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"There is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence

Cover Page Footnote

Professor of Law, Fordham University School of Law. I prepared this article for the Conference on The Jurisprudence of Justice Stevens, Fordham University School of Law, September 30-October 1, 2005.

“THERE IS ONLY ONE EQUAL PROTECTION CLAUSE”: AN APPRECIATION OF JUSTICE STEVENS’S EQUAL PROTECTION JURISPRUDENCE

*James E. Fleming**

INTRODUCTION

“There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”¹ These words open Justice John Paul Stevens’s famous concurring opinion in *Craig v. Boren*.² That was the first case in which the U.S. Supreme Court applied “intermediate” scrutiny to gender-based classifications and thus carved out a third tier of equal protection analysis between strict scrutiny and deferential rational basis scrutiny. *Craig* was decided in 1976, at the beginning of Justice Stevens’s long and distinguished tenure on the Supreme Court. With these words, he served notice that he was an independent thinker and that he was to be, in Professor Kathleen Sullivan’s apt formulation, a “justice of standards” as distinguished from a “justice of rules.”³

When I first read Justice Stevens’s words, I was puzzled by them. I had just begun to study constitutional law in a systematic way. I yearned for rigid rule frameworks as much as the next person who has just begun to study the subject. And I was distrustful of general standards, all-things-considered judgments, and balancing approaches in constitutional interpretation and doctrine. I wondered what Justice Stevens could possibly mean and what could possibly drive him to criticize the three-tier framework. I similarly wondered what was eating Justice Thurgood Marshall in his dissents in *Dandridge v. Williams*⁴ and *San Antonio v. Rodriguez*, where he similarly objected to rigid two-tier analysis and argued

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1. *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring).

2. *Id.*

3. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992).

4. 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

that we instead have a “spectrum of standards.”⁵ But over the years, I have come to see the wisdom in Justice Stevens’s words as well as in Justice Marshall’s critique. And so, I offer the following remarks, in terms of my title, as “an appreciation of Justice Stevens’s equal protection jurisprudence.”

I. WHAT DOES JUSTICE STEVENS MEAN WHEN HE SAYS “THERE IS ONLY ONE EQUAL PROTECTION CLAUSE”?

What does Justice Stevens mean when he says, “There is only one Equal Protection Clause”? I shall interpret his statement as making two important jurisprudential exhortations.⁶ First, Justice Stevens is making the exhortation that, to paraphrase Chief Justice John Marshall in *McCulloch v. Maryland*, “[W]e must never forget, that it is a constitution [not a doctrinal framework] we are expounding.”⁷ Put another way, Stevens is admonishing that in elaborating complex doctrinal frameworks, the Supreme Court should not lose sight of its obligation to make normative judgments about the meaning of our constitutional commitments.⁸ On this view, Stevens is worried that the Court is forgetting the Constitution and indulging the lawyerly yen to develop a complex doctrinal framework. Why might the Court do this? Because justices may think they can avoid making difficult normative judgments about the meaning of our constitutional commitments by making more mundane decisions about what tier of analysis applies to a given case, which in turn automatically decides the case. Worse yet, they may use doctrinal frameworks to obfuscate the need for, and the fact of, normative judgments that cannot be reduced to the application of bright-line rules. This is not to say that we should not have doctrine; it is just that it should not take the place of making judgments in elaborating our constitutional commitments.

Second and related, Justice Stevens is making an exhortation about the form or structure that doctrine should take: standards, not bright-line or rigid rules. Again, as Sullivan put it, he is the quintessential “justice of standards” as contrasted with “justices of rules.”⁹ I should note that this is a general feature of Justice Stevens’s jurisprudence. For example, he might just as well have written, in a number of cases applying the complex

5. *San Antonio v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

6. Justice Stevens’s statement also encapsulates a normative vision of equal protection, centering on impartiality, rationality, and legitimacy. For insightful works explicating and building upon his conception, see Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481 (2004); Note, *Justice Stevens’ Equal Protection Jurisprudence*, 100 Harv. L. Rev. 1146 (1987).

7. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

8. Cf. Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 Fordham L. Rev. 2339 (arguing that Justice Stevens is calling for “unmediated constitutional interpretation”).

9. Sullivan, *supra* note 3, at 88.

doctrinal framework for freedom of expression, that "there is only one First Amendment."¹⁰

What does Justice Stevens not mean when he says, "There is only one Equal Protection Clause"? Here I want to distinguish three things that Stevens might mistakenly be interpreted to mean. First, he does not mean that we should go back to the days before *Korematsu v. United States*¹¹ and *Skinner v. Oklahoma*¹²—that is, before the Court established strict scrutiny for laws embodying suspect classifications and impinging on fundamental rights, respectively—and apply only one standard, deferential rational basis scrutiny, to all categories of cases. Those were the days, respectively, of *Plessy v. Ferguson*¹³ and *Buck v. Bell*.¹⁴ Less provocatively, those were the days of *Lindsley v. Natural Carbonic Gas Co.*: "A classification having some reasonable basis does not offend against [the Equal Protection Clause] merely because it is not made with mathematical nicety or because in practice it results in some inequality."¹⁵

Second, nor does Justice Stevens mean that, prospectively, we should apply one standard, enhanced rational basis scrutiny, to all categories of cases.¹⁶

Third, he is not saying the same thing as then-Justice William H. Rehnquist said in dissent in *Craig*. Rehnquist objected that "[t]he Equal Protection Clause contains no such language"¹⁷ as *Craig*'s doctrinal formulations for intermediate scrutiny of gender-based classifications: Nowhere does the Constitution say "important governmental objectives" or "substantially related to achievement of those objectives."¹⁸ But, the last time I checked, the Constitution contained no such language as that expressed in the doctrinal test that Rehnquist proposed for gender-based classifications: a rational basis test,¹⁹ which would employ language such as "legitimate governmental objectives" and "rationally related to achievement of those objectives." Come to think of it, nor does the Constitution contain the words "compelling governmental objectives" or "necessary" or "narrowly tailored" to achievement of those objectives.

10. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 416 (1992) (Stevens, J., concurring in the judgment); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (Stevens, J., dissenting).

11. 323 U.S. 214 (1944).

12. 316 U.S. 535 (1942).

13. 163 U.S. 537 (1896).

14. 274 U.S. 200 (1927).

15. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

16. Here I disagree with the interpretation of Justice John Paul Stevens's equal protection jurisprudence set forth in Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. Contemp. L. 475, 478 (1997) ("Justice Stevens has long advocated an enhanced rational basis inquiry as the only test required under the Equal Protection Clause.").

17. *Craig v. Boren*, 429 U.S. 190, 220 (1976) (Rehnquist, J., dissenting).

18. *Id.* at 197.

19. *Id.* at 217-18.

Indeed, the Constitution does not contain the exact language of any doctrine. Rehnquist's objection, if taken seriously, would spell the end of all constitutional doctrine, including Rehnquist's own! Stevens, unlike Rehnquist, is not objecting that the Court is making it up rather than simply applying the Constitution. Moreover, Stevens, unlike Rehnquist, is not objecting to applying any searching scrutiny to gender-based classifications.

II. HOW MANY EQUAL PROTECTION CLAUSES ARE THERE?

Let's have a pop quiz. This is a pedagogic exercise I use in my Constitutional Law class at the end of our section on the Equal Protection Clause.

How many Equal Protection Clauses are there?

- (a) One
- (b) Two
- (c) Three
- (d) Four
- (e) Five
- (f) Six
- (g) All of the above
- (h) None of the above

I ask my students, "What is the best argument for each answer?" At the end, I ask, "Was Justice Stevens right after all?" Is "[t]here . . . only one Equal Protection Clause,"²⁰ with a "continuum of judgmental responses"?²¹ I also ask, "Was Justice Marshall right after all?" Instead of a rigid two-tier or three-tier framework, do we have a "spectrum of standards?" I want to go through this exercise here. In doing so, I will use and flesh out the following graphic illustration of the Equal Protection doctrinal framework.

20. *Id.* at 211 (Stevens, J., concurring).

21. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

Strict Scrutiny
Loving;²² *Skinner*

↓

 Strict scrutiny is not "strict in theory, but fatal in fact"
Adarand; *Grutter*

Intermediate Scrutiny
Craig

↑ "Exceedingly persuasive justification"
United States v. Virginia

Deferential rational basis scrutiny
Williamson

 ↑ Rational basis scrutiny with "bite"
Cleburne; *Plyler*; *Romer*

What is the best argument that the answer is "one"? Well, that is Justice Stevens's argument, made originally in *Craig* and elaborated in *City of Cleburne v. Cleburne Living Center, Inc.*²³ What is his argument? Again, in *Craig*, Justice Stevens argued that "[t]here is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."²⁴ Stevens continued,

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.²⁵

In *Cleburne*, Justice Stevens elaborated, "In fact, our cases have not delineated three—or even one or two—such well-defined standards. Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other."²⁶

22. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

23. *Cleburne*, 473 U.S. at 451 (Stevens, J., concurring).

24. *Craig*, 429 U.S. at 211-12 (Stevens, J., concurring).

25. *Id.* at 212.

26. *Cleburne*, 473 U.S. at 451 (Stevens, J., concurring).

We should also observe that a different version of the answer "one" was the Supreme Court's own answer, prior to its recognition of the suspect classifications strand of equal protection analysis in *Korematsu v. United States*²⁷ and its recognition of the fundamental rights strand in *Skinner v. Oklahoma*,²⁸ each of which triggers strict scrutiny.

What is the best argument for "two"? That was the best answer before *Craig*, and in fact was the answer given by the Supreme Court in cases like *Dandridge v. Williams*²⁹ and *San Antonio v. Rodriguez*.³⁰ What are the two standards or tiers? Strict scrutiny whenever a law rests upon a "suspect classification" or impinges upon a "fundamental right or interest." First, there is strict scrutiny of the end: The law must be justifiable as furthering a compelling governmental objective. Second, there is strict scrutiny of the fit between that end and the law considered as a means to further it: The law must be necessary or narrowly tailored to further such an objective. Otherwise, the court applies deferential rational basis scrutiny of the end (merely requiring that the law be justifiable as furthering a legitimate governmental objective) and of the fit between that end and the means (merely requiring that the law be rationally related to furthering such an objective).

It was the Court's decisions in *Dandridge* and *Rodriguez* that prompted Justice Marshall to dissent against rigid two-tier analysis and to offer his alternative, a spectrum of standards or sliding scale. In *Rodriguez*, Marshall wrote,

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions . . . defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued³¹

In *Dandridge*, Marshall had written,

In my view, equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the

27. 323 U.S. 214, 216 (1944).

28. 316 U.S. 535, 541-42 (1942).

29. 397 U.S. 471 (1970).

30. 411 U.S. 1 (1973).

31. *Rodriguez*, 411 U.S. at 98-99 (Marshall, J., dissenting) (citing *Dandridge*, 397 U.S. at 520-21).

classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.³²

What is the best argument for "three"? That is the best answer as of *Craig* (1976), and in fact is the answer given by the Supreme Court in *Craig*. What is the third standard or tier? Intermediate scrutiny for gender-based classifications: "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."³³ In *Mississippi University for Women v. Hogan*, the Court reaffirmed this formulation for gender-based classifications but also used the formulation "exceedingly persuasive justification."³⁴ (Subsequently, the Court evidently also applied intermediate scrutiny to classifications based on "illegitimacy" (or directed at nonmarital children)³⁵ and, for a time, to affirmative action measures approved by Congress.³⁶) Remember, it was *Craig*'s articulation of an intermediate tier between strict scrutiny and deferential rational basis scrutiny that prompted Justice Stevens to concur, arguing against rigid three-tier analysis and insisting that there is only one Equal Protection Clause.

What is the best argument for "four"? Well, that is the best answer as of *Cleburne* (1985), though that is not the answer officially given by the Supreme Court in that case. (The Court officially adheres to a three-tier framework.) There the Court invalidated a zoning ordinance as applied to a group home for mentally retarded persons.³⁷ What is the unofficial fourth standard or tier? It is rational basis scrutiny with "bite," as contrasted with the deferential rational basis scrutiny exemplified by *Williamson v. Lee Optical*.³⁸ What does the "bite" consist of? The answer is a somewhat more searching inquiry into both end and fit between means and end.³⁹ First, as for the end, instead of simply deferring—*Williamson*-style—to asserted governmental objectives as unquestionably legitimate, the Court inquires whether they reflect animus or private biases or a "bare . . . desire to harm a politically unpopular group" and thus are not legitimate.⁴⁰ Second, with respect to fit between means and end, instead of simply

32. *Dandridge*, 397 U.S. at 520-21 (Marshall, J., dissenting) (citations omitted).

33. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

34. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

35. *Clark v. Jeter*, 486 U.S. 456 (1988).

36. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

37. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

38. 348 U.S. 483 (1955).

39. *Cleburne*, 473 U.S. at 446-50. For analysis of how cases like *Cleburne* manifest a form of scrutiny that might be called "rational basis with 'bite,'" see Walter F. Murphy, James E. Fleming, Sotirios A. Barber & Stephen Macedo, *American Constitutional Interpretation* 1016-19 (3d ed. 2003).

40. *Cleburne*, 473 U.S. at 447-48 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

deferring—*Williamson*-style—because the legislature might have thought that the law is rationally related to furthering a legitimate governmental objective, the Court inquires whether the law actually does further such an objective.⁴¹ Two other notable cases exemplifying such an unofficial fourth tier are *Plyler v. Doe*,⁴² invalidating a law denying education to children of illegal aliens, and *Romer v. Evans*,⁴³ invalidating a state constitutional amendment forbidding measures that protected homosexuals against discrimination. The Court's opinion in *Cleburne* prompted Justice Stevens to concur and to elaborate his argument that "[t]here is only one Equal Protection Clause."⁴⁴ It also prompted Justice Marshall to concur in the judgment in part and dissent in part.⁴⁵

What is the best argument for "five"? That is the best answer as of *Adarand Constructors, Inc. v. Peña*⁴⁶ (1995), though again, that is not the answer officially given by the Supreme Court in that case. There, the Court held that strict scrutiny applies to racial classifications embodied in affirmative action programs.⁴⁷ What is the unofficial fifth standard or tier? Well, hitherto, strict scrutiny for racial classifications had been said, in Professor Gerald Gunther's famous words, to be "'strict' in theory and fatal in fact."⁴⁸ In *Adarand*, Justice Sandra Day O'Connor's opinion for the Court officially applies strict scrutiny.⁴⁹ But she was at pains to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"⁵⁰ She wrote: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."⁵¹ Thus, she gave notice that some affirmative action programs might survive strict scrutiny.

In dissent, Justice Stevens remarked as follows: "The Court suggests today that 'strict scrutiny' means something different—something less strict—when applied to benign racial classifications."⁵² More fully, he wrote,

41. *Id.* at 447-50.

42. 457 U.S. 202 (1982).

43. 517 U.S. 620 (1996).

44. *Craig v. Boren*, 429 U.S. 190, 211-12 (1976); *see also Cleburne*, 473 U.S. at 451 (Stevens, J., concurring).

45. *Cleburne*, 473 U.S. at 455 (Marshall, J., concurring in the judgment in part and dissenting in part).

46. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

47. *Id.*

48. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). Justice Thurgood Marshall used Gunther's words in concurrence in *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment).

49. *Adarand*, 515 U.S. at 200.

50. *Id.* at 237.

51. *Id.*

52. *Id.* at 243 n.1 (Stevens, J., dissenting).

As Justice Ginsburg observes . . . the majority's "flexible" approach to "strict scrutiny" may well take into account differences between benign and invidious programs. . . .

Even if this is so, however, I think it is unfortunate that the majority insists on applying the label "strict scrutiny" to benign race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. . . . Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis and place well-crafted benign programs at unnecessary risk.⁵³

Justice O'Connor's words were vindicated in her opinion of the Court in *Grutter v. Bollinger* (2003), upholding University of Michigan Law School's affirmative action program.⁵⁴ There she reiterated that "strict scrutiny is not 'strict in theory, but fatal in fact.'"⁵⁵ She added, "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."⁵⁶ Her opinion also spoke of deferring to the Law School's educational judgment as well as deferring to a university's academic decisions, formulations that sound decidedly more deferential than the language we typically associate with strict scrutiny.⁵⁷

Justice O'Connor's opinion in *Grutter* prompted Chief Justice Rehnquist and Associate Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas to protest in dissent that the Court had abandoned strict scrutiny.⁵⁸ When it comes to affirmative action programs, they wanted strict scrutiny indeed to be automatically fatal in fact. Arguably, in their view, the Court was squeezing out a less strict form of strict scrutiny lying somewhere between strict scrutiny and intermediate scrutiny.

What is the best argument for "six"? That is the best answer as of *United States v. Virginia*⁵⁹ (1996), although again that is not the official answer given by the Supreme Court in that case. There the Supreme Court held that the Virginia Military Institute's exclusion of women violated the Equal Protection Clause.⁶⁰ What is the unofficial sixth standard or tier? Officially, Justice Ruth Bader Ginsburg's opinion applies the same intermediate scrutiny standard to gender-based classifications that the Court had established in *Craig* and reaffirmed in *Hogan*.⁶¹ But Justice Ginsburg picks up on the phrase "exceedingly persuasive justification" from Justice

53. *Id.* (citations omitted).

54. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (quoting *Adarand*, 515 U.S. at 237).

55. *Id.* at 326.

56. *Id.* at 326-27.

57. *Id.* at 328-29.

58. *Id.* at 379-80 (Rehnquist, C.J., dissenting); *id.* at 387 (Kennedy, J., dissenting); *id.* at 348 (Scalia, J., concurring in part and dissenting in part); *id.* at 350, 362 (Thomas, J., concurring in part and dissenting in part).

59. 518 U.S. 515 (1996).

60. *Id.*

61. *Id.* at 533.

O'Connor's opinion in *Hogan*.⁶² And "exceedingly persuasive justification" may sound stricter than intermediate scrutiny, even if not as strict as strict scrutiny.

This prompted Justice Scalia in dissent to object that Justice Ginsburg in effect was applying strict scrutiny.⁶³ Now, it is well known that as a law professor and as a litigator, Ginsburg had argued for applying strict scrutiny to gender classifications. Indeed, she almost succeeded: A plurality of four justices endorsed that approach in a case she litigated, *Frontiero v. Richardson*.⁶⁴ But a majority never adopted strict scrutiny, instead adopting intermediate scrutiny in *Craig*.⁶⁵ In *United States v. Virginia*, Scalia clearly suspects that Justice Ginsburg is applying strict scrutiny under the guise of applying intermediate scrutiny.⁶⁶

What is the best argument for "all of the above"? As I hope I have shown, there is an argument for each of the above answers. Otherwise, my pedagogic exercise has failed.

What is the best argument for "none of the above"? Is there in fact a good argument for this choice? Or am I simply being a perversely and pedantically complete professor in giving it as a choice? Seriously, the argument for "all of the above" may also be an argument for "none of the above." After all, on the "all of the above" view, none of the above is definitively the best answer.

What does this pedagogic exercise teach us about the Equal Protection Clause?

(a) That equal protection jurisprudence is a jumble?

(b) That Justice Stevens was right after all? That there is only one Equal Protection Clause, with a "continuum of judgmental responses" instead of three clearly defined tiers? And that doctrinal developments since *Craig* and *Cleburne* have borne out the wisdom of his argument?

(c) That Justice Marshall was right after all? That there is a spectrum of standards instead of two or three rigid tiers? And again, that doctrinal developments since *Rodriguez* have shown the wisdom of his conception?

(d) All of the above?

62. *Id.* at 531.

63. *Id.* at 566, 570-71 (Scalia, J., dissenting).

64. 411 U.S. 677, 682 (1973) (plurality opinion).

65. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

66. See *United States v. Virginia*, 518 U.S. at 566 (Scalia, J., dissenting). I should also note that in some cases the Supreme Court officially applied intermediate scrutiny to gender-based classifications, but seemed to apply more deferential scrutiny. See, e.g., *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981); *Rostker v. Goldberg*, 448 U.S. 1306 (1980).

CONCLUSION: BOTH JUSTICE STEVENS AND JUSTICE MARSHALL WERE
RIGHT AFTER ALL

Now, it might seem that the moral of my story (the pop quiz pedagogic exercise) is that Justice Marshall, not Justice Stevens, was right after all. Again, Stevens says, "There is only one Equal Protection Clause," whereas Marshall says we have a "spectrum of standards." And my exercise seems to suggest not that there is only one Equal Protection Clause, but rather that there is a spectrum of standards!

But I want to suggest that Justice Stevens's view is more similar to Justice Marshall's view than this contrast suggests. First, let us remember that Stevens is the quintessential justice of standards, as distinguished from a justice of rules, and so Justice Marshall's talk about a spectrum of standards should be music to his ears. Second, let us recall that Stevens opens his concurrence in *Cleburne* by arguing that instead of tracking three clearly defined tiers, "our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other."⁶⁷ At this point, he drops a footnote with a "*cf.*" citation to Justice Marshall's dissent in *Rodriguez*, wherein Marshall articulates his formulation about a "spectrum of standards."⁶⁸ And Justice Stevens gives a list of bases of classification that don't clearly fit into any particular tier.⁶⁹ Today, as my pop quiz pedagogic exercise has shown, the argument that Justice Stevens is right is even stronger than it was in 1976 (when *Craig* was decided) or 1985 (when *Cleburne* was decided).

And so, let me conclude by stating that both Justice Stevens and Justice Marshall were right after all: There is only one Equal Protection Clause, with a "continuum of judgmental responses" or a "spectrum of standards."

67. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451 (1985).

68. *Id.* at 451 n.3.

69. *Id.* at 451-52.

Notes & Observations