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Legislative Enforcement of Equal Protection

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Should legislators evaluate the constitutionality of legislation? For too long, legislators have abdicated to the judiciary their responsibility to enforce constitutional norms. This abdication of responsibility is particularly troubling in equal protection cases because courts often use a standard deferential to legislative determinations to uphold statutes of questionable constitutionality.

Suppose, for example, that a state legislature is considering a bill that provides general state funding for public schools, but excludes special funding for handicapped students because of the high cost of such services. Is the legislature constitutionally obligated to amend the bill so that it provides equal educational opportunities to handicapped children?

Some may say that the United States Supreme Court suggested a negative answer to this question in *San Antonio Independent School District v. Rodriguez*.[1] In *Rodriguez* the Court refused to declare education to be a fundamental right and indicated that the courts would sustain a legislature's denial of equal education if rationally related to any legitimate public purpose.[2] It rejected the plaintiffs' argument that the vital role of education in a free society justified strict judicial scrutiny of unequal funding in state public schools.[3] The Court held that an asserted right's importance "does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[4] In so holding, however, the Court was heavily influenced by institutional con-

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1. 411 U.S. 1 (1973).
2. *Id.* at 33-35, 55.
3. *Id.* at 35.
4. *Id.* at 30.

siderations, refusing to assume a legislative role for which it lacked both authority and competence.[5] To avoid such a role, the Supreme Court refused to authorize the judiciary to demand significant justifications for unequal educational funding.

Applying *Rodriguez*, a *court* would reject a constitutional challenge to the hypothetical legislation denying equal educational services to handicapped students because saving money satisfies the rational basis test. A *legislature*, however, would not overstep institutional boundaries by concluding that education is a fundamental constitutional right. Thus, unlike the judiciary, a legislator cannot rely on institutional limitations to reject a constitutional challenge to proposed legislation.[6]

To use another example, suppose that Congress enacts a welfare or retirement system that provides different classes of beneficiaries with different levels of benefits. May a legislator—either out of genuine concern for equality or out of base political motives—attack this proposal on constitutional grounds, insisting that Congress treat similarly needy beneficiaries on an equal basis? Again, the courts would dismiss summarily a constitutional challenge to a congressionally established welfare or retirement system. The Supreme Court will sustain such statutory classifications if they have any rational relationship to a legitimate governmental objective.[7]

Because such socioeconomic statutes are neither inherently invidious nor restrictive of fundamental rights, the Supreme Court reasons that Congress is the appropriate institution to choose among solutions as "a necessary result of different institutional competences."[8] Its view reflects an awareness that the legislature is especially equipped to make difficult distinctions among groups of people.[9] The Court's reasoning, however, can-

5. *Id.* at 31.

6. Although the United States Congress has not declared education to be a fundamental constitutional right, it has attempted to ensure "that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774 (1975) (codified at 20 U.S.C. § 1400(c) (1982)).

7. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (upholding Supplemental Security Income exclusion); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (upholding denial of railroad retirement benefits); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (approving ceiling on Aid to Families with Dependent Children).

8. Schweiker v. Wilson, 450 U.S. at 230.

9. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam).

not be used by the legislature to avoid a constitutional inquiry. Two people may be equally entitled to benefits, but, as the Supreme Court indicates, it is not for the courts to so declare.

In both of these situations, the Supreme Court decisions should begin, not end, the legislative constitutional debate. Legislators should not adopt wholesale the rational basis standard used by the courts to evaluate equal protection challenges. Rather, they should test statutory classifications against different, stricter standards.

Legislators should reach their own conclusions about the constitutionality of legislation for several reasons. One reason is historical: the Madisonian view of three coequal branches of government supports the principle that each branch is charged with protecting the Constitution in its own deliberations.[10] Another is textual: all legislators take an oath to support and de-

10. D. MORGAN, CONGRESS AND THE CONSTITUTION 47-48 (1966). James Madison, as a member of the House of Representatives, acknowledged that "in the ordinary course of Government, . . . the exposition of the laws and Constitution devolves upon the Judiciary." Yet Madison asserted that it was the duty of the House, "so far as it depends upon us, to take care that the powers of the Constitution be preserved." 1 ANNALS OF CONG. 500 (J. Gales ed. 1789). Many of the framers clearly believed that Congress would make its own determinations concerning a statute's constitutionality. *See* D. MORGAN, *supra*, at 45-98.

The prevailing view of those serving in early Congresses was that Congress, as an independent branch of government, had both an independent authority and duty to decide constitutional questions. *Id.* at 47. For example, an 1818 debate concerning the constitutionality of the House of Representatives's broad exercise of the contempt power did not include a single suggestion that the issue be reserved for the judiciary, although the matter was fully justiciable. *Id.* at 117. The House's action was subsequently upheld by the Supreme Court in Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

The turmoil of the Civil War coincided with a slight but significant shift in the views of some members of Congress. Officers of the United States and of each state are all required to swear present and future loyalty to the Constitution. *See* U.S. CONST. art. VI, cl. 3. The Senate was considering legislation to require, in addition, an oath of past loyalty. 12 Stat. 502 (1862). Several Senators challenged Congress's constitutional power to add to the oath. *See* CONG. GLOBE, 37th Cong., 2d Sess. 2693, 2862 (1862) (remarks of Sen. Saulsbury); *id.* at 2694 (remarks of Sen. Davis). Defending the bill, Senator Trumbull agreed that Congress should not pass an unconstitutional law but argued for the provision's constitutionality by relying on judicial precedents. *Id.* at 2693. Trumbull's reliance on the judiciary indicates a shift away from complete congressional independence in deciding constitutional questions.

By 1890 the first substantial inclination toward constitutional buck passing was on record. An issue arose during consideration of the Sherman Antitrust Act as to whether the commerce clause authorized Congress to enact such a measure. A leading proponent of the bill stated that the only way to determine its constitutionality was to refer it to the Supreme Court. 21 CONG. REC.

fend the Constitution.[11] The most important argument, however, is functional: deference to the courts on all constitutional matters would leave numerous challenges unaddressed

2608 (1890) (remarks of Sen. Washburn). At the time, however, such views remained relatively rare. D. MORGAN, *supra*, at 158.

The floodgates began to open during the crisis of the great depression, when President Roosevelt's attempts to legislate a national recovery were met with hostility by the Supreme Court. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495, 527-51 (1935) (striking down part of a federal law regulating the poultry industry). A renewed attempt to aid the severely depressed coal industry was before Congress that same year. In an effort to move the legislation out of subcommittee, President Roosevelt wrote to the subcommittee chair, arguing that "the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality." *See* D. MORGAN, *supra*, at 424. Although this view had been held by only a minority of Congress a half-century earlier, it had become the prevailing view by 1935. *Id.* at 179. Unfortunately, it seems to have commanded substantial support ever since. *See, e.g.*, 130 CONG. REC. S5305 (daily ed. May 3, 1984) (Senator Dixon's response to questions about the constitutionality of line-item veto legislation: "[I]t is for the courts, not the Senate."); 100 CONG. REC. 14,647 (1954) (Senator Javits recognized constitutional flaws in Communist Control Act of 1954, but urged passage to allow implementation to be worked out by courts); D. MORGAN, *supra*, at 8 (approximately one-third of congressional members in survey during early 1960s felt constitutional questions should be passed to courts).

11. U.S. CONST. art. VI, cl. 3. The oath was intended "to harness the force of conscience, even of religious conviction, to the maintenance of constitutional safeguards." D. MORGAN, *supra* note 10, at 48; *see also* STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 375 (5th ed. 1891) ("The Congress, the executive, and the court must each for itself be guided by its own interpretation of the Constitution."). President Jackson invoked the oath to justify his veto of legislation rechartering the Bank of the United States. Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707, 713 (1985). Members of Congress have repeatedly invoked the oath to justify their duty to legislate in conformance with the Constitution. *See, e.g.*, *Civil Rights—The President's Program, 1963: Hearings Before the Senate Committee on the Judiciary on S. 1731 and S. 1750*, 88th Cong., 1st Sess. 39 (1963) (statement of Sen. Ervin); *Civil Rights—Public Accomodations: Hearings Before the Senate Committee on Commerce on S. 1732*, 88th Cong., 1st Sess. 248 (1963) (statement of Sen. Engle); *The President's Proposal on the Middle East: Hearings Before the Senate Committee on Foreign Relations and the Senate Committee on Armed Services on S.J. Res. 19 and H.J. Res. 117*, 85th Cong., 1st Sess. 192 (1957) (statement of Sen. Ervin); *id.* at 300-01 (statement of Sen. Morse); *id.* at 787 (statement of Sen. Fulbright); 130 CONG. REC. S5314 (daily ed. May 3, 1984) (remarks of Sen. Gorton); *id.* at S5315 (remarks of Sen. Bumpers); 104 CONG. REC. 18,681 (1958) (statement of Sen. Wiley); 103 CONG. REC. 2528 (1957) (statement of Sen. Jenner); 83 CONG. REC. 2741 (1938) (remarks of Sen. Bailey); 79 CONG. REC. 13,772 (1935) (remarks of Sen. Tydings); *id.* at 14,080 (remarks of Sen. King); 21 CONG. REC. 2463 (1890) (remarks of Sen. Vest); 8 ANNALS OF CONG. 1965 (1798) (remarks of Rep. Williams); *id.* at 2007, 2154 (remarks of Rep. Livingston); *id.* at 2133 (remarks of Rep. Smith of Md.).

because the courts have devised doctrines that preclude judges from deciding the constitutionality of many statutes.

This Article explores the legislative role in enforcing the constitutional guarantee to equal protection. Part I describes the underenforcement principle that explains the restrictive judicial exercise of authority in constitutional matters. The Article then focuses on Congress's role in examining issues relating to the constitutional guarantee of equal protection that the courts have chosen to underenforce. Part II analyzes relevant constitutional provisions that may empower or limit congressional actions. Part III considers ways in which Congress can address state violations of equal protection through directives to the judiciary and through the legislative process. Part IV details how both federal and state legislators can implement equal protection guarantees in everyday legislation.[12] Finally, Part V distinguishes between constitutionally motivated decision making and conscientious decision making within the legislature and discusses the political implications of a legislative process that directly addresses the constitutionality of equal protection issues.

I. JUDICIAL UNDERENFORCEMENT OF CONSTITUTIONAL NORMS

A. SUPREME COURT ANALYSIS OF EQUAL PROTECTION CLAIMS

Judges and scholars have continuously suggested limits on the exercise of the judiciary's authority to strike down allegedly unconstitutional legislation.[13] The Supreme Court has incorporated such limitations into its multitiered approach to equal protection issues. Through sparing use of heightened scrutiny and extensive application of the deferential rational basis test, the Court has adopted a policy of underenforcing equal protection issues.

In reviewing equal protection claims, the Supreme Court carefully scrutinizes legislation that classifies people based on

12. The Article suggests several substantive tests which are more rigorous than those presently used by the courts and which should be applied by legislators to assess the constitutionality of proposed legislation. *See infra* notes 147-72 and accompanying text.

13. In the nineteenth century, for example, Professor Thayer argued that courts should overturn only manifest violations of the Constitution because Congress, and not the courts, had been assigned the "primary authority to interpret" the Constitution. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893).

suspect traits or that involves the exercise of fundamental rights.[14] Because the Court requires that challenged classifications be necessary to fulfill a compelling state interest,[15] few statutes survive this strict scrutiny test.[16] Among the myriad traits legislatures use to classify people, however, only race[17] and national origin[18] invariably trigger strict scrutiny.[19] The Court employs a middle tier of heightened, but less strict, scrutiny for gender[20] and illegitimacy.[21] The Court has declined, however, to apply heightened judicial scrutiny to the poor,[22] to those over age fifty,[23] and to the mentally retarded.[24]

The Court has used strict scrutiny to invalidate laws bur-

14. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

15. *See, e.g., id.*; Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972).

16. Professor Gunther characterized the Court's use of close scrutiny as " 'strict' in theory and fatal in fact." Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

17. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (no overriding purpose for racial classification in criminal statute).

18. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (public necessity in war situation justified Japanese exclusion order).

19. Statutes discriminating on the basis of religious belief would also appear to qualify for strict equal protection scrutiny. The courts, however, do not need to reach the equal protection issue to dispose of the controversy because they normally review such statutes under the first amendment's free exercise clause. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 410 (1963).

The Court's treatment of alienage has been inconsistent. *Compare* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.") (footnotes omitted) *with* Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982) (strict scrutiny not appropriate when alienage is a basis for exclusion from political rather than economic participation). *See* Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 52 (1985) (Justice Blackmun remained consistent "even while the coalition of Justices that has voted with him has gradually eroded").

20. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197, 204 (1976) (gender classification for sale of beer does not further important governmental objective).

21. *See, e.g.*, Pickett v. Brown, 462 U.S. 1, 8 (1983) ("[S]tatutory classifications based on illegitimacy [are subject] to a heightened level of scrutiny."); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (invidious to discriminate against illegitimate children).

22. Maher v. Roe, 432 U.S. 464, 470-71 (1977) (denial of Medicaid funds to indigent women for most abortions); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (unequal allocation of state public school funds).

23. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (per curiam) (mandatory retirement at age 50).

24. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985) (finding no rational basis for requirement of special use permit for group homes of mentally retarded). *But see id.* at 456 (Marshall, J., concurring in

dening fundamental rights such as interstate travel,[25] voting,[26] and picketing,[27] but has expressly refused to limit discrimination concerning subsistence income,[28] housing,[29] education,[30] and government employment.[31] Unless a right is "explicitly or implicitly guaranteed by the Constitution,"[32] the Court will not apply the strict scrutiny test to a statutory classification that impairs that right.

In addition to narrowly defining the groups and rights subject to heightened scrutiny, the Supreme Court has made it exceedingly difficult to prove the existence of discrimination if the challenged statute is facially neutral. In *Washington v. Davis*[33] the Court held that without a showing of improper motive, it would apply minimal scrutiny to a statute with a disproportionate racial impact.[34] Fearing that strict judicial scrutiny "would raise serious questions about, and perhaps invalidate, a whole range of . . . statutes," the Court stated that "extension of [strict scrutiny] beyond those areas where it is already applicable by reason of statute . . . should await legislative prescription."[35]

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part and dissenting in part) (Court actually applied a more exacting standard than rational basis).

25. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969) (one-year residency requirement for public assistance eligibility).

26. *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 336-37 (1972) (three-month residency requirement for voting eligibility).

27. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972) (picketing near schools prohibited unless related to labor dispute).

28. Dandridge v. Williams, 397 U.S. 471, 487 (1970) (no constitutional authority to "second-guess state officials charged with . . . allocating limited public welfare funds among . . . potential recipients").

29. Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no strict scrutiny of special summary judicial procedure for tenant eviction).

30. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (no constitutional right to acquire more than "basic minimal skills").

31. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (mandatory retirement).

32. *Rodriguez*, 411 U.S. at 33-34.

33. 426 U.S. 229 (1976).

34. *Id.* at 242 (employment screening test disproportionately excluded blacks); *see also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (racial imbalance in school enrollment); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (rezoning denial for low- and moderate-income housing).

35. Washington v. Davis, 426 U.S. at 248. The decision was previewed five years earlier in Jefferson v. Hackney, 406 U.S. 535 (1972), in which the Court refused to apply strict judicial scrutiny to a welfare benefits plan that discriminated among classes of recipients. In addressing the disproportionate percentage of racial minorities within the disadvantaged class, the Court wrote:

> The acceptance of appellants' constitutional theory would render sus-

The Supreme Court's subsequent treatment of this issue demonstrates that this holding is part of a larger judicial policy to underenforce those rights that the Court feels institutionally incapable of addressing. In *Washington v. Davis* the Court refused to invalidate, as violative of equal protection, a facially neutral employment screening test that disproportionately disadvantaged blacks.[36] Yet in *Dothard v. Rawlinson*,[37] decided the following year under title VII of the Civil Rights Act,[38] the Court struck down a facially neutral test because of its disproportionately adverse impact on women.[39] The only material difference between the two cases was the *congressional* approval of disproportionate impact as proof of discrimination—legislative enforcement of equal protection norms.[40]

The Court's perception of itself as an unelected body in a democratic society has doubtlessly influenced its refusal to ex-

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pect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

Id. at 548-49; *see also* City of Mobile v. Bolden, 446 U.S. 55, 75 n.22 (1980) (rejecting a discriminatory impact standard for constitutionally based voting rights challenges founded on "sociological considerations" because of doubts that such considerations "could, in any principled manner, exclude the claims of any discrete political group that happens . . . to elect fewer of its candidates than arithmetic indicates it might").

36. 426 U.S. at 246. Without a showing of discriminatory intent, the employment screening test used by the Washington, D.C., Police Department was valid despite its disproportionate, detrimental impact on black candidates. The Court noted that title VII of the Civil Rights Act did not require proof of discriminatory purpose, but the plaintiffs had failed to amend their complaint to include such a claim after Congress extended title VII's coverage to public employees. *Id.* at 238 n.10, 246-47. The Court refused to apply the "more rigorous standard" of title VII to this purely constitutional challenge. *Id.* at 247-48.

37. 433 U.S. 321 (1977).

38. 42 U.S.C. § 2000e (1982). Title VII does not require proof of improper motive. It provides for active judicial scrutiny of racially disproportionate effects. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

39. *Dothard*, 433 U.S. at 329-31.

40. *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 452-53 (1976) (in discussing title VII authorization of money damages against state governments, Court found factual differences between cases not material and congressional authorization dispositive). *Compare also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (Court rejected equal protection challenge to city zoning decision without proof of discriminatory intent) *with* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 558 F.2d 1283, 1288 (7th Cir. 1977) (court, on remand, relied on Fair Housing Act to sustain challenge), *cert. denied*, 434 U.S. 1025 (1978).

pand strict scrutiny beyond these narrow limits.[41] The history of the fourteenth amendment clearly supports a ban on racial discrimination,[42] however, and little judicial activism is needed to extend judicial contempt for racial distinctions to discrimination based on race's cousin, national origin. Similarly, a limited and logical corollary to Court preclusion of direct state infringement upon constitutionally guaranteed rights is a prohibition on state discrimination against a class of persons exercising those same rights.[43] These limited applications of the strict scrutiny test indicate the Court's conservative view of its own institutional role in equal protection issues.

When the Court determines that the equal protection claims at issue do not warrant heightened scrutiny, it uses a rational basis test. In its most deferential form, the rational basis test precludes meaningful judicial scrutiny of the challenged statutory classification.[44] Courts show great deference to the legislature's judgment that the statute is legitimate, upholding a statute whose means and ends serve any conceivable public purpose.[45] Under the rational basis test, the judiciary will not

41. *Cf.* Bowers v. Hardwick, 106 S. Ct. 2841, 2846 (1986) (expressing similar concerns about creation of fundamental rights under due process clause).

42. *See generally* J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956) (detailed study of the amendment's evolution prior to enactment); H. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT (1977) (history of enactment and analysis of subsequent "judicial erosion").

43. Some commentators argue that the fundamental rights prong of strict scrutiny under the equal protection clause is nonsensical, and that constitutional analysis would be improved if such cases were viewed solely as alleged violations of the constitutional right at issue. *See, e.g.*, Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 560-63 (1982). Even if this view were correct, Congress could nevertheless use its due process enforcement power under § 5 of the fourteenth amendment to protect those rights that the Supreme Court declines to hold fundamental. For a discussion of Congress's power to enforce the fourteenth amendment, see *infra* text accompanying notes 70-90.

44. For most of this century, Supreme Court Justices have disputed the proper articulation of the rational basis test. *See generally* Choper, *Economic and Social Regulations and Equal Protection*, in J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1980-81, at 3-18 (1982) (discussing various formulations used by the Court). *Compare* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (judicial inquiry stops once plausible, hypothetical reason for statute appears) *with* Logan v. Zimmerman Brush Co., 455 U.S. 422, 442 (1982) (opinion of Blackmun, J.) ("connection between means and ends need not be precise, [but] it . . . must have some objective basis"). Even the Blackmun formulation—requiring *some* objective basis—is far from a de novo review. Thus, even vigorous formulations do not end judicial underenforcement of equality norms.

45. *See, e.g.*, *Fritz*, 449 U.S. at 179 ("[I]f there are plausible reasons for Congress' action, our inquiry is at an end."); McGowan v. Maryland, 366 U.S.

investigate whether the asserted public purpose was in fact the legislature's true objective or whether other means could better achieve the desired ends.[46] These questions are left to the legislative process.

420, 425-26 (1961) (statutory discrimination not to be overturned if any set of facts reasonably justifies it); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) ("One who assails the classification . . . must carry the burden of showing that it does not rest upon any reasonable basis . . . .").

46. Oregon Supreme Court Justice Linde, while a professor, sharply criticized the rational basis test. If the test were taken seriously, he wrote, it would turn courts into "lunacy commissions sitting in judgment upon the mental capacity of legislators." Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 208 (1976) (quoting Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 808, 819 (1935)). Linde concluded that the only real constitutional question was "whether the aim of the law is out of bounds, not whether it will miss its target—a question of legitimacy, not of rationality." *Id.* at 212.

A number of scholars, however, have presented forceful critiques of the rational basis test that recommend a more rigorous standard of judicial review for classifications not subject to strict scrutiny. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-30 (1978); Gunther, *supra* note 16, at 20-48. Legislatures remain entitled to a great deal of deference even under more rigorous standards—power that this Article argues should be carefully and constitutionally administered by the legislators themselves.

Professor Tribe advocated that courts not accept justifications for a challenged statutory classification if they believe that the state is offering a post hoc justification not actually considered by the legislature. L. TRIBE, *supra*, at 1085-86. Although this step may be desirable, *see infra* note 112 and accompanying text, it also highlights the institutional incapability of judges to divine the true intent of legislatures. Thus, even if this proposal were accepted, courts cannot protect equality norms fully because they cannot possibly determine true legislative intent.

Professor Gunther, on the other hand, advocated closer judicial scrutiny of whether the means chosen by a legislature substantially further its ends. Gunther, *supra* note 16, at 20. He conceded, however, that limitations on judicial competence impose a barrier to his proposal in a variety of contexts, such as in the design of a welfare program. In such cases Gunther would have the Court essentially abstain and defer to the legislature, just as it does under current doctrine. *Id.* at 23-24.

Justice Stevens, setting forth his own approach to equal protection review, rejected the traditional two- or three-tiered approach in favor of one that applies "a single standard in a reasonably consistent fashion." Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring). Among the factors Justice Stevens looks at in determining whether a classification meets the requirements of the equal protection clause is whether "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 452 (1985) (Stevens, J., concurring). Even if this standard were adopted by the courts, it would constitute a milder but no less real form of abstention and deference to the legislature. Merely because an impartial legislator *could* find that a classification meets Justice Stevens's test does not mean that the lawmakers actually *did* apply and follow that test.

B. THE RATIONALE FOR UNDERENFORCEMENT

The Court's lenient review under the rational basis test and limited use of heightened scrutiny in the equal protection area exemplify what Professor Sager calls judicial underenforcement of the Constitution.[47] Sager distinguished between two methods used by the Court to examine and ultimately to uphold challenged statutes. Under one method the Court independently analyzes the statute, upholding it because the Court believes that the statute does not violate any constitutional principles.[48] Under the second method, the Court upholds the statute because it believes that its institutional competence or role requires deference to the popular will as expressed by the legislature.[49]

The self-imposed limitations on the use of heightened scrutiny conform to Sager's second mode of judicial constitutional analysis. In many cases the Court rejects such scrutiny without making an independent determination that the challenged statute meets equality norms. Instead, heightened scrutiny is rejected because the Court believes that an unelected judiciary lacks a principled way to identify new suspect traits or fundamental rights[50] and because of an unwillingness to balance nonfundamental rights against legitimate state objectives.[51]

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47. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1215-16 (1978).

48. For example, in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Court sustained a part of a statute prohibiting contributions by a single individual of more than $1000 to a candidate for federal office. The Court closely examined the purposes behind the statute and found that the reduction of actual and apparent corruption justified the restriction on first amendment freedoms. *Id.* at 23-35. The discussion was void of legislative findings or language indicating deference to Congress. *See id.*

49. *See* Sager, *supra* note 47, at 1217-18.

50. *See* Plyler v. Doe, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring) (doubts over judiciary's ability to distinguish effects of social policies led Court to require that fundamental rights be explicitly or implicitly guaranteed by the Constitution).

51. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Although litigators could have used Sager's underenforcement theory to argue against plenary Supreme Court review of state *judicial* decisions that impose stricter constitutional standards than those imposed by the federal courts, *see* Sager, *supra* note 47, at 1247-50, the Supreme Court has rejected this argument. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 462 n.6 (1981) (state court applications of the fourteenth amendment fully reviewable).

Nevertheless, the Court's requirement that both state and federal courts use one constitutional standard does not suggest that members of Congress or state legislators must employ the same standard. As a general matter, legisla-

Federal court rulings applying the rational basis test and rejecting equal protection challenges to state legislation exemplify Sager's second method of examining constitutional challenges. The Supreme Court has proclaimed that the equal protection clause mandates that all people similarly circumstanced be treated alike,[52] but it underenforces that norm when it declares that "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[53] Thus, whenever the Court applies the rational basis test, it is underenforcing the equal protection clause.[54] Justices Brennan, White, and Marshall noted:

> [T]his limitation on judicial review of state legislative classifications is a limitation stemming, not from the Fourteenth Amendment itself, but from the nature of judicial review. It is simply a "salutary princi-

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tors frequently face election and include among their members persons of varying backgrounds and expertise. In addition, legislators use a system of decision making that permits the simultaneous consideration of varying proposals, thus accommodating diverse social, economic, and political interests. In contrast, regardless of their method of selection, state judges decide constitutional issues in the narrow context of litigation, a context that does not facilitate the type of interest balancing necessary to evaluate most legislative classifications.

52. *See, e.g.*, *Cleburne Living Center*, 473 U.S. at 439; *Plyler*, 457 U.S. at 216; F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Hayes v. Missouri, 120 U.S. 68, 71-72 (1887); *see also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949) (Constitution, in its concern for equality, requires that those who are similarly situated be similarly treated). *See generally* 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW § 18.2, at 318 (1986) (same).

In contrast to these judicial and scholarly pronouncements, scholars of the interpretivist school argue that the equal protection clause means only what its drafters in the 39th Congress intended it to mean: blacks should be afforded the specified civil rights enjoyed by whites. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 169-76 (1977). If this theory were adopted, constitutional norms could not be underenforced. The judiciary would strike down any law that interfered with the enjoyment by blacks of the enumerated rights afforded to whites but would uphold all other statutory classifications under the fourteenth amendment.

This Article does not attempt to resolve the debate between interpretivists and noninterpretivists. It assumes that the Supreme Court's exposition of the broad goal of equality reflects the actual constitutional norms of equality.

53. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

54. Recent cases demonstrate that use of the rational basis test constitutes judicial underenforcement of the equal protection clause. *See, e.g.*, *Plyler*, 457 U.S. at 216 (rational basis test reflects Court's decision to grant the legislature initial discretion to determine what is different and what is the same, a discretion that will not be disturbed in most cases).

> ple of judicial decision," one of the "self-imposed restraints intended to protect [the Court] and the state against irresponsible exercise of [the Court's] unappealable power."[55]

Proponents justify underenforcement, evidenced by the extensive use of the rational basis test and limited application of heightened scrutiny, in two ways. They argue that in a democratic republic, unelected judges should tread carefully before overruling the judgments of elected representatives.[56] In addition, federal courts lack the institutional competence to prescribe a workable standard that faithfully administers the fourteenth amendment's equal protection mandate across the breadth of governmental activity.[57]

These justifications are important because all statutes classify and discriminate to some degree. Thus, statutes tend to be either overbroad, including within a classification people who should be excluded, or underinclusive, excluding people who ought to be included.[58] If the judiciary were to rigidly apply the norm that statutes must treat equally all those similarly situated, it would have to invalidate most statutes. Short of such an untenable result, courts would have to evaluate a host of facts and policies in every determination of overbreadth or underinclusiveness. Politically responsive officials are in a better position to make such evaluations. Because courts are less able to weigh facts and policies in a principled manner, they should abstain and defer to the legislature.[59]

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55. Oregon v. Mitchell, 400 U.S. 112, 247 (1970) (brackets in original) (citation omitted).

56. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979). "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democractic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id.* at 97 (footnote omitted).

57. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30-31 (1973) (Court not competent to assume legislative role).

58. *See* Tussman & tenBroek, *supra* note 52, at 347-49.

59. As Professor Wechsler has eloquently stated, "[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959). Even constitutional theorists with widely divergent views on the proper degree of judicial activism agree on this fundamental point. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 23-28 (1962) (courts have capacity to deal with matters of principle that legislatures and executives do not possess); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 26-28 (1982) (courts' explanations must have force apart from the result reached in the narrow circumstances of a single case). Although legislatures make determinations that are principled in the sense of being intellectually honest, their

These arguments for *some* form of judicial deference and underenforcement of equal protection norms resemble the rationale for nonjusticiable political questions. Under the political question doctrine, courts refrain from deciding questions more properly decided by the other branches of government.[60] As set out by the Supreme Court in *Baker v. Carr*,[61] the judiciary will decline to decide an otherwise legitimate case or controversy[62] if it finds "a lack of judicially discoverable and

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determinations do not automatically satisfy Wechsler's definition of principled. Rather, most legislation requires such a delicate balancing of conflicting interests that, for example, the issue of who is similarly situated is inseparable from the immediate result that the legislation achieves. The judiciary refers the issue back to the legislature because these cases do not involve enduring principles.

The underenforcement thesis recognizes that an institutional difference between courts and legislatures renders the former less capable of engaging in decision making unbounded by principles, as defined by Wechsler. To the extent that one rejects Wechsler's view of the limitations on courts, the underenforcement thesis has little application.

60. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 210-17 (1962) (reviewing political question cases); *see also* Coleman v. Miller, 307 U.S. 433, 453-54 (1939) (timeliness of state ratification of constitutional amendment); Luther v. Borden, 48 U.S. (7 How.) 1, 40-41 (1849) (choice between rival regimes as lawful government of Rhode Island); Crockett v. Reagan, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (executive authorization of military assistance to El Salvador absent congressional declaration of war), *cert. denied*, 467 U.S. 1251 (1984).

The Court of Appeals for the District of Columbia has developed a variant on both the political question and standing doctrines, referred to as the doctrine of equitable discretion. Pursuant to this doctrine, a court will refuse to rule on constitutional issues presented by members of Congress when the members could obtain substantial relief through legislative action. *See, e.g.*, Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) (dismissing challenge to tax legislation based on the origination clause in article I); Vander Jagt v. O'Neill, 699 F.2d 1166, 1175-77 (D.C. Cir. 1983) (dismissing challenge to partisan makeup of committees of the House of Representatives based on several constitutional provisions); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 881-82 (D.C. Cir. 1981) (dismissing challenge to makeup of body that determines nation's money supply based on the appointments clause of article II).

Professor Henkin argued that a political question doctrine does not exist. Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). Yet, accounting for the Court's holding in Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1912), he conceded that the guarantee clause of article IV, which guarantees states a republican form of government and protection against invasion and domestic violence, may be read to exclude judicial enforcement. Henkin, *supra*, at 609. Henkin would also recognize the courts' prerogative, under general principles of equity, to refuse to remedy some constitutional violations. *Id.* at 617-22. Regardless of the courts' reason for refusing to overturn unconstitutional federal statutes, Henkin's thesis does not refute the duty of Congress itself to evaluate the constitutionality of legislation.

61. 369 U.S. 186 (1962).

62. The requirement that a plaintiff bringing a constitutional challenge

manageable standards for resolving" an issue or "the impossibility of deciding [an issue] without an initial policy determination of a kind clearly for nonjudicial discretion."[63]

As with political questions, if the resolution of an equal protection challenge would require unmanageable standard setting and policy making beyond judicial expertise, a court should not address the merits but should allow the legislature to determine the statute's constitutionality. The court should indicate that it has not determined the statute's constitutionality, but rather has observed the limitation on its role in evaluating most statutory classifications.[64]

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have standing to sue also limits court review of legislative acts. In Massachusetts v. Mellon, 262 U.S. 447 (1923), the Commonwealth of Massachusetts and a United States taxpayer both challenged the Maternity Act of 1921 as exceeding the powers delegated to Congress by the Constitution and as violative of states' rights protected by the tenth amendment. The Supreme Court held that neither party had demonstrated sufficient injury to render the controversy justiciable. Justice Sutherland wrote:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy.

Id. at 488 (italics in original); *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226-27 (1974) (plaintiffs acting in capacity as citizens lack standing to challenge service of members of Congress in armed forces reserve based on incompatibility clause of article I).

63. Baker v. Carr, 369 U.S. at 217.

64. A number of commentators have noted the adverse effects of Supreme Court decisions that appear to legitimize a statute without subjecting it to full constitutional analysis. Professor Bickel argued that the Court should use great political discretion in deciding which cases to hear and which not to hear. A. BICKEL, *supra* note 59, at 131-33. Dean Choper suggested that Court decisions upholding federal statutes against states' rights claims may have encouraged Congress to exceed the bounds it would otherwise have thought constitutionally proper. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 231-33 (1980). Judge Mikva concluded from his previous experience as a representative that Congress more willingly engages in constitutional debate when it acts in areas not subject to judicially imposed restraints. Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 484 (1971). Professor Sager used statutory restrictions on federally funded abortions to illustrate this point. When such proposals initially arose in Congress, they triggered a great deal of legislative debate on their constitutionality. The Supreme Court upheld the legislation in Maher v. Roe, 432 U.S. 464 (1977). Despite the Court's admonition that legislatures are as much the guardians of constitutional liberties as the courts, *id.* at 479-80, Congress engaged in little constitutional discussion during subsequent debates. Sager, *supra* note 47, at 1227-28 n.48. When the Court and Congress each assumes that the other is ensuring adherence to the Constitution, legislation that abridges constitutional rights goes unchecked.

Unfortunately, the similarities between the political question doctrine and the Supreme Court's analysis of equal protection issues have been overlooked. The judiciary's refusal to review the constitutionality of the Vietnam War[65] did not end the legislative debate over the president's power to authorize military operations without a congressional declaration of war.[66] Likewise, the Court's decisions in *San Antonio Independent School District v. Rodriguez*[67] and the many social welfare cases[68] should not stifle debate over whether the classifications at issue satisfy the equal protection commands of the fifth and fourteenth amendments.[69]

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65. *See, e.g.*, Mora v. McNamara, 389 U.S. 934 (1967) (certiorari denied in case in which lower court dismissed complaint challenging constitutionality of Vietnam War).

66. Congress responded by enacting the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982), which restricted the president's ability to "introduce United States Armed Forces into hostilities" absent a declaration of war or other specified situations. *Id.* § 1541(c).

67. 411 U.S. 1 (1973).

68. *See* cases cited *supra* note 7.

69. Professor Cox has eloquently distinguished the roles of Congress and the Court in constitutional decision making:

> [T]he question, is the statute constitutional, may deserve one answer from the legislator and a different answer from the judge because some of the [questions] on which the legislator is free, indeed, has a duty, to make up his own mind may be foreclosed from judicial consideration by the judge's duty to defer to the legislative judgment. In such cases, although the Supreme Court purports to say that the challenged measure is constitutional, in truth the decision is only that the measure does not conflict with the Constitution *given the finding or judgment that Congress has expressed* . . . .

Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 200 (1971) (emphasis in original).

Unfortunately, the Court has not responded clearly to this distinction. *Compare* Plyler v. Doe, 457 U.S. 202, 217 (1982) ("[t]he Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike,' " although the legislature has "initial discretion" to decide who is alike (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))) *and* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) ("The Clause announces a fundamental principle: the State must govern impartially.") *with* Clements v. Fashing, 457 U.S. 957, 962-63 (1982) (plurality opinion of Rehnquist, J.) ("The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people differently.") *and* Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979) ("When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.").

Congress frequently abdicates constitutional decison making in part because of confusion about its proper role in such decision making. *See* Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587, 587 (1983). The Supreme Court should distinguish substantive interpretations of constitutional norms from institutionally based decisions to defer

II. CONSTITUTIONAL LIMITATIONS ON CONGRESSIONAL EXPANSION OF EQUAL PROTECTION GUARANTEES

The Constitution expressly authorizes Congress to participate in the constitutional debate concerning whether statutes meet equal protection norms. Section five of the fourteenth amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article."[70] Congress may enforce equal protection norms by prohibiting state acts that the Court refuses, because of institutional concerns, to condemn.[71]

This power of Congress to limit state action with regard to equal protection issues stems from the democratic process itself. Judges hesitate to invalidate legislation because they are unelected. In contrast, legislation passed by Congress and signed by the president[72] reflects the will of political branches comprised of officials elected by and responsible to the people. Judges uphold statutes to avoid weighing competing goals and objectives. The legislative process, however, inherently involves such balancing, often producing compromise. Unlike judges, legislators can simultaneously address a variety of issues, thus facilitating the development of public policy that reflects a fair balance of competing interests. Indeed, although the judiciary may be ill-equipped to analyze the detailed and complex problem of whether a given classification can be justified despite its overbreadth or underinclusiveness, the legislative process is designed to address such problems.

Despite the particular advantages of congressional enforcement, opponents have voiced objections to congressional expan-

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to the legislature because of the delicate political relationship between the two branches. When the Court upholds a statute without distinguishing between these two rationales, it confuses the legislature and impedes legislative attempts to apply the Constitution in areas in which the Court declines an active role.

70. U.S. CONST. amend. XIV, § 5.

71. *See* Sager, *supra* note 47, at 1240 ("[W]here the Court has, on institutional grounds, stopped significantly short of full enforcement of a substantive norm of the fourteenth amendment, Congress is empowered by section 5 to address conduct falling within the unenforced margin of the norm."). *Compare* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding the congressional prohibition under the fourteenth amendment of literacy tests as a voting requirement) *with* Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959) (refusing to find literacy tests a violation of the fourteenth amendment).

72. A supermajority in Congress also may pass legislation over a presidential veto. U.S. CONST. art. I, § 7, cl. 2.

sion of equal protection guarantees. Objectors argue that the Constitution does not authorize congressional enforcement. Indeed, they claim that the concept of federalism embodied in the tenth amendment prohibits such a federal intrusion into state legislating. Section five of the fourteenth amendment, coupled with the concept of underenforcement, however, fully authorizes expansive congressional enforcement of equal protection, and the tenth amendment poses no significant *justiciable* barrier to congressional enforcement.[73]

A. SECTION FIVE OF THE FOURTEENTH AMENDMENT

The Supreme Court's decision in *Katzenbach v. Morgan*[74] confirmed that section five of the fourteenth amendment empowers Congress to mandate norms of equality in areas where the Court has declined to act.[75] Appellees in that case challenged a federal statute that prohibited states from denying the right to vote to literate Spanish-speaking citizens because of their inability to read English. The Court previously had refused to find that literacy requirements violated the fourteenth amendment.[76] The Court, however, sustained Congress's decision to extend equal protection to literate Hispanic voters. It found the decision to be within Congress's greater competence to determine whether the states' interests in encouraging fluency in English and ensuring intelligent use of the voting franchise justified literacy requirements.[77]

Oregon v. Mitchell[78] is the only subsequent Supreme Court decision to suggest any limitations on congressional authority to

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73. *See* City of Rome v. United States, 446 U.S. 156, 179 (1980) (principles of federalism overriden by congressional power to enforce the Civil War amendments). The tenth amendment's reservation of rights to the states does raise a series of important *nonjusticiable* barriers to Congress's enforcement power under § 5. *See infra* text accompanying notes 96-99.

74. 384 U.S. 641 (1966).

75. *Cf.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). In a general discussion of equal protection principles, the Court wrote:

> Section 5 of the Amendment empowers Congress to enforce this mandate, but *absent controlling congressional direction*, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.

Id. at 439-40 (emphasis added).

76. Lassiter v. Northampton Election Bd., 360 U.S. 45, 53-54 (1959).

77. Katzenbach v. Morgan, 384 U.S. at 653-56.

78. 400 U.S. 112 (1970).

enforce equality norms. In that case the Court held that a federal law extending voting rights to eighteen-year olds was unconstitutional as applied to state and local elections.[79] *Oregon v. Mitchell*, however, cannot fairly be read as an obstacle to congressional enforcement of equality norms under section five of the fourteenth amendment.

As an initial matter, *Oregon v. Mitchell* represents the opinion of a sharply divided Court. Five Justices wrote separately, and no one opinion commanded more than three votes. Justice Black united with four of his colleagues to uphold the eighteen-year-old voting rights provision as applied to federal elections and united with the other four to invalidate it as applied to state and local contests.[80] He believed that the Constitution expressly reserved to the states the power to determine voting qualifications for nonfederal offices.[81]

More importantly, despite the particular outcome of the case, the various opinions reveal a Court majority that strongly

79. *Id.* at 118 (Black, J., announcing the judgments of the Court). Subsequent to this decision, the minimum voting age was lowered to 18 for all elections. U.S. CONST. amend. XXVI.

80. Justices Douglas, Brennan, White, and Marshall joined Justice Black in concluding that the statutory reduction in the voting age for federal elections was constitutional. Chief Justice Burger and Justices Harlan, Stewart, and Blackmun joined Justice Black in concluding that the statute could not be applied to state elections. 400 U.S. at 118-19.

Justices Brennan, White, and Marshall would have upheld the statute as applied to both federal and state elections. They believed that even though the 21-year-old voting age survived scrutiny under the rational basis test, the Court's action did not prevent Congress from engaging in its own equal protection analysis of the issue. *Id.* at 247-49 (opinion of Brennan, White, and Marshall, JJ.).

Justice Douglas similarly voted to uphold the statute in its entirety. Because the fourteenth amendment protects the right to vote, he concluded that Congress could enforce the right under § 5 by lowering the voting age. *Id.* at 143-44 (opinion of Douglas, J.).

Justice Harlan believed that any congressional interference with the voting age was unconstitutional. He based his opinion on the strong belief, first announced in his dissent in Baker v. Carr, 369 U.S. 186, 330 (1962), that the equal protection clause did not limit the states' power to establish voting qualifications. 400 U.S. at 154 (opinion of Harlan, J.).

Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, also opposed congressional regulation of any voting requirements, believing that the Constitution specifically delegated such authority to the states. *Id.* at 287-91 (opinion of Stewart, J.). Justice Stewart thought that Congress did not have the power under § 5 "to determine as a matter of substantive constitutional law what situations fall within the ambit of the [equal protection] clause." *Id.* at 296 (restating his disagreement with the Court's opinion in *Katzenbach v. Morgan*).

81. 400 U.S. at 124-25 (opinion of Black, J.).

supported broad congressional enforcement of equality norms in most areas in which states legislate. Justice Douglas wrote: "Here we are dealing with the right of Congress to 'enforce' the principles of equality enshrined in the Fourteenth Amendment. The right to 'enforce' granted by § 5 of that Amendment is, as noted, parallel with the Necessary and Proper Clause . . . ."[82] Likewise, Justice Brennan, joined by Justices White and Marshall, noted that although the courts would normally uphold classifications unless arbitrary or unreasonable, Congress could itself determine whether justifications for statutory discrimination actually existed.[83] Finally, Justice Black, who cast the decisive vote against the statute on the grounds that the Constitution gives states the power to determine voter qualifications absent a showing of racial discrimination, stated that in areas not exclusively reserved to the states, Congress's enforcement power need not be so closely tied to the issue of racial discrimination.[84]

Many critics object to the Court's broad interpretation of Congress's power to define constitutional norms because they fear that Congress will *dilute* judicially established constitutional norms by creating new, conflicting rights.[85] These critics

82. *Id.* at 142.

83. *Id.* at 248. Justice Brennan stated that, unlike courts, Congress "need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter." *Id.*

84. *Id.* at 130.

85. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. at 667-68 (Harlan, J., dissenting) (majority holding allows Congress to qualify the Court's fourteenth amendment decisions); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 607-09, 612-13 (1975) (Congress may be able "to dilute judicially declared protections"); Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 427-28 (1982) (Congress by "adding protection for underenforced norms may dilute the protection already guaranteed by the Court").

Professor Estreicher argued that § 5 does not grant Congress power to interpret the Constitution. Rather, § 5 empowers Congress to create "a system of statutory rights" to further constitutional values identified by the Court. *Id.* at 430-33. It is unclear, however, how Congress can enforce what Estreicher calls "the ultimate constitutional objective of equality of opportunity," *id.* at 433, if Congress cannot define the content of that objective and if the Court is unwilling to define it as broadly as Congress (or Estreicher) would like.

Professor Sager, anticipating Estreicher's argument, wrote that such an interpretation of § 5 removes virtually all limits on congressional power. Sager, *supra* note 47, at 1237-38. In contrast, Sager's theory of underenforcement requires a nexus to the basic notion that statutes should treat equally those similarly situated. *See id.* at 1238 & n.88.

fail to appreciate the Court's policy of underenforcement and its premise that the Court's holdings do not necessarily reflect the full scope of constitutional norms. The Supreme Court at all times retains final power to determine what is and what is not constitutional. If the Court declines to invalidate a statute for institutional reasons, Congress may act; if a congressional statute violates a norm that the Court *is* fully enforcing, that statute must fall.[86]

Critics also assert that Congress improperly substitutes its judgment for that of the courts when it invalidates state statutes that have passed judicial scrutiny. These critics erroneously assume that the rational basis test and limited application of heightened scrutiny constitute an equal protection norm, not merely the judicial standard used to analyze the norm.[87] The use of these tests as part of an underenforcement technique does not represent the courts' desire to formulate a complete constitutional doctrine. Rather, it constitutes a *minimum* standard of analysis for equal protection issues. If the underlying norm is that all persons similarly situated should be treated alike,[88] Congress does not substitute its judgment for the courts' when proscribing a state statute that was sustained under the rational basis test but failed to satisfy this norm. In fact, Congress may use institutional skills that the courts do not

86. *See id.* at 1239-42. The Supreme Court has expressly so held. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982) (Congress cannot validate a law that denies rights guaranteed by the fourteenth amendment).

87. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 214-15 (1980) (Rehnquist, J., dissenting) ("[I]t would be a topsy-turvy judicial system which held that electoral changes which have been affirmatively proved to be permissible under the Constitution nonetheless [because of congressional action] violate the Constitution."); Katzenbach v. Morgan, 384 U.S. at 667 (Harlan, J., dissenting) ("The question here is . . . whether there has in fact been an infringement of that constitutional command, that is, whether . . . a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment."); Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 320-21 (1982) (criticizing notion that Court should "adopt the principle that it will defer to any 'reasonable' congressional determination that a state law is 'arbitrary,' 'irrational,' or 'unreasonable' ").

Chief Justice Rehnquist's disagreement with *Katzenbach v. Morgan* has reappeared in subsequent opinions. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 262 (1983) (Burger, C.J., dissenting) (disagreeing with proposition that Congress can define rights wholly independently of judicial precedent); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 16 n.12 (1981) (Court would not consider prospectively whether Congress could enforce § 5 of the fourteenth amendment by creating a right to treatment in the absence of judicial recognition of such a right).

88. *See* cases cited *supra* note 52.

possess to protect a judicially established norm.[89]

The underenforcement policy reveals that the rational basis test and limited application of heightened scrutiny do not represent a constitutional norm, but a constitutional floor—"simply a 'salutary principle of judicial decision.' "[90] From this perspective section five of the fourteenth amendment authorizes Congress to condemn statutes that the Court has not invalidated under the equal protection clause.

B. THE TENTH AMENDMENT

Critics of congressional enforcement of the Constitution could also object on the basis of tenth amendment principles of states' rights.[91] The fourteenth amendment, however, by creating and authorizing Congress to enforce a constitutional right of equal protection, shifted political power from the states to Congress.[92] Moreover, in the latest decision in a series of cases in which the Supreme Court discussed the power of Congress to restrict state action, the Court indicated that most tenth amendment challenges to actions by the federal government are nonjusticiable. According to the Court, the structure of the federal system adequately protects the states from undue congressional intrusion.[93] Even when the Court construed the

89. Justice Brennan explained this concept in a separate opinion in *Oregon v. Mitchell*:

> The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as "arbitrary," "irrational," or "unreasonable."
>
> *Limitations stemming from the nature of the judicial process, however, have no application to Congress.*

400 U.S. 112, 247-48 (1970) (opinion of Brennan, White, and Marshall, JJ.) (emphasis added) (citations omitted).

90. *Id.* at 247 (quoting Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935)).

91. U.S. CONST. amend. X. The amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

92. Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976). Any power which the fourteenth amendment, as a subsequent amendment, conferred upon Congress would supercede any conflicting rights extended to states by the earlier amendment. Indeed, the thirteenth, fourteenth, and fifteenth amendments adopted soon after the Civil War were expressly intended to constitute "limitations of the power of the States and enlargements of the power of Congress." *Ex Parte* Virginia, 100 U.S. 339, 345 (1879).

93. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (5-4 decision) (*overruling* National League of Cities v. Usery, 426 U.S. 833

tenth amendment as erecting a justiciable barrier to congressional action under the commerce clause,[94] it did not extend its holding to exercises of congressional power under section five of the fourteenth amendment.[95]

The courts' refusal to treat tenth amendment claims as justiciable, however, does not mean that the amendment does not contain constitutional norms limiting Congress's role in our federal system. Both judicial and academic proponents of the nonjusticiability approach recently adopted by the Supreme Court have called for Congress to abide by these norms in its decisions.[96] Recognizing that the nature and composition of Congress safeguards federalism interests, the Court underenforces the tenth amendment and shifts the debate over congressional interference with state interests back into the halls of Congress.

(1976) (5-4 decision) (*overruling* Maryland v. Wirtz, 392 U.S. 183 (1968))). The court in *Garcia* left open the possibility of judicially imposed limits on congressional power over the states if the internal safeguards of the national political process did not function as intended. 469 U.S. at 556.

94. *See* National League of Cities v. Usery, 426 U.S. 833, 845 (1976) (congressional regulation of states as states prohibited under the tenth amendment).

95. City of Rome v. United States, 446 U.S. 156, 179 (1980) (principles of federalism overridden by power to enforce Civil War amendments).

My colleague Deborah Merritt has suggested that the guarantee clause of article IV authorizes judicial invalidation of congressional statutes that unduly intrude upon state sovereignty. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. (1988) (forthcoming). If tenth amendment protections would not supersede § 5 congressional enforcement, however, it is unlikely that the Supreme Court would limit such enforcement under the guarantee clause.

96. *See, e.g.*, *Garcia*, 469 U.S. at 556; *National League of Cities*, 426 U.S. at 857 (Brennan, J., dissenting); J. CHOPER, *supra* note 64, at 175-76; Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35, 52 (1977) (cases affirming congressional statutes "represent only a rejection of federalism as a *judicially applied* limitation," which shifts to Congress the primary responsibility for applying the appropriate constitutional standard (emphasis in original)); Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. REV. 1301, 1343 (1978) (Court incorrectly assumed in *National League of Cities* "that constitutional limitations are meaningless unless they are enforceable in the courts"). One observer noted that Congress gave short shrift to tenth amendment concerns after the Court's decision in Maryland v. Wirtz, 392 U.S. 183 (1968) (upholding congressional acts that infringed on state prerogatives without making clear that it was doing so for institutional reasons). *See* Mikva, *supra* note 69, at 593. Once the Court deflected the issue back to Congress in *Garcia*, however, Congress quickly acted to accomodate local governments' concerns about application of the Fair Labor Standards Act to their employees. *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (1985) (codified at 29 U.S.C. §§ 201-216 (1985)).

In determining whether a piece of legislation violates tenth amendment norms, Congress should consider several limitations on congressional power. The legislation should address only problems calling for national solutions. If uniform state application is not desired, Congress should adopt a consistent, logical, and fair method of applying legislation to some states but not others.[97] Congress should avoid adopting a national solution when state-by-state experimentation remains desirable. Congress should also assure itself that the states are incapable of dealing adequately with the problem. Through legislative hearings and their own knowledge of state and local politics, members of Congress should analyze whether political realities prevent states from providing effective solutions. Finally, in considering legislation affecting an area previously left to state or local governments, Congress should weigh the seriousness of the problem and the benefits of federal involvement against the harm to the vitality of the other levels of government.[98]

Although the Supreme Court has treated tenth amendment norms as nonjusticiable, Congress can conform to the constitutional limitations of the tenth amendment by following these limitations.[99] These limitations reflect an appropriate balance between the intended ordering of power in a federal

97. For example, § 4 of the Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973b (1982)), imposed a host of remedies designed to assure greater participation in the electoral process only upon states or political subdivisions where literacy tests were maintained prior to November 1, 1964, or where less than 50% of voting-age residents were registered to vote on that date or voted in the 1964 presidential election. *See* South Carolina v. Katzenbach, 383 U.S. 301, 317 (1966).

98. In reviewing the politics of the 1950s, a noted political scientist concluded that Supreme Court decisions upholding the New Deal legislation "in effect, transferred to the care of Congress all questions of importance that could have been handled by the states. The American states exist only as vestigial remnants . . . ." V.O. KEY, JR., AMERICAN STATE POLITICS 4 (1956). *But see* Broder, *Take it From the Governors*, Wash. Post Nat'l Weekly Ed., Mar. 9, 1987, at 4 (contrasting "spirit, energy and willingness to step up to the challenges of change" by state government with "pervasive lethargy" in Washington).

A significant adverse impact on state government is an important factor to be weighed in determining whether a federal statute, either alone or in combination with other statutes, effectively subverts the constitutional scheme of federalism. *See* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 775 (1982) (O'Connor, J., dissenting). When evaluating this impact on states, particular concern should be taken to avoid undue interference with the ability of citizens within a state to order the internal workings of state and local government. *See generally* Merritt, *supra* note 95.

99. *See* J. CHOPER, *supra* note 64, at 184-90 (historical record demonstrates congressional sensitivity to federalism concerns).

system of government and the amended Constitution's concern that all levels of government extend equal protection to all citizens. Assuming proposed congressional legislation overcomes these federalism concerns, the following sections discuss how Congress might more effectively guard against violations of the equal protection guarantee by state legislatures.

III. CONGRESSIONAL EXPANSION OF EQUAL PROTECTION

Because section five of the fourteenth amendment empowers Congress to establish and protect equality rights, Congress should direct other branches of government to increase protection under the equal protection clause and should establish a system of constitutional analysis within the legislative process. Congress may expand the judiciary's role by identifying additional suspect classes and fundamental rights and by increasing the level of scrutiny in specified types of equal protection cases. Furthermore, Congress may redirect governmental scrutiny in cases involving discriminatory impact. Finally, Congress itself may engage in constitutional analysis of questionable state legislation.

A. INCREASING THE JUDICIARY'S ROLE

1. Suspect Classes and Fundamental Rights

Unlike the Supreme Court, Congress is not constrained by institutional concerns in determining when to carefully scrutinize state classifications. Congress should use a two-pronged test to evaluate whether to declare a particular nonracial trait suspect for purposes of invoking strict scrutiny and should authorize the courts to protect classes with such traits. Congress should initially evaluate whether a distinction based on a particular trait is relevant in any conceivable context in which the states might legislate, with such exemptions as Congress might choose to establish. Congress should then consider whether persons possessing the trait lack political power to defend themselves against discriminatory treatment.[100]

Congress is especially competent to determine whether certain traits are relevant to state classifications because of its fact-finding and policy decision-making skills. Decisions such as whether women should be treated the same as men in all cir-

100. *Cf.* J. ELY, DEMOCRACY AND DISTRUST 145-70 (1980) (reasons to apply suspect class status to various minorities).

cumstances or whether homosexuals might be singled out for discriminatory treatment require a mix of fact finding and value judgments suited to congressional consideration.[101]

As to the second prong, the Supreme Court has specifically adopted strict scrutiny to protect "discrete and insular minorities"[102]—those minority groups unable to protect themselves through the political process. The Court's unwillingness to extend strict scrutiny to the poor, to women, and to aliens,[103] however, indicates that political discrimination is insufficient to confer suspect status. Whatever the merits of this judicial approach, Congress itself may identify groups that are unable to protect themselves through the state political process.

In some sense it is true that in this country we are all minorities.[104] Many minority groups have the economic or historical power to succeed in the political arena. Others can build coalitions to achieve political clout. Some, however, due to size, historic discrimination, or other factors, cannot protect themselves against the "tyranny of the majority" at the state level.[105] In many cases Congress may be no more solicitous

101. This is not to suggest that classifying such traits as suspect is necessarily beyond judicial competence. In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices (Brennan, Douglas, White, and Marshall) concluded that gender is a suspect classification. Without refuting this finding, three Justices (Powell, Burger, and Blackmun) refused to join the plurality because of the contemporaneous national debate over the adoption of the Equal Rights Amendment. *Id.* at 692 (Powell, J., concurring). When not encumbered by concerns about interfering with the amendment process, other courts have characterized gender as a suspect class. *See, e.g.*, Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 17, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971); Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 46, 653 P.2d 970, 977-78 (1982); Hanson v. Hutt, 83 Wash. 2d 195, 199, 517 P.2d 599, 602 (1973); Peters v. Narick, 270 S.E.2d 760, 765-66 (W. Va. 1980); *see also* Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CALIF. L. REV. 1086 (1977) (levels of scrutiny used for gender in 16 state courts).

The decision whether to extend the protection of heightened judicial scrutiny to homosexuals has been discussed in terms of fundamental rights analysis. In People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), the court did not consider whether homosexuals were a suspect class, having held that the fundamental right of privacy protected the noncommercial, cloistered sexual conduct of homosexuals. *But see* Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986) (right of privacy does not extend to sexual conduct of homosexuals).

102. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

103. *See supra* notes 19-22 and accompanying text.

104. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292-93 (1978) (opinion of Powell, J.) (discussing the "racial, ethnic, and cultural diversity of the Nation").

105. *See* Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 720 (1985). Ackerman makes the intriguing point that, contrary to the assumption

than state legislatures of protecting victimized groups. Congress's power can be exercised, however, to address discriminatory animus centered in particular regions or in a minority of states.[106] For example, an overwhelming majority in Congress proposed the Equal Rights Amendment but a minority of primarily southern and rural states rejected it.[107] In such a situation, Congress could extend strict scrutiny to discrimination against women, superceding the actions of those states. Similarly, protection against discrimination based on sexual orientation could be forthcoming despite strong resistance from portions of the country.

2. Increased Judicial Balancing

Congressional authority to expand judicial scrutiny in equal protection litigation affords greater doctrinal flexibility than exists under current decisions. As noted above, Congress could authorize an expansion of strict scrutiny to include legislation that is discriminatory in all cases without sharply delineated exceptions.[108] Conversely, Congress may find situations when the hands-off attitude of the rational basis test is appropriate.

Between these two standards is a spectrum of approaches

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of the famous *Carolene Products* footnote, 304 U.S. at 153 n.4, minority groups that are anonymous and dispersed have greater difficulty in the political arena than discrete and insular racial or religious minorities. Ackerman, *supra*, at 723-24. Under Ackerman's view homosexuals and the poor would have more difficulty politically than would racial or religious minorities.

Women, who comprise a numerical majority of the population, historically have been silenced in the political arena. As late as 1972, for example, there were no women in the United States Senate and only 14 in the House of Representatives. Only one woman in the previous 20 years had chaired a congressional committee. Less than three percent of top federal bureaucrats (holding ranks at GS-16 or above) were women, there were no women governors, and less than six percent of state legislators were women. Joint Reply Brief of Appellants and American Civil Liberties Union *Amicus Curiae* at 8-9, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694).

106. Congress's enactment of civil rights, voting rights, and employment discrimination legislation demonstrates its ability and willingness to enact statutes that benefit minority interests. Hatch, Book Review, 99 HARV. L. REV. 1347, 1360-61 (1986) (reviewing L. TRIBE, GOD SAVE THIS HONORABLE COURT (1978)).

107. Congress passed the resolution proposing the Equal Rights Amendment (ERA) in 1972 by a House vote of 354-24 and a Senate vote of 84-8. 117 CONG. REC. 35815 (1971) (House); 118 CONG. REC. 9598 (1972) (Senate). For the geographic distribution of states opposing the ERA, see Burris, *Who Opposed the ERA? An Analysis of the Social Bases of Antifeminism*, 64 SOC. SCI. Q. 305, 315-16 (1983).

108. *See supra* text accompanying note 107.

that enhances the courts' ability to determine whether a state legislative classification meets equality norms.[109] For example, although courts currently uphold statutes under the rational basis test if they can find any real or hypothetical legitimate purpose, Congress could authorize courts to examine only those goals[110] the legislature actually considered.[111] This authorization would thereby mandate the rejection of purposes hypothesized by the state's attorneys in the context of litigation.[112] Similarly, in evaluating whether the challenged classification is sufficiently related to the purpose of the legislation, Congress could authorize courts to review the underlying legislative facts and strike down statutes if the factual assumptions are proven false. In such situations Congress should explicitly identify factors to be considered in evaluating a particular classification and direct courts to make determinations on a case-by-case basis.[113]

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109. *See, e.g.*, L. TRIBE, *supra* note 46, § 16-30, at 1082-89 (discussing variety of possible tests).

110. Unless, of course, the goal is itself constitutionally prohibited. *See, e.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985) (purpose to aid domestic industry by discriminating against foreign companies "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent"); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[A] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (emphasis in original); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (purpose of inhibiting migration from another state is "constitutionally impermissible"); Loving v. Virginia, 388 U.S. 1, 11 n.11 (1967) (Stewart, J., concurring) (interest in preventing interracial marriages is "repugnant to the Fourteenth Amendment").

111. Determining what the legislature actually considered requires legislative history. States which currently do not preserve legislative history would need to develop procedures to do so. Such a requirement might result in the incidental benefit of increased public understanding of the legislative process.

112. This aspect of the rational basis test has been criticized as giving the state's attorney inordinate power to make or break a constitutional challenge depending on which purposes the attorney chooses to ascribe to the challenged statute. Linde, *supra* note 46, at 213.

113. For example, in City of Mobile v. Bolden, 446 U.S 55 (1980), the Supreme Court held that state or local statutes governing elections or reapportionment would be sustained against racial discrimination challenges unless the plaintiffs proved that the electoral mechanism was *intentionally* adopted or maintained for a discriminatory purpose. Congress responded by amending the Voting Rights Act to require a reviewing court to determine whether, "based on the totality of circumstances," racial minorities are denied equal political participation. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3(b), 96 Stat. 134 (codified as amended at 42 U.S.C. § 1973(b) (1982)). The legislative history listed numerous factors for the courts to apply. S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 (1982); *see* Thornburg v. Gingles, 106 S. Ct. 2752, 2759-60 (1986) (listing the relevant factors as stated by the Senate Judiciary Committee).

Although the Supreme Court has been reluctant to explicitly engage in case-by-case balancing of interests under the equal protection clause,[114] the judiciary frequently balances interests in other contexts. For instance, courts exclude evidence from trials when its prejudicial effect outweighs its probity.[115] In antitrust litigation, courts analyze challenged restrictive trade practices under a "rule of reason" to determine if the practice's competitive benefits outweigh the resulting harms.[116] Federal courts explicitly balance interests when a state regulation allegedly violates the commerce clause.[117]

Arguably, these types of judicial balancing are distinguishable because, unlike equal protection cases, they can be reversed by statute.[118] This distinction is illusory, however,

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114. Despite Justice Marshall's advocacy of such an approach, *see, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting), the Court has, albeit with some significant deviations, *see supra* text accompanying notes 20-21, preserved the two-tier dichotomy in equal protection analysis. For most statutes the judicial refusal to balance competing interests results in a rejection of the equal protection challenge. *See supra* text accompanying notes 44-46.

115. *See, e.g.*, State v. Flett, 234 Or. 124, 127-29, 380 P.2d 634, 636-37 (1963) (prejudicial effect of evidence of marital infidelity outweighed probative value in manslaughter case). This common-law doctrine has been incorporated into Rule 403 of the Federal Rules of Evidence. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 185, at 545 n.27 (3d ed. 1984).

116. *See, e.g.*, Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977) ("Under this rule, the factfinder weighs all of the circumstances of a case . . . .").

117. *See, e.g.*, Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 783-84 (1945) ("[E]xamination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation . . . .").

118. In Luck v. United States, 348 F.2d 763, 768 (D.C. Cir. 1965), the court held that the trial judge may balance possible prejudice against the probative value of a criminal defendant's prior convictions. After extensive legislative review, Congress changed this rule to require the trial judge to admit evidence, on cross-examination, of certain prior crimes. FED. R. EVID. 609(a); *see* H.R. REP. NO. 1597, 93d Cong., 2d Sess. 5, 9 (1974) (conference report). Other examples of statutory modifications of judicial balancing include the National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1816 (1984) (codified as amended at 42 U.S.C. § 4302 (1982 & Supp. III 1985)) and its accompanying conference report, H.R. REP. NO. 1044, 98th Cong., 2d Sess. 3 (1984) (specifying rule of reason approach to be used by courts in evaluating antitrust liability of research joint ventures), and 12 U.S.C. § 1842(d) (1982) (authorizing states to prohibit chartering of out-of-state banks). *But see* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (balancing the interest of the plaintiff, the risk of error, and the governmental interest in minimizing burdens in deciding, as a matter of *constitutional* law, whether challenged procedures comport with due process clause).

because Congress could also revise any court decision applying a congressionally authorized balancing test. Institutional considerations that may have led the Court to reject case-by-case balancing of equal protection thus fade away.[119]

While a state legislature may be more qualified than the judiciary to weigh competing interests in social legislation, this is not always the case, particularly when regional biases come into play. For example, states may unduly favor their own parochial interests when dealing with interstate commerce. In such situations judges properly weigh the various competing concerns, not because they have some peculiar competence in matters of interstate trade, but because fear of bias places the state's competence in question.[120] Similarly, if Congress perceives that a state legislature has discriminated against a class of people possessing an unpopular trait or exercising an unpopular right, Congress is justified in preferring that judges, insulated from the pressures and biases of the contemporary majority, weigh the competing interests.

B. AGENCY REVIEW OF DISPROPORTIONATE IMPACT

In addition to expanding suspect classifications and increasing the levels of scrutiny, Congress should also evaluate whether a facially neutral statute violates equal protection if passed without a discriminatory purpose. Proving that a state adopted a particular classification to harm racial minorities is difficult indeed. Under current doctrine, no matter how harsh the impact on racial minorities, a state that was indifferent to a statute's discriminatory consequences will face only minimal judicial scrutiny.[121] Because the Court's position reflects institutional limitations, not a constitutional mandate, Congress could legislatively require more extensive federal intervention on behalf of racial minorities under the fourteenth amendment.

Undoubtedly, a blanket prohibition against acts that dispro-

119. Congressional authorization of judicial balancing also eliminates concern that a judicially imposed balancing test would inevitably lead to less stringent judicial review of those classifications now strictly scrutinized by the courts. *Cf.* Hawkins v. Superior Court, 22 Cal. 3d 584, 608-09, 586 P.2d 916, 932, 150 Cal. Rptr. 435, 450 (1978) (Bird, C.J., concurring) (fearing that an intermediate level equal protection test would eventually weaken the strict scrutiny test).

120. *Southern Pac. Co.*, 325 U.S. at 767 n.2 ("[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.").

121. *See supra* notes 33-35 and accompanying text.

portionately affect racial minorities would endanger a host of tax,[122] welfare,[123] licensing,[124] and regulatory[125] statutes that are more burdensome to the poor, who are disproportionately black, than to the affluent.[126] A more sensible approach to enforcing equal protection norms lies in balancing competing interests.

Sometimes racially discriminatory impact can be offset by mitigating measures. For example, colleges and universities that process a large number of applications for admission may legitimately need to use objective criteria such as grades and test scores. Schools could offset any resulting disproportionate impact by adopting an affirmative action program that allows deviation from objective measurements.[127]

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122. The sales tax disproportionately affects the poor because they spend a larger percentage of their income on taxable items than do wealthier persons. M. GRAETZ, FEDERAL INCOME TAXATION PRINCIPLES AND POLICIES 19 (1985).

123. In Jefferson v. Hackney, 406 U.S. 535 (1972), the Texas legislature imposed more stringent budget cuts on aid to families with dependent children, of which racial minorities represented 87% of the recipients, than on aid to the elderly, of which racial minorities represented less than 40% of the recipients. *Id.* at 548 n.17.

124. Statutes or regulations that limit entry into a field but allow incumbents to transfer their operating rights to others (for example, taxicab medallions) significantly raise the cost of entering the business. This, of course, hurts the poor more than the wealthy. When entry-limiting statutes are not coupled with effective rate regulation, the resulting insulation from open competition allows incumbents to raise rates above a competitive level. With more limited income at their disposal, the poor suffer from monopoly exploitation more than the rich. *See FTC Staff Urges Chicago to Dump Entry Barriers in Taxicab Market*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1298, at 90 (Jan. 15, 1987) (FTC advised that taxicab market monopolization adversely affected service to low-income neighborhoods).

125. Zoning and land use restrictions promote environmental goals but also deny housing opportunities to the poor and perpetuate socioeconomic segregation. Comment, *Exclusionary Zoning in California: A Statutory Mechanism for Judicial Nondeference*, 67 CALIF. L. REV. 1154, 1154 (1979).

126. *See* Washington v. Davis, 426 U.S. 229, 248 (1976).

127. Using this analysis, the defendants in *Washington v. Davis* may have prevailed even under heightened judicial scrutiny. Although the Washington, D.C., police department's standardized test had a disproportionate racial impact, a heavy, minority recruiting drive resulted in blacks comprising 44% of recent recruits, a figure that corresponded to the percentage of 20- to 29-year-old blacks in the recruiting area. 426 U.S. at 235; *cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (opinion of Powell, J.) ("To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all."). *But see* Connecticut v. Teal, 457 U.S. 440, 456 (1982) (rejecting under title VII such a "bottom line" justification as a defense to a non-job-related test with disproportionate racial effects).

When the discriminatory impact cannot easily be mitigated, however, a decision maker must choose between competing interests. For instance, many law school faculties believe that to maintain a school's academic standing and reputation, academic appointments should be based on law school grades, clerkships, publications, and recommendations from fellow academics. An equal protection challenge to a public school's decision to use such criteria will not be sustained under *Washington v. Davis* even if it results in an all-white faculty.[128] Although faculties may be best able to decide whether these hiring criteria will provide a prestigious faculty, they are not well suited to balance this legitimate interest against constitutional norms of equality. Congress could determine that faculties overemphasize academic ranking and that the need to correct historic patterns of racial discrimination requires that hiring decisions be subject to challenge and review by another decision maker.

Although Congress could assign this balancing task to the federal judiciary, it might share the courts' concern about the limits of judicial competence and therefore assign the task to a specialized agency. For instance, the reasonableness of tests in an employment or educational context might depend on the nexus between the test requirements and the employer's or faculty's real objectives. Determining that relationship, evaluating mitigating factors, and shaping appropriate remedies often requires specialized knowledge and extensive investigation. Thus, an expert nonjudicial decision maker could better ensure the adequate review of statutes that disproportionately affect minorities.

C. SPECIFIC CONGRESSIONAL PROHIBITIONS

What Congress may authorize courts or agencies to do in striking down discriminatory state statutes, it may do itself. Congress can conduct hearings and develop factual records to determine whether state actions violate judicially underenforced constitutional norms of equality.[129] The Supreme

128. *See supra* text accompanying notes 33-35.

129. An important corollary of the underenforcement thesis is that Congress cannot exercise its § 5 powers to expand equal protection guarantees in areas in which the Court is not underenforcing the fourteenth amendment. *See supra* notes 85-86 and accompanying text. The state action requirement is one area of equal protection doctrine in which the Court has been unclear as to whether its opinions constitute underenforcement. The Civil Rights Cases, 109 U.S. 3, 9-11 (1883), held that Congress could not use § 5 to prohibit racial discrimination by private persons. The language of that opinion did not sug-

Court confirmed this authority in *Katzenbach v. Morgan*,[130] upholding Congress's statutory prohibition of state-imposed literacy tests because of their discriminatory effect upon literate minorities.[131]

In addition to broad review of potential areas of discrimination, Congress can review specific state statutes and determine whether they violate norms of equal protection not fully enforced by the judiciary. For example, in *Williamson v. Lee Optical*[132] the challenged Oklahoma statute prohibited opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist but allowed retail stores to sell ready-to-wear glasses without any prior optometric consultation.[133] The Court upheld the statute, declaring that it was for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.[134]

If faced with a state statute similar to that in *Lee Optical*, Congress could evaluate the statute in the same manner as the Oklahoma legislature.[135] A congressional inquiry might deter-

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gest underenforcement. *See id.* at 10 (noting responsibility of Court to make independent judgment); *id.* at 11 ("Individual invasion of individual rights is not the subject-matter of the amendment."). To the extent that the state action requirement is not underenforcement, Congress lacks authority to proscribe private conduct pursuant to § 5.

A complex body of law has developed construing the state action requirement. *See generally* 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 52, § 16; L. TRIBE, *supra* note 46, § 18. In some cases the Court has permitted challenges to private party actions. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946) (company town). In other cases Congress has achieved similar results using other constitutional grants of power, such as the thirteenth amendment, which contain no state action requirement. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (thirteenth amendment used to require sale of private home to black individual). In United States v. Guest, 383 U.S. 745 (1966), six Justices in two separate opinions expressed the view that Congress could prohibit private conspiracies to violate fourteenth amendment rights. *Id.* at 762 (Clark, J., concurring); *id.* at 777 (opinion of Brennan, J.). Justice Brennan, writing for a unanimous Court in District of Columbia v. Carter, 409 U.S. 418, 424 n.8 (1973), cited the *Guest* opinions with approval in dicta. *See also* L. TRIBE, *supra* note 46, § 15-15, at 274 (Congress could find that a state's failure to punish private discrimination constitutes state action and thus could prohibit private discrimination under § 5).

130. 384 U.S. 641 (1966).

131. *Id.* at 643 n.1.

132. 348 U.S. 483 (1955).

133. *Id.* at 485 n.1, 488 n.2. The Oklahoma Attorney General argued that the prescription requirement ensured that Oklahomans received "the best possible visual care." Lee Optical v. Williamson, 120 F. Supp. 128, 133 (W.D. Okla. 1954), *aff'd*, 348 U.S. 483 (1955).

134. 348 U.S. at 487-88.

135. Any disagreement between the state legislature and Congress would

mine that the purported state goal of promoting eye care was not legitimate because, as a factual matter, such visits were unnecessary and inflated the cost of eyeglasses, resulting in undue profits for opthalmologists and optometrists and undue losses for opticians. If so, opticians could obtain congressional relief from the state's denial of equal protection.

As a limitation on such congressional action, Congress should resist prohibiting those state statutes unless it would support a nationwide ban and the states themselves were politically unlikely to remedy the discrimination. If this limitation is followed, Congress will promote equal protection by permitting national consensus in favor of equal treatment to overcome breakdowns in state political processes.[136]

Although Congress could abuse this power, the consequences do not significantly threaten the status quo. Congress clearly has the power to preempt state regulation of optical sales under the commerce clause.[137] Thus, Congress's active promotion of equal protection under section five of the four-

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be *judicially* resolved in favor of Congress under the supremacy clause. *See* Oregon v. Mitchell, 400 U.S. 112, 240, 248-49 (1970) (opinion of Brennan, White, and Marshall, JJ.). The mere fact that Congress disagreed with the state legislature's factual determinations should not be determinative for *Congress*, however. To justify use of congressional authority under § 5, the opticians and their allies must overcome the obstacles concerning states' rights set forth above. *See supra* text accompanying notes 96-99.

136. A full discussion on the uses of the concept of underenforcement concerning other constitutional provisions is beyond the scope of this Article. One other noteworthy area is the fifth amendment's protection against the taking of property without compensation. *See* Sager, *supra* note 47, at 1219 & n.22. Courts often permit the government to use its regulatory power in ways which reduce property values without providing compensation. This permissiveness may be because courts are institutionally incapable of making the complex "fairness" determinations necessary to decide when compensation should be awarded, except in the most egregious cases. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1246-51 (1967).

137. Although the concerns underlying the commerce clause overlap with those underlying the equal protection clause, they have a different focus. Under the commerce clause, Congress should focus on the effect state statutes may have on consumers and interstate trade. Under the equal protection clause, the emphasis should be on fairness and equitable treatment of those affected by the classification. *See* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 876 n.6 (1985) (clause concerned with discrimination, not implications for state and local interests). A classification might be grossly unfair to a politically powerless minority group, yet have no discernable effect on interstate commerce. For a general criticism of the use of the commerce clause to prohibit discrimination, see G. GUNTHER, CONSTITUTIONAL LAW 163 (11th ed. 1985) ("The aim of the proposed anti-discrimination legislation, I take it, is quite unrelated to any concern with national commerce in any substantive

teenth amendment would not increase the power of special interest groups to pressure Congress into invalidating state laws without good cause.

IV. LEGISLATIVE APPLICATION OF EQUAL PROTECTION PRINCIPLES

The preceding discussion addressed the roles of Congress and the judiciary in restraining state legislative acts that violate equal protection norms. At the heart of American constitutional theory is the belief that such external restraints are essential. Indeed, a principal purpose for adopting a written constitution as the supreme law of the land is to provide a mechanism for outside forces, most often the judiciary, to check legislative acts that stray from the principles that bind the nation.[138]

External restraints, however, do not release a legislature from the duty of ensuring that its own actions conform to constitutional mandates.[139] Because state and federal legislators are sworn to uphold the Constitution[140] and courts often underenforce constitutional protections, legislators must not leave constitutional questions solely to the courts. Thus, legislators confronted with legislation that possibly runs afoul of constitutional norms have a responsibility to assure themselves that the legislation is constitutional.[141]

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sense." (quoting a letter from Gerald Gunther to the Department of Justice (June 5, 1963))).

138. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

139. For a discussion of that duty, see *supra* note 10 and accompanying text.

140. *See supra* text accompanying note 11.

141. A legislator who abdicates to the courts the responsibility for constitutional decision making significantly weakens the guarantees of the equal protection clause in areas in which courts underenforce the clause. Although troublesome in theory, the practical effect is much less serious when a legislator, to achieve an otherwise legitimate legislative goal, votes in favor of a bill that courts clearly will strike down. For instance, in 1971 liberal California State Senator Anthony Beilenson reached agreement with conservative Governor Ronald Reagan on a welfare reform package that increased benefits to the poor but imposed a residency requirement similar to one the Court invalidated in Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969) (certain public benefits denied to residents of under one year). *See* Pearlman, *Welfare Administration and the Rights of Welfare Recipients*, 29 HASTINGS L.J. 19, 47 n.174 (1977). The California residency requirement was quickly struck down by the courts. *See id.* at 46-47 & n.172 (citing Brown v. Carleson, No. 217636 (Cal. Super. Ct. Feb. 15, 1972) (no appeal taken)).

This situation should occur infrequently. In essence, Beilenson received something for nothing. Reagan's agreement can be explained only as the re-

In the area of equal protection, federal representatives and senators are as obligated as state legislators to examine the constitutionality of their actions. The Supreme Court has held that equal protection analysis under the due process clause of the fifth amendment parallels analysis under the fourteenth amendment.[142] The congressional burden arguably exceeds that of state legislators because, as demonstrated in Part II, Congress may override state legislation when the judiciary chooses to underenforce the equal protection clause.[143] Excluding federal court oversight, however, Congress is free of any restraint unless it acknowledges the responsibility itself.

This Article does not attempt to identify the exact contours of the equality norm expressed in the fourteenth amendment, once the norm is stripped of institutional limitations relevant to judicial review. As demonstrated in Part II, this norm extends far beyond the minimal scrutiny of the rational basis test. There also appears to be widespread agreement that the goal of equality is equal treatment for all those similarly situated.[144] The legislatures and courts, however, can never achieve a perfect correlation between this goal and legislative classifications. Because of this imperfect correlation, Professors Tussman and tenBroek suggest that gaps due to overbroad or underinclusive statutes must be "reasonable,"[145] while Professor Sager argues that the equal protection guarantee mandates that "a state may treat persons differently only when it is fair to do so."[146] Regardless of the precise contours of the equality norm or the difficulty of relating it to legislation, constitutional adherence to the norm requires at least a careful legislative examination of the ends and means used in a statutory scheme. The examination may be divided into three areas of inquiry: the legitimacy

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sult of poor legal advice or a desire to dupe the uninformed public into believing he was reducing welfare benefits, when in fact he was acquiescing to demands of liberal legislators.

142. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); Bolling v. Sharpe, 347 U.S. 497 (1954).

143. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976) (Congress's authority to enforce equal protection norms under § 5 of the fourteenth amendment is "carved out of [state power]," and thus limits states' sovereign immunity (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1880))).

144. *See supra* note 52 and accompanying text.

145. Tussman & tenBroek, *supra* note 52, at 344, 346.

146. Sager, *supra* note 47, at 1215.

of the purpose, the costs and benefits of proposed legislation in terms of equality, and the fit between ends and means.

A. THE FIRST INQUIRY: A LEGITIMATE PURPOSE

The courts, as earlier described, accept any conceivable, legitimate purpose to justify a statutory classification that does not invoke heightened scrutiny.[147] Furthermore, under a rational basis test, the legislature's actual reasons for enacting the statute are treated as irrelevant.[148] This treatment does not represent a judicial evaluation of equality norms; rather, it reflects the longstanding institutional reluctance to probe the legislature's motivation.[149]

Legislators, however, can investigate a bill's purpose unconstrained by a need to defer to another branch of government.[150] A legislator should identify the reasons why the bill is being sponsored, either directly from the bill's author, from those close to the author, or from outside groups on whose behalf the bill was introduced. The bill's purposes or ends to which it is directed should be clear to the legislator.

If a statute has two plausible purposes, only one of which is legitimate, courts will accept that purpose unless presented with clear evidence of contrary legislative intent, but a legislator need not rely on such a presumption. If a statutory classification was motivated by an impermissible purpose, legislators must oppose the legislation.[151]

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147. *See supra* text accompanying note 45.

148. *See* Michael M. v. Superior Court, 450 U.S. 464, 472 n.7 (1981) ("[T]he purposes of the [statute are] not open to impeachment by evidence that the legislature was actually motivated by an impermissible purpose.").

149. *See* United States v. O'Brien, 391 U.S. 367, 383-84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 131 (1810) (Court "cannot sustain a suit" attacking a statute "in consequence of the impure motives which influenced certain members of the legislature which passed the law").

The difficulties courts face are compounded by the hypothetical raised by Justice Rehnquist in his dissent to Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 703 (1980): How would a court divine the actual legislative purpose if the legislative history indicated that the statute passed by a vote of 40-20, and that, of the 40 votes favoring the legislation, 10 were based on legitimate considerations, 10 were based on impermissible factors, and 20 were not explained?

150. "While congressmen are quite ordinary in general outline, their practice of the political art has made them knowledgeable in assessing one another. Their instincts, sharpened by the conflict of the personal and the impersonal, enable them to characterize each other to the finest hair." C. MILLER, MEMBER OF THE HOUSE 106 (1962).

151. Legislators must follow judicial decisions declaring specified purposes

Dean Brest made a similar point regarding the first amendment protection for free speech. Brest used the example of the federal statute criminalizing the burning of draft cards to argue that legislators should consider the constitutionality of their purposes for drafting legislation.[152] The Supreme Court upheld the statute in *United States v. O'Brien*[153] based on the asserted purpose of ensuring the smooth functioning of the selective service system.[154] The legislature, however, had an equally plausible, illegitimate intent to hinder an effective constitutional protest against the draft and the Vietnam War. Brest argued that legislators should have opposed the bill if their only reason for supporting it was the latter, constitutionally impermissible purpose.[155] As Brest argued, legislators should not hide behind the sophistry of clever attorneys who concoct fictional, but legitimate, purposes for otherwise illegitimate statutes or play upon the courts' anxieties over examining legislative motives.

A more difficult problem arises when a proposal, which is either unconstitutional itself or creates inequitable exceptions for certain classes of individuals, is offered as an amendment to otherwise desirable and constitutional legislation. For instance, assume that a state senate is considering workers' compensation legislation and that no principled reason exists to exclude agricultural workers from the compensation plan. Assume further that a coalition of those who oppose all workers' compensation legislation and those who unconstitutionally seek to exempt agricultural workers have a sufficient number of votes to defeat the legislation unless the senate amends it. The hypo-

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to be impermissible. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982) (Congress has no power to dilute judicially established equal protection rights); Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (same). For example, a state may not justify a statutory classification based on an illegitimate purpose, such as discrimination on the basis of race, national origin, gender, religion, or the exercise of constitutional rights. *See supra* note 110. In addition, certain methods of achieving otherwise legitimate state objectives have been held to be impermissible. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 694-95 (1977) (plurality opinion of Brennan, J.) (state cannot discourage premarital teenage sex by limiting access to contraceptives); *id.* at 715-16 (Stevens, J., concurring) (state may not deter sexual activity by minors through sanction of pregnancy or venereal disease); Trimble v. Gordon, 430 U.S. 762, 769 (1977) (state cannot punish illegitimate children to discourage their parents from extramarital sexual contact or conception).

152. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 590 (1975). The analysis does not differ depending upon whether free speech or equal protection values are involved.

153. 391 U.S. 367 (1968).

154. *Id.* at 377-81.

155. Brest, *supra* note 152, at 586.

thetical Senator A, who wishes to remain faithful to the constitutional oath but favors workers' compensation, faces the dilemma of whether or not to support the amendment.

This hypothetical emphasizes the difficulty of enacting sound public policies *fully* consistent with equality norms. Of course, Senator A should use all of her political skills to excise the offending exemption. If these efforts prove unsuccessful, Senator A must weigh the legislation's overall benefits and the need for its immediate passage against the harm to the victimized group. If by adamantly insisting that the legislation include all workers, Senator A will obtain passage of the bill within an appropriate time frame, she should continue to oppose amendment. On the other hand, if the need for the legislation is immediate and the bill as amended would be a genuine first step toward equal treatment within a reasonable period of time, Senator A need not advocate the amendment's defeat.[156] In the most troublesome scenario, Senator A realizes that the political situation is not likely to change and the legislation is critical, and therefore political realities dictate acceptance of a compromise containing an improper exemption.[157] Despite the potentially different outcomes depending on the political realities, Senator A has at least deliberated with the purposes of the statute in mind.

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156. It is legitimate and often necessary to implement reforms experimentally or in piecemeal fashion to successfully accomplish a policy objective. *See* Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) ("[R]eform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); Tussman & tenBroek, *supra* note 52, at 349; *cf.* Clements v. Fashing, 457 U.S. 957, 969-70 (1982) (upholding statute under rational basis test because reform taken 150 years ago was a "first step").

Similarly, short-term differential treatment of similarly situated persons may be justified as part of a legitimate experimental program. *See, e.g.*, Aguayo v. Richardson, 473 F.2d 1090, 1109-10 (2d Cir. 1973) (random selection of welfare recipients for work assignments), *cert. denied*, 414 U.S. 1146 (1974).

157. This is particularly true when comprehensive legislation contains provisions important to the legislator, but also includes unconstitutional provisions that cannot be struck by amendment. *Cf.* 100 CONG. REC. 14,209 (1954) (remarks of Rep. Celler) (despite concern that one section of Communist Control Act of 1954 would be unconstitutional, support for the bill was justified because, on balance, the good outweighed the evil).

The fact that the current equal protection jurisprudence does not adequately deal with the situation discussed in the text has led many to call for more meaningful judicial review than that provided by the rational basis test. *See* 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 52, at 329-30 (citing various authorities); Gunther, *supra* note 16, at 18-19.

B. THE SECOND INQUIRY: WEIGHING BENEFITS AND COSTS

To say that a purpose is legitimate does not mean that all discrimination intended to further it is consistent with norms of equality. Legislators must determine whether attainment of the goal is worth the harm to the misclassified. Although a test that balances costs and benefits of legislation will necessarily lead to something of a gestalt judgment by each legislator, a judgment that considers the equities dictated by equality norms should be rigorous and analytical.

The Kansas debt-adjusting statute, which the Supreme Court upheld in *Ferguson v. Skrupa*,[158] provides a useful example of the equities that legislators must consider. The statute prohibited debt adjusting, a practice in which a debtor pays a lump sum to an adjuster who then, for a fee, distributes it among specified creditors according to an agreed plan. The statutory ban, however, exempted acts by attorneys in the normal course of legal representation.[159] The legislature's purpose in enacting the statute, according to the Kansas Attorney General, was to end grave abuses of the practice, especially against low-income debtors.[160] By limiting debt adjusting to attorneys, the Kansas legislature presumably sought to ensure that debt adjusting would be offered to clients as one of several options, including bankruptcy.[161] The legislature may have also concluded that attorneys, who are subject to high ethical standards, would not engage in abusive practices.[162] Despite its concerns, the Kansas legislature did not perfectly tailor the statute to end all abuses in debt adjusting: lawyers who were not knowledgeable or ethical could continue to adjust debts while adjusters who were not lawyers but possessed the requisite skills and integrity would be put out of business.[163] A legislator, faced with

158. 372 U.S. 726, 731-32 (1963).

159. *See* Skrupa v. Sanborn, 210 F. Supp. 200, 201 (D. Kan. 1961) (three-judge court), *rev'd sub nom.* Ferguson v. Skrupa, 372 U.S. 726 (1963).

160. Ferguson v. Skrupa, 372 U.S. at 727.

161. Skrupa v. Sanborn, 210 F. Supp. at 203 (Stanley, J., dissenting).

162. *See, e.g.*, American Budget Corp. v. Furman, 67 N.J. Super. 134, 143, 170 A.2d 63, 68 (1961) ("Attorneys do not advertise and are subject to a high ethical standard."), *aff'd*, 36 N.J. 129, 175 A.2d 622 (1961).

163. As noted in the dissenting opinion in Skrupa v. Sanborn, 210 F. Supp. at 203, another possible explanation for the statute was the legislature's desire to protect debtors from adjuster conflicts of interest. Debt adjusters collect their fees only if their clients agree to adjustment as a means of resolving their financial difficulties. Attorneys, on the other hand, have no personal interest in advising clients either to pursue debt adjustment or to file for bankruptcy because they collect their fees in either case. If this was the real

such a statute, should satisfy himself that the benefits of obtaining knowledgeable and honest debt service—discounted by the gap between this goal and the statutory classification designed to achieve it—outweigh the costs to skilled, honest, nonlawyer debt adjusters against whom the statute discriminates.[164]

C. THE THIRD INQUIRY: A SUFFICIENTLY CLOSE FIT BETWEEN ENDS AND MEANS

Defenders of a statute attacked on equal protection grounds must show, under the strict scrutiny test, the absence of less restrictive alternatives to accomplish the legislature's purpose. Under the rational basis test, in contrast, courts do not seriously examine alternative ways of achieving the state's purpose[165] because they are not equipped to balance the costs and benefits of possible alternatives.[166]

Unlike courts, however, legislators engage in such balancing every day and can evaluate alternatives as part of the legislative process.[167] Examining a variety of alternatives enables legislators to reduce a bill's overbreadth or underinclusiveness. To achieve this goal, legislators should support any alternative that minimizes misclassification, unless its additional costs outweigh the benefits of more accurate classification. In assessing alternatives legislators should consider the following factors: the number of people misclassified and the importance of their interests, the extent to which the classification interferes with those interests, the financial and other costs of each alternative, the degree to which each achieves the legislative purpose, and the harm of any new misclassifications that each might

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explanation for the statute, then there was a direct fit between the legislature's end—ensuring that only persons who could also aid in bankruptcy proceedings would give advice on debt adjustment—and its means—permitting only lawyers to perform debt adjustment services.

164. Thus, although under the rational basis test a judge asks whether the classification *could* conceivably further a legitimate public purpose, a legislator must ask whether the classification actually advances public purposes and in such a way that there is a net improvement in the public welfare. *See* Brest, *supra* note 152, at 595.

165. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Williamson v. Lee Optical, 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

166. *See supra* text accompanying note 59.

167. For a discussion of the means by which legislators may initiate analysis of constitutionality, see *infra* text accompanying notes 187-90.

create.[168]

Returning to the Kansas ban on nonattorney debt adjusting as an example, the legislature's real concern may have been that debt adjusters, unlike attorneys, were not highly regulated by the state.[169] An alternative to prohibiting nonattorney adjusters would have been to license them. The legislature would have to carefully weigh a licensing program's administrative costs against the burden on ethical, competent, nonattorney debt adjusters whom the state would force out of business. A regulatory scheme tailored to problems of debt adjustment might have reduced underinclusiveness and provided more careful checks on abuse.

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168. The balancing process advocated here is similar to, but analytically distinguishable from, balancing processes that legislatures might use to enforce other constitutional norms. For instance, the state might prohibit a homeowner whose lot is situated just below a unique scenic overlook from erecting a vista-blocking second story. Such state action appears to meet the tests set forth here for conformance with equality norms. The goal of protecting a unique resource for the public is legitimate and seems to outweigh any diminution of property value suffered by the homeowner. No misclassification exists because, by definition, no other homeowner can be similarly situated with one whose home is situated below a *unique* overlook. Finally, a requirement that the homeowner not build in such a way as to obstruct the view seems perfectly tailored to fit the state's goal of preserving the scenic overlook.

The propriety of imposing on a single homeowner the full cost of preserving a scenic benefit for the public does not involve equality norms, but rather implicates the fifth amendment's taking clause. A determination of whether such a regulatory action constitutes a taking requiring compensation is not controlled by a precise rule and would require a court to weigh public and private interests. Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980) (scenic zoning). A court is not likely to find a taking here because the prohibition clearly advances "legitimate state interests," *id.* at 260 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)), and does not deny the homeowner an "economically viable use of his land." *Id.* (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978)). To the extent these rulings reflect the Court's institutional concerns, a legislature should give closer consideration to homeowners' rights in its own deliberations. *See supra* note 136.

169. Another possible justification for the statute is the economic protection of lawyers. This purpose would satisfy equality norms if it was asserted openly and justified by a perceived need to increase the incomes of Kansas bar members. Although such a justification would meet equality norms, the legislature should, perhaps, reconsider the means chosen—putting debt adjusters out of business—in favor of alternatives such as tax subsidies or state-imposed exhorbitant fees. If this purpose was held secretly and if few or none of the Kansas legislators sincerely believed that enriching attorneys was sound public policy, the purpose would be illegitimate and the legislation should be opposed.

D. THE FINAL OBLIGATION: REVISING OBSOLETE LEGISLATION

The courts will uphold a law under the rational basis test unless it is so clearly obsolete that no real or hypothetical basis justifies its continued existence.[170] Legislators, on the other hand, have an obligation to revise or repeal a law when changed circumstances render its original purpose invalid.[171] Through legislative committees or law revision commissions, legislatures should continually review statutes in force, subjecting them to the constitutional analysis proposed above for pending legislation.[172] This review would identify statutes designed to address problems that required far-reaching solutions years ago—despite harm to a misclassified group—but that no longer justified the same measures. Renewed analysis of the subject or even modern technology may suggest less restrictive alternatives to replace such laws. Legislatures should amend or appeal those statutes now on the books that fail to pass muster.

If legislators scrutinize all pending bills in this manner, and periodically subject existing statutes to similar scrutiny, they will go a long way toward fulfilling their constitutional duty to enforce the equal protection guarantee. It remains to consider obstacles that may hinder implementation of this scheme.

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170. *See, e.g.*, Barry v. Barchi, 443 U.S. 55 (1979). In *Barry* the Supreme Court upheld a New York statute authorizing the automatic suspension of a harness-racing trainer if his horse tested positively for drugs. *Id.* at 68. A harness-racing trainer claimed that the law denied him equal protection because thoroughbred-racing trainers could stay suspension pending administrative appeals. *Id.* at 62. The Court held that although the state legislature had passed the statute in 1954 following disclosures of widespread abuse in the harness-racing industry, New York did not have to justify the distinction in 1979. *See id.* at 67 & n.12, 68 (refusing to require "current empirical proof").

171. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5-6 (1982) (laws represent the majority when passed but soon stop serving current needs or representing current majorities).

172. This periodic review should not be particularly onerous for the legislature and might be a sound policy choice for reasons other than protection of equality. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-2351-79 (1978) (providing for orderly review and termination of agencies and statutes); FLA. STAT. § 11.61 (West Supp. 1987) (providing for automatic "sunset" of various state regulatory laws after a fixed period of time if not reenacted by the legislature). *But see* G. CALABRESI, *supra* note 171, at 61-62 (automatic sunset laws permit opponents of desirable regulation to obtain force of inertia to block reenactment of legislation still desired by a passive majority). The legislature could ease its burden by delegating the review function to commissions that would make recommendations concerning obsolete legislation.

V. IMPLEMENTING THE LEGISLATIVE ROLE

A. DISTINGUISHING *CONSTITUTIONAL* AND *CONSCIENTIOUS* LAWMAKING

Conscientious legislators, analyzing pending legislation, make inquiries similar to the three described above.[173] The legislature undoubtedly rejects most bills that misclassify unnecessarily, serve illegitimate purposes, constitute bad policies, or appear politically unwise. Similarly, most successful legislation implicitly satisfies these proposed constitutional standards because it is carefully tailored to achieve a valid purpose. Nevertheless, a *conscientious* legislator might act differently in some situations if not bound by the *constitutional* requirements of the equal protection clause. Moreover, a constitutionally motivated legislature might engage in a variety of procedural actions that it would not consider, absent a binding constitutional norm.

For instance, if legislators used the legitimacy of a bill's purpose to analyze constitutionality, many popular legislative goals might be constitutionally impermissible. Absent an independent constitutional mandate, conscientious legislators might agree to adopt a proposal with a constitutionally impermissible but attractive goal, knowing that if it is challenged in court, a creative lawyer could devise a legitimate purpose for the proposal.

A conscientious legislator, unencumbered by constitutional concerns, may still weigh a bill's costs and benefits and evaluate the fit between its ends and means, as required in an equal protection inquiry. The equal protection inquiry, however, requires legislators to consider the bill's impact on the entire jurisdiction. Conscientious legislators unencumbered by equal protection considerations are likely to focus solely on their own districts' needs and concerns.

Finally, political theorists have debated whether conscientious legislators in a representative democracy should vote consistent with the will of their constituency, even if their conscience suggests otherwise.[174] Allegiance to the Constitution mandates that legislators oppose legislation that denies citizens the equal protection of the laws.[175] Although proposed

173. *See supra* text accompanying notes 147-69.

174. *See* H. PITKIN, THE CONCEPT OF REPRESENTATION 216 (1972); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 175, 178-80, 189-96 (1969).

175. *See* Tussman & tenBroek, *supra* note 52, at 350 ("[L]egislative submis-

legislation might solve a severe problem in some legislators' districts, the constitutional norm of equality demands that the legislature consider the adverse consequences on those whose votes do not control a majority of legislative districts.

The focused approach of the inquiries themselves illustrates another difference between consitutional and conscientious analysis. While both types of lawmaking may compel legislatures to enact procedures to facilitate analysis and aid in decision making, only constitutional lawmaking provides a ready structure. This procedural structure is discussed in detail below.[176]

B. THE BENEFITS TO LEGISLATORS WHO ENFORCE THE EQUAL PROTECTION CLAUSE

While in a perfect world the expanded role of the legislature as proposed in this Article would be readily and flawlessly executed, inherent imperfections in the political process inevitably lead legislators to violate constitutional guarantees. Indeed, these imperfections serve as the principal justification for judicial review of legislative acts.[177] The prevailing model of the legislative process, the pressure theory, hypothesizes that special interest groups all vie for particular favors that will place one group above another.[178] Professors Tussman and tenBroek argued in their seminal equal protection work that "the pressure theory of legislation and the equal protection requirement are incompatible."[179] Thus legislators are not likely to achieve more than marginal improvement in constitutional decision making.

The improvement, although marginal, could be significant. Legislators may develop a greater sense of responsibility if they recognize that the courts will not meaningfully review most of their equal protection evaluations. Furthermore, express legis-

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sion to political pressure does not constitute a fair reason for failure to extend the operation of a law to those similarly situated whom it leaves untouched.").

176. *See infra* notes 193-202 and accompanying text.

177. *See, e.g.*, THE FEDERALIST No. 78, at 465 (A. Hamilton) (Heirloom ed. 1966).

178. *See, e.g.*, D. TRUMAN, THE GOVERNMENTAL PROCESS 353 (2d ed. 1971). According to Professor Ackerman, this theory describes the legislative process that the framers expected to prevail. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

179. Tussman & tenBroek, *supra* note 52, at 350. *But see* THE FEDERALIST No. 10, at 83 (J. Madison) (Heirloom ed. 1966) (Constitution designed to allow various factions to proliferate so they will cancel each other out, making it more difficult to advance special interests).

lative acceptance of equality norms might lead to procedural reforms that, as a practical matter, reduce the amount of legislation inconsistent with those norms. Finally, because success in defeating legislation can be politically rewarding, a constitutional arrow becomes a useful addition to a legislator's quiver.

1. Increased Sense of Responsibility

As noted above, legislative refusal to make independent constitutional determinations in areas of judicial underenforcement conflicts with the legislator's role in a constitutional system of government.[180] Fortunately, history suggests that Congress recognizes issues that invoke judicial deference and, in cases involving such issues, takes its constitutional role more seriously. To illustrate, in deliberating on the Reorganization Act of 1945, Congress grappled with the constitutionality of a one-house veto of a presidential reorganization plan. One Senator attributed Congress's close attention to the constitutional issue to the prevailing belief that the Supreme Court would view the Act's constitutionality as a political question.[181] Similarly, serious discussion of constitutional issues marked the 1970 debate over Congress's power to lower the voting age to eighteen by statute, rather than through constitutional amendment.[182] In contrast, the same Ninety-First Congress gave considerably less attention to the constitutionality of criminal law legislation authorizing detention prior to trial, which was destined for close judicial scrutiny.[183] Judge Mikva, a member of that Congress, attributed the difference to judicial doctrines of nonjusticiability: "Congress could accept more gracefully and deal more maturely with self-imposed restraints on the exercise of its power than with restraints imposed or enforced by a coordinate branch of government."[184] These illustrations suggest that

180. *See supra* notes 139-43 and accompanying text.

181. 91 CONG. REC. 10,269 (1945) (remarks of Sen. Murdock). Of course, that Senator Murdock's prediction proved incorrect almost 40 years later, *see* INS v. Chadha, 462 U.S. 919, 959 (1983) (legislative veto unconstitutional), does not alter the behavioral effect of Congress's perception that an issue is nonjusticiable.

182. *See* Mikva & Lundy, *supra* note 64, at 483-85 (commending the "full, fair and enlightened nature of the constitutional debate").

183. *See id.* at 474 (preventive detention debate showed that "highly charged, emotional situations make it virtually impossible to bring to bear convincing constitutional argumentation" in the legislature). Consideration in the House was particularly deficient in this respect. *Id.* at 473.

184. *Id.* at 484. Thayer, criticizing judicial activism, complained that when

the removal of judicial review enhances constitutional scrutiny during the legislative process.[185]

2. Procedural Changes

The equality norm, as an abstract concept of constitutional theory, is not controversial. Constitutional lawmaking is similar to the type of conscientious lawmaking that all legislators would claim to support.[186] The problem is ensuring that legislators apply abstract equality norms to specific legislation that may unfairly benefit their constituents or the constituents of colleagues to whom they owe favors. If persuaded that the Constitution mandates application of abstract equality norms, however, legislators will be more likely to promulgate and enforce procedures that improve constitutional lawmaking.

Existing legislative institutions are readily available to facilitate constitutional decision making. Professional legislative staffs, for example, can perform the requisite constitutional analysis by measuring the extent to which proposed bills result in misclassification and analyzing alternative approaches.[187] Rigorous staff analysis would be particularly helpful in states with part-time legislators, who may meet as few as thirty days in a year.[188] Without a constitutional mandate, however, those states might forego such staffing as a luxury.

Legislators may initiate constitutional scrutiny themselves through committee hearings.[189] These hearings provide an op-

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external restraints are imposed on the legislature, "the people . . . lose the political experience, and the moral education and political stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors." J. THAYER, JOHN MARSHALL 106 (7th ed. 1974).

185. For this reason courts sustaining legislative classifications against equal protection attack must clarify whether the decision is based on institutional deference to the legislature or on approval of the substantive aspects of the legislation. If courts eliminate confusion created by opinions applying the rational basis test, legislatures will be more likely to understand and to perform their constitutional obligations.

186. *See supra* text accompanying note 173.

187. *See* Balutis, *Legislative Staffing: Does it Make a Difference?*, in LEGISLATIVE REFORM AND PUBLIC POLICY 141 (1977) (staff improves quality of legislation by providing accurate information "carefully analyzed from the legislative perspective").

188. *Id.* at 137; *see, e.g.*, N.M. CONST. art. IV, § 5.

189. *See* Cohen, *Hearing on a Bill: Legislative Folklore?*, 37 MINN. L. REV. 34, 35-36 (1952) (hearing is only opportunity for Congress to "check on the accuracy of the fact situations, the plausibility of the means-end hypothesis, and the efficacy of the instrumental value judgments which underlie each of them"); Mikva & Lundy, *supra* note 64, at 458 (most thorough study of constitutional problems in legislation takes place in committees); *see also* D. MOR-

portunity to investigate the true purpose of a proponent's bill. Committee members often have greater expertise in the subject area than other legislators and thus can better discern whether the bill's alleged purpose is a sham. Committee members are also better able, because of their expertise, to determine whether the problem addressed by the bill is as serious as the proponents suggest and whether the means chosen are the most appropriate. Other legislators, aware of this expertise, often defer to the committee when close constitutional questions arise.[190]

Given this expertise and the resulting deference, commit-

GAN, *supra* note 10, at 351-57 (committees are appropriate arena for consideration of constitutional problems because senators and representatives rely on them for advice).

190. *See* Mikva & Lundy, *supra* note 64, at 458 (nonlawyers tend to resolve constitutional arguments "not by force of logic, but by the weight of numbers, or by an overwhelming presumption in favor of the Committee majority"); *id.* at 463 (if preventive detention bill came out of Judiciary Committee of either house, "it was virtually certain that the lawyers on those committees had resolved any doubts about the proposal's constitutionality"). *But cf.* D. MORGAN, *supra* note 10, at 134 (inadequate consideration of constitutional issues surrounding 1862 loyalty oath legislation caused in part by excessive reliance on Judiciary Committees).

In the course of making constitutional determinations, Congress has periodically debated the need to refer legislation to the Judiciary Committee for special consideration of constitutional issues. During consideration of the 1863 Greenback Act, for instance, Representative Noell responded to a constitutional challenge by offering an amendment to refer the constitutional issues to the Committee on the Judiciary. CONG. GLOBE, 37th Cong., 3d Sess. 1117 (1863). The House ignored the amendment. *See id.* at 1147. In 1890, however, the Senate did refer the Sherman Act to the Judiciary Committee, even though it had previously rejected such a motion for fear that the Committee would table the legislation. 21 CONG. REC. 2608, 2731 (1890).

Concerns that the Judiciary Committee will shelve legislation supported by a majority of the body suggest a need to ensure that committees which deliberate about constitutional issues are representative of the entire body. D. MORGAN, *supra* note 10, at 32-33, 65, 290, 353. The unrepresentative makeup of the Senate Judiciary Committee resulted in a series of parliamentary maneuvers that kept the Committee—dominated by civil rights foes—from considering the Civil Rights Act of 1964. *Id.* at 320. Concerns can also be alleviated by a joint motion by the majority and minority floor leaders (who, in practice, seek unanimous consent before making such a motion) to refer a bill to committee for a limited time period only. *See* Senate Rule XVII ¶ 3, *reprinted in* SENATE MANUAL, S. DOC. NO. 1, 98th Cong., 2d Sess. 16 (1984).

The Judiciary Committee can appropriately consider the general nature of equality norms to be used when a bill is challenged on fourteenth amendment grounds. If Congress adopted tests similar to those advocated in this Article, however, it would not need to refer each piece of legislation to the Committee. The legitimate purpose, cost-benefit, and means-end tests proposed above are within the competence of the committees that have subject matter jurisdiction over the legislation.

tee members must articulate fully the value judgments and factual analysis underlying their determination that a bill is constitutional. Staff reports presented to committees or to the full membership[191] or committee reports presented on the floor should include a systematic analysis of relevant constitutional inquiries. Full disclosure may prevent legislators with less expertise in the subject area from unconstitutionally supporting the bill or its alternatives without being cognizant of the bill's purpose.

Objective facts and reasoning in committee or staff reports supply legislators with sound reasons to oppose unconstitutional legislation. Legislators can greatly benefit from such data because of the practical functioning of the legislative process. Although legislation must have an author, it need not have an opponent. Legislators, as a practical matter, expect to be given the benefit of the doubt (at least by their friends) when sponsoring legislation. Hence, legislators hesitate to oppose a colleague's bill unless they have sufficient reasons to do so.[192] If a committee has concluded that the bill contravenes equality norms, a legislator is provided with an airtight reason for rejecting a bill—one based on the Constitution.

During deliberations, floor procedural rules should permit legislators to raise points of order against any bill, or any section of a bill, on the ground that it violates the Constitution.[193] Under these rules members should independently determine the constitutionality of the challenged provision. To further this goal, they should be given an opportunity to vote on consti-

191. Preferably a research unit for the entire legislature or staffs affiliated with party caucuses would prepare separate floor analyses. This procedure prevents a committee chair and staff from monopolizing available information. W. MUIR, LEGISLATURE: CALIFORNIA'S SCHOOL FOR POLITICS 130-33 (1982). *But cf.* J. VAN DER SLIK & K. REDFIELD, LAWMAKING IN ILLINOIS 109 (1986) (staff controlled by party leaders).

192. W. MUIR, *supra* note 191, at 42-43.

193. The United States Senate's rules permit constitutional points of order against any pending matter. The United States House of Representatives's rules do not provide for constitutional points of order apart from consideration of the merits. *See infra* notes 198-201 and accompanying text. Many state legislatures incorporate *Robert's Rules of Order* into their rules of procedure, providing they are not inconsistent with rules adopted by the house in question. *See, e.g.*, Illinois Senate Rule 51, *reprinted in* EIGHTY-FOURTH GENERAL ASSEMBLY, HANDBOOK OF THE ILLINOIS LEGISLATURE 89 (1985). *Robert's Rules* proscribe motions that conflict with the United States Constitution. H. ROBERT, ROBERT'S RULES OF ORDER NEWLY REVISED § 38, at 291 (S. Robert ed. 1970).

tutional issues apart from the merits of a proposal.[194] Inevitably, many members permit their views on the merits of a bill to dictate their votes on constitutionality,[195] but a process designed to separate merits from constitutionality would diminish this tendency.[196] A separate vote on constitutionality permits legislators, as a political move, to proclaim continued fidelity to the policies underlying an unconstitutional proposal while explaining that their constitutional obligations forced

194. D. MORGAN, *supra* note 10, at 33 (members must "detach constitutional questions from the policy framework" to achieve a satisfactory settlement).

195. Legislators who oppose a bill on the merits are likely to embrace arguments against its constitutionality, while those who agree strongly with the merits are not likely to change their votes because of doubts about constitutionality. This effect is most pronounced with emotionally charged issues. *See supra* note 183. To illustrate, the Senate in 1985 considered an amendment to an appropriations bill that restricted abortion funding for prison inmates. Equally divided on a motion to table, the Senate declined to defeat the amendment on the merits. 131 CONG. REC. S14,062-63 (daily ed. Oct. 24, 1985). They then disposed of the amendment using a constitutional point of order. Just prior to sustaining the constitutional point of order by voice vote, the Senate defeated by one vote (48-47) a motion to table the point of order. 131 CONG. REC. S14,632-33 (daily ed. Nov. 1, 1985). Even though the vote on the motion to table represented a vote on the merits and the point of order vote supposedly involved constitutionality, of the Senators participating in both votes, only two (Roth and Chiles) switched their votes between the two motions. *See* 131 CONG. REC. S14,062-63 (daily ed. Oct. 24, 1985); 131 CONG. REC. S14,632-33 (daily ed. Nov. 1, 1985).

196. For example, in 1874 members of the House of Representatives effectively separated constitutionality from the merits when considering a Senate bill that required banks receiving United States currency to pay a charge. Although the bill's proponents argued that this fee was not a tax, Representative Garfield disagreed and raised a point of order, contending that the bill would raise revenue in violation of the origination clause, U.S. CONST. art. I, § 7, cl. 1. 2 CONG. REC. 3076 (1874) (remarks of Rep. Garfield). By a vote of 56-179, the House rejected Garfield's contention. *Id.* at 3077. The bill then passed by a much narrower vote, 140-102. *Id.* at 3078. Thus, a substantial number of representatives who opposed the bill on the merits voted with the bill's proponents on the constitutional issue.

A more recent example occurred in 1984 during Senate consideration of legislation giving the president veto power over individual line items of appropriations bills. The Senate overwhelmingly sustained a point of order that the proposal violated the presentment clause, U.S. CONST. art. I, § 7, cl. 12. 130 CONG. REC. S5323 (daily ed. May 3, 1984). The next year a similar proposal was narrowly defeated when the Senate failed by one vote to end a filibuster. 131 CONG. REC. S9942 (daily ed. Jul. 24, 1985). Eighteen Senators voted on the merits to block the filibuster even though they had previously sustained the constitutional point of order. *See id.*; 130 CONG. REC. S5323 (daily ed. May 3, 1984). Interestingly, 6 of the 18 (Biden, Hatch, Heflin, Kennedy, Leahy, and Simpson) were Judiciary Committee members. CONGRESSIONAL DIRECTORY FOR THE 99TH CONGRESS 288 (1985).

them to sustain the point of order.[197]

To facilitate constitutional decision making, the United States House of Representatives and state legislatures should conform to the United States Senate rules permitting points of order on constitutional grounds against any pending matter.[198] Further, parliamentary rules should not permit a waiver of constitutional points of order.[199] In the Senate the presiding officer does not have to rule on the point of order but may submit it directly to the entire Senate for full debate.[200] Unfortu-

197. Suppose a legislator supports the merits of a particular bill but concludes after careful analysis that the bill is unconstitutional. This Article asserts that the legislator would be constitutionally obligated to vote to sustain a point of order against the bill. But suppose a majority of the legislative body disagrees on the constitutional issue and overrules the point of order. Is the legislator now free to vote on the political merits of the legislation? In such a case, the legislator would have to balance the harm of supporting legislation she believes to be unconstitutional against the orderly process of the legislature, which has duly considered and rejected the constitutional point. The legislator should consider the degree of confidence she has in her constitutional decision, the potential harm to our constitutional system or to those protected by the constitutional provision being violated if the legislation passes, and the effect on the legislative process of continuing to vote based on constitutional doctrine. An analogous situation arises when a Supreme Court Justice believes that particular conduct is unconstitutional but prior court precedent supports its constitutionality.

198. *See, e.g.*, 117 CONG. REC. 42,632 (1971) (Senate rejected point of order that public financing of presidential election campaigns violated article I, which bars expenditures except through appropriations statutes); 104 CONG. REC. 12,602-07, 12,611-12 (1958) (Senate rejected point of order that provision of proposed Constitution of Alaska violated seventeenth amendment, which governs "the manner and terms for the election of United States Senators"); *id.* at 12,454-59, 12,464-72 (1958) (Senate rejected point of order that Alaska statehood bill did not meet constitutional requirements of equality in article IV for admission to the Union.).

199. The United States House of Representatives has a procedure which permits waiver of all points of order against legislation by a resolution reported from the Committee on Rules. *See generally* L. DESCHLER, DESCHLER'S PROCEDURE, ch. 31, § 7 (1975). State legislative rules typically allow for rules to be suspended by a vote of a specified majority. *See, e.g.*, Illinois Senate Rule 30, *reprinted in* EIGHTY-FOURTH GENERAL ASSEMBLY, HANDBOOK OF THE ILLINOIS LEGISLATURE 75-76 (1985). If constitutional points of order are to have any procedural significance, a legislature's rules cannot allow its members to waive such points of order. As Representative Yates argued in unsuccessfully pressing a constitutional point of order under existing House rules, while the "waiver of points of order might apply to ordinary legislation, it cannot apply to a waiver of the constitutional provisions, because the Committee on Rules cannot waive any constitutional provisions." 119 CONG. REC. 15,290 (1968).

200. *See, e.g.*, SEN. DOC. NO. 1, 98th Cong., 1st Sess. 19-20 (1984); *see also* 124 CONG. REC. 27,249-59 (1978) (tabling point of order that proposed constitutional amendment permitting Senate representation for the District of Columbia violated article V by affecting equal suffrage of states within the Senate); 113

nately, the House of Representatives's rules, precedents, and present procedural mechanisms do not generally permit constitutional points of order to be considered apart from the merits of the legislative proposal.[201] Members of the House are expected to consider the constitutional issue when voting on the merits of the proposal.[202]

CONG. REC. 26,823 (1967) (challenging Economic Opportunity Act originating in Senate as unconstitutionally raising revenue); 112 CONG. REC. 13,548-49 (1966) (tabling point of order that Internal Revenue Code amendment concerning deductions for political contributions constituted revenue measure which could not originate in the Senate); 108 CONG. REC. 5083-87 (1962) (tabling point of order challenging establishment of national monument by resolution rather than by legislation presented to the President); 76 CONG. REC. 627 (1932) (challenging as revenue-raising a tariff amendment to Senate bill granting independence to the Phillipines); 66 CONG. REC. 2344-55, 2358, 2273-74 (1925) (challenging as revenue-raising the reclassification of postal salaries).

201. The House will sometimes consider an objection that legislation allegedly violates the origination clause, U.S. CONST. art. 1, § 7, cl. 1, which requires that all bills for raising revenue originate in the House. The House will consider such arguments, however, not because of the constitutional problems raised, but because a Senate-initiated revenue measure will affect the "privilege and prerogative" of the House. *See, e.g.*, 2 CONG. REC. 3076 (1874) (ruling of the Speaker). Senate action violating the origination clause may be rejected by House resolution and the bill returned to the Senate. *See, e.g.*, 114 CONG. REC. 17,970-78 (1968) (House tabled resolution returning Senate amendment to the Senate with explanation that amendment violated origination clause); 34 CONG. REC. 2261 (1901) (remarks of Rep. Bailey).

202. In 1878 the House considered a motion to suspend the rules and pass internal improvements legislation. (This parliamentary maneuver allows bills with strong support to be considered quickly without amendment and passed by a vote of two-thirds of the members. *See* A. MIKVA & P. SARIS, THE AMERICAN CONGRESS 235 (1983).) Representative Cox objected to the measure on constitutional grounds. Characterizing the authorized projects as "local improvements to inconsiderable rivers and creeks," he believed that funding these projects would exceed Congress's power under the commerce clause. 7 CONG. REC. 2713 (1878). In rebuttal Representative Reagan, the bill's sponsor, argued that a "point of order is an objection to the bill; it cannot lie against a motion to suspend the rules." *Id.* The Speaker refused to sustain the point of order. *Id.* at 2716.

On several occasions the House has refused to listen to members' points of order that Senate-initiated measures violated the origination clause. In overruling such a point of order in 1859, for example, the Speaker noted that he would have "nothing to do with the question, whether the amendment is in order, or constitutional, or not. That is a question for the House to determine by their votes." CONG. GLOBE, 35th Cong., 2d Sess. 1680 (1859).

The House tradition of melding constitutional and substantive issues was explained in 1901 in the course of a ruling on another origination clause point of order. Representative Payne, Chair of the Ways & Means Committee and the bill's sponsor, stated:

> The question of constitutionality is a question addressed to the conscience of each member, and his interpretation of it, and he decides whether the provision or amendment comes within the Constitution

3. Political Uses of Constitutional Arguments

Suppose Senator A serves on a committee considering legislation regulating optical sales similar to that adopted by the Oklahoma legislature and upheld by the Supreme Court in *Williamson v. Lee Optical.*[203] If no factual basis exists[204] for imposing a greater burden on opticians than on providers of ready-to-wear glasses, the Senator is constitutionally required either to oppose the bill or to extend the prescription requirement to all eyeglass providers. Moreover, this opposition may be politically advantageous, if, for example, a major chain of optical stores is headquartered in Senator A's district.

Armed with constitutional arguments, the Senator can demand a record that justifies the exemption for sales of ready-to-wear eyeglasses. By urging the committee to adhere to its constitutional mandate, Senator A may prevail on a majority or the Chair to schedule additional hearings to educate members about the legislation and, of course, cause delay.[205] Once a rec-

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according to his judgment in voting for the bill. . . . [A] point of order of this kind can never obtain against any proposition in the House.

34 CONG. REC. 2260 (1901). The ranking minority member of the Ways & Means Committee, Representative Richardson, explained that a member "can not make a question as to the constitutionality of an act . . . . It might be unconstitutional and yet be within our parliamentary rule, and it might be unparliamentary and yet be constitutional." *Id.*; *see also* 119 CONG. REC. 15,290-91 (1968) (rejecting point of order that transfer of funds to permit continued air strikes in Cambodia was unconstitutional absent congressional declaration of war or other congressional approval); 94 CONG. REC. 5817 (1948) (in rejecting point of order that amendment constituted ex post facto legislation, Chair held that "the House does not pass on questions of constitutionality"); 93 CONG. REC. 9522-23 (1947) (in rejecting point of order that legislation abolishing poll tax in federal elections violated article I, Speaker ruled that "[i]t is not within the jurisdiction of the Chair to determine what is constitutional and what is not constitutional").

203. 348 U.S. 483 (1955); *see supra* text accompanying notes 132-37.

204. Unlike courts, legislative fact-finding is not limited to the evidence presented in formal proceedings. Although committee hearings provide an effective and useful means of securing relevant facts, legislators are also allowed to draw from experiences of their own or of others. In the case of economic regulation, the various competing interests probably should present their evidence in public so it can be reviewed in an orderly marketplace of ideas. On the other hand, if a nearsighted legislator wishes to rely on personal experience to judge the similarity between ready-to-wear and prescription glasses, and his colleague prefers to rely on the opinion of his brother who is an eye doctor, they are free to do so. This Article's thesis requires only that legislators actually believe a distinction in fact exists before enacting a distinction in law.

205. In the United States Senate, for example, unlimited floor debate remains a key aspect of legislative strategy, and *any* delay aids the opposition. In many state legislatures, the sessions are quite short, and the need for thor-

ord is developed, the constitutional argument may help gain support for an amendment repealing the exemption for ready-to-wear eyeglasses. Such an amendment would presumably arouse the opposition of retailers who sell such glasses, thereby jeopardizing passage of the entire bill.

Strategic use of the constitutional point of order can be an important tactic in defeating legislation containing unconstitutional classifications if floor rules do not strictly limit legislative floor debate. For instance, a United States senator can bring a point of order early during the floor debate. If it is sustained, the legislation falls with a minimal expenditure of time and effort. If overruled, the senator still may attempt to defeat the bill through extended debate or other parliamentary tactics.

These tactics, however, can be time-consuming and detract from other responsibilities. A busy legislator does not want to expend time and effort, or risk antagonizing a colleague, by opposing legislation that is ultimately not adopted. As a result, opponents to the legislation often do not mobilize support until the bill's proponents, or the lobbyists supporting the legislation, have secured commitments from other members. Constitutional objections give the bill's opponents a renewed opportunity to lobby colleagues, especially those whose commitments in favor of the bill are weak or founded on scanty information. These legislators can write constituents who support the bill, proclaiming their support for the cause but advocating that the legislation be redrafted to meet constitutional concerns.

Although legislation with a proper basis can be objectionable if passed to accomplish an impermissible purpose, defeating bad legislation for base political reasons is never improper. In the former case, legislators acting in conformance with their constitutional obligations would defeat the bill because of its wrongful purposes. In the latter case, the bill would be defeated regardless of the legislators' motivation. Although some may question the use of constitutional arguments to gain tactical advantages, it nevertheless prevents legislatures from enacting unconstitutional statutes. Given the advantages that constitutional objections provide to opponents of a bill, opponents can be expected to use them to that end. Those genuinely concerned about equality norms may subsequently use these precedents motivated by politics, rather than constitu-

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ough hearings may result in a bill being condemned to consideration during the period between sessions. This delay gives foes time to solidify their opposition and diffuses any momentum in favor of the legislation.

tional law, to defeat legislation that otherwise would secure easy passage. In the real world of politics, such a marginal improvement should be commended.

CONCLUSION

In considering equal protection challenges, the judiciary has underenforced constitutional rights because of institutional limitations. Congress, using its powers under section five of the fourteenth amendment, should protect equality norms that the courts are unable to secure. In compelling cases groups currently subject to hostile treatment in state legislatures should be given the protection of heightened judicial scrutiny. Congress should also direct courts or specialized agencies to carefully review facially neutral classifications that disproportionately harm racial minorities but lack discriminatory intent. In other cases Congress should recognize that, although strict judicial scrutiny is unwarranted, the rational basis test is inadequate to guarantee that people similarly circumstanced are treated alike. As a result, Congress should authorize judicial balancing of the state's goal and the classification used to achieve that goal. Finally, Congress could conduct its own investigations and invalidate state laws that pervasively fail to treat similarly situated citizens fairly.

In addition to these prescriptive measures, state and federal legislators must consider whether debated bills provide equal treatment to persons who are similarly situated, not merely whether the bill might survive some deferential form of judicial scrutiny. Individual legislators should determine from debating proposed legislation whether the bill's true purpose is legitimate, whether the resulting public benefit outweighs the harm to those it misclassifies, and whether less restrictive alternatives are available.

History suggests that legislators act more responsibly in enforcing and abiding by the mandate of the equal protection clause if aware that the courts will defer to them in reviewing statutory classifications. If legislatures implement the procedural changes advocated above, they should see the political, as well as constitutional, benefits of more effectively assuring fair and equal treatment for their constituents.