[Missouri Law Review](https://scholarship.law.missouri.edu/mlr)

Volume 48
Issue 3 *Summer 1983*

Article 1

Summer 1983

Muddle of the Middle Tier: The Coming Crisis in Equal Protection, The

Richard H. Seeburger

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation

Richard H. Seeburger, *Muddle of the Middle Tier: The Coming Crisis in Equal Protection, The*, 48 Mo. L. Rev. (1983)
Available at: https://scholarship.law.missouri.edu/mlr/vol48/iss3/1

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

MISSOURI
LAW REVIEW

VOL. 48 SUMMER 1983 NO. 3

THE MUDDLE OF THE MIDDLE TIER: THE COMING CRISIS IN EQUAL PROTECTION

RICHARD H. SEEBURGER*

I. INTRODUCTION 587
II. THE RISE OF EQUAL PROTECTION 589
III. THE COLLAPSE OF THE SECOND TIER 594
A. *Alienage* 594
B. *Illegitimacy* 598
C. *Gender-Based Discrimination* 603
IV. THE END OF THE TWO-TIERED APPROACH 614
V. THE 1980'S: ATTEMPTS AT INTERMEDIATE SCRUTINY 615
VI. SUMMARY & CONCLUSION: DOUBTS ON JUDICIAL LEGITIMACY 624

I. INTRODUCTION

The 1980 and 1981 Supreme Court terms brought the usual quota of equal protection cases involving newly established suspect categories—alienage, illegitimacy, and gender—as well as fundamental rights. Both types of cases call for some form of heightened judicial scrutiny. While the justices seem to agree on the articulation of the standards of review, they have been unable to agree on the application of these standards where something other than strict scrutiny is involved.

It is the thesis of this Article that meaningful standards which are only "means oriented" cannot be applied consistently. The decisions being made in the equal protection area are at the very limits of the judicial power, if not beyond it. But the Court majority refuses to acknowledge that

* Distinguished Visiting Professor of Law, Pepperdine University.

Published by University of Missouri School of Law Scholarship Repository, 1983

it is making any value judgments at all, let alone making them based on legislative, not adjudicative, facts.

The past two terms suggest that modern equal protection jurisprudence has entered a third critical phase. The first phase ended in 1973 when it became clear that the categories triggering strict scrutiny, suspect classes and fundamental rights, had closed. The second phase began in 1976 with agreement that some form of intermediate scrutiny, other than the always fatal strict scrutiny, was appropriate for some of the suspect categories or fundamental rights. The third phase came to the fore in the 1980 and 1981 terms, with attempts, so far unsuccessful, to apply an intermediate level of scrutiny in ways that avoided making legislative judgments. But such judgments cannot be avoided, even in a test that purports to be purely means related.

Modern scholarship in equal protection began with a far-sighted 1949 article by Tussman and tenBroek.[1] They described the problems of underinclusive and overinclusive legislation and noted that judicial review under the equal protection clause is problematic, if not troublesome, because of the difference between a legislature doing theoretically all that it might do in a legal context and doing practically all that it could do in a political context. Twenty years later, a student piece described a developing two-tiered approach utilized by the Warren court and traced that all-or-nothing test in the context of the relative effectiveness of legislative and judicial remedies.[2] Three years later, Professor Gerald Gunther posited a new model derived from his perception of some Supreme Court decisions.[3] He urged an intermediate test, between strict scrutiny and minimum rationality, under which the Court would look at the legislative choice of means only with reference to the avowed legislative purpose. He called this test minimum rationality with bite. He believed that scrutiny of only the means used to achieve the avowed ends would provide a safeguard for the political process by keeping the judiciary out of an investigation of legislative ends.

The literature expressing concern with the political structure began to examine the potential social impact of equal protection litigation.[4] A new

1. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

2. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

3. Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

4. *See* Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974); Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976); Cox, *The Supreme Court 1965 Term—Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383 (1977); Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS

notion of egalitarianism was posited, and different types of inequality were examined.[5] Problems of political equality and equality of opportunity presented little analytic difficulty, but those of economic equality and equality of condition—when requiring more than minimum rationality—again raised questions regarding the institutional competency of courts.[6] Thus, the parameters of equal protection today remain much as Tussman and tenBroek perceived them. The Court deals with legislative classifications, which are most often the result of political compromise. The search for standards of review is complicated by the pervasive question of the substantive meaning of equal protection as it is affected by changing social norms and continuing questions about the legitimacy of the judicial role. Inevitably, scholarly attention has been refocusing on the primary responsibility of the legislative branch in such matters.[7]

II. THE RISE OF EQUAL PROTECTION

The growth of litigation under the equal protection clause should not have been surprising. That growth was to be expected as government programs became more important in the lives of more people. Legislative fine tuning of remedial categories was frequently a matter of political compromise. Since no rights of arguably absolute dimensions (like free speech) were involved, any due process approach to the validity of legislation might involve balancing. Balancing smacks of judicial legislation, of substitution of political judgment by the courts, even in cases where substantive rights are involved. As a device that challenges the fairness of legislative categories and strikes down non-individualized processes under which government deals with people in areas important to them, it now seems an inevitable tool for a "liberal" or activist court operating in the milieu of the 1960's to

CONST. L.Q. 153 (1975); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973); Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

5. The seminal piece in this area is Michelman, *The Supreme Court 1968 Term—Forward: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). The most recent of the "activist" arguments is found in Karst, *The Supreme Court 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

6. *See* Canby, *The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism*, 1975 ARIZ. ST. L.J. 1 (1975); Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703 (1975); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N. CAR. L. REV. 1 (1978); Monaghan, *The Supreme Court 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

7. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). *See* Linde, *supra* note 6; Sager, *supra* note 6; *cf.* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

develop. Indeed, if anything is surprising, it is that this interventionism has not been repudiated in the 1970's and 1980's.

An elusive sense of judicial propriety was found in what was styled the "two-tiered test" for equal protection. No judgment was required. The test was purely mechanical. On the lower tier, the inquiry was whether there was any relationship, on any set of facts, between means and ends. On the higher tier, the inquiry was whether there were other means that fit this purpose more snugly. While there is room for fair argument on the desirability of that approach, and some dispute on whether it ever was in fact realized,[8] it is now clear that the two-tiered analytic framework has collapsed. Any number of factors may have contributed to that collapse, including lingering doubts about the legitimacy of the approach; questions regarding the workability of such a mechanistic, nonjudgmental technique; questions of general institutional competency; and even the inevitable reaction of the Hegelian dialectic. A newly found political conservatism might also be involved.

The Court has been creating a new role for itself since the 1960's, and equal protection happened to be the vehicle it chose. While the clause historically may have had a specific purpose, the presence of such general language was bound to attract the attention of an activist Court.

The due process clause was unable to accommodate the Court's modern vision. The variety of opinions and the strange line-ups of justices in *Griswold v. Connecticut*,[9] the contraceptive case, suggested that substantive or judgmental due process was not the right vehicle. The reaction to *Roe v. Wade*,[10] the abortion case, marked the effective limit of significant due process activity. The struggle in *Griswold* to find a "penumbra" represented an

8. *See Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975) (panel discussion with Professors Jesse Choper, Ray Forrester, Gerald Gunther, and Philip Kurland).

9. 381 U.S. 479 (1965). Justice Douglas, writing for the Court, "found" the right to use contraceptives in the Bill of Rights. Justice Goldberg's concurring opinion, joined by Chief Justice Warren and Justice Brennan, noted that the ninth amendment recognized the right. *Id.* at 486 (Goldberg, J., concurring). For Justice Harlan, concurring, basic values implicit in the concept of ordered liberty—substantive due process—were involved. *Id.* at 499 (Harlan, J., concurring). For Justice White, concurring, the state statute worked a deprivation of "liberty" as that concept is used in the fourteenth amendment. *Id.* at 502 (White, J., concurring). For Justice Black, dissenting, joined by Justice Stewart, the right was not found in the Constitution and therefore the Court should not legislate it. *Id.* at 507 (Black, J., dissenting). For Justice Stewart, dissenting, joined by Justice Black, it was a silly law with which he philosophically disagreed, but it was not unconstitutionally vague and the procedures at the trial were constitutionally valid. *Id.* at 527 (Stewart, J., dissenting).

10. 410 U.S. 113 (1973). The public reaction is a matter of common knowledge. For critical comment, compare Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973), with Tribe, *The Supreme Court 1972*

effort by a liberal court to avoid the appearance of legislating. That appearance came through vividly in the abortion cases. Perhaps the Court *should* legislate in many areas, such as passing on the validity of state laws that burden interstate commerce. If the court incorrectly evaluates the federal interest in that situation, Congress can act to correct the judgment.[11] It is this ability of the legislature to correct the Court—or at least to relegislate in the substantive area—that Justice Jackson found attractive when he urged activity under equal protection rather than due process in his concurring 1949 opinion in *Railway Express Agency v. New York*.[12] There had been at that time no significant equal protection case invalidating legislation apart from the area of race, except for *Skinner v. Oklahoma*,[13] which was equal protection in form but due process in substance.

Modern equal protection can be said to have begun in 1966, with *Harper v. Virginia Board of Elections*.[14] There the Court talked about both invidious discrimination and the right to vote. For Justice Black, in dissent, the case represented no more than another use of the old "natural-law-due process formula."[15] That the case was about more than voting became clear in 1969, in *Shapiro v. Thompson*,[16] where the Court struck down residency requirements for welfare benefits. *Shapiro* referred to certain fundamental rights, such as interstate travel, which were being burdened, if not discriminated against, by the legislative category in question. The Court seemed to be impressed with the relative importance of welfare to poor people, as opposed to discrimination against out-of-state people for fishing and hunting licenses or tuition-free education.

Two years after *Harper*, the Court decided a pair of suspect category cases, *Levy v. Louisiana*[17] and *Glona v. American Guarantee and Liability Insurance Co.*[18] *Levy* invalidated a statute that barred unacknowledged illegitimate children from recovering for the wrongful death of the mother. *Glona* barred a mother from recovering for the wrongful death of her illegitimate child. In both cases the Court purported to use a form of heightened scrutiny like that previously used in alienage[19] and voting reapportionment

---

Term—Forward: Toward a Model of Roles in the Due Process of Life and Law, 87 HARV. L. REV. 1 (1973).

11. *Compare* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 621 (1851), *with* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 355 (1855). *See also* G. CALABRESI, *supra* note 7.

12. 336 U.S. 106, 111 (1949) (Jackson, J., concurring).

13. 316 U.S. 535 (1942). The Court, in an opinion by Justice Douglas, struck down a state's habitual criminal sterilization act. Justice Douglas stated that basic civil rights, marriage and procreation, were involved in the case.

14. 383 U.S. 663 (1966).

15. *Id.* at 676 (Black, J., dissenting).

16. 394 U.S. 618 (1968).

17. 391 U.S. 68 (1968).

18. 391 U.S. 73 (1968).

19. *See, e.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

cases.[20] *Levy* and *Glona* represented developments whose dimensions were uncertain. The language of the opinions suggested that not all of the suspect categories or fundamental rights requiring a higher degree of scrutiny had been identified.

In 1969 a two-tiered approach was identified that seemed descriptively accurate and serviceable.[21] That approach had a very attractive feature: it purported to call for no judgment, balancing, or evaluation of government ends by the Court. With the lower tier, or traditional equal protection, one could posit a governmental interest and suppose facts that created a relationship between the legislative means chosen and that governmental end. The Court was called upon to make no qualitative judgments. By the same token, the heightened or strict tier essentially asked whether the government could accomplish its end through the use of other legislative categories that did not involve suspect categories or burden fundamental rights. Theoretically, the Court's invalidation of legislation did not preclude legislation in the problem area.[22]

In 1971, *Reed v. Reed*[23] and *Graham v. Richardson*[24] were decided. Gender and alienage joined illegitimacy as suspect categories. In 1972, Professor Gunther called for a test related to means, not ends, to provide a safeguard for the political process. He wanted the means evaluated in terms of the *articulated* purpose, not some hypothetical one.[25] In this way, the Court's function would still be nonjudgmental with regard to the legislative ends.[26]

In 1973, the fundamental interest line of cases was delimited in *San Antonio Independent School District v. Rodriguez*,[27] a case that was no more about education than was *Brown v. Board of Education*.[28] The issue was one of

20. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

21. *See Developments in the Law, supra* note 2.

22. The only substantive or qualitative judgment made by the Court occurred when the state advanced administrative convenience as its interest in the legislative category. In Shapiro v. Thompson, 394 U.S. 618 (1968), the Court held that this interest was not factually demonstrated by the state. That matter seems to have been transmogrified from a question of fact to a question of law. Subsequent cases involving durational residency treated administrative convenience as if it were not an important governmental concern. This was expressed in Frontiero v. Richardson, 411 U.S. 677 (1973), when the plurality cast on the government the burden of proving that its decision on procedures was economically wise.

23. 404 U.S. 71 (1971).

24. 403 U.S. 365 (1971).

25. *See* Gunther, *supra* note 3.

26. The fourteenth amendment did not preempt any of the state's residual police power to legislate for the general welfare except the express provision relating to the requirements of state citizenship and its implicit limitations on racial discrimination.

27. 411 U.S. 1 (1973).

28. 347 U.S. 483 (1954).

institutional competency. Justice Powell, for the majority, and Justice Marshall, for the dissent, wrote thoughtful and balanced opinions. The area of their disagreement was small but significant. Due process prohibits governmental action, but equal protection does not. As a practical matter, equal protection actually mandates more extensive governmental action. For Justice Powell, enforcing equality of education, as opposed to equality of expenditures, was an impossible task for the judiciary. The provision of minimum just wants—however socially desirable they might be—was not entrusted to the article III branch of government. The idea of equality of condition[29] was cabined, and with it the nonjudgmental two-tiered approach became impossible brittle. Its artificiality was revealed. Even the limiting notion that fundamental rights had to be found implicitly or explicitly in the Constitution had to fall as a nonjudgmental equal protection device. The case of *Zablocki v. Redhail*[30] engendered as many opinions, six, as did *Griswold v. Connecticut*.[31] While nominally an equal protection case, *Zablocki*—which invalidated a restriction on remarriage by persons who were not supporting children from prior marriages—clearly involved the subjective and judgmental balancing of the state's interest in a natural law-due process formulation.

The inventory of suspect categories was also closed. The new categories the Court was urged to treat as suspect in the early 1970's, such as poverty, lacked important causation elements.[32] Poverty is socially caused and, given our system, is not attributable to state action. On the other hand, certain immutable characteristics of birth, such as race and gender, seem inappropriate categories for legislation, except where disabilities are socially caused and the legislation is ameliorative. In both *Reed v. Reed*[33] and *Bolling v. Sharpe*,[34] the actual holding of the Court was that there was no relationship between the category chosen and the state interest asserted, where the legislation imposed legal barriers on the socially disadvantaged group. Benign classifications thus may be a different matter.[35] Invidious discrimination involving gender and race arguably fails even minimum

29. *See* Wilkinson, *supra* note 4.

30. 434 U.S. 374 (1978).

31. 381 U.S. 479 (1965). A brief summary of the various opinions in *Griswold* is set forth in note 9 *supra*.

32. *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970). Professor Michelman's prescient piece remains the definitive treatment of the area. *See* Michelman, *supra* note 5.

33. 404 U.S. 71 (1971).

34. 347 U.S. 497 (1954). *Bolling* involved the segregated schools of the District of Columbia, and the challenge was mounted under the due process clause of the fifth amendment rather than the equal protection clause of the fourteenth amendment.

35. For a discussion of the difficulties in defining what is "benign," see Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U. PITT. L. REV. 285 (1977). *Cf.* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).

scrutiny. The other two suspect classifications, alienage and illegitimacy, are different in that they are legal categories, not physical categories attending the circumstances of birth.

The impulses that suggest treating gender as a category requiring some form of heightened judicial scrutiny are not based on the same historical background as those that warrant so treating race.[36] Similarly, there are significant differences between the past treatment of aliens and illegitimates, which suggest that these legally created categories should not be lumped together for identical nondiscriminating judicial solicitude. There also is no reason to apply the same standard of review to congressional enactments involving suspect categories as is applied to state enactments.[37] For one thing, considerations of federalism are not the same as considerations of separation of powers and issues of institutional competency.

In 1976, the attempt to apply strict scrutiny to all suspect category cases was abandoned in favor of a test that looked for substantial relationships to important actual governmental interests, even if not articulated.

This Article now will describe the movement away from the two-tiered approach and then analyze the intermediate level of review to see if the Court can avoid the charges—already leveled at it under due process—that it is legislating its own values, a charge which increased activity under equal protection was designed to avoid.

III. The Collapse of the Second Tier

A. *Alienage*

Alienage was recognized by Tussman and tenBroek as a category marked for concern under the equal protection clause.[38] State regulations had been invalidated on preemption grounds.[39] The wrongness of alienage as a suspect category triggering a pure means analysis was manifest from the beginning. *Graham v. Richardson*,[40] which started it all by striking down state laws restricting welfare payments to resident aliens, begins, "These are welfare cases. They provide yet another aspect of the widening litigation in this area."[41] The Court then cites as examples *Shapiro v. Thompson*[42] and

36. References based on color of skin seem only of social, rather than physical or biological origin.

37. Professor Gunther says the "synonymousness" of the fifth and fourteenth amendments is "well established," except where there are special national interests like alienage. *See Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 676 (1975). For Professor Karst, there is a basic rule of congruence. *See* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N. CAR. L. REV. 541 (1977). *But see* Seeburger, *supra* note 35; *cf.* Fullilove v. Klutznik, 448 U.S. 448 (1980) (plurality opinion of Burger, C.J.).

38. Tussman & tenBroek, *supra* note 1, at 376.

39. *See* Hines v. Davidowitz, 312 U.S. 52 (1941).

40. 403 U.S. 365 (1971).

41. *Id.* at 366.

Goldberg v. Kelly,[43] among others. Obviously what follows regarding aliens is suspect.

First, *Shapiro* was not about welfare. The only judicially enforceable provision of just wants occurs where the state itself has entered the field, such as in divorces,[44] voting,[45] or criminal appeals,[46] and has demanded exclusivity of its activity. Provision of housing, food, or education is procedurally entirely different.

Second, *Goldberg* itself is suspect. It makes sense only if there was a duty to provide welfare. The "property" interest to be protected by procedural due process is dependent on state law. That property was the entitlement—procedurally enforceable retroactively by access to state court—to payments for that period in which the criteria for eligibility were met, rather than payments for a period until it had been determined that the criteria were not met. The Court thus created a new vested state property interest out of an expectancy.

That *Graham* is correctly decided on its alternative ground as a preemption case seems beyond serious dispute. That there should be heightened scrutiny because aliens are a discrete and insular minority within the meaning of the *Carolene Products* footnote[47] is not apparent. The only relevant citations are to *Truax*[48] and *Takahashi*,[49] but the discussion in those cases is not addressed to suspectness of category but only to the absence of any compelling state interest. The state interest is lacking precisely because of the paramount or preemptive federal interest. The Court need not, and frequently ought not, search to find in the Constitution a clause or a phrase that justifies invalidating state legislation.[50]

To classify alienage as suspect is to do one of two things. Either it is to say that the category has a significance independent from its relation to the weight of the state interest, thus needlessly confusing the judgmental and evaluative process, or it is to be deadly serious about review of suspect categories, which is strict in theory and fatal in fact. The latter certainly seemed to be the case in *In re Griffiths*[51] and *Sugarman v. Dougall*,[52] where state interests of colorable legitimacy were denigrated by the Court.

42. 394 U.S. 618 (1969).

43. 397 U.S. 254 (1970).

44. Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973); Boddie v. Connecticut, 401 U.S. 371 (1971).

45. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

46. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

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

48. Truax v. Raich, 239 U.S. 33 (1915).

49. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

50. *See* C. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

51. 413 U.S. 717 (1973) (admission to the state bar).

52. 413 U.S. 634 (1973) (state civil service employment).

Then, in 1976, the Court decided two cases involving congressional regulations governing aliens, which had been invalidated by understandably confused lower courts. In *Mathews v. Diaz*[53] and *Hampton v. Mow Sun Wong*[54] the Court boilerplated the fourteenth amendment equal protection standards onto the fifth amendment, ignoring the notion that the choice of means is the essence of the legislative power, which the Constitution has vested in Congress, a co-equal branch. The boilerplating process implies that considerations of separation of powers are identical with considerations of federalism. There is simply no reason in logic or history to apply the same standard of review to Congress under the fifth amendment that is applied to the states under the fourteenth. The Court did recognize that the same standard of review could not always be applied to Congress in the alienage area. Unfortunately, rather than recognizing the inappropriateness of the alternative suspect category holding in *Graham* and rejecting equal protection notions as inapplicable, thus limiting the holding to structural preemption, the Court "solved" the problem by discerning a second and more deferential equal protection clause in the fifth amendment where the naked eye can find none.

The weakness of the suspect category approach under the fourteenth amendment was heightened when a Maryland law excluding aliens from grand or petty juries was summarily upheld on appeal.[55] This disparate treatment of alienage as suspect continued in 1977 with *Fiallo v. Bell*[56] and *Nyquist v. Mauclet*,[57] both of which were properly decided.

The functional importance of *Graham*'s equal protection alternative holding began to erode as the focus of review shifted from the significance

53. 426 U.S. 67 (1976) (denial of Medicare benefits to certain aliens upheld).

54. 426 U.S. 88 (1976) (civil service employment regulations invalidated).

55. Perkins v. Smith, 426 U.S. 913 (1976).

56. 430 U.S. 787 (1977). Federal law discriminated against illegitimates in granting immigration preferences. The Court, relying on *Hampton*, said that power over aliens is of a political character and therefore subject only to narrow judicial review. It felt it would not be a proper judicial role in cases of that sort to probe and test the justifications for the congressional decision.

57. 432 U.S. 1 (1977). A state statute required that recipients of certain scholarships and loans for higher education be citizens, or have made application for citizenship, or file a statement affirming their intent to apply for citizenship as soon as they qualified, or be within the class of refugees paroled by the attorney general. This was held to discriminate against a class. It was subject to strict scrutiny since it was directed at aliens and only aliens were harmed by it, even though its bar against them was not absolute. The distinctions made in the statute thus seem to be matters of only federal, not state, interest. The Court said, "The governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Id.* at 7.

of the category to the legitimacy of the state interest. In *Foley v. Connelie*,[58] the Court recognized that it would be inappropriate to require every statutory exclusion of aliens by the state to clear the high hurdle of strict scrutiny. Scrutiny, said the Court, would not be so demanding when it deals with matters firmly within a state's constitutional prerogatives. In *Ambach v. Norwick*,[59] the Court, while acknowledging *Graham*, went back to the public interest doctrine of pre-*Graham* cases.

Finally, in *Cabell v. Chavez-Salido*,[60] a five justice majority stated:

> Since Graham, the Court has confronted claims distinguishing between the economic and sovereign functions of government. This distinction has been supported by the argument that although citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community.[61]

A test that turns on the nature of the state or federal interest is hardly a means test. Where there has been no sovereign function, strict review has been fatal in fact. Where there is one, review is relaxed. Interestingly, the *Cabell* dissent makes a convincing case of both over- and underinclusiveness, which must have caused the category to fall on anything other than a minimum rationality test.

As if to illustrate the inutility of equal protection approaches to alienage, two very interesting cases were decided in June 1982, on what are essentially preemption grounds. That both state regulations disadvantaged only some aliens was not used as a reason for not treating the categories as suspect. In one case, the Court found that Maryland's attempt to bar the

---

58. 435 U.S. 291 (1978). A New York statute limiting appointment of members of the state police force to citizens of the United States was upheld since citizenship may be a relevant qualification for those important nonelective positions held by officers who participate directly in the execution of broad public policy. "The state need only justify its classification by a showing of some rational relationship between the interests sought to be protected and the limiting classification." *Id.* at 296.

59. 441 U.S. 68 (1979). A New York statute which precluded from employment as elementary and secondary public school teachers those aliens eligible for United States citizenship but who refuse to seek naturalization was held to bear a rational relationship to a legitimate state interest in furthering its educational goals.

> Although our more recent decisions have departed substantially from the public-interest doctrine of Truax's day, they have not abandoned the general principle that some state functions are so bound up with the operation of the state as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government . . . . The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this court.

Id. at 73-74.

60. 454 U.S. 432 (1982) (upholding state's citizenship requirement for position of deputy probation officer).

61. *Id.* at 438.

resident children of diplomats from higher education benefits was in fact preempted by federal statutes and regulations.[62] The second case involved Texas's refusal to provide public school education for illegal aliens.[63] While the invalidation of the statute did not turn on express preemption, the Court satisfied itself that the invalidation would cause no significant hardship to the state in fact and was in accord with congressional desires. The focus of the case was the end, the national problem of illegal immigration, rather than the means.

When the alienage category falls, it is because of the absence of any state regulatory power; there is a preemptive federal interest in uniformity. Equal protection adds nothing as an analytical tool and can only be a cause for confusion.[64]

B. *Illegitimacy*

Illegitimacy, like alienage, is not an immutable characteristic and is not necessarily determined at birth, as is the case with gender and race. The use of any of these four categories in legislation might attach legal disabilities to an individual at birth, but gender and race are physical characteristics while alienage and illegitimacy are based on the pre-existing, validly imposed, legal characteristics of the parents. A baby is illegitimate because the parents are not married. A baby is an alien because when he was born outside this country his parents were not citizens. Thus, treatment of illegitimacy as a suspect category triggering strict scrutiny is initially a dubious proposition because the status is in fact produced by a relationship validly regulated by the state. A strict analysis which purports to be purely means related—that is, one taking no account of the state interest, as in the alienage cases—must also ultimately fail as a judicial tool.

Recent cases indicate that the Court is moving to a position that should have been initially clear from a careful reading of the facts in *Levy v. Louisiana*[65] and from an appreciation of Justice Harlan's dissent in that

62. Toll v. Moreno, 458 U.S. 1 (1982).

63. Plyler v. Doe, 457 U.S. 202 (1982). The case is discussed in detail in text accompanying notes 152-55 *infra*.

64. A vivid example of the difficulties this kind of judicial intervention can cause is seen in the case of the injunction issued against selective enforcement of the deportation laws against Iranians. *See* Narenji v. Civiletti, 481 F. Supp. 1132 (D.D.C.), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979). If the action discriminates, it is only among aliens and not between aliens and citizens. The issue is whether treating aliens differently because of their national origin is invidious in that context. It certainly cannot be called irrational, because foreign policy deals with nations, not individuals. These aliens are treated differently because of their nationality and relations with their homeland, a relationship to which personal attributes are irrelevant. Here again, the language of equal protection confuses rather than assists analysis.

65. 391 U.S. 68 (1968). In *Levy*, illegitimate children, members of the house-

case.[66] Strict scrutiny language sometimes masks the fact that the legislative category does not even meet minimum rationality.[67] Differential treatment of an illegitimate, as opposed to differential treatment of his or her parent, can further no articulable state policy. Punishing the child for the sins of the parent has not been advanced as one. In addition, imposition of disabilities on the child presents serious due process problems. *Levy* involved the denial of a benefit extended to others being cared for in the family home who happened to be legitimate children. There was nothing the individual child could do to come within the provisions of the wrongful death statute. That the natural parent could have made the child legitimate does not alter the right of the child.

The case that causes confusion if read too broadly is *Glona*,[68] the companion case to *Levy*. In *Glona*, the illegitimate mother was denied a right under the wrongful death act, although for most every purpose under Louisiana law she was treated as if she were a legitimate mother. The basis of the decision was the absence of a rational relationship. The Court cited *Morey v. Doud*.[69] Treatment of illegitimacy as a suspect category was not essential to the decision.[70]

In *Labine v. Vincent*[71] the Court upheld a Louisiana law that prohibited even acknowledged illegitimates from inheriting in intestacy, applying minimal scrutiny. It chose to recognize the state interest in the "legal family" relationship, an interest which counted not at all in *Levy* or *Glona*.

The Court's approaches in these cases were plainly inconsistent, whether or not the results were. The problem was confronted by Justice Powell in *Weber v. Aetna Casualty & Surety Co.*,[72] where unacknowledged illegitimates received workers' compensation benefits through the injured father only if the benefits were not exhausted by the claims of legitimate

hold, were denied the right of recovery under the Louisiana wrongful death statute for the death of their mother.

66. *Id.* at 76 (Harlan, J., dissenting). For Justice Harlan, the biological relationship required by the court was no less arbitrary than the legal relationship it invalidated. He stated that neither a biological relationship nor a legal acknowledgement is indicative of the love or economic dependence that may exist between two persons.

67. This was the case in Bolling v. Sharpe, 347 U.S. 497 (1954), in which the Court held that racial segregation in the District of Columbia schools had no rational relationship to any educational purpose and was thus invalid under the due process clause of the fifth amendment.

68. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

69. 354 U.S. 457 (1957).

70. Eisenstadt v. Baird, 405 U.S. 438 (1972), is the same sort of case. Rather than looking at marriage as a suspect category or fornication as a fundamental right, the Court simply found no relationship between the means chosen by the state and the accomplishment of the stated objective of the statute.

71. 401 U.S. 532 (1971).

72. 406 U.S. 164 (1972).

Published by University of Missouri School of Law Scholarship Repository, 1983

children and acknowledged illegitimates. The statute's discrimination did not include all illegitimates, and Justice Powell correctly identified the issue as concerning persons similarly situated, i.e., dependent children.[73] Justice Powell concluded that *Levy*, not *Labine*, was the applicable precedent.[74] He recognized the presence of a state interest in the promotion of the legal family relationship, a recognition not granted in *Levy*. But unlike *Labine*, the existence of a rational relationship between the category and the state interest to be advanced was not enough. Justice Powell could not see a "significant" factual relationship. As Professor Gunther properly pointed out, the case involved something other than either strict scrutiny or minimum rationality.[75]

The language in *Weber* remained a trap for the unwary because of references to the social opprobrium attaching to the accident of birth. Subsequently, in *Gomez v. Perez*,[76] the Court struck down a Texas law denying illegitimates the right to support orders from their fathers. Such discrimination was found to be "invidious." But such a statute would be equally invalid if applied to all dependent children born in even numbered years. The fact is that as dependent children they are similarly situated. The category of illegitimacy furthers neither factually nor logically any suggested or conceivable state purpose.

The seeming lack of a settled approach continued in 1976, when the Court upheld those provisions of the Social Security Act that conditioned the eligibility of certain illegitimate children for a surviving child's insurance benefits upon a showing that the deceased wage earner was the claimant child's parent and at the time of his death was living with the child or was contributing to his support.[77] A legitimate child was automatically considered to be dependent. The Court recognized that Congress's purpose in adopting the statutory presumption of dependency was to serve administrative convenience. The Court noted that this was not a case of strictest scrutiny, where such approximations or presumptions would have to be supported by a showing that the government's dollar loss in overincluding benefit recipients is greater than the saving from avoiding administrative

73. To the same effect is Jimenez v. Weinberger, 417 U.S. 628 (1974). A provision of the Social Security Act denying disability benefits to some—but not all—illegitimate children born after the wage earner parent's disability was held unconstitutional. Strict scrutiny was not applied and the legitimacy of the interest in preventing spurious claims was recognized. The Court concluded that the Act's conclusive denial of an opportunity to establish dependency did not adequately serve the purpose of the Act.

74. One might wonder at this juncture how the Court would have approached the problem of a dependent illegitimate child complaining about dilution of his wrongful death recovery through having to share with a non-dependent legitimate one.

75. *See* Gunther, *supra* note 3.

76. 409 U.S. 535 (1973).

77. Mathews v. Lucas, 427 U.S. 495 (1976).

hearing expenses.[78] The Court also noted that the statute was not broadly discriminatory. Certain illegitimates, such as those who had been acknowledged in writing or who had been the beneficiary of a court's support order, had the benefit of the presumption of dependency. It is worth noting that this case involved an act of Congress.

The following year, in *Trimble v. Gordon*,[79] Justice Powell again applied something less than the strictest scrutiny but struck down a state law. An Illinois probate provision allowing illegitimate children to inherit only from their mothers was defended on that ground that it promoted legitimate family relationships and made estate administration easier. The Illinois act was more broadly discriminatory than the Louisiana act in *Labine*[80] and, in any event, the Court noted that the difference in the rights of illegitimate children in the estates of their mothers and fathers appears to be unrelated to the purpose of promoting family relationships. Referring to the state's interest in establishing a method of property disposition, the Court noted that the court below had failed to consider the possibility of a middle ground between the extremes of complete exclusion of all illegitimates and the burden of case by case determination of paternity.

Such an intermediate means-focused approach was brought before the Court in the 1978 case of *Lalli v. Lalli*.[81] While there was no majority opinion, the concurrences make it clear that the category does not invoke strictest scrutiny. Involved was New York's requirement of a judicial proceeding declaring paternity sometime before the father's death in order for the illegitimate to inherit. The dissent thought the requirement of judicial filiation too drastic, that public acknowledgments of paternity or an elevated standard of proof would serve the state interest of precluding fraudulent claims.[82] The plurality opinion noted that few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. It would seem that any intermediate step, the absence of which was the fatal flaw in *Trimble*, would be sufficient. All that can be required under equal protection is that the legislature address the problem—not that it come up with a solution that a majority of the Court thinks is the "fairest."[83]

---

78. The Court cited Frontiero v. Richardson, 411 U.S. 677 (1973). *See* note 22 *supra*.

79. 430 U.S. 762 (1977).

80. Labine v. Vincent, 401 U.S. 532 (1971).

81. 439 U.S. 259 (1978).

82. *Id.* at 277 (Brennan, J., dissenting).

83. In response to the invalidation of its law precluding illegitimates from obtaining support orders against their fathers, Gomez v. Perez, 409 U.S. 535 (1973), Texas provided that the illegitimate must get the support order within one year of birth. Without dissent, the Court invalidated the provision. Mills v. Habluetzel, 456 U.S. 91 (1982). The majority opinion by Justice Rehnquist noted that the procedures need not be co-terminal with those for legitimate children since the illegitimate has a different element of proof, i.e., paternity. Applying intermediate

Three more cases involving the category of illegitimacy arose in 1979. They all were of the *Glona* type,[84] imposing disabilities on parents of illegitimate children rather than on the children themselves. The challenges on illegitimacy grounds were unsuccessful.[85]

In the area of illegitimacy it is well settled that the children themselves cannot be subject to legal disabilities which they cannot unilaterally alter, since such disabilities do not relate to the valid state interest in the legal relationship between the parents, a relationship that the child cannot determine. The parents who are themselves the cause of their status can be subject to legal disabilities distinct from those of married parents, although generally not distinct because of gender. The question for the future is the extent of those disabilities. The state interest in procedural regularity in the administration of estates, for instance, is sufficient to justify rules that preclude natural parents from the right to ad hoc determination that they are in fact "similarly situated" with married parents because of their legal status.[86]

The requirement of the equal protection clause in the illegitimacy area, then, is only procedural. The substantive state interest is not denigrated by the requirement of procedures. To that end it would appear that any reasonable procedure the state comes up with, as opposed to the fairest

---

scrutiny, the Court found that the provision was not substantially related to important governmental interests since no important evidence would invariably be lost nor would the passage of time appreciably increase fraudulent claims. The statute did not provide a reasonable opportunity.

84. *See* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

85. In the first of these cases, Parham v. Hughes, 441 U.S. 347 (1979), the Court upheld a Georgia statute which precluded a father who had not legitimated his child from suing for the wrongful death of that child. The plurality opinion applied minimum rationality to the illegitimacy category, noting that the statute did not impose different burdens or award different benefits to legitimate children and that the appellant was responsible for fostering an illegitimate child and then failing to change its status. The second case, Califano v. Boles, 443 U.S. 282 (1979), involved a challenge to a Social Security Act provision which restricted "mothers' insurance benefits" to widows and divorced wives of wage earners and denied them to the mother of an illegitimate child. The Court said that Congress could reasonably conclude that a woman who has never been married to the wage earner is far less likely to be dependent upon the wage earner at the time of his death, that he was never legally required to support her, that he was less likely to have been an important source of income to her, and that the possibility of severe economic dislocation upon his death was therefore more remote. The Court, recognizing that some dependent women might be excluded, applied only the rational relationship test because the discrimination was not against illegitimate children. The dissent based its argument on the impact of the statute on illegitimate children rather than the discrimination against unmarried parents. The final case, Caban v. Mohammed, 441 U.S. 380 (1979), involved the adoption of illegitimates but was decided on gender-based discrimination rather than illegitimacy.

86. *See* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

one they could have, will suffice. Language of "suspect category" has only confused the issue. It hides the nature and value of the state interest.

C. *Gender-Based Discrimination*

The collapse of the purportedly two-tiered approach is most plainly seen in the area of gender-based discrimination. Gender, like race, turns on immutable physical characteristics determined at birth. For better or worse, society traditionally has recognized and imposed gender-based distinctions. Today, it is generally accepted that most, if not all, legally imposed gender-based disabilities are irrationally overbroad, although there are tangible differences between the sexes. On the other hand, it seems reasonably clear that the insertion of the equal protection clause into the fourteenth amendment contemplated no special role for the Court.

This ambivalence is clearly reflected in the first of the modern gender-based discrimination cases, *Reed v. Reed*,[87] decided in 1971. Chief Justice Burger, speaking for a unanimous Court, purported to adopt a minimum rationality test, involving no departure from established doctrine, to invalidate a mandatory Idaho probate provision that gave preference to the father in a case where both of the decedent's parents filed for letters of administration. But one can suppose a set of facts that would sustain the legislative judgment. It probably is true even today that any man about whom you know nothing is more likely to be experienced in those business skills relating to settling an estate than any woman about whom you know nothing. The Court addressed this problem and concluded that such a mandatory preference could not be used merely to accomplish the elimination of hearings on the merits. But this conclusion merely restates the problem. Legislative categories are meant to deal with problems in gross, without individual determinations or hearings on the merits, and such categories are almost always either over- or underinclusive. The use of legislative categories is meant to avoid making ad hoc or individual determinations.

The reluctance to confront this basic question of crude legislative categories manifested itself in the "irrebuttable presumption" line of cases under the due process clause.[88] The attractiveness to the Court of that ap-

87. 404 U.S. 71 (1971) (invalidated mandatory Idaho probate provision that gave preference to father in a case where decedent's parents each filed for letters of administration).

88. The line began with Vlandis v. Kline, 412 U.S. 441 (1973). In *Vlandis*, a statute created a conclusive and irrebuttable presumption that, for tuition purposes, a state university student who was a nonresident for the entire period of his attendance. The presumption was not necessarily or universally true, and the state had reasonable alternative means of making the crucial determination:

> We hold only that a permanent irrebuttable presumption of nonresidence—the means adopted by Connecticut to preserve that legitimate interest—is violative of the Due Process Clause, because it provides no

proach becomes apparent when one compares it with what the justices were

---

> opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents. The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

Id. at 453-454. In USDA v. Murry, 413 U.S. 508 (1973), the same technique was used to invalidate an act of Congress. A statute denied households food stamp eligibility solely because they contained persons 18 years old or older who had been claimed as dependents for federal income tax purposes by taxpayers who were themselves ineligible for food stamp relief. This was held to be an irrational measure of the need of the household with which the child of the tax-deducting parent lived because it rested on an irrebuttable presumption often contrary to fact. The Court found that it lacked the critical ingredients of due process:

> We have difficulty in concluding that it is rational to assume that a child is not an indigent this year because the parent declared the child as dependent in his tax return for the prior year . . . . We conclude that the deduction taken for the benefit of the parent in that prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact.

Id. at 514.

To the same effect was USDA v. Moreno, 413 U.S. 528 (1973). A different provision of the Food Stamp Act allowed participation by households of related persons but excluded households containing one or more unrelated persons. This was held rationally related to neither the chapter's stated purposes—maintaining adequate nutrition and stimulating the agricultural economy—nor the goal of minimizing fraud in the administration of the program. It thus violated the equal protection component of the fifth amendment's due process clause. "[T]he classification here in issue," said the Court, "is not only imprecise, it is wholly without any rational basis." *Id.* at 538. But compare Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), in which the Court upheld an ordinance restricting land use to one-family dwellings and excluding more than two unrelated people from living together as a housekeeping unit. One who took account of governmental ends would note that family relationship is a matter of legitimate state concern, but not a delegated federal end.

In Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), the Court held that mandatory maternity leave rules—which required a pregnant school teacher to take unpaid maternity leave months before the expected childbirth and provided for reinstatement only upon tender of a physician's certificate of physical fitness—violated the fourteenth amendment's due process clause. The Court found that the arbitrary cutoff dates in the mandatory leave rules had no rational relationship to the state's valid interest in preserving the continuity of instruction and that it created a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties. "Because public school maternity leave rules directly affect one of the basic civil rights of man, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's

attempting under the equal protection clause. First and foremost, the justices liked its surface textual legitimacy. The Court purported to rely on that part of the fourteenth amendment that all critics would admit was appropriate for the Court to concern itself with: procedural due process. No balancing of state interests against substantive rights, wherever found, was required.[89] In these log-jam breaking cases, no evaluation of procedures by the Court was required since the use of statutory irrebuttable presumptions meant there was no procedure at all.

In the term after *Reed*, the Court decided *Frontiero v. Richardson*,[90] a "federal" case, in which it struck down regulations treating male and female service personnel differently when allocating spousal benefits. The Court's trespass on Congress's power can be seen by recalling Chief Justice

---

constitutional liberty." *Id.* at 640. The Court "thus conclude[d] that the arbitrary cutoff dates embodied in the mandatory leave rules . . . [had] no *rational* relationship to the valid state interest of preserving continuity of instruction." *Id.* at 643 (emphasis added).

The last successful challenge using this approach was Jimenez v. Weinberger, 417 U.S. 628 (1974). The Social Security Act did not permit illegitimate children born after their father became entitled to disability or death insurance benefits to receive any benefits. This was held to deny the equal protection of the law guaranteed by the due process provisions of the fifth amendment. "The complete statutory bar to disability benefits imposed upon nonlegitimated afterborn illegitimates in appellant's position, is not *reasonably* related to the valid governmental interests of preventing spurious claims." *Id.* at 629 (emphasis added). Note that the Court talked about *reasonableness* rather than *rationality* in this puzzling opinion.

This line of cases came to an end in Weinberger v. Salfi, 422 U.S. 749 (1975), which upheld a provision of the Social Security Act denying benefits to surviving wives and stepchildren unless the relationship had existed for nine months prior to the wage-earner's death. The Court, after commenting on the degree of judicial involvement in the legislative function involved in the irrebuttable presumption line of cases, noted that such involvement was inconsistent with the broad latitude accorded economic regulations under both the due process clause, *see* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955), and the equal protection clause, *see* Dandridge v. Williams, 397 U.S. 471 (1970).

89. This approach has been characterized as an invitation to the political branch to "reconsider the matter and determine explicitly whether a gender discrimination was needed to accomplish any purpose at all." Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 381. The role of the court with reference to outdated or unjust statutes was the focus of the 1978 Holmes Lectures. *See* G. CALABRESI, *supra* note 7.

90. 411 U.S. 677 (1973). The Court held that requiring a female Air Force employee who sought housing and medical benefits for her spouse to prove his dependence upon her for over half of his support, while not requiring such proof of a male employee seeking similar benefits for his wife, solely for the purpose of avoiding more costly ad hoc hearings, was an arbitrary legislative choice violative of equal protection notions.

Missouri Law Review, Vol. 48, Iss. 3 [1983], Art. 1

Marshall's opinion in *McCulloch v. Maryland*;[91] in talking about the choices of means open to Congress, he clearly differentiated the legislative power referred to in article I from the judicial power in article III. It is difficult to conceive of that legislative power being differently interpreted if there had been no necessary and proper clause in the Constitution. At the time of *McCulloch* the fifth amendment was already in existence. Since then, Congress has been given additional legislative authority in section 5 of the fourteenth amendment.[92] *Frontiero* marked the first time in our history that the Court voided an act of Congress related to a subject matter admittedly delegated to it where no substantive right implicitly or explicitly derived from the Bill of Rights was involved. The act was invalid only because the Court disagreed with Congress's choice of means. Four members of the majority thought that a degree of scrutiny beyond minimum rationality—that is, beyond what would satisfy *McCulloch*—was called for.[93] The fifth thought the case governed by *Reed*. Of course, *Reed* involved an entirely different part of the Constitution; the fourteenth amendment, not the fifth. Though the plurality talked in terms of strict scrutiny, it stated that the provision would survive if the government showed the economic wisdom of its decision. The requirement that a female member of the armed forces demonstrate the dependency of her spouse before receiving the dependent allowance (when men could obtain such benefits by affidavit) would be upheld if the government showed it cost more to give the allowance for all male dependents than to conduct the individual determinations. In practical terms, the imposition of suspectness on the category of gender by casting the burden of justification on the government reversed the normal presumption of validity. But that was only a plurality opinion.

The fact that gender had not yet been held suspect was instrumental the following year in upholding a state category preferring widows over widowers.[94] The minimum rationality test was continued[95] when the Court

---

91. 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall wrote that "we must never forget that it is a constitution we are expounding." *Id.* at 407. He continued:

> But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

Id. at 423.

92. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966).

93. 411 U.S. at 688 ("[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin are inherently suspect and must therefore be subject to strict judicial scrutiny.").

94. In Kahn v. Shevin, 416 U.S. 351 (1974), Florida's grant of an annual $500 property tax exemption to widows, while not offering an analogous benefit to widowers, was held not to violate the fourteenth amendment's equal protection clause since the discrimination was founded upon the reasonable distinction in state policy of cushioning the financial impact of spousal loss upon the sex for whom the loss imposes a disproportionately heavy burden.

95. Geduldig v. Aiello, 417 U.S. 484 (1974), might be an exception. There the

https://scholarship.law.missouri.edu/mlr/vol48/iss3/1

sustained the benignly differential treatment of female naval personnel in *Schlesinger v. Ballard*,[96] but it wavered somewhat when the Court struck down a state law which placed the age of majority for support purposes at twenty-one for males but only eighteen for females.[97]

Finally, a unanimous Court in *Weinberger v. Weisenfeld*[98] invalidated a congressional act excluding widowers but not widows from Social Security survivor benefits, although the majority opinion purported only to apply minimum rationality. This is the watershed equal protection opinion, in that it exposes the weaknesses, theoretical and operational, of the two-tiered approach in gender discrimination cases. The Court held that the purpose of the payment was to enable the widow to remain home with minor children, thus irrationally discriminating among surviving children solely because of the gender of the surviving parent. The Court determined for itself what the "actual" purpose of the statute was. The Court seemed to say that the act was unconstitutional not because Congress was without power to pass this particular piece of legislation but because the Court believed the Congress really was trying to accomplish some other legislative end. That anyone would attempt to read the collective mind of Congress (and what an assumption is therein contained) is novel enough. That the validity of legislation otherwise admittedly within Congress's power would turn upon such a reading by a branch of only co-equal authority is downright startling.

Fortunately, the Court abandoned the two-tiered approach the following year. Something less than strict scrutiny but more than minimal rationality was expressly held to be the applicable test in gender-based

---

Court held that California's disability insurance system, which excluded the disabilities that accompany normal pregnancy and childbirth, did not invidiously discriminate. The Court said that there was no risk from which men were protected that women were not nor was there any risk from which women were protected and men were not.

96. 419 U.S. 498 (1975). The Court upheld a statutory scheme that accorded women naval officers a 13-year tenure of commission to service before mandatory discharge for want of a promotion but which required the mandatory discharge of male officers who were twice passed over for promotion but who might have less than 13 years of commission service. "The complete rationality of this legislative classification is underscored by the fact that in corps where male and female lieutenants *are* similarly situated, Congress has not differentiated between them with respect to tenure." *Id.* at 509.

97. Stanton v. Stanton, 421 U.S. 7 (1975).

98. 420 U.S. 636 (1975). Excluding widowers but not widows from the survivor's benefits provided for by the Social Security Act was an unjustifiable discrimination against female wage earners required to pay Social Security taxes since it afforded them less protection for their survivors than is provided for male wage earners. The Court stated that the distinction was "entirely irrational." *Id.* at 651.

discrimination cases.[99] The importance of the actual purpose of the statute was downplayed when the Court articulated the new test in *Craig v. Boren*:[100] "[C]lassification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[101] This test was applied the following year in an illegitimacy case.[102]

As articulated, the intermediate test of means has two troublesome aspects. First, what is important to a state under its police powers would seem to be a federal question to be decided by the Court. This is not an unfamiliar method under a due process balancing approach, but it undercuts the force of Justice Jackson's argument for more activity under equal protection. Second, it is difficult to think about the relative degree of fit that "substantial" suggests without thinking about the importance of the personal interest affected.

The Court in *Califano v. Webster*,[103] in an unanimous per curiam opinion, boilerplated the *Craig* fourteenth amendment test onto the fifth amendment without discussion. As in the alienage cases, this wrongly ignores the

---

99. *See* Craig v. Boren, 429 U.S. 190 (1976). In *Craig*, an Oklahoma statutory scheme prohibiting the sale of 3.2% beer to males under the age of 21 and to females under the age of 18 was held to constitute an invidious gender-based discrimination that denied those males equal protection of the law:

> Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving . . . . [T]he relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*'s requirement that the gender-based difference be substantially related to the achievement of the statutory objective.

Id. at 204.

100. 429 U.S. 190 (1976).

101. *Id.* at 197. Justice Brennan, writing for the majority, did not seem to be willing to give up on this point entirely, however. He "accept[ed] for purposes of discussion the District Court's identification of the objective," which the State Attorney General asserted was traffic safety. *Id.* at 199. He did not believe it was self-evident that this was the "true" purpose, as opposed to a "convenient but false post-hoc rationalization." *Id.* at 200 n.7.

102. *See* Trimble v. Gordon, 430 U.S. 762 (1977).

103. 430 U.S. 313 (1977). A former provision of the Social Security Act which allowed women a more favorable method of calculating retirement benefits was held to work directly to remedy some of the effect of past employment discrimination and was thus not unconstitutional. Moreover, Congress's subsequent 1972 equalization of the treatment of men and women did not constitute an admission by Congress that its previous policy was invidiously discriminatory, nor did its failure to make the 1972 amendment retroactive constitute discrimination on the basis of date of birth. The Court stated: "To withstand scrutiny under the Equal Protection component of the Fifth Amendment's Due Process Clause, classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 316-17.

differences between state and federal interests. Gender might be relevant to federal concerns when the congressional choice is to spend for the general welfare rather than to regulate under its delegated powers. Where the federal concern is "dependency" or "financial need," invidious (as opposed to benign or compensatory) discrimination along these lines can be viewed as invalid, since it may be unrelated to or outside the federal concern. The Court has had difficulty in gender-based discrimination in that area where it has traditionally been viewed as relevant, both historically and factually, to a paramount congressional interest—the regulation of the land and naval forces, at least in potential combat situations.[104]

The first half of 1979 saw no less than five full-blown opinions from the Supreme Court dealing with gender-based discrimination. The most illuminating was *Orr v. Orr*.[105] Justice Brennan, for the majority, examined "the three governmental objectives that might arguably be served."[106] Of the validity of the first two, the Court said,

> One is a legislative purpose to provide help for needy spouses, using sex as a proxy for need. The other is a goal of compensating women for past discrimination during marriage, which assertedly left them unprepared to fend for themselves in the working world following divorce. We concede, of course, that assisting needy spouses is a legitimate and important governmental objective. We have also recognized "[r]eduction of the disparity in economic conditions between men and women caused by the long history of discrimination against women . . . is . . . an important governmental objective . . . ."[107]

The Court then applied a substantial relationship test, which began with the analysis of whether sex was a sufficiently accurate proxy and whether the compensation rationale was appropriate. It asked whether women had in fact been significantly discriminated against in the sphere to which the statute applied a sex-based classification, thus leaving the sexes not similarly situated. But the Court concluded that there was nonetheless no reason to

104. In Schlesinger v. Ballard, 419 U.S. 498 (1975), which is discussed at note 96 *supra*, the Court did not address the question of the legitimacy of gender-based discrimination in combat and sea duty, which distinctions were the basis for upholding the regulations challenged there. The same unchallenged gender differential in combat duty, and with it the conclusion that men and women were thus not similarly situated, was an important part of the decision to apply minimum rationality in Rostker v. Goldberg, 453 U.S. 57 (1981), the males-only draft registration case.

105. 440 U.S. 268 (1979) (Alabama statutory scheme imposing alimony obligation on husbands but not on wives held invalid).

106. *Id.* at 279. Justice Brennan took an institutionally conservative position regarding the statute's real purpose when he said, "Of course, if upon examination it becomes clear that there is not substantial relationship between the statutes and the purported objectives, this may well indicate that these objectives were not the statute's goals in the first place." *Id.*

107. *Id.* at 280.

use sex as a proxy for need because individual hearings at which the parties' relative financial circumstances might be considered had already occurred. That this may have been the case in *Reed* does not appear.[108]

A third arguable governmental objective in *Orr* was a preference for an allocation of family responsibilities under which the wife played a dependent role. This was substantively rejected as a valid governmental purpose, just like disabilities based on illegitimacy. It thus appears that gender classification for the sake of gender classification—just like segregation for the sake of segregation albeit in separate but equal facilities—is per se invalid.

Two other cases involving gender-based discrimination also involved illegitimacy. The first, *Parham v. Hughes*,[109] upheld a state statute which precluded a father who had not legitimated his child from suing for wrongful death. The majority noted that mothers and fathers of illegitimate children are not similarly situated; that is, the classification does not discriminate against fathers but rather distinguishes between fathers who have legitimated their children and those who have not.[110] Thus, the majority concluded that only a minimum rationality test was applicable. The majority noted that the constitutionality of the state law that required fathers but not mothers to use the legitimation process was not challenged in the case. The dissent argued that this was circular, that the issue before the Court was whether the state may require unmarried fathers but not unmarried mothers to have pursued a statutory legitimization procedure in order to bring suit for the wrongful death of their children. The majority noted the obvious, that the identity of the mother of an illegitimate child will rarely be in doubt.

In the other gender-illegitimacy case, *Caban v. Mohammed*,[111] the Court confronted the question reserved in *Quilloin v. Walcott*:[112] the right of the father of an illegitimate child to withhold consent to an adoption. In *Quilloin* the particular father had not been "similarly situated," but in *Caban* the father had his name on the birth certificate and had lived with the mother and the children. After the couple separated, he frequently saw the children and maintained contact with them. He had also tried to secure the custody of the children before the mother and her new husband petitioned for adoption. The Court noted that it was not confronted with a statute addressed particularly to newborn adoptions, where more stringent requirements concerning acknowledgment of paternity or a stricter definition of abandonment might be required. When dealing with older children, the Court found no substantial relationship between the statute and the state's interest in facilitating adoption of older illegitimate children, because there

108. Reed v. Reed, 404 U.S. 71 (1971). *See* text accompanying note 87 *supra*.

109. 441 U.S. 347 (1979).

110. *Id.* at 356. *Compare* Geduldig v. Aeillo, 420 U.S. 636 (1975) *with* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

111. 441 U.S. 380 (1979).

112. 434 U.S. 246 (1978).

was no basis for finding a profound difference between the affection and concerns of mothers and fathers. It was not argued that unwed fathers would be more likely to object to adoption, and the Court could see no self-evident reason why as a class they would be.

In *Personnel Administrator v. Feeney*,[113] a state life-long veteran's preference in civil service was challenged. The Court upheld the statute, noting that it was gender neutral on its face and that there was no argument that the statute was a pretext for gender discrimination.

Finally, in the most interesting of the 1979 cases, *Califano v. Westcott*,[114] the Court struck down that part of the Social Security Act which provided benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father but not of the mother. The government made two arguments: first, that the provision did not discriminate against women as a class although it incorporated a gender distinction; and second, the need to deter real or pretended desertion by fathers. The Court had little difficulty with the first argument.[115] As to the second, the Court could find no support for it in the legislative history. The Court concluded that Congress had in mind an image of a traditional family. Rather than rejecting this outright as a purpose, the Court made an alternative determination. It assumed deterrence of desertion to be the purpose but concluded the classification was not substantially related to the achievement of that goal. The Court said that there was no evidence in the legislative history or elsewhere that a father has less incentive to desert in a family where the mother is the breadwinner and becomes unemployed than in the family where the father is the breadwinner and becomes unemployed.

The Court then confronted the very troublesome question of the form of relief. Should families with unemployed fathers cease receiving benefits or should families with unemployed mothers get them? It was clear that a tremendous amount of money was involved. The Court said, "Whenever a Court extends a benefits program to redress unconstitutional under-inclusiveness, it risks infringing legislative prerogatives."[116] The Social Security Commissioner proposed a cheaper remedy that would terminate some cur-

113. 442 U.S. 256 (1979).

114. 443 U.S. 76 (1979).

115. The Court disposed of the point briefly:

> The Secretary's argument, at bottom, turns on the fact that the impact on gender qualification is felt by family units rather than individuals. But this Court has not hesitated to strike down gender classifications that result in benefits being granted or denied to family units on the basis of the sex of the qualifying parent. . . . Here, as in those cases, the statute "discriminates against one particular category of family—that in which the female spouse is a wage-earner."

Id. at 84 (quoting Califano v. Goldfarb, 430 U.S. 199, 209 (1977)).

116. *Id.* at 92.

rent recipients' eligibility: limiting benefits to the situation where the principal wage earner becomes unemployed, thus denying benefits to unemployed fathers where the mother is the principal wage earner. The Court decided that it was ill-equipped to estimate the relative costs of various types of coverage or to gauge the effect that different levels of expenditures would have upon the alleviation of human suffering. Under those circumstances, said the Court, any fine-tuning of coverage along principal wage earner lines, a new concept in the statute, should properly be left to the democratic branches of government. The Court felt that the district court's solution—rendering the act gender neutral—was the simplest and most equitable extension possible.[117]

Westcott was a difficult case because the test the Court had created for itself in 1976, that of finding a substantial relationship to an important governmental interest in gender-based discrimination cases, is easy to articulate but almost impossible to apply as a purely means related test. The questions the tests ask are not traditional judicial questions. What is the governmental interest? It is what the statute does? If so, then the relationship of means to ends is perfectly congruent and thus always more than merely substantial. How is a court to know whether the interest is important, as opposed to merely legitimate, where the Constitution provides no liberty interest to be weighed against it?

While there was an unusual number of cases in the October 1979 Term

117. *Id.* at 93. The Supreme Court, in invalidating a state law under the equal protection clause, always treated the effect of the invalidation as a matter of state law to be decided on remand to the state court. Either the general provision should fall and the act be totally ineffective or only the subject matter coverage that was offensive should fall (thus extending the coverage of the act). On remand to a lower federal court there might properly be an occasion for the invocation of abstention, as in Bellotti v. Baird, 443 U.S. 622 (1979). The extension of coverage by a federal court by striking the offending limitation in state spending cases would require appropriations to be made by a sovereign not dependent for its existence on the federal authority in a situation where there was no constitutional duty to make any appropriation. Pending legislative revision, if the state court were to strike the spending limitations, no one would be subject to sanctions for violating any affirmative regulations that the state legislature did not authorize since only a spending provision, and not a regulatory one, is involved. Individuals with an admittedly legitimate legislatively authorized claim would not be denied the relief afforded by the spending provision which was held invalid for the simple reason that others were not included. Under this legislative revision view of equal protection, spending is the one area that the legislature must review at least once every two years.

Whether there ought to be a difference in the scope of review between congressional choices and state choices, or whether there ought to be a difference between review of spending provisions rather than regulations, the ultimate decision ought not to turn on an identification of an "actual" purpose. One simply cannot avoid making legislative judgments by discovering that something is unrelated to a fictive end.

presenting challenges to gender-based discrimination, none presented dramatic departures from prior (albeit closely divided) cases. But in the next two terms the idiosyncratic nature of the intermediate test came to the fore.[118] Perhaps not unexpectedly, these cases presented challenges by males to gender discrimination, one to the typical statutory rape provision and one to a females-only state nursing school. By a 5-4 vote without a majority opinion, the former was upheld in *Michael M. v. Sonoma County Superior Court*.[119] But Justice Stewart then left the Court, and the four dissenters subsequently joined with Justice O'Connor to strike down, by an identical vote, the females-only nursing school in *Mississippi University for Women v. Hogan*.[120]

There was no serious dispute that the appropriate test was intermediate scrutiny, i.e., whether the means chosen bore a substantial relationship to an important governmental interest. The briefest of summaries of the various opinions in the two cases suggests the illusory nature of a test that purports to be only means related.

There was no disagreement among the justices that the purpose of the statutory rape law was to prevent teenage pregnancies. For the plurality,[121] the statute was sufficiently related to the governmental objective to pass constitutional muster. They could not say that a gender-neutral statute would be as effective. In their view, then, the burden implicitly rested with the party challenging the statute. The principal dissent,[122] relying on *Craig v. Boren*,[123] placed the burden on the state to produce evidence that its assertion about the effectiveness of a gender-based statute is true. The plurality also addressed the underlying purposes of equal protection, noting that males and females are not similarly situated when it comes to getting preg-

---

118. The case of Kirchberg v. Feenstra, 450 U.S. 455 (1981), was not troublesome. Without dissent, the Court invalidated a Louisiana statute that gave the husband the unilateral right to dispose of community property, although the wife could take steps to avoid the provisions. The appellant failed to offer any justification for the statute and the state did not appeal from the invalidation below. Nor did Rostker v. Goldberg, 453 U.S. 57 (1981), provide difficulties with the complication of an intermediate level of scrutiny, since the majority concluded that only the lower level of scrutiny was called for. The registration for the draft of males only had been considered at great length by Congress. Women were not similarly situated because only males were eligible for combat. The Court also considered and deferred to the broad power granted Congress with regard to the military, citing Schlesinger v. Ballard, 419 U.S. 498 (1975). *Schlesinger* is discussed at notes 96 & 103 *supra*.

119. 450 U.S. 464 (1981).

120. 102 S. Ct. 3331 (1982).

121. Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Powell. 450 U.S. at 466.

122. Justice Brennan, joined by Justices White and Marshall. *Id.* at 481 (Brennan, J., dissenting).

123. 429 U.S. 190 (1976). The case is discussed in note 99 *supra*.

nant and that the gender-based discrimination was neither invidiously discriminatory nor solely for administrative convenience.[124]

The nursing school case presented the opposite issue. Here there was some dispute about the purpose but no question about who bore the burden of producing empirical evidence on the workings of the gender classification.[125] The majority rejected the justification of compensation for past discrimination, because there was no evidence of such practices in nursing. Rather, it seemed to them to perpetuate the stereotypical view of nursing as exclusively a woman's job. In any event, the Court concluded that the females-only rule was not substantially related to the compensatory objective because men were permitted to attend classes as unregistered auditors in the degree program. The dissenters viewed the provision as one to expand women's choices and not one making them the victims of a stereotypical perception of women's roles.

IV. THE END OF THE TWO-TIERED APPROACH

As a practical matter, none of the "new" suspect categories is governed by the two-tiered approach. The alienage cases, which announced a strict scrutiny test like that used in race cases, actually turn on a characterization of the governmental interests involved. The state has no legitimate interest in discriminating against aliens, since the category is of paramount federal concern. That federal interest does not include determining membership in the state's political community.[126] Congressional enactments of nationwide application are viewed with a relaxed standard.

Illegitimacy, like alienage, is also the product of a valid legal relationship. Absolute disadvantages visited on the child, however, are irrational and violate substantive due process. The state must provide some procedure whereby the child can arrange for the same legal rights as siblings

124. Justice Blackmun, who was with the majority in *Craig*, refused to place the burden on the state in *Michael M.* He concurred with the plurality because he believed the statute was sufficiently reasoned. 450 U.S. at 481 (Blackmun, J., concurring). Justice Stevens separately dissented on the ground that the exemption of the endangered class (females) was utterly irrational. *Id.* at 496 (Stevens, J., dissenting).

125. 102 S. Ct. at 3336. Justice O'Connor, for the majority, claimed the case did not involve the "separate but equal" issue of single sex institutions left open in Vorcheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1975), *aff'd by an equally divided Court*, 430 U.S. 703 (1977), because here there was no all-male school of nursing elsewhere. That distinction is troublesome. There were other coed state nursing schools. There is no suggestion the plaintiff would not have been accepted at any of them nor any hint that they were not at least as good as the all-female school. The majority opinion relied on the fact that they were not as close. That all of the other schools were coeducational would seem to be of little constitutional relevance.

126. *Cf.* National League of Cities v. Usery, 456 U.S. 833 (1976).

similarly situated, i.e., entitlement to the care and support of the natural parents. The fact that the natural parent might be disadvantaged is the parent's own doing and not the result of state action.

Gender-based distinctions continue to present problems. Since 1976, it has been reasonably clear that disabilities designed to limit or channel an individual's choice of personal development (at least where not compensatory) are per se invalid as irrational. However, the due process clause would serve equally well as a vehicle here. Equal protection has not functioned as a pure means analysis.

Some tacit evaluation of the nature of the interest invaded is made when comparing the fit of the means to the ends, because the comparison depends in part on an evaluation of the importance of the ends. The nature of the interest and the importance of the ends call for the Court to make value-laden judgments. These judgments showed through the statutory rape case[127] and the women's nursing college case.[128] They dominated *Plyler v. Doe*,[129] the Texas illegal alien case. They are at the bottom of the dissenting opinions in *Railroad Retirement Board v. Fritz*[130] and *Schweiker v. Wilson*,[131] which urged a standard of review marginally more demanding than minimum rationality, albeit less demanding than the intermediate scrutiny test of substantial relationship to an important governmental interest. Ironically, judgments are necessary in order to avoid the constitutionalizing of trivial personal interests and the denigrating of important state interests.

V. THE 1980'S: ATTEMPTS AT INTERMEDIATE SCRUTINY

The 1980's promise to be a critical time in equal protection jurisprudence. In the late 1960's and early 1970's, the Court sought to identify legislative categories that triggered a strict means oriented analysis. The Court then implicitly recognized that strict scrutiny was insensitive to governmental interests and, in 1976, announced the adoption of an intermediate or middle tier level of review. Since the October 1980 Term, the Court has attempted to apply such intermediate review. The temper of the language in the various opinions suggests that the judgments reflect the justices' hidden agendas.

The differing positions of the various blocs suggest that an intermediate level of scrutiny as a judicial test imposes no check on policy preferences. It creates the risk of further fractionalization within the Court—with correspondingly less deliberation in judgment. Unless some manageable equal protection test is devised, it seems likely that either equal protection will

127. Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464 (1981).
128. Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).
129. 457 U.S. 202 (1982).
130. 449 U.S. 166 (1980).
131. 450 U.S. 221 (1981).

have to cease being the chosen judicial tool for enforcing social justice or the Court will have to pay the price of politicization: loss of respect and institutional independence.

This Article now turns to a consideration of the recent equal protection cases, from the point of view of how the Court arrived at its conclusions rather than what those conclusions were.

The issue, simply stated, is whether there can ever be a purely means related analytic standard between the logical extremes of the two tiers, one that does not depend on the importance of the personal interest or value of the legislative end, however that end is identified. Means analysis failed in the alienage area, where cases turned on the legitimacy of the governmental end and not the fit of the means chosen. It failed in the illegitimacy area because cases turned on the irrationality of imposing disabilities on the child without procedures for him to make himself similarly situated with his legitimate siblings. No analysis of means was necessary.

Gender-based categories will be the testing ground. The imposition of a gender-based disability is easily disposed of. Like penalizing the illegitimate, it may be viewed as an irrational punishment in violation of due process. Like penalizing the alien, it may be viewed as unrelated to any legitimate governmental interest. Both are essentially natural law concepts. But differential treatment which does not prohibit the full development of selfhood is more complex. There are bases for differential treatment. Physiological differences might suggest class based accommodations even though individual members might not need them. Most differential cases presenting the Supreme Court with difficulty are those that disadvantage the male.

In 1981[132] and 1982,[133] the Court was confronted with cases that called for the application of the "substantial relation to important governmental purposes" test. The Court was more deeply divided than ever. At the same time, members of the Court were attempting to apply similar tests in other areas.[134] An examination of those cases shows that an intermediate level of means analysis will not solve the problems that caused the collapse of the two-tiered system. Thus, the viability of equal protection itself is called into question.

Craig v. Boren[135] itself suggests that some intermediate tier will not work.[136] The test, as formulated by Justice Brennan, is actually the strict

132. Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464 (1981).

133. Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).

134. Heated opinions were generated in attempts to break away from the lower tier in Plyler v. Doe, 457 U.S. 202 (1982); Schweiker v. Wilson, 450 U.S. 221 (1981); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980). The dispute spilled into an interstate commerce area. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (invalidating Iowa's truck length regulations).

135. 429 U.S. 190 (1976).

136. As previously discussed, the test was borrowed in Trimble v. Gordon, 430 U.S. 762 (1977) (striking down flat ban on illegitimate child inheriting from father),

scrutiny he wanted to use in *Frontiero*.[137] He employed the same shifting of the presumption of constitutionality and held: "Suffice is to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving."[138] Under this test the use of the legislative category must be shown to be "accurate," and it is unlikely that statistics would ever suffice.[139] *Craig* involved two important interests: the personal interest of an individual who wanted to sell near beer to teenage males and the state's interest in safe highways.[140] Justice Brennan assumed that the purpose was highway safety, although there was no legislative history.[141] Again, weighing the importance of the state's interest against the relative dignity of the individual interest was not considered part of the equal protection mix.[142]

Justice Brennan's articulation of the test, dissenting in the statutory rape case,[143] again appears to be the wolf of strict scrutiny in some less

---

but was unnecessary for the resolution of cases like Lalli v. Lalli, 439 U.S. 259 (1978) (upholding procedural restrictions on inheritance by illegitimate children), where the state is only required to provide the illegitimate with some fair procedure.

137. Frontiero v. Richardson, 411 U.S. 677 (1973). Justice Brennan was joined by Justices Douglas, White, and Marshall. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, and Justice Stewart separately, concurred on the authority of Reed v. Reed, 404 U.S. 71 (1971) (invalidating preference for father in naming administrator).

138. 429 U.S. at 204.

139. In *Craig*, for example, more than ten times as many males in the age group were arrested for drunkenness (2% males to .18% females). This difference was "not trivial," 429 U.S. at 201, but was "unduly tenuous," *id.* at 202. The statistics were not tied to 3.2% beer, however.

140. An extreme example of this indifference to life and preference for profit is found in Justice Brennan's concurring opinion in Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 679 (1981). *See* text accompanying notes 148-51 *infra*.

141. 429 U.S. at 200. As noted previously, Justice Brennan would be willing to look to the "actual" purpose.

142. The statute in *Craig* was an odd one. Justice Stewart, concurring separately here as in *Frontiero*, thought the arrangement irrational. 429 U.S. at 214 (Stewart, J., concurring). Chief Justice Burger, who also concurred in *Frontiero*, thought this statute not irrational. *Id.* at 215 (Burger, C.J., dissenting). The three-judge district court had found the statute "substantially" related to the goal. *Id.* at 199. The statute did not make drinking 3.2% beer by 18 to 21 year old males criminal, only their purchase of it. There is some relationship, but not very much. The same can be said about Eisenstadt v. Baird, 405 U.S. 438 (1972). While at times Justice Brennan's opinion in *Eisenstadt* reads as if he is suggesting that marriage is a suspect category and fornication a fundamental right, when it came to the interest of an unmarried woman in obtaining vaginal foam, the regulation on who could distribute it and for what purposes was lawfully so easily circumvented that again one would wonder if in fact the asserted ends were furthered at all.

143. Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464, 481 (1981) (Brennan, J., dissenting).

threatening costume.[144] He asserted that the state has the burden of proving that gender neutral categories would be less effective.[145] The "substantial relation to important interests" test is automatically flunked in this case unless the state proves that more severe penalties on males than females in statutory rape cases produces fewer teenage pregnancies than gender neutral penalties, i.e., that punishing males deters females.[146] To the argument that punishing the female less severely makes her more likely to report the crime, Justice Brennan retorted that such a bare assertion is not enough.[147]

The grotesqueness of shifting burdens and looking for actual purposes is best seen in Justice Brennan's concurring opinion in *Kassel v. Consolidated Freightways Corp.*,[148] the Iowa sixty-five foot double trailer case. While noting that the Court is not empowered to second guess the empirical judgment of the legislature,[149] he states that the proper test is to balance the burden on interstate commerce against the actual purpose of the legislature.[150] He adds, however, that a protectionist *motive* invalidates the regulation even if there are safety benefits.[151] Both the degree of this burden on

---

144. Justices Blackmun and Powell seem to have come full circle. Justice Blackmun joined in Justice Powell's concurrence in *Frontiero* but joined with Justice Brennan in *Craig*. Justice Powell joined the majority opinion of Justice Rehnquist in *Michael M.* while Justice Brennan concurred specially.

145. 450 U.S. at 489 n.2 (Brennan, J., dissenting).

146. *Id.* at 491 (Brennan, J., dissenting).

147. *Id.* at 492 (Brennan, J., dissenting). Here again, as in *Craig*, Justice Brennan expressed doubts as to what the actual purpose was. He suspected that the motive for the legislation was the traditional uncritical view that the female lacked the capacity to consent to the loss of anything so precious as her chastity. *Id.* at 494 (Brennan, J., dissenting). Compare the irrebuttable presumption line of cases, which are discussed in note 88 *supra*.

148. 450 U.S. 662 (1981). A similar Wisconsin regulation was invalidated by a unanimous Court in Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978). Iowa, unlike Wisconsin, offered evidence on the unsafe aspects of 65 foot doubles. There was no opinion of the Court, with Justices White and Blackmun joining with Justice Stevens on Justice Powell's plurality opinion and only Justice Marshall joining in Justice Brennan's concurrence.

149. 450 U.S. at 679 (Brennan, J., concurring). Compare the extremely deferential approach of Justice Brennan's majority opinion in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

150. 450 U.S. at 680 (Brennan, J., concurring). Justice Powell has stated that under the commerce clause, as opposed to the equal protection clause, the Court can ignore the stated purpose and look to the actual purpose. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 475-76 (Powell, J., concurring and dissenting).

151. He found a motive in the Iowa Governor's message vetoing legislation raising the truck limit to 65 feet and from the legislature's failure to override the veto. Thus, the result in the case is that the older law, passed at a time when there may have been no 65 foot doubles, by a legislature whose purpose and motives are unquestioned, is held unconstitutional because inferences about supposed motives of the governor and a minority of the legislature in refusing to act.

interstate commerce and the number of lives lost on the highway are thus irrelevant to this means oriented mode of analysis.

The final example of the use of burden-shifting techniques to avoid making substantive judgments is seen in Justice Brennan's opinion for the Court in *Plyler v. Doe*.[152] Texas refused to provide free public education to illegal aliens. Colorable state interests were posited but rejected as unproven. First, there was no evidence of a burden on the economy that would justify state concern over the economic effect of a sudden influx into schools caused by illegal aliens.[153] Second, there was no evidence that excluding these children would improve the quality of education, except in the way that the exclusion of any child would reduce numbers and thereby ease the financial burden on the schools.[154] Finally, there was no evidence that those children would be less likely to remain in Texas and put their education to productive social or political use.[155] Thus, Justice Brennan again did not have to confront the relative weight of the individual interest versus that of the state.

This burden-shifting approach to the middle tier translates into scrutiny which is "heightened in theory, fatal in fact." It suggests that, because there would never be adequate statistical proof, no state can resolve problems through novel legislative categories in areas that trigger intermediate scrutiny, even where there is a very strong intuitive feeling that they would work.

By way of contrast, Justice Rehnquist, who has most frequently written in opposition to Justice Brennan, is much more deferential to legislative judgments and much more hostile to heightened scrutiny. Because of his concern over the role of the judiciary vis-a-vis the legislature where no per-

152. 457 U.S. 202 (1982). The Court (Justice Brennan joined by Justices Marshall, Blackmun, Powell, and Stevens) applied a heightened form of scrutiny where there was no suspect category or fundamental right. Justice Brennan said simply that the means chosen must further some substantial goal rather than that they must substantially further some important goal. Nothing seems to turn on this difference in phrasing.

153. If such were the concern, Justice Brennan suggests denying the illegal aliens employment, *see* De Canas v. Bica, 424 U.S. 351 (1976), as a more effective alternative. This smacks of strict scrutiny.

154. Thus, the burden is to prove a *special* financial burden, not just an additional one. This is bottomed on the assumption that the illegal alien parents are meeting the same tax burden as other parents.

155. At this point Justice Brennan comes very close to breaking away from a pure means analysis and looking at the relative weight of the individual interest and the value of the state goal. Implicit throughout the opinion is the notion that illegal immigration is a national problem almost preempted by Congress's failure to act and that there was the real possibility that since the federal government might tolerate the presence of those illegal aliens almost indefinitely, Texas would wind up with a subclass of illiterates within its borders completely outweighing temporary marginal cost savings to the state.

Published by University of Missouri School of Law Scholarship Repository, 1983

sonal liberty interests are involved, he invariably votes to sustain the statutes without significant reference to the relative weight of the governmental interest or the dignity of the individual claim. This is not to say that he does not admit to employing some form of heightened scrutiny in gender discrimination cases,[156] but he seems to engage in the presumption of constitutionality common to the lower tier. He resolved the statutory rape case in favor of the statute's validity because he could not say that a gender neutral approach would be as effective. Thus, the classification was "sufficiently related to pass constitutional muster."[157] For Justice Rehnquist, this deference also seems to follow from his refusal to look for actual legislative purposes.[158] Like Justice Brennan, he has not been tempted to look to the dignity of the personal interest or the importance of government ends in order to resolve particular middle-level scrutiny cases. It may be that, like Justice Brennan's, Justice Rehnquist's heightened scrutiny is actually just the traditional two-tiered scrutiny—but with an emphasis on the lower, not the higher, tier.

All of the other justices joined either Justice Brennan[159] or Justice Rehnquist,[160] recognizing the appropriateness, at least in some instances, of an intermediate level of scrutiny.[161] Justice O'Connor has, since joining the Court, written a major sex discrimination opinion subscribing to the "sub-

156. Dissenting in Craig v. Boren, 429 U.S. 190, 217 (1976), Justice Rehnquist protested against heightened scrutiny where no personal interests were affected or where the statute did not work against a group entitled to special judicial protection. While recognizing that something more than minimal scrutiny was in fact being employed in Reed v. Reed, 404 U.S. 71 (1971), and its progeny, he found that *Craig* involved only discrimination against males. Later writing the plurality opinion in Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464 (1981), he recognized again that something more than minimal scrutiny has been used, *id.* at 468-69, even though the legislative category is neither invidious nor used only for administrative convenience. *Id.* at 476.

157. *Michael M.*, 450 U.S. at 473.

158. He calls finding legislative motives a "hazardous" business. *Id.* at 469. He does recognize that the commerce clause cases present a somewhat different situation "if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce." Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 692 (1981) (Rehnquist, J., dissenting). But he cautions against trying to find only one actual purpose.

159. Justice Brennan's opinion in Craig v. Boren, 429 U.S. 190 (1976), was joined by Justices White, Marshall, Powell, Stevens, and Blackmun.

160. Justice Rehnquist's plurality opinion in Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464 (1981), was joined by Chief Justice Burger and Justices Stewart and Powell.

161. Justice Stewart, who retired at the end of the October 1981 Term, joined the plurality but also submitted a separate concurring opinion in Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464, 476 (1981) (Stewart, J., concurring). While arguing that males and females were not similarly situated in the statutory rape area, he nonetheless seemed to apply something more than minimal scrutiny in

stantial relationship—important governmental interest" formulation in a case where the complainant was male.[162] Each of the other justices has written separately in the 1980 and 1981 terms in cases involving the attempt to apply a means oriented level somewhere between the two extremes.

Justice White and Marshall have joined Justice Brennan's burden-shifting opinions.[163] Justice White has differed from Justices Brennan and Marshall only in refusing to join them in those cases where the issue was whether heightened scrutiny was called for.[164] Both Justice White and Marshall dissented separately in the males-only draft registration case, and both were joined by Justice Brennan.[165] For Justice White, the nature of the governmental interest or the dignity of the individual claim did not seem relevant. The justification offered—that jobs filled by volunteers must be filled by a males-only draft—was not "adequate."[166] For Justice Marshall, there as no support for the government's argument.[167] The government must show that registering women would "substantially impede" its efforts, and it cannot meet that burden without showing that a gender neutral statute would be less effective.[168] Outside of the suspect category and fundamental rights area, Justice Marshall has urged a sliding scale standard of equal protection review which does take account of the nature of the governmental interest and the individual claim.[169]

---

concluding that the statute is "realistically" related to the "legitimate" state purpose of reducing problems and risks of teenage intercourse and pregnancy.

162. *See* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982). The language of the opinion suggests adherence to the Brennan approach. The state interest or purpose of compensation was examined and rejected. The burden of justification was placed on the state, and an individual interest of only trivial value prevailed. The male wanted to go to this particular school, not because he could not get the program or quality elsewhere, but because of its location. It would seem that either he would lose if there were a males-only school on the other side of the state rather than a coeducational one across the street, or that sexually separate but equal facilities trigger the same level of scrutiny as regulations that burden one sex.

163. *See* Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464, 488 (1981) (Brennan, J., dissenting); Craig v. Boren, 429 U.S. 190 (1975). With Justices Brennan and Stevens, they formed Justice O'Connor's majority in Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).

164. *See* Plyler v. Doe, 457 U.S. 202 (1982); Schweiker v. Wilson, 450 U.S. 221 (1981); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

165. *See* Rostker v. Goldberg, 453 U.S. 57 (1981) (opinions of White and Marshall, JJ., dissenting). For the majority, Justice Rehnquist refused to apply heightened scrutiny because of the nature of the governmental interest.

166. *Id.* at 85 (White, J., dissenting).

167. *Id.* at 111 (Marshall, J., dissenting).

168. *Id.* at 94 (Marshall, J., dissenting).

169. *See* Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting). The school financing case resolution for him, like the registration case, did

Justice Stevens's voting has been identical with Justice White's, except that he stayed with Justices Brennan and Marshall and joined Justice Powell's dissent in *Schweiker v. Wilson*.[170] However, he wrote a separate concurring opinion in *Railroad Retirement Board v. Fritz*,[171] rejecting anything more than minimal rationality there. He dissented separately in the statutory rape case, suggesting that the statute was irrational.[172]

Chief Justice Burger has consistently voted with Justice Rehnquist to uphold the legislation in any case where intermediate scrutiny was urged.[173] He wrote the dissent in the illegal alien education case.[174] The judgments made by the majority, in his view, were not appropriate for the judicial branch, however much he might agree with them.

Justice Brennan could not get the remaining justices, Powell and Blackmun, to join in his plurality opinions applying strict scrutiny to gender classifications.[175] He did get them to join in intermediate level cases,[176] but they joined the Rehnquist majority in the draft registration case.[177]

Justice Blackmun has made it clear that he has given up on formulating any particular test to measure the fit of the means in sex discrimination cases.[178] Justice Powell, joined by Justice Rehnquist, also dissented separately in the nursing school case.[179] He felt the majority was wrong under any standard of review, even where there was genuine sexual stereotyping. Justice Powell recognized the relative unimportance of the individual interest—the inconvenient distance of the school—rather than the denial of a

---

not turn on an evaluation of the relative weight of governmental purpose or individual interest. He rejected the states' purported concern with local control of education as "an excuse rather than as a justification for understood inequality." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 126 (1973).

170. 450 U.S. 221, 239 (1981) (Powell, J., dissenting).

171. 449 U.S. 166, 180 (1980) (Stevens, J., concurring).

172. Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464, 496 (1981) (Stevens, J., dissenting).

173. The Chief Justice dissented separately in Craig v. Boren, 429 U.S. 190, 215 (1976) (Burger, C.J., dissenting), joined the plurality in Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464 (1981), and wrote a separate dissent in Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3341 (1982) (Burger, C.J., dissenting), in which he generally agreed with the dissenting opinion of Justice Powell, joined by Justice Rehnquist.

174. Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting).

175. *See* Frontiero v. Richardson, 411 U.S. 679 (1973).

176. *See* Craig v. Boren, 429 U.S. 190 (1976).

177. Rostker v. Goldberg, 453 U.S. 57 (1981).

178. *See* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3341 (1981) (Blackmun, J., dissenting) (generally joining Justice Powell's dissent); Michael M. v. Sonoma Cty. Super. Ct., 450 U.S. 464, 481 (1981) (Blackmun, J., concurring) ("sufficiently reasoned").

179. Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3342 (1982) (Powell, J., dissenting).

substantive educational opportunity.[180] As for the state interest, he noted that the single-sex school was newly created and not an ancient relic of stereotypical thinking.[181] He concluded that the means chosen were substantially related to the end and that allowing men to audit classes was an insubstantial deviation from the perfect relationship, a policy which few took advantage of because tuition was charged but no credit was given.[182]

Thus, of all the current justices, only Justice Powell (explicitly) and Justice Blackmun (implicitly) apply an intermediate level of scrutiny. However, it is not purely means related because it is not insensitive to the potential importance of the state's interest or the validity of the individual interest.[183]

It is interesting that these two justices, but not Justice White, were able to join the majority in *Plyler v. Doe*.[184] Each also wrote a separate concurrence,[185] discussing the individual interest in some level of education, the potential creation of a permanent underclass, and the nature of the state's interest.

It is even more interesting that one wrote the majority and the other the dissent in *Schweiker v. Wilson*.[186] Both had previously joined Justice Rehnquist's majority opinion denying anything more than minimum scrutiny in the railroad pension case.[187] But Justice Powell's dissent, while bottomed on the idea that the category was not irrational, suggested a somewhat heightened level of scrutiny.[188] He recognized that under the

---

180. *Id.* at 3347 (Powell, J., dissenting).

181. *Id.* at 3346 (Powell, J., dissenting).

182. *Id.* at 3347 n.17 (Powell, J., dissenting).

183. Justice Blackmun joined Justice Powell's plurality opinion in Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1982), which balanced the burden on interstate commerce against the asserted countervailing safety interest.

184. 457 U.S. 202 (1982). Justice Powell was the swing vote, having written the majority opinion in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

185. 457 U.S. at 231 (Blackmun, J., concurring); *id.* at 236 (Powell, J., concurring).

186. 450 U.S. 221 (1981).

187. United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980). In dissent, Justice Brennan, joined by Justice Marshall, urged a standard of review that was "not toothless." *Id.* at 184 (Brennan, J., dissenting). For Justice Brennan, this level of review did not involve a shifting of the burden of justification as in Craig v. Boren, 429 U.S. 190 (1976). He did look to the equities of the case, the congressional interest in reducing expenditures, and the personal interest in earned (but not vested) benefits. To that extent, his view of a modified lower tier resembles the middle tier of Justices Powell and Blackmun in sex discrimination cases.

188. *Schweiker*, 450 U.S. at 239 (Powell, J., dissenting). Justice Powell was joined by Justices Brennan, Marshall, and Stevens. Justice Stevens concurred separately in United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring). Thus he noted the obvious, that the "any conceivable basis" standard of minimum rationality means that "judicial review will constitute a mere

Flemming v. Nestor[189] view of social security spending, the actual purpose is irrelevant if any state of facts would support mere rationality. However, where no purpose of the statute, other than its effect, appears from the legislative history, the lower tier test is whether the means bear a fair and substantial relationship to the asserted purposes of this statute. This approach, as articulated, does not state whether the relative importance of saving money or the personal dignity afforded by the largesse enters into the calculus.

VI. Summary and Conclusion: Doubts on Judicial Legitimacy

Equal protection seems to have become a preferred mode of analysis in cases involving challenges to legislative categories. The Court has presented itself as not preempting the democratic branch, concerning itself only with the choice of *means* and thus not precluding legislative action in needful areas because, unlike due process, the importance of the subject area or the constitutional protection of the individual interest were not part of the analysis.[190] The initial two-tiered approach failed because nothing in fact ever survived strict scrutiny. The test was insensitive to the importance, relative or otherwise, of the governmental interest. The difficulty became obvious when the Court boilerplated fourteenth amendment equal protection into the fifth amendment, then had to find another test because of Congress's manifest authority in the alienage area. Eventually, the Court recognized that legitimate governmental concerns required something other than strict scrutiny.[191]

---

tautological recognition that Congress did what it intended to do." *Schweicker*, 450 U.S. at 180 (Stevens, J., concurring). He noted that the actual purpose can be unknown, and that this use of an actual purpose test means that the same statute could be constitutional in one state but unconstitutional in another. For Justice Stevens, the statute seemed reasonable, a cut above merely rational.

189. 363 U.S. 603 (1961).

190. This justification for more judicial activism in the equal protection area probably no longer has the same force. The dimensions of an asserted liberty interest under due process are merely assumed. The analysis is simply whether that asserted interest could be less infringed upon were the state to pursue its interest by some less restrictive means. Compare Griswold v. Connecticut, 381 U.S. 479 (1965), especially the concurring opinion of Justice Harlan. The various opinions in the case are summarized briefly in note 9 *supra*. *See also* Roe v. Wade, 410 U.S. 113 (1973).

191. The failure to recognize this means that in drawing legislative districts, for example, interests such as history, economics, group interests, area, geography, desire to insure effective representation for sparsely settled areas, access of citizens to their representatives, theories of bi-cameralism, occupation, attempts to balance urban, suburban, and rural power, or any other preference of a majority (or all but one) of the voters, since they cannot be judicially evaluated, cannot be recognized at all as legitimate state interests. *See* Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

For most justices, the application of some intermediate level of review is no different from the unsuccessful two-tiered approach. Four or five continue the presumption of unconstitutionality, so that everything fails intermediate scrutiny regardless of the importance of the governmental interest. Two continue extreme deference to legislative judgments, so that mere rationality seems to suffice. Of the two who apply some intermediate level of scrutiny, only one attempts to articulate it in the opinion. All treat equal protection as involving only an analysis of means. In consequence, the Court actively and eagerly intervenes to upset legislative choices in order to vindicate what may be trivial personal interests. This is done at the expense of legislative action in areas of legitimate and important governmental concern. The Court simply disagrees with the choice of means, a choice which at one time was thought to be the essence of the legislative power and the paradigm of the lack of judicial institutional competence.[192]

The result of the call for more activity under equal protection than under due process is to bring the Court into areas where its institutional justification is actually weaker. The Court acts to extend benefits to classes of people, which frequently involves the appropriation and expenditures of additional funds. Due process involves the invocation of judicial relief on behalf of an individual against government intrusion, a much more judicially manageable form of relief.

Increased judicial activity by an increasingly divided Court, on behalf of trivial interests, in areas where judicially manageable standards have not been and probably cannot be developed, can only jeopardize the Court's position. The Court has been invalidating statutes that most would agree are unreasonable. It has been doing so by engaging in a presumption of unconstitutionality that requires a state to meet what has proved to be an unmeetable burden before it can legislate in critical areas. When it sustains legislation, it does so by making only conclusory statements that may in fact make legislative policy preferences. A new direction is imperative.

192. *See* note 91 *supra*.