Catholic University Law Review

Volume 24
Issue 3 *Spring 1975*

Article 6

1975

The Mandate for a New Equal Protection Model

Craig M. McCabe

THE MANDATE FOR A NEW EQUAL PROTECTION MODEL

Justice Jackson articulated the importance of the equal protection clause in the clearest terms when he stated,

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the politial retribution that might be visited upon them if larger numbers were affected.[1]

Yet, despite the apparent simplicity of the concept, the Supreme Court has been vexed in trying to find a suitable model of general application.

I. HISTORICAL VIEW

In the Reconstruction era the narrowest of all possible positions was taken by the Supreme Court in deciding the *Slaughter-House Cases*.[2] The fourteenth amendment's express provision guaranteeing "to any person within its jurisdiction the equal protection of the laws"[3] was given the gloss of historical circumstance to arrive at the conclusion that it was only to be applied to cases involving racial discrimination.[4]

One of the Supreme Court's most significant breaks with this narrow construction occurred in *Skinner v. Oklahoma ex rel. Williamson*[5] where Justice

1. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

2. 83 U.S. (16 Wall.) 36 (1873). The *Slaughter-House Cases* involved an exclusive franchise granted by the state of Louisiana to operate slaughter-houses in the New Orleans area. The franchise was upheld as part of the state's police power despite challenges under the thirteenth and fourteenth amendments. The Court chose to view both amendments as applicable only to suppression of the Negro race.

3. U.S. CONST. amend. XIV, § 1.

4. 83 U.S. (16 Wall.) at 71. The Court stated:

> [I]n the light of this recapitulation of events, almost too recent to be called history . . . no one can fail to be impressed with the one pervading purpose found in them all [the thirteenth, fourteenth and fifteenth amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race . . . .

5. 316 U.S. 535 (1942).

Douglas, writing for the majority, perceived the right to procreation as triggering the "strict scrutiny"[6] of the Court. However, it was not until the Warren Court that the first true model for equal protection analysis emerged. It was in such cases as *Harper v. Virginia Board of Elections*,[7] *Loving v. Virginia*,[8] and *Shapiro v. Thompson*[9] that the Warren Court articulated a two-tier model for the analysis of equal protection cases. On tier one, the Court chose to defer almost entirely to legislative prerogative in its application of the "rational relationship" standard.[10] The test was whether the legislation (the means) was rationally related to any possible legislative goal (the ends). This "any conceivable basis" test was easily met for it was only the purely arbitrary legislative enactment that could not be rationally connected with at least some legitimate goal. However, if a "fundamental right" or "suspect classification" were found, then the Court would apply "strict scrutiny" to the legislative enactment.[11] In practice, with only one exception through the end of the Warren Court era,[12] this second standard of review proved fatal to the legislation. The rigidity of this model made the Court reluctant to expand the scope of fundamental interests[13] or suspect classifications,[14] for that

6. *Id.* at 541. Justice Douglas drew an analogy to the discrimination against Chinese aliens desiring to enter the laundry business in Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), and Negro college students desiring to enter law school in Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). Of course, in view of subsequent developments in this area, the distinction can be made that *Yick Wo* and *Gaines* involved suspect classifications, while *Skinner* was uniquely a fundamental interest case.

7. 383 U.S. 663 (1966) (fundamental right to vote invokes strict scrutiny).

8. 388 U.S. 1 (1967) (race remains a suspect classification invoking strict scrutiny).

9. 394 U.S. 618 (1969) (fundamental right to travel invokes strict scrutiny).

10. "The constitutional safeguard is offended only if the classification rests on grounds *wholly irrelevant* to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if *any* state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (emphasis added).

This judicial construction of the tier one equal protection standard was followed in a long line of cases where great deference was given to the legislature's prerogative. The "rational basis" test has been most uniformly applied in the area of economic regulation. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Tigner v. Texas, 310 U.S. 141 (1940). *But cf.* Gulf, Colo. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897). However, it is the application of this test to social legislation by both the Warren and Burger Courts that has appeared the most arbitrary. *See* Jefferson v. Hackney, 406 U.S. 535 (1972) (Aid to Families with Dependent Children payments not violative of equal protection); Lindsey v. Normet, 405 U.S. 56 (1972) (tenant eviction regulations upheld); Dandridge v. Williams, 397 U.S. 471 (1970) (AFDC ceiling upheld); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) (restriction of pretrial detainees' right to vote upheld).

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

12. *See* Korematsu v. United States, 323 U.S. 214 (1944) (order excluding all persons of Japanese ancestry from the West Coast during World War II upheld).

13. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education is not a right grounded in the Constitution and therefore not fundamental); Jefferson

would severely restrain the legislature in enacting laws affecting those areas. The end result was a small patchwork of highly protected classes[15] and rights[16] with virtually no judicial protection for many other apparently deserving areas.

II. THE BURGER COURT TAKES A FEW CAUTIOUS STEPS FORWARD

Although unwilling to expand the coverage of the Warren Court's strictly applied tier two, the Burger Court has clearly been far more interventionist than many would have predicted. Legislative enactments have been struck down in a variety of circumstances which would have likely gone unprotected or at least unanswered by the Warren Court model.[17] Several commentators have noted this trend[18] and Professor Gunther, in his now famous article,[19] even attempted to fit the first group of these cases within a toughened tier one analysis. However, the difficulty has been that the Court has begun its new analysis with what Professor Shapiro would term an "incrementalist" approach.[20] Instead of delineating a new model in a landmark case,

---

v. Hackney, 406 U.S. 535 (1972) (no fundamental right to receive welfare benefits); Lindsey v. Normet, 405 U.S. 56 (1972) (party's interest in retaining housing unit is not a fundamental right).

14. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (sex not suspect classification); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth not suspect classification).

Justice Powell, writing for the majority in *Rodriguez*, reversed the district court's finding that local financing of public schools must be given strict scrutiny because it discriminated on the basis of wealth. Although finding that no identifiable class of "poor" existed on the facts of the case, Justice Powell went on to reiterate that the Court has never held a wealth classification to be suspect. *Id.* at 29.

15. *See* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (race).

16. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal appeals).

17. *See* pp. 575-77 *infra.*

18. *See* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155 (1973); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972).

19. 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 (1972) [hereinafter cited as Gunther].

20. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis*, 2 LAW IN TRANSITION Q. 134 (1965). Incrementalism is a term used to describe the slow evolution of a particular rule of law through the process of limited judicial decisionmaking upon a variety of fact patterns. This type of legal process, of course, has been followed most often under the common law system. The direct oppo-

the Court appears still in search of a model while at the same time unwilling to let certain cases pass without attention. The result is a variety of language which defies categorization, and a definite trend toward a more independent role for the Court in some unique new areas.[21] Apparently the Court is no longer willing to view deferentially all classifications which fall nominally within the Warren Court's tier one (rational relationship) area.

This Comment, in accepting the proposition of Professor Snortland that "mixed-scanning" most accurately describes judicial decisionmaking,[22] will attempt to illustrate that the Court must now either adopt a new model for dealing with equal protection issues or seriously impair its own judicial integrity in this area.[23] After having substantiated the need for a new approach, one such model will be suggested.

III. Rational Basis Test as the Defective Form of Analysis

The Court's apparent aversion to the use of strict scrutiny terminology, except within already defined categories, has led it to rely on the "rational basis" language of previous opinions[24] in striking down legislative enactments in several new areas. Although these cases appear to involve *near* suspect classes or *possibly* fundamental rights, acknowledgement of that fact is generally to be found only in concurring or dissenting opinions.[25] It was this lack of judicial candor in several majority opinions that led Professor Gunther to postulate that the Court was adopting a new middle tier where "means-focused" scrutiny would apply.[26] The new test he proposed would

---

site occurs where the court itself issues general code type decrees as has been the case more often under the civil law systems.

21. *See* Gunther 33-37.

22. Snortland & Stanga, *Neutral Principles and Decision-Making Theory: An Alternative to Incrementalism*, 41 Geo. Wash. L. Rev. 1006 (1973). Professor Snortland uses the term "mixed-scanning" to describe the process whereby courts will deal on an ad hoc basis with a series of cases in a particular area before attempting to promulgate a rule of more general application.

23. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959) (asserting that judicial integrity is evidenced in the reasoning judges use in reaching their decisions).

24. *See* note 10 *supra*.

25. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973) (Douglas, J., concurring) (classification in question affects fundamental right of freedom to associate and therefore should be accorded strict scrutiny).

26. Gunther 20-24. The term "means-focused" scrutiny is used by Professor Gunther as a shorthand expression for the Court's requiring that the legislation substantially further a legislative end. Thus the over-inclusiveness or under-inclusiveness of a classification would be more closely examined (even on tier one) and the Court would be more likely to examine the factual support for it before finding a rational relationship between means and ends. While not suggesting judicial intervention as to the choice of legisla-

require the Court to closely examine the legislative means (the act itself) to determine if it substantially furthered an articulated legislative end (the act's purpose). The initial difficulty with this position has been demonstrated in subsequent equal protection decisions in which the Court has also applied increasing scrutiny to legislative ends without concern for their relationship to the means.[27]

Perhaps more significantly, the Court has in the past exhibited the power to manipulate the rational basis (means/end) test to create almost any desired result.[28] This manipulative power has led one critic to conclude that the rationality test is "an empty requirement and a misleading analytic device."[29] By simply redefining a classification, the Court can make it appear either over-inclusive or under-inclusive. Conversely, the Court has also shown that by *its* definition of the legislative purpose or end, an enactment can be made to stand or fall.[30] Under the Warren Court's tier one, it

---

tive goals, the Court would hold the legislature to a closer standard when picking the means of effecting those goals. The means themselves would be given the new and closer scrutiny, hence the term "means-focused" scrutiny.

27. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). The Court there found the shallowly veiled goal of excluding "hippies" from the food stamp program unacceptable and a violation of the equal protection clause. There was no question raised as to the legislation's effectiveness in carrying out such a goal. In fact, if anything, the means chosen were too clearly related to the act's purpose. In *Moreno*, it was the end itself that was seen as violating the fourteenth amendment. *Compare id. with* Roe v. Wade, 410 U.S. 113 (1973), which was decided under the due process clause, but where the Court also overtly examined the legislative end.

28. The use of means/ends analysis as an avoidance technique is admitted even by its strongest advocate, Professor Gunther. *See* Gunther 30. Professor Gunther cited Reed v. Reed, 404 U.S. 71 (1971), and Eisenstadt v. Baird, 405 U.S. 438 (1972), as examples where the Court avoided tackling overtly the suspect qualities of a sex classification and the fundamental nature of the right to privacy by selective use of the rational basis test.

29. Yale Note, *supra* note 18, at 128.

30. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972). The plurality opinion identified three goals of the legislation: 1) the restriction of pre-marital sex; 2) better public health; and 3) the banning of an inherently immoral practice. The problem with goals two and three were their excessive generality. Better health was certainly a legitimate goal, but it was hard to say, when married people were allowed contraceptives, that the same contraceptives were inherently unhealthy for single people. Similarly, if contraception was per se immoral, why allow the practice among married persons? However, as to goal one, the Court had set up less of a strawman and was forced to more closely evaluate whether narrower alternative means to restrict pre-marital sex were available. The Court pointed out that pre-marital sex was criminally punishable in that jurisdiction, and that such provision represented a more precisely drawn means of attaining this goal than the statute under attack. It was at this point that the majority opinion came closest to tier two analysis, where the narrowness of the goal is of particular significance in determining if the means is "*necessary*," as opposed to being "merely *rationally related*" to fulfilling a "compelling state interest." *See* 405 U.S. at 447 n.7.

If, on the other hand, the Court truly had been interested in judicial deference, it

is simply up to the Court to define the level of abstraction which it wishes to assign the statute's goal and thereby preordain whether the act will be seen as logically in furtherance of the chosen goal or not.[31]

To avoid this pattern of judicial manipulation it would be necessary to somehow limit the Court's discretion in picking the legislative purpose. One suggestion would be to examine the goal of each enactment as reflected in the legislative process itself. Of course, it must be noted initially that there exists the possibility of multiple legislative goals. However, granted that difficulty is recognized and accepted, several more serious problems remain. First, one is faced with the practical difficulty that the legislative history of an act generally only gives the most vague impression of the actual reasons the particular act was favored by a majority of legislators on a given day. The legislature by its very nature embodies in any one act a multitude of separate decisions, each of which is premised upon such a variety of often unarticulated rationales, compromises, and ideas as to be incapable of precise ascertainment. To presume that a legislature acts with singlemindedness on even the most pressing legislation, not to mention an obscure provision of a particular servicemen's benfits bill,[32] or of a food stamp bill,[33] defies modern political analysis.[34] Though Professor Gunther has suggested this might all change if legislatures knew that in the future courts would test various enactments against articulated legislative goals,[35] it seems the more likely legisla-

---

could have picked a reasonable goal for the legislation at the outset. For example, the Court could have chosen the narrower goal of providing medical supervision of the distribution of contraceptives to the extent that this would not increase the availability of contraceptives to the unmarried. *See* Yale Note, *supra* note 18, at 127.

31. A good discussion of the Court's use of this technique appears in the Yale Note, *supra* note 18, at 137-38. In contrast, a balancing model would force the Court to evaluate openly the significance of an overly general goal, and correspondingly reduce its relevance. *See* p. 564 *infra*.

32. *See* Frontiero v. Richardson, 411 U.S. 677 (1973). The statute at issue provided as a matter of administrative convenience that a serviceman was automatically entitled to dependency benefits when married, whereas a servicewoman would be forced to prove she provided over half of her husband's support before being given similar benefits.

33. *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). The statute at issue excluded from participation in the food stamp program those households containing an individual unrelated to the claimant.

34. For a general discussion of legislative decisionmaking, *see* J. KINGDON, CONGRESSMEN'S VOTING DECISIONS (1973). Also, a detailed analysis of the legislative history of the food stamp programs is provided in N. KOTZ, LET THEM EAT PROMISES; THE POLITICS OF HUNGER IN AMERICA (1969).

35. If the Court were to require an articulation of purpose from an authoritative state source, rather than hypothesizing one on its own, there would at least be indirect pressure on the legislature to state its own reasons for selecting particular means and classifications. And that pressure would further the political process aims of the moderate intervention model.
Gunther 47.

tive reaction simply would be to preface every bill with a statement of purpose, as is frequently done already. The difficulty with such a procedure is that the statements of purpose would themselves be subject to the same tradeoffs that created the original bill. In fact, rather than the legislature defining narrow, meaningful goals that the courts could best work with, the response would more likely be the drafting of the most universally laudable and general goals possible in order for the bill's proponents to garner the broadest support for the measure.

As a second possible alternative to the judicial goal postulation inherent in the Warren Court's formulation of the rational basis test, Professor Gunther has suggested that the court be satisfied with examining the legislative purposes adopted either by the state courts or the state attorney general's office.[36] The difficulty, of course, with state court opinions as a source of legislative intent is that they are simply not coextensive with the Supreme Court's needs. Though often examined today in attempts to ascertain legislative purpose, they deal only with a limited number of enactments, and, more fundamentally, serve only to push the task of examining the act's legislative history back one step. Moreover, there is no assurance the state court has any greater access to the applicable legislative material than the Supreme Court; nor is there reason to believe the state court is any more qualified to examine those materials than federal courts.

Professor Gunther's suggestion that the Court look to the attorney general's description of the legislative purpose faces similar difficulties. If the attorney general's office is to make an objective determination, then it too must look to the legislative history with no more assurance of accuracy than the courts. On the other hand, if the state attorney general's office is merely to postulate a goal or several goals, the "any conceivable basis" test has simply been reinstated, with the attorney general's office replacing the Court as the party responsible for picking some conceivable basis for the legislation.[37] Surely the attorney general's response to the actual or potential litigant would be to state the purpose as laudably and generally as possible and thereby hope to aid in sustaining the legislative enactment.

Thus, given that the means/ends relationship test presupposes some ascertainable ends against which to test the means, the Court is left in an untenable position. If the Court were to return to the pure "any conceivable

36. Gunther 46-47.

37. A good example of the extreme such rationales can take was Justice Harlan's contention in Flemming v. Nestor, 363 U.S. 603, 612 (1960), that Congress had denied social security benefits to deported aliens for the laudable purpose of keeping all such payments within the country and thus increasing domestic purchasing power.

basis" standard as it did in *Jefferson v. Hackney*[38] for all tier one cases, then it is difficult to conceive of any legislative enactment which could be found violative of the equal protection clause. On the other hand, if the Court chose to adopt the toughened tier one model suggested by Professor Gunther, it would be faced with the pragmatic goal identification difficulties discussed above. We are therefore left with a test which cannot be meaningfully applied because it presumes to evaluate a logical relationship which in fact is not the basis of the constitutional infringement.

While the weight ultimately to be given a particular state interest may reflect an evaluation of the closeness of the causal connection between the act itself and such a state interest, that is not to say that the constitutional validity of the legislation rests only on this relationship. If there is no real connection between the act and a suggested state interest, then that interest may simply be irrelevant in terms of the issues raised by the legislation. Although the Court may choose to pick a particular goal or group of goals for an act so as to defy any causal relationship between those goals and the act, as it did in *Eisenstadt*,[39] that clearly is not the actual basis for finding a constitutional violation. The Constitution speaks of "equal protection of the laws", not protection against artificial caprice without harm. It is the actual harm flowing from the legislative classification that raises the question of a constitutional violation. The apparent arbitrariness of a particular legislative act with respect to "legitimate" state goals simply serves to identify the possibility that the legislature was actually acting as a result of an unarticulated, yet invidiously discriminatory motive. It appears that because such a motive is either too difficult or too controversial to overtly identify, the Court has found it convenient to adopt the essentially artificial rational relationship standard and thereby test only the relationship between the act and any "legitimate" goals the Court itself is willing to postulate. The result does not necessarily comport with the constitutional standard because the actual harm imposed by the classification has not been evaluated. The rational basis test only determines whether the state is without a justification for the legislation that the Court is willing to postulate. In fact, the purpose may be to directly harm a particular group of individuals, as the Court found while undertaking a rare example of judicial examination of legislative ends in *United States Department of Agriculture v. Moreno*.[40] Yet, fundamentally it is not the *hoped for* benefit or harm of a particular legislative act or even the causal connection between the legislative purpose and the act itself, but rather the *actual*

38. 406 U.S. 535 (1972).
39. *See* note 30 *supra*.
40. *See* note 27 *supra*.

effect of the act that is potentially unconstitutional. Whether the legislature is capricious in its reasoning or totally logical in its action is really not for judicial inquiry, but rather it is for the Court to determine if a class of individuals has in fact been unconstitutionally harmed by the classification drawn.

Further, the means/ends rational relationship test is subject to an additional critical flaw. It does not reflect accurately even the Court's actual decisionmaking process, which in fact more closely corresponds to the constitutional standard outlined above. While the closeness of the tie between means and ends may reflect a portion of the Court's analysis, it is in reality not nearly as determinative as equal protection opinions would imply. Professor Gunther makes this very admission when he praises the manipulative aspects of the test as it now exists, and his suggested modification of it.[41] Any artificial model which does not reflect the actual balancing type of decisionmaking which the Court uses will eventually reveal its own inadequacies, and thus only serve to discredit the judicial process in the end. Or, as another writer has stated in evaluating the equal protection area:

> Because the disputes that arise under the rubric of the Equal Protection Clause have to do with the relative merits of competing public policies, judicial decisions obscure the central issues in such cases to the extent that they are based on discussions of a statute's rationality. The nature of the conflict between the political values at stake as well as the underlying basis of judicial reasoning would be made more explicit if the competing public policies were weighed outright without diversionary discussions regarding a statute's rationality. Of course, it is an open question how aggressively the Equal Protection Clause should be used. But however actively it is used in the future, the process of forthright constitutional adjudication would be well served if the courts would recognize that discussion of a statute's rationality is a meaningless and confusing exercise.[42]

IV. Balancing: A Proposed Application of The Old Model to the "New" Equal Protection Issues

The idea of balancing is not new to the area of equal protection for it was an integral part of the Warren Court's tier two analysis. According to the Warren Court's language, the creation of a suspect classification or the infringement of a fundamental right could only be justified if it were necessary to the fulfillment of a "compelling state interest." Though in

41. Gunther 30.

42. Yale Note, *supra* note 18, at 154 (footnote omitted).

reality the result under the Warren Court was that such a compelling state interest did not exist, the framework was one of balancing, and the Court regularly went through the balancing process before rendering a decision.[43] The Court, however, began with a fixed high value on one side of the scale whenever a suspect class or fundamental right was established. Thus, in one sense, it was an all or nothing test where the sole issue was whether the state interest in question could be assigned compelling weight. Also, it should be pointed out that inherent in any weighing was the assumption that a substantial relationship existed between the means of achieving the supposed interest and the interest itself. The closeness of the tie between legislative goal and legislative act was therefore only one of the factors to be evaluated in the weighing process.[44]

The model proposed here to deal with all other equal protection cases will in many respects follow the Warren Court's model for tier two analysis. In general, it would require the overweighing of the potential *benefit* of the legislation against the legislation's potential for *harm* (the relative "suspectness" of the class or relative "fundamentalness" of the right infringed). Although an unrestricted weighing of such factors is arguably a job better suited

---

43. In Skinner v. Oklahoma, 316 U.S. 535 (1942), Justice Douglas, writing for the majority, balanced the state's police power against prison inmates' right to marriage and procreation in determining Oklahoma's Habitual Criminal Sterilization Act to be unconstitutional. After discussing both the state's interest and the nature of the inmates' rights, he chose to evaluate the statute under the strict scrutiny standard of Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

In the reapportionment case of Reynolds v. Sims, 377 U.S. 533, 580 (1964), after analogizing the right to vote to the right to procreate at issue in *Skinner*, the Court stated, "Citizens, not history or economic interests, cast votes. Considerations of area alone provide an *insufficient justification* for deviations from the equal-population principal." (emphasis added). Thus, after having evaluated the importance of state sovereignty and the logistical difficulties involved, and having discounted the historical precedent of the federal system, the Court determined that the individual's right to vote was paramount.

An even clearer example of overt judicial balancing in a tier two equal protection case is Graham v. Richardson, 403 U.S. 365 (1971), which dealt with an alien's right to receive welfare benefits. After analogizing the alien's position to that of other discrete and insular minorities, the Court evaluated the state's "special public interest" in favoring its own citizens. In summarizing the Court's position, Justice Blackmun, writing for the majority, stated, "[W]e conclude that a State's desire to preserve limited welfare benefits for its own citizens is *inadequate to justify* Pennsylvania's making noncitizens ineligible for public assistance. . . ." *Id.* at 374 (emphasis added).

Finally, the most often quoted formulation of the Warren Court's tier two test suggests the same judicial weighing of the state interest. "[A]ny classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

44. *See* pp. 574-76 *infra*.

for the legislature, the confines of this model as amplified below could make a balancing role for the Court in the tier one and mid-tier areas of equal protection analysis as appropriate and meaningful as that role has been in the area of procedural due process.[45]

A. Suspectness

In an abstract sense, all legislation classifies those benefited and those harmed, at least in that particular taxpayers generally receive a more immediate return than others. However, it has been suggested that certain classifications are more "suspect" than others.[46] By rooting the qualities of suspectness in those characteristics common to the racial minority at which the fourteenth amendment was originally, though not exclusively aimed,[47] the Court can achieve both the congruity and flexibility needed for a new weighing model.

One writer has chosen to list the characteristics of suspectness as: 1) application to a discrete and insular minority; 2) stigmatization of the affected class; and 3) immutability of traits upon which the classification is based.[48] By choosing to treat these characteristics as factors of suspectness, rather than requirements of a suspect class, the writer suggested that a relative weight

---

45. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (professor with ten years of seniority found to have sufficient "property" right in job to require hearing regarding rehiring); Board of Regents v. Roth, 408 U.S. 564 (1972) (professor hired for only one year, without notice that he would not be rehired, found not to have sufficient "property" interest in job to require hearing before regents decided against rehiring); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients' interest in continuation of benefits found to outweigh state interest in administrative efficiency, and pretermination hearing thus required).

46. The standard for determining suspectness was outlined by Justice Stone as "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry." United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). *Compare id. with* Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028 (5th Cir. 1975), where the court, although indicating its receptivity to a relaxed suspectness standard, refused to acknowledge such categories as "late achieving students" and "student athletes." The court declined to strike down the NCAA's minimum grade point average requirement for participation in intercollegiate athletic programs.

47. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 489 (1954); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873).

48. *See* Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155 (1973). Although this Note posits a second question with respect to each characteristic, *i.e.*, whether the legislation actually affects that characteristic, the question appears simply redundant in terms of the model here suggested. The very weighing of the statute's harm, discussed *infra*, will imply consideration of the statute's actual impact on the class.

could be given the harm caused by the classification. In cases where all three characteristics are solidly present, as is the case, for example, with a racial minority classification, then the harm is potentially the most overwhelming and even a very significant state interest will not overcome it. This would, of course, be particularly true where the state's interest is diminished by the fact that alternative means are available to achieve the same goal.

Yet, in many classifications of recent interest to the Court, such as illegitimacy,[49] sex[50] and poverty,[51] it is not clear that all three characteristics are present.[52] In such a case, if only two characteristics of suspectness were present, or if two were clearly present and the third present only to a limited degree, the Court should not be compelled to either strike down the legislation or to uphold it as the Warren Court model would have dictated. For example, if alienage were the classification, but the legislation involved a citizenship requirement for civil service jobs, perhaps the classification could stand or fall depending on the particular job's connection with national defense.[53] Whereas the traditional Warren Court model would have required initially an absolute decision as to whether a "suspect" class existed, the model proposed here would allow suspectness to be evaluated on a sliding scale. Then, if in a particular case the classification only rose to a nearly suspect level, a second and third step would be required to complete the analysis. The level of suspectness having been identified, the Court would still have to ascertain the fundamentalness of any rights affected and to evaluate the nature of the state interest, both in accord with specified standards,[54] before making a final determination of whether the classification was constitutional. Only if such specified standards are applied can it be argued that a reasonably congruent framework of analysis is actually presented. If the Court were left free to analyze suspectness, fundamentalness or the state's interest without the self-restraint of specific guidelines, then the specter of a judicial superlegislature reminiscent of the substantive due process era[55] would certainly be present.

49. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971).

50. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

51. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

52. *See* Note, *supra* note 48, at 166-73.

53. The Court recently decided that in the area of nondefense state civil service jobs such a requirement of citizenship is unconstitutional. Sugarman v. Dougall, 413 U.S. 634 (1973).

54. *See* pp. 567-68 *supra* & pp. 570-73 *infra*.

55. *See* Finkelstein, *From Munn v. Illinois to Tyson v. Banton: A Study in the Judicial Process*, 27 COLUM. L. REV. 769 (1927); McCloskey, *Economic Due Process and*

B. Fundamentalness

Justice Marshall, dissenting in *San Antonio Independent School District v. Rodriguez*,[56] suggested,

> Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[57]

While this standard clearly reflects the Warren Court's previous criteria for making a yes or no determination of whether a right was "fundamental", the amplification Justice Marshall suggests is to evaluate the quality of *fundamentalness* along a spectrum. The Court would no longer have to make the type of tortured analysis employed by Justice Powell in *Rodriguez*, where he was forced by his own model to deny any substantial tie between the quality of education and the right to vote,[58] which had previously been deemed

---

the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34; Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908). *See also* Liggett Co. v. Baldridge, 278 U.S. 105 (1928) (prohibition on new entry into pharmacy business by non-pharmacists invalid as an unreasonable restriction upon private business); Tyson & Bros. v. Barton, 273 U.S. 418 (1927) (price regulation of theatre ticket resales violates due process); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (regulation of wages violates due process); Adair v. United States, 208 U.S. 161 (1908) (statute forbidding interstate railroad to discharge employee for union membership infringes on employer's due process rights); Lochner v. New York, 198 U.S. 45 (1905) (statute prohibiting employment in bakery for more than sixty hours a week or ten hours a day violates due process).

56. 411 U.S. 1 (1973).

57. *Id.* at 102-03 (Marshall, J., dissenting).

58. In *Rodriguez*, Justice Powell opened his discussion of why the right to education cannot be deemed fundamental by quoting at length from *Brown*. Although he admitted that the *Brown* decision substantiated the importance of public education in our "free society," he contended that the test for determining whether a right is fundamental is not its general importance but rather its tie to the Constitution either "explicitly or implicitly." *Id.* at 30, 33. However, Justice Powell failed to answer why the right to travel found fundamental in *Shapiro* is more "implicit" in the Constitution than the right to an education. *Id.* at 31-32. Moreover, in citing Lindsey v. Normet, 405 U.S. 56 (1972) (right to housing) and Dandridge v. Williams, 397 U.S. 471 (1970) (right to welfare benefits), Justice Powell made no attempt to distinguish those rights from the right to travel. When he finally did address the question of why the right to education is not "implicit" in the Constitution, despite appellees' arguments, he stated, "We need not dispute any of these propositions [for showing the nexus between the right to educa-

fundamental in *Harper*.[59] Given Justice Marshall's suggestion, the majority analysis might have openly admitted the fundamentalness of the right to education due to its close tie to other fundamental rights,[60] and thereby have been able to deal more candidly with the factually obvious inequity in school facilities caused by the local property tax system of school financing. The majority would then have been forced to balance forthrightly the harm to the educational process against the potential state interest under the federal system in local control over public schools. Having been allowed by the model here suggested to make that full analysis, they would perhaps have been more willing to entertain the plaintiffs' position, particularly because they would not have been required arbitrarily to raise education to the level of a fundamental right for all future cases in order to decide for the plaintiffs in the instant case. Instead, the majority was caught in the unenviable position of having to admit the real harm of the Texas system, while feeling compelled to advocate in purely legalistic terms a complete judicial hands-off position.

Marshall's suggested nexus formula for determining fundamentalness could also be applied to other areas of recent Court interest. In fact, Justice Brennan implicitly used a similar form of analysis in *Shapiro v. Thompson*[61] in finding that the right to travel was fundamental. Moreover, the right of privacy and its close nexus with the Constitution appeared, as Justice Marshall has noted,[62] to lie behind the Court's equal protection analysis in *Eisen-*

---

tion and the right to vote or speak]." *Id.* at 36. Instead, he argued that the only constitutionally protected rights are the *absolute* right to vote or to speak, rather than the rights to "*effective* speech or the most *informed* electoral choice." *Id.* at 36. One can certainly wonder whether that statement represents anything more than a legalistic distinction without a true difference, especially in light of the reasoning of the Supreme Court throughout the due process and criminal procedure areas where the right to a *meaningful* hearing or a *fair* trial are the focal point of the Court's analyses. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 267-69 (1970).

There can be little doubt that under Justice Marshall's spectrum approach those very nexus propositions raised by the appellees, and conceded by Justice Powell, would have raised the right to education to a level of fundamentalness deserving the Court's closer scrutiny.

59. 383 U.S. at 667.

60. *See* 411 U.S. at 111-15. Justice Marshall in his dissent in *Rodriguez* fully discussed education's close ties to the first amendment freedoms and the right to vote as establishing the basis for evaluating education's fundamentalness.

61. 394 U.S. 618 (1969). Justice Brennan, without attempting to tie the right to travel to any explicit clause in the Constitution, found the right implicit in the overall intent of the drafters of the Constitution to form a federal union. *Id.* at 630. *See also* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (right to privacy found implicit in first amendment).

62. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 103-04 (1973)

stadt v. Baird.[63]

However, the question still remains how the Court can logically and with congruity weigh the other side of any balancing formula, the state interest. Even if we suggest to the Court a framework for evaluating both suspectness and fundamentalness when they are either individually or jointly present, is it not also necessary to suggest a framework within which the Court can consistently weigh the value given the state interest?

C. Weighing the State Interest

The answer need not be an obvious yes, because in practice, particularly in the area of procedural due process and in the first amendment cases, the Court already pursues the type of weighing suggested here in the absence of any rigid framework for analysis.[64] Perhaps such cases can serve as the logical starting point for evaluating those areas in which the Court has most consistently found the state interest to be significant.

In the areas of procedural due process and first amendment rights, the trend has been to value the state's police powers as most deserving of judicial deference. These powers have often been referred to as the means of preserving public health, safety and welfare. In the case of first amendment freedoms, generally the highest level of state interest must be shown to justify abridgement of the freedom of speech. The test historically used by the Court was the "clear and present danger" test.[65] However, where procedural due process rights were at issue, the Court could either find the state's financial interest a "rational" and sufficient reason for the infringement,[66] or find it simply irrelevant.[67]

(Marshall, J., dissenting). Justice Marshall went on to state, "[T]his Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification." *Id.* at 109.

63. Justice Brennan, writing the plurality opinion in *Eisenstadt*, stated:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453.

64. *See* cases cited note 45 *supra.*

65. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

66. *See* United States v. Kras, 409 U.S. 434 (1973). This case involved a bankrupt's filing fee and illustrates the often close tie between equal protection and due process analysis.

67. Mayer v. City of Chicago, 404 U.S. 189 (1971). *Mayer* involved the right of a

In the area of equal protection, several cases serve to illustrate the potential tie between a state's police power and a finding of a nearly or actually compelling state interest. In *Korematsu v. United States*[68] the Court found a compelling state interest reasonably pursued, pointing to the fear of public disturbance and sabotage, and the nature of the federal government's war powers. Similarly, the public's general welfare, as reflected in the "environment" of their village, was also raised to a substantial level of judicial deference in *Village of Belle Terre v. Boraas*[69] where the Court upheld a local zoning ordinance as clearly within the state's police powers. In comparison, even though the Court found that neither a suspect class nor a fundamental right was at issue in *United States Department of Agriculture v. Moreno*,[70] the state's financial interest, as distinct from its police powers, was nevertheless found insufficient to sustain the legislation in the face of an equal protection challenge. Although such a pattern may be sketchy at best, the Court has been willing to weigh openly the state interest in several areas and has generally found it most substantial where the public's health or safety was the most directly affected.

Therefore, a test for active enforcement of the equal protection clause would logically call for an evaluation of all legislation which affects a classification with suspect qualities or a right possessing indicia of fundamentalness. Such a model would then necessitate a judicial balancing of the state interest in the exercise of its police power against the suspectness of the classification drawn and the fundamentalness of the rights infringed. Although the Court clearly has not yet advocated this type of comprehensive model for the review of all equal protection cases, there are telling indications that the Court is going to use equal protection analysis in a far less rigid and far more comprehensive way than in the past.

---

misdemeanor defendant to have access to an adequate transcript on appeal. The right was granted by statute to all felony defendants. The Court, in finding the distinction between misdemeanor and felony defendants an unreasoned distinction in light of the fourteenth amendment, failed even to address the state's financial interest in the distinction. *Id.*

68. 323 U.S. 214 (1944). The Court here found the extenuating circumstances of World War II sufficiently "compelling" at the time to justify exclusion of all persons of Japanese ancestry from the West Coast.

69. 416 U.S. 1 (1974).

70. 413 U.S. 528 (1973). In *Moreno*, the class discriminated against included households with unrelated members and the right denied was the right to receive food stamp payments from the federal treasury. The Government based its position on the financial stake it held in preventing abuse of the system, but the Court independently evaluated that contention and found it without sufficient basis to support the discrimination. *Id.* at 533-38.

V. WHERE THE COURT STANDS NOW

During the last two full terms the Supreme Court has clearly broken with the two-tier test of the Warren Era,[71] yet no alternative model has been articulated. The Burger Court's equal protection decisions can be divided into six broad classes: 1) those in which the old rational basis test has been adhered to; 2) those in which the Warren Court's version of strict scrutiny has been applied; 3) those in which a new, toughened rational basis test has been alluded to; 4) those in which strict scrutiny would have apparently been called for, but where the results fail to follow the "fatal in fact" scenario of the Warren Court; 5) those in which due process analysis was used, but need not have been given a more flexible equal protection standard; and 6) those in which some form of judicial balancing was overtly present.

An attempt will be made here to look at how each class of cases either does or does not lend support for a new balancing test. Note will also be taken of the types of cases the Court has chosen to place into each category in order to determine what factors the Court might ultimately choose to rest its decisions upon if an overt balancing analysis were adopted.

A. Rational Basis Test

The Court has adhered to the pure application of the rational basis test only where it has either been faced with economic regulation[72] or where no direct suggestion of suspectness or fundamentalness was present. This trend did not exist even two terms earlier when the rights of illegitimates[73] and freedom from incarceration[74] were considered as undeserving of even minimal scrutiny. Although there is arguably one exception,[75] the more recent posi-

71. *See* commentaries cited notes 18 & 19 *supra.*

72. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (statute sustained which discriminated between corporations and individuals with respect to ad valorem taxes on personalty); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) (statute under which only registered pharmacists or corporations whose majority ownership was in the hands of practicing registered pharmacist could operate drug stores in South Dakota upheld, as in Williamson v. Lee Optical Inc., 348 U.S. 483 (1955)). *Compare id. with* City of New Orleans v. Dukes, 501 F.2d 706 (5th Cir. 1974), *postponing the question of juris. to hearing on merits*, 43 U.S.L.W. 3545 (U.S. April 14, 1975) (Fifth Circuit failed to find new vendors had fundamental right to sell hot dogs from a push cart in the Vieux Carre in New Orleans, but nevertheless struck down a "grandfather clause" which allowed only vendors who had been in operation for eight years to do so).

73. *See* Labine v. Vincent, 401 U.S. 532 (1971).

74. *See* Schilb v. Kuebel, 404 U.S. 357 (1971).

75. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). The appellees in this case argued that wealth was a suspect classification and education a fundamental right.

tion of the Court has been to use the purely deferential rational basis test only in cases where a classification was made which was clearly outside the traditional characteristics of a suspect class.[76] In this sense the Court has conformed to a balancing approach in that the least scrutiny has been applied where the least suggestion of suspectness exists. The variable in this formula, which may explain the one exception, is that where the state interest is viewed by the Court as very substantial, then even though a suggestion of fundamentalness or suspectness can be made, the Court will still employ only minimal scrutiny.[77]

B. Strict Scrutiny

It is possible that the only classifications for which the Court in the future will apply truly strict scrutiny are race, nationality, and alienage.[78] The reason may well be the Court's reticence to unnecessarily tie its hands in dealing with such potentially controversial topics as sex and wealth discrimination.

But not only has the expansion of the "suspect class" category been stopped,[79] the entire fundamental interest category has slipped into a new, more variable standard of review. The Court's new treatment of fundamental interest cases can be viewed as the vanguard for the more flexible standard of review suggested above.

C. A Toughened Rational Basis Standard of Review

The Burger Court was first seen breaking with the Warren Court's two-tier model within the traditional language of the rational relationship test.[80] In *Eisenstadt v. Baird*,[81] Justice Brennan, writing the plurality opinion with Justices Marshall, Douglas, and Stewart, used language of the rational relationship test in holding that the equal protection clause denies " 'to States the power to legislate that different treatment be accorded to persons placed by

76. *See, e.g.*, Johnson v. Robison, 415 U.S. 361 (1974) (conscientious objectors denied veterans' benefits).

77. The desire on the part of a state to maintain maximum control over its educational system may account for the Court's use of the rational basis test here despite the appellees' arguments of fundamentalness and suspectness. The tradition of localized control of education in America is longstanding and may have been at the root of the Court's use of the deferential rational basis standard.

78. *See, e.g., In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

79. *See, e.g.*, Humphrey v. Cady, 405 U.S. 504 (1972) (mentally ill persons not suspect class); Reed v. Reed, 404 U.S. 71 (1971) (sex not suspect class); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimates not suspect class).

80. *See* Gunther.

81. 405 U.S. 438 (1972).

a statute into different classes on the basis of criteria *wholly unrelated* to the objective of that statute.' "[82] Yet, by being careful to pick goals that were *not* so related and omitting goals that potentially were,[83] Justice Brennan was able to strike down the statute as lacking a rational goal which he was willing to postulate. Of course, this narrow type of goal evaluation was at variance with the traditional "any conceivable basis" test.[84]

The toughened tier one standard of review was striking and set a new tone which the Court has followed with some consistency where the rights denied could arguably be regarded as fundamental.[85] By its willingness to question a state's factual assumptions, as the *Eisenstadt* plurality had done,[86] the Court has since found invalid a state statute for commitment of the mentally ill.[87] In its most clear break with the past, the Court in *United States Department of Agriculture v. Moreno*[88] elevated welfare benefits to a new semiprotected status by striking down a clearly nonsuspect classification which deprived certain citizens of the right to food stamps.[89]

This trend implicitly extended the areas of suspectness as well. Three statutes affecting illegitimates were struck down through the use of a toughened tier one analysis, though no suspect class or strict scrutiny language was used.[90] Sex classifications were similarly denied suspect status, but were

---

82. *Id.* at 447, *quoting* Reed v. Reed, 404 U.S. 71, 75 (1971) (emphasis added).

83. *See* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972); discussion of this issue note 30 *supra*.

84. *See* cases cited note 10 *supra*.

85. In only one previous case had the Court hinted at this type of "narrow ends scrutiny" under the rational basis test. *See* Levy v. Louisiana, 391 U.S. 68 (1968).

86. *See* 405 U.S. at 447-54.

87. *See* Jackson v. Indiana, 406 U.S. 715 (1972).

88. 413 U.S. 528 (1973) (food stamps were denied households containing unrelated members).

89. *See* discussion of Davis v. Weir, 497 F.2d 139 (5th Cir. 1974), note 125 *infra*; Dorrough v. Estelle, 497 F.2d 1007 (5th Cir. 1974) (court applied toughened rational basis test to strike down Texas statute providing for dismissal of defendant's direct appeal from state felony conviction upon escape from confinement and failure to return voluntarily within ten days).

90. *See* New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (denial of welfare benefits to households with illegitimate children was found violative of equal protection clause); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (workmen's compensation law which gave priority to legitimate heirs found violative of equal protection clause as bearing no significant relationship to statutory purpose); Stanley v. Illinois, 405 U.S. 645 (1972) (statute which failed to provide for hearing at which fathers of illegitimate children would have opportunity to prove their fitness to have custody upon mother's death found violative of equal protection clause).

A subtle shift of language was employed in *Weber*, where the right of unacknowledged illegitimates to recover workmen's compensation benefits was at issue. Justice Powell, writing for the majority, appeared to modify the traditional "rational relationship" lan-

nevertheless closely scrutinized when made the basis for determining which military personnel would automatically receive dependency benefits and which would have to substantiate their eligibility.[91] Thus, by its selective use of a toughened tier one analysis, the Court has suggested new areas of both suspectness and fundamentalness without having to expressly declare their existence.

D. The Concurrent Expansion and Easing of Tier Two Strict Scrutiny

If some cases were now to be given more careful scrutiny under tier one analysis, the Court was also to scrutinize less severely certain tier two cases. This trend was most clearly evident in the area of "fundamental" rights. Far from applying the almost absolute scrutiny thought to exist in this area,[92] the Court has shown a growing willingness to adopt a variable standard of review in fundamental rights cases to fit the particular facts before it.

For example, in the area of legislative reapportionment where the fundamental right to vote is at issue, the Court has shown a new willingness to evaluate the facts of each case and a reticence to allow the mere categorization of the rights involved to determine completely the outcome. In *Reynold v. Sims*,[93] the right to vote in the reapportionment context had clearly been held to be fundamental and deserving of strict scrutiny when

---

guage of the tier one test to a requirement that a "*significant* relationship" between the classification and the state interest be shown. 406 U.S. at 175 (emphasis added). It is of course noteworthy that this shift of language occurred in a case involving a classification which possessed many of the indicia of suspectness, and in an opinion which six justices chose to join.

91. *See* Frontiero v. Richardson, 411 U.S. 677 (1973). Although only a plurality of the Court found that classifications drawn on the basis of sex were inherently suspect, a majority of the Court agreed that requiring female, and not male members of the military to prove a spouse's dependency was a violation of the equal protection guarantee found in the fifth amendment.

Similarly, in Reed v. Reed, 404 U.S. 71 (1971), Chief Justice Burger, writing for a unanimous Court, found the automatic preference of males over females in the appointment of administrators to estates without a rational basis despite his admission that such a procedure reduced the workload of probate courts. *Id.* at 76.

On the other hand, in Geduldig v. Aiello, 417 U.S. 484 (1974), a majority of the Court refused to find that the exclusion of pregnancy from an otherwise comprehensive state workmen's insurance program involved sex discrimination. Justice Brennan dissented strongly, arguing that a sex classification was present and that the stricter standard of *Frontiero* and *Reed* should thus apply. *Id.* at 503.

92. Such truly strict scrutiny still does exist in the case of certain suspect classes. *See* p. 575 *supra.*

93. 377 U.S. 533 (1964). "Like *Skinner v. Oklahoma*, . . . [this] case 'touches a sensitive and important area of human rights,' and 'involves one of the basic civil rights of man. . . .'" *Id.* at 561.

Justice Warren, speaking for the majority, analogized it to the right of procreation at issue in *Skinner v. Oklahoma*[94] and also traced the constitutional roots for judicial control over apportionment.[95] Later, however, in *Swann v. Adams*[96] it was not as clear that "strict scrutiny" was invoked, despite the fact that the state legislature's apportionment scheme again was struck down. The Court placed heavy emphasis on the fact that in *Reynolds* the door had been left open to the state where "variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines."[97] This is hardly a list of considerations that would meet the traditional compelling state interest test. Then, only last term, the Court was willing in both *White v. Regester*[98] and *Gaffney v. Cummings*[99] to allow state apportionment plans to stand where the deviation between districts was deemed by the Court so slight as not to raise even a prima facie equal protection claim. By the use of this seemingly unique means of avoidance the Court did not have to face the issue of when a fundamental right can be infringed, however slightly, without the showing of a compelling state interest. Essentially the Court's position was that no infringement at all had occurred. However, left unanswered is the question of how the Court would deal with this type of "minor" infringement, if it in fact recognized it as such. Since the Court has only recognized an all or nothing standard for determining if a fundamental right exists and has applied a virtually fatal-in-fact test when such a right is found, it appears analytically impossible for the Court to deal directly with either a "minor" infringement of a fundamental right or a more serious infringement of rights not previously deemed fundamental but possessing many of the indicia of fundamentalness. The Court in both *Gaffney* and *White* was simply forced to avoid the issue because no adequate test as yet exists.

Another interesting example of the Court's dilemma in the area of fundamental rights is *O'Brien v. Skinner*,[100] where convicted misdemeanants and pretrial detainees confined in their home counties were denied the opportunity to register and vote. Justice Burger, writing for the majority, refused to expressly raise the cause of action to one involving a fundamental right,

94. 316 U.S. 535 (1942).
95. *See* 377 U.S. at 561-68.
96. 385 U.S. 440 (1967).
97. *Id.* at 444.
98. 412 U.S. 755 (1973).
99. 412 U.S. 735 (1973).
100. 414 U.S. 524 (1974).

yet found the state action so "wholly arbitrary" as to be a violation of the equal protection clause.[101] Justice Marshall, with Justices Douglas and Brennan, voiced concurrence in the result, but a lack of understanding as to why the case did not turn on the infringement of a fundamental right and thus call for invocation of the compelling state interest test.[102]

Therefore, while not explicitly adopting a variable standard for weighing fundamentalness, the suggestion is apparent that the absolute categorization of rights may no longer be adequate to deal with the broad range of equal protection issues before the Court. As in *Gaffney*, *White* and *O'Brien*, the issue of whether or not a fundamental right has in fact been infringed may often simply have to be avoided by the Court until a more adequate test is adopted. The curious result reached in *O'Brien*, at least under traditional notions of equal protection as practiced by the Warren Court, of having a state action struck down while nominally using traditional tier one language, evidences the shift in analysis. It is also significant that this occurred in a case where three Justices felt a "fundamental" right was at issue.

E. A Thin Line Between Equal Protection and Procedural Due Process

In several recent cases the line between equal protection and due process issues has become blurred. The result has been an interesting group of potential equal protection cases which have been overtly handled by due process balancing and which therefore never required the Court to make a determination of whether tier one or tier two equal protection analysis was appropriate. It is in this grey area that the unnecessary and unsatisfactory qualities of the two-tier equal protection structure are most apparent. In *Boddie v. Connecticut*[103] a filing fee required for all divorce actions was at issue. The case raised both due process and equal protection questions, *i.e.*, the general right of access to the courts and the right of the poor as a class to change their fundamental marriage relationships. However, Justice Harlan, writing for the majority, chose to view the case from a due process perspective and was thus able to weigh all the relevant facts, including the nature of the class discriminated against and the right infringed upon, before arriving at his decision to strike down the filing fee requirement. In so doing he il-

101. *Id.* at 530.

102. *Id.* at 533-34 (Marshall, J., joined by Douglas & Brennan, JJ., concurring).

103. 401 U.S. 371 (1971). Both Justice Douglas and Justice Brennan, in separate concurring opinions, argued that the case should be decided under the equal protection clause, rather than the due process clause used by Justice Harlan in writing for the majority. *Id.* at 383, 386 (Douglas & Brennan, JJ., concurring in part).

lustrated the practicality of using the same balancing method of analysis to deal with both due process and equal protection issues.

Another interesting illustration of the convergence of the two issues is found in the companion cases of *United States Department of Agriculture v. Moreno*[104] and *United States Department of Agriculture v. Murry*,[105] both of which dealt with provisions of the Food Stamp Act of 1964.[106] The Court chose to characterize *Moreno* as an equal protection case by viewing the "household" qualification involved as absolute, while in *Murry* the Court viewed a tax dependency qualification as somehow less absolute and therefore more susceptible to a due process cure. Although technically there may be some basis for the distinction, Justice Marshall was quick to identify the essential convergence of due process and equal protection issues in both cases by noting the overt and distinct classifications involved in each case.[107] He might also have pointed out that the spectrum approach he had suggested in *Rodriguez*,[108] if carried to its logical conclusion, would have made any distinction between equal protection and due process issues unnecessary.

Finally, it should be noted that the Supreme Court has acknowledged implicitly the convergence of equal protection and due process issues in certain fact patterns by adopting a new irrebutable presumption test.[100] The test is inherently one of due process balancing and can be applied when the Court finds a legislative enactment which presupposes that if one is in a certain class, then a particular result must follow. By utilization of this approach the Court implies that a more adequate hearing process would provide an adequate remedy. Though this may not be true in many of the traditional areas of equal protection interest, it is the case generally where equal protection and due process issues converge. The most notable advantage of the irrebutable presumption approach flows from the overt balancing implicit in its due process origins. If, however, the balancing model proposed here for equal protection cases were adopted, this advantage would disappear. This very position was adopted by Justice White in disagreeing with the irrebuttable presumption analysis of the majority in *Vlandis v. Kline*:[110]

> From these and other cases, such as *Dandridge v. Williams*, 397 U.S. 471 (1970); *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v.*

104. 413 U.S. 528 (1973).

105. 413 U.S. 508 (1973).

106. 7 U.S.C. § 2011-25 (1970).

107. United States Dep't of Agriculture v. Murry, 413 U.S. 508, 517-19 (1973) (Marshall, J., concurring).

108. 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

109. *See* Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection*, 24 CATH. U.L. REV. 217 (1975).

110. 412 U.S. 441 (1973).

> *Richardson*, 411 U.S. 677 (1973); and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), it is clear that we employ not just one, or two, but, as my Brother MARSHALL has so ably demonstrated a 'spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.' *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98-99 (MARSHALL, J., dissenting) . . . for [as] must now be obvious, or has been all along . . . as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.
>
> Here, it is enough for me that the interest involved is that of obtaining a higher education, that the difference between in-state and out-of-state tuition is substantial, and that the State, without sufficient justification, imposes a one-year residency requirement on some students but not on others, and also refuses, no matter what the circumstances, to permit the requirement to be satisfied through bona fide residence while in school. It is plain enough that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizarre pattern of discrimination among those who must or must not pay a substantial tuition to the University. The discrimination imposed by the State is invidious and violates the Equal Protection Clause.[111]

F. The Balancing of Some Equal Protection Cases

Particularly where a classification tends to restrict the fundamental rights of a class, the Burger Court has in many instances expressly balanced the individual harm against the state interest. Although even the strictures of the Warren Court model would have allowed this type of balancing for tier two cases, the initial question was always on to which tier the case fell. Thus, in the area of fundamental rights the Warren Court's initial determination was simply whether the right was indeed fundamental[112] or not.[113] Only

111. *Id.* at 458-59 (White, J., concurring) (emphasis added). Note should also be taken of the vacillation between due process and equal protection analysis in Justice Stewart's majority opinion in Cleveland Bd. of Educ. v. Le Fleur, 414 U.S. 632 (1974), where pregnant teachers were required to take extended leave. After characterizing *Le Fleur* as an irrebutable presumption case, Stewart laid out the standard due process test as being "whether the interests advanced in support of the rules of the . . . School Boards can justify the particular procedures they have adopted." *Id.* at 640. However, he then switched to the traditional language of tier one equal protection analysis in stating, "We thus conclude that the arbitrary cutoff dates embodied in the mandatory leave rules before us have no *rational relationship* to the valid state interest of preserving the continuity of instruction." *Id.* at 643 (emphasis added).

112. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (travel).

113. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972) (housing).

if the right were deemed fundamental would the state interest have to be weighed to ascertain if it were compelling. In other words, for the Warren Court the fundamental right side of the formula was an in-or-out test and it was actually only the state interest that was weighed. However, the Burger Court began implicitly, as Justice White pointed out,[114] to weigh both ends of the scale. Thus, even where the clearly fundamental right to travel was at issue, it could be assigned one weight where it arose in the context of indigent medical care,[115] and another when the context was voter registration.[116] Similarly, if the classification affected the right to vote, the nature of the franchise involved would be reflected in the value of the state interest required to justify it. When the right to vote in a water district election was at issue, the Court expressly assigned the fundamental right to vote a low value and was willing to accept the state's allegations of fact almost without question.[117] Yet, when a candidate's filing fee in a primary would effect voter choices in a general election, the Court's stance shifted.[118] Thus, Justice Burger, writing for the majority in *Lubin v. Parish*, spoke of a more substantial form of scrutiny and even discussed the balancing of interests on both sides of the scale though never overtly invoking the language of the Warren Court's tier two compelling state interest test. Justice Burger noted the standard of review he thought should apply in stating:

> This legitimate state interest [in limiting the length of the ballot], however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of

---

114. *See* Vlandis v. Kline, 412 U.S. 441, 458-59 (White, J., concurring).

115. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). *See also* Hawkins v. Moss, 503 F.2d 1171, 1179 (4th Cir. 1974) (right to travel seen as depending on circumstances; state interest in controlling admission to bar was sufficient to justify classification as to residents of reciprocal and nonreciprocal states when granting automatic admission to South Carolina bar).

116. *See* Burns v. Fortson, 410 U.S. 686 (1973); Marston v. Lewis, 410 U.S. 679 (1973). *Cf.* Dunn v. Blumstein, 405 U.S. 330 (1972).

117. *See* Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

118. *See* Lubin v. Panish, 415 U.S. 709 (1974). *Compare* Bullock v. Carter, 405 U.S. 134 (1972) *with* Bell v. Hongisto, 501 F.2d 346 (9th Cir. 1974), where the court noted:

> In equal protection cases, the burden of justification that must be carried by the state is sometimes *heavy* and sometimes *light*, depending on the nature of the classification in question and the nature of the imposition which the state law places upon the encumbered class.

Id. at 353. However, since the court ruled that the right to appeal a contempt citation was not fundamental, and, even if fundamental, was not sufficiently infringed in the case at bar, it declined to find an equal protection violation.

> political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance.[119]

The Court's growing willingness to weigh both sides of the now shifting two-tier model has also become apparent where potentially suspect classifications must be evaluated. In *Reed v. Reed*[120] the Court found that there was a rational relationship between a sex classification and the valid state goal of increasing probate efficiency, but, for an unarticulated reason, still did not find the state interest sufficient to sustain the legislation. Though failing to agree that the classification was "suspect," the Court noted the need to accomplish a legitimate state interest in a "*manner* consistent with the command of the Equal Protection Clause."[121] Thus, the Court had clearly been caught by a case where agreement could not be reached that the classification was invidious enough to be characterized as "suspect" but where the majority was also unwilling to subject the classification to only the minimal scrutiny of the rational basis test. The result was an ambiguous opinion that implied judicial balancing could occur on tier one of traditional equal protection analysis, where it had never been previously acknowledged to exist.

Similarly, the Court used a balancing form of analysis in a series of cases in which the rights of illegitimate children were at issue. Although illegitimates may be viewed historically as possessing many of the same indicia of suspectness that one would associate with other classifications which have been deemed by the Court to create "discrete and insular minorities"[122] they have never been officially elevated to the position of a "suspect" class with the accompanying protection of the compelling state interest test. However, beginning with *Levy v. Louisiana*,[123] the Warren Court accorded illegitimates

---

119. 415 U.S. 709, 716 (1974). *See also* Stanton v. Stanton, 43 U.S.L.W. 4449, 4452 (U.S. April 15, 1975) (where the Court recently struck down a statutory distinction between the sexes by stating, "under any test—compelling state interest, or rational basis or *something in between*— . . . [this statute] does not survive an equal protection attack." (emphasis added)).

120. 404 U.S. 71 (1971).

121. *Id.* at 76 (emphasis added). For a toughened tier one approach to sex classifications, *see* Brenden v. Indep. School Dist., 477 F.2d 1292 (8th Cir. 1973) (court struck down rule barring females from participating with males in high school interscholastic athletics). *See also* Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974) (court applied "strict rationality" test to strike down use of higher admission standards for females than males).

122. Under the criteria for determining suspectness as outlined in the text accompanying note 45 *supra*, illegitimate children have certainly suffered stigmatization because of a characteristic which is immutable.

123. 391 U.S. 68 (1968).

a special position. Justice Douglas, writing for the majority, characterized the rights involved as flowing from the "intimate, familial relationship between a child and his mother."[124] Thus, after expressly stating that the traditional tier one rational relationship test would be applied,[125] Justice Douglas immediately qualified his position by stating that, in fact, the Court has applied this test differently depending upon whether basic civil rights were affected or whether the classification was one affecting only the economic sector. Having drawn this heretofore unrecognized distinction under traditional tier one analysis, he then found the classification between legitimate children and illegitimate children under the Louisiana wrongful death statute without any rational basis.[126]

Yet, in *Labine v. Vincent*[127] the Burger Court found this same classification between legitimate children and illegitimate children permissible under the Louisiana intestate succession statute. This apparent contradiction was explained by Justice Powell, writing for the majority in *Weber v. Aetna Casualty & Surety Co.*,[128] when he expressly admitted that judicial balancing had occurred in the equal protection area. Justice Powell took the position that the majority opinion in *Labine* reflected the importance which the Court had attached to the state's regulation of property disposition within its borders.[129] In contrast, he suggested that the state interest in the workmen's compensation statute involved in *Weber* was more analogous to the wrongful death statute which had been at issue in *Levy*.[130] Having drawn this distinction between state interests, Justice Powell struck down the classification between legitimate children and illegitimate children under the workmen's compensation statute. In so holding, he put forward a new method of judicial scrutiny which strongly suggested a balancing model: "The essential inquiry in all the foregoing cases is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights

---

124. *Id.* at 71.

125. Justice Douglas stated, "Though the test has been variously stated, the end result is whether the line drawn is a rational one." *Id.*

See Davis v. Weir, 497 F.2d 139, 144 (5th Cir. 1974), where the court held that an Atlanta ordinance which enabled city water works to terminate tenant service when the landlord is delinquent failed the "traditional 'rational basis' test."

126. 391 U.S. at 72. Justice Douglas stated, "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."

127. 401 U.S. 532 (1971).

128. 406 U.S. 164 (1972).

129. *Id.* at 170. Justice Powell stated, "That [*Labine*] decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders." *Id.*

130. *Id.* at 171-72.

might the classification endanger?"[131] Then in the final sentence of the opinion, without ever having asserted that illegitimacy created a "suspect class," Justice Powell stated, "[T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise."[132]

Therefore, just as in the cases noted previously, where the right to vote or a sex classification was at issue,[133] the Court has again independently evaluated *both* the legislative means and ends in applying what is essentially a balancing test.

VI. Justice Marshall Suggests a New Approach

Justice Marshall can be credited as the first Supreme Court Justice to express recognition of the need for a new framework within which the Court could more honestly deal with equal protection questions. In his now famous dissents in *Dandridge v. Williams*[134] and *San Antonio Independent School District v. Rodriguez*,[135] his view on the need for a spectrum approach in dealing with equal protection issues was presented. He argued that the Warren Court two-tier model simply failed to deal adequately with the variety and complexity of the issues now before the Court in the area of equal protection. The model that had once seemed the tool of an activist Court was now in effect stunting judicial growth in this area.

The specific model he would suggest was not at first clear, but at the least it called for a determination of relative fundamentalness[136] and suspectness[137] rather than the seemingly more simplistic aye or nay determinations used previously. He advocated varying standards of scrutiny and the weighing of state interests. In referring to his earlier opinion in *Police Department of Chicago v. Mosely*,[138] he stated, "We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests."[139] Justice Marshall also suggested the need for candor in developing a new equal protection model, pointing out that in several past decisions "this Court has

131. *Id.* at 173.
132. *Id.* at 176.
133. *See* pp. 582-83 *supra.*
134. 397 U.S. 471, 508 (1970).
135. 411 U.S. 1, 70 (1973).
136. *See id.* at 110-17.
137. *See id.* at 104-10.
138. 408 U.S. 92 (1972).
139. 411 U.S. at 124 (1973) (Marshall, J., dissenting).

consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification."[140]

Later, in *Marshall v. United States*,[141] which dealt with a federal law automatically excluding felons with two prior convictions from gaining access to a special drug rehabilitation program, Justice Marshall again dissented[142] and renewed his objections to the Court's inflexible approach to equal protection. The case did not fit into the previously mentioned neat categories of a suspect class or a fundamental right, but, as Marshall noted, neither were the issues similar to those in a case involving the sale of eyeglasses[143] or the right to own a pharmacy.[144] Here, in contrast, a vivid and substantial harm was involved in the denial of narcotics treatment, and apparently no remedy was available under traditional equal protection analysis.

As Justice Marshall noted in his dissent in *Richardson v. Ramirez*,[145]

> Compelling state interest is merely a shorthand description of the difficult process of balancing individual and state interests that the Court must embark upon when faced with a classification touching on fundamental rights.[146]

Perhaps that same form of judicial balancing has already begun to occur on what is traditionally assumed to be the purely deferential first tier of equal protection analysis and the Court's frank admission of that development will avoid some of the inconsistencies Justice Marshall has so aptly criticized.

VII. Conclusion

As Justice Marshall noted,[147] balancing is not new to equal protection analysis. In fact, a restricted example of balancing has always occurred on the second tier of the Warren Court model. The difference suggested here,

---

140. *Id.* at 109. Justice Marshall cited Eisenstadt v. Baird, 405 U.S. 438 (1972), James v. Strange, 407 U.S. 128 (1972), Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), Reed v. Reed, 404 U.S. 71 (1971), and Levy v. Louisiana, 391 U.S. 68 (1968), in support of this position.

141. 414 U.S. 417 (1974).

142. *Id.* at 430.

143. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955). *See also* Goldstein v. City of Chicago, 504 F.2d 989, 991 (7th Cir. 1974) (court gratuitously noted that there is no fundamental right to garbage collection).

144. *See* North Dakota St. Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

145. 418 U.S. 24 (1974).

146. *Id.* at 78 (Marshall, J., dissenting).

147. *Id.*

and supported by Justice Marshall,[148] is that not only the state interest but also the actual harm of the legislation should be weighed in a flexible manner. The state interest would be viewed as the potential *benefit* of the legislation and would present an area within which the Court has shown itself able to make weighing evaluations in the past. Conversely, the classification affected and the rights infringed would be evaluated as the potential *harm* of the legislation and would present a newer area for judicial weighing. However, given criteria of suspectness (such as the discrete and insular nature of the minority, the stigmatization involved, and the immutability of the trait), a reasonable judicial evaluation of the harm from the classification itself could be made. Also, by evaluating the nexus between the right infringed and the Constitution, the Court could make an equally reasonable evaluation of the harm stemming from that infringement. Only after having used both the criteria suggested for evaluating the legislation's potential harm and the criteria suggested for determining the benefit of the state interest promoted would the Court be in a position to make a candid decision as to whether a given equal protection challenge should be sustained. Further, by consistently engaging in the balancing form of analysis the Court would itself create a more complete set of judicial decisionmaking criteria which could, in turn, be used by legislators, practitioners and the public as a coherent basis for determining whether or not to challenge a particular legislative enactment. Only by adopting this more open system can both the parties' expectations and judicial candor be preserved.

Craig M. McCabe

148. *See* pp. 585-86 *supra*. Justice Marshall is not necessarily alone on the Court in advocating a balancing model. He was joined in his dissent in *Dandridge* by Justice Brennan and in his dissent in *Rodriguez* by Justice Douglas. Further, Justice White advocated a similar position in his dissent in *Vlandis* and Chief Justice Burger implicitly accepted a balancing approach in *Labine*. Also, a majority of the Court joined Justice Powell in advocating a new approach in *Weber*, and the majority appeared to apply a balancing model in *Moreno*.