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THOUGHTS ON *RODRIGUEZ:* MR. JUSTICE POWELL AND THE DEMISE OF EQUAL PROTECTION ANALYSIS IN THE SUPREME COURT

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> Continuity with the Warren Court jurisprudence is not a duty but only a necessity. The necessity is not to follow precedent blindly, but to explain the reasons for departure from it and to justify, again by reason rather than personal predilection, the results reached in every case.[1]

Since the fall of 1969 when Warren Earl Burger took his seat as Chief Justice, the academic community has placed the Supreme Court under a thorough and searching examination.[2] Coming on the heels of enormous and far-reaching activity in the judicial branch, the Burger Court has been called to account for both its adherence

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1. Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 329.

2. Professor Kurland has surveyed each term. *See* Kurland, *Enter the Burger Court: The Constitutional Business of the Supreme Court, October Term 1969*, 1970 SUP. CT. REV. 1; *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265. And, of course, the Foreword series in the Harvard Law Review has examined the cases with accustomed clarity. *See* 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]; Kalven, *The Supreme Court, 1970 Term—Foreword: Even When a Nation is at War*, 85 HARV. L. REV. 3 (1971); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) [hereinafter cited as Tribe].

to[3] and its rejection of[4] the Warren Court's innovations in constitutional adjudication. The purpose of this article is to continue that constructive criticism by taking stock, after five years, of the Court's performance in one significant class of cases—those interpreting the equal protection clause of the fourteenth amendment.[5] Following earlier works,[6] this paper will focus on Mr. Justice Powell and attempt, through a discussion of his contributions, to analyze the success of the Court as a whole in an area of increasing judicial concern. The scope of the article requires that it begin with an assessment of equal protection doctrine as it developed in the Warren Court era and as it stood at the end of the October 1973 Term. Mr. Justice Powell's views will then be examined, with a view toward identifying and appraising his affinity for a case-by-case, balancing approach to constitutional adjudication, borrowed from the late Mr. Justice Harlan. Ultimately, this paper will defend the thesis that equal protection analysis, as it is conceived and applied by Justice Powell, is not equal protection at all but a Harlanesque notion of fundamental fairness, derived from the due process clause.[7]

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3. *E.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) [hereinafter cited as Ely]; *see* Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765 (1973); Tribe, *supra* note 2.

4. *E.g.*, Dershowitz & Ely, *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). In reality, the Burger Court has been unwilling in most instances to overrule squarely the precedents established during the Warren years. *See, e.g.*, Michigan v. Tucker, 417 U.S. ___, 94 S. Ct. 568 (1974) and Harris v. New York, 401 U.S. 222 (1971)—cases that failed to extend but still did not overrule *Miranda*.

5. U.S. CONST. amend. XIV. The paper will also discuss cases involving the United States, in which the Court has applied analogous doctrine derived from the due process clause of the fifth amendment. It is well settled that, textual arguments notwithstanding, the fifth amendment embodies a notion of equality which justifies restricting the federal government in the same manner in which the states are restricted by the fourteenth. *Cf.* Schneider v. Rusk, 377 U.S. 163 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

6. Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972); Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1972) [hereinafter cited as Howard].

7. This paper leaves aside the Court's work in two classes of equal protection cases that raise peculiar problems of their own, not essential to an examination of equal protection doctrine generally. For illustrations of Justice Powell's position on apportionment of state legislatures and school desegregation, *see* Keyes v. School Dist., 413 U.S. 189, 217 (1973) (Powell, J., concurring and dissenting); White v. Weiser, 412 U.S. 783, 798 (1973) (Powell, J., concurring).

I. FOUR MODELS OF EQUAL PROTECTION REVIEW

A. The Minimum Rationality Model

At various stages in the growth of equal protection doctrine, several models have been employed by the Court.[8] An early formulation of the equal protection test was that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[9] This standard may be referred to as the minimum rationality model. Put simply, the model holds that a classification is valid if it includes "all [and only those] persons who are similarly situated with respect to the purpose of the law."[10] The cases have refined the model to comprehend the ordinary presumption of constitutional validity accorded to legislative action[11] and have indicated that the Court is willing to postulate legitimate purposes that might be served by the classification under examination.[12] Under the minimum rationality model, a classification will not be struck down because it is not "made with mathematical nicety or because in practice it results in some inequality."[13] Nor is it necessary that "all evils of the same genus be eradicated or none at all."[14] Thus the equal protection clause poses no barrier if the legislature adopts a remedial measure that addresses only part of a difficult problem on

8. Inasmuch as this section is intended only as a brief overview of the development of equal protection doctrine, other models that have been advanced but which seem to be inconsistent with or superseded by the decided cases are put to one side. *E.g.*, Wheeler, *In Defense of Economic Equal Protection*, 22 KAN. L. REV. 1 (1973); Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41; Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through The Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter cited as Michelman].

9. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); *see* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

10. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949) [hereinafter cited as Tussman & tenBroek], *quoted in, Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969) [hereinafter cited as *Developments*].

11. *See* McDonald v. Board of Election Commr's, 394 U.S. 802, 809 (1969).

12. *E.g.*, Flemming v. Nestor, 363 U.S. 603, 611-12 (1960).

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

14. Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

an experimental basis, even though short-run inequality results. The test is whether "any state of facts reasonably may be conceived to justify [the classification]."[15] If the Court can conceive of such a justifying rationale, the classification must be upheld.

The minimum rationality standard was adopted, at least in part, to avoid the pitfalls associated with the Old Court's formalistic application of substantive due process doctrine.[16] During the first three decades of this century, the "liberty" protected by due process was viewed expansively, to include far-ranging conduct in business affairs, and the Court used the fifth and fourteenth amendments to invalidate an array of economic regulation measures, enacted by the federal and state legislatures.[17] The Court, during the *Lochner* era,[18] virtually imposed upon the country a *laissez faire* economic philosophy. This philosophy led the Court to invalidate "laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities."[19]

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15. McGowan v. Maryland, 366 U.S. 420, 426 (1961); *see* McDonald v. Board of Election Commr's, 394 U.S. 802 (1969).

16. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 484-86 (1973) [hereinafter cited as Goodpaster]; *see* Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District No. 15*, 15 ARIZ. L. REV. 457, 470-71 (1973) [hereinafter cited as Lee]; Michelman, *supra* note 8, at 17.

17. Professor Strong has recently surveyed the Court's decisions in Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973) [hereinafter cited as Strong].

18. Lochner v. New York, 198 U.S. 45 (1905). *Lochner* is often cited as the high water mark of substantive due process. *See* Lee, *supra* note 16; Strong, *supra* note 17.

19. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949). One commentator has pointed out that:

> The great significance of *Lochner v. New York* lies in the fact that it was the focal point in a judicial move to fasten on the country by constitutional exegesis unsanctioned by the Constitution a pattern of economic organization believed by the Court to be essential to the fullest development of the nation's economy. Without appreciation of this dimension of *Lochner*, the lesson of this episode in constitutional history, however read, will be lost for evaluation of other instances where pressures build to induce the Court to discover in the Constitution what is not there but arguably ought to be in furtherance of fundamental postulates of political and social organization. Strong, *supra* note 17, at 419.

Professor Strong has persuasively demonstrated that the "inarticulate major premise" of *Lochner* was the enshrinement of "competitive capitalism as *the* one type of economic organization compatible with the Constitution." *Id.* at 428 (emphasis in the original). The Supreme Court's substantive due process approach combined with legislative antitrust policy to constitute a "grand design for an American economy cast in the likeness of Adam Smith . . . ." *Id.* at 435. *See also* Hamilton, *Affection with Public Interest*, 39 YALE L.J. 1089 (1930); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

The needs of the modern industrial state and a growing social concern for the less fortunate, however, mandated a new and policy-oriented jurisprudence—supplied by the Roosevelt appointees who came to the Court in the late 1930's. A retrenchment began immediately, and by 1955 the Court could say:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.[20]

As the demise of the *Lochner* era substantive due process took hold, the Court sensed a similar problem in cases arising under the equal protection clause. Perceiving early that it might be drawn into doing in the name of equal protection what *Lochner* had done through substantive due process, the Court was loath to review allegedly discriminatory classifications on a more stringent standard than the new, restrained test under the due process clause.[21] Thus the minimum rationality model of equal protection was adopted—leaving the states and the national government with broad leeway in constructing regulatory schemes.[22]

In succeeding years, however, the Court breathed new life into the due process clause in cases involving personal rights and liberties.[23] The Court recognized that, while the *Lochner* era had caused infinite difficulty in cases involving economic regulation,[24] the same

20. Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); *see* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 [hereinafter cited as McCloskey].

21. That test, of course, virtually abdicated to the legislature all responsibility for judging the need for and validity of business regulation legislation.

22. Railway Express Agency v. New York, 336 U.S. 106 (1949). With the notable exception of Morey v. Doud, 354 U.S. 457 (1957), the modern Court has not struck down state or federal economic regulatory measures in the name of substantive due process or equal protection. *See, e.g.*, North Dakota Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Hurtado v. United States, 410 U.S. 578 (1973). *See generally* Ferguson v. Skrupa, 372 U.S. 726 (1963); Goodpastor, *supra* note 16, at 486-87.

23. Goodpaster, *supra* note 16, at 487-88; Tussman & tenBroek, *supra* note 10, at 812.

24. The damage from *Lochner* was not limited to the cases that reached the Court; the *Lochner* judicial philosophy made it virtually impossible for the other two branches of government to effectively meet the mounting needs of the country through legislation.

period had seen the rise of judicial activism in support of personal liberty.[25] Although due process had been used to excess in the economic sphere, it had provided the Court with a firm constitutional basis for protecting personal liberties, particularly the first amendment freedom of expression.[26] In the post-*Lochner* years the task was to find a principled basis for intervening even further on behalf of personal liberty while maintaining a posture of abstention in economic regulation cases. The resulting double standard was much-criticized at the time[27] and still flounders for want of a satisfactory

25. *E.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (the right to teach children in a language other than English); *see* Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926). Gunther and Dowling have described the Court's retreat from *Lochner* as follows:

> Rejection of the *Lochner* heritage is a common starting point for modern Justices; reaction against the excessive intervention of the 'Old Men' of the pre-1937 Court has strongly influenced the judicial philosophies of the successors. The modern Court has not drawn from *Lochner* the lesson that *all* judicial intervention via substantive due process is improper. Rather, it has withdrawn from careful scrutiny in most economic areas but has maintained and increased intervention with respect to a variety of non-economic liberties. G. GUNTHER & N. DOWLING, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 379 (1970) (emphasis in the original) [hereinafter cited as GUNTHER & DOWLING].

Thus the consequence of breaking with the *Lochner* scrutiny of economic regulation cases is the absence of a constitutional basis for intervention in personal liberty cases. The Court has continually grappled with the question whether an activist posture in personal liberty matters can be justified in principle at the same time the Court assumes a "hands off" posture in business regulation cases. Goodpaster, *supra* note 16, at 487-88.

Immediately upon his appointment to the Court in 1937, Mr. Justice Black sought to limit the reach of the due process clause of the fourteenth amendment to the specific provisions of the Bill of Rights, thereby protecting personal liberty against state infringement while restricting the Court's intervention in the nation's economic affairs. *Compare* United Gas Pub. Serv. Co. v. Texas, 303 U.S. 123, 146 (1938) (Black, J., concurring) *with* Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting). *See* Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 166-67 (1949) [hereinafter cited as Morrison]. Those who rejected Justice Black's approach to the problem, however, remained unpersuaded that the due process clause might be used by the Court to intervene in personal liberty cases without raising once again the spectre of *Lochner*. In the balance of this article, the persistent problem of justifying activism in personal liberty cases is a recurring theme. The two-tier approach to equal protection analysis developed by the Warren Court seems to be an attempt to state a principled basis for strict scrutiny in some cases and minimal review in others, and the Burger Court's assessment of the relative success of that effort is of vital importance in the further development of equal protection doctrine.

26. *E.g.*, Fiske v. Kansas, 274 U.S. 380 (1927); *see* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

27. Judge Hand was perhaps the most eloquent critic of the Court's evolving double standard. In his view, there was no principled basis for varying the standard of judicial review

basis for distinguishing between cases on the basis of their subject matter.[28]

B. The Two-Tier Approach

Perhaps in recognition of the problems associated with due process adjudication, the Warren Court turned to the equal protection clause as a vehicle for close examination of personal liberty cases. Rather than attempting to forge due process into an effective tool, the Warren Court turned instead to the development of a two-tier approach to equal protection.[29] The Court retained the minimum rationality standard for business regulation cases,[30] but established a new "strict scrutiny" standard of review in cases involving constitutionally suspect classifications or fundamental personal interests.[31] In these cases, the Court refused to recognize a presumption in favor of duly enacted legislation[32] or to hypothesize justifying

according to the subject matter of particular cases. Nothing in the Constitution provided the Court with authority to afford greater protection to first amendment interests than to economic liberty. L. Hand, *Chief Justice Stone's Concept of the Judicial Function*, in THE SPIRIT OF LIBERTY (Dillard ed. 1952); *see* P. FREUND, ON UNDERSTANDING THE SUPREME COURT 13 (1949).

28. *Cf.* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); *see* the Symposium on *Griswold* at 64 MICH. L. REV. 197 (1965), and the criticism of *Roe* in Ely, *supra* note 3. *See generally* McCloskey, *supra* note 20. The only persuasive basis for distinguishing economic regulation cases and those involving "personal liberty" was offered by Chief Justice Stone in a footnote in *Carolene Products*, set out in note 32 *infra*. His rationale has more recently been urged as a principled solution to the analogous problem arising in equal protection analysis.

29. *See generally Developments*, *supra* note 10, at 1087-1132.

30. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); *see* McGowan v. Maryland, 366 U.S. 420 (1961).

31. *See* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39.

32. In Kramer v. Union School Dist., 395 U.S. 621 (1969), Chief Justice Warren wrote:

> [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable . . . . The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. *Id.* at 627-28 (citations omitted).

Although the *Kramer* rationale would seem inapplicable outside the voting rights cases, a footnote in Chief Justice Stone's opinion in *Carolene Products* would deny the presumption of validity in a variety of personal liberty contexts. In an opinion concerning substantive due

rationales for statutory classification.[33] Apparently borrowing language from first amendment precedents, the Court demanded that government show its classification to be justified by a compelling state interest that could not be served by some less drastic means.[34]

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process analysis, but in principle relevant to equal protection review as well, Stone wrote:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . . 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 a correspondingly more searching judicial inquiry. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (citations omitted).

The Stone footnote, read broadly, supports strict scrutiny in any case in which circumstances indicate that the personal interests asserted may not receive a fair hearing in the legislative branch. Thus when litigants attack the integrity of the electoral process or show that, because of prejudice against them or even political powerlessness, they are denied effective recourse to the legislature, strict scrutiny by the Court may be appropriate. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971); Gordon v. Lance, 403 U.S. 1, 6 (1971).

33. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

34. This two-prong enhanced standard of review had appeared in prior cases only in the first amendment context. *E.g.*, NAACP v. Alabama, 357 U.S. 449 (1959); Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring) (state interest justifying a deterrent effect on the right of association must be compelling); Shelton v. Tucker, 364 U.S. 479 (1960) (government cannot pursue even substantial objectives in a way that infringes upon the right of association when the end can be achieved by less intrusive means). The Warren Court adopted a similar approach in selected equal protection cases. *E.g.* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel is a fundamental interest); McLaughlin v. Florida, 379 U.S. 184 (1964) (racial classification is suspect). The views expressed in a recent case by two holdover Justices from the Warren Court describe clearly the two prongs of the strict scrutiny analysis. In Kahn v. Shevin, 416 U.S. ___, 94 S. Ct. 1734 (1974), the majority upheld a Florida law which granted a property tax exemption to widows but not to widowers. In dissent, Mr. Justice Brennan, with Mr. Justice Marshall concurring, argued that the strict scrutiny test was applicable because the statute drew a distinction on the basis of sex, a suspect classification. *See* Justice Brennan's plurality opinion for the Court in Frontiero v. Richardson, 411 U.S. 677 (1973). In *Kahn*, the dissenters agreed that the state's interest in "cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden" satisfied the requirement that a compelling justification be shown. 416 U.S. at ___, 94 S. Ct. at 1738. But they were not convinced that that interest could not be "served equally well by a more narrowly drafted statute." *Id.* Thus the Florida law failed the second prong of the strict scrutiny test, and, according to the dissenters,

This "new" equal protection model must, of course, be justified by a principled distinction between the cases subject to it and those left to the minimum rationality standard. The Warren Court attempted to establish that justifying principle, but with limited success. In cases relying on the suspect classification branch of the new equal protection, the Court emphasized that some minority groups have been subject historically to discriminatory treatment.[35] This factor may be significant in two ways. First, if history is a fair indication of what lies ahead, it is unlikely that such a group can successfully seek redress from the legislative branch, and, therefore, the Court should provide maximum protection, consistent with its historic role as protector of unpopular minorities against the majority will.[36] Second, a more stringent standard of review may be justified to assure that historical discrimination is not continued or, perhaps, to compensate for past mistreatment.[37]

The Court, in its search for principles to justify strict scrutiny review, also focused on certain immutable characteristics, determined solely by birth.[38] This factor, too, implicates two bases for applying a strict standard of review. First, a classification on the basis of skin color[39] or national origin[40] fastens the affected individuals into a place in a regulatory scheme from which they cannot escape. Once again, the Court may be justified in a more activist posture in cases in which individuals are unable to move themselves, through appeals to the legislature or self-help, from an unde-

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violated the equal protection clause. Recent cases, including *Kahn*, have cast doubt on the *Frontiero* view that classifications according to sex are constitutionally suspect, but the dissenters' statement of the strict scrutiny test, given a suspect classification, seems reliable.

35. *See* Loving v. Virginia, 388 U.S. 1 (1967) (black Americans).

36. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due Process Formula"*, 16 U.C.L.A. L. REV. 716, 724-25 (1969) [hereinafter cited as Karst]; *see* Hobson v. Hansen, 269 F. Supp. 401, 507-08 (D.D.C. 1967), *aff'd as modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

37. *Cf.* Karst, *supra* note 36, at 723.

38. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion). Although *Frontiero* is a recent case, decided by the Burger Court, the plurality opinion by Mr. Justice Brennan reflects the thinking of the Warren Court, and it seems legitimate to view that opinion as a statement of the criteria Justice Brennan and other Warren era Justices find relevant to the determination of a constitutionally suspect classification.

39. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

40. Graham v. Richardson, 403 U.S. 365 (1971); *see* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

sirable category within a legislative scheme to some more advantageous classification.[41] Second, the inference is strong that any classification that treats individuals differently on the basis of physical characteristics or place of birth is arbitrary, having no rational relation to any legitimate governmental purpose.[42] Thus even under the minimum rationality standard racial classifications would seem vulnerable, and the Court may be justified in examining closely any legislation that purports to rely on a rational relationship between racial characteristics and statutory purpose.[43]

The fundamental interest branch of the new equal protection model has been more difficult to justify. The Warren Court failed to establish principled grounds for determining what interests will invoke the strict scrutiny standard of review. As the new model developed in the 1960's, the Court found interests associated with the political process,[44] the criminal appellate system,[45] and interstate travel[46] to be fundamental, but at no time did the Court make clear what thread tied the cases together, what distinguished merely important interests from fundamental interests. In a dissenting opinion in 1969, Mr. Justice Harlan bitterly complained of what he saw as an unprincipled usurpation of legislative authority, implicated by the majority's willingness to "pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test."[47] Others flatly accused the Court of resurrecting the value-laden approach to constitutional adjudication associated with the *Lochner* era.[48]

41. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 121-22 (1973) (Marshall, J., dissenting). Once again, although the case cited was decided by the Burger Court, it is appropriate to take the views of a holdover Justice from the Warren Court as an indication of the underlying rationale of that Court's equal protection doctrine.

42. Indeed, two Warren Court Justices have taken the position that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious per se." McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring) (citations omitted). Mr. Justice Douglas concurred in Mr. Justice Stewart's opinion.

43. *Cf.* text accompanying notes 227-29 *infra*.

44. Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

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

46. Shapiro v. Thompson, 394 U.S. 618 (1969).

47. *Id.* at 662 (Harlan, J., dissenting).

48. A recent article by a respected scholar includes this cautious warning:

In recent years, several of the Burger Court Justices have voiced their disenchantment with the Warren Court's two-tier analysis.[49] Not only is the two-tier model open to the same criticism leveled against the substantive due process double standard, but it is also result-oriented. At the outset the judgment which will ultimately be reached is determined by the mere adoption of one of the two standards of review. Legislative classifications analyzed under the minimum rationality test are almost universally upheld,[50] while those subject to strict scrutiny only rarely survive examination.[51] Thus the two-tier approach tends to inhibit rather than further analysis.[52]

C. *Two Alternative Models*

Two alternative models of equal protection review have been advanced to meet the growing criticism. In a dissenting opinion written in 1970,[53] Mr. Justice Marshall avoided the language of the

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Lochner, then, is no more. Yet there are growing indications that *Lochner*'s ghost is abroad in the land, masquerading under Equal Protection rather than Due Process. Its underlying philosophy is not competitive capitalism but cooperative collectivism. Its powerful and pervasive protagonists are not Adam Smith, Herbert Spencer or even John Maynard Keynes; rather the roll is headed by Robert Owen, St. Simon, Karl Marx and Friedrich Engels. One wonders whether in the present age, enamored as it is of equalitarianism as was the late nineteenth century of individualism, the Court will again be enticed into reading into the Constitution what is not there but for judicial fiat. Strong, *supra* note 17, at 455.

49. *See, e.g.*, Marshall v. United States, 414 U.S. 417, 430 (1974) (Marshall, J., dissenting with Brennan and Douglas, J.J.); *In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting with Rehnquist, J.); Vlandis v. Kline, 412 U.S. 441, 456 (1973) (White, J., concurring); San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 70 (1972) (Marshall, J., dissenting with Douglas, J.); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (majority opinion by Powell, J.); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting with Brennan, J.).

50. *See* note 22 *supra*.

51. As the Chief Justice said in dissent in Dunn v. Blumstein, 405 U.S. 330 (1972):

> Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection. *Id.* at 363-64.

But see Burns v. Fortson, 410 U.S. 686 (1973); Marston v. Lewis, 410 U.S. 679 (1973); *cf.* Morton v. Mancari, 417 U.S. ___, 94 S. Ct. 893 (1974). One recurring theme in the cases is that, under the minimum rationality standard, the Court tends to accept the state's interest in administrative convenience as a justification for a statutory classification. On the other hand, in a case reviewed under the strict scrutiny test, administrative convenience is insufficient. *See* Oregon v. Mitchell, 400 U.S. 112, 247 n.30 (1970) (dissenting opinion).

52. *In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting).

53. Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

two-tier approach and advocated instead a "sliding-scale analysis."[54] Rather than identifying a suspect classification or a fundamental interest that will invoke strict scrutiny, Marshall said that the Court should balance the "character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[55] Moreover, Justice Marshall argued that the Court had, in fact, already adopted this more flexible approach in prior cases.[56]

In his review of the 1971 Term, Gerald Gunther noted Justice Marshall's growing discontent and his reading of recent equal protection decisions.[57] Gunther, too, perceived a changed attitude in a number of purported minimum rationality cases. Pointing particularly to opinions by Justices Powell and Marshall,[58] Gunther argued that the Court was gradually moving away from the rigid two-tier approach and embracing instead an intermediate model. While the precise character of the new standard of review was, in 1972, still unclear, the cases suggested "a means-focused, relatively narrow, preferred ground of decision in a broad range of cases."[59] Gunther advanced the theory that the Court should require in all cases that legislative means substantially further legislative ends.[60] Although

54. This descriptive phrase originated with Professor Gunther. *See* Gunther, *supra* note 2, at 17-18.

55. Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting). *See also* Marshall's opinion for the Court in Dunn v. Blumstein, 405 U.S. 330 (1972).

56. Justice Marshall cited Kramer v. Union School Dist., 395 U.S. 621 (1969); Rinaldi v. Yeager, 384 U.S. 305 (1966); Carrington v. Rash, 380 U.S. 89 (1965); McLaughlin v. Florida, 379 U.S. 184 (1964); Douglas v. California, 372 U.S. 353 (1963); and Skinner v. Oklahoma, 316 U.S. 535 (1942). In his later dissenting opinion in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), Justice Marshall continued to argue that the cases support his model of equal protection analysis. In *Rodriguez*, he focused on James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Reed v. Reed, 404 U.S. 71 (1971). According to Justice Marshall, these cases actually applied a relatively stringent standard of review, while purporting to employ only the minimum rationality test. It seems clear that Marshall is correct insofar as he identifies an intermediate equal protection model at work in *Eisenstadt*, *James*, *Reed*, and *Weber*, but it remains altogether unclear whether that intermediate standard is, in fact, the sliding scale analysis urged by Marshall himself. *See* Part IV *infra*.

57. Gunther, *supra* note 2.

58. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (majority opinion by Powell, J.); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

59. Gunther, *supra* note 2, at 20.

60. Professor Gunther candidly conceded that his means-ends model was "as legitimate

the Court has not recognized the Gunther model as the guide in equal protection cases, some Justices have employed language suggestive of the means-ends approach.[61] Thus a fourth model must be added to the three already discussed. Both the Marshall and Gunther models seek to correct identifiable shortcomings of the Warren Court's two-tier analysis. They do not attempt to justify the application of a rigid double standard—an enhanced standard of review in personal liberty cases but a more relaxed test in cases involving the regulation of business activity. Additionally, rather than permitting the choice of a standard of review to determine the outcome, both Gunther and Marshall contemplate a thorough treatment of the merits in every case.

The end of the 1973 Term found the Burger Court still undecided on the direction in which equal protection doctrine should move. Although a new model seems to be emerging from the numerous equal protection cases the Court is deciding, as yet the final product has not been unveiled.[62] Some opinions continue to recognize the Warren Court's two-tier analysis,[63] though the Court is unwilling to reaffirm that approach by declaring more classifications to be suspect or more interests to be fundamental.[64] In marked contrast to

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an ingredient of due process as of equal protection." *Id.* at 42. Nevertheless, he defended the inquiry demanded by the model as entirely legitimate. The real evil of the *Lochner* substantive due process cases was, not the judicial focus on the rational relationship between legislative means and legitimate ends, but the willingness of the Old Court to look behind the legislature's choice of objectives, to find in the Constitution prohibitions not there. *Id.*; *see* note 19 *supra*. In contrast, the narrower focus on the means-ends relationship, without a judgment as to the prudence of the objective itself, is a wholly justifiable judicial function. Gunther's advice, however, was that the Court should proceed under the rubric of equal protection in order to avoid the "modern revulsion" to substantive due process. He would follow the lead of Justice Jackson, concurring in Railway Express Agency v. New York, 336 U.S. 106, 111-13 (1949), who fastened on equal protection analysis rather than due process as a less intrusive vehicle for judicial inquiry.

61. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 63 (1973) (White, J., dissenting); *see* note 274 *infra*.

62. *See* Areen & Ross, *The Rodriguez Case: Judicial Oversight of School Finance*, 1973 SUP. CT. REV. 33, 52 n.63 (suggesting that the equal protection cases decided during the October 1973 Term reveal no consistent pattern).

63. *E.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

64. In a line of cases, the Court has consistently found classifications on the basis of illegitimacy to constitute invidious discrimination in violation of the equal protection clause. Gomez v. Perez, 409 U.S. 535 (1973) (per curiam); Richardson v. Davis, 409 U.S. 1069 (1972) (per curiam); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Glona v. American Guar.

past experience, the Court occasionally reviews legislative classifications that withstand even strict judicial scrutiny.[65] And, perhaps most significantly, in opinions purporting to apply the minimum rationality test, the Court appears to examine the merits more closely than that standard has heretofore demanded.[66] The balance of this article will examine the intermediate standard of review that is now developing, in an effort to identify its intellectual underpinnings and to evaluate the Burger Court's apparent attempt to retain only that part of the Warren Court legacy that can be justified in principle.

II. JUSTICE POWELL AND THE HARLAN FLEXIBLE DUE PROCESS MODEL

When Lewis Powell was asked about his judicial philosophy in the Senate hearings on his nomination, he candidly admitted that he

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& Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); *see* New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (per curiam); King v. Smith, 392 U.S. 309, 334 (1968) (Douglas, J., concurring). *But see* Labine v. Vincent, 401 U.S. 532 (1971). Yet the Court has never explicitly held that illegitimacy is a suspect classification invoking strict scrutiny review. In a recent case, the Court found it unnecessary to decide that issue in order to strike down a Social Security regulation that placed illegitimate children at a disadvantage. Jimenez v. Weinberger, 418 U.S. ___, 94 S. Ct. 567 (1974). The upshot is that the Court's developing equal protection model is sufficiently stringent to invalidate classifications that might, under the two-tier approach, have been deemed suspect. That being the case, the Court is under no pressure to expand the suspect class concept to new categories. *See* notes 216 and 224 *infra*.

Similarly, in Eisenstadt v. Baird, 405 U.S. 438 (1972), the majority of a seven-member Court invalidated a classification affecting the right of privacy without relying on the strict scrutiny test. In a concurring opinion, Justice White urged that the strict scrutiny test be applied in any case implicating the right of privacy recognized in Griswold v. Connecticut, 381 U.S. 479 (1965). The majority avoided reliance on the fundamental interest branch of the new equal protection model. 405 U.S. at 447 n.7. *But see* Roe v. Wade, 410 U.S. 113 (1973) (relying on *Griswold*). In Lindsey v. Normet, 405 U.S. 56, 73-74 (1972), the Court declined to hold that the need for decent housing is a fundamental interest, and in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court rejected a similar claim regarding education.

65. *E.g.*, Storer v. Brown, 416 U.S. ___, 94 S. Ct. 1274 (1974); American Party of Texas v. White, 416 U.S. ___, 94 S. Ct. 262 (1974).

66. *E.g.*, Jimenez v. Weinberger, 418 U.S. ___, 94 S. Ct. 567 (1974); United States Dep't. of Agriculture v. Moreno, 413 U.S. 528 (1973). In *Jimenez* and *Moreno*, the Court invalidated statutory classifications it found irrational, but even in those cases in which classifications were sustained, the Court seemed to apply an enhanced standard of review. *See, e.g.*, Johnson v. Robison, 415 U.S. 361 (1974); McGinnis v. Royster, 410 U.S. 263 (1973). *See generally* GUNTHER & DOWLING, *supra*, note 25, at 221-22 (Supp. 1974).

had not given the matter much thought.[67] Yet his articulated views closely resembled those of Justices Frankfurter and Harlan.[68] Moreover, Powell's temperament suggested that he would adopt a case-by-case, balancing approach to constitutional adjudication, with a decided preference for opinions that bear the print of reasoned consideration according to a definite and consistent method of thought. Thus, Justice Powell was expected to be a "balancer" in first amendment cases and an adherent to a flexible case-by-case approach in cases involving constitutional aspects of the criminal process.[69] Most importantly, he was expected to adopt the Frankfurter and Harlan approach in cases involving the due process and equal protection clauses of the fourteenth amendment.[70] At the end of his first six months on the Court, Justice Powell had partially borne out those predictions. Professor Gunther identified Harlanesque attitudes in a number of Justice Powell's early opinions and labeled the Powell record "extraordinarily encouraging."[71] Powell had, indeed, adopted the balancing approach to first amendment questions and a case-by-case analysis in the area of criminal procedure.[72] But, at

67. *Hearings on Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Associate Justices of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 219 (1971), noted in Howard, *supra* note 6, at 449.

68. Professor Howard has written:

> The resemblance of Powell's stated views on the judicial process to the views of Felix Frankfurter and those of the second Justice Harlan is obvious. It was with an obvious touch of pride that, in outlining his views to the Judiciary Committee, Powell attributed his belief in the importance of judicial restraint to his having studied under Frankfurter at Harvard Law School. Howard, *supra* note 6, at 451 (footnote omitted).

See note 84 *infra*.

69. Howard, *supra* note 6, at 452-57, 459-63.

70. As Professor Howard has put it:

> The Nixon appointees to the Court [presumably including Justice Powell] will be less likely than some of their colleagues to experiment with the 'new' uses of the equal protection clause . . . . [I]n future equal protection opinions we shall see more talk of 'rational basis' and less of 'inherently suspect' classification . . . . Like the Court's conservatives of earlier years, the emerging majority may be more willing to put the due process clause to work than to experiment with equal protection . . . . *Id.* at 463-64 (footnotes omitted).

71. Gunther, *supra* note 6, at 1035.

72. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (concurring opinion); Healy v. James, 408 U.S. 169 (1972) (first amendment); Barker v. Wingo, 407 U.S. 514 (1972); United States v. United States Dist. Court, 407 U.S. 297 (1972) (criminal procedure).

the end of the 1971 Term, Justice Powell had yet to expose fully his approach to equal protection analysis.[73] During the succeeding two terms Justice Powell wrote numerous opinions, some announcing the judgment of the Court, and many separate opinions as well.[74] From these opinions it is clear that Justice Powell feels most comfortable with the flexible approach associated with the late Justice Harlan. His constitutional opinions are replete with references to "balancing,"[75] "case-by-case"[76] methodology, and an "accommodation of competing values."[77]

In first amendment cases, Justice Powell carefully balances individual and governmental interests, striving to arrive at a judgment which accommodates conflicting claims. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[78] in which the Commission had ordered a local newspaper to classify its help-wanted advertisements without reference to sex, he weighed the alleged infringement upon editorial prerogative against the Commission's interest in preventing sex discrimination. Emphasizing that the classified advertisement pages of a newspaper are essentially commercial, contributing little to the market place of ideas, and that the Commission's order would hardly disable the newspaper, Powell found the interest of the Commission to be paramount and upheld its order. In *Procunier v. Martinez*,[79] Justice Powell considered the problem of prisoners' first amendment rights. Although the *Martinez* case had been considered by the lower courts to present the question of whether prisoners' mail may be censored by institutional authorities, Powell chose to view the matter broadly, implicating the right of outside correspondents to communicate with inmates. Thus, for Powell, the case raised traditional first

73. *But see* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (suggesting a single standard for all equal protection cases instead of the two-tier approach employed by the Warren Court).

74. *See The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 274 (chart) (1974); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 303-04 (chart) (1973) [hereinafter cited as Note].

75. *E.g.*, Barker v. Wingo, 407 U.S. 514, 530 (1972); *see* United States v. United States Dist. Court, 407 U.S. 297, 314 (1972).

76. *E.g.*, Argersinger v. Hamlin, 407 U.S. 25, 63 (1972) (Powell, J., concurring).

77. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. ___, 94 S. Ct. 2997, 3011 (1974).

78. 413 U.S. 376 (1973).

79. 416 U.S. ___, 94 S. Ct. 264 (1974). *See also* Saxbe v. Washington Post Co., 417 U.S. ___, 94 S. Ct. 2827 (1974) (Powell, J., dissenting).

amendment questions that transcended the prison context in which *Martinez* arose. Accordingly, he applied the balancing test he had adopted in prior cases, weighed the conflicting interests, and came to a judgment that mail censorship in prison must further an important governmental interest unrelated to the suppression of expression and must limit expression no more than is necessary to protect the governmental interest involved. Again, in *Gertz v. Robert Welch, Inc.*,[80] Justice Powell attempted to reconcile the competing interests of a free press and the law of defamation. In a majority opinion for a sharply divided Court,[81] Powell balanced conflicting concerns and concluded that the actual malice rule of *New York Times v. Sullivan*[82] should not be extended to cases involving defamatory falsehoods about individuals who are involved in matters of public concern, but who are neither public officials nor public figures.[83]

In criminal procedure cases, Powell has adhered to Justice Harlan's view that the due process clause of the fourteenth amendment does not incorporate, totally or selectively, the specific provisions of the Bill of Rights, with all the attendant detail developed in federal cases interpreting those provisions.[84] In *Apodaca v. Oregon*,[85] Powell

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80. 418 U.S. ___, 94 S. Ct. 2997 (1974).

81. The vote in *Gertz* was 5-4. Justice Powell wrote the majority opinion; Justice Blackmun wrote a brief concurring opinion explaining his vote; the Chief Justice and Justices Douglas, Brennan, and White dissented.

82. 376 U.S. 254 (1964). The *Times* case held that a newspaper cannot be held liable for defamation of a public official absent proof that the defamatory statements were published with knowledge of their falsity or with reckless disregard of the truth.

83. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (the *Times* rule extended to public figures). In *Gertz*, Justice Powell's majority opinion departed from the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). It is perhaps noteworthy that the *Gertz* resolution of the problem corresponds to the view taken by Justice Harlan in dissent in *Rosenbloom*.

84. *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 117 (1970) (Harlan, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting). *See also* Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring). The incorporation theory was, of course, the creation of Mr. Justice Black, who argued for it with passion in *Adamson*. *Id.* at 71-72. During the Warren Court years, Justice Black maintained a running debate with Justice Frankfurter and then with Justice Harlan over the validity and utility of applying the Bill of Rights to the states through the fourteenth amendment. The Black view was that judges must be confined to specific standards and not left at large to apply their own sense of decency and fairness under the rubric of natural law or flexible due process. In Black's view, the application of the provisions of the Bill of Rights would protect individual liberty more

concurred separately in the majority's judgment that the right to a jury trial in a state court does not comprehend the additional requirement that a verdict of conviction be unanimous.[86] While accepting Warren Court precedents requiring jury trial in serious state

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fully and permanently than an appeal in each case to judges' conception of fundamental fairness. Moreover, outside the ambit of individual liberty, Black warned that the application of a flexible due process standard would raise again the spectre of the *Lochner* Court's invalidation of necessary economic legislation. *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting); Ferguson v. Skrupa, 372 U.S. 726 (1963). Frankfurter and Harlan, on the other hand, argued that history precludes the view that the framers of the fourteenth amendment intended to make the Bill of Rights applicable against the states. They argued that the concept of due process necessarily contemplates a judicial inquiry in every case to determine the fundamental fairness of challenged state action. Thus Justice Frankfurter said in *Adamson*:

> [W]hen . . . a conviction in a State court is here for review under a claim that a right protected by the Due Process Clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provisions of the first eight Amendments is disclosed . . . . The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of . . . due process of law . . . . *Judicial review . . . inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . . These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.* 332 U.S. at 67-68 (Frankfurter, J., concurring) (emphasis added).

After Frankfurter's retirement in 1962, Justice Harlan became the Court's chief proponent of the flexible due process approach to the review of state criminal convictions. The debate raged until both he and Justice Black left the Court. At the very crux of the continuing controversy was Black's assertion that the due process analysis advanced by Harlan lacked standards to provide needed guidance and Harlan's rejoinder that standards do, indeed, exist. Harlan maintained that the Court need only "start with the words 'liberty' and 'due process of law' and attempt to define them in a way that accords with American traditions and our system of government." Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting). For an examination of the historical validity of Justice Black's incorporation theory, *see* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Morrison, *supra* note 25. *See also* Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960) [hereinafter cited as Black]; Frankfurter, *Memorandum on Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

85. 406 U.S. 404 (1972) (Powell, J., concurring). Powell's concurring opinion in *Apodaca* is recorded in Johnson v. Louisiana, 406 U.S. 356, 366 (1972).

86. The plurality opinion by Justice White held that a state may, consistent with the fourteenth amendment, permit conviction in a criminal case to be grounded upon a jury verdict of ten votes to two for conviction.

prosecutions,[87] Powell challenged the majority's premise "that the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment."[88] Thus he objected to the implicit holding that unanimous jury verdicts would no longer be required in federal prosecutions directly subject to the sixth amendment.[89] In *Apodaca*, Powell, relying on Justice Harlan's dissenting views in Warren Court incorporationist decisions,[90] inveighed against the "constitutional schizophrenia"[91] created by the Court's attempt to rationalize a rule of uniformity with the fundamental principles of federalism.[92] Rejecting the incorporationist approach, Justice Powell instead carefully balanced Oregon's

87. 406 U.S. at 372 n.9; *see* Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial required in serious state prosecutions).

88. 406 U.S. at 369.

89. Although *Apodaca* involved only a state prosecution, the tenor of the plurality opinion suggested that the result applied to federal prosecutions as well. Justice White's opinion adopted an historical approach, examining the relevant documentary evidence, and concluded that there is insufficient support for a judgment that the framers of the sixth amendment intended to preserve the common law requirement of unanimity in jury trial cases. The inference is that, having decided in *Duncan* that the sixth amendment is applicable against the states through the fourteenth amendment, in this subsequent jury trial case the Court saw itself interpreting the sixth and not the fourteenth amendment, and any result reached would apply equally to state and federal criminal prosecutions. While one dissenter half-heartedly suggested that unanimity might still be demanded in federal cases, *see* 406 U.S. at 383 (Douglas, J., dissenting), Justices Brennan and Marshall expressly recognized that the reasoning of the plurality precluded that result. *Id.* at 395-96 (Brennan, J., dissenting).

90. *E.g.*, Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

91. Williams v. Florida, 399 U.S. 78, 136 (1970) (Harlan, J., dissenting), *quoted at* 406 U.S. 356, 375 (Powell, J., concurring).

92. Specifically, Justice Powell said:

> In the name of uniform application of high standards of due process, the Court has embarked upon a course of constitutional interpretation that deprives the States of freedom to experiment with adjudicatory processes different from the federal model. At the same time, the Court's understandable unwillingness to impose requirements that it finds unnecessarily rigid . . . has culminated in the dilution of federal rights that were, until these decisions, never seriously questioned . . . . Although it is perhaps late in the day for an expression of my views, I would have been in accord with the opinions in similar cases by the Chief Justice and Justices Harlan, Stewart and Fortas that, at least in defining the elements of the right to jury trial, there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards. 406 U.S. at 375 (Powell, J., concurring) (citations and footnotes omitted).

interest in experimentation against the petitioner's argument that a less-than-unanimous jury verdict would increase the likelihood of conviction and permit a biased majority to disregard the views of minority jurors. This balancing approach required a reasoned judgment on the question of whether a less-than-unanimous verdict is fundamentally fair within the context of Anglo-American jurisprudence.[93] After a thoughtful examination of the interests involved, Powell concluded that the 10-2 verdict permitted by the Oregon law was valid, although some smaller majority might be inconsistent with due process.[94] He declared that "[d]ue process and its mandate of basic fairness often require the drawing of difficult lines,"[95] and he had no difficulty drawing such a line in *Apodaca*.[96]

Justice Powell was, however, careful to commit himself only on the jury trial issue. He pointedly avoided taking issue with "every precedent of this Court applying various criminal procedural rights to the States with the same force that they are applied in federal courts." *Id.* at 375 n.15.

93. Powell departed from Justice Harlan's approach to the jury trial cases insofar as he embraced Justice White's view that fundamental fairness might be judged within the context of the English and American systems. 406 U.S. at 372 n.9; *see* Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968) (opinion for the Court by White, J.). Harlan took the position that, if a fair system of justice can be conceived without jury trials, due process does not require that the states adopt the jury method of factfinding. *Duncan, supra* at 186-93 (1968) (Harlan, J., dissenting).

94. Thus Powell left open the possibility of striking down a statute permitting 9-3 or 8-4 conviction verdicts. 406 U.S. at 377 n.21.

95. *Id.*

96. It is worthy of note that the Powell concurring opinion in *Apodaca* bears a striking resemblance, both in analysis and result, to Justice Harlan's concurring opinion in Ker v. California, 374 U.S. 23 (1963). In *Ker*, the question was whether state police officers' unannounced entry into a household constituted a violation of the fourth amendment, recently made applicable against the states through the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949). Justice Clark, writing for himself and three other Justices, stated that, while federal statutory law would have required a reversal of the convictions if the case had arisen in federal court, the fourth amendment was not violated by the conduct of the state officers in the case at bar. Justice Brennan and three other dissenters would have held that the entry violated the fourth amendment. Justice Harlan's tie-breaking vote was based on an entirely different standard. In his view, the convictions would have been invalid in federal court because the entry violated the fourth amendment, but these state convictions were subject to a less stringent standard—the test of fundamental fairness under the due process clause. Similarly, Justice Powell's opinion in *Apodaca* determined the judgment, based upon a view of the case rejected by all eight other Justices. It seems clear that Justice White's plurality opinion and the opinions written by the dissenters assumed that the issue in the case was the proper interpretation of the sixth amendment right to jury trial; hence any result reached would be applicable equally to cases

In his concurring opinion in *Argersinger v. Hamlin*,[97] Justice Powell again approached a question as to the content of due process in a fashion reminiscent of Justice Harlan. In *Argersinger*, the Court extended the sixth amendment right to counsel to all criminal prosecutions in which imprisonment is imposed as punishment upon conviction.[98] Justice Powell embraced the *Gideon v. Wainwright*[99] rule that counsel must always be provided in felony cases,[100] but he balked at establishing a similar rule in less serious prosecutions. Rather than drawing a line "with such rigidity,"[101] Powell proposed a "middle course,"[102] focusing on the flexible due process question whether, in a particular case, a fundamentally fair trial can be had without counsel. While embracing *Gideon's* rejection of the "special circumstances" test associated with *Betts v. Brady*,[103] Powell advo-

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tried in state and federal court. Justice Powell, on the other hand, challenged the threshold assumption that a uniform standard under the sixth amendment must govern all cases. Instead, he applied the flexible due process test to the state prosecution in *Apodaca*, while adhering to prior cases applying a different standard to federal trials. The similarity between Harlan's opinion in *Ker* and Powell's approach in *Apodaca* suggests more than coincidence. *Apodaca* seems clearly to be an early indication that Justice Powell intends to model his approach to constitutional adjudication after Justice Harlan. The consequences for the development of equal protection doctrine, it will be seen, are substantial.

97. 407 U.S. 25, 44 (1972) (Powell, J., concurring).

98. The *Argersinger* majority did not reach the question whether counsel must also be appointed when no loss of liberty is involved but the accused may be subject to a fine upon conviction. *Id.* at 37. Justice Powell maintained, however, that the logic of the opinion made extension of the *Argersinger* rule to all cases inevitable:

> The Fifth and Fourteenth Amendments guarantee that property, as well as life and liberty, may not be taken from a person without affording him due process of law. The majority opinion suggests no constitutional basis for distinguishing between deprivations of liberty and property. In fact, the majority suggests no reason at all for drawing this distinction. The logic it advances for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed. *Id.* at 51-52 (Powell, J., concurring).

Cf. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

99. 372 U.S. 335 (1963).

100. 407 U.S. at 65 n.33 (Powell, J., concurring).

101. *Id.* at 47.

102. *Id.*

103. 316 U.S. 455 (1942). In *Betts*, the Court declined to hold that counsel must be appointed to assist indigents in all felony cases, but instead ruled that in some cases special circumstances may require the assignment of counsel to assure that the trial is fundamentally fair within the meaning of due process. Justice Powell cited Justice Harlan's concurring opinion in *Gideon*, which relied on developments *after Betts* to support the *Gideon* judgment replacing the case-by-case balancing approach with an absolute rule. 407 U.S. at 65 (Powell, J., concurring).

cated a case-by-case approach in misdemeanor prosecutions. In each case, the trial court should weigh several relevant factors in order to determine whether fundamental fairness requires the assignment of counsel.[104] Thus Powell endorsed the flexible, balancing approach advanced by Justice Harlan in prior cases.[105] Though quick to declare that the effects upon the system of criminal justice brought about by the majority's hard and fast rule would not influence his judgment on the constitutional question presented,[106] Powell nevertheless dwelled at length on the problems he envisioned—in apparent support of his basic view that application of the specific safeguards of the Bill of Rights to the states ignores serious practical difficulties. Once again, he challenged the incorporationist theory as inconsistent with the federal system, restricting the reach of the Bill of Rights in federal prosecutions while saddling the states with definite rules that make variety and experimentation impossible.[107]

In cases requiring interpretation of "specific" provisions of the Bill of Rights—federal prosecutions or state prosecutions clearly subject to federal rules because of incorporationist precedents —Justice Powell employs a similar case-by-case approach. *Barker v. Wingo*,[108] a habeas corpus case arising from a state criminal conviction, presented the question of the proper scope of the sixth amendment right to a speedy trial. Powell's majority opinion rejected the two rigid approaches urged by the parties and applied instead "a balancing test, in which the conduct of both the prosecution and the defendant are weighed."[109] Similarly, in federal cases

104. Specifically, Justice Powell proposed that judges consider the complexity of the offense charged, the probable sentence upon conviction, and the special circumstances of the accused in each case. *Id.* at 64.

105. *See* note 84 *supra*.

106. 407 U.S. at 62 (Powell, J., concurring).

107. In another 1972 Term case in which he might have applied a "specific" provision of the Bill of Rights—the jeopardy clause—in a state prosecution, Powell adhered instead to the flexible due process model adopted in prior cases. Chaffin v. Stynchcombe, 412 U.S. 17 (1973). The Powell majority opinion upheld a jury's imposition of a harsher sentence upon a person who had been reconvicted after a successful appeal. Once again, Powell approached the problem as calling for a balancing of interests. *See* Note, *supra* note 74, at 233-43. *Chaffin* was reaffirmed last term in Blackledge v. Perry, 417 U.S. ____, 94 S. Ct. 2098 (1974). In Gagnon v. Scarpelli, 411 U.S. 778 (1973), Justice Powell's majority opinion adopted a test for providing counsel in probation revocation proceedings that mirrored his concurring opinion in *Argersinger*.

108. 407 U.S. 514 (1972).

109. The petitioner contended that the sixth amendment requires that an accused in a

Powell takes the position that the Court should approach existing standards as "relatively unstructured."[110] In *Almeida-Sanchez v. United States*,[111] he concurred in the majority opinion invalidating a federal conviction based on evidence seized in a warrantless search.[112] Powell conceded that the search could not be justified under any recognized exception to the warrant requirement and accordingly voted for reversal, but his separate opinion proposed the adoption of a rule permitting magistrates to approve a series of "roving searches on a particular road or roads for a reasonable period of time."[113] The novel approach illustrates Powell's view that the Court's task in every case is to come to a reasoned judgment accommodating competing interests.[114] While he is slow to advocate the overruling of prior cases,[115] he does not hesitate to advance innovative solutions that attempt to resolve conflict. Powell's goal is fundamental fairness, and he attempts to achieve just that through a Harlanesque balancing process.[116]

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criminal case be brought to trial within a fixed period of time. The government argued that the right attaches only after a defendant demands trial and is waived for any period prior to a demand. Powell rejected both approaches and adopted instead a balancing test, which:

> [N]ecessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id.* at 530.

110. Almeida-Sanchez v. United States, 413 U.S. 266, 283 (1973) (Powell, J., concurring).

111. *Id.*

112. The search was conducted by the Border Patrol, and the government attempted to justify it under § 287(a) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a) (1970).

113. 413 U.S. at 283 (Powell, J., concurring).

> There is no reason why a judicial officer could not approve where appropriate a series of roving searches over the course of several days or weeks. Experience with an initial search or series of searches would be highly relevant in considering applications for renewal of a warrant. *Id.* at 283 n.3.

114. *See* note 116 *infra*.

115. Indeed, in United States v. United States Dist. Court, 407 U.S. 297 (1972), Justice Powell's majority opinion embraced the warrant requirement in domestic surveillance cases even though recent Burger Court cases had seemed to relax the general rule that a warrantless search is unreasonable per se, absent a specific exception. *Id.* at 315; *see* Adams v. Williams, 407 U.S. 143 (1972) (finding an exception to the warrant requirement in a street encounter between a police officer and a suspect). *But see* Schneckloth v. Bustamonte, 412 U.S. 218, 250-51 (1973) (Powell, J., concurring) (advocating that a prior case be overruled). *See also* Cardwell v. Lewis, 417 U.S. ___, 94 S. Ct. 2464, 2472 (1974) (Powell, J., concurring); Mitchell v. W.T. Grant Co., 416 U.S. ___, 94 S. Ct. 1895, 1908 (1974) (Powell, J., concurring).

116. Powell's statement of the problem in *Almeida-Sanchez* illustrates the frame of mind

Similarly, in cases outside the criminal procedure context, Justice Powell is most at ease when he is able to marshal broadly based considerations in a given case to the end of reconciling competing claims and coming to a reasoned judgment that sacrifices none but accommodates all. In *Arnett v. Kennedy*,[117] he thought that the Court's opinion did not give full attention to the significant procedural due process issue presented. The case involved the discharge of a federal employee under the provisions of the Lloyd-LaFollette Act.[118] Justice Rehnquist's plurality opinion seemed to view the employment as defined by the procedures for discharge enumerated in the statute granting the employee a reasonable expectation of continued employment.[119] With that, Justice Powell could not agree.

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in which he approaches constitutional adjudication.

> We are confronted here with the all-too-familiar necessity of reconciling a legitimate need of government with constitutionally protected rights. There can be no question as to the seriousness and legitimacy of the law enforcement problem with respect to enforcing along thousands of miles of open border valid immigration and related laws. Nor can there be any question as to the necessity, in our free society, of safeguarding persons against searches and seizures proscribed by the Fourth Amendment. I believe that a resolution of the issue raised by this case is possible with due recognition of both of these interests, and in a manner compatible with the prior decisions of this Court. 413 U.S. at 275.

Consider also Powell's statement of the case in another recent majority opinion.

> In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context. United States v. Calandra, 414 U.S. 338, 349 (1974).

117. 416 U.S. ___, 94 S. Ct. 1633 (1974).

118. 5 U.S.C. § 7501 (1970).

119. Specifically Justice Rehnquist said:

> Here appellee did have a statutory expectancy that he not be removed other than for "such cause as will promote the efficiency of the service." But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. 416 U.S. at ___, 94 S. Ct. at 1643.

Justice Powell charged:

> This [Rehnquist] view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. *Id.* at ___, 94 S. Ct. at 1650 (Powell, J., concurring) (footnote omitted).

The Rehnquist approach virtually read the due process clause out of the case, but Powell found a balanced application of it essential. He first concluded that Kennedy had been deprived of liberty or property within the meaning of recent cases[120] and then applied a balancing test to determine what procedural safeguards were required. Coming to the conclusion that the safeguards provided in the statute were sufficient, Powell concurred in the judgment but not the reasoning of the plurality opinion. Again in a concurring opinion, in *Mitchell v. W. T. Grant Co.*,[121] Powell adhered to his view that the due process clause governs any governmental deprivation of liberty or property and that, in a particular case, the question of what constitutes due process is answered through a careful balancing process, necessarily *ad hoc* and proceeding from the firm conviction that judges can and do determine the fundamental fairness of state action.[122]

A review of Justice Powell's constitutional opinions thus makes clear that he stands firmly in the tradition of the late Justice Harlan. From the time he took his seat during the 1971 Term, Powell has endeavored to analyze constitutional problems from the Harlan point of view. One recurring theme is that the principal vehicle for the review of state action is the flexible concept of due process,

120. *E.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). Not insignificantly, Justice Powell also found occasion for citing Justice Harlan's opinion for the Court in Boddie v. Connecticut, 401 U.S. 371 (1971). 416 U.S. at ___, 94 S. Ct. at 1649 n.1. In *Boddie*, the Court held that the due process clause prohibits a state from denying indigents access to its courts for purposes of seeking a divorce. Concurring opinions in *Boddie* by Justices Douglas and Brennan argued that the case presented a clear equal protection problem. Justice Harlan's reliance on due process sought to avoid equal protection analysis in favor of the more flexible and, to him, more useful concept of due process. In dissent, Justice Black scored the Court for resting its opinion "solely on a philosophy that any law violates due process if it is unreasonable, arbitrary, indecent, deviates from the fundamental, is shocking to the conscience, or fails to meet other tests composed of similar words or phrases equally lacking in any possible constitutional precision." 401 U.S. at 392-93. Nor, in Black's view, would the equal protection clause serve to accomplish the same result by another route. *Id.* at 394. The difference between Harlan and Black in *Boddie* was, of course, the same debate that had long raged between them. *See* note 84 *supra*. Justice Powell's continual reference to and reliance upon Harlan's opinions indicates that, in his view at least, Harlan has had the better of the argument.

121. 416 U.S. ___, 94 S. Ct. 1895, 1908 (1974).

122. Mr. Justice Powell stated:

> In brief, the Louisiana statute satisfies the essential prerequisites of procedural due process and represents *a fairer balancing of the interests* of the respective parties than the statutes in *Fuentes* [Fuentes v. Shevin, 407 U.S. 67 (1972)]. *Id.* at ___, 94 S. Ct. at 1909 (Powell, J., concurring) (emphasis added).

rather than the specifics of the Bill of Rights. And, even when straightforward interpretation of the Bill of Rights cannot be avoided, Powell tends toward a balancing standard that approximates due process adjudication. For Harlan and Powell, due process embodies a fundamental principle of fairness that can and must be ascertained and applied by judges. Justice Powell's firm grasp of, and persistent adherence to, flexible due process analysis has been carried over into the Burger Court's developing notions of equal protection. It is the thesis of this article that Powell's due process approach has, over the past three years, displaced the Warren Court's equal protection doctrine in virtually all cases. That thesis will now be stated in detail and defended by reference to recent cases.

III. Equal Protection According to Mr. Justice Powell

A. *Rumblings of Discontent*

Gerald Gunther was the first to identify in the Burger Court's equal protection opinions a definite shift from the result-oriented two-tier approach[123] to a more flexible analysis focusing on the rationality of the state's means in relation to its legitimate ends.[124] While following precedents imposing strict scrutiny in certain cases, the Burger Court clearly seems disinclined to identify new suspect classifications or fundamental interests that will invoke the stringent standard of review associated with the new equal protection.[125] Moreover, particularly in opinions written by Justices Powell and Marshall, there are signals that, at long last, the Court may be abandoning the post-*Lochner* minimum rationality model and embracing in its place an intermediate standard of review.[126] Powell

123. Gunther, *supra* note 2.

124. After reviewing some of the Burger Court's 1971 Term cases, Gunther concluded:

> The model suggested by the recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends. The equal protection requirement that legislative classifications must have a substantial relationship to legislative purposes is, after all, essentially a more specific formulation of that general principle. *Id.* at 20.

125. *Id.* at 20-48; *see* McCloskey, *supra* note 20, at 40-41.

126. Gunther described the developing trend as the old equal protection with "new bite."

opinions of particular importance in this development came in *Weber v. Aetna Casualty & Surety Co.*[127] and *James v. Strange.*[128]

Weber involved an equal protection challenge to a provision of the Louisiana workmen's compensation law defining "unacknowledged illegitimate children" as "other dependents" rather than "children." The resulting classification relegated unacknowledged offspring to an inferior position in the legislative scheme, permitting them to recover benefits only if legitimate and acknowledged illegitimate children failed to exhaust the maximum benefits allowed under the statute.[129] The Louisiana Supreme Court deftly distinguished Supreme Court precedents that seemed on their face to condemn discrimination against illegitimate children[130] and upheld the classification as a valid legislative attempt to protect "legitimate family relationships."[131] For a near unanimous Court,[132] Justice Powell rejected the state court's reasoning, concluding that "the inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve."[133]

The analysis employed in *Weber* merits careful examination. Jus-

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Gunther, *supra* note 2, at 20. Professor Goodpaster distinguishes the intermediate standard of review from the minimum rationality model by terming the former a "reasonable basis standard." Goodpaster, *supra* note 16, at 483.

127. 406 U.S. 164 (1972).

128. 407 U.S. 128 (1972).

129. 406 U.S. at 167-68.

130. *E.g.*, Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968). The state relied principally upon Justice Black's opinion for the Court in Labine v. Vincent, 401 U.S. 532 (1971), but Justice Powell distinguished that case on the ground that the issue there had arisen in the context of the Louisiana intestacy laws, traditionally an area of intense state concern. 406 U.S. at 170.

131. Stokes v. Aetna Cas. & Sur. Co., 257 La. 424, 433, 242 So. 2d 567, 570 (1970); *see* 406 U.S. at 173.

132. Mr. Justice Blackmun concurred separately; Mr. Justice Rehnquist dissented in an extended opinion challenging both the two-tier approach to equal protection analysis and Justice Powell's over-arching variant of it as departing from the intent of the framers of the fourteenth amendment. 406 U.S. at 181 (Rehnquist, J., dissenting). In Justice Rehnquist's view, the equal protection clause was intended to govern only racial discrimination. *See* note 292 *infra*. In other contexts, "[t]he Equal Protection Clause of the Fourteenth Amendment requires neither that state enactments be 'logical' nor does it require that they be 'just' in the common meaning of those terms. It requires only that there be some conceivable set of facts that may justify the classification involved." 406 U.S. at 183.

133. 406 U.S. at 175.

tice Powell relied principally upon *Levy v. Louisiana*,[134] in which Justice Douglas had struck down a Louisiana statute which barred recovery by an illegitimate child for the wrongful death of a parent. In *Weber*, Powell stated the *Levy* doctrinal standard, unclear in *Levy* itself, to be a dual inquiry: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[135] Powell cited cases applying the minimum rationality standard as well as Warren Court strict scrutiny opinions and declared that a single standard of review is applicable in *all* equal protection cases.[136]

Justice Powell then proceeded to examine the equal protection challenge in *Weber* on the basis of this single, all-embracing model. Alternating between minimum rationality and strict scrutiny language,[137] he questioned whether denying workmen's compensation benefits to unacknowledged illegitimates served the state's end of discouraging illicit sexual relationships.[138] It could hardly be as-

134. 391 U.S. 68 (1968).

135. 406 U.S. at 173.

136. *Id.* at 172; *see* Section IV *infra*; *e.g.*, Morey v. Doud, 354 U.S. 457 (1957) (minimum rationality); Brown v. Board of Educ., 347 U.S. 483 (1954) (strict scrutiny). Justice Rehnquist's assessment of the Powell approach is worth repeating:

> The Court in today's opinion, recognizing that two different standards have been applied in equal protection cases, apparently formulates a hybrid standard which is the basis of decision here. The standard is a two-pronged one:
>
> > "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"
>
> Surely there could be no better nor more succinct guide to sound legislation than that suggested by these two questions. They are somewhat less useful, however, as guides to constitutional adjudication. How is this Court to determine whether or not a state interest is "legitimate"? And how is the Court to know when it is dealing with a "fundamental personal right"? 406 U.S. at 181.

Justice Rehnquist thus attacked the equal protection analysis developed by the Warren Court and apparently altered by Justice Powell as a return to the Old Court's substantive due process approach under the guise of equal protection. Rehnquist found no constitutional authority permitting the Court to assess the legitimacy or importance of governmental and personal interests. In his view, the exercise of that sort of judgment lies with the legislature.

137. For example, Justice Powell repeated the traditional minimum rationality rule that "[t]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." 406 U.S. at 172. But elsewhere in the opinion, he said: "Whatever the merits . . . of . . . [the state's] contention, it is not *compelling* in a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone's recovery . . . ." *Id.* at 173 (emphasis supplied).

138. *Id.* at 173.

sumed that individuals avoid extra-marital relations because offspring of such liaisons will be ineligible for workmen's compensation benefits in the future.[139] Nor could it be said that the Louisiana classification took account of closer family relationships associated with acknowledged offspring living in the parent's home. Indeed, the workmen's compensation statute required that anyone recovering benefits must show himself to have been dependent upon the deceased.[140] Powell conceded that Louisiana must be given broad leeway to draw arbitrary lines in complex social legislation in order to avoid difficult problems of proof, but he found that the requirement that persons permitted to recover benefits must have been dependent upon the deceased sufficiently protected the legislative scheme from becoming embroiled in time consuming fact-finding. The additional requirement that illegitimate children be acknowledged appeared ineffectual. Finally, Powell urged that the age-old condemnation of extra-marital liaisons should not be visited upon the unfortunate offspring of illicit relationships. To burden the child because of his parents' irresponsibility would be to disregard "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[141] Although the courts lack power to prevent "the social opprobrium suffered by these hapless children,"[142] Powell insisted that the equal protection clause does provide courts with constitutional authority to strike down legislative classifications that discriminate against illegitimates without justification, "compelling or otherwise."[143]

While the Powell opinion in *Weber* might be explained as only an illustration of the Court's preference for the minimum rationality model when strict scrutiny is unnecessary to invalidate a discriminatory classification,[144] the case seems to go further. Clearly, Powell consciously avoided the two-tier approach to equal protection adjudication. He declined to declare at the outset that illegitimacy is a constitutionally suspect classification which will invoke strict judicial scrutiny in any case in which a state regulatory scheme catego-

139. *See* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968).
140. 406 U.S. at 173-74.
141. *Id.* at 175.
142. *Id.* at 176.
143. *Id.*
144. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Powell, J., concurring).

rizes persons on that basis. Yet his references to "compelling"[145] state interests indicate that he did, indeed, analyze the case under the strict scrutiny model. On the other hand, his references to "legitimate"[146] or "rational"[147] state concerns suggest the minimum rationality standard of review. That model has traditionally required the Court to give credence to conceivable state purposes that might be served by the classification under attack.[148] Yet Powell hardly strained his imagination to postulate possible objectives to be furthered by the classification in *Weber*. On the contrary, he focused on the purpose asserted by Louisiana and then examined the classification thoroughly to determine whether it rationally related to that avowed state end. He seemed poised to discredit the state's contentions in the case, to view the constitutional problem in the light of the "recognized"[149] purposes of workmen's compensation laws, and to ask, in the final analysis, whether the classification was rational, that is, whether the governmental action involved was fundamentally fair. Powell's concluding remarks were, perhaps, most telling. He declared that the Louisiana statute was "illogical,"[150] "unjust,"[151] and contrary to a "basic concept of our system."[152] The reader hardly needs more to be reminded of Justice Harlan's eloquent defense of the notion of fundamental fairness he found embodied in due process.[153]

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145. 406 U.S. at 173, 176.

146. *Id.* at 172, 173, 176.

147. *Id.* at 172.

148. *Id.* at 183 (Rehnquist, J., dissenting); *see* case cited in and text accompanying note 12 *supra*.

149. 406 U.S. at 175.

150. *Id.*

151. *Id.* (footnote omitted).

152. *Id.*

153. *See, e.g.*, Justice Harlan's majority opinion in Boddie v. Connecticut, 401 U.S. 371 (1970). Ironically, Justice Harlan dissented strenuously in *Levy*, the case relied upon by Powell in *Weber*. In Harlan's view, the Louisiana wrongful death statute challenged in *Levy* was only one of many examples of legislative line-drawing. He was not persuaded that the equal protection clause required the legislature to take account of the nature of personal relationships and dependence in determining who was to be afforded a statutory right of action arising out of the death of another. On the contrary, he found the Louisiana decision to base the right on legal rather than biological relations entirely rational. Justice Harlan reserved his strongest criticism for the suggestion in the Douglas majority opinion that illegitimacy might be, like race, a suspect classification. Thus his dissent also stemmed from his distaste for the two-tier approach to equal protection analysis. Levy v. Louisiana, 391 U.S. 68, 81 (1968) (Harlan, J., dissenting). If Harlan had been on the Court for *Weber* it is likely

James v. Strange[154] involved a Kansas statute providing for the recoupment from the accused of the costs of providing him with court-appointed counsel at trial. The statute was designed to permit the state to proceed against a person who, at the time of trial, is unable to procure counsel but who later becomes able to repay the costs of his defense.[155] A three-judge district court sustained the petitioner's principal contention that the recoupment statute impermissibly encouraged an indigent defendant to forego the assistance of counsel.[156] In the Supreme Court, Justice Powell, writing for the majority, adopted a narrower, alternative view of the case. Under the terms of the statute, the indigent defendant was denied the ordinary exemptions afforded by the code of civil procedure to other debtors.[157] While the civil code protected other debtors' wages, personal clothing, books, and tools of trade, the recoupment statute made those very possessions subject to attachment by the state to regain from the convict the costs of his criminal defense.[158] Because the recoupment statute discriminated unreasonably between convicts and other debtors, Powell concluded that it violated the equal protection clause.

The significance of *James* lies in Powell's thorough examination of the justifications advanced by the state in support of the recoupment statute. Although the case clearly did not fall within the class of cases subject to strict scrutiny, Powell applied a standard more

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that he would have again dissented, but the possibility remains that he would have agreed with Powell's treatment of the merits—divorced from the rigidity of the new equal protection. In any event, Powell's *Weber* opinion is not inconsistent with the basic Harlan approach to constitutional adjudication. At most, the two men might have disagreed on the appropriate balance to be struck between the competing interests involved.

154. 407 U.S. 128 (1972).

155. KAN. STAT. ANN. § 22-4513 (Supp. 1971).

156. James v. Strange, 323 F. Supp. 1230 (D. Kan. 1971). *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

157. KAN. STAT. ANN. § 22-4513(a) (Supp. 1971). Professor Gunther has offered *James* as an illustration of the Burger Court's preference for narrow holdings based upon equal protection analysis to avoid broad questions presented on the face of docketed cases. Gunther, *supra* note 2, at 26. If Powell's approach in *James* was intended as a device for putting off a decision on the straightforward sixth amendment issue dealt with below, his success was Pyrrhic at best. Last term, in Fuller v. Oregon, 417 U.S. ___, 94 S. Ct. 2116 (1974), the Court faced and decided the right-to-counsel issue left open in *James*. In an opinion by Mr. Justice Stewart, the Court held that a recoupment statute does not impinge upon the right to counsel. Justice Powell voted with the majority.

158. 407 U.S. at 135; *see* KAN. STAT. ANN. §§ 60-2301-11 (1964, Supp. 1971).

stringent than minimum rationality. Rather than postulating what legitimate purposes might be served by treating convicts subject to the recoupment law differently from other debtors, Powell addressed himself only to the arguments asserted by the state. Kansas contended that the state's claims against its citizens might justifiably take priority over obligations arising from private transactions.[159] But Justice Powell noted that another Kansas statute, which provided for recoupment of public assistance benefits paid to an ineligible recipient, did not deny the individual involved the ordinary exemptions set forth in the civil code.[160] Accordingly, the recoupment statute concerning ex-felons seemed clearly to single out convicts for inferior treatment, even as against other debtors of the state. Powell further reasoned that a person who has been convicted of an offense often has difficulty obtaining employment after his release from prison. The recoupment statute, by making any earnings obtained subject to attachment, actually discouraged convicts from seeking employment and attendant self-betterment. Justice Powell recognized that recoupment proceedings may protect the state treasury from fraudulent assertions of indigency and help meet the rising costs of providing counsel.[161] He concluded, however, that a more even-handed treatment of persons indebted to the state would not unduly hamper the state in its legitimate attempt to conserve public funds.

The concluding passages of the *James* opinion revealed once again Justice Powell's persistent concern that state action be fundamentally fair. State statutes, said Powell, "need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect."[162] The recoupment statute under attack embodied "elements of punitiveness and discrimination"[163] that Powell found inconsistent with the equal protection clause. Thus *James* closed as had *Weber*. After a thorough treatment of the merits of the arguments advanced by the state, Powell found the statute to be arbitrary—that is, not rationally related to the purpose for which it was intended. The strong concluding language again suggested that

159. 407 U.S. at 138.
160. *Id.* at 137; *see* KAN. STAT. ANN. §§ 39-719(b) (1964) & 59-2006 (Supp. 1971).
161. 407 U.S. at 141.
162. *Id.* at 141-42.
163. *Id.* at 142.

Powell's principal approach is a search for fairness, in equal protection as well as due process cases. Accepting the legislature's policy decision in choosing recoupment of defense costs as an objective, Justice Powell focused on the narrow question whether the means chosen, a classification denying to one class of debtors the statutory exemptions afforded to others, rationally furthered the state's purpose. The technique, clothed in equal protection language, rests at bottom on the due process analysis urged by Justice Harlan.[164]

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164. Specifically, Justice Powell said:

> We do not inquire whether this statute is wise or desirable, or "whether it is based on assumptions scientifically substantiated." Roth v. United States, 354 U.S. 476, 501 (1957) (separate opinion of Harlan, J.). Misguided laws may nonetheless be constitutional . . . . Our task, however, is not to weigh this statute's effectiveness but its constitutionality. *Id.* at 133 (footnote omitted).

Relying on *James*, Justice Powell wrote another opinion for the Court a few months later in McGinnis v. Royster, 410 U.S. 263 (1973). *McGinnis* involved an equal protection challenge to a New York statute denying "good-time" credit, for purposes of computing a parole eligibility date, to *state* prisoners awaiting sentence in the county jail while providing credit to *county* prisoners and to persons released on bond pending sentencing. Powell stated the appropriate test to be "only whether the challenged distinction rationally furthers some legitimate, articulated state purpose." *Id.* at 270. The reference to an *articulated* purpose indicated that Powell was not prepared to postulate possible justifying rationales for the statute, even though the minimum rationality standard of review ordinarily calls for just that. Indeed, Powell expressly stated that he would supply "no imaginary basis or purpose for this statutory scheme." *Id.* at 277. Nevertheless, he upheld the New York law on the ground that one of its purposes was to further the prisoners' rehabilitation. While state prisons were furnished with various programs for the betterment of inmates, county jails were mere detention centers. The state contended, and Justice Powell held, that it was reasonable to withhold "good-time" credit from jail prisoners because they were not entitled to be rewarded for rehabilitative effort. Indeed, no such effort was possible in a county jail. Once again, Powell's focus was on the vertical relationship between the individual and the state, and the crucial question was whether the state had a reasonable basis for denying a benefit, in this case "good-time" credit. He minimized the horizontal relationship between state and county prisoners and between state prisoners in jail and those able to post bond. In dissent, Justice Douglas complained that Powell overlooked obvious discrimination on the basis of wealth. *Id.* at 282. *Cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), discussed in Section III-B *infra*.

McGinnis is also significant for Justice Powell's refusal to look beyond one legitimate state purpose served by the classification under attack, even when other, perhaps primary, objectives seemed not to be rationally furthered by it. The plaintiffs contended that, while the rehabilitation of inmates was a subsidiary objective served by the statute governing "good-time" credits, the principal aim of the law was the maintenance of prison discipline. That being the case, awarding "good-time" credit for good behavior was just as appropriate in jails as in state prisons. Justice Powell responded:

> [O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate . . . . So long as the

B. Rodriguez—The Demise of Equal Protection Analysis in the Supreme Court

In *San Antonio Independent School District v. Rodriguez*,[165] the Supreme Court addressed the "far-reaching constitutional questions"[166] presented in a class action challenge to the Texas system of financing public schools. The complex legislation under attack, the Texas Minimum Foundation School Program,[167] relied upon general state revenues for eighty percent of its financial support and upon a Local Fund Assignment for the remaining twenty percent.[168] The Local Fund Assignment in turn depended upon a local property tax network that forced each school district to contribute to the education of its children.[169] In addition to the property taxes required by the Local Fund Assignment, every district imposed additional property taxes upon itself to generate supplemental funds to be spent locally. Thus the total expenditure per child in a given district equalled the sum of the state contribution through the Minimum Foundation School Program, twenty percent of which was contributed by the local district under the Local Fund Assignment requirement, and whatever further funds might be raised through additional property taxes at the local level. The "core-city"[170] school district in which the plaintiffs resided spent a total of $248 per pupil from state and local sources in the 1967-1968 school year.[171] In contrast, a more affluent district, located in a San Antonio suburb, spent $558 per pupil during the same period.[172] The substantial disparity was due to the affluent district's superior taxpaying capability. In that district the assessed property value per pupil was

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state purpose upholding a statutory class is legitimate and non-illusory, its lack of primacy is not disqualifying. 410 U.S. at 276.

For general discussions of the difficulty surrounding the identification of legislative purpose, see *Developments*, *supra* note 10, at 1077-87, and Gunther, *supra* note 2, at 46-48.

165. 411 U.S. 1 (1973).

166. *Id.* at 6.

167. *Id.* at 9; *see* R. STILL, THE GILMER-AIKIN BILLS (1950).

168. 411 U.S. at 9.

169. *See* TEXAS STATE BOARD OF EDUCATION, A REPORT OF THE ADEQUACY OF TEXAS SCHOOLS (1938).

170. 411 U.S. at 12.

171. *Id.* In addition, the district received federal funds in the amount of $108 per pupil, bringing the total expenditure per child to $356.

172. 411 U.S. at 13. The federal funds received by the affluent district added $36 per pupil, making the expenditure per child in that district a total of $594.

more than $49,000, and, at a local tax rate of $.85 per $100 of valuation, the district was able to generate a sizeable sum to meet the costs of financing its schools.[173] In the poor district, on the other hand, the assessed property value per pupil was only $5,960, raising, on the basis of a local tax rate of $1.05 per $100 of valuation, a considerably smaller amount for school financing.[174] A three-judge district court found that the Texas statutory scheme resulted in "substantial interdistrict disparities in school expenditures . . . largely attributable to differences in the amounts of money collected through local property taxation"[175] and held the system unconstitutional as violative of the equal protection clause. Viewing wealth as a constitutionally suspect classification and education as a fundamental interest, the district court applied the strict scrutiny standard of review.[176] The court concluded, not only that the state could not demonstrate a compelling justification[177] for the classification, but that not even a reasonable basis for it had been shown.[178]

In the Supreme Court, Justice Powell, writing for the majority, began with the following statement of the case.

> We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right *explicitly or implicitly protected by the Constitution*, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, *articulated* state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.[179]

With that definition of the task, Powell began the Burger Court's most thorough and revealing inquiry into equal protection doctrine. The Powell opinion in *Rodriguez* was a broadside attempt to synthesize the cases that had gone before and to set forth a consistent analytical model to govern future equal protection adjudication.[180]

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173. 411 U.S. at 13.

174. *Id.* at 12.

175. *Id.* at 15-16; *see* Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280 (W.D. Tex. 1971).

176. 337 F. Supp. at 282-84.

177. *See* cases cited in and text accompanying notes 31-34 *supra*.

178. 337 F. Supp. at 284.

179. 411 U.S. at 17 (emphasis supplied).

180. At this point a caveat is appropriate. The Powell opinion in *Rodriguez* may arguably

The success of that attempt, it will be argued here, is measurable by the extent to which Powell was able to restrict the reach of equal protection analysis and replace it with a Harlanesque flexible due process approach to a wide range of constitutional questions.

1. Suspect Classifications: Toward a Notion of Constitutional Adequacy.

Justice Powell first examined the question whether the strict scrutiny standard of review was applicable because the Texas school financing system discriminated on the basis of wealth. Powell recognized that some prior cases had suggested that wealth is a suspect classification,[181] but he called attention to a threshold consideration: the class of impoverished persons allegedly suffering wealth discrimination must be "identified or defined in customary equal protection terms."[182] In other cases in which the Court had strictly scruti-

be written off as an atypical situation in which the Court was required to fashion special rules in a factually complex case. Indeed, Powell early declared the case to be *sui generis* in "significant aspects" and not "neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause." *Id.* at 18. Moreover, at one point Justice Powell hypothesized a school financing system "in which the analogy to the wealth discrimination cases would be considerably closer." *Id.* at 25 n.60; *see* notes 188, 217 *infra*. The inference from Powell's language is that he did not consider the case *sub judice* of a piece with ordinary equal protection cases, but rather an aberrational case in which the Court was asked to review for reasonableness an enormously complicated state regulative scheme. His attempt to cast the school financing system as a mere taxation measure, subject to the most relaxed standard of review, is consistent with this view of the case. *Id.* at 40-41; *see* Madden v. Kentucky, 309 U.S. 83, 87-88 (1940); 411 U.S. at 116-17 n.75 (Marshall, J., dissenting).

On the other hand, *Rodriguez* can hardly be lifted out of the context in which it was decided. For some time, the Court had been wrestling with innovative equal protection doctrine, never fully explaining the precise nature of the test it was gradually developing. Powell's extensive analysis in *Rodriguez*, treating most of the elements of the Warren Court's two-tier approach to equal protection, sheds some light on the doctrine that is now taking shape.

181. *E.g.*, McDonald v. Board of Election Commr's, 394 U.S. 802 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Even Mr. Justice Marshall acknowleged, however, that the Court has never declared that wealth discrimination alone requires the invocation of strict scrutiny. 411 U.S. at 121.

182. 411 U.S. at 19. As Justice Powell viewed the case, the class represented by the plaintiffs might be described in three different ways:

> The Texas system of school financing might be regarded as discriminating (1) against "poor" persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally "indigent," or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal

nized wealth classifications, the class consisted of functionally indigent persons whose poverty left them utterly unable to pay for some desired benefit.[183] But here no clearly defined class of indigents was involved. Many impoverished people might live in relatively wealthy school districts, "clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts."[184] Thus, on the record, the *Rodriguez* plaintiffs had not established that they represented a neatly drawn class of indigent persons. Moreover, in prior cases, the class suffering wealth discrimination had suffered an "absolute deprivation of a meaningful opportunity to enjoy"[185] a desired benefit. In *Rodriguez*, there was no allegation that children in poor districts received no education at all. On the contrary, Texas argued strenuously that, however flawed, its school financing system insured that every child in the state received an adequate education.[186] Coupled with his common sense evaluation that no system can assure equal quality of education to all, the state's evidence persuaded Justice Powell that no absolute deprivation of educational opportunity had occurred.[187] At most the plaintiffs contended that the education open to them in poor districts was inferior to that available in well-heeled areas.[188] Powell's opinion relied on two War-

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incomes, happen to reside in relatively poorer school districts. *Id.* at 19-20 (footnotes omitted).

Of the three possibilities, Powell found only the first to arguably meet the criteria established by wealth discrimination precedents. Accordingly, his principal discussion focused on a class defined as the functionally indigent. *See* 411 U.S. at 61 n.6 (Stewart, J., concurring); James v. Valtierra, 402 U.S. 137 (1971). The other two possible formulations of the class were summarily rejected, the second for want of support in the record, and the third for lack of "the traditional indicia of suspectness." 411 U.S. at 28; *see* text accompanying notes 35-43 *supra*. Justice Marshall's dissenting opinion defined the class suffering discrimination as Texas school children living in districts with low assessable property values. 411 U.S. at 96.

183. In support of this proposition, Justice Powell cited Bullock v. Carter, 405 U.S. 134 (1972); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963); and Griffin v. Illinois, 351 U.S. 12 (1956).

184. 411 U.S. at 23 (footnote omitted). In this connection, Powell relied not upon anything in the record from Texas but upon the results of a study undertaken in Connecticut. *See* Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1328-29 (1972).

185. 411 U.S. at 20.

186. Texas argued that the Minimum Foundation School Program it had established was, after all, intended to afford each child just that—a minimum foundation. *Id.* at 24.

187. *Id.*

188. In a footnote to this portion of his opinion, Justice Powell indicated that a school

ren Court cases that have long been the subject of discussion. Those cases are *Griffin v. Illinois*,[189] and *Douglas v. California*.[190]

Griffin invalidated the Illinois practice of supplying free trial transcripts to indigent criminal appellants only in capital cases. In all other cases, the appellant was required to purchase a trial record for use in the appellate process.[191] Over a stinging dissent by Justice Harlan, who would have relied only on due process,[192] the Court held that the Illinois practice violated both the equal protection and due process clauses.[193] While recognizing that the states are not constitutionally required to provide a right of appeal in criminal cases,[194] the Court held that, once the right to appellate review is granted, a state cannot administer it in a manner that discriminates among convicts on the basis of wealth.[195] Significantly, however, the Court did not

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financing system that made elementary and secondary education available only to those students able to pay a fee taxed against each child would present a stronger case for strict scrutiny. In that situation, the class of persons suffering from wealth discrimination would be rather clearly defined to include only those unable to pay the tuition fee fixed by the state, and the deprivation of benefits on failure to pay would be absolute. In Texas, argued Powell, the school financing system was quite different. The state had afforded everyone what it considered a minimum education and conditioned only a superior education upon the ability to generate more revenue through the property tax. *Id.* at 25 n.60; *see* note 217 *infra*.

189. 351 U.S. 12 (1956).

190. 372 U.S. 353 (1963).

191. Indigent persons unable to pay for a transcript were allowed to appeal, but the review given their convictions was confined to an examination of a "mandatory record," including only the indictment, arraignment, plea, verdict, and sentence, provided at state expense. For indigents, then, appellate review was limited to errors appearing on the face of the mandatory record; other errors occurring at trial could not be considered. 351 U.S. 12, 13-14 n.2 (1956); *see* Comment, *The Indigent's Right to a Transcript of Record*, 20 KAN. L. REV. 745, 748 (1972).

192. Justice Harlan's precise words warrant quotation:

> [T]he issue here is not the typical equal protection question of the reasonableness of a "classification" on the basis of which the State has imposed legal disabilities, but rather the reasonableness of the State's failure to remove natural disabilities. The Court holds that the failure of the State to do so is constitutionally unreasonable in this case although it might not be in others. I submit that the basis for that holding is simply an unarticulated conclusion that it violates "fundamental fairness" for a State which provides for appellate review, and thus apparently considers such review necessary to assure justice, not to see to it that such appeals are in fact available to those it would imprison for serious crimes. That, of course, is the traditional language of due process . . . and I see no reason to import new substance into the concept of equal protection to dispose of the case . . . . 351 U.S. at 35-36 (Harlan, J., dissenting) (citation omitted).

193. *Id.* at 18.

194. *Id.*; *see* McKane v. Durston, 153 U.S. 684, 687-88 (1894).

195. The standard Justice Black applied for the Court in *Griffin* seems closer to due process

hold that the state "must purchase a stenographer's transcript in every case where a defendant cannot buy it."[196] What was at stake was "adequate and effective appellate review,"[197] and that might be achieved through alternative means. Later cases elaborated on *Griffin's* language by holding that the Constitution requires only a "record of sufficient completeness" to permit "adequate and effective" review.[198] Similarly, in *Douglas*, the Court held that, if a state provides a right of appeal in criminal cases and permits affluent persons to procure counsel to represent them in that process, both the equal protection and due process clauses require that counsel be supplied free of charge to indigents.[199] Once again the question was the adequacy and effectiveness of the appellate process. *Douglas* did not hold that impoverished persons are entitled to "the best legal talent available,"[200] but only to representation that makes adequate review possible. Reaffirming in *Douglas* his position in *Griffin*, Justice Harlan again dissented, protesting the Court's use of equal protection analysis. To Harlan, both cases warranted only review for fundamental fairness under the due process clause, and the disparity in treatment received by persons similarly situated was relevant, if at all, only as evidence of the fairness of the treatment afforded a particular individual.[201] The Court in *Douglas* rejected Harlan's result but embraced to some extent his approach, choosing to supple-

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than equal protection. First, he declared that the legislature might have declined to establish a system of appellate review at all; the decision to act affirmatively to grant a right of appeal was thus solely within the legislative prerogative. Once appellate review had been voluntarily established as the state's purpose, however, the Constitution entered the picture to govern the way in which the state went about achieving its objective. Black's references to a "fair" trial and "rational relationship" suggest heavy reliance upon the due process rationale. The thrust of the opinion focused on the fundamental fairness to individuals rather than a notion of equality among all those involved in the appellate process. *See* Comment, *Griffin v. Illinois: The Right to "Adequate and Effective" Appellate Review*, 55 MICH. L. REV. 413, 417 (1957). Later, Justice Harlan maintained that, in *Griffin*, "although reference was made indiscriminately to both equal protection and due process the analysis was cast primarily in terms of the latter." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 682 n.3 (1966) (Harlan, J., dissenting).

196. 351 U.S. at 20.

197. *Id.* Thus Black suggested that a bystander's bill of exceptions might be used in some cases.

198. Draper v. Washington, 372 U.S. 487, 499 (1963); *see* Coppedge v. United States, 369 U.S. 438 (1962).

199. 372 U.S. 353 (1963).

200. *Id.* at 363 (Harlan, J., dissenting).

201. *Id.*

ment its reliance on equal protection with a reference to due process as well. Thus an assessment of the fairness of the vertical relationship between the individual and the state was critical, apart from the Court's focus on the horizontal relationship between rich and poor defendants. The principle to be drawn out of these cases is that absolute equality of treatment between rich and poor is not constitutionally required. Taken together, the equal protection and due process clauses demand only that the state not draw lines that invidiously discriminate against the poor—treating them, that is, in a fundamentally unfair manner.[202]

In *Rodriguez*, Justice Powell contended that *Griffin* and *Douglas* support the proposition that, in order to invoke strict scrutiny, a wealth discrimination case must involve an absolute deprivation of some benefit. Powell argued that in *Griffin* the indigent appellants were absolutely denied a transcript, and that in *Douglas* impoverished appellants were deprived of counsel. Dissenting in *Rodriguez*, Justice Marshall forcefully objected that Powell's focus was misplaced.[203] The real interest in both *Griffin* and *Douglas* was in the adequacy of appellate review, not transcripts or court-appointed attorneys. "The right of appeal itself was not absolutely denied to those too poor to pay; but because of the cost of a transcript and of counsel, the appeal was a substantially less meaningful right for the poor than for the rich."[204] Nevertheless, while Powell

202. The principle has been stated as follows:

> The root idea of the *Griffin* and *Douglas* cases may not be that every inequality of any consequence in the criminal process is taboo, but only that due process incorporates a basic notion of equality. It may be that the *Griffin-Douglas* principle does not come into play unless and until "discriminations" based on wealth work an inequality so significant in the criminal process as to amount to "fundamental unfairness." Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 10 (1963).

203. 411 U.S. at 119-20 (Marshall, J., dissenting).

204. *Id.* at 119 (footnote omitted). Justice Marshall also cited Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), as an illustration of the Court's past willingness to strictly scrutinize state action when no absolute deprivation of benefits is shown. *Harper* invalidated, on equal protection grounds, a Virginia poll tax charged as a prerequisite to voting. The Court struck down the tax as it applied to everyone, even those able to pay it. Thus, in Marshall's view, *Harper* rejected the position now taken by Justice Powell that an absolute denial of benefits is necessary to invoke strict scrutiny review. Clearly, the voters in *Harper* who were able to pay the tax were not totally deprived of the franchise, yet they obtained relief just as

may have mistaken the real import of *Griffin* and *Douglas* in his *Rodriguez* analysis, those cases do, in fact, support his basic position. They stand for the proposition that the Constitution is not violated in a wealth discrimination case unless the deprivation of benefits is substantial. Both cases relied, not only upon a sense of equality requiring even-handed treatment of persons similarly situated, but upon a notion of fundamental fairness between the state and a particular individual, irrespective of the treatment afforded to others.[205] In the criminal process, a pauper is not entitled to a verbatim trial transcript merely because an affluent defendant can buy one. Nor can he demand the assistance of the most capable defense attorney to be found merely because a wealthy defendant is able to purchase his services. The basic issue is fundamental fairness; discrimination is not unconstitutional until state action is so arbitrary as to violate due process. Quite clearly the equal protection clause alone would not support either *Griffin* or *Douglas*; it was the flexible due process approach propounded by Justice Harlan, albeit in dissent, that provided the rationale of the decisions.

The Harlan view in *Griffin* and *Douglas* was enormously persuasive a decade later in *Rodriguez*. Justice Powell's insistence that an absolute deprivation of educational opportunity be shown thus

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did those who were unable to pay it and who were absolutely barred from voting. On the other hand, it can be argued that *Harper* is distinguishable as a voting rights case. To the extent strict review depended in that case on the infringement of the interest in voting, it may be inadequate precedent for Marshall's purposes in *Rodriguez*.

It is noteworthy that Marshall listed *Griffin* and *Douglas* as illustrations of strict scrutiny review in cases involving fundamental interests. While he recognized that the cases also involved discrimination on the basis of wealth, he nevertheless was persuaded that they "can only be understood as premised on a recognition of the fundamental importance of the criminal appellate process." 411 U.S. at 102 n.61. *But see* Schilb v. Kuebel, 404 U.S. 357 (1971). As was his reliance on *Harper*, Marshall's characterization of *Griffin-Douglas* is questionable. Cynically, it may be said that viewing those cases as belonging to the fundamental interest branch of the new equal protection serves too neatly Marshall's argument that fundamental interests need not be constitutional rights. *See* note 254 *infra*.

205. In Ross v. Moffitt, 417 U.S. ___, 94 S. Ct. 2437 (1974), a recent case declining to extend *Douglas* to require the appointment of counsel for discretionary appeals, Justice Rehnquist had this to say about the relationship between equal protection and due process:

> "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity . . . between classes of individuals whose situations are arguably indistinguishable. *Id.* at ___, 94 S. Ct. at 2443.

was geared, not to an egalitarian ideal of identical treatment for all fostered by the equal protection clause, but to a fundamental notion of minimum protection for each traceable to flexible due process. Justice Marshall, dissenting, charged Powell with embracing a principle of "constitutional adequacy,"[206] contemplating that poor people can validly be given inferior treatment so long as everyone is afforded "some unspecified amount . . . which evidently is 'enough.' "[207] Marshall contended that the equal protection clause speaks, not to "minimal sufficiency" but to "unjustifiable inequalities."[208] Clearly, Marshall's focus was on the concept of equality; he insisted that similarly situated persons must receive treatment that is substantially the same, with a margin of error permitted only as a matter of practical necessity.[209] Powell, on the other hand, focused on the relationship between a single individual and the state, asking at what point the treatment afforded the individual becomes so unfair that the Court should intervene to protect the essentials of ordered liberty. The Powell approach is not independent of equality, but the treatment received by others becomes relevant only as a measure of what is fair in the particular context. Equality is not Powell's central concern but is merely an indicator of how much is enough and how little is fundamentally unfair. It therefore should have come as no surprise to Justice Marshall that Powell maintains a sense of "constitutional adequacy," and he need not have asked, as he did, where Powell finds "judicially manageable standards . . . for determining how much education is 'enough' to excuse constitutional discrimination."[210] The source of standards for Justice Powell

206. 411 U.S. at 89 (Marshall, J., dissenting).

207. *Id.* at 88.

208. *Id.* at 89.

209. *Id.* at 88. The difference in philosophy between Justices Powell and Marshall turns on the meaning each attaches to the language in numerous cases that the equal protection clause does not demand that state statutes achieve "abstract symmetry," Patsone v. Pennsylvania, 232 U.S. 138, 144 (1914), or "mathematical nicety." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See* Douglas v. California, 372 U.S. 353, 363 (1963) (Harlan, J., dissenting) (indigents not entitled to the best attorney); Tigner v. Texas, 310 U.S. 141, 147 (1940) (fourteenth amendment does not require "disembodied equality" in state statutes). For Powell, these cases underscore his basic view that equal protection does not strive for a general leveling but for fairness between the individual and the state, with recognition that the treatment afforded others is evidence of what society takes to be just in the context. For Marshall, however, the equal protection clause does, indeed, look to "substantial equality." 411 U.S. at 119 n.76.

210. 411 U.S. at 89.

in *Rodriguez* was the same as in any other case. It is the case-by-case process of reasoned judgment adhered to by common law judges time out of mind; it is flexible due process, a sense of what is fundamentally fair and just because citizen and state in this system.

Lest Justice Powell's notion of "constitutional adequacy"[211] be expanded out of context, it must be pointed out that his discussion of *Griffin* and *Douglas* came in the course of determining when wealth discrimination will invoke strict scrutiny. Indeed, he expressly limited himself to wealth cases, stating that "*at least where wealth is involved*, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[212] Yet, as Justice Marshall suggested, there seems to be no logical basis for restricting the principle to cases involving wealth.[213] Once the focus shifts from the horizontal relationship between persons similarly situated to the vertical relationship between the individual and the state, the tendency is to uphold any classification whose discriminatory effect does not rise to a level of arbitrariness that violates the due process standard of fundamental fairness. Thus other kinds of discrimination, based on illegitimacy[214] or sex,[215] may be subject to the rule that the strict scrutiny standard of review does not apply unless an absolute deprivation is presented.[216] Assuming that to be the case, it may

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211. *Id.*

212. *Id.* at 24 (footnote omitted) (emphasis supplied).

213. *Id.* at 88 n.50 & 120 n.77.

214. *E.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); *see* note 64 *supra*.

215. *E.g.*, Reed v. Reed, 404 U.S. 71 (1971); *see* note 34 *supra*.

216. Justice Marshall allowed that, unlike classifications based on race or nationality, statutory schemes that draw distinctions according to wealth may not always be irrelevant to the legitimate purpose they are intended to serve.

> The "poor" may not be seen as politically powerless as certain discrete and insular minority groups. Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups. But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have. While the "poor" have frequently been a legally disadvantaged group, it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. 411 U.S. at 121-22 (footnotes omitted).

Classifications such as sex or illegitimacy may be analogous, under Marshall's scheme, to wealth discrimination cases. While sex and illegitimacy are attributes of discrete and insular minority groups that have suffered social opprobrium and have little clout in the legislature,

fairly be said that the Court has emasculated equal protection analysis in most cases. If equal protection does not require equality, but only constitutional adequacy, and adequacy in turn is defined by reference to the due process clause, then the equal protection ground of *Griffin* and *Douglas* becomes superfluous. The Court's sights are trained on the treatment afforded a particular individual and the critical question is whether that treatment is fundamentally fair.[217]

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it may still be the case that rational classifications can be based upon them. In Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), the Court expressly noted that an illegitimate child born posthumously might be treated differently from a child alive at the time of the parent's death and therefore the object of affinity and dependency. But, even then, the Court said that "a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child . . . ." *Id.* at 169 n.7. Similarly, there is some authority for the view that the physical characteristics of women are not always irrelevant to a legitimate governmental purpose. *E.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948). *Goesaert*, never squarely overruled, upheld a Michigan statute prohibiting a woman from obtaining a bartender's license unless she was to work in an establishment owned by her husband or father. Justice Frankfurter wrote the majority opinion over strong dissent from Justice Rutledge, joined by Justices Douglas and Murphy. In *Rodriguez*, Justice Marshall cited *Goesaert* for the proposition that the equal protection clause does not require "precise equality in the treatment of all persons." 411 U.S. at 88. It is unclear whether Marshall would follow the Frankfurter rationale if *Goesaert* should arise again, but the unqualified citation to the case in *Rodriguez* suggests that he may be willing to find rational distinctions between men and women in some contexts, so as to make classifications according to sex valid. *Cf.* Forbush v. Wallace, 405 U.S. 970 (1972) (upholding a regulation requiring a married woman to use her husband's name in applying for a driver's license). On the other hand, even though the Court may decline to declare illegitimacy and sex to be suspect classifications, it is rather clear that they, in fact, receive more thorough review than economic regulatory measures. *See* cases cited in note 64 *supra* (illegitimacy); Stanley v. Illinois, 405 U.S. 645 (1972) (sex); Reed v. Reed, 404 U.S. 71 (1971) (sex). In all these cases, the governmental interest advanced by the state in support of the classification under attack was administrative convenience, a justification usually deemed sufficient under the relaxed, minimum rationality standard, but insufficient under strict scrutiny. *See* note 51 *supra*. The Court's unwillingness to accept administrative convenience as a justifying rationale in these cases thus suggests an enhanced standard of review.

217. The thesis here is that, while retaining remnants of the two-tier approach that the Burger Court finds palatable, Powell is well on his way toward replacing equal protection with due process analysis. Indeed, the hypothetical case he advanced as more closely analogous to prior wealth discrimination cases analyzed under the equal protection clause can as easily be examined with reference only to due process.

> If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. 411 U.S. at 25 n.60.

Although it must be conceded that Powell's hypothetical does seem to fit the mold of cases such as Bullock v. Carter, 405 U.S. 134 (1972), in which an unusually high filing fee kept poor candidates off the ballot in Texas, the same case can be treated as a straightforward due process problem. *See* Boddie v. Connecticut, 401 U.S. 371 (1971), in which Mr. Justice Harlan

The foregoing analysis, however, is not applicable to all types of cases. *Rodriguez* did nothing to undercut the continuing validity of strict scrutiny in cases involving established suspect classifications. Clearly, the Court was applying the strict scrutiny standard when it struck down the separate but equal doctrine in *Brown v. Board of Education.*[218] Yet it is equally clear that the black children involved in that case were not absolutely deprived of an education. The thrust of *Brown* was that "[s]eparate educational facilities are inherently unequal,"[219] not that they deny to black children an education that meets the "constitutional adequacy" test embraced twenty years later in *Rodriguez*. Since *Rodriguez* offers no evidence of a retreat from the equality principle adopted in *Brown* and other race discrimination cases,[220] there is every reason to believe that the suspect classification branch of the new equal protection remains intact. Moreover, there is language in *Rodriguez* to indicate that the Court views suspect classifications as a principled conception, involving certain elements that extend beyond race, but perhaps go no further than national origin. Powell stated the "indicia of suspectness"[221] to include disabilities suffered by a class that has his-

struck down a statutory filing fee in divorce cases. In light of recent cases reaffirming *Boddie*, but upholding filing fees, *e.g.*, Ortwein v. Schwab, 410 U.S. 656 (1973) (fees in judicial review of state administrative action); United States v. Kras, 409 U.S. 434 (1973) (fees in bankruptcy), it is perhaps too soon to say that Justice Powell, applying the *Boddie* rationale, would strike down the tuition-based school financing system posed in his hypothetical. The absolute denial of an asset so important as education would seem to correspond to the deprivation of an opportunity to obtain a divorce in *Boddie*. And, as with divorce, education is often a prerequisite for pursuing other associational activities. The only distinction between the cases is that divorce is a state monopoly while education is not. Nevertheless, public elementary and secondary education has a long history in this country, and a state would be hard put to explain how private institutions could handle the crush of students if public schools were suddenly closed to all but those who could pay for instruction. Accordingly, it is not too much to presume that even the hypothetical case Justice Powell suggests for equal protection analysis under the strict scrutiny test would be susceptible as well to the weighing and balancing approach associated with due process. In this regard, it is noteworthy that in two prior cases decided on the authority of *Griffin*, Justice Harlan concurred in the judgment but disassociated himself from the equal protection rationale. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

218. 347 U.S. 483 (1954).

219. *Id.* at 495.

220. On the contrary, Justice Powell recognized that suspect classifications exist and that strict scrutiny must be afforded cases in which they are presented. 411 U.S. at 16-17; *see* text accompanying note 179 *supra*.

221. 411 U.S. at 28.

torically been subjected to purposeful unequal treatment or placed in such a position of powerlessness in the legislature that the courts should undertake protection of the class against the majoritarian will.[222] These general guidelines seem to contemplate racial minorities and little else, save aliens,[223] who can be easily analogized to black Americans. Although classifications based on illegitimacy, sex, and wealth may arguably conform to the mold as well, it seems unlikely that the Burger Court will designate them as constitutionally suspect.[224] The present Court is committed to an historical approach to constitutional adjudication, and clearly only racial minorities can adduce firm historical support for activist judicial intervention in their behalf.[225] In addition, Justice Powell, the prime mover behind these developments, prefers reasoned, case-by-case analysis rather than adherence to more rigid constitutional standards. It must be remembered that finding a suspect classification in a statutory scheme is tantamount to condemning it; the Court has never upheld a measure found to discriminate on the basis of race.[226] The assumption is that race is almost always irrelevant to any legitimate governmental interest, and there is no reason to pause longer over state action that so obviously is unjustifiable.[227] In contrast, classifications based on illegitimacy, sex, or wealth may, in Justice Powell's mind, rationally further ends the legisla-

222. *See* notes 35-43 and accompanying text *supra*.

223. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

224. *Rodriguez* itself declined to view wealth as a suspect classification that alone will invoke strict scrutiny. *See* note 181 and accompanying text *supra*. Although the Court has had numerous opportunities to designate illegitimacy as suspect, each time the opportunity has been declined. *See* note 64 *supra*. And, of course, the continuing dispute over the suspectness of sex classifications is still being waged, though for the moment at least the nays seem to have it. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 653 n.2 (1974) (Powell, J., concurring); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (separate opinions by Stewart, Rehnquist, and Powell, J.J.). In two recent cases, classifications according to sex were upheld. Kahn v. Shevin, 416 U.S. ___, 94 S. Ct. 1734 (1974) (tax exemption for widows); Geduldig v. Aiello, 417 U.S. ___, 94 S. Ct. 2485 (1974) (mandatory maternity leaves). *See also* Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908).

225. Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873); *see* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 181 (1972) (Rehnquist, J., dissenting); note 132 *supra*.

226. The proposition in the text puts to one side the cases in which the Court has approved judicial decrees that contemplate racial classifications. *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). Similarly, no attempt is made to forecast the result in cases involving benign racial classifications intended to remedy the effects of past discrimination. *See* DeFunis v. Odegaard, 416 U.S. ___, 94 S. Ct. 1704 (1974).

227. *See* note 42 *supra*.

ture is entitled to pursue.[228] Although Powell may think it unlikely that he can be persuaded, he is nevertheless prepared to consider the state's contentions in cases not involving race or alienage. Only as to that type of case is he so confident of the result that thorough examination can be waived upon identification of the class.[229]

The conclusion, then, is that the Powell approach to the suspect classification branch of the new equal protection limits strict scrutiny to a narrow class of cases, defined generally but limited in practice to race and national origin. In other cases, Powell proceeds to a less stringent but still thoughtful treatment of the merits, applying what is essentially a flexible due process approach.[230]

2. Fundamental Interests, Constitutional Rights, and a Synthesis of Decisions.

Justice Powell turned next to the question whether the strict scrutiny standard of review was applicable because the classification established by the Texas school financing system interfered with the exercise of a fundamental right.[231] The district court had relied on the fundamental interest[232] branch of the new equal protection, as well as the suspect classification branch, in coming to the conclusion that strict scrutiny was appropriate.[233] This, too, Powell rejected. While restating the Court's "historic dedication to public education,"[234] he declared that "the importance of a service per-

228. For an analysis of this reasoning, see note 216 *supra*.

229. Thus it is clear that Justice Powell would hardly pause over the threshold question whether de jure segregation of public schools is constitutional. Indeed, he has argued that de facto segregation should be subject to the same remedial measures. *See* Keyes v. School Dist., 413 U.S. 189, 217 (1973) (Powell, J., concurring and dissenting).

230. Although the precise verbal formulation for describing this new standard is as yet unclear, this article will attempt to identify some aspects of the evolving doctrine. *See* Section IV *infra*.

231. *See* notes 44-48 and accompanying text *supra*.

232. The cases and the literature have used the terms "fundamental right" and "fundamental interest" interchangeably to characterize the second branch of the Warren Court's new equal protection. *E.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942) (referring to the fundamental "right to have offspring"); GUNTHER & DOWLING, *supra* note 25, at 444 (referring to "fundamental interests"). After *Rodriguez*, it seems clear that the proper term is "right," inasmuch as only constitutional guarantees are to be given strict scrutiny in the future.

233. In his dissenting opinion in Shapiro v. Thompson, 394 U.S. 618, 658 (1969), Justice Harlan first referred to the two "branches" of the Warren Court's new equal protection.

234. 411 U.S. at 30.

formed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[235] Following Justice Harlan's dissent in the right to travel case,[236] Powell took the position that, if the standard of judicial review were to turn on the Court's sense of the importance of the interests involved in a particular case, "[w]e would, indeed . . . be assuming a legislative role and one for which the Court lacks both authority and competence."[237] Accordingly, he concluded that the strict scrutiny standard is applicable only when the individual right affected is "explicitly or implicitly guaranteed by the Constitution."[238]

As an answer to the serious problem of limiting the power of judges to cast about for important interests to be given special protection under the equal protection clause,[239] tying fundamental rights to the text of the Constitution was plausible, if analytically troublesome.[240] But as a synthesizing principle for explaining the precedents, Justice Powell's approach was unsuccessful. To be sure, he found language in some cases to indicate that only constitutional rights are entitled to special protection,[241] and some results seemed to bear out his thesis that mere importance is insufficient to invoke strict scrutiny.[242] Yet some of the most significant strict scrutiny cases resist similar categorization. In the grandfather of the new equal protection analysis developed in the Warren Court years, the Court struck down a state statute that permitted the sterilization of some but not all habitual offenders.[243] Powell unpersuasively attempted to explain the case away as an early recognition of the right

235. *Id.*

236. Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting). *See* text accompanying note 47 *supra*.

237. 411 U.S. at 31.

238. *Id.* at 33-34. *See* text accompanying note 179 *supra*.

239. *See* notes 47-48 and accompanying text *supra*.

240. *See* notes 241-48 and accompanying text *infra*.

241. *E.g.*, Chicago Police Dep't v. Mosley, 408 U.S. 92, 101 (1972) (right of expression); Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972) (right of privacy); Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (Stewart, J., concurring) (right to travel).

242. Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (interest in decent housing insufficient to invoke strict scrutiny); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (interest in public assistance benefits insufficient).

243. Skinner v. Oklahoma, 316 U.S. 535 (1942).

of privacy later found implicit in the penumbras of the Bill of Rights.[244]

The voting rights cases are even more troublesome. Various cases have made it clear that there is no constitutional right to vote in state elections,[245] yet several significant equal protection cases have employed strict scrutiny to strike down state statutes that interfere with the exercise of the franchise.[246] Again unconvincingly, Justice Powell declared that "a citizen has a *constitutionally protected right* to participate in elections on an equal basis with other citizens in the jurisdiction."[247] Just how a right to equal participation in elections can be constitutionally protected independently of the equal protection clause was left unexplained.[248]

In fairness, however, Justice Powell's extraordinary attempt in *Rodriguez* to draw a single line connecting all the precedents cannot be dismissed merely because some cases defy the characterization assigned to them. It is the responsibility of judges to deal forthrightly with prior cases in order to foster consistency and reliability in the law.[249] Yet, particularly in constitutional matters,[250] the Supreme Court must always be willing to re-examine precedents or to read them restrictively, so that the flexibility of this constitutional system can be maintained.[251] Accordingly, it is often the Court's task to draw the precedents together, to explain them as fully as possible by reference to a single principle, and then to declare that

244. 411 U.S. at 34 n.76; *see* Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

245. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

246. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union School Dist., 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

247. 411 U.S. at 34 n.74, *quoting*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (emphasis in the original).

248. In dissent, Justice Marshall commented:

> If . . . the Court intends to recognize a substantive constitutional "right to equal treatment in the voting process" independent of the Equal Protection Clause, the source of such a right is certainly a mystery to me. 411 U.S. at 101 n.60.

249. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

250. *See* Edelman v. Jordan, 415 U.S. 651, 671 (1974); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting).

251. *See* Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 748 (1963).

principle to be the basis upon which future cases will be reviewed.[252] The Court's ultimate goal is reasoned adjudication in a system in which standards of review are knowable to the litigants seeking redress. Thus Justice Powell's attempt at synthesis in *Rodriguez* must be considered a legitimate judicial undertaking. The significant question for examination now is whether the principle adopted improves upon the doctrine displaced by it.

It is essential to recognize at the outset what Justice Powell did *not* hold in *Rodriguez*. The rule that strict judicial review depends upon an infringement of a right explicitly or implicitly protected by the Constitution does not contemplate that the Court will search in every case for some link between the individual interest at stake and some specific constitutional safeguard. On the contrary, a mere logical connection is precisely what is insufficient to invoke strict scrutiny. The *Rodriguez* plaintiffs contended that education is essential to the first amendment right of free expression, and also to the intelligent exercise of the franchise.[253] Accordingly, they argued that constitutional rights were, in fact, abridged in the case, and the strict scrutiny standard of review was appropriate. In dissent, Justice Marshall embraced the plaintiffs' position, advancing the theory that the degree of judicial scrutiny applicable in each case should be adjusted according to the nexus between the individual interest asserted and some constitutional right, explicit or implicit.[254] Justice Powell, however, rejected Marshall's "sliding scale"

252. Perhaps the best example of a great judge undertaking this fundamental judicial task is Justice Cardozo's opinion in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

253. 411 U.S. at 35-36. Inasmuch as the right to vote, per se, is not protected by the Constitution, Justice Powell understood the plaintiffs to rely upon the right to participate equally in state elections, established in the precedents. *Id.* at 35 n.78; *see* notes 247-49 and accompanying text *supra*.

254. Justice Marshall expressed the standard he would apply as follows:

> 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. 411 U.S. at 102-03.

Thus Marshall would adopt a variable standard of review, more stringent in cases involving

analysis.[255] He declined to "dispute any of [the plaintiffs'] propositions,"[256] but declared that the Court had "never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."[257] Apparently, after *Rodriguez*, it is not enough that a plaintiff complains of governmental action that impinges upon nonconstitutional interests so as to curtail the full realization of a constitutional right. Rather, there must be a forthright allegation that the right has been denied. Only then is strict judicial scrutiny appropriate.

Extending Powell's approach to its logical conclusion, the strict scrutiny test heretofore associated with equal protection analysis in fundamental interest cases is now the appropriate standard only when an absolute violation of constitutional rights is presented. This is a backhand way of freeing fundamental right strict scrutiny from its equal protection moorings and establishing that standard of review as the basic test for constitutional adjudication. For, as Justice Harlan pointed out years ago, "[w]hen the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause."[258] Constitutional guaran-

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interests that approach constitutional proportion and less in cases that do not implicate rights guaranteed in the text of the Constitution. *See* Marshall v. United States, 414 U.S. 417, 430 (1974) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting). Mr. Justice Douglas joined Marshall's dissent in *Rodriguez*, and Mr. Justice Brennan adopted the same approach in his separate opinion. 411 U.S. at 62-63 (Brennan, J., dissenting).

255. *See* note 54 *supra*.

256. 411 U.S. at 36. Indeed, Powell allowed that the desirability of well-educated persons exercising the right of expression and the right to vote is "not to be doubted." *Id.* On the other hand, he added that, even if he were to agree that "some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right," the record in *Rodriguez* did not support a finding that the Texas system failed to provide all students with that minimal level of education. *Id.* He insisted that at least an absolute denial of education must be shown before the Court would be justified in strictly scrutinizing a state school financing scheme. *Id.* at 37.

257. *Id.* at 36 (emphasis in the original).

258. Shapiro v. Thompson, 394 U.S. 618, 661-62 (1969) (Harlan, J., dissenting). *But see* note 265 *infra*. In his separate concurring opinion in *Rodriguez*, Justice Stewart made it clear that, at least in his view, strict scrutiny under the fundamental interest branch of the new equal protection is and always has been identical in principle to straightforward interpretation of substantive constitutional provisions.

> [Q]uite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. For example, a law that provided that newspapers could be published

tees stand on independent footing and provide their own protection, directly against impingement by the national government,[259] and indirectly through the due process clause of the fourteenth amendment against state action.[260] Justice Powell's doctrinal statement in *Rodriguez* that only a violation of a constitutional right will invoke strict scrutiny effectively made equal protection analysis superfluous and established the strict scrutiny standard of judicial review as the general guide to straightforward interpretation of substantive constitutional provisions.

Two significant consequences flow from Powell's departure from equal protection analysis. First, the strict scrutiny standard of review, contemplating a balancing of compelling governmental interests against the individual liberty recognized in substantive constitutional provisions, is returned whence it came.[261] In every case in which the Court is called upon to interpret substantive provisions of the Constitution, the state must demonstrate a compelling interest that will offset the individual rights at stake. Additionally, the particular means chosen by the legislature to achieve its objective

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> only by people who had resided in the State for five years could be superficially viewed as invidiously discriminating against an identifiable class in violation of the Equal Protection Clause. But, more basically, such a law would be invalid simply because it abridged the freedom of the press. Numerous cases in this Court illustrate this principle. 411 U.S. at 61.

Accord, id. at 100 n.59 (Marshall, J., dissenting); *see* Shapiro v. Thompson, 394 U.S. 618, 642-44 (1969) (Stewart, J. concurring). It thus seems clear that, in those cases in which Justice Stewart has acquiesced in applying strict judicial scrutiny under the guise of the new equal protection, in his own mind he has been interpreting the substantive constitutional right affected by the statute under attack. Since the same compelling interest balancing test is the standard under both approaches, for Stewart the Court's equal protection framework was from the first a tolerable but needless diversion from the real question at hand. In cases not affecting substantive constitutional rights, Stewart has consistently applied a relaxed standard of review, irrespective of the character of the individual, nonconstitutional interests at stake. *See, e.g.*, Geduldig v. Aiello, 417 U.S. ____, 94 S. Ct. 2485 (1974); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970). Although his opinion for the Court in Carrington v. Rash, 380 U.S. 89 (1965), has been read as an application of new equal protection analysis, *see* Shapiro v. Thompson, 394 U.S. 618, 660 n.8 (1969) (Harlan, J., dissenting), the case is perhaps better explained as an illustration of Stewart's fondness for the "irrebuttable presumption" doctrine. *See* note 295 *infra.*

259. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 464 (1833).

260. Through a case-by-case process of selective incorporation, most of the specific provisions of the Bill of Rights have now been held applicable against the states through the due process clause of the fourteenth amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

261. *See* note 34 and accompanying text *supra.*

must be shown to be necessary, that is, clearly more effective than some alternative, less intrusive measure.[262] Other possible standards of review, some more stringent than others, are abandoned in favor of this pervasive balancing approach.[263] Second, an apparent corollary of tying fundamental rights to the Constitution is the surrender of equal protection analysis as an evasive device. Arguably, it is no longer sufficient to pass over crucial questions as to the scope of constitutional guarantees and the extent to which they may be infringed in a given case by declaring simply that a narrower ground of decision is possible by way of stringent review under the equal protection clause.[264] Although the question remains in some doubt,[265]

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262. *See, e.g.*, Procunier v. Martinez, 416 U.S. ___, 94 S. Ct. 1800 (1974), discussed in text accompanying note 79 *supra*.

263. Thus Powell has adopted the balancing approach advocated by Justices Frankfurter and Harlan in first amendment cases. *E.g.*, Barenblatt v. United States, 360 U.S. 109 (1959); Dennis v. United States, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring). Other tests, however, have been advanced. It was Justice Black's view that "freedom of speech" is absolute and "beyond the reach of this government." Black, *supra* note 84, at 874, *quoting*, Madison, 1 ANNALS OF CONG. 738 (1789). Holmes and Brandeis formulated a "clear and present danger" rule. *E.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Schenck v. United States, 249 U.S. 47, 52 (1919). In Gitlow v. New York, 268 U.S. 652 (1925), Justice Sanford adopted a more relaxed "bad tendency" test. Chief Justice Stone, however, placed first amendment freedoms in a "preferred position." *E.g.*, Jones v. Opelika, 316 U.S. 584, 608 (1942). The Vinson-Hand rendition of the Holmes-Brandeis approach in *Dennis*, *supra*, relaxed the standard once again, perhaps making way for the balancers.

Similarly, in Barker v. Wingo, 407 U.S. 514 (1972), discussed in Section II *supra*, Powell rejected other tests advanced by the parties and chose instead to rely on a balancing standard. Specifically, he declined to hold that the sixth amendment speedy trial guarantee requires that trial be offered to an accused within a fixed period of time *or* that, in order to invoke the sixth amendment protection, a defendant must first demand that trial be commenced. *See* note 109 *supra*.

264. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of privacy); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel). Dissenting in *Shapiro*, Justice Harlan rejected the majority's evasive equal protection approach and instead found it necessary to identify the constitutional status of the right to travel. Assuming for purposes of decision that the right is rooted in due process, he proceeded to address forthrightly the question whether the denial of public assistance benefits in the case constituted a violation of the substantive right to travel. *Id.* at 662.

265. This proposition is expressed tentatively because of Justice Powell's concurring opinion in Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974). In that case, the Court struck down an Indiana statute requiring an overbroad loyalty oath as a prerequisite to access to the ballot. The majority opinion by Mr. Justice Brennan held that the oath failed to distinguish between the advocacy of present action and advocacy of abstract doctrine and thus violated the first and fourteenth amendments. Even though Indiana had not made advocacy of abstract doctrine a criminal offense, the limitation upon the party's access to

it would seem that, at least after *Rodriguez*, the strict scrutiny

the ballot was a sufficient burden to invoke first amendment protection. *Cf.* Keyishian v. Board of Regents, 385 U.S. 589 (1967) (an overbroad oath may not be made a prerequisite of public employment). Justice Powell, joined by the Chief Justice and Justices Blackmun and Rehnquist, concurred separately. He took the position that the substantive first amendment issue addressed by the Court need not have been reached. Since Indiana did not require the same oath of the Democratic and Republican Parties, Powell found discrimination under the equal protection clause to provide a narrower ground of decision. 414 U.S. at 451-52 (Powell, J., concurring). If he had said that the statute, as applied, established an irrational classification of political parties that failed to meet the minimum rationality standard, his position would have led to no difficulty. But Powell invoked the strict scrutiny standard of review, citing Williams v. Rhodes, 393 U.S. 23 (1968), for the proposition that a discriminatory preference for established parties can be justified only by a compelling state interest. In a footnote, he went so far as to suggest that, if it were not for the "unconstitutional application of the statute," he might find the oath valid by distinguishing the first amendment cases relied on by the majority. 414 U.S. at 452 n.3.

In light of *Rodriguez*, Powell's position is puzzling. If the strict scrutiny standard is applicable only when a violation of a constitutional right is alleged, it is altogether unclear how it was possible in *Whitcomb* to employ that test without reaching the threshold question of the validity of the oath. Clearly, the case involved two constitutional rights: the first amendment freedom from overbroad loyalty oaths and the right of association and access to the ballot. This second right was supplemented by the related right of party members to cast an effective ballot. The teaching of *Rodriguez* is that an allegation that state action has made the exercise of constitutional rights less effective is insufficient to invoke strict scrutiny; a forthright allegation of a constitutional violation is required. Accordingly, in order for the Communist Party in *Whitcomb* to have the benefit of that test, it would seem that it would have to allege a violation of one of these constitutional rights. The majority held forthrightly that the oath violated the first amendment. Justice Powell purported to avoid that issue by focusing on the discriminatory application of the oath, whatever its validity. Yet he applied strict scrutiny, indicating that some other constitutional right was infringed. Since the only other such right in the case was the right of access, apparently Powell saw the oath requirement as touching upon that constitutional guarantee. But surely Powell would not be prepared to hold that requiring a *valid* oath of the Communist Party would violate its members' rights of association and effective participation in the political process. The only substantive constitutional question, then, was the validity of requiring the Party to subscribe to *this* oath, a question Justice Powell found unnecessary to decide. One possible explanation for Powell's position comes to mind. While he demands an allegation of a violation of a constitutional right to invoke strict scrutiny review, perhaps a decision that a statute offends the equal protection clause under that test can be based upon a less substantial infringement of the constitutional right than would be required for a forthright decision that the right itself has been violated. At the very least, *Whitcomb* leads down a thorny conceptual path. The apparent message from the Powell concurring opinion is that a state statute can still be struck down under the strict scrutiny test without holding in the process that a constitutional right has been violated. Arguably, that view is inconsistent with *Rodriguez*; if it is not, then perhaps this article has attached too much significance to the plain language of that decision and too little to Justice Powell's fair warning that the school financing plan under examination in *Rodriguez* was *sui generis*. *See* note 180 *supra*.

standard is appropriate only if an absolute violation of a substantive constitutional provision is presented.[266]

266. Justice Powell's *Rodriguez* opinion found other, perhaps less doctrinally significant reasons for failing to afford strict judicial scrutiny to the Texas school financing system. First, Powell found the Texas statutory scheme to be essentially remedial—designed to gradually extend more and better educational opportunities to all students attending public schools in the state. Accordingly, he applied the rule from Katzenbach v. Morgan, 384 U.S. 641, 656-57 (1966), that reformatory measures which address only a part of a complex problem should not be struck down under strict scrutiny because they might have gone further to eradicate all aspects of the problem at once. Although the standard of review when fundamental rights are *denied* is more stringent, a relaxed test is appropriate when fundamental rights are being extended to some but not to all those entitled to them. This "one step at a time" rationale is usually applied to cases analyzed under the minimum rationality standard and is employed as a means of justifying a seemingly arbitrary classification. *See* note 14 and accompanying text *supra*. Yet, in *Rodriguez*, Justice Powell found the doctrine appropriate as a basis for choosing minimum rationality over strict scrutiny review. 411 U.S. at 38-39. In dissent, Justice Marshall objected to Powell's use of the *Morgan* case, saying that *Morgan* involved federal legislation extending the right to vote to persons who would otherwise have been barred from the polls by state law. In *Rodriquez*, on the other hand, the Texas legislature was itself responsible for any defects in the system of financing schools. "It is the State's own scheme which has caused the funding problem, and, thus viewed, that scheme can hardly be deemed remedial." *Id.* at 81 n.35.

Second, Justice Powell found a relaxed standard appropriate in light of the Court's many precedents giving a presumption of validity to state taxation programs. "We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues." *Id.* at 40. Moreover, Powell called attention to the "persistent and difficult questions of educational policy" raised by the case, the inability of experts to agree on what reforms were needed, and the relative incompetence of the Court to choose among conflicting views. *Id.* at 41 n.85, 42-43. In dissent, Justice Marshall challenged Powell's reliance upon those taxpayers suits that attacked the lines drawn by complex taxation schemes as unfair to some taxpayers. In this case, Marshall argued that a different standard of review was applicable to permit the Court to examine alleged discrimination as to beneficiaries of taxation measures. *Id.* at 116-17 n.75. As to the Court's competence to interfere in complex matters regarding educational policy, Marshall maintained that a number of financing plans might be adopted by Texas in order to avoid invidious discrimination among rich and poor districts. The Court need only invalidate the present discriminatory program and rely on the state to fashion an acceptable one. *Id.* at 130-31.

Finally, citing the Court's traditional deference to the states in matters for which they have primary responsibility, Justice Powell contended that the Court should be slow to adopt a strict standard of review in any case that presents significant questions of federalism. A decision invalidating complex school financing systems in Texas and other states would, argued Powell, enmesh the Court in wholly state concerns to an intolerable degree. *Id.* at 44. Predictably, Marshall had a rejoinder for this view, too. He contended that an order invalidating the school financing system in Texas would involve the Court in state affairs much less than a similar order striking down the public assistance scheme challenged in *Dandridge*. *Id.* at 131-32.

3. The "Traditional" Standard: A New Brand of Minimum Rationality.

Having decided that the strict scrutiny standard of review was inapplicable, Justice Powell turned in the second part of his opinion to an application of the appropriate test. He stated that the Texas system of school financing must be examined to determine whether it was rationally related to some legitimate, articulated state objective.[267] Although Powell implied that this test was "the traditional standard of review,"[268] the examination given the financing plan was, like that applied in *Weber* and *James*, more stringent than the minimum rationality standard employed in business regulation cases.[269] While mentioning that the statutory scheme was entitled to a presumption of constitutionality,[270] Justice Powell nevertheless declined to strain his imagination for possible justifications for the classification under attack. Instead, he focused on and closely examined the *articulated* purpose put forward by the state in support of its system.[271] The only substantial state interest asserted was the maintenance of local control of public schools.[272] The plaintiffs did not challenge the legitimacy of local control as a state goal but questioned whether the school financing system adopted in Texas rationally furthered that interest. Their argument[273] contended that the Texas system rendered a poor district unable to affect significantly the education of its children because of its inability to raise sufficient funds through the property tax.[274] Moreover, because

267. *See* text accompanying note 179 *supra*.

268. 411 U.S. at 40.

269. *See* Section III-A *supra*.

270. 411 U.S. at 55.

271. *See* McGinnis v. Royster, 410 U.S. 263, 271 (1973), discussed in note 164 *supra*. In economic regulation cases reviewed under the minimum rationality standard, the presumption of constitutionality has generally contemplated that the Court will assume, for purposes of its decision, that facts justifying the classification under attack exist and that the legislature established the classification in response to those facts. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911); *see* notes 11-15 and accompanying text *supra*.

272. 411 U.S. at 48-53. Justice Powell noted that the Court has in the past expressed sympathy with the interest of local communities in having some control over elementary and secondary schools. *See, e.g.*, Wright v. Council of the City of Emporia, 407 U.S. 451, 469 (1972).

273. 411 U.S. at 63-70.

274. On this point, Justice White said:

> The Equal Protection Clause permits discriminations between classes but requires

Texas fixed the ceiling on local property taxes at $1.50 per $100 of valuation, a poor district was prohibited by law from taxing itself sufficiently to provide local children with an educational experience comparable to that afforded by a wealthy district.[275] To this contention, Justice Powell responded that, under the "traditional standard

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> that the classification bear some rational relationship to a permissible object sought to be attained by the statute. It is not enough that the Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved . . . .
>
> Neither Texas nor the majority heeds this rule. If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture. *Id.* at 67-68 (footnotes omitted).

Although Justice White did not refer to the Gunther means-ends model, the language used to express his view of the case suggests the Gunther approach. *See* notes 57-61 and accompanying text *supra*.

On the other hand, Justice Marshall saw in White's opinion the application of "a more stringent standard of review [than the minimum rationality test White purported to employ], a standard which at the least is influenced by the constitutional significance of the process of public education." 411 U.S. at 129 n.96. Of course, Marshall advocated a "sliding-scale" approach that would have invoked a relatively stringent test in this case because of the nexus between education and constitutionally protected rights concerning freedom of expression and participation in the political process. *Id.* at 115 n.74; *see* note 254 and accompanying text *supra*. Perhaps the most significant aspect of White's dissent was his heavy reliance upon Justice Powell's opinion for the Court in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). *See* Section III-A *supra*. Presumably, when Powell applied the appropriate standard of review to the case at bar, he had in mind his own opinion in *Weber*, which declared that there is but one real test under the equal protection clause. *See* text accompanying notes 35-36 *supra*. Inscrutably, he did not cite *Weber*; indeed, nowhere in the *Rodriguez* majority opinion did he so much as refer to *Weber* or *James*, his two most significant equal protection opinions. Powell did cite McGinnis v. Royster, 410 U.S. 263 (1973), however, suggesting perhaps that he preferred precedents that, applying the proper standard of review, upheld the classifications under attack. *See* note 164 *supra*. To compound confusion, Justice Stewart, in his separate concurring opinion, cited *Weber* for the proposition that illegitimacy is, at least in some cases, a suspect classification. 411 U.S. at 61. That, of course, was precisely the question that Powell's *Weber* opinion avoided. *See generally* Section III-A *supra*.

275. 411 U.S. at 67. In response to this argument raised by Justice White's dissent, Justice Powell insisted that, on the record, the poor district in which the *Rodriguez* plaintiffs resided had not attempted and, indeed, did not desire to tax itself beyond the ceiling set by Texas law. Therefore, the question of the constitutionality of the tax ceiling was not properly before the Court. *Id.* at 50-51 n.107.

of review,"[276] the equal protection clause does not condemn a state classification merely because it results in "some inequality"[277] or because it "imperfectly effectuates the State's goals."[278] Nor is it critical that the state's objective might be achieved by some alternative, "less drastic"[279] means.[280] Rather, the system must be upheld so long as it constitutes a "rough accommodation"[281] of competing interests in an attempt to reach feasible solutions to complex problems.[282]

IV. Conclusion: The Evolving Intermediate Standard of Equal Protection Review

The precise contours of the equal protection analysis employed by Justice Powell in *Rodriguez*, and now apparently applicable to most cases in which a state statute is challenged as constituting invidious discrimination, are not yet clear. But a few general comments may safely be made. It *does* seem clear that Powell rejects the sliding scale model proposed by Justice Marshall. The Powell standard of review is the same in every case; it seems to fall between the minimum rationality test applied in the past to economic regulation cases and the strict scrutiny standard now limited to suspect classification cases and those cases in which a specific constitutional provision is violated.[283] Thus Powell bridges the gap between the two-tiers of the Warren Court's approach, rejecting the double standard that has long been criticized in favor of a single test that requires, in every case, a thorough treatment of the merits. If the

276. *Id.* at 40.

277. *Id.* at 51, *quoting*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

278. 411 U.S. at 51; *see* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

279. 411 U.S. at 51, *quoting*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

280. The "least drastic alternative" doctrine has been applied only in cases in which strict scrutiny is appropriate. *See* note 34 and accompanying text *supra*.

281. 411 U.S. at 55, *quoting*, Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913).

282. Perhaps significantly, Justice Powell relied almost entirely upon cases applying the minimum rationality standard in its most relaxed form, rather than more recent cases in which that test has been given more "bite." See note 126 *supra*. *See also* cases cited in and text accompanying notes 56 and 64 *supra*; *cf.* note 274 *supra*.

283. In this latter case, a more straightforward approach would declare flatly that the Court no longer is applying an equal protection standard of review at all but instead is employing the strict scrutiny test as the general standard for interpreting substantive constitutional provisions. *But see* note 265 *supra*.

Powell model contemplates a judicial judgment as to the importance of particular individual or state interests, it shifts the exercise of that judgment away from the threshold choice of the appropriate standard of review and toward the Court's actual examination of the parties' contentions. The developing intermediate standard purports to retain the ordinary presumption in favor of state legislation, yet Powell apparently will no longer postulate justifications for statutes under attack. Instead, he will require the state to articulate the purpose the statute is designed to further and to demonstrate that the statute rationally relates to that objective.[284] The test thus approaches the means-ends model proposed by Professor Gunther[285] and apparently embraced by Justice White in *Rodriguez*.[286] On the other hand, if indeed the Powell test is similar to the Gunther model, the result in *Rodriguez* is puzzling. Justice White and the two Justices who concurred in his dissent[287] clearly were persuaded that, under the means-ends standard, the Texas school financing system was invalid. Yet Powell found little difficulty in upholding the system.[288]

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284. This is what Justice Powell apparently did in *Weber* and *James*, though he failed to rely on those cases in *Rodriguez*. The best authority for the proposition in the text is Powell's statement of the case in *Rodriguez*, in which he referred to the *articulated* purpose to be served by the classification under attack. *See* text accompanying notes 179 and 271 *supra*. *See also* McGinnis v. Royster, 410 U.S. 263, 271 (1973); note 164 *supra*. Powell did rely on *McGinnis* in *Rodriguez*. 411 U.S. at 55; *see* note 274 *supra*. Powell's concurring opinion in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), stated that classifications "must at least rationally serve some legitimate *articulated* or *obvious* state interest." *Id.* at 653 n.2 (emphasis supplied).

285. *See* notes 57-61, 124 and accompanying text *supra*. Justice Powell's language in a concurring opinion in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), comes very close to the Gunther model. In *LaFleur*, he said: "I . . . conclude that in these cases the gap between the legitimate interests of the boards and the particular *means* chosen to attain them is too wide." *Id.* at 657 (emphasis supplied).

286. *See* note 274 *supra*.

287. Justices Douglas and Brennan joined White's opinion. Additionally, Justice Brennan wrote a separate dissent in which he embraced Justice Marshall's sliding-scale approach to equal protection analysis. 411 U.S. at 62-63 (Brennan, J., dissenting); *see* note 254 *supra*. Apparently, Brennan concurred with White in order to make clear that, even though he considered the case properly reviewed under the strict scrutiny standard, the classification established by the Texas school system failed even to meet the traditional, more relaxed test which White purported to apply. Justice Douglas merely concurred in both the White and Marshall dissenting opinions.

288. There is some dispute over the correctness of Powell's result. Professor Goodpaster, while cautioning that "*Rodriguez* is a far too recent and complex case for summary simplification," nevertheless concluded that "[o]n balance, it does not appear that the legislature

Perhaps the crucial point to be made about the evolving Powell standard of equal protection review is that it is indistinguishable from the Harlanesque flexible due process approach to constitutional adjudication now woven deeply into Justice Powell's thinking. The fundamental proposition that, in every case, the question is whether the statute under attack rationally furthers a legitimate state purpose is, in truth, the same principle operating in substantive due process cases.[289] Although some statutes establish obviously invidious classifications among the persons they affect and seem naturally to invoke analysis under the equal protection clause, the Powell formulation ultimately focuses, not on the difference in treatment afforded different classes, but upon the statute's structuring of the relationship between a particular individual and the state. The critical question is whether the statute rationally furthers a legitimate end or, instead, arbitrarily works an injustice upon the individual, irrationally depriving him of liberty or property. Equal protection and due process considerations thus tend to blur, leaving the Court with a single standard of review that focuses upon the fundamental fairness of state action.

In opinions handed down since *Rodriguez*, some written by Justice Powell and some not, the Court has tended toward analysis consistent with these generalizations. The classifications deemed to be constitutionally suspect and therefore subject to strict scrutiny have not been expanded. Justice Powell's opinion for the Court in *In re Griffiths*[290] reaffirmed the holding of prior cases that alienage is a suspect classification[291] and accordingly struck down a Connect-

dealt fairly with the interests of the poorer districts, and the financing plan should have fallen." Goodpaster, *supra* note 16, at 518-19; *accord*, Tribe, *supra* note 2, at 1-2. On the other hand, it has been suggested that the Court might have upheld the Texas system even under a stricter standard of review. Note, *supra* note 74, at 114-16.

289. *See* note 60 *supra*. On the other hand, it seems clear that Justice Powell is not yet prepared to abandon the language of equal protection as well as its analysis. Although due process can be expected to dominate *sub rosa* future equal protection adjudication, it is likely that the Court's opinions will continue to be framed in the language of equal protection. In this regard, it must be remembered that *Rodriguez* hardly rejected the two-tier approach out of hand. *See* Note, *supra* note 74, at 108. Nevertheless, the Powell version of what the Warren Court was about seems a far cry from what has gone before. Certainly, *Rodriguez* should still the fears expressed by some that equal protection analysis is developing into a monster of the *Lochner* ilk, albeit in a different cause. *See* note 48 *supra*.

290. 413 U.S. 717 (1973).

291. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

icut rule of court that closed membership in the bar to non-citizens.[292] On the other hand, *Kahn v. Shevin*,[293] *Geduldig v. Aiello*,[294] and Justice Powell's concurring opinion in *Cleveland Board of Education v. LaFleur*,[295] once again declined to declare sex to be constitutionally suspect.[296] Similarly, the Court passed over an opportunity in *Jimenez v. Weinberger*[297] to treat illegitimacy as suspect. In *Kahn* and *Geduldig*, apparent sex classifications were upheld under the relaxed minimum rationality standard.[298] But the

292. It is noteworthy that, even in this case in which he found the strict scrutiny standard applicable, Justice Powell indicated discomfort with the language usually employed to describe it. Thus he declared that the state must show its interest to be "substantial" and then defined that term to take in "overriding," "compelling," and "important," the terminology used in prior cases. 413 U.S. at 722 n.9. On the other hand, he did say flatly that the state must also prove that "its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Id.* at 722, *quoting*, McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (race classification).

Dissenting in *Griffiths* and in the companion case, Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating a state civil service provision limiting permanent positions to United States citizens), Justice Rehnquist quarreled with the Court's treatment of alienage as constitutionally suspect. He would apparently limit that concept to classifications according to race. *Id.* at 649 (Rehnquist, J., dissenting); *see* note 132 *supra*. In his own dissenting opinion in *Griffiths*, the Chief Justice declared his general agreement with the Rehnquist opinion. 413 U.S. at 730.

293. 416 U.S. ___, 94 S. Ct. 1734 (1974).

294. 417 U.S. ___, 94 S. Ct. 2485 (1974).

295. 414 U.S. 632, 651 (1974) (Powell, J., concurring). The majority opinion in *LaFleur*, written by Mr. Justice Stewart, held that mandatory maternity leaves violate procedural due process by establishing a conclusive presumption that all women need to stop working some months before childbirth. In relying on due process, Stewart was able to avoid equal protection analysis, with which he does not feel comfortable. *See* note 258 *supra*. In other cases as well, Stewart has been successful in persuading a majority of the Court to accept the "irrebuttable presumption" doctrine as an alternative to equal protection. *E.g.*, United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973). That doctrine has come under substantial criticism in the literature, *see, e.g.*, Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974), and Justice Powell, at least, has rejected it. In *LaFleur*, he concurred in the majority's result, but on equal protection grounds:

> As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner of "irrebuttable presumptions." If the Court nevertheless uses "irrebuttable presumption" reasoning selectively, the concept at root often will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause. 414 U.S. at 652 (Powell, J., concurring).

296. *See* notes 216 and 224 *supra*.

297. 418 U.S. ___, 94 S. Ct. 2496 (1974); *see* note 64 *supra*.

298. In *Kahn*, Mr. Justice Douglas' majority opinion emphasized that the tax exemption for widows under attack in that case was distinguishable from the administrative rule struck down in *Frontiero* on at least two grounds. First, the exemption was part of the Florida

Court in *Jimenez* and Powell's concurring opinion in *LaFleur* were able to invalidate the classifications under attack, indicating that when sex and illegitimacy are the basis of classifications the minimum rationality test the Court purports to apply may have more "bite" than it exhibits in other contexts.[299] Importantly, however, all four cases support the proposition that, whatever result is reached in a given case, the Burger Court does not intend to lengthen the list of suspect classifications that invoke the strict scrutiny standard of review associated with the new equal protection.

In a like manner, the Court has adhered to the *Rodriguez* position that strict scrutiny review along the fundamental interest branch of the new equal protection is confined to cases involving a violation of a constitutional right. In *Rosario v. Rockefeller*,[300] actually de-

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taxation structure, traditionally ground upon which the Court has tread lightly. Second, unlike the regulation in *Frontiero*, the tax exemption operated to the advantage of the group historically—and, indeed, within the very statutory structure involved in the case—subject to inferior treatment. Thus this was a benign classification and therefore, perhaps, to be examined on a more relaxed standard of review. *See* DeFunis v. Odegaard, 416 U.S. ___, 94 S. Ct. 1704 (1974); Frontiero v. Richardson, 411 U.S. 677, 689 n.22 (1973). Dissenting in *Kahn*, Justices Brennan and Marshall would have applied strict judicial scrutiny and invalidated the exemption as unnecessary to further the state interest in softening the burden carried by widows, an interest both agreed was "compelling" within the meaning of the new equal protection doctrine. *See* note 34 *supra*. In *Geduldig*, Justice Stewart's opinion for the Court found the insurance policy exclusion for pregnancy-related disabilities under attack to be a "far cry" from cases involving discrimination based upon "gender as such."

> Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any *reasonable* basis. 417 U.S. at ___, 94 S. Ct. at 2492 n.20 (emphasis supplied).

Accordingly, over the dissents of Brennan, Douglas, and Marshall, who contended that the strict scrutiny standard of review should apply, Justice Stewart upheld the exclusion under the minimum rationality test. Perhaps significantly, he distinguished even *Reed*, a case which struck down a sex-based classification—but purported to apply a relaxed standard of review. *Id.*; see note 216 *supra*.

299. Indeed, in *Jimenez*, Chief Justice Burger's majority opinion struck down a classification between different classes of illegitimates. *See* 418 U.S. at ___, 94 S. Ct. at 2496. In *LaFleur*, Justice Powell cut through what he found to be shallow reasoning in the majority opinion, *see* note 295 *supra*, and applied an equal protection standard of review that asked whether mandatory maternity leaves "at least rationally serve some legitimate articulated or obvious state interest." 414 U.S. at 653 n.2. He expressly declined to decide whether "sex-based classifications invoke strict judicial scrutiny . . . or whether these regulations involve sex classifications at all." *Id. See generally* notes 216 and 224 *supra*.

300. 410 U.S. 752 (1973).

cided prior to *Rodriguez*, Justice Stewart's majority opinion upheld a New York statutory scheme that required voters to register as members of a political party thirty days before an election in order to vote in the party primary during the next year. The Court applied a relaxed standard of review because the statute did not absolutely prohibit anyone from participating in a primary but only required that each voter comply with a time deadline.[301] The state's interest in protecting the nomination process from "party raiding"[302] was deemed sufficient justification for the registration requirement.[303] *Rosario* was soon followed by *Kusper v. Pontikes*,[304] a factually similar case from Illinois. In *Kusper*, Justice Stewart struck down a statute prohibiting a voter from participating in a party primary if he voted in the primary of any other party within the preceding 23-month period. The statute effectively made it impossible to change party affiliation without foregoing voting in any party primary during the intervening year. Stewart found this statute to be a "significant encroachment upon associational freedom,"[305] and applied strict scrutiny review. *Rosario* was distinguished on the ground that the New York law upheld in that case had not absolutely denied the

301. The majority distinguished numerous cases applying strict scrutiny to statutory schemes infringing on the right to vote, concluding that "[i]n each of those cases, the State *totally denied the electoral franchise* to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." *Id.* at 757 (emphasis supplied).

302. As Justice Stewart explained, "party raiding" occurs when voters in sympathy with one party nevertheless register in a different party in order to participate in that party's primary and influence the outcome. *Id.* at 760. The attempt is to select an opposition party candidate who can be defeated by the candidate of the favored party.

303. Justice Powell dissented in *Rosario*. In his view, the lengthy period between party registration and primary required by the New York scheme infringed upon the "right of all persons to vote, once the State has decided to make it available to some . . ." and, additionally, the "right to associate with the party of one's choice," derived from the first amendment. *Id.* at 764 (Powell, J., dissenting); *see* Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Alabama, 357 U.S. 449 (1958). Speaking to Justice Stewart's point that the deadline did not absolutely deny the franchise, but only established time limits for registration, Powell insisted that "[o]ur decisions . . . have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that any serious burden or infringement on such 'constitutionally protected activity' is sufficient to establish a constitutional violation." 410 U.S. at 766-67, *quoting*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972). Accordingly, Justice Powell argued that the state must show its exclusion of unregistered voters to be necessary to a compelling state interest.

304. 414 U.S. 51 (1973).

305. *Id.* at 58.

right to vote but instead had only established a registration deadline.[306] Voters in New York were able to change parties freely, so long as they complied with the statute's timing requirements. In contrast, the Illinois voters in *Kusper* were unable to participate in a different party's primary without first letting a primary go by.

In related cases involving access to the ballot for fledgling political candidates and parties, the Court has also applied the strict scrutiny standard of review. In this context, however, some state statutory schemes have withstood even stringent examination. Last term, in *Storer v. Brown*[307] and *American Party of Texas v. White*,[308] the Court examined complex legislation governing access to the ballot in California and Texas, and, expressly applying strict scrutiny review, upheld most of the provisions under attack.[309] The

306. In dissent, Justices Blackmun and Rehnquist were not so easily persuaded that *Rosario* was a different case. *Id.* at 65 (Rehnquist, J., dissenting).

307. 416 U.S. ___, 94 S. Ct. 1274 (1974).

308. *Id.* at ___, 94 S. Ct. at 1296.

309. *Id.* at 1313. The complexity of state legislation regulating access to the ballot has caused the Court difficulty on several occasions. In the first case to reach the Court, the strict scrutiny standard of review was deemed applicable, and the election laws of Ohio were held to violate equal protection by unduly burdening the first amendment freedom of association implicated in political party affiliation. Williams v. Rhodes, 393 U.S. 23 (1968). *Williams* was distinguished three years later when, in Jenness v. Fortson, 403 U.S. 431 (1971), the Court upheld similar Georgia legislation under the relaxed, minimum rationality standard. It is noteworthy, however, that Justice Stewart's opinion for the Court in *Jenness* considered the first amendment question apart from the equal protection challenge. Thus he first asked forthrightly whether the legislative scheme violated the first amendment, and only after having decided that question in the negative did he move to a consideration of the petitioners' equal protection claim.

In two recent filing fee cases, the Chief Justice apparently, but not clearly, applied the strict scrutiny standard. In Bullock v. Carter, 405 U.S. 134 (1972), his opinion for a unanimous seven-member Court struck down a Texas fee system that required unusually high payments for placing candidates' names on the ballot. While *Bullock* purported to "closely scrutinize" the filing fee system under examination in that case, *id.* at 144, the Chief Justice later characterized the case as having been decided on the minimum rationality standard. In Lubin v. Panish, 416 U.S. ___, 94 S. Ct. 1315 (1974), he said that *Bullock* "involved filing fees that were so patently exclusionary as to violate *traditional equal protection concepts*." *Id.* at 1319 n.4 (emphasis supplied). On that basis, *Bullock* was inadequate authority for the application of strict scrutiny in *Lubin*, which involved filing fees fixed at a percentage of the salary for the office sought. Nevertheless, leaving the appropriate standard of review unclear, he declared simply that the state could not demand payment of fees by indigents, "consistent with constitutional standards." *Id.* at 1321. Mr. Justice Douglas concurred in an opinion relying squarely on precedents applying strict scrutiny to classifications on the basis of wealth. *Id.* at 1322 (Douglas, J., concurring).

Court emphasized that the state interest in maintaining the stability of the political process justified reasonable requirements that candidates and parties prove at least some support among the electorate before being given a place on the ballot. The consequent restriction on first amendment associational freedom, while significant enough to invoke strict judicial review, was considered not to be unduly burdensome. The ballot access cases thus may signal even further doctrinal developments.

If *Rodriguez* limited the fundamental interest branch of the new equal protection to cases involving violations of constitutional rights, and that holding effectively left equal protection behind and established the compelling interest test as the general standard of review applicable to substantive constitutional provisions, the *Storer* and *White* cases suggest that the test, while stringent, may be met by complex state regulatory legislation touching upon constitutional rights. It may be that, freed from its equal protection moorings, the strict scrutiny standard is no longer outcome-determinative, but instead is, after all, a balancing test that does not always dip in favor of the individual.[310]

Whatever may lie ahead for the strict scrutiny test, the Court

310. *See also* Burns v. Fortson, 410 U.S. 686 (1973) and Marston v. Lewis, 410 U.S. 679 (1973), which upheld 50-day voter residency requirements in spite of Dunn v. Blumstein, 405 U.S. 330 (1972), which clearly made the strict scrutiny standard of review applicable. On the other hand, rather than loosening the strict scrutiny standard itself, the Court, faced with equal protection challenges to highly complex state legislation governing the political process, may choose to fall back on the more relaxed, traditional standard. *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); Note, 72 MICH. L. REV. 868 (1974). The current flux in the choice of standards of review seems, in any event, to be linked with the Court's evolving intermediate model. While *Rodriguez* clung to the basic structure of two-tier equal protection and only narrowed the cases in which strict scrutiny would henceforth be invoked, it is rather clear that the present Powell-influenced Court is most comfortable outside the two-tier framework, applying a standard of review that looks more closely at challenged state statutes than does the traditional, minimum rationality model, but less stringently than the new equal protection strict scrutiny test. To the extent the Court finds itself satisfied with adjudication under the intermediate standard, it may find fewer and fewer cases falling within the already-narrowed categories invoking strict scrutiny. *See* O'Brien v. Skinner, 414 U.S. 524 (1974) (avoiding strict scrutiny language but striking down an infringement of prisoners' access to the electoral process). *See also* cases cited in note 309 *supra; compare* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (applying an enhanced version of the traditional test) *with* Village of Belle Terre v. Boraas, 416 U.S. ___, 94 S. Ct. 1536 (1974) (rejecting the lower court's reliance upon an intermediate standard of review); *see* Note, 72 MICH. L. REV. 508 (1974).

seems clearly to be settling upon an intermediate standard of review in the run of equal protection cases now dominating the docket. Perhaps the best recent illustration of the evolving doctrine is *Ross v. Moffit*,[311] which took up the question whether the states must furnish assigned counsel to assist indigent criminal appellants seeking discretionary review beyond the first appeal as of right.[312] In an opinion by Justice Rehnquist, the Court elaborated at some length on the *Griffin-Douglas* line of cases and concluded that North Carolina's failure to appoint counsel beyond the first appeal violated neither equal protection nor due process. The Court dispensed with the petitioner's due process claim by declaring that fundamental unfairness results only if "indigents are singled out by the State and denied meaningful access to that system because of their poverty."[313] That question was "more profitably considered under an equal protection analysis."[314] Relying on *Rodriguez* and other cases holding that the equal protection clause does not demand "absolute equality,"[315] Justice Rehnquist concluded that the state denial of counsel was valid, so long as "indigents have an adequate opportunity to present their claims fairly within the adversarial system."[316] Since discretionary appeals follow after thorough examination of a case is complete, the need for a lawyer is diminished and adequate consideration in the state supreme court can be afforded without further participation by assigned counsel.[317]

To be sure, Justice Rehnquist avoided direct reliance upon the due process clause and chose instead to base his decision on equal protection. Nevertheless, notions of fundamental fairness permeate the opinion, indicating once again that the adjudicatory approach

311. 417 U.S. ___, 94 S. Ct. 2437 (1974).

312. The question was left open in Douglas v. California, 372 U.S. 353 (1963); *see* Section III-B-1 *supra*.

313. 417 U.S. at ___, 94 S. Ct. at 2444.

314. *Id.*

315. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973).

316. 417 U.S. at ___, 94 S. Ct. at 2444-45.

317. The Court also upheld North Carolina's denial of assigned counsel to assist indigents seeking review in the United States Supreme Court. The responsibility for appointing counsel in that process rests, according to Justice Rehnquist, solely with the federal government, although the states are free to provide counsel if they choose. Justices Douglas, Brennan, and Marshall dissented in *Ross*, relying almost entirely upon the lower court's opinion. No significant discussion of the majority's analysis was offered. *See* 417 U.S. at ___, 94 S. Ct. at 2448 (Douglas, J., dissenting).

taken by the post-*Rodriguez* Court is due process in equal protection clothing. While the Court may view the treatment afforded others as evidence of what is fair to the individual, the ultimate focus is on the vertical relationship between the individual and government, and the task in every case is to assess the fairness of that relationship. Justice Powell, the architect of what the Burger Court has wrought from the Warren Court's two-tier approach, has, then, succeeded in reviving the views expressed, often in dissent, by the late Justice Harlan during the formative years of equal protection analysis. The egalitarian ideals of that period have given way, and, in the name of principle, a newly-constituted Court has chosen as its guide the very judicial philosophy rejected as unprincipled by its immediate predecessor. The Warren Court faulted Harlan's reliance upon the ability of judges to draw from societal values a sense of fundamental fairness sufficiently definite to provide a basis for principled decision-making. To his peers, Harlan's approach lacked standards; it left judges at large to decide cases on the basis of their own predilections. Yet the alternative to which that Court turned, two-tier equal protection analysis, required judges to exercise similar judgment at an earlier analytic stage—the point at which the appropriate standard of review is chosen. It was the necessity for a judicial assessment of the relative importance of individual and state interests that brought the two-tier approach under criticism.

In cases examined under the emerging intermediate model, the outcome depends, not upon the Court's selection of a stringent or relaxed standard of review based upon the character of the classification or the importance of the individual interests at stake, but upon the Court's sense of the fairness of the governmental action under attack. A single standard is applied, and in every case the Court arrives at a result only after balancing the competing interests. The Powell model is, then, a good faith, principled response to the criticism leveled against the double standard approach. Yet the exercise of judgment is hardly avoided; it is only shifted from the choice of standards of review to the application of a single, flexible test. It remains to be seen whether Justice Powell can employ Harlan's due process in a manner that will avoid raising again the charge that it leaves judges at large to impose their personal views upon the nation in the guise of constitutional adjudication.