Flag of Convenience: Substituting Void-for-Vagueness Doctrine for Equal Protection Analysis in *Manning v. Caldwell*[*]

In the 2019 case Manning v. Caldwell*, the Fourth Circuit considered the constitutionality of a Virginia statutory scheme that allowed "habitual drunkards" to be civilly interdicted. Plaintiffs argued that this scheme had been used to repeatedly jail and prosecute homeless alcoholics. Setting aside arguments under due process and equal protection, the Fourth Circuit instead raised the void-for-vagueness doctrine to hold the scheme unconstitutional.*

This Recent Development provides the equal protection analysis that the Fourth Circuit strategically circumvented by using the void-for-vagueness doctrine. That analysis requires discriminatory intent in the initial passage of a facially neutral law to trigger heightened scrutiny. A review of the history of the challenged statutory scheme shows that the plaintiffs likely would have failed to meet this burden.

In circumventing equal protection analysis, the Fourth Circuit illustrates a failing in current equal protection doctrine—that the requirement of showing discriminatory intent in the initial passage of a law is too high a bar and can lead to paradoxical results, especially when application of a facially neutral law has changed over time. In response, this Recent Development proposes a lower evidentiary bar when plaintiffs have credibly alleged disparate impact, but the challenged statute lacks sufficient legislative history. Although not guaranteeing plaintiffs a win, or even heightened scrutiny, the proposal would at least give plaintiffs a fighting chance.

INTRODUCTION

During the War of 1812, American ships in the Atlantic often sailed under Portuguese flags.[1] Flying a flag of convenience, as the practice became known, was a strategic decision to avoid detection and detention of sailors by a British Royal Navy unafraid of American naval power.[2] By simply replacing the American flag with Portuguese colors, American ships could bypass blockades, sail past their British foes undetected, and avoid impressment of their crew.

In *Manning v. Caldwell*,[3] the Fourth Circuit chose to fly its own flag of convenience by raising the void-for-vagueness doctrine to avoid applying the

1. *See* Tina Shaughnessy & Ellen Tobin, *Flags of Inconvenience: Freedom and Insecurity on the High Seas*, J. INT'L L. & POL'Y, 2006–2007, at 1, 16.

2. *See id.*

3. 930 F.3d 264 (4th Cir. 2019) (en banc).

Equal Protection Clause. The court considered a challenge to a Virginia scheme allowing civil interdiction of "habitual drunkards," who were then subject to enhanced criminal penalties for alcohol-related offenses.[4] Setting aside arguments under the Equal Protection and Due Process Clauses, the Fourth Circuit instead raised the void-for-vagueness doctrine sua sponte.[5] The void-for-vagueness doctrine originated as a common-law rule implied under the Due Process Clause of the Fourteenth Amendment and requires that criminal offenses be defined clearly so ordinary people would understand what conduct is prohibited and, specifically, so arbitrary and discriminatory enforcement of those offenses is not encouraged.[6] Sailing under the colors of the void-for-vagueness doctrine, the Fourth Circuit found the term habitual drunkard to be "unconstitutionally vague"[7] and to "invite arbitrary enforcement."[8]

This Recent Development analyzes that application of the void-for-vagueness doctrine, positing that the Fourth Circuit used it to circumvent ruling against the sympathetic plaintiffs' losing equal protection argument. Notwithstanding the Fourth Circuit's analysis, an exploration of the plaintiffs' losing argument in *Manning* reveals the counterintuitive results under current equal protection doctrine, which often departs from the aims of providing equal protection of the law. In response, this Recent Development suggests a modification of how courts treat claims of disparate impact under facially neutral laws with a dearth of legislative history which, while fitting with existing precedent, would provide plaintiffs with a chance of success.

This Recent Development's analysis is divided into four parts. Part I discusses the relevant facts of *Manning*. Part II provides the legislative history of the statute considered by the Fourth Circuit in *Manning*. Part III analyzes *Manning* under the Equal Protection Clause in light of this history. Part IV proposes a reinterpretation of equal protection analysis that would obviate the need to substitute void-for-vagueness doctrine for equal protection.

4. *Id.* at 268.

5. *Id.* at 271–72.

6. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

7. *Manning*, 930 F.3d at 274.

8. *See id.* at 276 (finding that the Commonwealth's argument that a habitual drunkard is someone who "causes harm to other persons or their community" leaves the definition to the "subjective view of judges and law enforcement officials").

I. RAISING THE FLAG: THE RELEVANT FACTS OF *MANNING*

In March 2016, four homeless people[9] suffering from alcoholism brought suit against the City of Roanoke, Virginia.[10] These individuals alleged that the city used a Virginia statutory scheme to repeatedly prosecute them based on their status as vulnerable alcoholics.[11] Under section 4.1-333(A) of the Code of Virginia ("section 4.1-333(A)"), courts were permitted to enter a civil interdiction order to prohibit the sale of alcoholic beverages to individuals who had "shown [themselves] to be a habitual drunkard."[12] The term habitual drunkard was not defined in Virginia's statutory scheme nor was a clear standard provided for how a person would have "shown" themselves to be one. However, once a person was designated as a habitual drunkard, they were prohibited from consuming; purchasing; possessing; or attempting to consume, purchase, or possess any alcoholic beverage[13] and were subject to punishment of up to a year in prison and as much as a $2,500 fine upon violation.[14]

In *Manning*, the plaintiffs put forth evidence purporting to show that enforcement of section 4.1-333(A) disparately impacted people similar to themselves.[15] The plaintiffs' key evidence showed that of the 4,743 prosecutions for the possession or consumption of alcoholic beverages by interdicted persons between 2005 and 2015, only 1,220 distinct individuals were interdicted between 2007 and 2015.[16] Of those interdicted persons, many were homeless and struggled with chronic alcoholism, addiction, or other physical and mental illnesses.[17]

The plaintiffs initially alleged four grounds for invalidation of the statutory scheme—including the void-for-vagueness doctrine[18]—but the district

9. Use of the term "the homeless" as a collective noun can be considered dehumanizing. Alissa Walker & Emma Alpern, *The Language Around Homelessness Is Finally Changing*, CURBED (June 11, 2020, 1:32 PM), https://archive.curbed.com/2020/6/11/21273455/homeless-people-definition-copy-editing [https://perma.cc/HUX8-URLX]. As such, I instead use "homeless people" throughout this Recent Development.

10. *See Manning*, 930 F.3d at 268–69.

11. *Id.* at 269–70.

12. VA. CODE ANN. § 4.1-333(A) (LEXIS through the 2021 Reg. Sess. of the Gen. Assemb. and Acts 2021 Spec. Sess. I). Section 4.1-333(A) also allows civil interdiction of drunk drivers, but the plaintiffs in *Manning* did not contest the constitutionality of that aspect. *Id.*; *see also Manning*, 930 F.3d at 269 n.1.

13. *Id.* § 4.1-305(A) (making consumption, possession, or purchase of alcohol by prohibited persons a Class 1 misdemeanor); *see also id.* § 4.1-304(A) (designating "interdicted" persons as those prohibited from purchasing alcoholic beverages).

14. *Id.* § 18.2-11(a) (setting the punishment for Class 1 misdemeanors).

15. *Manning*, 930 F.3d at 269.

16. *Id.*

17. Maria Slater, Note, *Is* Powell *Still Valid? The Supreme Court's Changing Stance on Cruel and Unusual Punishment*, 104 VA. L. REV. 547, 585 (2018).

18. *Manning*, 930 F.3d at 270 ("Plaintiffs . . . alleg[ed] that the Virginia scheme (1) constituted cruel and unusual punishment outlawed by the Eighth Amendment, (2) deprived them of due process

court rejected all four claims.[19] Upon appeal before a three-judge panel, the plaintiffs declined to argue the void-for-vagueness claim[20] and the panel affirmed the decision of the district court below.[21]

The Fourth Circuit then agreed to rehear the case en banc,[22] this time holding that the term habitual drunkard violated the void-for-vagueness doctrine.[23] First, despite the void-for-vagueness doctrine traditionally applying only in a criminal context,[24] the court stated that the "integrated structure of the challenged scheme" which "plainly ha[d] criminal consequences" made section 4.1-333(A) "quasi-criminal" in nature.[25] Under precedent,[26] therefore, the civil consequences imposed by section 4.1-333(A) warranted a "relatively strict" test for vagueness.[27]

With the applicability of the void-for-vagueness rule established, the court turned to the second step: applying this "relatively strict" test for vagueness.[28] In applying the test, the Fourth Circuit pointed to the "absence of meaningful guidance" as to proscribed conduct under section 4.1-333(A) or who would qualify as a habitual drunkard,[29] especially as compared to well-defined terms in the Code of Virginia, such as "intoxicated."[30] The "arbitrary enforcement" invited by the lack of standards for the term habitual drunkard was particularly important for the court.[31] In the court's view, the lack of clear guidelines

of law in violation of the Fourteenth Amendment, (3) denied them the equal protection guarantees of the Fourteenth Amendment, and (4) was unconstitutionally vague in violation of the Fourteenth Amendment.").

19. *Id.*

20. *Id.* at 271.

21. *Id.* at 270. For a discussion of *Manning*'s treatment of addiction and voluntariness for the purposes of enforcing criminal law, see generally Dawinder S. Sidhu, *Criminal Law x Addiction*, 99 N.C. L. REV. 1083 (2021).

22. *Manning*, 930 F.3d at 270.

23. *See id.* at 272–74. The Fourth Circuit also held that the plaintiffs stated a claim that the statutory scheme constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 265.

24. *See id.* at 303 (Wilkinson, J., dissenting) ("The Supreme Court has spoken of vagueness in explicitly criminal terms for decades."). *But see* Sessions v. Dimaya, 138 S. Ct. 1204, 1212–13 (2018) (holding that the void-for-vagueness doctrine may apply in noncriminal deportation proceedings).

25. *Manning*, 930 F.3d at 273 (majority opinion).

26. *See* Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (1982) (holding that laws imposing civil penalties with "prohibitory and stigmatizing effect[] may warrant a relatively strict test").

27. *Manning*, 930 F.3d at 273.

28. *See id.* at 273–78.

29. *Id.* at 274–75.

30. *Id.*; VA. CODE ANN. § 4.1-100 (LEXIS through the 2021 Reg. Sess. of the Gen. Assemb. and Acts 2021 Spec. Sess. I) ("'Intoxicated' means a condition in which a person has drunk enough alcoholic beverages to observably affect his manner, disposition, speech, muscular movement, general appearance, or behavior.").

31. *Manning*, 930 F.3d at 276.

confirmed that "the law was designed to target persons, including the homeless, that state officials deem undesirable."[32]

II. UNFURLING THE COLORS: THE LEGISLATIVE HISTORY OF SECTION 4.1-333(A)

Despite concluding that section 4.1-333(A) was "designed" to target people found undesirable by state officials, the Fourth Circuit delved only briefly into its history.[33] In its discussion of the legislative history of section 4.1-333(A), the court identified the scheme as "dat[ing] to the late nineteenth century" at which point it had a "rehabilitative purpose," allowing family members or friends to petition for someone under the influence of alcohol to be subjected to a hearing and possibly home confinement to restore them to sobriety.[34] According to the court, Virginia abandoned this rehabilitative approach in 1934 and adopted the punitive scheme at issue in *Manning* in its place.[35]

However, a closer look at the history of section 4.1-333(A) reveals a more nuanced story—a tale of two statutes. The first statute, section 46-1070 of the Virginia Code of 1936 (the "rehabilitative statute"),[36] followed the path initially described by the Fourth Circuit.[37] The rehabilitative statute offered a means for a court to intervene when a family member or friend was concerned about an individual who was a habitual drunkard or otherwise addicted.[38] The second statute, section 184A-4675 of the Virginia Code of 1936 ("the improper-person statute"),[39] the true precursor to section 4.1-333(A), put forth the punitive scheme of civil interdiction at issue in *Manning*. It originated in the wake of the passage of the Twenty-First Amendment in 1933 and was aimed at regulating the sale and possession of alcohol in the state of Virginia.[40] But the two statutes are distinct: before the revision of the Code of Virginia in 1950, both statutes existed simultaneously.[41]

32. *Id.*

33. *See id.* at 270 n.3 (outlining the history of section 4.1-333(A)).

34. *Id.*

35. *Id.* Notably, this information is provided without giving a citation. *See id.* Presumably, the court was referring to the Virginia Legislature's passage of the Alcoholic Beverage Control Act of 1934, ch. 94, 1934 Va. Acts 100 (codified as amended at VA. CODE ANN. § 4.1-100 (LEXIS through the 2021 Reg. Sess. of the Gen. Assemb. and Acts 2021 Spec. Sess. I)).

36. VA. CODE ANN. § 46-1070 (1936).

37. *Manning*, 930 F.3d at 270 n.3.

38. *See id.*; *see also* VA. CODE ANN. § 46-1070 (1936).

39. VA. CODE ANN. § 184A-4675 (1936).

40. *See* Alcoholic Beverage Control Act of 1934, 1934 Va. Acts at 100.

41. *See* VA. CODE ANN. §§ 46-1070, 184A-4675 (1936).

The rehabilitative statute served a purely rehabilitative purpose.[42] When relatives or friends (if there were no living relatives) were concerned about a person thought to be a "habitual drunkard, opium eater, or addicted to other drug habits," the rehabilitative statute allowed for a complaint in writing to be filed with a justice of the peace.[43] If after a hearing and examination by a physician the person were found to be addicted, that individual could be committed to a private hospital or sanitarium, provided that such treatment might prove beneficial to them.[44] The rehabilitative statute was strictly time-limited, as "no such inebriate . . . [could] be compelled . . . to remain in said hospital or sanitarium for a period exceeding four months, without his or her consent."[45]

The confusion between section 4.1-333(A) and the rehabilitative statute likely stems from the use of habitual drunkard in both (although the original codification of section 4.1-333 did not include the term).[46] Originally a part of the Alcoholic Beverage Control Act of 1934,[47] the improper-person subsection allowed a court to enter an order of interdiction prohibiting the sale of alcoholic beverages to anyone who "[was] convicted of driving or running any automobile . . . while intoxicated or has shown himself to be an improper person to be allowed to purchase alcoholic beverages."[48] Unlike the time-limited, compelled treatment allowed by the rehabilitative statute, the order of interdiction was indefinite, prohibiting the sale of alcoholic beverages "until further ordered."[49]

Coincidentally, the void-for-vagueness doctrine was the reason the term habitual drunkard was first adopted in the precursors to section 4.1-333(A). Following its recodification in 1950, the Code of Virginia initially retained the term "improper person" in section 4-51, the recodified version of the improper-person subsection.[50] This changed in 1955, when the Supreme Court of Appeals of Virginia[51] held in *Booth v. Commonwealth*[52] that the term improper person was "unconstitutionally vague and indefinite."[53] The following year, the

42. *See Manning*, 930 F.3d at 270 n.3; *see also* VA. CODE ANN. § 46-1070 (1936) (outlining how habitual drunkards could be committed to private hospitals).

43. VA. CODE ANN. § 46-1070 (1936).

44. *Id.*

45. *Id.* § 46-1071.

46. *See* VA. CODE ANN. § 4.1-333(A) (LEXIS through the 2021 Reg. Sess. of the Gen. Assemb. and Acts 2021 Spec. Sess. I); VA. CODE ANN. § 46-1070 (1936).

47. Ch. 94, 1934 Va. Acts 100 (codified as amended at VA. CODE ANN. § 4.1-100 (LEXIS through the 2021 Reg. Sess. of the Gen. Assemb. and Acts 2021 Spec. Sess. I)).

48. *Id.* § 35, 1934 Va. Acts at 123.

49. *Id.*

50. VA. CODE ANN. § 4-51 (1950).

51. In 1971, the name of the Supreme Court of Appeals of Virginia was changed to its current name, the Supreme Court of Virginia. *A Short History of the Supreme Court of Virginia*, VA. APP. CT. HIST., https://scvahistory.org/scv/supreme-court-of-virginia/ [https://perma.cc/6CCD-AGF7].

52. 88 S.E.2d 916 (Va. 1955).

53. *Id.* at 918.

Virginia General Assembly responded by replacing the term improper person with habitual drunkard,[54] the language that was later used in section 4.1-333(A), and which would eventually be struck down by *Manning*.

The Virginia General Assembly did not make its intentions clear in preventing an improper person from purchasing alcohol in either section 4-51 or the improper person subsection, but the context and initial enforcement give the appearance that the language was intended to prevent bootlegging. As a whole, the Alcoholic Beverage Control Act of 1934 was principally concerned with establishing a regulatory system to oversee the sale and distribution of alcohol following the end of the Prohibition Era.[55] The subsections immediately following the improper-person subsection detailed how to determine which items relating to alcoholic beverages were contraband (for example, stills),[56] provided procedures for obtaining search warrants,[57] and outlined the appropriate process for confiscating such contraband.[58] Early enforcement of the language gives a similar impression. In *Booth*, John Booth was originally designated as an improper person because there was evidence tending to show he had illegally sold alcoholic beverages, albeit insufficient evidence to convict him of a crime.[59]

The Virginia General Assembly's intent in replacing improper person with habitual drunkard is also unclear but was likely an attempt to clarify the law. With the change coming only five months after the Supreme Court of Appeals of Virginia struck down the term improper person as unconstitutional,[60] the legislature's action was likely motivated by the *Booth* decision that found the term unconstitutionally vague. And, in using the term habitual drunkard, the legislature was not creating a new term; rather, it was appropriating a term with a long history in Virginia law. In the rehabilitative statute and its precursors, the term habitual drunkard had been used for civil commitment of individuals

54. Act of Feb. 16, 1956, ch. 53, 1956 Va. Acts 45 (codified as amended at VA. CODE ANN. § 4.1-333 (LEXIS through the 2021 Reg. Sess. of the Gen. Assemb. and Acts 2021 Spec. Sess. I)).

55. *See* Alcoholic Beverage Control Act of 1934, ch. 94, §§ 3–31, 1934 Va. Acts 100, 103–21 (codified as amended at VA. CODE ANN. § 4.1-100 (LEXIS through the 2021 Reg. Sess. of the Gen. Assemb. and Acts 2021 Spec. Sess. I)) (establishing the Department of Alcoholic Beverage Control, the Virginia Alcoholic Beverage Control Board, and various licensing procedures for the sale of alcohol).

56. *Id.* § 36, 1934 Va. Acts at 123.

57. *Id.* § 37, 1934 Va. Acts at 123–24.

58. *Id.* § 38, 1934 Va. Acts at 124–25. The next subsections criminalize a variety of behaviors related to alcoholic beverages. *See id.* §§ 39–52, 1934 Va. Acts 125–28.

59. Booth v. Commonwealth, 88 S.E.2d 916, 917 (Va. 1955).

60. *Booth* was decided on September 14, 1955. *Id.* at 916. The session law changing improper person to habitual drunkard was approved on February 16, 1956. Act of Feb. 16, 1956, ch. 53, 1956 Va. Acts 45 (codified as amended at VA. CODE ANN. § 4.1-333 (LEXIS through the 2021 Reg. Sess. of the Gen. Assemb. and Acts 2021 Spec. Sess. I)).

since at least 1872.[61] Moreover, individuals determined to be habitual drunkards could be prevented from obtaining a driver's license or chauffeur's license;[62] have their license to practice optometry revoked; [63] or even have their certification to work as an architect, professional engineer, or land surveyor revoked. [64] In replacing improper person with habitual drunkard, then, the Virginia legislature may have felt it was replacing an "unconstitutionally vague" term with one more readily defined by its historical usage.[65]

III. TRUE COLORS: *MANNING* ANALYZED UNDER EQUAL PROTECTION ANALYSIS

Thus, the history of section 4.1-333(A) and its precursors provide little evidence for the conclusion that the law "was designed to target persons, including the homeless, that state officials deem undesirable."[66] And while the history of section 4.1-333(A) was not a large component of the majority's analysis in *Manning* under the void-for-vagueness claim, the history proves important in evaluating another claim brought by the plaintiffs but left unaddressed by the court: that the statutory scheme deprived them of equal protection under the Fourteenth Amendment.[67] But on closer examination, the court's sidestep of the plaintiffs' equal protection argument seems to be a sly judicial maneuver meant to provide a fair outcome in the face of a doctrine that would have otherwise withheld one.[68] Indeed, had the court taken up the equal protection argument, the argument was unlikely to have succeeded.[69]

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[70] As a practical matter, this requires that "all persons similarly

61. An Act to Incorporate the Inebriate's Home, ch. 172, 1872 Va. Acts 231 (1872) (codified as amended at VA. CODE ANN. § 83-5 (1874)).

62. VA. CODE ANN. § 90C-2154(174)(c) (1936).

63. VA. CODE ANN. § 68-1635 (1936).

64. VA. CODE ANN. § 125A-3145j(d) (1936).

65. Indeed, the Fourth Circuit's previous position was that the Virginia Legislature was correct. *See* Fisher v. Coleman, 486 F. Supp. 311, 315 (W.D. Va. 1979), *aff'd*, 639 F.2d 191 (4th Cir. 1981) (per curiam), *abrogated by* Manning v. Caldwell, 930 F.3d 264 (4th Cir. 2019) (en banc).

66. Manning v. Caldwell, 930 F.3d 264, 276 (4th Cir. 2019) (en banc).

67. *Id.* at 270.

68. However, this is not the first time a court has used the void-for-vagueness doctrine in lieu of another doctrine to achieve a desired result. *See* Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1365 (2010) ("[T]he draft opinions in the Justices' papers did not in fact rely on vagueness alone. In addition, they relied at first on the Ninth Amendment and then on substantive due process.").

69. *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1359 (11th Cir. 2000) ("In order to establish [an equal protection] violation, however, it is not enough to show the ordinance has a disproportionate impact upon the homeless.").

70. U.S. CONST. amend. XIV, § 1.

situated should be treated alike."[71] But laws are still allowed to classify among individuals; generally, a classification drawn by a given statute will be upheld if the classification is "rationally related to a legitimate state interest."[72] Rational basis review, as it is known, is highly deferential to the government, presuming legislation is valid unless demonstrated otherwise.[73]

However, in the context of equal protection, a litigant typically triggers heightened scrutiny if they show that a law makes classifications on the basis of a suspect or quasi-suspect class. Suspect classifications arise when legislation demonstrates "prejudice against discrete and insular minorities . . . tend[ing] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[74] Suspect classifications will typically warrant strict scrutiny and include characteristics such as race, national origin, religion, alienage, and nonresidency.[75] Quasi-suspect classes, including sex and the legitimacy of a child, are typically entitled to an intermediate level of scrutiny.[76] The burden placed on the government under even an intermediate level of heightened scrutiny requires a showing that the challenged classification serves "important governmental objectives" to which the classification is "substantially related."[77] If strict scrutiny is triggered, the government must show that classifications are "narrowly tailored to further compelling governmental interests."[78]

The analysis in this part proceeds in two sections. First, Section III.A analyzes the potential classifications made by section 4.1-333(A) and ultimately concludes that no such classification warrants heightened scrutiny. Second, Section III.B applies an equal protection analysis to section 4.1-333(A) and concludes that the plaintiffs' arguments would have failed under both rational basis review and any form of heightened scrutiny.

A. *Possible Suspect Classifications in* Manning

In alleging an equal protection violation, the plaintiffs in *Manning* argued that although section 4.1-333(A) was "not limited to the homeless, in practice it function[ed] as a tool to rid the streets of particularly vulnerable, unwanted alcoholics like themselves."[79] This argument presents several potential suspect

71. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

72. *Id.* at 440.

73. *Id.*

74. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

75. 16B AM. JUR. 2D *Constitutional Law* § 858, Westlaw (database updated Feb. 2021).

76. *Id.* § 859.

77. United States v. Virginia, 518 U.S. 515, 533 (1996). The burden placed on the government under strict scrutiny is even more demanding and requires classifications to be "narrowly tailored to further compelling governmental interests." Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

78. *Grutter*, 539 U.S. at 326.

79. Manning v. Caldwell, 930 F.3d 264, 269 (4th Cir. 2019) (en banc).

classes: (1) homeless people, (2) alcoholics, and even (3) homeless alcoholics. In the analysis that follows, I will in turn examine each of these classes for possible suspect or quasi-suspect status.

Although the Supreme Court has not yet ruled on whether homeless people constitute a suspect or quasi-suspect class,[80] courts that have considered the issue have concluded they do not.[81] In so holding, these courts have invariably rejected the argument that because "the homeless have no access to private property, they are an insular minority which has no place to retreat from the public domain."[82] Rather, most courts consider homeless people a "subset of the poor,"[83] falling under Supreme Court precedent that distinctions based on wealth or poverty generally do not constitute suspect classifications or warrant heightened scrutiny.[84]

However, some academic works argue that homelessness should be a quasi-suspect or suspect class. They note several factors that "militat[e] strongly for suspect classification," such as the historical discrimination and political powerlessness experienced by homeless people, the relatively immutable nature of homelessness, and the reality that people often become homeless because of mental health problems or substance misuse.[85] Moreover, given the physical and social isolation of homeless people from society, homeless people might meet "both [a] narrow definition of 'discrete and insular' and [the] broader definition . . . intended by the . . . Court."[86]

Even setting aside arguments that homelessness should or should not be a protected class, asserting that section 4.1-333(A) impermissibly made

80. Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 511 (2003).

81. *See, e.g.*, Kreimer v. Bureau of Police, 958 F.2d 1242, 1269 n.36 (3d Cir. 1992) (noting that homeless people do not constitute a suspect class); Joel v. City of Orlando, 232 F.3d 1353, 1357 (11th Cir. 2000) ("Homeless persons are not a suspect class . . . ."); Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996) (same).

82. Pottinger v. City of Miami, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992). In this case, the trial court indicated that it was not "entirely convinced that homelessness as a class has none of the[] 'traditional indicia of suspectness.'" *Id.* (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). However, the court found that "resolution of this issue is beyond the scope of evidence presented at trial." *Id.*

83. Watson, *supra* note 80, at 511.

84. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 471 (1977) ("But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."). *But see* Jones v. City of Los Angeles, 444 F.3d 1118, 136 (9th Cir. 2006) (holding that a statute prohibiting "sitting, lying, or sleeping" outdoors violated the Eighth Amendment because, for homeless people, that conduct was "involuntary and inseparable from status").

85. Greg Vamos, Note, Kreimer v. Bureau of Police*: Are the Homeless Ready for Suspect Classification?*, 14 WHITTIER L. REV. 731, 742–45 (1993).

86. Watson, *supra* note 80, at 517–18; *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (noting that heightened judicial scrutiny may be needed to protect "discrete and insular minorities" when prejudice against them prevents the operation of political processes which would otherwise protect them).

classifications on the basis of homelessness remained a weak argument for the plaintiffs. First, as the plaintiffs themselves admitted, the terms of section 4.1-333(A) did not limit its application to homeless people.[87] Moreover, unlike other ordinances with a disparate impact on the homeless,[88] the Virginia statutory scheme was not limited to outdoor or public conduct.[89] And although some states historically conflated the term habitual drunkard with vagrancy,[90] Virginia is not one of those states.[91] In this context, there is no apparent classification based on homelessness in the statutory scheme at issue in *Manning*.

The second potential suspect class, alcoholics, similarly offers little support for heightened scrutiny than does homelessness. Although the Supreme Court has not yet issued a decisive ruling on whether alcoholics constitute a suspect class, circuit courts that have considered the topic have uniformly held alcoholics to be neither a suspect nor quasi-suspect class for the purposes of equal protection analysis.[92] In *Mitchell v. Commissioner of the Social Security Administration*,[93] for example, the Fourth Circuit refused to extend heightened scrutiny to a law which directly prohibited the award of disability benefits to those disabled by alcoholism or drug addiction.[94]

Moreover, Supreme Court precedent provides mixed support, at best, for the designation of alcoholics as a suspect class.[95] In *Robinson v. California*,[96] the Court considered whether a state could criminalize addiction to narcotics.[97] In reversing the defendant's conviction, the Court noted that "narcotic addiction

87. Manning v. Caldwell, 930 F.3d 264, 269 (4th Cir. 2019) (en banc).

88. *See* Joel v. City of Orlando, 232 F.3d 1353, 1359 (11th Cir. 2000) (providing evidence that the ordinance at issue was targeted toward homeless people because "at least 98 percent of those arrested under the ordinance were homeless" people). The relevant ordinance in *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), prohibited sleeping or cooking outdoors, or otherwise being in a temporary shelter, on public and private property (unless the owner gave permission) within city limits. *Id.* at 1356.

89. *Manning*, 930 F.3d at 281 n.14.

90. Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 HOUS. L. REV. 781, 793 (2014) ("[L]aws sometimes equated public intoxication with vagrancy by listing a 'common drunkard' or 'habitual drunkard' as a per se vagrant.").

91. *See id.* at 793 n.61.

92. Mitchell v. Comm'r of the Soc. Sec. Admin., 182 F.3d 272, 274 (4th Cir. 1999); *see also* Palmer v. Merluzzi, 868 F.2d 90, 96 (3d Cir. 1989) (holding that a student's suspension for alcohol use "was not based on a suspect classification"); Gazette v. City of Pontiac, 41 F.3d 1061, 1067 (6th Cir. 1994) ("The status of being an alcoholic, or a recovering alcoholic, is not a suspect class for equal protection analysis, and so the lowest level of scrutiny applies to the defendants' action.").

93. 182 F.3d 272 (4th Cir. 1999).

94. *See id.* at 274. Admittedly, it could be argued that the Fourth Circuit chose to go in a different direction in *Manning* by recognizing alcoholism as an illness. *Manning*, 930 F.3d at 282.

95. *See generally* Sidhu, *supra* note 21 (discussing the Supreme Court's treatment of people with addiction).

96. 370 U.S. 660 (1962).

97. *Id.* at 660.

is an illness" and held that a law convicting someone on that basis inflicted a cruel and unusual punishment in violation of the Fourteenth Amendment.[98] However, only six years after the *Robinson* decision, the Supreme Court decided *Powell v. Texas*,[99] which considered a statute criminalizing drinking or being intoxicated in a public place.[100] In a 4-1-4 decision, the Court held that a conviction under the statute did not violate the Eighth Amendment.[101] In the opinion of the plurality, the defendant was convicted not because of his status as a chronic alcoholic but because of his conduct (appearing in public while drunk).[102]

In light of this precedent, the Fourth Circuit in *Manning* was confronted with an uphill battle to find that section 4.1-333(A) triggered heightened scrutiny by classifying on the basis of alcoholism. The Fourth Circuit further expressed doubts that the terms habitual drunkards and alcoholic were congruous.[103] While the term habitual drunkard certainly included some alcoholics within its purview, its unclear definition resulted in many (or indeed most) alcoholics never being classified as habitual drunkards. The application of section 4.1-333(A) bore this out as well, as only 1,220 individuals were interdicted between 2007 and 2015,[104] despite there being an estimated 500,000 alcoholics in the state of Virginia.[105]

Because many of those interdicted individuals were both homeless and struggled with alcoholism,[106] the most precise class targeted by section 4.1-333(A) could be described as "homeless alcoholics,"[107] but this categorization faces similar issues. As neither homeless people nor alcoholics have separately been recognized as a suspect or quasi-suspect class, recognition of a narrower subset of those classes proves unlikely.[108] Moreover, with increased specificity comes increased evidentiary issues. Showing that homeless people or alcoholics are a "discrete and insular minority" has proven challenging but proving that

98. *Id.* at 667.

99. 392 U.S. 514 (1968) (plurality opinion).

100. *Id.* at 517.

101. *Id.* at 515.

102. *Id.* at 532.

103. Manning v. Caldwell, 930 F.3d 264, 281 (4th Cir. 2019) (en banc) (questioning whether the term "'habitual drunkard,' as used in Virginia law, could be limited to alcoholics").

104. *Id.* at 269.

105. Frank Green, *Federal Appeals Court To Hear Challenge to Virginia's Habitual Drunkard Law*, RICHMOND TIMES-DISPATCH (Jan. 29, 2019), https://richmond.com/news/plus/federal-appeals-court-to-hear-challenge-to-virginia-s-habitual/article_ec156469-f336-5237-821a-5820431e55b2.html [https://perma.cc/8F68-GTT6 (dark archive)].

106. Slater, *supra* note 17, at 585.

107. *See Manning*, 930 F.3d at 281 n.14 ("As noted above, Plaintiffs allege that the Virginia statute targets homeless alcoholics, rather than all alcoholics.").

108. *See* Watson, *supra* note 80, at 511 (noting that because homeless people have been considered a "subset of the poor," courts have rarely analyzed whether homeless people may constitute their own suspect class).

homeless alcoholics are a "discrete and insular minority" would prove even more challenging, as it would require finding a history of discrimination specifically targeted at homeless alcoholics.

It thus seems unlikely that the Fourth Circuit would have applied heightened scrutiny for the equal protection analysis in *Manning* on the basis of section 4.1-333(A) impermissibly classifying on homelessness, alcoholism, or any combination of the two.

B. *Section 4.1-333(A) Examined Under Equal Protection Analysis*

Even if the Fourth Circuit found that homeless alcoholics comprised a protected class, thereby triggering heightened scrutiny, the plaintiffs' equal protection argument was still unlikely to succeed. When a facially neutral law is shown to have a disparate impact on a protected class, the Equal Protection Clause is only violated if a discriminatory purpose against that class can also be proven.[109] Discriminatory purpose is separate from the application of the law and instead asks whether the initial passage of the law was "shaped" by discriminatory intent.[110] For a law to be shaped by discriminatory intent, the legislature needs more than mere knowledge that harm might result to a group; rather, the legislature must act "because of," not merely "in spite of," adverse effects upon that group.[111]

109. *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 274–81 (1979) (holding a veteran-plus hiring policy disproportionately impacting women did not violate the Equal Protection Clause because no discriminatory purpose was shown).

110. *Id.* at 276. Just because a law has a clear disproportionate impact does not mean that it is a "purposely discriminatory device." *See* Washington v. Davis, 426 U.S. 229, 229–31 (1976) (holding that a verbal skills test for police officers, which four times as many Black people failed compared to White people, did not violate Equal Protection because no discriminatory purpose was claimed).

111. *Feeney*, 442 U.S. at 279. Determining whether discriminatory intent was a substantial or motivating factor in the passage of a law "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). The Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), provided a nonexhaustive list of five factors to consider when determining if discriminatory intent has motivated passage of a law, including: (1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence of passage, (4) substantive departures, and (5) legislative or administrative history. *Id.* at 267–68. Thus, the Second Circuit applied only rational basis review to an affirmative action policy for businesses based on a definition of Hispanic that did not include those of non-Latin American descent because the plaintiffs could point to nothing in the law's history, enforcement, or sequence of events leading up to its enactment that would support an inference of anti-Spanish "animus." Jana-Rock Constr. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 212 (2d Cir. 2006). On the other hand, the Fourth Circuit found sufficient evidence that an election-reform law was based on discriminatory intent because of a history of racial discrimination in North Carolina, the speed at which the law passed through the legislative process following the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), and a legislative history indicating consideration of racial data in passage of the law. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 223–30 (4th Cir. 2016).

While the plaintiffs in *Manning* put forth evidence of the disparate impact of section 4.1-333(A) on homeless alcoholics,[112] they failed to show that a discriminatory purpose toward homeless alcoholics shaped the passage of the law. As previously discussed, the inclusion of the term habitual drunkard was a response to a previous version of section 4.1-333(A) being struck down under the void-for-vagueness doctrine in a contextually different case brought by an individual accused of illegally selling alcohol.[113] Even the previous version of section 4.1-333(A) (using the term improper person instead of habitual drunkard) offers little evidence that it was shaped by discriminatory intent towards homeless alcoholics. Indeed, section 4.1-333(A) makes no mention of other terminology that might be associated with homeless people—for example, by making the term habitual drunkard equivalent to per se vagrancy[114] or by prohibiting activity outdoors.[115] And, from its initial passage in 1934, section 4.1-333(A) and its precursors have allowed the interdiction of individuals who operated a motor vehicle while intoxicated,[116] an activity unlikely to have been associated with homelessness at the time.

Because equal protection analysis was destined to fail under heightened scrutiny, rational basis review would prove no kinder. Under rational basis review, a statute is "presumed to be valid" and will be upheld as long as the statute is "rationally related to a legitimate state interest."[117] This bar is incredibly low; statutes survive an equal protection challenge under rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[118] The burden would be on the plaintiffs, then, to "negat[e] every conceivable basis which might support it."[119]

However, rational basis review has been elevated beyond this low bar in some contexts. In *United States Department of Agriculture v. Moreno*,[120] the Supreme Court reviewed the constitutionality of a statute that prohibited households containing unrelated individuals from receiving food stamps under equal protection analysis.[121] Finding the classification could not be sustained under rational basis review, the Court pointed to a legislative history indicating that the classification was intended to prevent "hippie communes" from

112. *See Manning*, 930 F.3d at 269 ("Plaintiffs allege that, although by its terms the challenged scheme is not limited to the homeless, in practice it functions as a tool to rid the streets of . . . unwanted alcoholics like themselves.").

113. *See supra* Part II.

114. *See* Rathod, *supra* note 90, at 793.

115. *See* Joel v. City of Orlando, 232 F.3d 1353, 1356 (11th Cir. 2000).

116. *See* VA. CODE ANN. § 184A-4675(35) (1936).

117. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

118. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

119. Madden v. Kentucky, 309 U.S. 83, 88 (1940).

120. 413 U.S. 528 (1973).

121. *Id.* at 529.

participating in the food stamp program.[122] Although the Court did not comment on whether the statute had a disparate impact in practice, the Court held that "bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[123] And, though still not applying a form of rational basis review, the Court went on to set aside other possible justifications offered by the government.[124] In effect, the Supreme Court found that legislation shaped by a discriminatory purpose, even without evidence of disparate impact or infringement of the rights of a protected class, gave rise to some form of additional scrutiny in practice. In practice, this additional scrutiny allowed the Supreme Court to effectively remove the presumption of rationality for the government's justification, and instead, the Court evaluated whether those justifications were in fact rational.

But as was the case under heightened scrutiny, the plaintiffs in *Manning* would have seen their equal protection argument struck down under rational basis review. Put simply, the history of section 4.1-333(A) and its precursors do not show a discriminatory intent toward homeless alcoholics and instead reveal the creation of a regulatory system for alcohol distribution.[125] With no discriminatory intent shaping the passage of the legislation, the test simply becomes "whether the governmental end is legitimate and whether the means chosen to further that end are rationally related to it."[126]

This is a test that section 4.1-333(A) could satisfy. Indeed, this is a test that section 4.1-333(A) *did* satisfy when originally considered by the Fourth Circuit before the en banc rehearing.[127] In that decision, a three-judge panel of the Fourth Circuit held that "Virginia has a legitimate interest in discouraging alcohol abuse and its attendant risks to public safety and wellbeing."[128] In "identifying those at the greatest risk for alcohol abuse" and "restricting their ability to possess" alcohol, the interdiction scheme was rationally related to that interest and preventing the attendant risks.[129] Any potential argument made by the plaintiffs in *Manning* based on the Equal Protection Clause thus seemed certain to fail.

122. *Id.* at 534.
123. *Id.*
124. *Id.* at 535–36.
125. *See supra* Part II.
126. Siena Corp. v. Mayor of Rockville, 873 F.3d 456, 465 (4th Cir. 2017).
127. *See* Manning v. Caldwell, 900 F.3d 139, 153 (4th Cir. 2018), *rev'd en banc*, 930 F.3d 264 (4th Cir. 2019).
128. *Id.*
129. *Id.*

IV. LOWERING THE FLAG: OBVIATING THE NEED FOR VOID FOR VAGUENESS AS A SUBSTITUTE FOR EQUAL PROTECTION

The certainty of failure of the plaintiffs' equal protection arguments in *Manning* reveals the counterintuitive nature underlying current equal protection analysis. Although the Equal Protection Clause prohibits denying any person "equal protection of the laws"[130] and requires that "all persons similarly situated should be treated alike,"[131] the plaintiffs in *Manning* would have had no recourse (even when able to show the law had a disparate impact) but for the void-for-vagueness doctrine. On the other hand, in *Moreno*, the Supreme Court struck down a statute based on an equal protection analysis that classified on the basis of a nonsuspect class even though that statute was not shown to have any actual impact on the targeted class.[132] Thus, equal protection analysis provided relief when a nonsuspect class (hippies) *could* have been unequally impacted by application of a law. On the other hand, no relief was available when a nonsuspect class (homeless alcoholics) *was* unequally impacted by application of a law. But when discriminatory purpose is the byword of equal protection analysis, such counterintuitive outcomes are likely to result.

These counterintuitive results are most common in statutes with long histories, such as section 4.1-333(A) and its precursors. Had the plaintiffs in *Manning* been able to show a discriminatory intent behind the replacement of improper person with habitual drunkard, they may have been able to succeed in their equal protection challenge.[133] But, at the time that the plaintiffs brought their challenge, the term habitual drunkard had been used in section 4.1-333(A) and its predecessors for over sixty years,[134] making it difficult to trace evidence of legislative history beyond statutory language. Moreover, despite a lack of evidence that the use of the term habitual drunkard in section 4.1-333(A) had been originally intended to discriminate against homeless alcoholics,[135] the modern trend of targeted enforcement of section 4.1-333(A) seems difficult to ignore. Indeed, current doctrine lays out an almost prescriptive means for avoiding heightened scrutiny under equal protection analysis: find an already-

130. U.S. CONST. amend. XIV, § 1.

131. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

132. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) ("But the classification here in issue is not only 'imprecise', it is wholly without any rational basis.").

133. *See* Joel v. City of Orlando, 232 F.3d 1353, 1359 (11th Cir. 2000) ("Joel has not proven that Section 43.52 was enacted for the purpose of discriminating against the homeless. Consequently, a disparate effect on the homeless does not violate equal protection.").

134. The term habitual drunkard was adopted in February of 1956. Act of Feb. 16, 1956, ch. 53, 1956 Va. Acts 45 (codified as amended at VA. CODE. ANN. § 4.1-333 (LEXIS through the 2021 Reg. Sess. of the Gen Assemb. and Acts 2021 Spec. Sess. I)). Plaintiffs brought their case in March of 2016. Manning v. Caldwell, 930 F.3d 264, 270 (4th Cir. 2019).

135. *See supra* Part II.

existing law with little legislative history that features a facially neutral term vague enough to allow for enforcement against the nonsuspect class of choice. And finding such a law may not be difficult. As Judge Wilkinson observed in his spirited dissent in *Manning*, "[m]any civil statutes make use of imprecise phrases."[136]

One solution that has been proposed in hopes of reducing such incoherent results is to expand the number of suspect classes,[137] but this proposal does not address the underlying issue. While providing suspect status for homeless alcoholics or other classes would help in cases where a law facially classifies on that basis, facially neutral statutes like section 4.1-333(A) would be a different matter. As previously discussed, due to a lack of discriminatory intent, the plaintiffs' equal protection arguments in *Manning* would have failed even had heightened scrutiny been applied.[138] Likewise, unless plaintiffs could point to legislative intent to discriminate against their class, even their suspect status would offer little protection.[139] And, much as with section 4.1-333(A), other facially neutral statutes run into the same potential difficulties if legislative history is scant.

In light of this, and to resolve the paradox presented by current equal protection doctrine, I propose that the treatment of disparate impact when a facially neutral statute is lacking in legislative history be analogous to the treatment of discriminatory intent. When a court is confronted with a facially neutral statute and a dearth of legislative history (which has either been lost or was never originally present), such an absence should not be treated as evidence of an absence of discriminatory intent. Rather, I propose that a plaintiff's proof of disparate impact in such cases be sufficient to trigger something beyond mere rational basis review. Specifically, like the evidence of discriminatory intent in

136. *Manning*, 930 F.3d at 303 (Wilkinson, J., dissenting).

137. Scholars have suggested suspect or quasi-suspect status for a variety of groups, including homeless people, children, and individuals with disabilities, among others. *See* Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 908 (1975) ("It seems clear, therefore, that under any of the standards for suspectness enunciated by the Supreme Court, handicapped persons amply qualify."); Althea Gregory, *Denying Protection to Those Most in Need: The FDA's Unconstitutional Treatment of Children*, 8 ALB. L.J. SCI. & TECH. 121, 124 (1997) ("To correct this shortcoming, Part III argues that the courts should recognize children as a 'quasi-suspect' class that can be denied full protection of the laws only when the government's justification for differential treatment can pass heightened judicial scrutiny."); Vamos, *supra* note 85, at 745 ("By equal protection standards, the homeless qualify for suspect classification through historical unequal treatment, relegation to non-entity status in the political process, and possession of immutable characteristics guiding legislative distinctions.").

138. *See supra* Section III.B.

139. *See* Joel v. City of Orlando, 232 F.3d 1353, 1359 (11th Cir. 2000) ("Even where a group is entitled to more protection and a higher degree of scrutiny is applied, a law neutral on its face, yet having a disproportionate effect on the group will be deemed to violate the Equal Protection Clause only if a discriminatory purpose can be proven.").

Moreno, proof of disparate impact would remove the presumption that the justifications proffered are rational, allowing the court to conduct a real rational basis analysis. Unlike adding to the number of suspect classes, this proposal would account for statutes like section 4.1-333(A), where its modern enforcement may have shifted from the original purpose.

Although this proposal may seem counter to current Supreme Court precedent,[140] it is more accurately characterized as a reframing of precedent for a small class of cases. My proposal does not suggest that plaintiffs receive heightened scrutiny in the traditional sense, in terms of either intermediate or strict scrutiny once disparate impact has been proven. Instead, I suggest that courts continue to apply rational basis review to cases where disparate impact alone has been proved, but a rational basis review that bears resemblance to that applied in *Moreno*,[141] a form "*not* equivalent to formal heightened scrutiny."[142] Known by a variety of names, such as "heightened rational-basis review," "rational basis with bite," "rational basis with teeth," or "rational basis plus,"[143] it would require a court to actually investigate the justifications put forth by the government for their actions and determine how well those stated justifications fit with the ends.[144] The test would remain deferential to the government, though not to the extent of requiring the plaintiff to "negat[e] every conceivable basis which might support it."[145] And, unlike the potential impact of adding new suspect classifications,[146] the impact of this proposal would be limited: only statutes with a lack of legislative history and a proven disparate impact would be affected.

Although such a reframing of precedent by the Supreme Court in the short term may be unlikely, the Supreme Court has frequently been outpaced by state and lower courts on constitutional issues. State courts applied intermediate scrutiny[147] to classifications on sexual orientation more than a decade before the Supreme Court recognized that discrimination based on such classifications

140. *See* Washington v. Davis, 426 U.S. 229, 239–40 (1976) (holding that the Equal Protection Clause was not implicated by disparate impact absent evidence of discriminatory intent).

141. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533–38 (1973).

142. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 761 (2011).

143. Bishop v. Smith, 760 F.3d 1070, 1099 (10th Cir. 2014) (Holmes, J., concurring) (citations omitted).

144. *Moreno*, 413 U.S. at 537 ("Moreover, in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud.").

145. Madden v. Kentucky, 309 U.S. 83, 88 (1940).

146. *See* Yoshino, *supra* note 142, at 762 ("[T]he Court can never give heightened scrutiny to classifications of, say, twenty groups without diluting the meaning of that scrutiny.").

147. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (concluding that sexual orientation "constitute[d] a quasi-suspect classification for purposes of the equal protection provisions of the state constitution"); Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009) ("[W]e hold that legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution.").

amounted to sex discrimination.[148] Particularly on the issue of heightened rational basis review, lower and state courts may be amenable to such a change. As Professor Katie Eyer has pointed out, "rational basis review—as deployed in the lower and state courts, as well as within the political branches—has often afforded one of the most plausible openings for . . . constitutional change."[149] Moreover, even circuit courts have not always been afraid to depart from mere rational basis review when they find it is warranted.[150] It is difficult to imagine a case more fitting of departure from traditional standards of proof of discriminatory intent than a statute so lacking in legislative history as to make proof of such intent impossible.

This proposal, while not providing an automatic or even certain win for plaintiffs in cases like *Manning*, might at least provide a fighting chance. In *Elhady v. Piehota*,[151] for example, the Eastern District of Virginia considered an equal protection challenge brought by twenty-five Muslims, all of whom were U.S. citizens, to their placement on the government's terrorist watch list as well as their subjection to additional screening when flying.[152] Despite concluding that the plaintiffs had pled some evidence of disparate impact, the court found insufficient facts to allege "the Watch List was created based on, or operates through, intentional discrimination" and ultimately concluded that the plaintiffs had failed to state a claim.[153] Had the pleading required only evidence of disparate impact to proceed, the plaintiffs equal protection claim would likely not have been dismissed. More importantly, had the case been allowed to proceed, the plaintiffs may have been able to gather more information via discovery about the potential discriminatory intent behind the inner workings of the watch list. Evidence of discriminatory intent would potentially expose certain justifications given for the watch list as invalid, even if others survived rational basis review.

148. Bostock v. Clayton County, 140 S. Ct. 1731, 1746–47 (2020) ("[H]omosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex . . . .").

149. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1355 (2018).

150. *See, e.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215, 225 (5th Cir. 2013) (holding that a law preventing the selling of handmade caskets was not rationally related to a legitimate governmental interest in consumer protection); Craigmiles v. Giles, 312 F.3d 220, 228 (6th Cir. 2002) (finding a prohibition on sale of caskets by anyone not licensed as a funeral director bore "no rational relationship to any of the articulated purposes of the state"); Merrifield v. Lockyer, 547 F.3d 978, 991–92 (9th Cir. 2008) (finding that the removal of a licensing classification for pest control did not serve a legitimate government interest); *see also* Eyer, *supra* note 149, at 1352 n.152.

151. 303 F. Supp. 3d 453 (E.D. Va. 2017).

152. *Id.* at 457.

153. *Id.* at 467. The Plaintiffs' factual allegation that supported disparate impact was that persons living in Dearborn, Michigan, a town with a high Arab and Muslim population, were disproportionately included in the watch list. *Id.*

In other cases, "rational basis with bite" for disparate impact might provide more than just a fighting chance. In *United States v. Petersen*,[154] the District Court for the Eastern District of Virginia considered an equal protection challenge to the one-hundred-to-one quantity ratio of powder cocaine to crack cocaine necessary to trigger the mandatory minimum penalties for drug trafficking.[155] Under the sentencing guidelines in place at the time, the defendant's sentencing range for possessing crack cocaine was from 262 to 327 months, while the range for the same amount of cocaine powder would have been only 151 to 188 months.[156] The one-hundred-to-one ratio stemmed from the Anti-Drug Abuse Act of 1986 ("the 1986 Act"),[157] which was rushed into law in response to the perceived dangers of crack cocaine, making legislative history sparse.[158] What was not sparse, however, was evidence of disparate impact: a 1995 Sentencing Commission report indicated that Black individuals made up 27.4% of powder-cocaine offenders but 88.3% of crack-cocaine offenders, resulting in disproportionately long sentences for Black offenders.[159] Despite the "overwhelming evidence of discriminatory impact," due to a lack of discriminatory intent in the initial passage of the 1986 Act, the court found that any equal protection argument was foreclosed.[160] However, had the court been allowed to apply "rational basis with bite," the outcome would have been different.[161] With disparate impact being clear, the court could have turned its attention to the government's justification for the one-hundred-to-one ratio. In that case, the court's conclusions that "the assumptions [underlying the ratio] are no longer supported" and that the ratio "is not rationally justified" may have been dispositive in favor of the defendant.[162]

154. 143 F. Supp. 2d 569 (E.D. Va. 2001).

155. *Id.* at 569–70.

156. *Id.* at 571.

157. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 5, 10, 15, 16, 18, 19, 20, 21, 22, 25, 31, 42, 47, and 48 U.S.C.).

158. *Petersen*, 143 F. Supp. 2d at 573. Although little legislative history was available, what did exist showed that Congress believed crack cocaine was more dangerous than cocaine powder and should be treated differently for sentencing purposes. *Id.* at 573–74.

159. U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at xi (1995), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/EXECSUM.pdf [https://perma.cc/X62X-H932]; *see also Petersen*, 143 F. Supp. at 578. White individuals, likewise, comprised 32.0% of powder-cocaine offenders but only 4.1% of crack-cocaine offenders. U.S. SENT'G COMM'N, *supra*, at xi; *see also Petersen*, 143 F. Supp. at 578.

160. *Petersen*, 143 F. Supp. 2d at 583.

161. *See id.* at 586 ("I respectfully think that such a result is not faithful either to reality or to the equal protection clause.").

162. *Id.* The court went on to beseech that "the legal precedents that necessitate such an application of the clause need to be revisited or amended to afford the protection of the clause to those disparately affected here—Black defendants convicted of trafficking in crack cocaine." *Id.*

CONCLUSION

The void-for-vagueness doctrine is intended to protect against "the poor and the unpopular" from being stripped of their right to "stand on a public sidewalk . . . at the whim of any police officer."[163] And while achieving that end in *Manning*, the Fourth Circuit's use of the void-for-vagueness doctrine as a substitute for equal protection analysis reveals the often counterintuitive results of requiring evidence of discriminatory intent to mount a challenge against a facially neutral law, particularly when the legislative history has been lost to time or never existed in the first place. To avoid these counterintuitive results, the treatment of disparate impact for statutes lacking in legislative history should be brought more in line with discriminatory intent, allowing evidence of disparate impact alone to trigger *Moreno* analysis—review beyond mere rational basis scrutiny. In bringing disparate impact in line with discriminatory intent in these cases, courts will no longer need to fly a flag of convenience by instead conducting void-for-vagueness analysis as a substitute for equal protection. Instead, they can let their holding sail under its true colors.

NATHAN PINNELL[**]

163. Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1971) (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965)).

** The list of those I could thank is long, so I will try to be brief. First, to my primary editor, Drew Bencie, and all of the executive editors who gave their time to this Recent Development, your insightful comments made it stronger and more thoughtful, and for that I am thankful. To the harried cite checkers who worked on this Recent Development, I apologize for all of the citations to historical state statutes, and I appreciate your dedication and hard work. To all those people who have offered me support, guidance, and counsel along the way—Bill Allred, Jen Barkley, Tony Madonna, the Maguires, the Nelmes', the Pares, Daniel Pinnell, Jeanne Reese, and Iain Scott Walsh, to name a few—you have my eternal gratitude. And to my wife, Grace, your love and support has given me wings, but I only fly for you.