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The Equal Protection and Due Process Clauses: Two Means of Implementing "Integrationism" for Handicapped Applicants for Public Employment

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COMMENT

THE EQUAL PROTECTION AND DUE PROCESS CLAUSES: TWO MEANS OF IMPLEMENTING "INTEGRATIONISM" FOR HANDICAPPED APPLICANTS FOR PUBLIC EMPLOYMENT

Over a decade ago, Professor tenBroek, a noted constitutional law authority, argued that the United States has been influenced by a policy of "integrationism"—the policy of encouraging and enabling handicapped persons to fully participate in the community.[1] However, this nation has yet to see full participation of qualified physically and mentally handicapped persons in the work force.[2] Until recently, the judiciary has avoided even facing the merits of a handicap employment discrimination case under a constitutional challenge.[3] Although the federal government and a substantial majority of the states have enacted legislation to prohibit unjustified employment discrimination of the handicapped population,[4] there are indications that it has been of limited effectiveness.[5]

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1. tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 843 (1966).

2. An estimated fourteen million physically handicapped individuals face employment discrimination in the United States. I. KOVARSKY, DISCRIMINATION IN EMPLOYMENT 150 (1976). Approximately five million mentally retarded persons could work if given proper training and rehabilitation. 118 CONG. REC. 3320 (1972) (remarks of Sen. Williams).

3. In 1974, one commentator observed that no handicap employment discrimination case had then been decided on the merits under the fourteenth amendment. *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J. SOC. PROB. 457, 470 n. 70 (1974).

4. Congress recently enacted the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-94 (1975) which prohibits discrimination against qualified handicapped individuals in federally assisted programs. This act also mandates that federal departments and agencies, as well as those standing in a contractual relationship with the federal government where the contract exceeds $2,500, implement affirmative action programs in employing and advancing qualified handicapped persons. For a general discussion of the Rehabilitation Act *see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 220-26 (1976); *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J. L. SOC. PROB. 457, 466-68 (1974); Note, *Lowering the Barriers for Employment of the Handicapped: Affirmative Action Obligations Imposed on Federal Contractors*, 81 DICK. L. REV. 174 (1976); Note, *Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. CHI. L. J. 814, 829-35 (1977); Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L. REV. 785, 803-08 (1976).

Thirty-six states and the District of Columbia have enacted legislation which prohibit various types of handicap employment discrimination. *See* ALASKA STAT. §§ 18.80.220-.300 (1962); CAL. LAB. CODE §§ 1410-33 (West Supp. 1977); CAL. GOV'T CODE § 19701 (West Supp. 1977); CAL. EDUC. CODE §§ 13168.1-.2; 13220.15 (West 1975); COLO. REV. STAT. §§ 24-34-302; 24-34-306; 24-34-801 (1973); CONN. GEN. STAT. ANN. § 31-126 (West Supp. 1976); D.C. CODE ENCYCL.

Today, however, courts are receptive to constitutional challenges to unfair employment practices directed against handicapped individuals.[6] Thus, the advocate for the handicapped person should employ constitutional theories, when appropriate, as a means of challenging unjustified employment discrimination. This Comment will discuss two constitutional provisions which can be successfully utilized to challenge unjustified handicap discrimination in public employment. Initially, the three tiers of equal proctection clause[7] review will be

§§ 11.1-.3 (West 1975); 1977 Fla. Sess. Law Serv. 1480-84; HAW. REV. STAT. § 1378-2 (Supp. 1974); ILL. ANN. STAT. ch. 23 § 3365 (Smith-Hurd Supp. 1976); ch. 38 §§ 13-2; 65-21 to 30; ch. 48 § 853 (Smith-Hurd 1977); IND. CODE ANN. §§ 22-9-1-1 to -13 (Burns Supp. 1977); IOWA CODE ANN. §§ 601 A.1-7; 601D.2 (West 1975); 1976 Iowa Legis. Serv. 851; KAN. STAT. §§ 39-1103; 39-1105 (1973) §§ 44-1001 to -1014 (Supp. 1976); KY. REV. STAT. ANN. 207.130-.240 (Baldwin 1978); ME. REV. STAT. tit. 5, §§ 4561-4613 (Supp. 1977); MD. ANN. CODE art. 49B, §§ 18-19 (Supp. 1977); MASS. ANN. LAWS ch. 149, § 24K (Michie/Law Co-Op Supp. 1976); MICH. STAT. ANN. §§ 37.1101-.1208 (Supp. 1977); MINN. STAT. ANN. §§ 43.15; 363.01-.14 (West Supp. 1978); MISS. CODE ANN. § 43-6-15 (Supp. 1977); MONT. REV. CODES ANN. §§ 64-301 to -330 (Supp. 1975); NB. REV. STAT. §§ 20-131; 48-1101 to -1125 (1943); NEV. REV. STAT. §§ 284.012; 613.310-.430 (1973); N.H. REV. STAT. ANN. §§ 354-A:1-:14 (Supp. 1977); N.J. STAT. ANN. §§ 10:5-4.1; 10:5-5 (West 1976); N.M. STAT. ANN. §§ 4-33-1 to -13 (1953); N.Y. CIV. RIGHTS LAW § 47a (McKinney 1976); N.Y. EXEC. LAW § 296 (McKinney Supp. 1976); N.C. GEN. STAT. §§ 95-28.1; 128-15.3 (Supp. 1977); § 168.6 (1976); OHIO REV. CODE ANN. §§ 4112.01-.02 (Page Supp. 1976); OR. REV. STAT. §§ 659.400-.990 (1977); PA. STAT. ANN. tit. 43, §§ 951-63 (Purdon Supp. 1977); R.I. GEN. LAWS §§ 28-5-1 to -39 (Supp. 1976); TENN. CODE ANN. §§ 8-4131 & -4132 (Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 4419e (Vernon 1976); VT. STAT. ANN. tit. 21, §§ 497-98 (Supp. 1975); VA. CODE § 40.1-28.7 (1976); WASH. REV. CODE ANN. §§ 49.60.180-.230 (Supp. 1977); W. VA. CODE § 5-11-9 (Supp. 1976); WIS. STAT. ANN. § 16.765 (West Supp. 1977) §§ 111.31-.325 (West Supp. 1974). For further discussion of state handicap employment discrimination statutes, *see* B. SCHLEI & P. GROSSMAN, *supra* at 226-30; Note, *Potluck Protection for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 LOY. CHI. L.J. 814, 835-43 (1977).

5. One commentator has argued that state civil rights commissions cannot be expected to strictly enforce such laws because these commissions have been lax in the enforcement of statutes prohibiting unjustified employment discrimination against other classes of persons. *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J. L. SOC. PROB. 457, 460 (1974). It has also been contended that "lack of teeth" in some state laws prevented satisfactory outcome for the handicapped employee who wins his/her case. Brody, *Equal Opportunity Job Laws for the Disabled Have Little Effect*, N.Y. Times, May 3, 1975, at 14, col. 1.

Similar criticism has been made concerning federal enforcement of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1975). *See* Bayh, *Forward to the Symposium Issue on Employment Rights of the Handicapped*, 27 DEPAUL L. REV. 943 (1978).

6. Several courts have accepted fourteenth amendment procedural due process and irrebuttable presumption theories raised by plaintiffs challenging public employment discrimination. *See, e.g.*, Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977)(irrebuttable presumption); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977) (irrebuttable presumption); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) (irrebuttable presumption); Bevan v. New York State Retirement Sys., 44 App. Div. 2d 163, 355 N.Y.S. 2d 185 (App. Div. 1974) (procedural due process). *But see, e.g.*, Spencer v. Toussaint, 408 F. Supp. 1067 (E.D. Mich. 1976) (privacy, procedural due process, substantive due process, & irrebuttable presumption).

7. The fourteenth amendment equal protection clause provides that " . . .No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

examined. Secondly, two due process clause[8] theories, procedural due process and the irrebuttable presumption doctrine, will be analyzed. Finally, this Comment will argue that these constitutional provisions are a viable means of eliminating unjustified handicap discrimination in public employment.

The aim of integrationism is the elimination of discrimination directed against individuals with disabilities. Although the term "discrimination" generally encompasses any act of distinguishing like entities from one another,[9] the integrationist seeks to abolish unjustified discrimination against qualified handicapped job applicants. The decision not to hire such an individual is unjustified when the decisionmaker has insufficient evidence to support his/her decision or when the evidence more strongly supports a contrary choice. In confronting this problem employment discrimination laws by implication have defined unjustified job discrimination.[10] Under such laws, unjustified handicap discrimination occurs when an employer categorically discriminates against a handicapped person who possesses the occupational requirements necessary for performing the job, because of a disability unrelated to the effective performance of necessary job functions.[11] It is this type of employer behavior which the integrationist seeks to eliminate.

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8. There are two due process clauses in the U.S. Constitution. The fifth amendment states "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment, applicable to the states, provides " [N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

9. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 238 (1965) defines "discriminate" as "to distinguish by discerning or exposing differences; esp.: to distinguish (one like object) from another."

10. *See, e.g.*, ALASKA STAT. § 18.80.220(1) (1962); CAL. LAB. CODE § 1420(a)(1) (West Supp. 1978); COLO. REV. STAT. § 24-34-306(a) (1973); CONN. GEN. STAT. ANN. § 31-126 (West Supp. 1978); 1977 Fla. Sess. Law Serv. 1483-84; HAW. REV. STAT. § 378-2(1) (1978); ILL. ANN. STAT. ch. 48 § 853(a) (Smith-Hurd 1977); IND. CODE ANN. § 22-9-1-3(q) (Burns Supp. 1977); IOWA CODE ANN. § 601A.6(1)(a) (West 1975); KAN. STAT. § 44.1002(i) (Supp. 1976); KY. REV. STAT. ANN. § 207.150 (Baldwin 1977); ME. REV. STAT. tit. 5, § 4572(1)(A) (Supp. 1977); MD. ANN. CODE art. 49B § 19(a)(1) (Supp. 1977); MICH. STAT. ANN. § 37.202 (Supp. 1977); MINN. STAT. ANN. § 363.03 subdv. 1(2) (West Supp. 1976); MISS. CODE ANN. § 43-6-15 (Supp. 1977); MONT. REV. CODES ANN. 64-306(1)(a) (Supp. 1977); NEB. REV. STAT. § 48.1108(1) (1943); NEV. REV. STAT. § 613.350.1 (1973); N.H. REV. STAT. ANN. § 354-A:8(1) (Supp. 1975); N.J. STAT. ANN. § 10:-4.1 (West 1976); N.M. STAT. ANN. § 4-33-7 (1953); N.Y. EXEC. LAW § 296 (5) (McKinney Supp. 1977); N.C. GEN. STAT. § 128-15.3 (Supp. 1977); OHIO REV. CODE ANN. § 4112.02(L) (Page Supp. 1977); OR. REV. STAT. § 659.425 (1977); PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1977); TENN. CODE ANN. § 8-4131 (Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 4419e, § 3(f) (Vernon 1976); VT. STAT. ANN. tit. 21, § 498 (Supp. 1975); VA. CODE § 40.1-28.7 (1976); WASH. REV. CODE ANN. § 49.60.180(1) (Supp. 1977); W. VA. CODE § 5-11-9 (Supp. 1976); WIS. STAT. ANN. § 111.32(5)(f) (West 1974).

11. *Id.*

The term "handicap" must also be defined in order to determine the scope of protection necessary to implement the goals of the integrationist. Part of the problem in dealing with this area results from the notably broad spectrum of definitions of the word "handicap." The Wisconsin Supreme Court adopted a broad definition of handicap when it was faced with the issue of whether asthma contituted a handicap under the Wisconsin Fair Employment Act.[12] This act did not contain a definition of handicap. In the case of *Chicago, Milwaukee, St. Paul & Pacific R.R. v. Department of Industry, Labor & Human Relations*,[13] the Wisconsin Supreme Court defined handicap as "a disadvantage that makes achievement unusually difficult; esp[ecially]: a physical disability that limits the capacity to work."[14] The Court summarily concluded that because asthma makes achievement unusually difficult, it was a handicap under the act.[15] On this basis "handicap" includes such conditions as diabetes and hypertension, as well as past histories of illnesses, such as cancer.[16] Conceivably, conditions such as high blood pressure, stuttering, and temporary mental illness could be considered handicaps under this broad definition because they are disadvantages that make achievement unusually difficult.[17]

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12. WIS. STAT. ANN. §§ 111.31-.37 (1974). For a comprehensive discussion of the Wisconsin Fair Employment Act, *see* Comment, *Wisconsin's Fair Employment Act: Coverage, Procedures, Substance, Remedies*, 1975 WISC. L. REV. 696.

13. 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

14. 62 Wis. 2d at 398, 215 N.W.2d at 446 *citing* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1027 (1961). *See also* State v. Turner, 3 Ohio App. 2d 5, 7-8, 209 N.E.2d 475, 477 (1965) (adopting this definition with respect to mental injuries).

15. 62 Wis. 2d at 398, 215 N.W.2d at 446.

16. The trend in state employment discrimination statutes has been to broadly define "physical handicap" to include persons suffering from such conditions as diabetes, asthma, epilepsy, and hypertension. The statutory trend, in addition, has included those who have a history of disability or illness who are not presently suffering from such an impairment. B. SCHLEI & P. GROSSMAN, *supra* note 5 at 227.

Relying on the *Chicago, Milwaukee St. Paul, Pacific R.R. Co.* definition of handicap, lower Wisconsin courts have broadened the scope of that state's Fair Employment Act. *See, e.g.*, Connecticut Gen. Life Ins. Co. v. Department of Indust., Labor & Human Relations, 13 Fair Empl. Prac. Cas. 1811 (Wis. Cir. Ct. 1976) (alcoholism); Fraser Shipyards, Inc. v. Department of Indus., Labor & Human Relations, 13 Fair Empl. Prac. Cas. 1809 (Wis. Cir. Ct. 1976) (diabetes); Chrysler Outboard Corp. v. Department of Indus., Labor & Human Relations, 13 Empl. Prac. Dec. 6883 (Wis. Cir. Ct. 1976) (leukemia); Journal Co. v. Department of Indus., Labor, & Human Relations, 13 Fair Empl. Prac. Cas. 1655 (Wis. Cir. Ct. 1976) (deviated septum); J.C. Penney Co. v. Department of Indus., Labor & Human Relations, 12 Fair Empl. Prac. Cas. 1109 (Wis. Cir. Ct. 1976) (rheumatoid arthritis).

17. Complaints have been filed under state employment discrimination statutes alleging discrimination on the basis of each of these conditions. Brody, *Equal Opoortunity Job Laws for the Disabled Have Little Effect*, N.Y. Times, May 3, 1975 at 14, col. 1.

At the other extreme is the narrow, traditional definition. This approach was taken by the Rhode Island Supreme Court in *Providence Journal Co. v. Mason*,[18] a case which interpreted The Rhode Island Fair Employment Practice Act definition of physical handicap. Under this act "physical handicap" included disabilities, infirmities, and malformations and was not limited to specific impairments.[19] The Rhode Island Court concluded that the legislature did not intend to protect persons with "any physical disability, no matter how slight," rather the handicap had to "be a serious injury or impairment of more than a temporary nature."[20] Applying this definition the Court concluded that the condition of whiplash was a temporary impairment, and not a physical handicap.[21] Thus, under the Rhode Island Court definition, impairments such as blindness, paraplegia, and deafness would be considered handicaps because each meets the criteria of seriousness and permanence.[22]

CONSTITUTIONAL PROVISIONS

The constitutional provisions which have been relied upon to challenge handicap employment discrimination include the due process clauses of the fifth and fourteenth amendments and the equal protec-

18. 359 A.2d 682 (R.I. 1976).

19. R.I. GEN. LAWS § 28-5-6(H) (Supp. 1976) provided that:

> "Physical handicap" means any physical disability, [infirmity,] malformation or disfigurement which is caused by bodily injury, birth defect or illness, including, epilepsy, and which shall include, but not be limited to any degree of paralysis, amputation, lack physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device.

20. 359 A.2d at 686.

21. *Id.*

22. This Comment will adopt the traditional narrow definition because it is a better constitutional law approach. In order for a class of individuals to be effectively protected under the equal protection clause it must either be a "discrete and insular" group or possess a common permanent characteristic. *See* notes 35-38; 103-106 and accompanying text *infra*. The broad definition does not meet either requirement. Its perimeters are unclear; hence, it does not describe a discrete and insular group. This definition does not meet the permanent characteristic requirement, either. However, the narrow definition fits both requirements. Only severely impaired or injured persons—a discrete and insular minority—with permanent impairments are handicapped persons under the traditional definition.

Additionally, courts generally will be more receptive to a traditional approach. Leon Green, an American legal realist, has observed that courts are hesitant to extend protection to a new interest if such an extension appears to be unduly burdensome, expensive, or vain. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1035 (1928). Given the extent of handicap employment discrimination in the United States, one would expect that many courts would be skeptical of expanding constitutional protection to handicapped persons. *But see* R. BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

tion clause of the fourteenth amendment. The fourteenth amendment applies only to "state action" while the fifth amendment applies only to "federal action."[23] Hence, neither the equal protection clause nor the due process clause reach private employment discrimination. Therefore, only public employment discrimination can be challenged.[24]

Equal Protection

1. Strict Scrutiny

In guaranteeing citizens equal protection of the laws, the fourteenth amendment prohibits the state from engaging in unjustified

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23. These principles have recently been reaffirmed. In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) the Supreme Court held that the challenged practices of a privately owned utility which were authorized and approved by a state commission were not state action. Thus, the *Jackson* Court refused to apply the fourteenth amendment due process clause. In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), a private club's discriminatory practices were challenged. The Supreme Court held that state action was not present and refused to apply the fourteenth amendment equal protection clause.

24. Moreover, although the prohibition of slavery found in the thirteenth amendment has no state action requirement the Supreme Court has relied on legislative intent to limit this provision to the prohibition of racial discrimination. For instance, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court, after examining the framers' intent stated that the 1866 Civil Rights Act (enacted under the authority of the thirteenth amendment) applies only to racial discrimination. For further discussion of *Jones, see* Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537 (1968); Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272 (1969); Note, *Open Housing: Jones v. Alfred H. Mayer Co. and Title VIII of the Civil Rights Act of 1968*, 18 AM. U. L. REV. 553 (1969); Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019 (1969); Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969); Comment, *Civil Rights: Housing Discrimination—Revival of Civil Rights Act of 1866*, 53 MINN. L. REV. 641 (1969); 22 ARK. L. REV. 773 (1969); 35 BROOKLYN L. REV. 275 (1969); 20 CASE W. RES. L. REV. 448 (1969): 37 FORDHAM L. REV. 277 (1968); 29 LA. L. REV. 158 (1968); 41 U. COLO. L. REV. 152 (1969); 23 U. MIAMI L. REV. 225 (1968); 21 VAND. L. REV. 271 (1969); 8 WASHBURN L. J. 268 (1969).

The Supreme Court in McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976) held that the 1866 Civil Rights Act prohibits private racial employment discrimination against whites. Again, the Court turned to legislative intent to determine the scope of the statute. The Court found that Congress intended to prohibit racial discrimination against whites and non-whites alike. It cited language which emphasized *racial* discrimination. *Id.* at 288-95.

Lower courts, when faced with non-racial discrimination challenges based on a thirteenth amendment theory, have also examined framers' intent. Such courts have concluded that the 1866 Civil Rights Act and thirteenth amendment apply only to racial discrimination. *E.g.*, Rackin v. Univ. of Pa., 386 F. Supp. 992, 1008-09 (E.D. Pa. 1974); League of Academic Women v. Regents of Univ. of Cal., 343 F. Supp. 636, 638-40 (N.D. Cal. 1972). *But see, e.g.*, Parmer v. Nat'l Cash Register Co., 346 F. Supp. 1043, 1046-47 (S.D. Ohio 1972), *aff'd on other grounds*, 503 F.2d 275 (6th Cir. 1974); *see* Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L. J. 1501, 1512-19 (1973) (arguing that the thirteenth amendment can be liberally construed to proscribe private employment discrimination of handicapped persons).

discrimination.[25] Traditionally, the United States Supreme Court has utilized two tiers of review to analyze claims brought on equal protection grounds: strict scrutiny and minimal scrutiny.[26] The Burger Court has introduced a third tier of examination, intermediate scrutiny.[27]

Strict scrutiny is invoked whenever state action interferes with the exercise of a fundmental interest[28] or makes a classification on the basis of a suspect criterion.[29] Strict scrutiny operates to create a presumption of unconstitutionality. Classifications have been invalidated unless the state can show a furtherance of a "compelling state interest" in a narrowly tailored manner.[30] Additionally, the state must show that the classification completely reaches all those within the class and no others in order to carry its burden of proving constitutionality.[31]

Strict scrutiny has not been applied to handicap public employment discrimination challenges unless the complainant can show either that he/she is a member of a suspect class or that the government's discrimination infringes upon a fundamental interest. To satisfy the "suspect class" requirement, two basic tests must be met.[32] The first test is based on an often cited footnote of *United States v. Carolene Products Co.*[33] It requires that a class must be a "discrete and insular minority" to gain suspect status.[34] This requirement is met if a

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25. *See* text accompanying notes 9-11 *supra*.

26. *See generally* C. PRITCHETT, THE AMERICAN CONSTITUTION 538-540 (3d ed. 1977); Gunther, *The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. (1972).

27. *See generally* Gunther, *supra* note 26; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071 (1974); Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 385, 388 (1976); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Yackle, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICH. L. REV. 181 (1975).

28. *E.g.*, Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972) (right to assemble); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

29. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Hunter v. Erickson, 393 U.S. 385 (1969) (race); Korematsu v. United States, 323 U.S. 214 (1944) (nationality).

30. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

31. *See generally* Turkington, *supra* note 27 at 388; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343-46 (1949).

32. Although the Court has not expressly stated that both tests must be met to gain suspect status, it strongly implied this conslusion in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam).

33. 304 U.S. 144 (1938).

34. This test is based on the following exerpt:

> [P]rejudice against discrete and insular minorities may be a special condition, which

class of individuals can be characterized as a readily ascertainable group which is distinct from the remainder of society.[35]

The second test, set forth in *San Antonio Independent School District v. Rodriguez*,[36] defines a suspect class as one

> saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[37]

These two tests recently have been used to characterize the status of handicapped persons as a suspect class.[38] In this context, the *Rodriguez* test has been viewed as three independent tests: a suspect class is one that has been saddled with disabilities *or* historically treated unequally *or* relegated to political powerlessness.[39] Under

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> tends seriously to curtail the operation of the political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n. 4.

35. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (per curiam). The Surpeme Court used the "discrete and insular minority" test in Graham v. Richardson, 403 U.S. 365 (1971) to bestow suspect status on aliens because they constitute a distinct, isolated minority. The Court denied this status to the elderly in Massachusetts Bd. of Retirement v. Murgia because they are not a clearly defined group.

36. 411 U.S. 1 (1973).

37. *Id.* at 28. The *Rodriguez* Court applied this test to find that the poor were not members of a suspect class. *Id.* The Court then determined that education was not a fundamental interest because it is not implicitly or explicitly protected under the Constitution. *Id.* at 35. Because of the absence of a suspect class and a fundamental interest, the Court invoked the minimal scrutiny rationality test to examine the challenged system of public education financing. It concluded that reliance on local property taxes was rational even though it resulted in great disparities between rich and poor district per pupil expenditures. *Id.* at 56-59. For further discussion of *Rodriguez, see generally* Harrison, *What Now After San Antonio Independent School District v. Rodriguez?: Electoral Inequality and the Public School Finance Systems in California and Texas*, 5 RUT.-CAM. L.J. 191 (1974); Roos, *The Potential Impact of Rodriguez on Other School Reform Litigation*, 38 LAW & CONTEMP. PROB. 566 (1974); Note, *San Antonio Independent School District v. Rodriguez: A Retreat from Equal Protection*, 6 COLUM. HUMAN RIGHTS L. REV. 195 (1974); Comment, *Disparity in Financing Public Education: Is There an Alternative to Rodriguez?*, 8 U. RICH. L. REV. 88 (1973); 18 HOW. L. J. 435 (1974); 26 U. FLA. L. REV. 155 (1973).

In *Murgia* the Supreme Court applied both *Rodriguez* and *Carolene Products* to hold that the elderly were not members of a suspect class. 427 U.S. at 313-14. The Court also affirmed the notion that employment was not a fundamental interest. *Id.* The majority held that a state statute requiring police officers to retire at age fifty was rational. *Id.* at 314-17. For a discussion of the rationality determination made by the Court in this case, *see* note 90 *infra*. *See generally* Comment, *The Burger Court's "Newest" Equal Protection: Irrebuttable Presumption Doctrine Rejected—Two Tier Review Reinstated*, 1977 WASH. U.L.Q. 140.

38. Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under The Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975). [Hereinafter cited as Burgdorf & Burgdorf.]

39. *Id.* at 906.

the first *Rodriguez* criterion handicapped persons have been characterized as a class "saddled with disabilities" by definition and as such, necessarily are members of a suspect class.[40] However, this argument overlooks the fact that many handicapped individuals possess only one disability and are not literally saddled with disabilities.[41] Therefore, only multiple handicapped persons should be considered a suspect class under this criterion.

It has also been argued that handicapped persons meet the second *Rodriguez* criterion because they have a history of being subject to unequal treatment.[42] Legislation has existed which subjected epileptics, the mentally ill, and mentally retarded persons to sterilization; prohibited mentally retarded, epileptic, and mentally ill persons from marrying; and denied driver's licenses to individuals with epilepsy.[43] Additionally, the contract law requirement of legal capacity has prevented mentally handicapped persons from entering into enforceable contracts.[44] Handicapped persons have also been subjected to unequal social treatment, including social ostracism. As a class, they have suffered discrimination in employment, transportation, and education and have been subjected to inhumane institutionalization practices.[45]

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40. *Id.*

41. Other suspect minorities, such as aliens and blacks, are saddled with linguistic and cultural disabilities.

42. Burgdorf & Burgdorf, *supra* note 38 at 907-08.

43. In the late 1950's, twenty-eight states had sterilization statutes, seventeen of which specifically included individuals with epilepsy, mental illness, and mental retardation. *Id.* at 861. *See* O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L. J. 20 (1956). Most states prohibit marriages in which one of the parties is mentally incompetent. At one time, seventeen states had prohibitions against marriage by persons with epilepsy. Burgdorf & Burgdorf, *supra* note 38 at 861. Nearly all states restrict the driving rights of persons with epilepsy. *Id.* at 863 n. 51.

44. *Id.* at 861-62. This rule of law also limits mentally incompetent persons' rights in other legal matters. For instance, one must be of sound mind and memory to execute a will. W. PAGE, 1 THE LAW OF WILLS 230 (2d ed. 1926). A settlor of a trust must also have legal capacity. G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 21 (3d ed. 1952).

45. Historically, handicapped persons who were not imprisoned were driven from the cities and punished upon returning. Burgdorf & Burgdorf, *supra* note 38 at 884-85.

Large numbers of handicapped persons face discrimination. An estimated nineteen million handicapped persons face employment discrimination. *See* note 2 *supra*. Approximately 13,370,000 persons have such a handicap as to experience difficulties in utilizing mass transit systems as presently designed. Achtenberg, *Law and the Physically Handicapped: An Update with Constitutional Implications*, 8 SW. U. L. REV. 847, 866 n.57 (1976). Over 2.2 million handicapped children receive schooling indadequate for their educational needs. Another 1.75 million receive no educational services at all. Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L. F. 1016, 1016. *See generally* Burgdorf & Burgdorf, *supra* note 44 at 864-83.

Institutionalized handicapped persons have been subjected to prisonlike atmospheres. Segregation of the sexes, as well as segregation from friends, relatives, and "normal society," was prevalent in past institutionalization practices. Burgdorf & Burgdorf at 889-90.

However, these inequities are insufficient to bestow the status of "suspect" upon handicapped persons in general. Historic unequal legal treatment and inhumane institutionalization generally were incurred by only four subclasses of handicapped individuals: the mentally retarded, epileptics, mentally ill persons, and multiple handicap individuals.[46] Only these groups can meet the second *Rodriguez* test, not the entire class of handicapped persons, although they have been subjected to social ostrascism and discrimination. The Supreme Court has held that other disadvantaged groups which have been subjected to ostracism and discrimination, such as illegitimates and the elderly, have not experienced such a degree of unequal legal treatment to be classified as "suspect." For instance, in *Mathews v. Lucas*,[47] the Court held that illegitimacy is not a suspect classification.[48] The majority, recognizing that illegitimates have been subjected to discrimination, found that it has never reached the level of the historic legal and political discrimination waged against other groups considered "suspect."[49] Using this same analysis in *Murgia*, the Court found that the aged have not "experienced a history of purposeful unequal treatment" which suspect groups have faced, although the elderly have been subjected to a history of discrimination.[50]

Finally, it has been argued that the third *Rodriguez* criterion was satisfied because handicapped persons can be characterized as politically powerless.[51] Forty-six state constitutions and related state legislation deny mentally handicapped persons the right to vote.[52] Other state statutes prohibit mentally handicapped persons from holding office.[53] Additionally, transportation difficulties and architectural barriers at polling places make it difficult for persons with seri-

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46. *Id.* at 889. However, other handicapped persons have faced historic unequal treatment. For instance, 8 U.S.C. 1182(7) (1970) provides that aliens "who are certified by the examining surgeon as having a physical defect, disease, or disability. . . of such nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living. . . " shall be excluded from admission to the United States and shall be ineligible to receive visas. *See* Burgdorf & Burgdorf, *supra* note 38 at 862. This statute, however, does not discriminate against handicapped individuals *per se*. Rather, it makes a distinction between those aliens who are capable of subsistence in the U.S. and those who are not. Hence, this statute lends more support to the contention that poor persons have been subjected to unequal legal treatment.

47. 427 U.S. 495 (1976).

48. *Id.* at 504-06.

49. *Id.* at 506.

50. 427 U.S. 307, 313 (1975).

51. Burgdorf & Burgdorf, *supra* note 38 at 906.

52. *Id.*

53. *Id.* at 906-07.

ous mobility problems to vote.[54] However, despite these facts the third *Rodriguez* criterion is met only by some members of the class of all handicapped persons: mentally handicapped persons and mentally competent individuals with mobility impairments. Moreover, despite transportation barriers, the availability of absentee voting permits those who cannot be at their respective polling places on election day to cast ballots. Thus, it is clear that mobility impaired persons are not politically powerless as a class.

In summary, it is arguable that handicapped persons, as a whole, under the traditional narrow definition of "handicap" meet the *Carolene Products* "discrete and insular minority" test of suspectness.[55] But, as a whole, handicapped persons cannot be deemed members of a suspect class because collectively they do not satisfy any of the three independent *Rodriguez* criteria. From previous discussion it is clear that epileptics, mentally retarded persons and multiple handicapped persons meet at least one of the three *Rodriguez* tests as well as the *Carolene Products* tests.[56] Accordingly, these three subclasses may be properly classified as suspect and therefore entitled to strict scrutiny by the judiciary.

Although different rationales have been used, case law is generally consistent with the interpretation of the *Rodriguez* and *Carolene Products* tests to hold that handicapped persons do not constitute a suspect class.[57] For example, the New York Court of Appeals in *Matter of Levy*[58] held that handicapped children do not constitute a suspect class. This court did not rely on *Rodriguez* or *Carolene Products* rationale. Instead it cited, without discussion, cases holding that illegitimacy was not a suspect classification and decisions holding that race, national origin, and alienage were suspect criteria.[59]

Moreover, the status of multiple handicapped persons as comprising a suspect class was expressly denied in *Department of Mental*

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54. *Id.*

55. Under the narrow definition of handicap, handicapped persons are a discrete and insular minority. They are a readily ascertainable group because they possess severe, permanent disabilities—characteristics not shared by the remainder of the population. For a discussion of the narrow definition of handicap, *see* text accompanying notes 18-22 *supra*.

56. These three subclasses fulfill the *Carolene Products* "discrete and insular minority" requirement because objective data can be used to ascertain the members of these groups.

57. In fact some courts have expressly stated that handicapped persons are not members of a suspect class. For instance, a federal district court in dictum concluded that blind persons are not members of a suspect class. Gurmankin v. Costanzo, 411 F. Supp. 982, 992 n.8 (E.D. Pa. 1976), *aff'd on other grounds*, 556 F.2d 184 (3d Cir. 1977).

58. 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S. 2d 13 (1976) *appeal dismissed sub. nom.* Levy v. City of New York, 429 U.S. 805 (1976).

59. *Id.* at 658, 345 N.E.2d at 558, 382 N.Y.S. 2d at 15.

Hygiene v. Dolan.[60] In this case an equal protection challenge was waged against a state statute which provided maintenance to blind and deaf children as state expense at certain state educational institutions. The counter plaintiff, a child who was deaf as well as retarded, was denied free maintenance. The *Dolan* court found *Matter of Levy* controlling.[61] The *Dolan* counter plaintiff sought to distinguish *Levy* on the ground that handicapped children at state institutions are a "more discrete class."[62] The *Dolan* court rejected this analysis because no evidence was adduced to establish that institutionalized handicapped children were member of a suspect class.[63]

The *Levy* holding, which concerned the entire class of handicapped persons, should not have been controlling in *Dolan*, which concerned the subclass of multiple handicapped persons. The *Dolan* court should have found the existence of a suspect class based on the *Rodriguez* and *Carolene Products* tests. Multiple handicapped persons are "saddled with disablities" and have been "historically treated unequally." Furthermore, multiple handicapped persons constitute a "discrete and insular minority" because each member of the subclass possesses at least two severe, permanent impairments.[64]

Courts have recently, however, recognized a distinction between handicapped persons as a group and special subcategories by expressly bestowing suspect status upon certain types of handicapped individuals. In 1974 the North Dakota Supreme Court in *In re G.H.*[65] held that a young girl with severe multiple handicaps possessed "just the sort of 'immutable characteristic determined solely by the accident of birth' to which the 'inherently suspect' classification would be applied."[66] The North Dakota Court purported to base this decision on *Frontiero v. Richardson*,[67] a Supreme Court plurality opinion holding that sex is a suspect classification.[68] The North

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60. 89 Misc. 2d 1003, 392 N.Y.S.2d 980 (Cir. Ct. N.Y. 1977).

61. *Id.* at 1007, 392 N.Y.S.2d at 984.

62. *Id.* 392 N.Y.S.2d at 984-85.

63. The Dolan Court also stated that further subdivision of handicapped children weakens the thrust of the defendant's position. *Id.* 392 N.Y.S.2d at 985.

64. *See* text accompanying notes 18-22.

65. 218 N.W. 2d 441 (N.D. 1974).

66. *Id.*at 447. The North Dakota Court then concluded that the state was obligated under the equal protection clause to provide the handicapped child an education at the state's expense. *Id.*at 447-48.

67. 411 U.S. 677 (1973) (plurality opinion).

68. *Id.*at 688. The *Frontiero* plurality stated that gender was "an immutable characteristic determined solely by the accident of birth" and cited evidence that women, as a class, have been subjected to invidious social and political discrimination. The plurality concluded that the imposition of hardships by the legislature upon members of a particular gender because of their

Dakota Court applied the "immutable characteristic" language found in that decision to severe multiple handicaps. The *Frontiero* suspect classification test has since been impliedly rejected by a majority of the Supreme Court.[69] However, the *G.H.* holding is consistent with *Rodriguez* because multiple handicapped persons are "saddled with disablities" and have been subjected to a history of unequal treatment.

Several U.S. District Courts have likewise confronted equal protection challenges made by mentally retarded children.[70] In 1973, the Federal District Court for the Eastern District of New York in *New York State Association for Retarded Children, Inc. v. Rockefeller,*[71] held without citation or reasoning, that mental retardation is not a suspect classification.[72] In 1975, the Federal District Court for the Eastern District of Pennsylvania in *Fialkowski v. Shapp,*[73] carefully examined *Rodriguez* and *G.H.* to determine the appropriate level of scrutiny to analyze a statute which absolutely denied public education to mentally retarded children. The *Fialkowski* court utilized an intermediate level of scrutiny[74] but in dicta stated that mental retardation was a suspect classification.[75] The *Fialkowski* court, in reaching

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gender "would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.' [citation omitted]" *Id.* at 686. Thus, based on these factors, the *Frontiero* Court concluded that gender was a suspect classification.

69. In a number of Supreme Court decisions decided after *Frontiero*, a standard less than strict scrutiny was applied to gender based classifications. *E.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding Navy procedures which treat officers differently on the basis of sex in promotion and discharge determinations); Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding a statute which provided mandatory medical coverage for employees within the state, excluding coverage for disability that accompanies normal pregnancy and child birth); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding a state law which provided widows with a property tax exemption but excluded widowers).

Recently, the Supreme Court has established a new test for scrutinizing gender based classifications. To withstand an equal protection challenge such a classification must be "substantially related" to the achievement of "important governmental objectives." Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976). The Court has not applied the strict scrutiny compelling state interest test to such classifications since the *Frontiero* decision. Thus, the Court has impliedly rejected the *Frontiero* suspect classification holding.

70. In Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46 (N.D. Ohio 1976) a class action was brought challenging the constitutionality of Ohio's system of education and/or training for mentally retarded school age children, on equal protection and due process clause grounds. The district court used the rational basis test to scrutinize plaintiff's claim. Thus, this case impliedly held that mental retardation was not a suspect classification. *Id.* at 52.

71. 357 F. Supp. 752 (E.D.N.Y. 1973).

72. *Id.* at 762.

73. 405 F. Supp. 946 (E.D. Pa. 1975).

74. For a discussion of intermediate scrutiny, *see* text accompanying notes 93-118 *infra*.

75. 405 F. Supp. at 959.

this conclusion, stated that the *Rodriguez* criteria for suspectness was satisfied because thirty-two states have subjected mentally handicapped individuals to unequal treatment by enacting statutes providing for sterilization of retarded persons and additionally cited the fact that retarded children have been historically denied admittance to public schools.[76] However, the *Fialkowski* court, because it was confronted with the complete denial of educational opportunity, did not require a determination of whether mental retardation was a suspect classification.[77]

The *Fialkowski* analysis is clearly more well-reasoned than the *Rockefeller* approach. Mentally retarded persons not only met two of the *Rodriguez* tests as being historically treated unequally and being politically powerless.[78] They also met the *Carolene Products* discrete and insular requirement because they are a clearly defineable group of persons. Thus, the *Fialkowski* dicta is consistent with the Supreme Court's indicia of suspectness.

Although strict scrutiny is also triggered when a classification interferes with the exercise of a fundamental interest,[79] the interest in employment is neither recognized as fundamental in the Constitution nor in case law.[80] Hence, only three subclasses of handicapped persons: epileptics, mentally retarded persons, and individuals with multiple handicaps, are *per se* entitled to strict scrutiny review of employment discrimination challenges since they qualify as suspect classes.[81] Such handicapped persons have the greatest chance of

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76. *Id.* at 959 n.9 *citing* O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L. J. 20 (1956).

77. The court then held that under intermediate scrutiny, plaintiffs had an actionable claim, and thus denied defendants' motion to dismiss. 405 F. Supp. at 959.

78. *See* text accompanying notes 42-44 & 52-53 *supra*.

79. The United States Supreme Court has determined that a number of interests are fundamental. *E.g.*, Police Dep't. of the City of Chicago v. Mosley, 408 U.S. 92 (1972) (first amendment rights); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel interstate); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Griffin v. Illinois, 351 U.S. 12 (1956) (right to be afforded procedural fairness). The Court has expressly denied other interests this status. *E.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Lindsey v. Normet, 405 U.S. 56 (1972) (housing).

80. The *Rodriguez* Court promulgated the test to determine whether an interest is fundamental: a fundamental right is one "explicitly or implicitly guaranteed by the Constitution." 411 U.S. 1, 33-34. Case law firmly establishes that employment, an interest not guaranteed under the Constitution, is not a fundamental interest. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam).

81. *See* text accompanying notes 40-56 *supra*. However, handicapped persons challenging pre-employment inquiries of public employers may be afforded strict scrutiny review because of the potentially fundamental interest at stake. A recent Supreme Court decision indicates that personal medical information may be encompassed in the constitutional right of privacy, a fundamental interest. Whalen v. Roe, 429 U.S. 589, 605-06 (1977) (dictum). If such data is pro-

prevailing in public employment discrimination suits because strict scrutiny presumes that the challenged action in unconstitutional. Accordingly, persons with these handicaps are entitled to protection from all unjustified public employment discrimination. It is clear, however, that discrimination can be justified when the particular job requires skills not possessed by the handicapped individual. The mentally retarded individual's lack of the job requirement of average intelligence is a sufficiently compelling reason to refuse employment.[82]

2. *Minimal Scrutiny*

Under the Warren Court's two tier system, minimal scrutiny was applied to classifications which did not affect fundamental interests and which were not based on suspect criteria. A classification has been constitutionally upheld under this tier if it is "rationally related" to a "legitimate state interest."[83] Moreover, rationality of the clas-

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tected from unwarranted exposure, then public employers would have to assert a "compelling" reason for requesting a job applicant to furnish such information. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942). Under this standard, an employer could request data which is necessary to determine whether the job applicant has the necessary occupational requirements for the job in question. A federal district court in Spencer v. Toussaint, 408 F. Supp. 1067 (E.D. Mich. 1976) applied such a standard to the challenge, on constitutional grounds, of a job applicant for the position of bus driver. The plaintiff applicant contended that the defendant city's inquiries concerning the applicant's prior history of mental illness was an unconstitutional invasion of privacy. The employer's interest in making the inquiry was the determination as to whether the applicant possessed the occupational requirement of emotional stability. The district court concluded that the employer's interest in obtaining the information was sufficient to override the job applicant's privacy interest. *Id.* at 1074. For a discussion of the other constitutional issues resolved in *Spencer*, *see* text accompanying notes 122-28 & note 136 *infra*.

82. Although the Supreme Court generally declares classifications unconstitutional when it invokes strict scrutiny, it has held that some classifications based on suspect criterion are the only means of effectuating a compelling state interest. *E.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

83. Fourteenth amendment tests which determine the reasonableness of legislation have undergone significant changes in application over the past century. From the 1870's to the 1930's, the "rule of reason" was a means of critically scrutinizing economic legislation challenged on due process grounds. *See* C. PRICKETT, *supra* note 26 at 518-30. Operationally, this test acted as a substantive means of review—i.e., a judicial instrument for passing judgment on the substantive policies of legislation. Most legislation examined under the test in this era was found to be "unreasonable" and therefore declared unconstitutional. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923) (declaring minimum wage statute unconstitutional); Lochner v. New York, 198 U.S. 45 (1905) (declaring ten hour work day statute unconstitutional). *But see, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (upholding ten hour workday for women).

In the 1930's the rule of reason was transformed into a less demanding means of examining legislation. The Court began to defer to the legislature. Reasonableness of legislation was presumed. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage statute), *rev'g*, Adkins v. Children's Hospital, 261 U.S. 525 (1923); Nebbia v. New York, 291 U.S. 502 (1934) (upholding price regulation of milk). *See* C. PRICKETT, *supra* at 530-34.

sification is presumed even if it is patently over-inclusive, affecting more persons than necessary to accomplish the purpose of the classification, or under-inclusive, not affecting all persons necessary to accomplish the objective of the classification.[84] Since it is apparent that the rational relationship test is applied by the courts in a superficial manner, minimal scrutiny, in essence, means virtually no scrutiny at all.

Minimal scrutiny has been invoked to examine employment discrimination challenges brought by handicapped persons when strict scrutiny was found inapplicable because of the absence of suspectness. For instance, in 1976 a federal district court applied the minimal scrutiny rational relationship test to examine a public employment discrimination challenge brought by a plaintiff with a past history of mental illness.[85] In this case, the defendant city denied

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The rule of reason has since been verbalized as the "rational relationship" test. Until recently, the Court has continued to presume that legislation analyzed under this test is reasonable and therefore constitutional. *See, e.g.*, Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483 (1955) (upholding statute forbidding opticians to fit or replace eye glass lenses without a prescription of an ophthalmologist or optometrist). *But see, e.g.*, Morey v. Doud, 354 U.S. 457 (1957) (declaring unconstitutional statute which exempted American Express Co. money orders from licensing and state regulation).

Under the "new" equal protection of the Burger Court, the rational relationship test has undergone a further alternation. For a discussion of this change, *see* text accompanying notes 107-109 *infra*. *See also* Shaman, *The Rule of Reasonableness In Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and The Establishment of A Viable Theory of the Equal Protection Clause*, 2 HASTINGS CONST. L. Q. 153 (1975); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L. J. 123 (1972).

84. For instance, in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) the Supreme Court applied the rationality test to a state statute which required mandatory retirement of state police officers at age fifty. The Court concluded that this law was rationally related to the interest of assuring physical preparedness of police officers and held that the law was constitutional. The Court presumed the rationality of the law despite its over and under inclusiveness. The statute was over inclusive because some state police officers older than age fifty are physically capable of performing their job. It was under inclusive because not all state police officers younger than age fifty are physically fit. For further examples of the Court's presumption of rationality, *see* County Bd. of Arlington County, Va. v. Richards, 98 S. Ct. 24 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Jefferson v. Hackney, 406 U.S. 535 (1972).

85. Spencer v. Toussaint, 408 F. Supp. 1067 (E.D. Mich. 1976). The *Spencer* court impliedly held that mentally ill persons are not members of a suspect class. This same implicit conclusion was reached in Montoroula v. Parry, 54 App. Div. 2d 327, 388 N.Y.S. 2d 916 (1976). In *Montoroula*, a lower New York state court was faced with an equal protection challenge to a medicaid classification which denied mentally disturbed persons benefits while providing such benefits to physically handicapped persons. The *Montoroula* court implied that mentally disturbed persons were not members of a suspect class by applying minimal scrutiny to the classification in question. *Id.* at 332, 388 N.Y.S. 2d at 919.

The implicit holding reached by the *Spencer* and *Montoroula* courts can be justified on the basis of the *Carolene Products* discrete and insular minority test. Mentally ill persons are not such a minority because the temporary nature of some such disorders, as well as the various

plaintiff employment as a bus driver because of her past illness. The court concluded that the city denial was justified in that it reasonably promoted the safety of passengers and other users of public streets.[86] However, the court did not determine whether the plaintiff's past illness would manifest itself in an unsafe manner. In other words, it did not decide whether she possessed the occupational requirement of emotional stability at the time she applied for the job. Additionally, the city's policy of denying employment for the position of bus driver to persons with past histories of mental illness was both under-inclusive (not affecting mentally ill persons whose condition has not been diagnosed) and over-inclusive (affecting persons without mental illness having a prior history of such a condition). However, because minimal scrutiny was utilized, the state successfully justified its actions by asserting the state interest in public safety.

3. *Intermediate Scrutiny*

The Burger Court has introduced a third tier of equal protection examination, intermediate scrutiny.[87] Definite rules defining when this form of review is appropriate have yet to be established by the Supreme Court. A federal district court has found that this tier should be utilized to scrutinize "quasi-suspect classifications" and "quasi-fundamental interests."[88] This appears to be the approach taken by the Supreme Court when it has seemingly employed middle tier review in cases involving the right to receive welfare benefits and the rights of minors to procreate.[89] Additionally, the Court has

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degrees of severity of such conditions, makes it nearly impossible to clearly define this group of persons.

86. 408 F. Supp. at 1073.

87. *See* note 27 *supra*.

88. Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976).

89. The Burger Court has seemingly applied intermediate scrutiny to a statute impinging on the right to receive welfare benefits. In United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), the Court applied the "rational relationship" test to strike down a statute which prohibited members of households composed of unrelated persons from receiving food stamp benefits. Although the Court applied the traditional minimal scrutiny test, it engaged in closer scrutiny than usually applied under this test. The Court found that Congressional intent to discourage fraud was not necessarily promoted under this statute. Under minimal scrutiny, the Court does not engage in such a probing analysis. For a discussion of Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam), a case in which the rational relationship test was applied in the traditional superficial manner, *see* note 84 *supra*.

The Supreme Court has expressly indicated that the privacy interests of minors are given middle tier review. The Court in Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976), set forth the test for scrutinizing state restrictions inhibiting the procreation rights of minors. Such restrictions are valid only if they serve "significant state interest[s]." *Id.* at 75. In Carey v. Population Services Int'l, 431 U.S. 678 (1977), the Court noted that the *Danforth* test

utilized the intermediate scrutiny test to classifications based on gender,[90] and illegitimacy.[91] The Supreme Court has applied this test to void classifications which are not "substantially related" to the achievement of "important governmental objectives," do not further "significant state objectives," or which do not bear "some rational relationship" to a legitimate state purpose.[92] Hence, this test requires that a governmental classification actually be established as a rationally tailored means to more than a nominal state interest. Accordingly, there is no presumption of rationality or unconstitutionality of the classification under this tier.

Although the Supreme Court has not given any indication of what constitutes a "quasi-fundamental interest,"[93] language used in illegitimacy discrimination cases seems to set forth the criterion of "quasi-suspectness." A reasonable determination of whether handicapped persons constitute a quasi-suspect class can, therefore, be made. *Weber v. Aetna Casualty & Surety Co.*,[94] a 1972 opinion, appears to set forth characteristics of a quasi-suspect class. In *Weber*, a state workman's compensation law was challenged because it denied dependent illegitimate children benefits which were provided to de-

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was less rigorous than the strict scrutiny compelling state interest test although it was not a toothless form of review. *Id.* at 693 n.15.

90. *See* note 69 *supra*.

91. Although the Burger Court has concluded that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny," it has maintained the position that such classifications should be afforded more than a toothless scrutiny. Trimble v. Gordon, 430 U.S. 762, 767 (1977). *See* Mathews v. Lucas, 427 U.S. 495, 505-10 (1976); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972).

92. Three distinct tests for intermediate scrutiny have emerged. Currently, the Supreme Court demands that gender based classifications be "substantially related" to the achievement of "important governmental objectives." Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976). When the legislature interferes with the minors' right to procreate, the Court determines whether "significant state objectives" are furthered. Carey v. Population Services Int'l., 431 U.S. 678 (1977); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976). *Cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942) (strict scrutiny used to analyze interference with an adult's right to procreate). The third intermediate scrutiny test is the "strict rationality" test. This requires that a classification bear some "rational relationship" to a legitimate state purpose. United States Dep't. of Agriculture v. Moreno, 413 U.S. 528 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). On its face, this test is identical to the minimal scrutiny rational relationship test. *Compare* Trimble v. Gordon, 430 U.S. 762 (1977) (intermediate scrutiny rationality) *with* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (minimal scrutiny rationality). However, the intermediate scrutiny test, strict rationality, is a more vigorous examination of a legislative classification. Rationality is not presumed under strict rationality. For a discussion of the minimal scrutiny rationality test, *see* note 84 *supra*. For further discussion of strict rationality, *see* text accompanying notes 101-103 *infra*.

93. This Comment will not attempt to determine whether employment constitutes such an interest.

94. 406 U.S. 164 (1972).

pendent legitimates for the death of one's natural father. This decision strongly implied that illegitimates, as a class, should be given special judicial protection because they have been unjustly and illogically condemned for possessing a specific permanent characteristic.[95] The Court found that such condemnation was "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[96] The majority then declared the statute unconstitutional because it bore no rational relationship to a legitimate state purpose.

The *Weber* reasoning, which has been expressly affirmed by subsequent cases,[97] recognized two characteristics possessed by quasi-suspect classes. First, all the members of the class possess a common permanent trait, such as being born out of wedlock or being a specific gender. Second, because of this trait members of this class, as a whole, have been subjected to unjust and illogical discrimination.

Handicapped persons possess both of these characteristics. All members of this group possess handicaps, which are permanent characteristics under the traditional definition.[98] Because of these impairments, handicapped persons have faced unjustified discrimination in transportation, employment, and education,[99] as well as having been historically ostracized by society.[100] Thus, under the *Weber* analysis handicapped persons are a quasi-suspect class which should, therefore, be afforded protection under the intermediate scrutiny test.

Currently, there are two alternative intermediate scrutiny articulations used to examine quasi-suspect classifications. The rationality test requires that a classification bear some rational relationship to the purpose it is designed to promote.[101] Under intermediate scrutiny,

95. *Id.* at 175-76.

96. *Id.* at 175. In Frontiero v. Richardson, 411 U.S. 677 (1973), a plurality of the Court found that women, as a class, possessed the characteristics identified in *Weber*. *See* note 68 *supra*. After citing evidence that women had been the victims of invidious discrimination, the plurality held that gender was a suspect classification. *Id.* at 688. This holding has been impliedly rejected in subsequent Supreme Court decisions. *See* note 69 *supra*. However, the *Frontiero* analogy of women to illegitimates, which implies that these two classes should be afforded a similar means of equal protection review, has been tacitly affirmed by later decisions which apply intermediate scrutiny to gender and illegitimacy based classifications. *Compare* Califano v. Goldfarb, 430 U.S. 199 (1977) (gender) *with* Trible v. Gordon, 430 U.S. 762 (1977) (illegitimacy).

97. *E.g.*, Trimble v. Gordon, 430 U.S. 762, 769-70 (1977); Mathews v. Lucas, 427 U.S. 495, 505 (1976); Jimenez v. Weinberger, 417 U.S. 628, 632 (1974).

98. *See* note 22 *supra*.

99. *See* note 45 *supra*.

100. *Id.*

101. A problem arises in discussing this test in relation to intermediate scrutiny. The rationality test is essentially the same verbalization as the minimal scrutiny rationality test. Yet, there

unlike minimal scrutiny,[102] there is no presumption of rationality. Hence, courts determine whether a legislative classification is actually established as a rationally tailored means to more than a nominal state interest.[103] The second intermediate scrutiny test is the "important governmental objectives" test. This provides that a classification be "substantially related" to the achievement of "important governmental objectives" to withstand constitutional attack.[104] This test appears to be a more rigorous means of scrutiny than the intermediate scrutiny rationality test.[105] Thus far, the Supreme Court has applied this approach to gender based classifications only.[106] Since the rationality test is the form of intermediate scrutiny review afforded newly-recognized quasi-suspect classes,[107] it should be used to analyze public employment discrimination challenges of handicapped persons.

At least one court has held that handicapped persons are members of a quasi-suspect class and are thereby entitled to intermediate scrutiny review of equal protection claims.[108] In *Frederick L. v. Thomas*,[109] a federal district court was confronted with a civil rights

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is an obvious difference in the manner in which the test is applied. Under minimal scrutiny, rationality is presumed. Thus, patently over-inclusive and under-inclusive classifications are upheld in a minimal scrutiny context. For a discussion of the minimal scrutiny rationality test, *see* text accompanying notes 83-84 *supra*.

102. *Id.*

103. The intermediate scrutiny rationality test has been labelled by one federal district court as "strict rationality." Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976).

104. *See* note 92 *supra*.

105. Administrative convenience alone can never justify a classification under the important governmental objectives approach. Califano v. Goldfarb, 430 U.S. 199 (1977). However, in some circumstances administrative convenience is a sufficient state objective under the strict rationality test. Mathews v. Lucas, 427 U.S. 495, 509 (1976).

106. The Court first applied this test in Craig v. Boren, 429 U.S. 190 (1976). In that case it examined a state statute which prohibited the sale of 3.2% beer to males under twenty-one years of age but permitted the sale to females age eighteen and older. Applying this test, the Court declared the statute unconstitutional.

107. The first time the Supreme Court applied intermediate scrutiny to a gender-based classification, the rationality test was applied. *See* Reed v. Reed, 404 U.S. 71 (1971).

108. A number of courts have applied intermediate scrutiny in cases in which disabled children were denied equal educational opportunity. Although none of these courts expressly stated so, they strongly implied that education is a quasi-fundamental interest thereby mandating greater than minimal scrutiny. However, these cases can also be construed as affording handicapped children quasi-suspect status. *E.g.*, Kruse v. Campbell, 431 F. Supp. 180 (E.D.Va. 1977); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam) *aff'd* 343 F. Supp. 279 (E.D. Pa. 1972); In re Jessup, 85 Misc. 2d 575, 379 N.Y.S.2d 626 (Fam. Ct. 1975). *See generally* Krass, *supra* note 45; Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974); Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637 (1976).

109. 408 F. Supp. 832 (E.D. Pa. 1976).

suit which alleged that children with specific learning disabilities[110] were discriminated against by failure of the defendant board of education to provide instruction specially suited to such children's handicaps. The district court noted that the case involved education, a quasi-fundamental interest. Additionally, it stated that the plaintiff class, although not suspect, "exhibited the essential characteristics of suspect classes—minority status and powerlessness."[111] Therefore, the *Frederick L.* court held that the intermediate scrutiny rationality test was the appropriate means of scrutinizing plaintiffs' claims.[112]

Due Process

1. Procedural Due Process

The second constitutional provision which can be used to challenge unjustified public employment discrimination of handicapped persons is the due process clause. Procedural due process requires that an individual deprived of a property or liberty interest be afforded a meaningful evidentiary hearing to determine whether this deprivation can be justified.[113] The property interest, rather than the liberty aspect of this provision, is most relevant in handicap employment discrimination.

The Supreme Court has generally followed a three-step approach in resolving procedural due process claims. First, the Court determines whether the plaintiff possesses a property interest. Next, it decides whether governmental action has impaired that interest. Finally, if impairment is found, the Court determines what procedures the government must follow to satisfy due process under the circumstances.[114] Each of these steps is crucial to analyzing the rights of handicapped persons who were victims of unjustified employment discrimination.

In *Board of Regents v. Roth*,[115] the Supreme Court set forth the criteria for determining whether one has a property interest. The

110. Plaintiff children with specific learning disabilities according to the complaint have "disorder[s] in one or more of the basic psychological processes involved in understanding or in using language, spoken or written. . . . Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." *Id.* at 833-34 n. 1.

111. *Id.* at 836.

112. *Id.* The Court then denied defendants' motion for judgment on the pleadings. *Id.*

113. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed. 1975) 895-97.

114. *See generally* Bishop v. Woods, 426 U.S. 341 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

115. 408 U.S. 564 (1972).

Roth Court held that property interests are created and defined by "existing rules or understandings that stem from [a] . . . source such as state law—rules that secure certain benefits and that support claims of entitlements to those benefits."[116] Accordingly, if the state in which the discrimination took place has promulgated a public policy of forbidding unjustified public employment discrimination of handicapped persons,[117] handicapped complainants meet this criterion. The second step requires the aggrieved handicapped person to establish that his/her employment interest was impaired. A showing that the handicapped individual was denied an employment opportunity although he/she possessed all the necessary occupational requirements fulfills this criterion for it is clear evidence of a property interest impairment.[118] If the first two steps are satisfied, then the aggrieved party must be afforded a hearing on the constitutionality of his/her deprivation. In order for this constitutional right to be meaningful, the hearing examiner must be impartial.[119] Clearly, procedural due process is not a viable theory if the employer appoints a biased hearing officer. Should that party make an unjustified decision, the handicapped person on appeal would have to demonstrate that this fact-finding determination was wholly unsupported by "compe-

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116. *Id.* at 577. For a comprehensive discussion of *Roth*, *see* Kallen, *The Roth Decision: Does the Nontenured Teacher Have a Constitutional Right to a Hearing Before Nonrenewal?*, 61 ILL. B. J. 464 (1973); Comment, *Due Process and the Non-Tenured Professor: A Comment on Roth and Perry*, 8 GONZ. L. REV. 99 (1972); Note, *Public Employee's Right to a Pre-termination Hearing Under the Due Process Clause*, 48 IND. L. J. 127 (1972); 22 BUFFALO L. REV. 624 (1973); 73 COLUM. L. REV. 882 (1973); 41 FORDHAM L. REV. 684 (1973); 38 MO. L. REV. 279 (1973); 7 U. RICH. L. REV. 357 (1972).

117. For instance, the Kansas Act Against Discrimination provides in part that:

> It is also declared to be the policy of this state to assure equal opportunities and encouragement to every citizen regardless of . . . physical handicap . . . in securing and holding, without discrimination, employment in any field of work or labor for which he is properly qualified . . . .

KAN. STAT. § 44-1001 (Supp. 1976). For examples of other state statutes promulgating similar policies, *see* note 4 *supra*.

118. In effect, the complainant must show that he/she has been the victim of unjustified discrimination. For a general discussion of unjustified discrimination, *see* text accompanying notes 9-11 *supra*.

Although the applicant seeking the governmental benefit usually has the burden of demonstrating eligibility, state employment discrimination laws may reverse this burden so that handicapped persons are presumed qualified. *See, e.g.*, Bucyrus-Erie Co. v. Department of Indus., Labor & Human Relations, 13 Empl. Prac. Dec. 11580 (Wis. Cir. Ct. 1977).

119. There is widespread employer prejudice against handicapped persons. *See* Nathanson, *The Disabled Employee: Separating Myth from Fact*, 55 HARV. BUS. REV. 6,6 (No. 3 1977); *Equal Employment and the Disabled: A Proposal*, 10 COLUM. J. L. SOC. PROB. 457, 458 (1974); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L. J. 1501, 1512 (1973).

tent, substantial, and apparently credible evidence."[120] Because of this heavy burden of proof placed on a party appealing a fact-finder's determination, the handicapped person under these circumstances is likely to have a greater chance of prevailing if he/she had initially brought the suit on equal protection in addition to due process grounds.

The second means of invoking procedural due process is by demonstrating the deprivation of a liberty interest. *Roth* set forth the criteria to be alleged when a deprivation of liberty is asserted. This criteria includes a consideration of whether one's standing in the community was damaged; whether one's good name, reputation, or honor was at stake; and whether any stigma was attached to an alleged deprivation of a governmental benefit.[121] However, because none of these factors are usually present in a handicap discrimination challenge, there is nothing inherent in handicap employment discrimination or the laws proscribing such discrimination which necessarily triggers procedural due process on a liberty interest basis. For instance, in *Spencer v. Toussaint*,[122] the plaintiff, a job applicant with a past medical history of mental illness, claimed that the city's rejection of her application for the position of bus driver deprived her of procedural due process. The court concluded that under the *Roth* liberty interest criteria, no deprivation of liberty existed because there was no evidence that the city's decision imposed on the plaintiff a stigma or other disability which foreclosed her freedom to take advantage of other employment opportunities.[123] In support of this position, the court relied on evidence that the plaintiff subsequently gained employment with the state.[124]

Although the *Spencer* decision is consistent with the Supreme Court's procedural due process approach, this decision could have had a different result under slightly varying facts. First, if the plaintiff had proven that the city's decision imposed a stigma on her, she would have been entitled to a hearing. This could have been established by empirical data demonstrating that employers are extremely

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120. This is the standard which an appealing party must meet to overturn a fact finder's determination. *See* M. GREEN, BASIC CIVIL PROCEDURE 188 n.201 (1972).

121. 408 U.S. at 573.

122. 408 F. Supp. 1067 (E.D. Mich. 1976). For a discussion of the *Spencer* court's equal protection analysis, *see* text accompanying notes 85-86 *supra*.

123. *Id.* at 1072.

124. *Id.* It next held that the plaintiff's property interests were not as great as those of the *Roth* plaintiff, a university professor denied tenure.

reluctant to hire disabled persons.[125] By refusing to hire handicapped persons, it is arguable that employer-stereotyped prejudices are aggravated, thereby stigmatizing handicapped job applicants. However, this argument can only be made if the city's reasons for denying plaintiff employment are made public.[126] A second fact variation that could have triggered procedural due process in *Spencer* was the existence of an articulated public policy against handicap employment discrimination by the state. Had *Spencer* taken place in a jurisdiction which had adopted a broad policy of prohibiting employment discrimination of handicapped persons, the plaintiff would have met the property interest requirement.[127] The plaintiff would then have to establish that she possessed all the necessary occupational requirements. Under some state laws this would be sufficient to establish unjustified discrimination.[128] Otherwise, the plaintiff would have to show that she was rejected on the basis of her former disability. This she could easily do because the city notified her in writing that she was rejected for medical reasons. Had the plaintiff established this in such a jurisdiction the court would then be required to grant her a hearing.

2. *The Irrebuttable Presumption Doctrine*

The second potential due process challenge to public employment discrimination of handicapped persons is the validity of the irrebuttable presumption that handicapped persons are incapable of performing certain jobs. An irrebuttable presumption is created when a governmental body states that an actual fact or set of circumstances is conclusive evidence of a presumed fact and forbids the introduction of evidence to refute this presumption.[129] The Supreme Court uses a

125. A study analyzing handicap prejudice indicated that personnel directors prefer to hire former prison inmates to epileptics. Rickard, Triandis, & Patterson, *Indices of Employer Prejudice Toward Disabled Applicants*, 47 J. APPLIED PSYCH. 52 (1963).

126. The Supreme Court in Bishop v. Woods, 426 U.S. 341 (1976) clarified the *Roth* criteria, holding that one is not deprived of liberty interests in employment unless the reasons for denial of employment are made public. For an extensive discussion of *Bishop*, *see* Note, *A Constitutional Interest in Public Employment: The Last Hurrah?—Bishop v. Woods*, 26 DEPAUL L. REV. 631 (1977).

127. The *Spencer* plaintiff's application was rejected by the City of Detroit in 1973, four years before Michigan guaranteed equal employment opportunity for handicapped persons. *See* MICH. STAT. ANN. §§ 37.1101-.1208 (Supp. 1977). However, the Michigan statutory definition of handicap does not include temporary mental illness. *See* MICH. STAT. ANN. § 37.1103(b) (Supp. 1977). Thus, the statute would not have established a property interest for the plaintiff.

128. *See* note 118 *supra*.

129. *See generally* Note, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur*, 62 GEO. L. J. 1173 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

three-step process in irrebuttable presumption cases. First, it determines whether the doctrine is applicable. Second, if the doctrine applies, the Court subjects the challenged presumption to rigorous scrutiny for constitutional defects. Third, if the Court finds that the presumption is not true in fact, the complainant is granted a hearing.[130]

The Supreme Court has not clearly designated what invokes the application of a strict scrutiny in analyzing irrebuttable presumptions. It has invoked this level of scrutiny to analyze the validity of conclusive presumptions of presumed out-of-state residency of college students who were non-residents at the time of application;[131] the supposed unfitness of an unwed father to be a parent;[132] the presumed lack of need of food stamps in households which included a member who was at least eighteen years old and was claimed as a dependent child by a taxpayer who was not a member of a household eligible to receive food stamps;[133] and the supposed physical incompetency of school teachers who were three months pregnant.[134] On the other hand, the Court has refused to apply irrebuttable presumption scrutiny to a presumption that a person marrying a wage earner who died within nine months of marriage was presumed to have entered into matrimony for the purpose of receiving social security benefits.[135]

Several explanations have been offered to explain the basis of the Court's distinctions. First, it has been asserted that this strict test is invoked when life, liberty, or property interests are at stake.[136] This

130. *See generally* Weinberger v. Salfi, 422 U.S. 749 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Department of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

131. Vlandis v. Kline, 412 U.S. 441 (1973).

132. Stanley v. Illinois, 405 U.S. 645 (1972).

133. Department of Agriculture v. Murry, 413 U.S. 508 (1973).

134. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

135. Weinberger v. Salfi, 422 U.S. 749 (1975).

136. *See* Spencer v. Toussaint, 408 F. Supp. 1067, 1072 (E.D. Mich. 1976). This explanation accounts for the application of the doctrine in family relations cases. Language used in these cases lends support for this explanation. For instance, in Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam), the Court voided a statute which declared pregnant women ineligible for employment compensation benefits for twelve weeks prior to and six weeks after childbirth. The Court relied exclusively on Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) as controlling precedent noting that *LaFleur*, an irrebuttable presumption case, concerned " 'freedom of personal choice in matters of marriage and family life' " which is protected under the due process clause. 423 U.S. 44, 46. The Court has since relied on another irrebuttable presumption case, Stanley v. Illinois, 405 U.S. 645 (1972), to support the contention that the privacy of family relations is entitled to procedural due process protection. Mathews v. Lucas, 427 U.S. 495, 504 n. 8 (1976) (dictum). This explanation also explains the use of the stricter test in Department of Agriculture v. Murry, 413 U.S. 508 (1973), a food

explanation requires courts to make the same determinations as are made under procedural due process claims.[137] Additionally, irrebuttable presumption analysis has been used when the presumptions involve substantive rules embedded in once prevalent attitudes which have become outdated.[138] But this explanation sets forth no objective criteria by which courts can determine whether irrebuttable presumption scrutiny is appropriate.[139] Thirdly, the irrebuttable presumption doctrine has been held to apply only to cases which do not involve social security benefits.[140] This interpretation is based on the factual distinction between the Supreme Court case analyzing the Social Security Act presumption of good faith matrimony and the other Supreme Court irrebuttable presumption decisions.[141]

Under the latter two explanations, handicapped persons who have been the victims of unjustified employment discrimination are virtually assured irrebuttable presumption review. Handicapped persons can establish that general attitudes regarding their inability to successfully undertake employment are unfounded and, therefore, no longer command general assent.[142] They should be afforded irrebuttable presumption scrutiny under the third explanation because employment should be given a higher standard of review than social security.

The Federal Court of Appeals for the Third Circuit determined that the irrebuttable presumption test was applicable in *Gurmankin v. Costanzo*,[143] a case challenging a school district's policy of refusing blind job applicants the opportunity to take a teacher's examination.

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stamps case. For some, food stamps are a necessary means of subsistence, and thus a life interest. However, this theory does not explain why the irrebuttable presumption test should be used to scrutinize residency requirements.

137. The *Spencer* court adopted this view and rejected the plaintiff's irrebuttable presumption claim on the same basis that it rejected her procedural due process challenge. 408 F. Supp. at 1072-73. *See* text accompanying notes 122-24 *supra*.

138. *See* Tribe, *From Environmental Foundations to Constitutional Structures: Learning From Nature's Future*, 84 YALE L.J. 545, 553-54 (1975).

139. This theory implies that the doctrine is merely a disguise for substantive due process. Several members of the Court have maintained this position. *See* Vlandis v. Kline, 412 U.S. 441, 455 (1973) (Rehnquist, J. dissenting joined by Burger, C.J. and Douglas, J.). For a discussion of substantive due process, *see* note 89 *supra*.

140. *See* Gurmankin v. Costanzo, 556 F.2d 184, 187 n.5 (3d Cir. 1977).

141. *Compare* Weinberger v. Salfi, 422 U.S. 749 (1975) (social security classification denied rigid scrutiny) *with* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (employment policy afforded rigid scrutiny).

142. *See* Nathanson, *The Disabled Employee: Separating Myth from Fact*, 55 HARV. BUS. REV. 6 (No. 3 1977); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L. J. 1501, 1512 (1973).

143. 556 F.2d 184 (3d Cir. 1977).

The *Gurmankin* court relied on the Supreme Court case of *Cleveland Board of Education v. LaFleur*[144] to demonstrate the applicability of the doctrine. *LaFleur* held that mandatory leaves for pregnant teachers five months before childbirth created an unconstitutional irrebuttable presumption of physical incompetency to teach. The *Gurmankin* court ruled that the plaintiff, a blind job applicant, was in a position analogous to the pregnant teachers in *LaFleur*, and likewise was denied the opportunity to refute the presumption that she was physically incompetent to teach.[145]

Once a court finds that irrebuttable presumption review is appropriate, it engages in a form of review similar to that of equal protection strict scrutiny to determine whether the government's interest in having the permanent irrebuttable presumption is justified. In handicap employment discrimination cases, the court must decide whether the presumption that individuals with a certain handicap are not competent to perform a particular job is correct.[146] Once the court determines that the state has created an unconstitutional irrebuttable presumption, then as in procedural due process, it grants the handicapped complainant a hearing. In *Gurmankin* the court examined the school district's presumption that blind persons could not be competent teachers of sighted children. After granting a hearing, the court ruled that this presumption was unjustified because expert testimony established that many blind persons can overcome their disability to

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144. 414 U.S. 632 (1974).

145. 556 F.2d at 187. The *Gurmankin* court distinguished Weinberger v. Salfi, 422 U.S. 749 (1975), a U.S. Supreme Court social security benefits case in which the Court refused to apply the irrebuttable presumption doctrine to a conclusive statutory presumption. The *Gurmankin* court held that *LaFleur* rather than *Salfi* controlled because *Salfi* is a government benefits case, therefore deserving lesser review while *LaFleur* and *Gurmankin* concern employment. 556 F.2d at 187 n.5.

146. That presumption, however, may be changed by operation of law. In some jurisdictions, employers are required to make "reasonable accommodation" for handicapped persons. *See, e.g.*, 41 C.F.R. § 60-741.6(a) (1977); D.C. CODE ENCYCL. § 1.1 (West 1975); MICH. STAT. ANN. § 37.207 (Supp. 1977); MONT. ADMIN. CODE § 64-306(1)(a) (Supp. 1975); ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION, GUIDELINES ON DISCRIMINATION IN EMPLOYMENT § 3.2(D) (1976). The presumption in such jurisdictions is more easily refuted. The advocate for the handicapped person need only present evidence proving the invalidity of the presumption that individuals with a certain handicap are incapable of performing a particular job *when given reasonable accommodation by the employer.* However, because the meaning of "reasonable accommodation" has not been precisely determined, the perimeters of this implied in law presumption are unknown. *See generally* Note, *Lowering the Barriers to Employment of the Handicapped: Affirmative Action Obligations Imposed on Federal Contractors*, 81 DICK. L. REV. 174, 183-84 (1976); Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L. REV. 785, 813-17 (1976).

become average or better than average teachers, noting that over four hundred blind persons nationally are teaching.[147]

However, when one's handicap is directly related to job performance, this analysis has reached an opposite result. For instance, in *Coleman v. Darden*[148] a federal district court found that the irrebuttable presumption that blind persons cannot perform the job of legal research assistant was justified. The *Coleman* court concluded that sufficient visual acuity was an occupational requirement which bore a direct relationship to the duties of the job.[149] The irrebuttable presumption test, like strict scrutiny, will sustain employment discrimination if such discrimination is justified.

CONCLUSION

There are a number of reasons the advocate for a handicapped person should assert constitutional theories to challenge public employment discrimination.[150] First, state and federal administrative remedies have proven to be unsatisfactory.[151] Second, attorney's fees are recoverable.[152] Third, administrative remedies need not be exhausted to assert a constitutional claim.[153] Finally, courts have broad equitable powers to remedy infringements of constitutional rights.[154]

The receptiveness of the judiciary to handicap employment discrimination claims should be enlightening to the integrationist. Handicapped persons, as a class, can now successfully challenge unjustified acts by way of intermediate scrutiny, procedural due process,

147. This was the determination of the district court. Gurmankin v. Costanzo, 411 F. Supp. 982, 986 (E.D. Pa. 1976) *aff'd* 556 F.2d 184 (3d Cir. 1977).

148. 13 Empl. Prac. Dec. 6788 (D. Colo. 1977).

149. *Id.* at 6789.

150. One commentator has argued that statutory claims should be joined with constitutional challenges for tactical reasons. Constitutional theories speak of "suspect classes" and "invidious discrimination." According to this viewpoint, such language can invoke judge sympathy for the complainant. Workshop presentation in Chicago, Illinois (April 14, 1978) by Jonathan Stein, Director, Community Legal Services.

151. *See* note 5 *supra*.

152. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C.A. § 1988 (Supp. 1977) provides: "In any action or proceeding to enforce a provision of [section] . . . 1983 . . . of this title, [the jurisdictional means of vindicating constitutional rights] . . . , the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

153. Courts have carved an exception to the "exhaustion of administrative remedies" doctrine for plaintiffs raising constitutional claims. *Id. See, e.g.*, Bio-Medical Laboratories, Inc. v. Trainer, 68 Ill.2d 540, 548, 370 N.E.2d 223, 227 (1977); Walker v. State Bd. of Elections, 657 Ill.2d 543, 552, 359 N.E.2d 113, 117 (1976).

154. Stein, note 150 *supra*. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

and the irrebuttable presumption doctrine. Three subclasses of handicapped individuals can challenge such discrimination by means of strict scrutiny. As a result, the public work force may soon be integrated with qualified handicapped persons.

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