Minnesota Equal Protection in the Third Millennium: "Old Formulations" Or "New Articulations"?

Ann L. Iijima

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MINNESOTA EQUAL PROTECTION IN THE THIRD MILLENNIUM: "OLD FORMULATIONS" OR "NEW ARTICULATIONS"?

ANN L. IIJIMA†

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† Associate Professor, William Mitchell College of Law. B.A. 1977, Carleton College; J.D. 1985, University of Minnesota.

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Equal protection guarantees are arguably the most important constitutional guarantees of individual rights. They balance governmental interests against two important individual rights: the right to be free from unnecessary governmental interference in the exercise of fundamental rights, and the right to be free from governmental discrimination against insular and politically powerless groups.

One hundred and seventy-five years ago, the United States Supreme Court laid the foundation for equal protection review of legislation. Courts have applied the highly deferential rational basis standard that developed from that early foundation under the equal protection provisions of both the United States and Minnesota Constitutions. Under both provisions, however, federal and state courts have found it necessary to adopt heightened standards of review in certain situations.

Part I of this Article provides an overview of equal protection jurisprudence. Part II focuses on the efforts of federal courts to establish an equal protection standard that fairly balances the interests of the government and the interests of individuals. Part III discusses a similar effort by Minnesota courts to establish a fair standard under the state constitution. This commentary examines the comparison engendered by Minnesota’s two rational basis standards and discusses points of departure from the federal heightened scrutiny standards. Part IV proposes and designs a multi-factor approach that would address the apparent

1. See John E. Nowak & Ronald D. Rotunda, Constitutional Law 568 (4th ed. 1991). Nowak and Rotunda comment: In recent years the equal protection guarantee has become the single most important concept in the Constitution for the protection of individual rights. As we have seen, substantive due process analysis was disclaimed after 1937 and the justices today are not willing to restrict the legislative ability to deal with a subject under that analysis. And the privileges or immunities clause of the fourteenth amendment has never been a meaningful vehicle for the judicial review of state actions, although it may have been intended to be a primary safeguard of natural law rights by the drafters of the amendment.

Id. (footnotes omitted).

concerns of the judiciary and provide clear guidance to state lawmakers. Part V concludes that, after a century-long effort to construct a just system based on rigid categories, Minnesota courts should abandon that attempt and adopt the multi-factor approach.

II. Overview

Both the Fourteenth Amendment of the United States Constitution and article 1, section 2 of the Minnesota Constitution provide individuals with equal protection guarantees from state and local governmental regulation. Although the Minnesota Constitution does not have an equal protection clause per se, article 1, § 2 is most frequently cited as the source of state equal protection rights. See, e.g., State v. Russell, 477 N.W.2d 886, 887 (Minn. 1991) (citing article I, § 2 of the Minnesota Constitution). The language of this provision is significantly different from the language of the Fourteenth Amendment of the United States Constitution, facially providing guarantees more along the lines of due process protection. Assuming Minnesota article I is a due process provision, however, rights to equal protection arguably may be implied in a manner similar to the implication of equal protection under the Due Process Clause of the Fifth Amendment of the United States Constitution. See infra note 5.

On the other hand, a number of Minnesota cases have found the source of equal protection in other provisions of the Minnesota Constitution. See, e.g., State v. Pehrson, 205 Minn. 573, 577, 287 N.W. 313, 315 (1939) (relying on article IV, § 33 as well as on article I, § 2); Franke v. Allen, 199 Minn. 450, 272 N.W. 165 (1937) (rejecting defendant's argument that the statute violated his equal protection rights found in article IV, §§ 33-34).

At one time, article IV, § 33 provided: "In all cases when a general law can be made applicable, no special law shall be enacted . . . ." Minn. Const. of 1857, art. IV, § 33 (1881). This provision became article XII, § 1 of the Minnesota Constitution when it was amended and restructured in 1974. See Minn. Const. art. XII, § 1. Justice Tomljanovich attempted to clarify this issue in her dissenting opinion in Mitchell v. Steffen, 504 N.W.2d 198 (1993). "Our equal protection 'clause' is an un-enumerated but inherent constitutional right, found and confirmed in Minn. Const. art. I, § 16 and included in art. I, § 2. Under this equality guaranty, 'persons similarly situated are to be treated alike unless a sufficient basis exists for distinguishing among them.' " Id. at 208 (citations omitted).

5. The Fifth Amendment, which applies to acts of the federal government, does not have an equal protection provision, per se. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This Due Process Clause has been construed to provide equal protection guarantees. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (rec-
To determine whether or not state action violates equal protection, federal and state courts traditionally have balanced the interests of the individual against those of the governmental entity that seeks to regulate the individual’s activities. This balancing approach has focused on two separate factors: the purpose or ends sought by the government and the means chosen by the government to achieve the ends. The ends analysis requires courts to consider the nature and importance of the state’s ends. Under the means analysis, courts consider the closeness of the relationship between the state’s ends and the means chosen to accomplish those ends.

Nowak and Rotunda explain:

The equal protection clause of the fourteenth amendment by its own terms applies only to state and local governments. There is no equal protection clause that governs the actions of the federal government, and the Court has not attempted to make the clause itself applicable to federal acts. However, if the federal government classifies individuals in a way which would violate the equal protection clause, it will be held to contravene the due process clause of the fifth amendment.

NOWAK & ROTUNDA, supra note 1, at 568-69.


In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. “Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling . . . .” Id. at 497 (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)); see also Barrenblatt v. United States, 360 U.S. 109 (1959) (balancing the individual’s interest in not divulging his association with the Communist Party against the government’s interest in investigating Communist activities); Bolin v. State, 313 N.W.2d 381, 384 (Minn. 1981) (balancing the state’s interest in promoting harmony between the state highway patrol and the sheriff’s office against the individual trooper’s interest in running for political office).

7. See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 652 (1966) (finding appropriate, as a means of enforcing the Equal Protection Clause, the section of the Voting Rights Act providing that those who complete the sixth grade in an American school cannot be required to take a literacy test); State v. Russell, 477 N.W.2d at 889 (considering whether the state’s goal of targeting street level drug dealers was met by a statute that provided more severe penalties for those possessing crack as opposed to powder cocaine).

8. See, e.g., Katzenbach, 384 U.S. at 654 (finding that the Voting Rights Act was enacted by Congress to eliminate “invidious discrimination in establishing voter qualifications” and thus enforce the Equal Protection Clause).

9. See, e.g., Korematsu v. United States, 323 U.S. 214, 218 (1944) (finding that exclusion of individuals of Japanese ancestry from “threatened areas” on the West coast of the United States had a “definite and close relationship to the prevention of espionage and sabotage”).
Under both federal and state equal protection guarantees, courts scrutinize to varying degrees the legitimacy of the government's ends and the relationship of the regulation to those ends. The standard that courts apply has depended on a number of factors, including: (1) the nature of the government's interests;\(^\text{10}\) (2) the nature of the individual interest burdened;\(^\text{11}\) and (3) the identity of the class burdened.\(^\text{12}\) The degree of a court's deference in reviewing challenged legislation also is influenced by whether the challenge is based on the federal or a state constitution.\(^\text{13}\)

The degrees of scrutiny a court will apply include the rational basis standard and varying degrees of heightened scrutiny, such as the intermediate standard and the strict scrutiny standard.\(^\text{14}\) Courts apply these standards with considerable flexibility. For example, under the Minnesota equal protection clause, there apparently are two different rational basis standards, one of which is significantly less deferential than the other.\(^\text{15}\) Similarly, under the Federal Equal Protection Clause, the United States Supreme Court has occasionally applied the rational basis standard in a less deferential manner than it usually does.\(^\text{16}\)

III. "OLD FORMULATIONS"—FEDERAL EQUAL PROTECTION

In 1819, Chief Justice Marshall laid the foundation for subsequent ends/means analyses when he delineated the constitu-

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10. See, e.g., Korematsu, 323 U.S. at 217-18 (considering the interest of the military, which was "charged with the primary responsibility of defending our shores," in excluding individuals of Japanese descent from areas of the West coast).
12. See, e.g., Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (holding that "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns"); see also infra notes 27-35 and accompanying text.
13. See infra notes 54-72, 101-04 and accompanying text.
14. See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988). In Clark, the Court recognized that:

In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

Id. (citations omitted).
15. See infra part IV.A.1.
16. See infra part III.C.
tional limits of the implied powers of Congress: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 Depending on the nature of the interest at issue, federal courts have traditionally imposed one of two analytical models, either a rational basis standard, or some form of heightened scrutiny.

A. Rational Basis Standard

The United States Supreme Court has effectively adopted Justice Marshall’s formulation as the general standard of review under equal protection. 18 Under this “rational basis standard” courts apply a two-factor analysis to review general social welfare or economic regulations. 19 The state’s ends need only be legitimate, and the means chosen need only be rationally related to those ends. 20 Under this extremely deferential standard, “legitimacy” is broadly defined—the issue is whether the ends are prohibited by the constitution. 21 The rational relationship portion of the standard is similarly broad—courts need inquire only whether the classification conceivably bears a rational relationship to the ends. 22

18. "[W]hen the Court examines substantive due process or equal protection claims, a majority of the justices will uphold the challenged governmental act unless no reasonably conceivable set of facts could establish a rational relationship between the challenged regulation and a legitimate end of government." Nowak & Rotunda, supra note 1, at 379.
19. See, e.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (applying a "reasonable basis" analysis to a statute regulating the pumping of gas). During various periods, particularly between 1865 and 1937, the Court applied this standard with less deference to the legislature to invalidate a number of economic regulations. See Nowak & Rotunda, supra note 1, at 356-69, 574-75.
20. See Nowak & Rotunda, supra note 1, at 574-75.
21. See, e.g., Katzenbach v. Morgan, 384 U.S. 641 (1966). The Court in Katzenbach described the analysis as requiring consideration of "whether [the Voting Rights Act] may be regarded as an enactment to endorse the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the [C]onstitution.' " Id. at 651 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).
22. See, e.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); see also Nowak & Rotunda, supra note 1, at 574-75.
B. Heightened Scrutiny

The Supreme Court subsequently determined that, in certain situations, the extremely deferential rational basis standard did not sufficiently protect the interests of individuals from incursions by the state. Accordingly, the Court modified the ends/means formulation to allow for higher levels of scrutiny of some governmental regulations. Under these newer formulations, courts do not defer to the decision of the governmental body, but independently determine whether the classification bears the requisite relationship to a sufficiently important governmental end.

The Supreme Court applies heightened scrutiny in two types of cases: (1) where the legislation discriminates against groups of individuals based on certain "suspect" or "near-suspect" classifications; or (2) where the regulation intrudes upon individual rights deemed to be "fundamental."

1. Use of Suspect Classifications

Legislation often imposes classifications on groups in order to apply benefits and burdens without raising equal protection issues. Courts generally use the highly deferential rational basis standard to determine the validity of the discriminatory classification. However, courts are unwilling to presume that the state's ends are legitimate where the state's classifications are

23. See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). Gunther described this transition as follows:

At the beginning of the 1960's [sic], judicial intervention under the banner of equal protection was virtually unknown outside racial discrimination cases. The emergence of the "new" equal protection during the Warren Court's last decade brought a dramatic change. Strict scrutiny of selected types of legislation proliferated. The familiar signals of "suspect classification" and "fundamental interest" came to trigger the occasions for the new interventionist stance. The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact.

Id. at 8.

24. See infra parts III.B., III.C.

25. See infra part III.B.

26. See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970) (upholding state statute that capped family welfare benefits at $250 per month regardless of number of family members). The Court has stated:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend...
"suspect." A suspect classification is found where the regulations disparately burden insular groups historically subjected to discriminatory treatment.

a. Strict Scrutiny Standard

In 1944, the Supreme Court determined that deference to governmental action would be inappropriate where disparate treatment was based on race or national origin. Rather, the Court held that such governmental action would be subject to "the most rigid scrutiny." Under this standard, the action must

the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." 


See, e.g., Plyler v. Doe, 457 U.S. 202, 216 (1982) (reasoning that a classification that disadvantages a suspect class is "presumptively invidious").

27. See United States v. Carolene Products Co., 304 U.S. 144 (1938). In Carolene Products, the Court for the first time suggested the rationale for additional protection for suspect classifications:

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 153 n.4 (citations omitted).

29. Korematsu v. United States, 323 U.S. 214, 216 (1944). In Korematsu, an American citizen of Japanese heritage refused to comply with Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, that required all persons of Japanese ancestry to leave the West Coast of the United States, a so-called "Military Area." Id. at 215-16. Although his loyalty was not questioned, the Court held that Korematsu's conviction did not violate the Fifth Amendment. Id. at 223.

30. Korematsu, 323 U.S. at 216. In Korematsu, the Court reasoned:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Id. The Court went on to hold that the assertion of military necessity was a sufficient justification for the racial classification. Id. at 223-24. Although the Korematsu decision did not expressly establish the strict scrutiny standard, it did set the stage. Nowak and Rotunda have observed:

This opinion thus established three points for future analysis of classifications based on race or national origin. First, these classifications were "suspect" which meant, at a minimum, that they were likely to be based on an impermissible purpose. Second, these classifications were to be subject to independent judicial review—"rigid scrutiny." Third, such classifications would be invalid if based on racial antagonism and upheld only if they were based on "public necessity." From this opinion came the concepts of "strict judicial
be necessary to achieve a compelling governmental purpose. In 1971, the Court applied this strict scrutiny standard to a state law that classified individuals on the basis of alienage.

b. Intermediate Scrutiny Standard

In the 1970s, faced with gender-based legislation, the Supreme Court found it necessary to fashion a third standard of review that fell between the rational basis and strict scrutiny standards. By 1976, the Supreme Court formulated an "intermediate scrutiny" standard under which the challenged regulation had to be "substantially related" to an "important governmental interest." The Court now applies this intermediate standard to classifications based on the legitimacy of children, as well as to gender-based classifications.

scrutiny" and the requirement that some restrictions on liberty must be necessary to promote "compelling" or "overriding" interests.

NOWAK & ROTUNDA, supra note 1, at 623 (footnotes omitted).

31. Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993) (holding that North Carolina's redistricting plan was an unconstitutional attempt to segregate people to improve their voting power); see also Korematsu, 323 U.S. at 216.

32. See Graham v. Richardson, 403 U.S. 365, 372 (1971) (reasoning that "classifications based on alienage, like those based on . . . race, are inherently suspect and subject to close judicial scrutiny"). The Supreme Court is more deferential to federal legislation based on alienage. See, e.g., Mathews v. Diaz, 426 U.S. 67, 69 (1976) (upholding the constitutionality of a federal statute conditioning an alien's eligibility to participate in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence).

33. In 1972, Professor Gunther observed that the Burger Court demonstrated increasing dissatisfaction with the "rigid two-tier formulations of the Warren Court's equal protection doctrine," and its tendency to use the Equal Protection Clause for independent review of governmental regulation without applying the strict scrutiny standard. Gunther, supra note 23, at 12. Nowak and Rotunda further describe this evolution:

It soon became clear that the Court would no longer treat sex-based classifications with the judicial deference given economic regulations; however, it became equally clear that such classifications are not subject to the "strict scrutiny" given to truly suspect classifications such as those based upon race. For a five-year period, the Court struggled with the appropriate standard or [sic] review to be applied in gender-based discriminations.

NOWAK & ROTUNDA, supra note 1, at 734.

34. See Craig v. Boren, 429 U.S. 190, 197 (1976). The Court earlier had rejected applying rational basis review to sex-based classifications, but had not fully articulated the intermediate scrutiny standard. See, e.g., Reed v. Reed, 404 U.S. 71, 75-76 (1971) (holding that the challenged regulation had to be "substantially related" to the object of the legislation).

35. See Clark v. Jeter, 486 U.S. 456, 461 (1988) (holding unconstitutional a Pennsylvania statute setting a six-year statute of limitations in paternity actions). In earlier cases, the Court applied an intermediate scrutiny standard to classifications based upon illegitimacy that was somewhat differently worded. See, e.g., Lalli v. Lalli, 439 U.S. 259,
2. Interference with Fundamental Rights

The Supreme Court has applied heightened scrutiny to legislative classifications that significantly burden the exercise of rights deemed to be "fundamental." Fundamental rights include the right to engage in: activities expressly protected by the constitution, such as the exercise of First Amendment rights; activities impliedly protected by the constitution such as interstate travel and marriage; and certain activities which do not enjoy independent constitutional protection, but, like the general right to vote, are nevertheless considered fundamental.

C. Rational Basis Standard with Teeth

In the 1980s, the Supreme Court arguably created a fourth standard for equal protection analysis when it applied the rational basis test in a less deferential manner than was typical. This less deferential use of the rational basis standard has been called "rational basis with teeth" or "with bite."

265 (1978) (stating that a New York illegitimacy statute must be "substantially related to permissible state interests"); Mathews v. Lucas, 427 U.S. 495, 516 (1976) (holding provisions of the Social Security Act constitutional because congressional assumptions were not so "inconsistent or insubstantial as not to be reasonably supportive of its conclusions.

36. The Court sometimes applies the strict scrutiny standard, requiring the classification to be necessary to a compelling governmental interest. See Nowak & Rotunda, supra note 1, at 577. At other times, it performs an independent review of the legislation without expressly applying the strict scrutiny standard. Id.


38. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (holding that marriage is a fundamental liberty under the Due Process Clause); Memorial Hospital v. Maricopa County, 415 U.S. 250, 254 (1974) (stating that "[t]he right of interstate travel has repeatedly been recognized as a basic constitutional freedom"); Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (holding that the right to travel is a fundamental right); Loving v. Commonwealth of Virginia, 388 U.S. 1, 12 (1967) (holding that marriage is a fundamental freedom).

39. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (holding that the right to vote is a fundamental right "preservative of all rights").

40. These orthodontic analogies have gained strong support among commentators. See, e.g., Renata J. Baker et al., Survey: Developments in Maryland Law, 1991-92, 52 Md. L. Rev. 530, 551 n.150 (1993) (citing cases in which the Court's standard of review has been characterized as "rational basis with teeth"); Marco de Sa e Silva, Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death, 63 Wash. L. Rev. 653, 660 n.67 (1988) (noting that "one commentator suggests that the Court should give the rational basis test 'teeth' " by requiring a real rather than
In *City of Cleburne v. Cleburne Living Center, Inc.*, the city had denied a permit for a group home for mentally retarded individuals under a zoning regulation that required a special use permit for the construction of "hospitals for the insane or feebleminded." The Court held that application of the regulation to the group home violated the Equal Protection Clause. However, the Court found that mental retardation was neither a suspect class requiring the application of strict scrutiny, nor a quasi-suspect class requiring the application of intermediate scrutiny. According, the rational basis standard applied.

The Court then broke from its typically deferential review under the rational basis standard. Despite acknowledging that, under this test, "legislation is presumed to be valid" and "the Equal Protection Clause allows the States wide latitude," the Court nonetheless undertook an independent review to hold that the zoning regulation was not rationally related to any legitimate end. The City of Cleburne argued that a number of traditionally legitimate interests, such as safety and traffic control, were advanced by the zoning regulations. The Court rejected this argument, noting that "other care and multiple-dwelling facilities are freely permitted." Although, under traditional rational basis analysis, a regulation is not invalid on grounds that it is underinclusive or merely because only partial steps are taken toward a legitimate goal, the Court nonetheless found the stat-

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42. Id. at 436-37.
43. Id. at 450.
44. Id. at 440-42.
45. Id. at 446. The Court stated that "[t]o withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose." Id.
47. Id. at 448-50.
48. Id. at 448. "At least this record does not clarify how . . . the characteristics of the intended occupants of the [group home] rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." Id. at 450.
ute unconstitutional under the rational basis standard of review.49

As this discussion illustrates, equal protection analysis has evolved significantly from its rational basis origins. Federal equal protection analysis today could be considered four-tiered in nature: rational basis, rational basis with teeth, intermediate scrutiny, and strict scrutiny.

IV. MINNESOTA EQUAL PROTECTION

Minnesota courts have undertaken a similar struggle to establish a workable analysis for the state equal protection clause.50 To a great extent, Minnesota courts have addressed the problem through adoption of the federal equal protection standards.51 Where no fundamental rights or suspect classifications are implicated, Minnesota applies a rational basis test.52 Where the gov-

49. Id. See also Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) (reasoning that equal protection does not require "that all evils of the same genus be eradicated or none at all"). But see Nowak & Rotunda, supra note 1, at 590. Nowak and Rotunda state that "all of the Supreme Court's recent majority opinions are consistent with the use of a true rationality test for the review of economic or social welfare legislation," apparently including Cleburne in this conclusion. Id. Specifically, they suggest:

The justices had no difficulty in invalidating the zoning regulation at issue in Cleburne because the denial of a permit for the group of mentally retarded persons to live together could not in any conceivable way promote any interest other than the desire to exclude mentally retarded persons from the city. The city zoning ordinance that authorized a denial of a "special use permit" for mentally retarded persons to live together in a group home in this case would have allowed an identical number of unrelated people to inhabit an identical house or apartment building if those persons were not mentally retarded.

50. See Deborah K. McKnight, Minnesota Rational Relation Test: The Lochner Monster in the 10,000 Lakes, 10 WM. MITCHELL L. REV. 709 (1984). McKnight examines Minnesota's independent approach to equal protection analysis and criticizes the court for engaging in substantive review which "appears confused and result-oriented." Id. at 735.

51. In many cases, the Minnesota Supreme Court has discussed equal protection challenges only under the Federal Constitution. See, e.g., Meyers v. Roberts, 310 Minn. 358, 363, 246 N.W.2d 186, 189 (1976) (holding that a county auditor's refusal to certify a nineteen-year-old as court commissioner did not violate federal equal protection); Blue Earth County Welfare Dept. v. Cabellero, 302 Minn. 329, 346, 255 N.W.2d 373, 383 (1974) (holding a Federal Housing Act amendment as applied to county welfare department did not violate federal equal protection); Larson v. City of Minneapolis, 190 Minn. 138, 139, 251 N.W. 121, 121 (1933) (applying the Federal Equal Protection Clause to a Minnesota state statute concerning milk pasteurization); State v. Wagener, 77 Minn. 483, 498, 80 N.W. 633, 636 (1899) (focusing on whether there was "an apparent and just reason" for the distinction between classifications).

52. See, e.g., Davis v. Davis, 297 Minn. 187, 194, 210 N.W.2d 221, 226 (1973).
ernmental action either interferes with fundamental rights or imposes suspect classifications, heightened scrutiny is applied.\textsuperscript{53}

On the other hand, decisions by the Minnesota Supreme Court suggest that even the federal four-tiered analysis is insufficiently flexible to provide a truly sensitive balancing of individual and governmental interests. The Minnesota Supreme Court, therefore, occasionally has found it necessary to deviate in some respects from the federal analysis. This deviation occurs in two forms under the Minnesota Constitution: the court vacillates between two different rational basis standards and has expanded the reach of the heightened scrutiny standard.

A. Rational Basis Standard

1. Two-Factor and Three-Factor Analyses: State v. Russell

As illustrated by the recent cases of State v. Russell\textsuperscript{54} and Skeen v. State,\textsuperscript{55} the Minnesota Supreme Court has vacillated between two analytical approaches to rational basis review under the Minnesota Constitution. The court often has applied a two-factor analysis apparently identical to the federal rational basis analysis.\textsuperscript{56} In a number of other cases, however, it has applied a three-factor analysis.\textsuperscript{57}

\textsuperscript{53.} See, e.g., Bolin v. State, 313 N.W.2d 381, 383-84 (Minn. 1981) (applying strict scrutiny to hold that requiring patrolmen to resign before running for public office violated equal protection because the policy was not the least restrictive means available to accomplish the State's goal); Ulland v. Growe, 262 N.W.2d 412 (Minn. 1978) (reasoning that legislative enactments which directly infringe on the fundamental right to vote are subject to strict scrutiny).

\textsuperscript{54.} 477 N.W.2d 886 (Minn. 1991).

\textsuperscript{55.} 505 N.W.2d 299 (Minn. 1993).

\textsuperscript{56.} See, e.g., In re Estate of Turner, 391 N.W.2d 767, 770 n.2 (Minn. 1986) (noting that standards applicable under Minnesota state protection analysis are the same as those applicable under federal analysis); AFSCME Councils 6, 14, 65 & 96 v. Sundquist, 338 N.W.2d 560, 569 (Minn. 1983) (applying a two-factor rational basis test “coextensive” with the federal standard to uphold a statute that required public employees to make additional payments to a pension fund); State v. Forge, 262 N.W.2d 341, 347 n.23 (Minn. 1977) (stating that federal equal protection standards are “synonymous” with standards applied under the Minnesota Constitution).

\textsuperscript{57.} See, e.g., Thompson v. Estate of Petroff, 319 N.W.2d 400, 404 (Minn. 1982) (holding that a statute providing that only certain personal injury actions survived an individual’s death did not pass the three-factor test); Nelson v. Peterson, 313 N.W.2d 580, 581 (Minn. 1981) (applying the three-factor test to strike down a statute prohibiting state-employed attorneys who represented workers’ compensation petitioners from serving as workers’ compensation judges for two years); Wegan v. Village of Lexington, 309 N.W.2d 273, 280 (Minn. 1981) (applying the three-factor analysis to the Dram Shop Act to hold that procedural requirements that distinguished between 3.2 beer and stronger liquor were unconstitutional); Guiliams v. Commissioner of Revenue, 299
The three-factor analysis is substantially less deferential than the two-factor analysis. Although both analyses require that "the purpose of the statute must be one that the state can legitimately attempt to achieve," the three-factor analysis uses two additional factors that encourage independent judicial review of the appropriateness of the classification. These factors require the court to consider:

1. The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy.

N.W.2d 138, 142 (1980) (finding that a statute limiting the amount of farm loss a taxpayer may offset against non-farm income was constitutional because there was a genuine, relevant and reasonable basis for the classification).

The Minnesota Supreme Court apparently first applied the three-factor test in the late 1970s. See, e.g., Miller Brewing Co. v. State, 284 N.W.2d 353 (Minn. 1979) (establishing three primary elements necessary to determine the constitutionality of statutory classifications). Prior to Miller Brewing, the court maintained that state and federal equal protection analyses were substantially identical. See McKnight, supra note 50, at 723 (citing State v. Forge, 262 N.W.2d 341, 347 (Minn. 1977)); see also C. Thomas Stores Sales Sys. v. Spaeth, 209 Minn. 504, 514, 297 N.W. 9, 16 (1941).


59. Russell, 477 N.W.2d at 888 (citing Wegan, 309 N.W.2d at 280). Both the United States Supreme Court and the Minnesota Supreme Court have occasionally applied the federal rational basis test in a manner similar to Minnesota's three-factor test. See, e.g., Morey v. Doud, 354 U.S. 457, 465-66 (1957) (reasoning that "genuinely different" characteristics of businesses may justify treating them differently); Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 165 (1897) (reasoning that a classification must bear "a just and proper relation to the attempted classification" and cannot be a "mere arbitrary selection"); Halverson v. Rolvaag, 143 N.W.2d 239, 242 (Minn. 1966) ("Equal protection of the law requires that legislative classifications be founded upon some real and substantial difference bearing a fair relationship to the legislation so that the law operates equally and uniformly on all persons similarly situated.").

Justice Marshall discussed the rational basis standard in a case involving subsistence benefits paid to needy children:

[1]Individuals should not be afforded different treatment by the State unless there is a relevant distinction between them and a "statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." Consequently, the State may not . . . supply benefits to some individuals while denying them to others who are similarly situated.
In *State v. Russell*, the Minnesota Supreme Court used the three-factor analysis to hold that section 152.023, subdivision 2 of the Minnesota Statutes violated equal protection under the Minnesota Constitution. Although the statute had a legitimate

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60. 477 N.W.2d 866 (Minn. 1991). Although the Russell court found a determination of the applicability of the federal strict scrutiny standard unnecessary, it suggested that the statute might not have passed muster under this test. *Id.* at 888 n.2. In *Russell*, there was little question that the statute had a disparate impact on African Americans. However, the court noted that federal strict scrutiny was applicable only where the legislature enacted the statute "because of" rather than "in spite of" an anticipated racially discriminatory effect. *Id.* While courts ordinarily refuse to intrude or inquire into the legislative process, *Russell* reasoned that the correlation between race, the type of cocaine used, and the "gross disparity in resulting punishment cries out for closer scrutiny of the challenged laws." *Id.* The court further reasoned that the disparate effect of the law, coupled with statutory history, could create an inference of discriminatory intent that would trigger strict scrutiny. *Id.* The *Russell* court declined to apply this standard, however, because it found the statute was unconstitutional under Minnesota's rational basis test. *Id.* Justice Yetka, concurring specially, agreed with the majority that "strict scrutiny could be applied to this statute since there is enough evidence from which to infer discriminatory purpose." *Id.* at 892. Justice Simonett also concurred specially. *Id.* at 894-95. See infra note 81 and accompanying text.

Justice Coyne dissented, asserting that the majority was engaging in "an activist form of judicial review." *Id.* at 895. She argued that the court had previously adopted the federal two-factor rational basis standard and the intent requirement in disparate impact cases. *Id.* at 896 & 902 n.1. In Justice Coyne's view, the majority had replaced the rational basis test "not with a stricter standard, but with no standard at all." *Id.* at 902. She believed the legislature could reasonably distinguish between crack and powder cocaine based on differences in their form and marketing, and that there was no evidence of either discriminatory purpose or enforcement. *Id.* at 895, 897-901. Moreover, a federal statute equating 100 grams of powder to one gram of crack for the purpose of sentencing had been upheld as not violating federal due process or equal protection guarantees. *Id.* at 897.

61. *Russell*, 477 N.W.2d at 888. The Legislature subsequently amended this statute to provide equivalent penalties for crack and powder cocaine. See *Act, 1992 Minn. Laws* 359. The changes included:

The 1992 amendment in subd. 2, in cl. (1) deleted "base" following "cocaine", in cl. (2) added "other than cocaine", deleted former cl. (3) which made it a crime to unlawfully possess one or more mixtures containing a narcotic drug with the intent to sell it, and redesignated former cls. (4) to (7) as cls. (3) to (6) respectively.

**Minn. Stat. Ann. § 152.023 (Supp. 1993).** Subdivision 2 now reads:

A person is guilty of controlled substance crime in the third degree if: (1) the person unlawfully possesses one or more mixtures of a total weight of three grams or more containing cocaine; (2) the person unlawfully possesses one or more mixtures of a total weight of ten grams or more containing a narcotic drug other than cocaine.

**Minn. Stat. § 152.023, subd. 2 (Supp. 1993).**

The *Russell* court also suggested that the statute might constitute a due process violation. "Because the statute creates an irrebuttable presumption of intent to sell without affording the defendant an affirmative defense of lack of intent to sell, and on
purpose of discouraging the activities of street level drug dealers, the court nonetheless held the statutory classifications to be inappropriate.\textsuperscript{62}

To reach this conclusion, the court found there was no "genuine and substantial" distinction between those who fell inside and those who fell outside of the classification.\textsuperscript{63} The State had argued that it was valid to distinguish between crack and powder cocaine because an individual possessing three grams of crack cocaine is presumably a drug dealer.\textsuperscript{64} Moreover, crack cocaine was depicted as more addictive, more dangerous, and more likely to be associated with violence than powder cocaine.\textsuperscript{65} The court rejected these distinctions because they were based on insufficient, contradicted anecdotal evidence that could be explained by factors unrelated to the form of the cocaine.\textsuperscript{66}

Next, the court reasoned that the classification was not "genuine or relevant to the purpose of the law."\textsuperscript{67} The court could find no connection between the Legislature's desire to penalize street level drug dealers and the crack/powder classification.\textsuperscript{68} Exhibiting concern about the statute's overinclusiveness, the court noted that there was insufficient evidence to determine whether the statute punished personal users as well as dealers.\textsuperscript{69} The court also criticized the statute for its underinclusiveness because the statute did not impose equivalent punishment for possession of an amount of powder cocaine that could easily be converted into three grams of crack.\textsuperscript{70}

Although the statute did not pass constitutional muster under the Minnesota three-factor rational basis test, it likely would have

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\item \textsuperscript{62.} Russell, 477 N.W.2d at 891.
\item \textsuperscript{63.} Id. at 889.
\item \textsuperscript{64.} Id.
\item \textsuperscript{65.} Id. at 890.
\item \textsuperscript{66.} Id. One alternative explanation provided by the court was gang warfare and other types of group behavior. Id.
\item \textsuperscript{67.} Russell, 477 N.W.2d at 888.
\item \textsuperscript{68.} Id. at 890.
\item \textsuperscript{69.} Id.
\item \textsuperscript{70.} Id.
\end{thebibliography}
satisfied the federal two-factor test. Lawmakers could reasonably believe that the three-grams-of-crack/ten-grams-of-powder classification would target street level dealers. The court’s decision under the Minnesota Constitution, however, averted consideration of this issue. As might be expected, the Minnesota Supreme Court’s less deferential three-factor test produced substantially different results than might be anticipated under the highly deferential two-factor test. Accordingly, Russell illustrates a simple principle—the standard that a court chooses to apply is likely to determine the outcome of the case.

2. Relationship of Two-Factor and Three-Factor Analyses: Competing Approaches or Coordinating Alternatives?

The court acknowledged in Russell that it had “not been consistent in explaining whether the rational basis standard under Minnesota law, although articulated differently, is identical to the federal standard or if it represents a less deferential standard under the Minnesota Constitution.” At issue, then, is whether

71. Id. at 888. The State argued that:

[T]he legislature has a permissible and legitimate interest in regulating the possession and sale of crack cocaine and cocaine powder and that it was reasonable for lawmakers to believe that the three grams of crack—ten grams of powder classification would regulate the possession of those drugs by the 'street level' dealers at whom the statute was primarily aimed.

Id.

72. Russell, 477 N.W.2d at 888 n.2. Minnesota’s attempt to distinguish between crack and powder cocaine would likely be constitutional under the federal standard because similar distinctions in federal statutes have been upheld. For example, 21 U.S.C. § 841(b)(1)(B), which establishes a “100 to 1 ratio” for punishment of crack, as opposed to powder, cocaine offenses, has survived due process and equal protection challenges under the Fifth Amendment. See United States v. Buckner, 894 F.2d 975, 978-79 (8th Cir. 1990) (holding that 21 U.S.C. § 841(b)(1)(B) did not violate due process); accord United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989).

Moreover, federal courts have held that the federal sentencing guidelines, which distinguish between the forms of cocaine, pass the rational basis standard. See, e.g., United States v. Frazier, 981 F.2d 92, 95 (3d Cir. 1992) (stating that all circuit courts have ruled that the distinction between cocaine base and powder in the federal sentencing scheme is constitutional under a rational basis standard).

The Eighth Circuit, in particular, has repeatedly rejected Russell-type attacks on federal sentencing guidelines under the Fifth Amendment. See, e.g., United States v. Lattimore, 974 F.2d 971, 976 (8th Cir. 1992) (holding that the federal sentencing guidelines did not violate federal equal protection); United States v. Willis, 967 F.2d 1220, 1225 (8th Cir. 1991) (rejecting application of the Russell rationale and upholding the federal sentencing guidelines). But see United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994) (finding that identical punishment for possession minimums of 5000 grams of cocaine or 50 grams of crack cocaine violated equal protection).

73. Russell, 477 N.W.2d at 888.
there is a single rational basis standard under Minnesota equal protection with the two-factor and three-factor standards competing for the coveted position, or, alternatively, if the two analyses reflect a two-tiered rational basis standard with the appropriate tier applied according to the circumstances. Although the Minnesota Supreme Court presumably is trying to establish a single standard, the effect of the competition has been to produce a two-tiered standard.

a. One Standard, Two Interpretations

Although the court apparently would prefer the establishment, once and for all, of one rational basis standard, it has been unable to definitively determine which of the two approaches should occupy that position. In In re Estate of Turner, then Chief Justice Amdahl attempted to settle the issue by stating that “the rational basis standard used in Minnesota equal protection analysis is the same as the standard used in federal equal protection analysis.” The Turner court noted that the differences in wording between the two analyses “merely represent[s] different ways of stating the same analysis.” In Russell, however, Justice Wahl, writing for the majority, stated that “[s]ince the early eighties, this court has, in equal protection cases, articulated a rational basis test that differs from the federal standard.”

Russell thus suggested the possibility that the Minnesota Supreme Court had finally settled on the three-factor analysis as the Minnesota rational basis standard. Applying this analysis, the court could engage in independent judicial review of all legislation, including general social and economic regulations. However, Justice Simonett, somewhat apprehensive of this extension of equal protection analysis, warned that the three-factor rational basis analysis must be restrained lest courts substitute their

74. 391 N.W.2d 767 (Minn. 1986).
75. Id. at 770 n.2.
76. Id.
77. Russell, 477 N.W.2d at 888; see also Wegan v. Village of Lexington, 309 N.W.2d 273, 281 n.14 (Minn. 1981) (asserting that, even if classifications were constitutional under federal equal protection analysis, they might still be defective under the Minnesota three-factor test). In applying the three-factor analysis, however, the Russell court did not attempt to explain the relationship between the two-factor and three-factor analyses. See Russell, 477 N.W.2d at 888-91.
judgment for that of the legislature. Simonett's apprehensions were assuaged two years later in Skeen v. State. In Skeen, the court applied the two-factor analysis to uphold Minnesota's school funding system in the face of an equal protection challenge.

**b. Two-tiered Standard**

In the wake of Russell and Skeen, and at least for the foreseeable future, Minnesota equal protection will continue to provide two separate rational basis analyses. Because different results may be obtained depending on the analysis applied, the court's basis for determining which of the two analyses is applied remains an essential issue.

One option before the court would incorporate both analytical standards into the approach which currently predominates both federal and Minnesota equal protection analysis, the use of multiple tiers of review. The court would apply the more deferential two-factor analysis when neither the classifications used nor the individual interest burdened raise any suspicion regarding the legitimacy of the government's objectives. The more stringent three-factor analysis would be reserved for situations that raise such suspicion.

Justices Simonett and Tomljanovich appear to support this approach. In Russell, Justice Simonett suggested that the court apply the more intrusive scrutiny of the three-factor analysis where racial groups suffer a disparate impact.

I would hold that where a facially neutral criminal statute has, in its general application, a substantial discriminatory racial impact, this court may then apply its three-factor rational basis test, even though there is no showing that the legislature intended this impact. It seems to me the critical importance of racial equality in our multicultural society warrants this closely tailored modification.

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78. *Russell*, 477 N.W.2d at 894 (Simonett, J., concurring). Justice Simonett was concerned that more invasive scrutiny of the legislative purpose underlying regulations would revive "the discredited doctrine of substantive due process." *Id.*
79. 505 N.W.2d 299 (Minn. 1993).
80. *Id.* at 316.
82. *Id.* (footnote omitted). The approach advocated by Justices Simonett and Tomljanovich offers the advantage of familiarity because it is analytically similar to the approach used in employment discrimination suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1981 & Supp. 1993), and under the Minne-
Although the *Russell* majority did not expressly accept Justice Simonett’s invitation to limit the application of the three-factor analysis, it did indicate that the disparate impact on African Americans imposed by the crack/cocaine distinction was one of the persuasive factors encouraging use of the less deferential analysis. The *Russell* majority reasoned that “[i]t is particularly appropriate that we apply our stricter standard of rational basis review in a case such as this where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection.”  

On the other hand, in earlier cases, the court’s selection of either the two- or three-factor test did not correlate with the absence or presence of disparate impact on certain racial groups.  

Two years after *Russell*, in her dissenting opinion to *Mitchell v. Steffen*, Justice Tomljanovich articulated a three-part framework for selecting the analytical standard in constitutional equal pro-


If, as suggested by Justices Simonett and Tomljanovich, the three-factor rational basis test is applied in disparate impact cases, the plaintiff would bear the initial burden of showing that the governmental action had a disparate impact on racial groups. The burden would then shift to the government to show that the distinctions between the various classes were “genuine and substantial,” and that there was an evident connection between the classification and the law’s purpose. This burden of proof is similar to the employer’s job relatedness/business necessity burden required under the employment discrimination statutes. Finally, both analyses require a showing of legitimate reasons for the discriminatory action.  

83. *Russell*, 477 N.W.2d at 889.  

84. Earlier court decisions applying the stricter three-factor standard did not involve race-based classifications. See, e.g., Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981) (distinguishing 3.2 beer from stronger liquor); Guilliams v. Commissioner of Revenue, 299 N.W.2d 138 (Minn. 1980) (classifying farm and non-farm income); Miller Brewing Co. v. State, 284 N.W.2d 353 (Minn. 1979) (distinguishing, for taxation purposes, Minnesota beer brewers from brewers with production facilities outside the state). In one case that did involve a race-based classification, the court applied the more deferential two-factor test. See State v. Forge, 262 N.W.2d 341, 347-48 (Minn. 1977).  

85. 504 N.W.2d 198 (Minn. 1993).
tection challenges.\textsuperscript{86} Whenever a fundamental right is implicated or if a suspect class is burdened, the court should apply strict scrutiny.\textsuperscript{87} Next, if the legislation has a disparate impact or burdens a semi-suspect class, the three-pronged \textit{Russell} test should be applied.\textsuperscript{88} Finally, for all remaining legislation, the court should employ the more deferential two-pronged rational basis test.\textsuperscript{89} To date, however, the Minnesota Supreme Court has failed to define the relationship between the two approaches to rational basis analysis.

c. Skeen v. State and Mitchell v. Steffen: Lost Opportunities

The Minnesota Supreme Court had two opportunities since \textit{Russell} to determine the relationship between the two- and three-factor rational basis analyses. However, it failed to take advantage of either.

The first opportunity arose in \textit{Mitchell v. Steffen}\textsuperscript{90} in which welfare recipients challenged a Minnesota statute that required a six-month residency as a condition for receipt of full general assistance benefits.\textsuperscript{91} The welfare recipients asserted that the provision violated their right to travel under the federal constitution and their right to equal protection under both the federal and Minnesota constitutions.\textsuperscript{92} The appellate court held that the provision violated equal protection under the Minnesota Constitution because the statute failed to satisfy the three-factor \textit{Russell} test.\textsuperscript{93} The appellate court found that the challenged stat-

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\bibitem{86} Id. at 210 (Tomljanovich, J. dissenting). The \textit{Mitchell} majority, however, relied on federal equal protection rather than applying the Minnesota Constitution. \textit{Id.} at 203.
\bibitem{87} Id. at 210.
\bibitem{88} Id.
\bibitem{89} Id.
\bibitem{90} 504 N.W.2d 198 (Minn. 1993).
\bibitem{91} The challenged statutes provided that general assistance applicants who have resided in Minnesota less than six months would receive 60\% of the benefits available to other applicants. \textit{SeeMINN. STAT.} § 256D.065 (1992). If the applicants received benefits in their last state of residence, they would be eligible for the lesser of those benefits or the maximum Minnesota benefits. \textit{Id.}
\bibitem{92} \textit{Mitchell}, 504 N.W.2d at 199.
\bibitem{93} \textit{Mitchell} v. \textit{Steffen}, 487 N.W.2d 896, 904 (Minn. Ct. App. 1992) \textit{aff'd on other grounds}, 504 N.W.2d 198 (Minn. 1993). The court of appeals determined that the \textit{Russell} three-factor test "applies when analyzing any case under the equal protection clause of the Minnesota Constitution," not only where the classification has a racially disparate impact. \textit{Id.} at 904 n.2; \textit{see also} Backdahl v. Commissioner of Pub. Safety, 479 N.W.2d 89 (Minn. Ct. App. 1992) (applying the three-factor test to uphold a statute that distin-

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ute created two classes of residents that were indistinguishable except for their length of residence.\textsuperscript{94}

Although the Minnesota Supreme Court affirmed the judgment of the court of appeals in \textit{Mitchell}, it did so based on the fundamental rights prong of the Federal Equal Protection Clause.\textsuperscript{95} In fact, the court specifically declined to consider the statute under the Minnesota Constitution.\textsuperscript{96}

In \textit{Skeen v. State},\textsuperscript{97} the Minnesota Supreme Court bypassed a second opportunity to clarify the relationship between the two-factor and three-factor analyses. In \textit{Skeen}, the plaintiffs were school districts and parents who claimed that Minnesota's public

\footnotesize{guished between offenders younger than 18 years old and adult offenders for penalty purposes under Minnesota's implied consent law).}

\textsuperscript{94} \textit{Mitchell}, 487 N.W.2d at 901. The court of appeals reasoned that the State had not shown genuine and substantial distinctions separating those within the classification from those excluded. \textit{Id.} at 904. The court determined that "the state must provide more than anecdotal support for creating a classification that adversely affects one group over another, particularly when such support is contrary to studies prepared by a state agency." \textit{Id.} (citing \textit{State v. Russell}, 477 N.W.2d 886, 889-90 (1991)). Furthermore, the legislature's anecdotal evidence that people were coming to Minnesota because of the higher benefits available was contrary to at least two agency studies. \textit{Id.}

The appellate court also held that the State had not produced sufficient evidence that the level of public assistance influenced decisions to migrate to Minnesota. Therefore, there was insufficient evidence the legislation furthered the State's purpose. \textit{Id.}

The court reasoned that the classification was inconsistent with both the purpose of \textsc{Minn. Stat.} § 256D.065 (1992) and Minnesota's general assistance statute. \textit{Mitchell}, 487 N.W.2d at 904. While one purpose of the general assistance statute was to provide subsistence-level funds, the grant level provided by § 256D.065 "is insufficient to provide even housing, let alone other basic necessities of life." \textit{Id.} at 904-05.

Finally, the court held that the statute used illegitimate means to achieve its purpose because it was overbroad. \textit{Id.} at 905. Specifically, the statute affected all new residents by reducing benefits rather than only those purposely moving to Minnesota for the benefits. \textit{Id.}

\textsuperscript{95} \textit{Mitchell v. Steffen}, 504 N.W.2d 198, 203 (Minn. 1993). Because the statute used a classification that burdened a fundamental right to migrate, the court applied the federal strict scrutiny test. \textit{Id.} The court found that the statute was not necessary to achieve some compelling state purpose. Although the State argued that conserving its funds was a legitimate interest, the court found that this was not sufficiently compelling to justify the means chosen. \textit{Id.} The classification was not sufficiently precise; although only a small percentage of public assistance applicants move to the state to receive higher benefits, all new applicants were burdened. \textit{Id.} at 897.

\textsuperscript{96} \textit{Mitchell}, 504 N.W.2d at 203. The court stated: "There is no need to consider whether the 1991 amendment violates our state equal protection clause, and we do not reach that issue." \textit{Id.} This wasted opportunity was not lost on Justice Tomljanovich. She noted in her dissenting opinion that the court's "case law on state equal protection analysis has not always been characterized by doctrinal constancy, and this case seems an appropriate occasion to review briefly and to clarify that analysis." \textit{Id.} at 208 (Tomljanovich, J., dissenting).

\textsuperscript{97} 505 N.W.2d 299 (Minn. 1993).
school financing system violated equal protection under the Minnesota Constitution. Without articulating its rationale, the court chose the two-factor over the three-factor analysis. As might be expected, the school financing system passed muster under the two-factor standard.

Taken together, Russell and Skeen illustrate the Minnesota Supreme Court's reluctance to make a clear determination of the applicable rational basis analysis.

3. Current Status of Rational Basis Standard

At this point, the court remains unwilling—or unable—to select either the two-factor or three-factor analysis as the governing rational basis standard under Minnesota equal protection. This lack of resolution has created, in effect, a two-tiered rational basis standard. Moreover, the Minnesota Supreme Court has failed to identify any basis for selecting between the two standards. Arguably, Minnesota courts will determine which standard to apply on an ad hoc basis in light of each particular court's view of the appropriate level of deference based on the totality of circumstances.

B. Heightened Scrutiny Analysis

Applying a standard similar to federal heightened scrutiny analysis, Minnesota courts closely examine legislation that either differentiates on the basis of suspect classifications or burdens fundamental rights. Consequently, classifications and fundamental rights that receive heightened scrutiny under federal

98. Id. at 312. The Skeen plaintiffs included 52 "outer-ring" suburban school districts. Id. at 302. These suburbs were characterized by income and home values above the state average, but a low property tax base. Among the defendants were 24 "inner-ring" suburban school districts that had high property tax bases. Over the last 14 years, plaintiff school districts had experienced an increase in student population while defendant school districts had experienced a decline. Neither rural districts nor inner-city districts joined the suit. Id. at 302. The plaintiffs claimed that Minnesota's system of funding education violates the education clause and equal protection guarantees of the Minnesota Constitution. Id. at 303, 312.

99. See Skeen, 505 N.W.2d at 316. The court described the analysis to be applied as follows:

Under the rational basis test, legislative classifications will be upheld if they are at least rationally related to a legitimate state interest. It must only be shown (1) that there was a legitimate purpose for the challenged legislation, and (2) that it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose.

Id. (citations omitted).
equal protection receive equivalent protection under Minnesota equal protection analysis.100

However, the Minnesota court has indicated a willingness to diverge from federal heightened scrutiny analysis in significant ways. First, it may be willing to apply heightened scrutiny even where there has been no showing of a governmental intent to discriminate against the suspect class.101 By contrast, under federal analysis the party challenging the governmental action must show that the government intentionally discriminated on the basis of the suspect classification before a court will apply heightened scrutiny to the use of suspect classifications.102 Minnesota may also diverge from federal heightened scrutiny by recognizing additional classes as "suspect."103 Finally, Minnesota may recognize fundamental rights under the Minnesota Constitution that are not deemed fundamental under the federal constitution.104

1. Proof of Intent to Discriminate Against Suspect Class

As previously noted, legislation that discriminates on the basis of suspect classifications is not subject to heightened scrutiny under federal equal protection analysis unless the party challenging the legislation can prove an intent to discriminate

100. See, e.g., Anderson v. Medtronic, Inc., 382 N.W.2d 512 (Minn. 1986) (applying federal equal protection standard to Minnesota equal protection analysis). "[S]ocial and economic legislation which does not employ suspect classifications or impinge on fundamental rights carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." Id. at 517.

101. See State v. Russell, 477 N.W.2d 886, 889 (1991) ("It is particularly appropriate that we apply our stricter standard of rational basis review in a case such as this where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection.").

102. See, e.g., Washington v. Davis, 426 U.S. 229, 239 (1976) (upholding written test that had disparate impact on African Americans); Personnel Administrator v. Feeney, 442 U.S. 256, 278-81 (1979) (upholding veterans' preference despite fact that State was aware of disparate impact on women).

103. Skeen v. State, 505 N.W.2d 299 (Minn. 1993); see infra notes 169-74 and accompanying text (discussing wealth as a suspect class under the Minnesota Constitution).

against members of the classification. In *Russell*, the Minnesota Supreme Court indicated a willingness to abandon the federal intent requirement. The *Russell* court implied that disparate impact alone might justify heightened scrutiny, stating: "[T]he correlation between race and the use of cocaine base or powder and the gross disparity in resulting punishment cries out for closer scrutiny of the challenged laws." The court was highly critical of the intent requirement, reasoning that the intent requirement "places a virtually insurmountable burden on the challenger, who has the least access to the information necessary to establish a possible invidious purpose." The court further indicated that the requirement "defies the fundamental tenets of equal protection" because minorities are injured not just by intentional discrimination, but also by governmental indifference to their interests or blindness to the effects of prior official discrimination.

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105. *See supra* note 102 and accompanying text.
107. *Id.* The court in *Russell* did not find it necessary to apply heightened scrutiny to the case because it found that the statute violated equal protection under the Minnesota Constitution, even under the rational basis test. *Id.* The court indicated that the statute would not have passed the strict scrutiny test under Minnesota law. *Id.* at 889.

The statute's discriminatory impact on African Americans was incontrovertible. The statute provided that a person in possession of three or more grams of cocaine base (crack) was guilty of a third degree offense. *Id.* at 887. The penalty for that offense was up to 20 years in prison with a presumptive sentence of an executed 48-month imprisonment. *Id.* By comparison, a person possessing the same amount (i.e., less than ten grams) of powder cocaine was guilty of a fifth degree offense. *Id.* The penalty for a fifth degree offense was up to five years imprisonment with a presumptive sentence of a stayed 12-month imprisonment and probation. *Id.* Because crack cocaine users were predominantly African American and powder cocaine users were predominantly white, a greater percentage of African Americans suffered the more severe consequences. *Id.*

108. The *Russell* court reiterated that it was not bound by federal court interpretation of the federal clause when interpreting the state equal protection clause. *Id.* at 889. Despite its misgivings about the intent requirement, however, the court addressed the intent issue in applying the Minnesota law of strict scrutiny to the challenged statute. The court stated that:

"[U]nder Article 1, Section 2 of the Minnesota Constitution, the statistics showing the effect of the statute in operation combined with relevant factors that appear in the statute's history could be held to create an inference of invidious discrimination which would trigger the need for satisfaction of a compelling state interest not shown on the record before us." *Id.* at 888 n.2.

109. *Id.*

110. *Id.* As the court recognized, "[i]f a state may not club minorities with its fist, surely it may not indifferently inflict the same wound with the back of its hand." *Id.* (citing *Lawrence H. Tribe, American Constitutional Law*, § 16-21, at 1518-19 (2d ed. 1988)). The court's criticisms of the intent requirement have been raised by numerous
The Minnesota Supreme Court's criticism of the intent requirement aligns it with others who have rejected the traditional intentional/unintentional dichotomy. Commentator Charles R. Lawrence III has rejected this strict dichotomy which asserts that results are either consciously sought or "random, fortuitous, and uninfluenced by the decisionmakers' beliefs, desires, and wishes."\textsuperscript{111} Rather, racially discriminatory results frequently stem from unconscious racism that is produced by "a common historical and cultural heritage in which racism has played and still plays a dominant role."\textsuperscript{112} The intent requirement ignores not only the history of race relations, but also the irrationality of racism and the workings of the human mind.\textsuperscript{113}

Lawrence has suggested a new "cultural meaning" test for judicial recognition of racial discrimination.\textsuperscript{114} Under this test, strict scrutiny analysis is triggered if the governmental action has racial significance for a given culture. The Lawrence test would take into account unconscious racism that cannot be directly observed.\textsuperscript{115} The analysis evaluates governmental action "to determine whether it conveys a symbolic message to which the culture attaches racial significance."\textsuperscript{116} If some racial significance exists, the governmental action is presumed to have a racially motivated intent because the governmental actors are "part of the culture and presumably could not have acted without being influenced by racial considerations, even if they are unaware of their racist beliefs."\textsuperscript{117} Thus, strict scrutiny analysis should be applied.\textsuperscript{118}

Using his "cultural meaning test," Lawrence analyzed a number of cases, both real and hypothetical, in which African Americans were disproportionately burdened by a facially neu-

\textsuperscript{111} Lawrence, \textit{supra} note 110, at 322.
\textsuperscript{112} \textit{Id.} (footnotes omitted).
\textsuperscript{113} \textit{Id.} at 323 (footnotes omitted).
\textsuperscript{114} \textit{Id.} at 324 (footnote omitted).
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} Lawrence, \textit{supra} note 110, at 324.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
tral governmental action.\textsuperscript{119} He easily disposed of cases where the actions clearly had racial connotations, such as the construction of a wall between African American and white communities\textsuperscript{120} and the racial segregation of public schools.\textsuperscript{121} The clear racial connotations of such actions would give rise to the presumption of intentional racial discrimination and the application of strict scrutiny. Lawrence also easily disposed of actions that have a disparate impact on African Americans but lack a racial meaning, such as increases in public transportation fares.\textsuperscript{122} In such cases, the presumption would be that the actions were not race-based, and the rational basis standard would apply.

More difficult are cases where the cultural meaning of the governmental action, whether race-based or race-neutral, was ambiguous. Lawrence cited two examples: (1) denial of a rezoning request that would have allowed the construction of racially-integrated townhouses in an area zoned for single family homes in a predominantly white suburb,\textsuperscript{123} and (2) police department tests for verbal ability.\textsuperscript{124} In these ambiguous situations, a careful examination of evidence illustrative of the "historical and contemporaneous" meaning of particular governmental actions is necessary.\textsuperscript{125} Such evidence would include the historical use of such actions,\textsuperscript{126} the contemporaneous meaning of such actions to our culture,\textsuperscript{127} the reasonableness of any nonracial criteria,\textsuperscript{128} and the particular context of the action.\textsuperscript{129}

Under the "cultural meaning test," the statute struck down in \textit{Russell} probably would have been grouped among the "more difficult" cases. In \textit{Russell}, unlike in cases of housing segregation, for example, "there is less agreement about the social meaning"

\begin{enumerate}
\item \textit{Id.} at 362-78.
\item \textit{Id.} at 357-58, 363-64 (discussing City of Memphis v. Greene, 451 U.S. 100 (1981)).
\item Lawrence, \textit{supra} note 110, at 362-63 (discussing Brown v. Board of Educ., 347 U.S. 483 (1954)).
\item \textit{Id.} at 364-65.
\item \textit{Id.} at 369-76 (discussing Washington v. Davis, 426 U.S. 229 (1976)).
\item \textit{Id.} at 366.
\item Lawrence, \textit{supra} note 110, at 366.
\item \textit{Id.} at 367.
\item \textit{Id.} at 368.
\item \textit{Id.} at 369.
\end{enumerate}
of the racial impact of criminal sanctions. Nevertheless, there is clear evidence to show that the statute's disparate impact on African Americans conveys a cultural meaning with strong racial connotations.

First, law enforcement has been used in a racially discriminatory fashion, both historically and presently. Historically, law enforcement was an important mechanism for maintaining the social/political dominance of the majority culture. Unfortunately, one need look no further than the front pages of newspapers to conclude that discriminatory law enforcement is not confined to the past.

Second, crime control conveys a racial meaning. In a recent federal election, some candidates were criticized for making ref-

130. Id. at 365.
131. Lawrence, supra note 110, at 366. The Russell court used both statistical and historical evidence of discrimination in a similar manner when it noted that "the statistics showing the effect of the statute in operation combined with relevant factors that appear in the statute's history could be held to create an inference of invidious discrimination." State v. Russell, 477 N.W.2d 886, 888 n.2 (1991).
133. See, e.g., Defense Says Rodney King Invited Beating By Officers, STAR TRIB. (Mpls.), Jan. 21, 1993, at 20A; No Blacks on jury in Rodney King Beating, STAR TRIB. (Mpls.), Mar. 3, 1992, at 7A; Dave Shiflett, Rodney King Film May Find Place in the Mind's Gallery, STAR TRIB. (Mpls.), May 8, 1992, at 19A. See also Mann, supra note 132, at 220-21 (discussing studies which indicate that race discrimination plays a role in sentencing).

According to the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System: Final Report (1993), "more than 75% of the judges, attorneys, and probation officers responded that bias against people of color exists in the court system. Nearly 90% said the bias is subtle and hard to detect." MINNESOTA SUPREME COURT, TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM: FINAL REPORT 50 (1993) (footnotes omitted). The Task Force also compared imprisonment rates and departures from the state's sentencing guidelines. Id. at 51-55. The report found that judges departed from the sentencing guidelines to stay sentences more often for white offenders than for minority offenders. Id. at 52. Likewise, judges departed from the guidelines more often to imprison minorities than whites. Id. Although the rate of departure was not statistically significant, the Task Force observed "certain patterns" that showed that "people of color had consistently higher imprisonment rates" compared to whites. Id. at 52-53, 55. The result was the same regardless of whether the study controlled for criminal history. Id. at 51-53. Additionally, the Task Force found that even where other factors were equal (i.e. criminal history score, severity of offense level, gender, employment status, age or method of conviction), African American offenders were still more likely to do jail time than white offenders. Id. at 56. In Hennepin County misdemeanor cases, "whites were more likely to receive a fine when compared to people of color, and people of color were more likely than whites to have a jail sentence imposed even though they were convicted of the same offense and had similar criminal histories." Id. at 56.
ferences to issues of crime which were merely thinly veiled statements with racial connotations.\footnote{134}{See, e.g., \textsc{Andrew Hacker}, \textsc{Two Nations: Black and White, Separate, Hostile, Unequal} (1992). Hacker illustrated the political use of the crime/race connection by reference to George Bush's first presidential campaign. Hacker recounted that:}

Third, the nonracial criteria that supported the disparate criminal sanctions for possession of crack cocaine, as opposed to powder cocaine, were not reasonable.\footnote{135}{See infra notes 136-138 and accompanying text.}

Fourth, the particular context of the crack cocaine provision demonstrates a racial connotation. Although the State in \textit{Russell} advanced a number of justifications to support its contention that there was a "substantial and genuine distinction" between crack and powder cocaine, those justifications have, by themselves, traditionally evoked racial connotations.\footnote{136}{State v. Russell, 477 N.W.2d 886, 888-89 (Minn. 1991).} The State argued that a smaller amount of crack cocaine was indicative of the defendant's involvement in drug dealing, as opposed to

\begin{itemize}
\item Two Black Americans played critical roles in George Bush's 1988 presidential victory. One was Jesse Jackson, who became a major contender for the Democratic nomination. The other was a man named Willie Horton, a convicted murderer from the state of Massachusetts.
\item Willie Horton was made part of the campaign by Republican strategists, who cited him as a casebook study of what is wrong with the criminal justice system. Even though he had been sentenced to a lengthy term for murder, Horton still qualified for a furlough program, which allowed him to leave the prison for specified periods. During one such sojourn, he took off for Maryland, where he broke into a home of a white couple, and then proceeded to tie up the man and brutally rape the woman.
\item All this happened while Michael Dukakis, the 1988 Democratic candidate, was serving as governor of Massachusetts. Of course, Dukakis had not been directly aware of Horton's eligibility for a furlough. Even so, those managing the Bush campaign took care to have Willie Horton mentioned in speeches and advertisements. They knew that few voters supported furloughs, and that most would be aghast to learn they were awarded to murderers. That one ended with a rape was not only reprehensible; some might add it was quite predictable. It would be hard to find a better case for portraying a politician as soft on crime and solicitous toward criminals.
\item But there was also the racial aspect. Willie Horton was black; his Maryland victims were white. That racial nexus would have roused emotions had he simply got hold of a gun and robbed a liquor store. However, Horton used his grant of freedom to rape a white woman. Of all the offenses black men may commit, a sexual assault on a white victim stirs deeply primal fears. \textit{Id.} at 179-80. \textit{See also Id.} at 202 ("[R]acial references tend to be conveyed in nuances and codes, including allusions to crime and comments on quotas.").
\item David Duke also used the crime/race strategy as a campaign ploy. Said Duke, "You might think my [conceivable] election is the worst fear of the Times-Picayune's editors [but] it's not. Their worst fear is having a flat tire near their inner-city office." \textsc{Howard Kurtz}, \textsc{New Orleans Paper Plays Central Role in Contest}, \textsc{Wash. Post}, Nov. 16, 1991, at A12.
\end{itemize}
mere personal use,\textsuperscript{137} "that crack is more addictive and dangerous than powder cocaine,"\textsuperscript{138} and "that there is more violence associated with the use of crack powder."\textsuperscript{139} Drug dealing, drug addiction, danger, and violence are often used to stereotype African Americans.\textsuperscript{140} The cycle is perpetuated because the impact of the crack/powder distinction—the incarceration of African Americans—creates additional racial stigma.\textsuperscript{141}

Lawrence also pointed out the need to "pay heed to one's intuitions."\textsuperscript{142} "One individual's gut feeling is hardly conclusive evidence of cultural meaning, but such feelings often derive from feelings that are more widely shared, and they may well indicate

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\item \textsuperscript{137} Id. at 889.
\item \textsuperscript{138} Id. at 890.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} See, e.g., Hacker, supra note 134, at 181 (noting that the general population associates the phrase "black crime" with offenses that involve violence like murder, robbery, and rape); id. at 187 (suggesting that the fear of black crime by whites is greater than the actual probability of black crime); Mann, supra note 132, at 103, 144-45 (stating that the majority population associates African Americans with violent crime); id. at 208 (stating that "where the victim is white and the jurors are also white, and the defendant is a minority with whom a juror cannot identify, the horror of the murder is intensified"); see also Dwight L. Greene, Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers, 39 Buff. L. Rev. 737, 764-65 (1991) (stating that "[m]any whites still believe stereotypes such as the alleged desire of Blacks... to be on welfare, their inability to be caring parents, and their angry or hostile nature" and "that minorities are lazy and would rather steal than work"); A. Leon Higginbotham, Jr., Racism in American and South African Courts: Similarities and Differences, 65 N.Y.U. L. Rev. 479, 533 (1990) (noting the "stereotype of blacks as less controlled, and so more violent or more prone to crime than whites"); Kenneth B. Nunn, Rights Held Hostage, Ideology and the Peremptory Challenge, 28 Harv. C.R.-C.L. L. Rev. 63 (Winter 1993) (discussing how the acquittals in the first Rodney King trial demonstrated the power of the "Black Savage" stereotype over juries).
\item \textsuperscript{141} See Lawrence, supra note 110, at 370-73. In a discussion of written examinations, Lawrence stated that:

Our society has increasingly sought to measure intelligence through the use of written tests, and we have come to believe that performance on such tests accurately reflects the whole of our intelligence. Thus, most people are likely to think of those who performed poorly on "Test 21" not simply as lacking in communication skills but as unintelligent. The average person is likely to see the city's use of the test as an admirable and reasonable attempt to insure that the city has smart police officers. If larger numbers of blacks than white fail the test, this will be seen as proof that blacks are not smart enough for the job.

\textit{Id.} at 373.

Similarly, the average person is likely to view the statute challenged in \textit{Russell} as an admirable and reasonable attempt to keep the streets safe. See \textit{State v. Russell}, 477 N.W.2d 886 (Minn. 1991). The average person may consequently stigmatize African Americans as being more prone to engaging in illegal activities when disproportionately larger numbers of African Americans as compared to whites are incarcerated under the statute.

\item \textsuperscript{142} Lawrence, supra note 110, at 370.
\end{itemize}
that more substantial testimony is available."\textsuperscript{143} This may describe the \textit{Russell} court's reaction to the cocaine provision, when it observed that the disproportionate impact of the statute on African Americans itself was evidence of racism.\textsuperscript{144}

To paraphrase Lawrence, in order to obtain strict scrutiny of the statute under the cultural meaning test, the \textit{Russell} defendants:

[W]ould seek to convince the court that most people in our culture believe that the average white person is [less likely to be a cocaine dealer] than the average black person and that whites will interpret the racially selective impact of [section 152.023, subd. 2(1)] as a confirmation of that belief. If the culture gives the governmental action this kind of racial meaning, the action constitutes a direct racial stigmatization. Like the segregated beach and the Memphis wall, it conveys a message that has its origins in a pervasive and mutually reinforcing pattern of racially stigmatizing actions, and it adds one more stigmatizing action to that pattern. Presumably, the decisionmakers who chose to [enact section 152.023, subd. (1)] were aware of that message and were influenced by it, whether consciously or unconsciously.\textsuperscript{145}

The Equal Protection Clause protects individuals from "governmental decisions that take race into account without good and important reasons. Therefore, equal protection doctrine must find a way to come to grips with unconscious racism."\textsuperscript{146} Unlike the intent test, the "cultural meaning test" attacks unconscious racism where governmental action has some racial significance.\textsuperscript{147}

Accordingly, the Minnesota Supreme Court in \textit{Russell} was justified in its criticism of the intent requirement. Government action that has a disparate racial impact should be subjected to strict scrutiny, even absent proof of a conscious intent to discriminate, where the disparate impact has a cultural meaning that

\textsuperscript{143} Id.

\textsuperscript{144} See \textit{Russell}, 477 N.W.2d at 888 n.2; supra note 107 and accompanying text; see also \textit{Feeney v. Massachusetts}, 442 U.S. 256, 279-80 (1979) (finding that while the disparate impact on women of Massachusetts veterans' preference statute did not prove the existence of a discriminatory purpose, it was relevant to prove purpose); \textit{Lawrence}, supra note 110, at 369-76 (discussing the effect of scores on a written civil service examination).

\textsuperscript{145} See \textit{Lawrence}, supra note 110, at 375.

\textsuperscript{146} Id. at 323.

\textsuperscript{147} Id. at 323-24.
stigmatizes on the basis of race. In this way, perhaps equal protection analysis will come to grips with unconscious racism.148

2. Additional Suspect Classifications and Fundamental Rights

The Warren Court’s formulation of the strict scrutiny standard created hope among some, and fear among others, that a plethora of interests would be deemed “fundamental” and hence receive the substantial protection of the strict scrutiny standard.149 The Burger Court, by refusing to extend the coveted status to housing or welfare benefits, quickly demonstrated that these hopes and fears were unwarranted.150

The Minnesota Constitution may be used as an alternative means to extend fundamental right status to additional individual interests. The Minnesota Supreme Court has affirmed that the state constitution can provide more protection to fundamental constitutional rights than the federal constitution offers.151 Furthermore, the court has recognized that additional fundamental rights may be either explicitly or implicitly found in the state constitution.152

In San Antonio Independent School District v. Rodriguez,153 the Texas system of financing public education was challenged under the Equal Protection Clause of the Fourteenth Amendment because the students in poorer school districts received substantially less expensive educations than students in more affluent districts.154 The United States Supreme Court determined that wealth did not constitute a suspect class,155 and that education was not a fundamental right.156 Accordingly, the

148. Id. Lawrence summarized this argument by noting that “[i]t may often be appropriate for the legal system to disregard the influence of the unconscious on individual or collective behavior. But where the goal is the eradication of invidious racial discrimination, the law must recognize racism’s primary source.” Id. at 925.

149. Gunther, supra note 23, at 8-10.


151. Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993) (“We have noted that Minnesota is not limited by the United States Supreme Court and can provide more protection under the state constitution than is afforded under the federal constitution.”).

152. Id.


154. Id.

155. Id. at 28.

156. Id. at 33, 37-38.
Court held that the Texas finance system was constitutional under the rational basis test.\textsuperscript{157}

By comparison, in a similar challenge to the constitutionality of the Minnesota public school financing system, the Minnesota Supreme Court was presented with an opportunity to extend additional protection under the Minnesota Constitution. In the denouement of the longest-running civil case in the history of Minnesota,\textsuperscript{158} the state supreme court affirmed that education is a fundamental right within the meaning of the equal protection clause of the Minnesota Constitution.\textsuperscript{159}

Nevertheless, while conceding that the present system of funding public education in the state is not a perfect system,\textsuperscript{160} the court declared that the statutory scheme did not violate either the education clause\textsuperscript{161} or equal protection under the state constitution.\textsuperscript{162} Even though the \textit{Skeen} court determined that the

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\item \textsuperscript{157} Id. at 55.
\item \textsuperscript{158} \textit{Skeen}, 505 N.W.2d 299. The \textit{Skeen} action was originally brought in Wright County District Court in October, 1988. Id. at 301. After a 67-day trial, Judge Gary J. Meyer handed down his decision, finding the financing system unconstitutional. Both parties appealed to the Minnesota Court of Appeals, which consolidated the appeals and certified the case to the state supreme court. Id. at 302. \textit{See also} Kathy Smith Ruhland, \textit{Equal Opportunity Education for Minnesota's School Children: A Missed Opportunity by the Court}, 20 WM. MITCHELL L. REV. 559 (1994).
\item \textsuperscript{159} \textit{Sheen}, 505 N.W.2d at 320. The court also found that education was a fundamental right under the state's education clause. \textit{Id.} at 313. The education clause of the Minnesota Constitution requires that the state "shall" provide a "general and uniform system of public schools." \textit{See Minn. Const. art. XIII, § 1.} The \textit{Skeen} court found that this education clause imposes an affirmative duty on the state. \textit{Skeen}, 505 N.W.2d at 313. The education clause is the only place in the Minnesota Constitution where an explicit obligation is imposed on the Legislature with the words "it is the duty of the legislature." \textit{Id.} The \textit{Skeen} court also recognized the extensive social importance of education. \textit{Id.} at 313. The \textit{Skeen} court concluded that the explicit language of the state constitution and the social importance of education raised the caliber of the right to an education to a fundamental right. \textit{Id.}
\item \textsuperscript{160} Id. at 320.
\item \textsuperscript{161} Id. The education clause of the Minnesota Constitution states:
\begin{quote}
The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.
\end{quote}
\textit{Minn. Const. art. XIII, § 1.}
\item \textsuperscript{162} \textit{Skeen}, 505 N.W.2d at 320. The district court in \textit{Skeen} held that the right to an education is a fundamental right under the equal protection guarantee of the Minnesota Constitution. \textit{See Findings of Fact, Conclusions of Law, and Order [and incorporated Memorandum], Skeen v. State,} No. C7-88-1954 (Wright Co. Dist. Ct. December 17, 1991). The district court held that, although the right to an education is not a fundamental right under the United States Constitution, Minnesota is not bound by federal law when interpreting the state constitution. \textit{Id.} at 173-76. Fundamental rights are
\end{itemize}
right to education is a fundamental right guaranteed by the state constitution, it drew a fine distinction between the right itself and the funding scheme that provides that right.\textsuperscript{163} The scope of the fundamental right to an education under the Minnesota Constitution would not stretch to cover the funding of the educational system in the view of the \textit{Skeen} court.\textsuperscript{164} However, any funding scheme must be consistent throughout the state at a basic level.\textsuperscript{165} 

The \textit{Skeen} court went on to hold that, although the fundamental right to an education would trigger strict scrutiny review of any affiliated legislation, a lesser standard of review would apply for analysis of legislation regarding the funding of education.\textsuperscript{166} Because the court differentiated between the fundamental right to an education and the funding of that right, the legislature's educational funding scheme simply needed to pass the two-pronged rational basis test.\textsuperscript{167} The \textit{Skeen} court then found that the system of education financing readily passed this lenient two-pronged analysis.\textsuperscript{168}

\begin{itemize}
\item defined as those expressed and implied by the constitution. Because the Minnesota Constitution, unlike the United States Constitution, explicitly and implicitly guarantees the right to a uniform education, education constitutes a fundamental right under state law. \textit{Id.} at 178. In addition, the district court held that wealth classifications are suspect under Minnesota law, particularly where they affect the right to an education. \textit{Id.} at 183-84.
\item \textsuperscript{163} Skeen v. State, 505 N.W.2d 299, 314-15 (Minn. 1993).
\item \textsuperscript{164} \textit{Id.} In the original Minnesota Constitution of 1857, educational funding was provided under a different section than the education clause itself. \textit{Compare} MINN. CONST. art. VIII, § 2 (1857) \textit{with supra} note 161. The \textit{Skeen} court found that this distinct difference in the placement of the education clause and the education funding clause indicated that the legislature distinguished between the right to education and the financing of an education. \textit{Skeen}, 505 N.W.2d at 315. While the Minnesota Constitution imposes a "duty" on the Legislature to establish a "general and uniform system of public schools," the constitution requires only that the Legislature "shall make provisions" for a "thorough and efficient system of public schools." \textit{Id.} This difference in legislative intent compelled the \textit{Skeen} court to hold that different standards of review would apply to statutes that burden these two different constitutional clauses. \textit{Id.}
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} ("[A] lesser standard, such as a rational basis test, should apply to the determination of whether the financing of such a system is 'thorough and efficient.' ").
\item \textsuperscript{167} \textit{Skeen}, 505 N.W.2d at 316 ("[W]e believe that challenges to the state's financing of education beyond what is necessary to provide an adequate level of education which meets all state standards must be evaluated, not under strict scrutiny, but rather under the rational basis test.").
\item \textsuperscript{168} \textit{Id.} The legislation provided a basic and uniform funding of education, that guaranteed an acceptable level of education state-wide. In addition, the legislation allowed school districts to supplement that basic funding with contributions of their own choosing. \textit{Id.} This satisfied a legitimate state purpose in encouraging innovation by the
Although the practical results from the state equal protection analysis in Skeen and the federal analysis applied in Rodriguez were similar, Skeen still demonstrates the potential for significant differences in analysis. The extension of fundamental right status to education shows that the Minnesota Supreme Court is generally willing to use the state constitution to protect more individual rights than those granted protection under the federal constitution.

Moreover, Skeen hints that the court may extend suspect class status to additional groups in the future. The Skeen plaintiffs did not sufficiently demonstrate that they were historically subject to the “purposeful unequal treatment” that would relegate them to a “position of political powerlessness.” The court noted that in those cases in which wealth was a suspect class, “the apparent disparities were far greater than the present case and the plaintiffs were relatively powerless, thereby facilitating a ‘suspect class’ finding.” In Skeen, however, there were no great disparities in revenues. The court thus reasoned that generally the disadvantaged class in school funding cases is “not susceptible to being classified as a ‘suspect class’ absent any evidence that the financing system discriminates against a definable category of ‘poor’ people.” Furthermore, the financing system does not result in the “absolute deprivation of education.” Accordingly, the court might be willing to reconsider the question when the facts of a case show greater disparities in wealth or political power.

In summary, recent cases reflect the Minnesota Supreme Court’s discomfort with the inflexible boundaries of federal heightened scrutiny analysis. To ensure greater flexibility, the

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individual school districts to add to the basic state funding. The legislation also balanced the conflict between the desire of society to provide equal educational opportunities to all its citizens and the desire of all parents to provide the best education for their own children. Id. (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 48-49 (1973)).

169. See supra notes 153-57, and accompanying text (discussing the Rodriguez analysis).

170. Skeen, 505 N.W.2d at 314 (noting “the Minnesota Constitution does not require strict economic equality under the equal protection clause”).

171. Id. at 318 (citing Serrano v. Priest, 135 Cal. Rptr. 345, 367, cert. denied, 432 U.S. 907 (1977); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 334 (Wyo. 1980), cert. denied, 449 U.S. 824 (1980)).

172. Id. at 314.

173. Id.

174. Id.
court has considered eliminating the proof of intent required under this standard. In addition, the court has interpreted the state equal protection clause to protect additional individual interests as “fundamental rights,” and has indicated that it may be willing to grant “suspect class” status to additional groups.

V. “NEW ARTICULATIONS”—MULTI-FACTOR SLIDING SCALE APPROACH TO EQUAL PROTECTION

A. Need for an Independent Minnesota Equal Protection Standard

In In re Estate of Turner,' 175 Justice Wahl made a cogent argument for the adoption of an equal protection analysis that would differ from and be independent of federal analysis under the Constitution. Justice Wahl articulated two reasons why Minnesota should apply its own constitutional standard of rational basis review.

The first reason is the difficulty courts experience discerning the actual level of scrutiny that the federal rational basis standard represents. Justice Wahl suggested that while the language of the United States Supreme Court suggests an extremely deferential standard of review, “the Court has, on occasion, invalidated legislation as irrational by analyses that depart from deference and appear to constitute much more substantive levels of review.” 176

The second reason is the need for stability in construing the Minnesota Constitution. If the meaning of Minnesota’s equal protection guarantee shifts every time federal case law changes, the “integrity and independence of our state constitution” will be undermined. 177 Unquestioning dependence on federal law would “degrade the special role of this court, as the highest court of a sovereign state, to respond to the needs of Minnesota citizens.” 178 A more substantial standard of review would provide a meaningful judicial inquiry that would protect against arbitrary and unreasonable discrimination.179

This period in the history of Minnesota’s judicial system is particularly appropriate for a reconsideration of our equal protection jurisprudence. As Gunther points out, “rapid changes in

175. 391 N.W.2d 767 (Minn. 1986).
176. Id. at 772.
177. Id. at 773.
178. Id.
179. Id. at 772-73.
personnel, and in concomitant perception of values, [can] coexist with preservation of desirable institutional qualities of reasoned elaboration and candor" in some situations.¹⁸⁰ Historically, two characteristics are necessary for a successful change in constitutional adjudication. "[T]here [must be] available doctrinal tools with which new constitutional approaches could be fashioned; and there [must be] Justices with the talent to reexamine the old and develop the new carefully and imaginatively."¹⁸¹ The requisite doctrinal and personnel characteristics are present at this period in the development of Minnesota equal protection. As recent cases show, the Minnesota Supreme Court has shown both a readiness and the capacity to adopt an independent equal protection standard.

Minnesota courts have available "doctrinal materials that can be refashioned to reflect altered values."¹⁸² As Justice Wahl has noted, neither federal nor state equal protection analysis is firmly established. This is particularly true of Minnesota equal protection analysis. Reliance on the Minnesota Constitution as the source of law, rather than the federal constitution, is a relatively new phenomenon.¹⁸³

In addition, justices with the requisite talents to develop a new standard are now seated on the Minnesota Supreme Court.¹⁸⁴ This court has demonstrated its ample legal expertise and acumen, as well as its skill at critical and creative analysis. Additionally, the composition of the court, and of the state judiciary as a whole, has begun to more closely reflect the diversity of society in general. As more diverse points of view are represented on both sides of the bench, the judicial system may find that traditional legal practices and doctrines cannot sufficiently accommodate the reasonable interests of all groups.¹⁸⁵

¹⁸⁰. See Gunther, supra note 23, at 5.
¹⁸¹. Id.
¹⁸². Id. at 7.
¹⁸³. See, e.g., William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. REV. 535 (1986); Shirley Abrahamson, Reincarnation & Reawakening, 1992 A.B.A. SEC. IND. RTS. AND RESP. 26 ("In judicial jargon, new federalism describes a growing awareness in the state courts of the importance of state law, especially state constitutional law, as the basis for the protection of individual rights against state government.").
¹⁸⁴. See Gunther, supra note 23, at 7.
¹⁸⁵. For example, recent studies of the Minnesota legal system disclosed failings with regard to gender and race issues. See, e.g., Hennepin County Bar Association Glass Ceiling Task Force Report 1 (1993) ("There is growing evidence and a developing consensus that women lawyers' and lawyers' of color fail as a group to advance
Thus, the need for an independent state standard for equal protection and a unique opportunity to develop that standard have propitiously converged in Minnesota. Important questions, however, regarding the type of standard to be developed remain unanswered. The following section proposes an approach to equal protection analysis under the Minnesota Constitution.

B. Proposal: A Multi-Factor Sliding-Scale Approach

Gunther identified a number of attempts by both the United States Supreme Court and individual justices to formulate "an overarching inquiry applicable to 'all' equal protection cases." For example, the Court has applied variations of the ends/means analysis in its current multi-tiered approach.

Minnesota's multi-tiered approach to equal protection analysis under the state constitution has proven similarly unsatisfactory. The lack of flexibility has provided insufficient protection to important interests. Moreover, the multi-tiered structure has ar-
guably encouraged a result-oriented approach to choosing the appropriate level of scrutiny.\textsuperscript{188} The multi-tiered approach requires the application of one of at least four different standards, each with a different degree of deference to legislative decisions.\textsuperscript{189} The degree of deference paid to the legislature generally determines the outcome, that is, whether or not the enactment will be found constitutional.\textsuperscript{190}

Justice Marshall suggested a clean break with the multi-tiered formula. In his dissent in \textit{Dandridge v. Williams},\textsuperscript{191} he formulated what Gunther describes as a "multifactor, sliding-scale analysis."\textsuperscript{192} Instead of adhering to a mechanical determination of whether or not a fundamental right exists, Marshall exhorted the Court to consider the "facts and circumstances" of each case,

\textsuperscript{188} See, e.g., \textit{Rostker v. Goldberg}, 453 U.S. 57, 70 (1981) (stating that "levels of scrutiny . . . may all too readily become facile abstractions used to justify a result"); \textit{Craig v. Boren}, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring) (noting that the two-tier approach has been criticized as "a result-oriented substitute for more critical analysis"); \textit{Dandridge v. Williams}, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting) ("We are told no more than that this case falls in 'the area of economics and social welfare,' with the implication that from there the answer is obvious."); \textit{see generally Gunther, supra note 23, at 36} (indicating that "[a]fter one takes account of all the deviant applications and contextual explanations, there remains the undeniable residue that old equal protection formulations have been given an interventionist twist in a significant number of cases, with widespread support on the Court.").

\textsuperscript{189} These four standards are: two-factor rational basis, three-factor rational basis, intermediate scrutiny, and strict scrutiny. \textit{See supra} parts IV.A.-B. The court conceivably could also adopt the federal rational basis with teeth standard. \textit{See supra} part III.C. Whatever state standards Minnesota applies, they are, of course, separate from the federal standards. Thus, parties involved in equal protection cases in Minnesota consequently are presented with a bewildering array of standards because the federal strict scrutiny standard differs in important respects from the Minnesota strict scrutiny standard.

\textsuperscript{190} \textit{See Gunther, supra} note 23, at 8; \textit{see also supra} part IV.A.1 (suggesting that the result in \textit{Russell} would likely have been different had the two-factor rational basis standard been applied).

\textsuperscript{191} 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). In \textit{Dandridge}, the Supreme Court upheld the constitutionality of a state law that set a ceiling for the level of benefits a family could receive under the Aid to Families with Dependent Children program. Id. at 487. Because the program involved "economics and social welfare," the Court applied a rational basis test. Id. at 485. Justice Marshall charged that the majority's decision had "emasculated the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration." Id. at 508. He asserted that the strict two-tier approach "lays down an insupportable test for determining whether a State has denied its citizens the equal protection of the laws." Id. at 518. Justice Marshall attacked the traditional approach to Equal Protection analysis as judicial pigeonholing, citing the fatal flaw in such reasoning: "This case simply defies easy characterization in terms of one or the other of [the rational basis and strict scrutiny] 'tests.' " Id. at 520.

\textsuperscript{192} \textit{See Gunther, supra} note 23, at 17-18.
concentrating on “the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.”193 This single standard could be applied to all cases.

For these reasons, the multi-factor sliding-scale approach is superior to the multi-tiered approach. Despite being a truism, the legal standard, when applied to the particular facts, should determine the outcome. The reality of current equal protection analysis under both the federal and Minnesota constitutions is often in conflict with this truism. The renewed vigor of the Minnesota Constitution offers our state courts an opportunity to take a more principled approach to equal protection and to establish a standard applicable to all equal protection cases.

C. Assessment of the Sliding-Scale Analysis

Gunther suggests several important questions that courts should consider when considering adoption of a new analytical framework. The reality of the model must be the first consideration: To what extent do prior decisions conform to the new model? Is there reason to believe the old model is inadequate? The second consideration is the attractiveness of the model: Are there indications in court decisions that the model would be adopted? What features of the model make it attractive for the court to adopt? Finally, the court must consider potential problems the proposed model would create: To what extent must the details of the model be fleshed out and refined to make it “an operational judicial technique for the years to come?”194

Application of these questions to the multi-factor sliding-scale approach indicates that this approach has great promise.

193. Dandridge, 397 U.S. at 521; see also Harris v. McRae, 448 U.S. 297, 343-44 (1980) (Marshall, J., dissenting) (suggesting that financially destitute women comprise a class that is subjected to “a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”); Craig v. Boren, 429 U.S. 190, 212 nn.1-2 (1976) (Stevens, J., concurring) (determining the degree to which a classification is objectionable by considering if the characteristic was immutable, if the burdened class comprised victims of historic, pervasive discrimination, and whether the classification was totally irrational).

194. Gunther, supra note 23, at 24-25. Although Gunther’s framework refers to a specific change in the United States Supreme Court analysis, the questions he raises are arguably relevant to the pronouncement of any new analytical framework.
1. Reality of Approach

While there has been no "conscious" adherence to the sliding-scale analysis, both the United States and Minnesota Supreme Courts have nonetheless relied on this approach.

"This is essentially what the United States Supreme Court has done in applying equal protection concepts in numerous cases, though the various aspects of the approach appear with a greater or lesser degree of clarity in particular cases."

For example, in Craig v. Boren, Justice Stevens expressed his opinion that only one standard was, in fact, applied in equal protection analysis. The Court's so-called "two-tiered analysis of equal protection claims... is a method the court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." In order to identify this single standard, one must look to the "careful explanation of the reasons motivating particular decisions" rather than at any "attempt to articulate it in all-encompassing terms."

In Plyler v. Doe, the Court's application of a multi-factor approach was more evident. In that case, the Court based its decision on the importance of the individual interests involved, the importance of the state interests, and the identity of the individuals burdened to justify its departure from its traditional equal protection formulations. Plyler involved a Texas statute which authorized school districts to deny admission to the children of illegal aliens and withhold state funds for their education.

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197. Id. at 212 (Stevens, J., concurring).
198. Id.
200. Id. at 218-23.
201. Id. at 227-30.
202. Id. at 210-16.
203. Id. at 230. Plyler could be regarded as another example of the Court's application of rational basis with teeth. See supra part III.C. "But in the area of special constitutional sensitivity presented by these cases, the State must demonstrate that the classification is reasonably adapted to 'the purposes for which the state desires to use it.'" Plyler, 457 U.S. at 203, 226 (emphasis omitted) (citing Oyama v. California, 332 U.S. 633, 664-65 (1948)). Arguably, the Plyler Court used the rational basis standard but, shifted the burden to the state to prove presence of a rational relationship to legitimate state interests.
204. Plyler, 457 U.S. at 205.
Under normal circumstances, the Court would have applied the rational basis standard to the statute. Here, however, the Court observed that "more is involved in these cases than the abstract question whether [section] 21.031 discriminates against a suspect class, or whether education is a fundamental right." In determining the rationality of [section] 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [section] 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

Some of the newest members of the Court appear to have joined the ranks of justices who are dissatisfied with the inflexibility of multi-tiered equal protection analysis. In Planned Parenthood v. Casey, a joint opinion by Justices O'Connor, Kennedy, and Souter signaled a move from the rigid, formalistic approach to a more relativistic determination of whether the challenged legislation worked an "undue burden" on a fundamental right. The joint opinion rejected the strict scrutiny analysis as paying too little attention to important state interests. Instead of following the rigid framework imposed by the tiers of scrutiny, the Casey opinion balanced the strength of the individual's interests, the strength of the state's interests, and the extent of the burden that the state regulation placed on the individual interest.

205. Id. at 216-18.
206. Id. at 223.
209. Id. at 2820.
210. Id. at 2801.
211. See id. at 2805-08. Although Casey was brought under the Due Process Clause rather than the Equal Protection Clause, these two guarantees are analyzed in a substantially similar fashion. See, e.g., Russell Pannier, Substantive Due Process and Equal Protection Arguments: An Analysis of the Tussman and Tembrook Distinction, 15 WM. MITCHELL L. REV. 535 (1989) (discussing distinctions between equal protection and due process analyses). Moreover, both protections originate from the same amendment. See generally U.S. CONST. amend. XIV, § 1. Thus, it is not unusual that a claim brought under the Due Process Clause may be actionable on equal protection grounds as well. Compare City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477 (1989) (noting that the standard of review under the Equal Protection Clause of Fourteenth Amendment is
The Minnesota Supreme Court has essentially applied a multi-factor approach in numerous cases. In *Skeen v. State*, for example, despite its rejection of wealth as a suspect classification and its refusal to extend fundamental right status to the financing of education, the court nonetheless implied that the extent of financial disparities and extent of the adequacy of education were important considerations. The court distinguished other cases that held school finance systems unconstitutional by arguing that the disparities in financial means in the school districts under consideration were not as substantial. Moreover, the court relied heavily on the fact that all students were receiving an adequate education, implying that any adverse affect on the students resulting from a lack of funds would have been a relevant consideration.

Consequently, one can successfully argue that both the federal and state supreme courts base their initial determination of which standard is to apply according to the same balancing of factors.

2. Attractiveness of Approach

Several observations suggest that the multi-factor sliding-scale analysis would be attractive to the Minnesota Supreme Court. First, the Minnesota Supreme Court has shown a basic dissatisfaction with the multi-tiered approach, or, at the very least, the adequacy of the various tiers.

Second, the multi-factor sliding-scale approach offers a number of practical advantages. Adoption would signal a clean break with the current multi-tiered approach. The current method, which merely presents variations of the old end/means analysis, threatens the imposition of additional tiers to an al-

similar to principles embodied in the Due Process Clause of Fifth Amendment) with San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 543 n.23 (1987) (recognizing that entities subject to suit under Due Process Clause of Fifth Amendment may also be subject to suit under the Equal Protection Clause of Fourteenth Amendment) and Bearden v. Georgia, 461 U.S. 660, 665-66 (1983) (equating analysis under the Equal Protection Clause to analysis under the Due Process Clause).

212. 505 N.W.2d 299 (1993).
213. Id. at 314-15.
214. Id. at 317-18.
ready confusing analytical framework.\textsuperscript{216} A clean break would have the added benefit of promoting the independent development of state equal protection law.\textsuperscript{217} Accordingly, adoption of the multi-factor approach would limit federal court review of state court decisions by presenting clear evidence of adequate and independent state grounds for decisions.

Next, the multi-factor sliding-scale approach makes sense as a matter of judicial policy. Instead of following "a relentlessly formalistic catechism,"\textsuperscript{218} this more flexible approach balances the actual effect legislation has on the lives of real people against the interests of the state.\textsuperscript{219} Given the varied nature of individual and governmental interests, the number of potential combinations would make it impractical to sort interests into rigid categories. Moreover, the relative strengths of those interests, and the extent to which those interests would be affected would also vary enormously.

Perhaps most important, adoption of the multi-factor sliding scale approach may embody most closely the true basis of courts' decisions. Federal and state courts arguably apply these factors, overtly or covertly, to select the appropriate standard of review. The Minnesota Supreme Court's current practice of shifting without notice between the two-factor and three-factor rational

\textsuperscript{216} One example is the three-factor rational basis analysis under Minnesota equal protection. See also Gunther, \textit{supra} note 23, at 21. Gunther stated that the means-focused technique would be "more interventionist" than the old rational basis standard, but "considerably less strict" than the strict scrutiny standard. He noted, however, that this technique would not:

[\textit{M}]ean the end of strict scrutiny. In the context of fundamental interests or suspect classifications, the Court would continue to demand that the means be more than reasonable—\textit{e.g.}, that they be 'necessary,' or the 'least restrictive' ones. . . . The intensified means scrutiny would, in short, close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry.

\textit{Id.} at 24.


\textsuperscript{219} See id. at 344 (criticizing use of two-tiered standard and stating "a showing that state action has a devastating impact on the lives of minority racial groups must be relevant for purposes of equal protection analysis"); see also Planned Parenthood v. Casey, 112 S. Ct. 2791, 2832-33 (1992) (holding that the effect of the spousal notification requirement on access to abortion by victims of spousal abuse constitutes an undue burden).
basis analyses, for example, threatens to undermine the court's legitimacy.

3. Problems with Approach

Perhaps the most serious problem with the sliding-scale analysis is the potential for unbridled judicial interference with legislative enactments. This accusation is valid only if one assumes that the current multi-tiered approach is basically principled, and that the personal predispositions of the members of the court do not influence either the selection of the applicable standard or the intensity with which the court applies the chosen standard.

Another problem is the potential for increased litigation because of unsettled law and the possibility of additional protections. This rationale, taken to its logical extreme, however, would support the withdrawal of constitutional protection from even established fundamental rights and suspect classes. Additionally, the adoption of standards weighing the relative importance of interests and the burden upon those interests could well encourage the legislature to take these factors into account when adopting regulations. No undue burden would be imposed by requiring the legislature to articulate important interests and to carefully consider alternative approaches before substantially interfering with important individual interests. Thus, thoughtful legislation could mitigate the threat of increased litigation.

VI. Conclusion

As Justice Wahl incisively noted, it is time to end the "battle of footnotes" over the appropriate Minnesota equal protection rational basis standard. The most responsible method would be

221. In re Estate of Turner, 391 N.W.2d 767, 771 (Minn. 1986) (Wahl, J., concurring). Justice Wahl is seeking a cease-fire:

I am concerned, however, that footnote 2 in the majority opinion perpetuates confusion and continues as a "battle of footnotes" as to whether the rational basis standard under Minnesota law is identical to the federal rational basis standard. By footnote in a 1981 opinion, [Wegan], we indicated the rational basis standard under the Minnesota constitution differed from the federal standard. By footnote in 1982, in [Sundquist], we stated that the federal and Minnesota state standards were "coextensive." By footnote in 1984, in [McGuire], we again declared that the state and federal standards are different. In today's opinion we shift our position with still another footnote. The result is that the legal
to accept the court's historical need to balance the strengths of competing interests. One means to this end would be to acknowledge the existence of a two-tiered rational basis standard and to articulate the specific interests that implicate each tier. This method, while more consistent with the traditional multi-tiered approach established under both federal and Minnesota equal protection jurisprudence, fails to address the underlying inability of inflexible categories to respond to an infinite variety of governmental and individual interests.

The better method would be to honestly acknowledge the multi-factor balancing process that in fact influences the selection of the equal protection standard that will be applied. Using this ad hoc approach would establish a single standard for the convenience of the bench, bar, and parties, and would increase the public's confidence in the integrity of the legal system.

Chief Justice Marshall, when he formulated the rational basis standard for constitutionality of legislation, set in motion an ongoing quest for a bright line.222 Minnesota jurisprudence has established, at last estimate, at least five "bright lines" with hints of additional sub-standards. Now, 175 years later, the time has come to acknowledge that the complexities of our society need not be reflected in a labyrinthine jurisprudential system. Rather, application of an ad hoc balancing standard would explicitly recognize the factors that, although not presently acknowledged, nonetheless effectively are applied through the courts' choice of standards. While the ad hoc approach arguably is not as "bright" as the current multi-tiered approach, its more accurate reflection of the actual judicial process is ultimately more lucid. As Justice Wahl wisely observed, "To insist on engaging in judicial review in the real world rather than in never-never land is not to impermissibly substitute our own values and policy judgments for those of the legislature but to move toward realism and protection of constitutional rights, this court's proper function."223

community is left not knowing which statement of the relationship between the state and federal rational basis standards, if any, is to be given precedential value.

Id. at 771 (citations omitted) (referring to McGuire v. C & L Restaurant, Inc., 346 N.W.2d 605, 613 n.10 (Minn. 1984); AFSCME Councils 6, 14, 65 & 96 v. Sundquist, 338 N.W.2d 560, 570 n.12 (Minn. 1983); and Wegan v. Village of Lexington, 309 N.W.2d 273, 281 n.14 (Minn. 1981)).