinions written by other judges. Thus, the effect of total deference to the government under rational basis on the articulation of equal protection rights is to how those debates surrounding social movements shape the understanding and articulation of constitutional meaning). See also, William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062 passim (discussing the effect that constitutional litigation and judicial decisions can have on affecting change in other arenas, for example, social, political and legislative).

167. See Rehnquist, supra note 165, at 694 (“Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.”).

168. See, e.g., Nancy Leong, Improving Rights, 99 Va. L. Rev. (forthcoming 2013) (noting the several existing doctrines that exist to reduce judicial cognitive bias and generally make decision making fairer).

169. See Gunther, supra note 20, at 8 (stating that a review under rational basis is “virtually none in fact”).


171. Id. at 12-13 (“[B]ecause judges interpret other opinions, examine their stories and modes of analysis ... and otherwise comment[,] on what other judges have written[,] opinions thus become part of a complex web of writers and readers who elaborate legal meaning. How a given judge characterizes ‘the law’ is the result of this dialogue.”).
distort the influence of the conversation by consistently ruling in favor of a party who presents no evidence. The net result is the continued devaluation of unfamiliar perspectives and the maintenance of the legal status quo.\footnote{distort the influence of the conversation by consistently ruling in favor of a party who presents no evidence. The net result is the continued devaluation of unfamiliar perspectives and the maintenance of the legal status quo.}

Additionally, it is troublesome when judges allow hypothetical justifications or personal speculation into the judicial process to wholly supply the reasons for laws to be rationally related to a government interest. The discursive process of judicial resolution is meant to explore the supporting justifications for a position—and no support is really uncovered when the government is not even required to submit its own justifications for a law that makes classifications of people. As a result, the laws are not only affording an unpredictable (and unequal) protection, but also the integrity of judicial system and faith in judiciary becomes doubted.

Courts are also arguably failing to act as a check on legislatures when the justifications for discriminatory laws are left unreviewed. Neutral arbiters are meant to give the judicial system a sense of fairness and integrity.\footnote{The public’s confidence in the judiciary is undermined when it looks as though judges are arbitrarily picking sides. And when no evidence is presented to support the government’s position, then a judge ruling for that side is indistinguishable from a judge making an arbitrary decision by simply picking the party that never said anything to advance its own argument.}

Even more, it looks like the judges are in fact asserting justifications for the government, not just in lieu of a government rationale, which is effectively what is happening. And even the “appearance of impropriety, regardless of whether such impropriety is actually present or proven, erodes that confidence and weakens our system of justice.”\footnote{The public’s confidence in the judiciary is undermined when it looks as though judges are arbitrarily picking sides. And when no evidence is presented to support the government’s position, then a judge ruling for that side is indistinguishable from a judge making an arbitrary decision by simply picking the party that never said anything to advance its own argument.}

Because the judicial process is meant to be one that explores the nature of the underlying support for a party’s position, when the government is not required to proffer any justifications for a law—and instead courts are allowed to do so on behalf of the government—the law articulation and rights-making function of courts, as well as the integrity of the judicial system overall, are called into question.\footnote{The public’s confidence in the judiciary is undermined when it looks as though judges are arbitrarily picking sides. And when no evidence is presented to support the government’s position, then a judge ruling for that side is indistinguishable from a judge making an arbitrary decision by simply picking the party that never said anything to advance its own argument.}

\footnote{See id. at 15. Rubinson cites as examples cases such as: Buck v. Bell, 274 U.S. 200 (1927); Plessy v. Ferguson 163 U.S. 537 (1896); and Dred Scott v. Sandford 60 U.S. (19 How.) 393 (1857).}


\footnote{Hurles v. Ryan, 650 F.3d 1301, 1309 (9th Cir. 2011), abrogated by Hurles v. Ryan, 706 F.3d 1021 (9th Cir. 2013).}

\footnote{The current rational basis standard also undermines the adversarial process itself, which affects the articulation of our equal protection rights. When the government is not obligated to proffer any justifications, the reasons asserted by plaintiffs challenging laws are not weighed against anything. Thus, any decisions in favor of the government when no reasonable evidence is put forth are indistinguishably arbitrary. That is, generally parties prevail by persuading the reviewing court that they, more likely than not, have demonstrated their argument to be the most meritorious. When only one side presents evidence, a court normally rules for that side on the grounds that only one party has made a persuasive case. The result of the current rational basis standard is, in effect, a denial of judicial access to plaintiffs because their arguments are not actually tried against the}

\footnote{The current rational basis standard also undermines the adversarial process itself, which affects the articulation of our equal protection rights. When the government is not obligated to proffer any justifications, the reasons asserted by plaintiffs challenging laws are not weighed against anything. Thus, any decisions in favor of the government when no reasonable evidence is put forth are indistinguishably arbitrary. That is, generally parties prevail by persuading the reviewing court that they, more likely than not, have demonstrated their argument to be the most meritorious. When only one side presents evidence, a court normally rules for that side on the grounds that only one party has made a persuasive case. The result of the current rational basis standard is, in effect, a denial of judicial access to plaintiffs because their arguments are not actually tried against the}
Lofton serves as an example of how stereotypes are perpetuated by the exceedingly deferential rational basis standard. Because the rational basis standard requires the challenger to "negate every plausible rational connection," the Lofton court accepted Florida's optimal household argument as "one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action." This is an explicit acknowledgment by the court that the truth likely does not lie beneath the premise; those assertions that are "unprovable" or are mere "assumptions" should not serve as the foundation for a court's decision where individual rights are at stake and description to constitutional principles is being developed. Nevertheless, after Lofton, the optimal household argument serves as legal precedent, thus perpetuating unsupported stereotypes about same-sex households.

The Heller Court also acknowledged that "[i]t could be that 'the assumptions underlying [the government's] rationales are erroneous, but the very fact that they are 'arguable' is sufficient, on rational basis review, to 'immunize' the legislative choice from constitutional challenge.'" Which is tantamount to stating: if someone can say it out loud, it will pass rational basis review, no matter how unfounded that argument may be. Moreover, courts are explicitly giving credibility to those unfounded arguments by permitting them to support otherwise baseless opinions. With respect to articulating equal protection law, our rights are thus subjected to a continual narrowing—or least are prohibited from developing—based on hypothetical or speculative rationales as those rationales are accepted and become part of the law.

Admittedly, the rationale review proposed in the following section would not necessarily ensure that all subordinated groups are capable of striking down every offensive law one hundred percent of the time. But it would, at a minimum, force a dialogue about our rights to take place. It would stimulate courts' engagement in a more meaningful review of the driving force behind discriminatory laws. And an actual review of legislative rationales would also function to improve the articulation of equal protection jurisprudence and doctrine, so that the pace of the law would better keep pace with (or even be ahead of) the normative temperature of an evolving society.

governmental justifications. This undermines the entire adversarial nature of litigation; and in an important context like articulating our individual constitutional rights this means the only voice being heard to further articulate the law is that of the government—except their argument does not even need to be voiced; it is up to the challenger to negate every conceivable, hypothetical, speculative, and imaginary reason for a law to potentially be constitutional. As a means of articulating the law in line with changing social values, this is particularly problematic.

177. Id. at 819-20. This, in spite of research presented by the challengers. See supra notes 108-13 and accompanying text.
179. For discussion on the interaction between societal norms and constitutional doctrine, see Post & Siegel, supra note 144, at 513-26. "The Court's equal protection jurisprudence has emerged from a partnership between the Court and the nation . . . . Sometimes, as in Brown, the Court has forged ahead and brought the nation with it; and sometimes, as with sex discrimination, the Court has caught up to the vision of Congress and the nation." Id. at 521. See also, Roosevelt, supra note 133, at 200 ("'Progress' on such issues occurs not when society is ready to embrace the full
III. RATIONALE REVIEW

Because the current rational basis standard is flawed and no new classes are likely to attain the status of suspect or quasi-suspect, a new standard of rational basis review is necessary. I propose that our equal protection doctrine should keep the prospect of suspect/quasi-suspect classification as a potential option, but, because rational basis will be the standard applied to almost all equal protection claims, we need to reconsider that standard. In this Part, I propose and describe a revised rational basis standard that accounts for the concerns discussed in Parts I and II, and that is consistent with the principles underlying the Equal Protection Clause and other areas of constitutional law. Admittedly, this new standard is not perfect, and is focused more on the process of judicial review under equal protection than with the substance. But it takes a step in the right direction by providing a better vehicle for a principled judicial process that more meaningfully examines those cases challenging discriminatory laws, and that better develops equal protection doctrine. And, ultimately, if the process is improved, the substance will almost certainly follow as decisions come down and the law is articulated with more integrity.

Section A acknowledges the contributions of others who have proposed a reformatting of the equal protection review standards. Section B then proposes a new standard called rationale review that suggests a slight but important change: shifting the burden of proof onto the government. Section C addresses potential criticisms and concerns with the revised standard proposed in this Article.

A. Previous Criticisms of Rational Basis

Criticisms of equal protection’s review standards are not uncommon. Those criticisms are generally aimed at the overall tiered equal protection framework, although some are specific to the rational basis standard. Because the standard of review is so important to the ultimate outcome of equal protection cases, the subject has generated substantial scholarship. This section will only very briefly survey some of that scholarship in order to give context to the proposal in the subsequent section.

Regarding the tiered equal protection framework, fundamentally the three most common criticisms are that there is indeterminacy in classification, rigidity in the meaning of its pre-existing commitments but when social attitudes shift—when differential treatment of blacks, or women, or gays, stops seeming natural and starts seeming invidious.

180. See Parts I and II. Despite the unlikelihood of any new suspect or quasi-suspect classes, I do not advocate for closing the door entirely by drastically restructuring the entire framework and eliminating the tiers. After all, perhaps one day the court will decide to afford heightened scrutiny to a new class (or perhaps there really are only a few suspect classes), but since it is unlikely that any group will actually attain that magical status, we instead need to rethink the rational basis standard that is going to be applied to most equal protection claims.

181. See generally Goldberg, supra note 19; Andrew M. Siegel, Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation, 74 FORDHAM L. REV. 2339 (2006); Shaman, supra note 25.

182. E.g., Siegel, supra note 181 at 2343-44.

183. See, e.g., Gunther, supra note 20; Siegel, supra note 181, at 2343.
tiers, and a failure to "capture the normative content of the Equal Protection Clause." That the framework is non-determinative is problematic because "there is simply nothing in the modern doctrine that tells us conclusively in which box to place statutory schemes that impose burdens on gays and lesbians, or the mentally ill, or racial majorities." Furthermore, "the choice of tier is so crucial to the outcome of the case, seat-of-the-pants determinations as to the proper classification of a given legislative scheme are often the deciding factor in resolving cases and those are—definitionally—difficult to predict." Similarly, the determination about whether a government interest is "compelling" is also vague; the framework fails to provide guidance to courts in resolving disputes that are somewhat novel. The rigidity critique is that fundamentally the tiers impose a contrived uniformity on dissimilar classifications. Thus, a framework that bluntly lumps those classifications into a mechanical matrix for analysis largely ignores constitutionally relevant differences.

Finally, the normative concerns with the tiered framework are that it is under-inclusive and fails to account for factors and circumstances that the principles underlying the Equal Protection Clause are meant to embody.

These critiques have prompted proposed changes such as replacing the three tiers with a single standard that includes a three-part inquiry drawn from "commitments common to equal protection review at the highest and lowest levels." Others have advocated for a sliding scale or balancing test in place of the tiered framework. Other proposals for reform have suggested retaining the tiered framework, but introducing a litany of changes to aid in the doctrine's ability to

184. Id. See also Shaman, supra note 25, at 172-77 (noting the flaws in the tiered system: rigidity, inhibition of analysis, and internal inconsistency).
185. Siegel, supra note 181, at 2343.
186. Id.
188. Siegel, supra note 181, at 2344.
191. See generally Goldberg, supra note 19, at 491-92. Professor Goldberg's three inquiries are: First, "an 'intracontextual' inquiry, which asks courts to consider whether a plausible, nonarbitrary explanation can justify the government's singling out of a particular trait from among all others within the regulatory context." The second is "an 'extracontextual' inquiry, which seeks to ensure that justifications are not simply generalizations about a characteristic that, though plausible, lack specific relevance to the regulatory context and could support broad, acontextual distinctions based on that trait . . . ." Third, "where a trait-based distinction is justifiable in context based on a government interest that would not support broad-scale burdening of the trait holders, the proposal urges courts to pursue a 'bias' inquiry. This inquiry would determine whether the line drawing reflects impermissible government purposes, such as hostility toward or stereotyping of the trait being regulated." Id. at 492.
acknowledge subordinated groups that do not meet the inflexible requirements of the tiered framework.193

Although largely encompassed in the criticism of the tiered framework more broadly, specific criticism of the rational basis standard is also relatively common. First, as a historical point, the contemporary (mis-) understanding of rational basis can be traced to an overreaction by the Court to its clash with President Roosevelt’s New Deal, “one of the most traumatic experiences ever suffered by the Supreme Court.”194 The hostile reaction to the Court striking down New Deal legislation aimed at ameliorating the economic conditions of the Great Depression resulted in a milestone low in the Court’s prestige and a plan by Roosevelt to add more Justices to the Court.195 Reacting to Roosevelt’s Court-packing plan, the Court responded by renouncing a degree of its power and “adopting a posture of extreme deference to the other branches of government . . . granting them a presumption of constitutionality that could be overcome only by showing them to be clearly irrational or unreasonable.”196 But, that posture of extreme deference

has a deceptive lineage to the past. . . . In the past, [it] was rarely invoked, and when it was, it was more as a rhetorical formality than as a working principle. After the New Deal Court struggle, though, the presumption of constitutionality was invoked frequently, and not just as a matter of rhetoric; it quickly became a working principle that was used as a matter of course.197

Although the Court realized the standard was unworkable in many other constitutional contexts,198 in contrast it has persisted in equal protection jurisprudence, despite our individual rights being at stake.

The historical critique notwithstanding, commentators have suggested that the misalignment of interests is largely responsible for the government’s near universal

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193. See Siegel, supra note 181, at 2346. Those changes include:

the adoption of more definitive criteria to determine whether classifications prompt heightened review, for a more literal application of the doctrinal tests regardless of consequence, and for the affirmative acknowledgment of a fourth category of review to deal with classifications aimed at unpopular groups who nevertheless fail to meet the traditional criteria for strict or intermediate scrutiny.

194. Shaman, supra note 25, at 161.
195. Id.
196. Id.
197. Id.
198. Id. at 162.

The Court was quick to see that minimal scrutiny does not provide adequate protection for express constitutional rights, such as freedom of speech, or for implicit but nonetheless fundamental rights, such as the right of privacy, or when governmental action is based upon an invidious suspect classification, such as race or ethnic origin. In all three of these situations, the Court has retained a more exacting mode of judicial review that requires strict scrutiny of the governmental conduct in question.

Id.
success in equal protection challenges.\textsuperscript{199} This has prompted a suggestion for reform that includes a proposal that the rational basis standard itself be infused “with the equivalency principle [whereby] constitutional review will demand that the construction of the governmental interest be congruent with the identification of the individual’s interest.”\textsuperscript{200} Under this proposed interest-aligning rational basis standard, the interests of the government would have to be characterized with a degree and scope equivalent to those interests of the individual.\textsuperscript{201} Other proposed changes include the “base plus six” model, which advocates for seven levels of review.\textsuperscript{202} Those levels include, “a ‘base’ level of minimum rationality review, ‘plus six’ levels of heightened scrutiny: two heightened levels of rational review; two kinds of intermediate scrutiny; and two kinds of strict scrutiny.”\textsuperscript{203}

Building on this previous work, I advocate for a somewhat different approach, one that is less upsetting to equal protection doctrine and surprisingly has not previously been suggested. Instead of eliminating the entire tiered framework altogether, or tweaking the threshold concern of framing the parties’ interests under rational basis, I advocate for keeping things relatively the same, but making one subtle change. That change, discussed in the next section, is shifting the burden of proof in equal protection’s rational basis review onto the government.

B. Rationale Review Standard for Equal Protection

Because of the aforementioned flaws identified with traditional rational basis, and because no new suspect classes are likely to be announced, the current rational basis standard requires reworking. I propose modifying the rational basis standard by placing the burden of proof on the government instead of the challenger of a law. This revision—the government bearing the burden—is more consistent with the principles underlying the Equal Protection Clause as well as other areas of constitutional law where the government is required to overcome a presumption of unconstitutionality when operating under a negative right.\textsuperscript{204} Furthermore, courts have already begun to employ a standard similar to rationale review, although they have done so unpredictably.\textsuperscript{205}

\textsuperscript{199} Wadhwni, supra note 125, at 802-03. This critique is similar to the normative critique of the tiered system as a whole.

\textsuperscript{200} Id. Wadhwni’s example is: if a court determining an individual’s liberty interest characterizes it “as the right to smoke marijuana in the privacy of one’s home,” the court cannot characterize the government’s interest in prohibiting possession of marijuana as broadly as, “the interest in ensuring public health and safety.” Rather, it is appropriately characterized as “furthering the government’s interest in the prevention of drug abuse . . . . Such lofty goals as public health and safety are a priori legitimate ends of government action and thus can never be deemed irrational.” Id. at 803.

\textsuperscript{201} Id.


\textsuperscript{203} Id.

\textsuperscript{204} See supra, section II.D.

Under this proposed rationale review standard, states would still be able to make laws, even laws that classify people. But the rationale review standard would require the government to justify the law in question by asserting some actual evidence to ground the justifications for the law in logic, science, policy, reason, facts—something. As will be demonstrated later in this Article, under this proposed standard those troublesome cases would more often be decided the right way, and the cases decided rightly would not change. That is, there would be noteworthy improvement in, accompanied by little disruption to, the doctrine and jurisprudence of equal protection and its central analysis.

Rationale review’s procedural and analytical arrangement draws on Title VII discrimination claims. Under rationale review the challenger would be required to make a prima facie case that a particular law is making an “inappropriate classification.” If the challenger successfully establishes a prima facie case, the government would then be afforded the opportunity to assert—with some tangible, “reasonable evidence”—a legitimate, or appropriate, reason for the classification (or that no inappropriate classification was being made in the first place). The inappropriate classification prima facie case would thus be a rebuttable presumption; that presumption being—as it should be—that laws making inappropriate classifications of people are unconstitutional. The State would then have the opportunity to rebut that presumption by offering real evidence to justify the underlying rationale behind the legislative classification.


206. Obviously this is a value-based assessment. The values driving the normative argument here for “troublesome” cases and those “rightly decided” are: the troublesome cases are those where laws classifying people (most often socially subordinated groups) are upheld with little or no justification set forth by the state. See, e.g., Heller v. Doe, 509 U.S. 312 (1993); Lofton v. Sec’y of Dept. of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004). Conversely, those cases I contend are rightly decided are the cases where a court that actually examines the purported reasoning, and whatever the ultimate outcome, actually reviews laws classifying people. See, e.g., Cleburne, 473 U.S. 432; U.S. Dept. of Agric. v. Moreno, 413 U.S. 528 (1973). See Christopher A. Bracey, Adjudication, Antisubordination, and the Jazz Connection, 54 ALA. L. REV. 853, 855 (2003). Bracey describes successful judging as a style of judging that engages

in the constructive enterprise of giving full meaning and content to minority rights in a manner consistent with the best of the American democratic tradition of freedom and majority rule. Successful judging, in this context, is judging that offers maximum protection of minority interests without running afoul, so to speak, of political theory.

207. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating “[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection”). The complainant then also has the opportunity to show the legitimate reason was a pretext. It does not seem particularly warranted in the equal protection rationale review framework to include the opportunity to prove pretext. If the state asserts a legitimate reason for law, and supports that justification with evidence, the law should live or die with the fact finder’s ultimate determination.

208. See infra notes 210-24 and accompanying text for a method of determining what classes are inappropriate.

209. I use the term “reasonable evidence” to mean evidence that is not fabricated or created surreptitiously purely for the purposes of litigation.
An obvious starting point to this proposed analysis, then, is to ask what the prima facie elements are. That is, what legislatively distinguished classes are "inappropriate" so as to warrant review in the first place? Because the tiered framework would not be eliminated under this revised standard, those classes already deemed eligible for heightened scrutiny would continue to be afforded the ascribed level of review. But under rationale review, identifying the nature of the classification is a key factor. It functions as a limiting principle and serves to determine what classifications, as a threshold matter, amount to inappropriate classifications warranting review. To identify those classes that are inappropriately classified by the law, a nearly forgotten, landmark civil rights case provides the standard for us.

_Hernandez v. Texas_,\(^{210}\) an equal protection case that "deserves the honor of being recognized as the first civil rights decision of the Warren Court,"\(^{211}\) was decided two weeks before _Brown v. Board of Education_.\(^{212}\) In _Hernandez_, Pedro (Pete) Hernandez, a person of Mexican descent, shot and killed a man during a bar fight and was quickly indicted for murder by an all white grand jury.\(^{213}\) In a motion to quash the indictment, Hernandez alleged that persons of Mexican descent were systematically excluded from serving on juries, despite the fact that many were qualified.\(^{214}\)

The doctrinal relevance of _Hernandez_ is the constitutional focus on group subordination—as opposed to race—in equal protection.\(^{215}\) In striking down a law that in effect prohibited Latinos from jury participation, the Court focused not on race relations, but on "other differences from the community norm" that sometimes formed the basis of social hierarchy."\(^{216}\) In part, the Court was restricted from adjudicating the case solely in racial terms, because "parties on both sides of the litigation classified people of Mexican ancestry as white."\(^{217}\)

Chief Justice Warren noted that "race and color" often make identification of groups easier, but

community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on

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213. _Hernandez_, 347 U.S. at 476; Lopez & Olivas, _supra_ note 211 at 275.
214. _Hernandez_, 347 U.S. at 476-77 (1954). The brief in support of that motion noted that, "in thirty-five years no Mexican Americans had been called to jury duty in any capacity in the county, which was home to more than 6,000 Mexican Americans, constituting approximately one-quarter of the county population." Lopez & Olivas, _supra_ note 211, at 279.
215. _See_ Lopez & Olivas, _supra_ note 211, at 274.
216. _Id._ (quoting _Hernandez_, 347 U.S. at 478).
217. _Id._
some reasonable classification, the guarantees of the Constitution have been violated.218

Hence, Chief Justice Warren articulated a two-step test for determining when the Equal Protection Clause was implicated, notwithstanding per se racial classifications. Chief Justice Warren’s test serves as the prima facie case under rationale review.

The first step is whether a group constitutes a distinct class, which “may be demonstrated . . . by showing the attitude of the community.”219 Chief Justice Warren’s focus in the first step—the distinct class determination—was on evidence “demonstrating a history of group subordination” and a “process[ ] of social differentiation and . . . social stratification,” which was fundamentally “an inquiry into whether a group existed under social practices of group subordination.”220 The second step of the Hernandez inquiry focuses on different treatment; here, the challenger has “the burden of proving discrimination.”221 Applying this step to the case, Chief Justice Warren utilized established precedent and relied on “the rule of exclusion” as “supplying proof of discrimination against any delineated class.”222 He further held that whether the discrimination was intentional was irrelevant; what mattered was that a pattern of discrimination was apparent.223

The Hernandez inquiry for defining classes under equal protection—and the prima facie case under rationale review—asks, at bottom: (1) does there exist a distinct class, identifiable based on differences from the community norm or the subordinating attitude of the community? And (2) does the challenged practice or law amount to different treatment? As applied in Hernandez, the Court “asked, first, whether the group seeking constitutional protection suffered from subordination generally and, second whether the challenged practice amounted to a specific aspect of such oppression.”224

The inquiry is important because it serves not only to afford protection to those groups facing subordination but who do not fit into the rigid framework of the current equal protection tiers, but also to limit the claims to those who can establish the existence of a subordinated group and discriminatory treatment as a result of membership in that group. Furthermore, because those same groups are not afforded any form of heightened scrutiny, their claims are, for all intents and purposes, dead on arrival under the current rational basis standard, which defers to the government except in extraordinary circumstances. Thus, in order to afford a more meaningful review of allegedly discriminatory laws and to provide protection to groups facing subordination that are traditionally unable to garner legal protection under the current equal

219. Id. at 479.
220. Lopez & Olivas, supra note 211, at 290.
221. Hernandez, 347 U.S. at 480.
222. Id.
223. Id. at 481-82.
224. Lopez & Olivas, supra note 211, at 291.
protection doctrine, rationale review, including the *Hernandez* inquiry, serves to identify groups that have valid equal protection claims but have thus far been unable to bring them to court and legitimize their concerns. The *Hernandez* inquiry also holds the challengers of a law to a standard of evidence similar to that the government is required to meet under rationale review. That is, the challenger must make a prima facie case by presenting evidence tending to show the existence of a distinct class identifiable based on subordinating community attitudes and dissimilar treatment based on that classification.

Under rationale review, the *Hernandez* inquiry is the threshold or prima facie case of an equal protection plaintiff. It further serves as a limiting principle to flush out claims based on benign (or nonexistent) classifications before frivolous lawsuits could move forward.225 Once a group is identified based on a subordinating difference from the community norm and has shown different treatment, the threshold showing or prima facie case would be met and the proposed rationale review standard would apply. Under that standard the government bears the burden of proving—with actual facts—a justification supporting the rationale for the legislation. Similar to the burden faced by Title VII defendants, this would still be a relatively deferential standard of review, but the State would be required to assert some reason—not even a great reason, just one that is over and above a hypothetical or speculative reason by being grounded in actual facts—to justify the law.

Fundamentally, under rationale review, courts reviewing the rationale for laws that make classifications of people would be required to determine whether there is reasonable evidence supporting the rationale for a law as it relates to a legitimate government interest. The review of that rationale would require a minimal evidentiary presentation by the government to determine if the asserted basis is reasonable. Under rationale review, the determination of whether an interest is legitimate would remain unchanged.226 Thus, to accept justifications as sufficient to uphold a law, courts would need justifications supported by fact and demonstrated by evidence.

In addition to improving the process by which our Fourteenth Amendment rights are articulated, rationale review has the added benefit of being something that courts already do all the time: determining whether evidence is probative of a particular justification. That is, the government would no longer be allowed to assert hypothetical or speculative reasons as the underlying impetus for a classification. Instead the government would actually have to justify the rationale linking the government interest and the classification. Thus, the government—like the challenger

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225. For example, laws regulating bike lanes or rollerbladers. Neither arguably constitutes a distinct class based on the attitude of community but even if that could be shown, the laws that regulate those things likely are not a specific aspect of such subordination and are instead aimed at achieving public safety. That also means that in the event that a challenge to a bike lane law were to succeed past this threshold matter, it could be shown, with traffic data, for example, that it was necessary to public safety, reducing accidents, and such.

226. As is currently the case, "a bare congressional desire to harm a political unpopular group cannot constitute a legitimate government interest." *See, e.g.*, U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973).*
of a law—would be required to put forth actual evidence in support of its interest, and the challenger of a law will no longer be facing a situation where she is trying to prove a negative, or battling the courts’ own hypothetical or speculative explanations for a law.

Instead, although still a relatively deferential test, the State would have to assert some real reason, some evidence to justify the rationale behind the classifications made in the law at issue. Under rationale review, if the government asserts reasonable evidence to rebut the presumption of unconstitutionality, then the classifying law should be upheld. “A classification [would] not [necessarily] fail [rationale] review because it ‘is not made with mathematical nicety or because in practice it results in some inequality.’”227 The rationale would merely have to be supported by a modicum of reasonable evidence.

Under rationale review, states would no longer be afforded free reign to make sweeping, unverifiable assertions to justify a law that creates classes of people. Additionally, judges would also no longer be able to make those assertions. Instead, rationale review would function to enable an honest discourse about the types of government actions that lend credibility to groups discriminated against, but who fail to meet the criteria for the rigid tiered equal protection framework, or who cannot overcome the plaintiff’s burden under the current rational basis standard because disproving the hypothetical is simply impossible.

Justice Stevens’s concurrence in Cleburne, discussed in Part I.C, partially informed the basis for this proposed rationale review. Justice Stevens believed that most classes “do not fit well into sharply defined classification”228 and instead advocated for an approach whereby judges should simply ask themselves whether they “could find a ‘rational basis’ for the classification at issue.”229 He noted that the term “rational,” should include 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.”230 Thus the word “rational,” of course, “includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign’s duty to govern impartially.”231

An impartial lawmaker, one would think, would require some factual basis on which to rest legislative and policy decisions. Otherwise, without relying on facts, a decision is necessarily arbitrary and capricious.232 And an impartial lawmaker relying on facts to make a legislative decision would presumably rely on the same facts to withstand an equal protection challenge to that legislation. Thus, so long as the neutral

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229. Id.
230. Id.
231. Id.
and impartially motivated legislative decisions were actually neutral and legislatively impartial, but driven by a legitimate government interest and supported by reasonable evidence, the law would be upheld. This fact-based understanding of the foundations for legislation under rationale review would also account for laws that make classifications of people, but that do so for the purpose of favoring a particular group.\footnote{For example, evidence supporting a law that makes classification but that benefits a group traditionally subordinated would likely overcome the presumption of unconstitutionality by relying on data that could be presented at trial.}

Although under rationale review those class-favoring laws may still be subject to an equal protection challenge, and ultimately may even be found unconstitutional if the facts supported that position, the process by which that takes place would be one with a greater sense of legitimacy. That is, at least the conversation will have taken place. As it stands, the process often forgoes any honest discourse about the justification for laws that classify people. That lack of discourse fails to explore the issue and it can stall the articulation of individual rights by diverting attention away from the actual facts underlying an argument, leaving latent stereotypes to provide the foundation for binding legislation. That stall in rights articulation, particularly in a normatively evolving society, can also leave individuals (and groups) without rights shared by everyone else.

C. Anticipated Reproaches to Rationale Review

The four primary anticipated criticisms of shifting the burden in rationale review are: that it would turn equal protection cases into a battle of the experts, that it would invite a flood of frivolous litigation, that it is indistinguishable from intermediate scrutiny, and that it would violate separation of powers. Although this list is no doubt incomplete, addressing these concerns serves to highlight the strengths and weaknesses of the proposed rationale review standard. Thus, I will briefly address each in turn.

The first anticipated objection is that the rationale review standard would turn equal protection proceedings into a ‘who-has-better-evidence’ contest, a battle of the experts. However, litigation turning on the quality of evidence is something courts are experienced in, and dealing with a classic battle of the experts is not uncommon.\footnote{See, e.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 940-53 (N.D. Cal. 2010) (discussing and evaluating the evidence presented in support of, and in opposition to, the government’s rationale).} Including in the constitutional litigation context, this is an unremarkable occurrence for courts and one that most courts have a great deal of experience in. It bears noting that courts are likely more experienced at handling competing evidentiary presentations than they are at providing policy or other justifications for laws where the government fails to do so. Furthermore, the battle of experts should be welcomed as it would lead to a more thorough and honest discourse about our social structure and societal values, and would ultimately help to further the articulation of equal
protection law, something needed after the Court’s lengthy break from such articulation.235

The next anticipated criticism is that rationale review will invite a flood of (frivolous) litigation, forcing states to appear in court all the time to litigate equal protection challenges, and even potentially paying damages out of state coffers.236 The thinking goes: now anyone who feels even remotely slighted and can claim membership in any identifiable group can bring a successful equal protection challenge, and is even incentivized to do so. However, as discussed above, the Hernandez inquiry serves as a limiting principle as to what groups can establish a prima facie case. It limits classifications to distinct groups as demonstrated by showing the subordinating attitude of the community. But what about a group like runners, for example? They have clubs and whatnot; they would seem to be a distinct group characterized by the attitude of the community. Those laws, that, let’s say hypothetically require runners to run only on running paths, would arguably always pass the new standard. First, that community would not necessarily hold subordinating attitudes toward runners. But even if that subordination could somehow be shown, the law is not treating runners differently; it does not distinguish between non-runners and runners as a class because the law would technically apply to everyone who engaged in the act of running. Furthermore, even if the challenger of the running path law could surpass the threshold showing, the law would almost certainly pass the revised rational basis standard on the grounds—presumably provable with data—that it enhances runners’ safety by reducing car-on-runner accidents. Thus, the Hernandez inquiry’s value as a threshold matter serves double purpose by also functioning as a limiting principle where the presumption of constitutionality has been stripped from the government.

Of course, this would largely result in the same outcome under the current rational basis standard; the difference is highlighted when looking at more invidious classifications like groups such as the mentally ill or gays and lesbians. Under the current rational basis, those groups are not afforded heightened scrutiny, and as demonstrated by cases like Heller and Lofton, they routinely fail under an equal protection challenge because they cannot disprove the hypothetical “ease of diagnosis” or “optimal family” type of arguments.237 But under the rationale review proposed here, those groups would have a reasonable chance at rectifying constitutional

235. See, e.g., John Marquez Lundin, Making Equal Protection Analysis Make Sense, 49 SYRACUSE L. REV. 1191, 1202-03, 1203 n.52, 1203 n.53 (1999) (discussing the Court’s restrictive approach to equal protection and noting that between 1886 and 1945 in only 4% of cases “did the Court find an equal protection violation based on something other than the denial of the fundamental rights of African Americans.” Conversely, from 1960 to 1994 26% “were successful claims of a denial of equal protection based on grounds other than racial discrimination . . . .” Those claims included sex, alienage, and non-marital parentage.).

236. 42 U.S.C. § 1983 (1996) provides a mechanism for individuals to sue states for money damages where constitutional harms are inflicted “under color of [law].”

237. See supra Part I.
violations by challenging laws and forcing the government to show that the law actually is reasonably related to a legitimate government interest.

Next, a potential problem with the rationale review standard is that it looks a lot like intermediate scrutiny. How is this standard different? The rationale review standard would be unique under equal protection doctrine. Although rational basis is meant to be highly deferential, this new standard would be a novel approach and would look more like the Title VII analysis or the Fourth Amendment's exigency analysis. Thus, where intermediate scrutiny is often fatal to the government's case, the revised rationale review standard would be more neutral, and would require courts to take a more disinterested stance from the outset of litigation. It would also be less rigid than intermediate scrutiny, encompassing more than just classifications based on gender and non-marital parentage. Rationale review would focus on weighing the facts on a case-by-case basis, instead of working solely to determine whether government conduct is "substantially related" to an "important" government interest.

Finally, rationale review is susceptible to the criticism that separation of powers doctrine would be violated by not granting total deference to government. Under rationale review, requiring the government to justify its legislation could be seen as judicial intrusion into legislative sphere. But, the extreme deference to other branches of government is a relatively new invention, and one that finds little basis in the history of the Equal Protection Clause itself. Furthermore, the Equal Protection Clause deals with individual rights, and thus courts should start from a near-zero-preservation posture. Under rationale review, neither party is afforded total deference, but because the government is operating under a prohibitory right, it appropriately bears the burden of showing why it acted and proving that its conduct is constitutional. The rationale review standard would still be relatively deferential in that there could still be an "imperfect fit" between the legislation, its goals, and the evidence, but not the same way as under intermediate scrutiny.

238. I hesitated to call it "unique" here because the current rational basis standard is arguably more unique in that it places the burden on the challenger and allows judges to do the work of a government lawyer by coming up with her own arguments. My point is that it is different from intermediate scrutiny, and "new" to equal protection doctrine in that it would be a change.

239. See supra note 207 (discussing the Title VII framework). The exigency analysis asks if (1) there was an objectively "reasonable basis to believe there was an immediate need to protect lives or safety, and (2) was the manner and scope of that search reasonable in relation to the exigency. If the government is unable to prove those elements, the warrantless search will be held unconstitutional. United States v. Martinez, 643 F.3d 1292, 1296 (10th Cir 2011). See, e.g., Brigham City v. Stuart, 547 U.S. 398 (2006).


241. See supra text accompanying notes 184-89. See also, Hlavac, supra note 187, at 1375; Siegel, supra note 181, at 2344.

242. See supra text accompanying notes 194-98 (discussing the reaction to Roosevelt's court packing plan).

243. See supra section II.C, and text accompanying notes 151-61.

244. Under the current rational basis standard, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." Heller v. Doe, 509 U.S. 312, 321 (1993) (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)) (internal quotation marks omitted).
there would be a requirement that the government show some evidence to support the reasonableness of the justification for the rationale.

So, for laws that make classifications based on characteristics such as mental disability, age, sexual orientation, and other characteristics not currently afforded heightened scrutiny, challengers of laws would not be required, as a threshold matter, to prove their entitlement to suspect classification analysis and heightened scrutiny in order to be successful. Those challengers would merely need to show they constitute a distinct class based on community attitudes and that they have been treated differently because of membership in that group. Although those challengers may not always be successful in litigation under rationale review, they would at least have their day in court and force the government making the legislative classifications to put its money where its mouth is. Instead of allowing the government to take cover behind hypothetical and speculative reasons, at the very least, our society would be engaging in a more open and forthright discourse about our values and how they translate into the law. And the law would continue to evolve alongside our societal norms as equal protection cases are at the very least heard and the law articulated accordingly.

Rationale review is consistent with the principles motivating the Equal Protection Clause. It is also in line with Justice Stevens’ reasoning in his concurrence in Cleburne. Not every law that makes a classification is per se irrational; courts must undertake an examination of the justifications for legislation on a case-by-case basis. If an impartial lawmaker relying on a factual foundation creates a law that makes classifications of people, courts should endeavor to determine if that justification is, in fact, rational and reasonable. Judicial review should take account of the motivating factors behind the legislation, which is only rationally done when courts have something to actually review. If the government can show a rational link between the impetus for legislation that makes classifications of people and the law itself, then the law should be upheld—and it will be under the rationale review standard proposed here.

IV. APPLYING RATIONALE REVIEW

Applying the rationale review standard will reconcile with precedent and will not be disruptive to current equal protection doctrine. The tiered framework will continue to exist (even if the two top tiers never get applied to new classes), as would a relatively deferential rationale review standard. What would be altered is the process; and likely those cases that uphold invidious laws that make classifications of people would decline in number. Further, those courts that engage in a more thorough examination of the rationale justifying a law that makes classifications of people would continue engaging in such an inquiry, only under rationale review that level of judicial review would be required instead of applied haphazardly.

When groups traditionally marginalized by discriminatory laws—like gays and lesbians—challenge those laws, the laws are routinely upheld under the current
rational basis standard. Under rationale review however, the purported justifications for those laws would be put to the test to determine their legitimacy. That is, the purported government rationale would have to be supported in court by evidence that demonstrates the reasonableness of the link between the government’s goal and the classification at issue. Ultimately, as compared to traditional rational basis, under rationale review discriminatory laws would be subjected to a judicial review process with more integrity, which would likely lead to more decisions in favor of the subordinated group challenging the law. Furthermore, as this Part will demonstrate, the impact that the revised standard will have on those cases that have employed a more searching review is minimal.

Section A will speculatively demonstrate how the new rationale review standard would have affected the proceeding in Lofton. The following two sections offer two cases to demonstrate that lower courts can use and have been using a standard resembling rationale review. Section B will examine a California district court case, Perry v. Schwarzenegger, where a judge required the government to justify its rationale with evidence supporting a classification that singled out gays and lesbians for unequal treatment. Section C will review Collins v. Brewer, an Arizona district court case, where the judge undertook a similar rationale review, and required an evidentiary showing to demonstrate the relationship between the legitimate government interest and the discriminatory law aimed at gays and lesbians.

A. Applying Rationale Review to Lofton

Under rationale review, the arguments relied upon in Lofton to uphold a state law prohibiting homosexuals from adopting would likely fail. Additionally, the senseless arguments the court supplied of its own accord are doubly problematic and warrant brief mention. First, that the court injected its own reasoning into the discourse in order to uphold the discriminatory law illustrates a core concern of this Article. That concern is that a court substituting its own bias into a process meant to explore the truth surrounding the issue relieves that state of all but showing up to court. If the state can simply sit back and say, “prove a negative,” then the burden to overcome the presumption of constitutionality under (the current) rational basis is overwhelming, if not impossible, for most challengers of a law.

In Lofton, had the State been put to the rationale review standard, the law most likely would have been struck down as unconstitutional. The State’s asserted interest was the interest of the child in seeking a good adoptive home. But the court conceded that the premise upon which the State’s argument rested, that a

248. See supra section I.C.
249. Lofton, 358 F.3d at 818.
heteroparental household was the only optimal one, was "one of those 'unprovable assumptions.'" And even in the face of research stating that it was not true, the baseless optimal household argument ultimately was able to carry the day for the State.

Under rationale review, shifting the burden of proof would have forced the State in *Lofton* to actually demonstrate the benefit to children and thus align its conduct with the stated goal of the statute, which is to provide for the best interests of the child. In the absence of the State raising its own counter argument, the arguments put forth by the challengers, which were demonstrable with actual social science and research evidence, would have carried the day. Under rationale review, the State would have had to rebut by actually showing that the scientific evidence presented by the challengers was not credible, or that the legislature had actually considered opposing research. Instead, the *Lofton* court, applying traditional rational basis, simply said the legislature "might" have done so, which was enough to deny adoption rights to a discrete and insular minority of Florida citizens.

Another argument in *Lofton*, one actually raised by the State, was that heterosexual parents are better situated to help guide kids through puberty, and that homosexual parents having the pubescent ritual "sex talk" with their children could somehow be more "embarrassing for teenagers" than would be the case with heterosexual parents. This argument is particularly illustrative of the problem with the current rational basis standard. This argument would not pass the laugh test in a first year law school classroom; it is so ridiculous that it is difficult to read it without recognizing the absurdity. However, this argument carries weight under the current rational basis standard. This argument is not, in the lay sense of the word "rational," but it somehow has become acceptable for courts to declare this inane sort of assertion a "rational" basis for discriminatory legislation under a framework meant to assist in judging the acceptability of depriving citizens of their constitutional right to equal protection of the laws. The court even acknowledged that "[i]t could be that the assumptions underlying these rationales are erroneous, but the very fact that they are arguable is sufficient, on rational-basis review, to immunize the legislative choice from constitutional challenge." This is a near-literal announcement that if someone can say an argument out loud, it will pass rational basis, no matter how absurd or unfounded that argument may be.

Although, admittedly, the final outcome of *Lofton* may not ultimately have been different if the State had introduced competing evidence. That is, the *Lofton* court may still have ruled in favor of the State if the State had demonstrated its

250. *Id.* at 819 (quoting Paris Adult Theater I v. Slayton, 413 U.S. 49, 62-63 (1973)).

251. As a matter of policy, striking down the law in *Lofton* would also have arguably served the State well given the number of foster children seeking foster homes and the "exemplary" parenting demonstrated by people like Lofton himself. *Id.* at 807.

252. *Id.* at 824-26.

253. *Id.* at 825.

254. *Id.* at 822.

255. *Id.* (quoting Heller v. Doe, 509 U.S. 312, 533 (1993)).
position with reasonable evidence; the process then would have included the presentation of evidence and thus given that process the veracity or legitimacy that rationale review is meant to introduce. And, if the goal of judicial discourse is to articulate the law through an exploratory oppositional process—then even if the outcome in *Lofton* were the same under rationale review as it was under rational basis, the proposed standard here would have at least maintained a stronger sense of truthfulness and integrity in reaching that decision, which leads to the authentic articulation of constitutional principles.

The adversarial process requires courts to pick a winner, but the person doing the judging should do so with virtue and be restrained from injecting her own epistemology into the process. Thus, although *Lofton* may still have come out the same way under the rationale review standard, the process to reach that decision would be greatly improved, and at the very least the conversation exploring the issue from all sides would have actually taken place and would have honestly addressed the rationale for the legislation.

**B. Perry v. Schwarzenegger: A Preview of Rationale Review**

*Perry v. Schwarzenegger*\(^{256}\) not only demonstrates that lower courts are already applying a standard like rationale review, but also offers a preview of that standard at work. In *Perry*, same-sex couples brought an equal protection action against the State, challenging a voter enacted constitutional amendment—Proposition 8—that defined marriage as exclusively between one man and one woman, and thus prohibited same-sex couples from marrying.\(^{257}\)

In *Perry*, the district court applied a standard of rational basis that provides a template for the rationale review standard proposed in this Article. Although the *Hernandez* inquiry—the threshold prima facie analysis under rationale review—was not explicitly addressed in this *Perry*, it seems clear that the same-sex couples challenging the law that prohibited them from marrying would meet the required elements: Gays and lesbians are markedly a distinct class based on the attitude of the community, as evidenced by the fact they were singled out by public referendum and denied a right afforded to all others.\(^ {258}\) Similarly, gays and lesbians suffered different treatment: they were denied a right afforded to all people not sharing the characteristic at issue.

The *Perry* court allowed (and possibly required) both sides to present evidence as to whether a legislative classification that barred only same-sex couples from marriage was legitimate.\(^ {259}\) In admitting the testimonial evidence, the court first

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257. *Id.* at 927. The parties also brought a due process claim, although only the equal protection claim is addressed here.
258. *Id.*
259. See *id.* at 936-91.
sought to answer whether a witness was qualified as an expert.\textsuperscript{260} After weighing the witnesses’ testimony along with evidence introduced at trial—which included research, lay opinions, expert opinions, economic analyses, and more—the \textit{Perry} court concluded that “[t]he trial evidence provides no basis for establishing that California has an interest in refusing to recognize marriage between two people because of their sex.”\textsuperscript{261}

In resolving the battle of the experts, the court noted that some of the expert testimony went unchallenged.\textsuperscript{262} Furthermore, the court noted that the proponents of the law failed to “explain the discrepancies between the arguments in favor of Proposition 8 presented to voters and the arguments presented in court,”\textsuperscript{263} as well as the “proponents’ failure to call their expert witnesses.”\textsuperscript{264} In other research-related expert battles, the court examined the credibility of the studies, noting in one instance that the variables used in the research put forth by one party were too broad to have a credible bearing on the issue in the case.\textsuperscript{265}

\textit{Perry} is a particularly cogent representation of the rationale review standard at work. The \textit{Perry} court noted the importance of evidence in deciding whether a law that makes classifications of people can withstand constitutional inquiry.\textsuperscript{266} Chief Judge Walker, although noting that “[a]n initiative measure adopted by the voters deserves great respect,” found that “the evidence presented at trial fatally undermine[d] the premises underlying proponents’ proffered rationales.”\textsuperscript{267} Chief Judge Walker went on to say that when a law is challenged, even one that should be afforded great respect, the determinations used to justify the law, “must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons.”\textsuperscript{268} Because the “evidence demonstrated beyond serious reckoning that”\textsuperscript{269} the challenged law had no support in the reasons offered by the proponents, the law was held unconstitutional. It is worth noting that had the evidence shown that the proponents were basing their justifications for the law in fact, \textit{Perry} may have come out the other way, and the discriminatory law may have been upheld.

The relevant upshot of \textit{Perry} is that this is a case that, from the outside looking in—no matter how one feels about the actual outcome—should warrant respect because the court functioned as an impartial arbiter by weighing actual evidentiary realities. The \textit{Perry} court required both parties to put their money where their mouths were and to make their case to persuade the fact finder, to engage in the adversarial process with integrity, and to make arguments that withstood a minimal amount of

\textsuperscript{260} \textit{Id.} at 946 (applying the tests set forth in \textit{Kumho Tire Co. v. Carmichael} 526 U.S. 137 (1999) and \textit{Daubert v. Merrell Dow Pharm.}, 509 U.S. 579 (1993)).

\textsuperscript{261} \textit{Id.} at 934.

\textsuperscript{262} \textit{Perry}, 704 F. Supp. 2d at 935.

\textsuperscript{263} \textit{Id.} at 944.

\textsuperscript{264} \textit{Id.}

\textsuperscript{265} \textit{Id.} at 935-36.

\textsuperscript{266} \textit{Id.} at 938.

\textsuperscript{267} \textit{Id.}

\textsuperscript{268} \textit{Perry}, 704 F. Supp. 2d at 938.

\textsuperscript{269} \textit{Id.}
surface scratching. As such, *Perry* is an excellent example of how the rationale review standard will work. Furthermore, it demonstrates that by applying a standard of rationale review that endeavors to examine actual evidence, parties will be forced to present evidence and to uncover truths while doing so. Ultimately, when courts employ rationale review the law will be infused with a veracity that is absent from recent equal protection cases decided using rational basis.

C. Collins v. Brewer: *A Preview of Rationale Review*

In *Collins v. Brewer*, lesbian and gay state employees with committed same-sex partners brought an equal protection claim against the State. They alleged that an amendment to an Arizona statute limiting family health care coverage eligibility to married opposite-sex couples violated the Equal Protection Clause. "As part of the State’s personnel compensation system, the State provide[d] subsidized health care benefits to eligible employees and their dependents." In 2009, the State amended the law to limit coverage to "spouses" under state law and to children who met certain criteria, which eliminated coverage for non-spouse domestic partners. Thus, opposite-sex couples could maintain subsidized coverage by getting married, but because coverage was limited to spouses under state law, and the Arizona Constitution prevents same-sex couples from marrying, same-sex couples were precluded from obtaining coverage.

The employees alleged that the amended bill violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. They requested a permanent injunction barring enforcement of the portion of the statute that excluded lesbian and gay couples from coverage. Plaintiffs further requested an order requiring the State to maintain equal family coverage for same-sex and opposite-sex couples.

The State moved to dismiss the case on the grounds that the plaintiffs had failed to state a claim because the statute was constitutional under rational basis.

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271. *See id.* at 801.
272. *Id.*
273. *Id.* at 799.
274. *Id.* at 800-01.
275. *Id.* at 801. Plaintiffs’ amended complaint stated:

The selective withdrawal of family coverage from lesbian and gay State employees—while leaving family coverage intact for heterosexual State employees with a legally recognized spouse—will deny each Plaintiff equal compensation for equal work and discriminatorily inflict upon each Plaintiff and his or her family members anxiety, stress, risk of untreated or inadequately treated health problems, and potentially ruinous financial burdens.

277. *Id.*
278. *Id.* at 801-02.
Putting the "Review" Back in Rational Basis Review

Preliminarily, the court found that “[b]ecause the spousal limitation in [the section of the statute at issue] imposes different burdens on the basis of sexual orientation, it is subject to scrutiny under the Equal Protection Clause.” Noting first that it would apply the rational basis standard, the court addressed in turn each of the rationales the State offered in support of its discriminatory law by examining the facts allegedly supporting each one. Those purported rationales were:

1. the statute “will save the State millions of dollars per year”; 2. the statute will be “much easier to administer”; 3. “scarce funds for employee benefits are better spent on employees and dependents as defined in the new statute”; 4. “this benefit would be most valuable to married persons, who are more likely to have dependent children”; and, 5. the new statute “would further the rational, long-standing and well-recognized government interest in favoring marriage.” Plaintiffs argue there is no legitimate interest served by denying lesbian and gay State employees, including plaintiffs, equal compensation in the form of subsidized family coverage.

With respect to the cost savings argument, the court held that “plaintiffs have demonstrated that denying benefits to same-sex domestic partners of State employees is not rationally, much less substantially, related to the purported rationale of cost savings.” In reviewing the State’s rationale, the court found that the cost of family coverage for same-sex couples was negligible for the State, amounting to “far less than the half-of-one-percent-of-health-costs figure . . . attributable to unmarried domestic partners . . . .” Furthermore, the court found the negligible “costs of offering family coverage to lesbian and gay State employees is offset by the resulting reduced use of [the State Medicaid Agency] which is more costly . . . than allowing employees to share the cost of their health insurance by paying a portion of the premium for family coverage.”

Regarding the State’s administrative efficiency rationale, the court found that it, too, rested on an “impermissible invidious classification,” and that the State had already implemented criteria for domestic partners to meet in order to qualify for

279. Id. at 802.
280. Id. at 803. The court found that when the statute was read together with the constitutional prohibition on marriage equality, it treated “unmarried heterosexual State employees differently than unmarried homosexual employees” and had “the effect of completely barring lesbians and gays from receiving family benefits. Consequently, the spousal limitation in [the section of the statute at issue] burdens State employees with same-sex domestic partners more than State employees with opposite-sex domestic partners.” Id.
281. Id. at 804-05. The court found that the “funds better spent on heterosexual couples” rationale was not a legitimate state interest, and thus did not examine the rationale. Id. at 806. Therefore, because under either the current rational basis standard or rationale review this interest would not be a legitimate one, I will not address the rationale.
282. Collins, 727 F. Supp. 2d at 805. The court noted first that the State “may not attempt to ‘limit its expenditures . . . by invidious distinctions between classes of its citizens,’” and that the statute indeed rested on such invidious distinction. Id. at 805 (quoting Graham v. Richardson, 403 U.S. 365, 374 (1971)).
283. Id.
284. Id.
285. Id. at 806.
family coverage and had successfully applied that criteria to state employees.\textsuperscript{286} Therefore, "[a]pplying the existing standards to the occasional new gay or lesbian applicant would be a minimal burden," and thus the rationale the State offered could not justify the classification.\textsuperscript{287}

Similarly, the State claimed that the law's classification would further its interest in favoring marriage and families with children.\textsuperscript{288} However, the court determined that denying benefits to same-sex couples could not promote marriage because those couples were ineligible for marriage under state law.\textsuperscript{289} Only by denying those benefits to opposite-sex couples might the State promote marriage, but that did not require denying those benefits to same-sex couples.\textsuperscript{290} Thus, the court found the evidence did not substantiate this rationale either.\textsuperscript{291}

Ultimately, the \textit{Collins} court denied the State's motion to dismiss the equal protection claim.\textsuperscript{292} It held that although the employees had no fundamental right to subsidized health care coverage for dependents, the employees were likely to prevail on the merits of their equal protection claim.\textsuperscript{293} Where the State had asserted a legitimate interest, there were no facts to support its proffered rationale linking that interest to the classification.\textsuperscript{294}

Both \textit{Perry} and \textit{Collins} demonstrate that not only are lower courts applying a standard of rational basis that is strikingly similar to rationale review, but also that the standard is encouraging a more honest discourse about the driving force behind laws. Even if laws are passed without intentional maliciousness or overt discriminatory intent, often the latent stereotypes and subliminal animus harbored by individual legislators about the groups classified are at the root of legislation. When legislatures are forced to justify their rationales with real facts, the harbored stereotypes are brought to light, and inappropriate classifications are forced into the open and exposed for what they are.

This all means that under rationale review, those groups who have traditionally faced legislative discrimination based on underlying stereotypes—groups who have never been able to succeed on an equal protection challenge because those stereotypes are never discussed—now have an opportunity to engage the government in an honest discussion about the actual motivations driving discriminatory legislation. That discourse will help to eventually ameliorate stereotypes by forcing a conversation

\textsuperscript{286} Id.
\textsuperscript{287} Id.
\textsuperscript{288} \textit{Collins}, 727 F. Supp. 2d at 806-07.
\textsuperscript{289} Id. at 807.
\textsuperscript{290} Id.
\textsuperscript{291} Id. The court also pointed out that "It is possible that the State's proffered interest in promoting or protecting marriage and procreation is a post hoc justification in response to litigation." \textit{Id.} Which is a nice illustration of a "reasonable evidence" requirement. See Kelso, \textit{supra} note 202.
\textsuperscript{292} \textit{Collins}, 727 F. Supp. 2d at 807.
\textsuperscript{293} Id. at 809.
\textsuperscript{294} Id. at 807.
about them and eliminating their judicial legitimization, and will ultimately lead to the constitutional guarantee of equal protection being assured for all people.

V. CONCLUSION

In this Article I have endeavored to demonstrate that the existing rational basis standard is problematic. The procedural and constitutional issues result in it being applied with an unpredictable degree of meaningfulness. The presumption of constitutionality for laws that make classifications of people runs counter to the underlying principles of the Equal Protection Clause and other areas of constitutional law. The existing rational basis standard also allows for the perpetuation of stereotypes and accordingly results in distorted articulation of the law. Thus, because the rational basis standard is the one likely to be applied to most equal protection claims, a reimagined standard is essential. By revising the rational basis standard of review by shifting the burden of proof from the challenger to the government, the majority of equal protection cases will be decided in a manner consistent with equal protection principles and other constitutional doctrines. Furthermore, through an increase in judicial discourse about our rights, the law will develop on pace with a society whose values are constantly evolving.

Ultimately, under rationale review, cases will more often be decided in accordance with important equal protection principles, and groups identified based on social subordination will actually have an opportunity to be treated fairly under the law, which is precisely the opportunity the Equal Protection Clause is intended to provide. Finally, all of this will occur with little disruption to the current doctrine. The tiered framework will stay in place, with the most deferential standard of review staying at the bottom rung where it is now, but the burden will be shifted on to the party that should rightfully be bearing it.