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Equal Protection: Modes of Analysis in the Burger Court

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NOTE

EQUAL PROTECTION: MODES OF ANALYSIS IN THE BURGER COURT

INTRODUCTION

The 1971-1976 Terms of the Supreme Court have produced significant developments in equal protection. Among the more important of these have been the modes of analysis employed in this area of constitutional law. The Burger Court inherited from its predecessor a rigid, two-tier model of equal protection.[1] In the

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[1] A two-tier or "new" equal protection evolved during the Warren Court era. No mention was made of a bifurcated form of analysis in an important article appearing in 1949 which predicted the emergence of an active equal protection. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). The authors predicted, however, that race would become a "forbidden classification." *Id.* at 352-59. In 1966, Justice Harlan was still able to argue:

> It is suggested that a different and broader equal protection standard applies in cases where "fundamental liberties and rights are threatened" . . . which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause . . . .

Katzenbach v. Morgan, 384 U.S. 641, 660-61 (1966) (Harlan, J., dissenting). *See also* Justice Harlan's dissent in Shapiro v. Thompson, 394 U.S. 618, 659 (1969).

More recently, Justice Stevens has indicated an unwillingness to accept the two-tier analysis.

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not require the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be levelled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.
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> I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms. . . .

Craig v. Boren, 97 S. Ct. 451, 464 (1976) (Stevens, J., concurring).

Indeed, nothing on the face of the fourteenth amendment compels two-tier analysis. For most of its history, equal protection has had only one level of scrutiny, today's version of minimum scrutiny. *E.g.*, City of New Orleans v. Dukes, 96 S. Ct. 2513 (1976); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). This low degree of scrutiny was particularly appropriate for economic regulation, the area in which equal protection was

Warren Court era, minimum scrutiny almost always resulted in upholding the legislation under attack, while strict scrutiny had the opposite effect.[2] Since the outcome of a two-tier analysis was foreordained by the level of scrutiny applied, the real contest centered on whether or not the classifications or interests at stake called for minimum or strict scrutiny. The Burger Court has radically altered this game by closing the door on the recognition of "new" suspect classifications and fundamental, constitutional interests.[3] Constitutional inquiry now focuses more meaningfully on the *means* and *ends* of legislation to ascertain whether or not it will pass muster under the appropriate level of scrutiny.[4] Unlike

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most often applied in the early part of the twentieth century. The fourteenth amendment, however, was adopted in response to a more invidious form of discrimination—racial discrimination. McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Civil Rights Cases, 109 U.S. 3 (1883); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Speculation as to the need for a higher standard of review was expressed in 1938 when Justice Stone suggested that the presumption of constitutionality should be given a narrower scope in the case of legislation which discriminates against "discrete and insular minorities." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Several years later, the Court announced "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and would be subject "to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944). This stricter level of review has also been applied to legislation impinging on fundamental rights, such as voting. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). For commentary see Note, *The Mandate for a New Equal Protection Model*, 24 CATH. U.L. REV. 558 (1975); Note, *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969); Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155 (1973).

[2] Chief Justice Burger expressed his displeasure with these automatic results in *Dunn v. Blumstein:*

> 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.

405 U.S. 331, 363-64 (1972) (Burger, C.J., dissenting). Professor Gunther expressed the same observation in 1972:

> The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact.

Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (footnote omitted). *See also* Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS CONST. L.Q. 153, 159-60 (1975).

[3] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) [hereinafter cited as *Rodriguez*].

[4] In his analysis of the 1971 Term, Professor Gunther suggested that the Court would

the Warren Court, the Burger Court has used minimum scrutiny to strike down legislation[5] and has also upheld legislation against strict scrutiny.[6]

Faced with a dramatic alteration in the modes of constitutional analysis, state and lower federal courts and commentators have attempted to identify governing principles or patterns.[7] Lower courts which cannot discern with reasonable clarity the constitutional standards which should guide their decisions must guess at the right answer, and must, sometimes, guess wrongly.[8] Constitutional uncertainty also breeds an increased number of appeals, resulting not only in congested dockets but also in greatly increased expense for the litigants and the public. Legislators as well are caught in this web, since they must draft laws conforming to prevailing constitutional standards. Part I of this Note will examine developments in the area of strict scrutiny and Part II will examine the alternatives to a rigid, two-tier equal protection analysis.

I. STRICT SCRUTINY

A. *Suspect Classifications*

During the Warren Court era, the rigid, two-tier analysis left

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focus on the "means" selected by a legislature, and that the Court would leave to the discretion of legislatures, at least for equal protection purposes, the determination of appropriate legislative "purposes" or "ends." Gunther, *supra* note 2. Thus, he postulated, the Court would avoid inquiry which would be strongly suggestive of substantive due process. While Gunther's model has won a following in the lower courts, *e.g.*, Isakson v. Rickey, 550 P.2d 359 (Alas. 1976), it has not always carried the day in the Supreme Court. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533-38 (1973); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1071-72 (1974); Comment, *Constitutional Law—Two Eligibility Criteria Created by the 1971 Amendment to the Food Stamp Act Ruled Unjustifiably Discriminatory and Violative of Due Process*, 78 DICK. L. REV. 788 (1974).

[5] *E.g.*, Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972).

[6] *E.g.*, American Party v. White, 415 U.S. 767, 776 (1974).

[7] One federal district court judge expressed his frustration in trying to find the answer in this way: "A lower court faced with this line of cases has an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea." Vorchheimer v. School Dist., 400 F. Supp. 326, 340-41 (E.D. Pa. 1975) (footnote omitted), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided Court*, 45 U.S.L.W. 4378 (U.S. Apr. 19, 1977) (Rehnquist, J., not participating). An affirmance on certiorari by an equally divided Court is entitled to no precedential weight. Neil v. Biggers, 409 U.S. 188 (1972).

[8] *E.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), *rev'g* 476 F.2d 806 (2d Cir. 1973), *rev'g* 367 F. Supp. 136 (E.D.N.Y. 1972).

little doubt about the outcome, once it was clear whether strict or minimum scrutiny would be applied.[9] Nevertheless, flexibility was retained, inasmuch as the Warren Court was always somewhat foggy about which classifications or interests would turn a case into one requiring strict scrutiny.[10] Given the inclination to

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[9] Gunther, *supra* note 2, at 8; *see* Note, *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

Classifications which have been found suspect are: race, Loving v. Virginia, 388 U.S. 1 (1967); alienage, Graham v. Richardson, 403 U.S. 365 (1971); and nationality, Oyama v. California, 332 U.S. 633 (1948). Interests which have been found to be fundamental in the constitutional sense are: voting, Kramer v. Union Free School Dist., 395 U.S. 621 (1969), *but see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); travel, Shapiro v. Thompson, 394 U.S. 618 (1969), *but see* Sosna v. Iowa, 419 U.S. 393 (1975); and procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942). Whenever a suspect classification or fundamental constitutional interest is impinged on, the legislation must satisfy three criteria: The means selected must be necessary; the means must serve a compelling need; the means must serve a legitimate state purpose. Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971, 996-1006 (1974).

Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977), presents the Court with the question it ducked earlier in DeFunis v. Odegaard, 416 U.S. 312 (1974). That question is whether affirmative action programs in which race is an intentional component must be tested against and can satisfy the compelling interest standard. In *Bakke* the California Supreme Court held that a state medical school's affirmative action program violated federal equal protection because it did not satisfy the less restrictive alternative requirement of the compelling interest test. Broad language in a subsequent United States Supreme Court decision, United Jewish Organizations v. Carey, 45 U.S.L.W. 4221 (U.S. Mar. 1, 1977), offers hope that *Bakke* will either be overturned or, at a minimum, the Court will set some standard by which affirmative action programs can be established to conform to constitutional mandate. In *United Jewish Organizations* the Court upheld a reapportionment plan which was admittedly drawn with racial considerations in order to satisfy the Voting Rights Act, 42 U.S.C.S. § 1973 (1975). Although only the Chief Justice dissented and Justice Marshall did not participate, there is no one thread which can be pulled from the Court's decision. For himself and three others, Justice White observed that the fourteenth amendment does not mandate "any *per se* rule against using racial factors" in reapportionment. 45 U.S.L.W. at 4226. Justice Brennan's concurring opinion briefly discusses three objections to "benign discrimination." First, benign discrimination may become a facade behind which disadvantageous treatment is perpetuated. If courts are unable to distinguish the benign from the invidious programs, that would weigh heavily against the use of affirmative action. Second, remedial programs might stimulate racism and may stigmatize intended beneficiaries. Third, even a benign policy may seem unjust to those adversely affected by it. 45 U.S.L.W. at 4229. Justice Brennan has elsewhere indicated that a carefully prepared affirmative action policy may satisfy the compelling interest standard. Kahn v. Shevin, 416 U.S. 351 (1974) (dissenting opinion).

[10] In Carrington v. Rash, 380 U.S. 89 (1965), the Court was faced with a portion of the Texas Constitution which impinged on both the right to vote and the right to travel. With a choice between resting its decision on either one of these interests, the Warren Court did not clearly rest its decision on one or the other as the *ratio decidendi*. This soft

strike down a particular legislative scheme, the Court always seemed to be able to reach out and find a classification or interest calling for strict scrutiny.[11]

The Burger Court's rebellion against this flexible approach blossomed in *San Antonio Independent School District v. Rodriguez.*[12] In that case the Court was squarely asked to find that a school financing scheme which discriminated against poor

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method of decision-writing was carried over by the Warren Court into areas where neither the interest nor the classification has been held, specifically, to require strict scrutiny. Thus, in Griffin v. Illinois, 351 U.S. 12 (1956), the Court applied strict scrutiny when confronted with a legislative scheme which required criminal appellants to file a transcript in order to obtain full appellate review and where the state would not provide free transcripts to indigent appellants, thereby limiting the right of appeal. In applying strict scrutiny, the Court did not indicate whether it was doing so because of poverty or the criminal appeal process, or whether both were necessary to invoke this degree of review. It was this fortuity that the Burger Court seized upon in *Rodriguez.* No prior Supreme Court case had held poverty to be a suspect classification and, as far as the Burger Court could help it, no one ever would. Similarly, no prior case had held education to be a fundamental interest. Brown v. Board of Educ., 347 U.S. 483 (1954), and all of its progeny, up until *Rodriguez,* had involved both race and education. It had never, therefore, been necessary to hold expressly that education was a fundamental interest. It came as something of a shock to find out, in *Rodriguez,* that education was not, of itself, sufficient to invoke the higher tier of scrutiny. Thus, by making hard-nosed distinctions, as in *Rodriguez,* the Burger Court has been able to escape from the broadest reaches of the Warren Court legacy.

[11] Although the Warren Court's process was open-ended, it had in fact produced only a smattering of interests or classifications which would, either alone or in combination, invoke strict scrutiny. *See* discussion in notes 9-10 *supra.*

[12] 411 U.S. 1 (1973). The California Supreme Court reached a result diametrically opposed to *Rodriguez* on *state* equal protection grounds. Serrano v. Priest, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (*Serrano II*).

> As *Serrano I* makes clear . . . our state equal protection provisions, while "substantially the equivalent of" the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable. We have recently stated in a related context: "[I]n the area of fundamental civil liberties—which includes . . . all protections of the California Declaration of Rights—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. . . . Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.

Id. at 950, 135 Cal. Rptr. at 366. Justice Brennan's views on the use of independent state grounds for decision are set forth in his article, Brennan, *State Constitutions and the Protection of Human Rights,* 90 HARV. L. REV. 489 (1977).

people created a suspect classification. Speaking through Justice Powell, the Court declined the invitation. Prior cases involving poverty, such as *Douglas v. California*[13] and *Harper v. Virginia Board of Elections,*[14] were distinguished with the observation that the factor which called strict scrutiny into play in those cases was the "absolute deprivation" of a particular right, such as the right to take a criminal appeal or access to the ballot, rather than a classification based on poverty as such. Another factor which Justice Powell indicated militated against recognition of poor people as a suspect class was that the Texas financing plan did not operate to discriminate *solely* against poor people nor against *all* poor people. Justice Powell then articulated a standard to be used in determining whether or not a particular classification should be recognized as being suspect:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[15]

Since announcing this test the Court has not recognized any new classification as suspect.[16]

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[13] 372 U.S. 353 (1963).

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

[15] 411 U.S. at 28. This was a transparent warning that the Burger Court would not listen favorably to pleas for recognition of "new" suspect classes. Advocates for the recognition of sex and illegitimacy as suspect classifications were undeterred. Framed as it was, Justice Powell's test did not foreclose recognition of either as a suspect class. To the contrary, the test seemed to have been drawn with gender-based discrimination in mind, at the very least; it is an understatement, rather than an exaggeration, to say that both classes, but most especially women, have been saddled with disabilities, have been subjected to purposeful unequal treatment, and have been and still are, for the most part, politically powerless. Moreover, the Supreme Court itself has said that women and illegitimates are special disfavorites of the law. Mathews v. Lucas, 96 S. Ct. 2755 (1976) (illegitimates); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (women). Nonetheless, the Court has so far refused to hold, by a majority vote, that either classification is suspect. Craig v. Boren, 97 S. Ct. 451 (1976) (sex); Mathews v. Lucas, 96 S. Ct. 2755 (1976) (illegitimacy).

[16] In addition to sex and illegitimacy, the Court has declined to recognize age as a suspect classification. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976). Although the Court has traditionally applied strict scrutiny to state programs discriminating against aliens, Graham v. Richardson, 403 U.S. 365 (1971), the Court backed away from this degree of scrutiny in a recent decision upholding a federal Medicare program denying benefits to resident aliens who had been in the United States for less than five

Justice Marshall sharply dissented from the Court's holding and reasoning with respect to suspect classifications generally and poverty in particular.[17] In neither *Griffin v. Illinois*[18] nor *Douglas v. California*,[19] Marshall emphasized, did the offensive scheme work an *absolute* deprivation of the right to take an appeal. In the one case, poor people were deprived of a transcript, and in the other they were deprived of an attorney, but in both cases poor people could still take an appeal. In *Harper v. Virginia Board of Elections*,[20] the poll tax discriminated not merely

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years. Mathews v. Diaz, 96 S. Ct. 1883 (1976). The denial of benefits was upheld as a reasonable fiscal measure based on the plenary power of Congress to regulate aliens.

There continues to be disquiet within the Court over the treatment to be accorded gender-based classifications. Of the four-member plurality in Frontiero v. Richardson, 411 U.S. 677 (1973), composed of Justices Brennan, Douglas, Marshall, and White, which would have designated sex as a suspect class, Justice Douglas no longer is on the Court. Of the three members who expressed a desire in that case to await the fate of the Equal Rights Amendment, Justices Blackmun and Powell would evaluate gender-based classifications by a "middle-tier" approach. Craig v. Boren, 97 S. Ct. 451, 463-64 (1976) (Powell, J., concurring); 97 S. Ct. at 466 (Blackmun, J., concurring). In his majority opinion in Mathews v. Lucas, 96 S. Ct. 2755 (1976), Justice Blackmun held that illegitimates should not be treated as a suspect class because illegitimacy does not carry the same obvious badges as do race and sex, nor has discrimination against illegitimates ever approached the severity or pervasiveness of legal and political discrimination against women or blacks. 96 S. Ct. at 2762. Given the parallels between race and sex which Justice Blackmun drew in *Mathews v. Lucas*, it may be that he would now vote to find sex a suspect class. Even if he were so inclined, there would still be no more than four votes to that effect. Justice Stevens has dissociated himself from two-tier analysis altogether, Craig v. Boren, 97 S. Ct. 451, 464-65 (1976) (Stevens, J., concurring), and would not, presumably, add the fifth vote which would be necessary for a majority of the Court to hold sex to be a suspect classification. The Chief Justice, and Justices Powell, Rehnquist, and Stewart have held fast to their position that sex is not a suspect class. Each of the four wrote an opinion in *Craig v. Boren, supra*. The majority opinion by Justice Brennan in *Craig v. Boren* is also interesting in that it suggests a more than minimal, but less than strict, scrutiny of a gender-based classification. It may be postulated that the "middle-tier" test for gender-based discrimination set out for the majority by Brennan in this case is not the "retreat" from the plurality position of Frontiero v. Richardson, 411 U.S. 677 (1973), over which Justice Rehnquist rejoices in *Craig*. If the Equal Rights Amendment is passed, it is difficult to see how the Court could avoid holding sex to be suspect. On the other hand, in view of the difficulties which the ERA is encountering, members of the Court seem to feel that by adopting a "middle-tier" test for gender-based discrimination *now*, and even assuming the ERA then fails, sex classifications would not be relegated to the same superficial minimal scrutiny analysis which the Chief Justice and Justice Rehnquist advocate in their separate dissents in *Craig v. Boren*. Further signs of internal Court disagreement over the definition of sex discrimination are evident in General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976).

[17] 411 U.S. at 117-24 (Marshall, J., dissenting).

[18] 351 U.S. 12 (1956), *limited by* United States v. MacCollom, 96 S. Ct. 2086 (1976).

[19] 372 U.S. 353 (1963), *limited by* Ross v. Moffitt, 417 U.S. 600 (1974).

[20] 383 U.S. 663 (1966).

against poor people who were unable to pay but it also operated to prevent from voting those who simply failed to pay, although able to do so. The Court struck down both aspects of the poll tax. Justice Marshall pointed out that these cases, upon which Justice Powell relied, did not support a holding that a classification is suspect only if it works an *absolute* deprivation of some right. Indeed, Justice Marshall said, an analysis of past decisions proved that the Court had focused on the relevance of the classification to the right denied.[21] In *Rodriguez*, Justice Marshall would have looked at the relevance of the taxable wealth of a school district to the interests of school children in the education they would receive. Since the discrimination effected by such a classification was a function of group wealth, rather than personal wealth, and in no way reflected the individual's abilities or needs, it was, Justice Marshall believed, invidious. Moreover, even within the terms of Justice Powell's test, poor people were politically powerless to effect a more equitable financing scheme against certain opposition from a political majority opposing higher taxation. For these reasons Justice Marshall would have found the wealth-related classification affecting education in *Rodriguez* suspect.[22]

Basic to understanding strict scrutiny in the Burger Court is a thorough understanding of *Rodriguez*. Its significance is less in its holding, though important, and even less in the test of suspectness that it enunciates and which Justice Marshall deflates; the true significance is the tone it sets—an inhospitable climate in which strict scrutiny stops growing and begins to shrink. In this atmosphere pleas for the recognition of sex[23] and illegitimacy[24] as

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[21] The highly suspect character of classifications based on race, nationality, or alienage is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as "discrete and insular minorities" who are relatively powerless to protect their interests in the political process. Moreover, race, nationality, or alienage is "'in most circumstances irrelevant' to any constitutionally acceptable purpose." Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality.

411 U.S. at 105 (Marshall, J., dissenting) (footnotes and citations omitted). *See also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

[22] 411 U.S. at 120-24.

[23] Frontiero v. Richardson, 411 U.S. 677 (1973). At least two state courts have held sex to be suspect—California and Washington. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485

suspect classifications have not moved a majority of the Court. Spurious as Justice Powell's three-pronged test for suspectness may be, its message is clear: No more suspect classes!

B. *Fundamental Interests*

The Warren Court's catalogue of fundamental interests was neither large nor well-defined.[25] Again, it was this weakness which the Burger Court attacked through Justice Powell in *Rodriguez*. In his opinion, Justice Powell moved quickly to defuse arguments that education is a constitutionally protected fundamental interest. He did not directly attack the importance of education. Instead, he undercut the supports on which this claim to extraordinary constitutional protection rested. Since the close of the era of substantive due process, the Court has been loath to find substantive rights in the fourteenth amendment,[26] an onus shared by equal protection.[27] Emphasizing this backdrop, Justice Powell announced another test:

P.2d 529, 95 Cal. Rptr. 329 (1971); Hanson v. Hutt, 83 Wash. 2d 195, 517 P.2d 599 (1973). *See generally* B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES (1975); Brown, Emerson, Falk, & Freedman, *The ERA: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A.L. REV. 235 (1975); Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617 (1974); Lombard, *Sex: A Classification in Search of Strict Scrutiny*, 21 WAYNE L. REV. 1355 (1975); Note, Geduldig v. Aiello: Pregnancy *Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975); Note, *The Supreme Court 1974 Term and Sex-Based Classifications: Avoiding a Standard of Review*, 19 ST. LOUIS L.J. 375 (1975).

[24] Mathews v. Lucas, 96 S. Ct. 2755 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974). For commentary on the status of illegitimates see Gray & Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liab. Ins. Co., 118 U. PA. L. REV. 1 (1969); Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Lee, *The Changing American Law Relating to Illegitimate Children*, 11 WAKE FOREST L. REV. 415 (1975); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479 (1974).

[25] *See* notes 9-10 *supra*.

[26] Among the most noted substantive due process cases are Coppage v. Kansas, 236 U.S. 1 (1915), and Lochner v. New York, 198 U.S. 45 (1905). The doctrine fell into constitutional disrepute in the mid-1930's, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), and has since been buried many times over, *e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963). To this day, however, black-robed justices denounce the reappearance of this doctrine, *e.g.*, Vlandis v. Kline, 412 U.S. 441, 467-68 (1973) (Rehnquist, J., dissenting). *See also* Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489 (1972).

[27] "Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties." San Antonio Independent

> Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[28]

Applying this test, Justice Powell concluded that education is not a fundamental, constitutional right. It is not expressly guaranteed and he could find no basis for implying its guarantee. In particular, he rejected the "nexus theory" that education was impliedly guaranteed because of its central importance to the meaningful exercise of other guaranteed rights, such as freedom of expression and voting. Moreover, he added, even assuming education is essential to the exercise of these rights, this is not to say that the Constitution guarantees to each the most "*effective* speech or the most *informed* legislative choice."[29] To the extent there was *any* bare, minimum quantity of education necessary to exercise other constitutional rights, the Texas financing scheme, he held, did at least that much. By anyone's reading, Justice Powell's opinion is a studied effort to communicate the Court's unwillingness to expand fundamental interests beyond voting, travel, and procreation.

Justice Marshall's dissent is logically less compelling on this point than his critique of the Court's treatment of suspect classifications. The difference between Justice Marshall and the majority is that Justice Marshall accepts the "nexus theory"—the more closely the interest is tied to other fundamental rights, the more searching the scrutiny it must withstand.[30] While this argument has appeal and may serve to explain Warren Court strict scrutiny

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School Dist. v. Rodriguez, 411 U.S. at 59 (Stewart, J., concurring) (footnote omitted). Giving full force to this logic would go a long way toward undermining the fundamental right status of interests such as procreation and travel. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 502 (1973).

[28] 411 U.S. at 33-34. The California Supreme Court rejected this analysis and found education to be a fundamental right based on the state's equal protection guarantees in Serrano v. Priest, 557 P.2d 929, 951, 135 Cal. Rptr. 345, 367 (1976).

[29] 411 U.S. at 36.

[30] *Id.* at 110-17. Justice Marshall did not contend that the Warren Court had ever held public education to be constitutionally required. He argued that education has a special status in light of its close relationship to individual development and the exercise of constitutional rights. *Id.* at 111.

decisions, such as *Griffin v. Illinois*,[31] it is more a matter of philosophical orientation than settled constitutional doctrine.[32] Justice Marshall's flexible approach to the identification of fundamental interests is in sharp contrast to the narrow standard adopted by the Burger Court majority. This narrow standard allows the Burger Court to confine the holdings of Warren Court decisions to their facts without the discomfort of overruling precedent. At the same time, a begrudging, narrow standard for the identification of fundamental interests has the benefit of relative certainty in application. Moreover, an articulated standard lends itself more readily to the semblance of intellectual and constitutional integrity than an ad hoc balancing test which may appear to be, if it is not in fact, arbitrarily manipulated to fit the facts of the case.

C. *Ignoring Precedent*

While no fundamental interest or suspect classification bequeathed to the Burger Court has been specifically abandoned, the legacy has not always been faithfully applied. From time to time the Court has clearly "distinguished" controlling precedent on specious or wholly unarticulated grounds. Two decisions, *Sosna v. Iowa*[33] and *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[34] illustrate this approach.

Sosna involved a challenge to Iowa's one-year residency requirement for divorce. It was argued that the scheme penalized the right to travel in violation of equal protection[35] and hence should be tested against the compelling interest standard.[36] Al-

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[31] 351 U.S. 12 (1956).

[32] Justice Marshall's dissent is actually an elaborate development of what has been described as a "sliding-scale" balancing test in equal protection in counterpoint to the rigid, two-tier equal protection. *See* text accompanying notes 103-14, 142-46 *infra*. Justice Stewart labeled Justice Marshall's dissent as "imaginative." 411 U.S. at 59.

[33] 419 U.S. 393 (1975).

[34] 410 U.S. 719 (1973).

[35] Legislation which impinges on the right of persons to engage in interstate movement should be measured by the strict scrutiny standard. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

[36] It was also urged that the legislation created an irrebuttable, conclusive presumption violating due process. 419 U.S. at 409. For an examination of this doctrine see text accompanying notes 49-85 *infra*. Justice Rehnquist rejected this claim, observing that Vlandis v. Kline, 412 U.S. 441 (1973), should not be construed as prohibiting bona fide

though the logic of prior cases considering durational residency requirements would seem to require strict scrutiny here,[37] Justice Rehnquist dismissed those cases as not controlling, because, in his estimation, the residency requirements in those cases were only justified by administrative convenience and fiscal considerations. He urged that Iowa's interest in maintaining the integrity of its dissolution decrees against collateral attack in sister states was a different and, therefore, satisfactory ground of justification.

Justice Rehnquist's majority opinion is analysis by misdirection, artfully inviting analysis of the legislation by the wrong standard and then concluding that the legislation satisfies that standard. He achieved this result by giving an obscure answer to the question of whether strict scrutiny had been satisfied or even applied.

> We therefore hold that the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack, requires a different resolution of the constitutional issue presented than was the case in *Shapiro, supra, Dunn, supra,* and *Maricopa County, supra.*[38]

The statement that this case "requires a different resolution of the constitutional issue" can be interpreted in either of two diametrically opposed ways. Does he mean here, that unlike *Shapiro, Dunn,* and *Maricopa County,* the scheme satisfies strict scrutiny? While the opinion does not say so directly, the answer must be no. The compelling interest standard is satisfied only if the state has chosen "means that do not unnecessarily burden constitutionally protected interests."[39] Justice Rehnquist made

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residency requirements, citing Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd,* 401 U.S. 985 (1971), which upheld a one year residency requirement for students qualifying for in-state tuition rates. Notwithstanding the state's monopoly on the divorce apparatus as the only legal means of dissolving a marriage relationship, Boddie v. Connecticut, 401 U.S. 371 (1971), and the severe hardship which a one year delay may impose, Justice Rehnquist found it unnecessary to require the state to make an individualized determination of residency for persons seeking divorce. 419 U.S. at 410.

[37] "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." Shapiro v. Thompson, 394 U.S. 618, 638 (1969). For commentary on durational residence requirements for divorce see Wurfel, *Jet Age Domicil: The Semi-Demise of Durational Residence Requirements,* 11 WAKE FOREST L. REV. 349, 407-12 (1975).

[38] 419 U.S. at 409.

[39] Memorial Hosp. v. Maricopa County, 415 U.S. at 263. *See also* Dunn v. Blumstein,

no effort to show that the Iowa statute met this burden, as well he could not, since the state could determine the fact of residence by other means, *i.e.*, by individualized determinations.[40] The Iowa scheme, therefore, would fail the compelling interest test. Therefore, it must be assumed that when Justice Rehnquist spoke of a different resolution of the constitutional issue, he was referring to the use of minimum scrutiny, rather than strict scrutiny. His argument that Iowa's statute was justified by reasons of full faith and credit and comity, rather than administrative and budgetary considerations,[41] goes to the question of whether the proferred justifications satisfy the appropriate level of scrutiny, *not* to the more basic question of which level of scrutiny is appropriate.[42] Notwithstanding prior cases implicating the right to travel—which had held that strict scrutiny must be applied—Justice Rehnquist applied minimum scrutiny without articulating standards for not applying strict scrutiny. It seems apparent that strict scrutiny was ignored, not because it was inappropriate in light of the constitutional interest involved, but because the Justices did not like the results its application would bring.

The Burger Court has also retreated from the use of strict scrutiny in the case of voting. In *Salyer Land Co. v. Tulare Lake*

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405 U.S. at 343; Kramer v. Union Free School Dist., 395 U.S. at 627. For a general discussion see Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974).

[40] 419 U.S. at 424 n.6 (Marshall, J., dissenting).

[41] *See* text accompanying note 37 *supra*.

[42] The dissent was sharply critical of the majority's approach.

> The Court's failure to address the instant case in these terms [strict scrutiny] suggests a new distaste for the mode of analysis we have applied in this corner of equal protection law. In its stead, the Court has employed what appears to be an *ad hoc* balancing test . . . . I am concerned not only about the disposition of this case, but also about the implications of the majority's analysis for other divorce statutes and for durational residency requirement cases in general.

419 U.S. at 419 (Marshall, J., dissenting). Prior to *Sosna*, a number of state and lower federal courts had considered challenges to other divorce statutes with durational residency requirements. When the question was presented to the Alaska Supreme Court, it held *all* residency requirements to be prima facie invalid as infringing on the fundamental constitutional right of travel. State v. Adams, 522 P.2d 1125 (Alas. 1974). For commentary see McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class*, 28 VAND. L. REV. 987, 1014-16 (1975); Comment, Sosna v. Iowa: *A New Equal Protection Approach to Durational Residency Requirements?*, 22 U.C.L.A.L. REV. 1313 (1975).

Basin Water Storage District,[43] the Court applied minimum scrutiny to uphold a voting system which restricted the right to vote in water district elections to resident landowners.[44] Four years earlier, in *Kramer v. Union Free School District*,[45] the Warren Court had applied strict scrutiny to a plan which deprived non-property owners and those who were not parents or guardians of public school children from voting on school district affairs. Because the right to vote is preservative of other rights, *Kramer* held, exclusions from the franchise must serve a compelling state interest. *Salyer* avoids this rule by creating a special purpose district exception. When this exception applies, the limitation on the franchise need only satisfy minimum scrutiny.

The grounds by which the Court in *Salyer* distinguished *Kramer's* requirement for strict scrutiny are not sound. Justice Rehnquist said that the water district in *Salyer* was so specialized that it affected only the interests of a few people within its geographical boundaries. Moreover, the district's purposes were limited to flood control and irrigation, and the economic burdens of the district did not fall on all district residents. He also noted that the district did not have general governmental powers. Because of these considerations, he found that the restrictions on the right to vote were "rationally based."[46] But, why he applied minimum scrutiny rather than strict scrutiny is not satisfactorily explained. The differences in the types of districts at issue in *Salyer* and *Kramer*, the fact the Court relied upon in justifying different standards, are insignificant in constitutional terms—a fact the Court made abundantly clear in another of its decisions, *Rodriguez*. In the latter case, the Court held education was not a constitutionally protected interest and did not require anything more than minimum scrutiny. The different standards of review in *Salyer* and *Kramer* thus cannot be justified on the ground that the educational interest involved in *Kramer* is entitled to special protection. Stripped of collateral issues, the constitutionally significant interest in both *Salyer* and *Kramer* is the right

[43] 410 U.S. 719 (1973). Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973), was a companion case.

[44] Among those excluded from the franchise were resident lessees of farmland and all landowners who were not farmers.

[45] 395 U.S. 621 (1969).

[46] 410 U.S. at 734-35.

to vote. There is no constitutional basis for protecting the right to vote in one kind of district more than in another. In the absence of a constitutional basis for applying different standards, the different results in *Salyer* and *Kramer* can only be explained as a conscious decision to ignore precedent. Ironically, it is this same ad hoc approach to determining the appropriate level of review which the Burger Court majority denounced in *Rodriguez*.[47]

Both *Sosna* and *Salyer* reflect disturbing trends. Each case concerned fundamental constitutional rights, recognized as such in *Rodriguez*. Precedent called for the application of strict scrutiny. Yet, in neither case did the majority articulate sound reasons for ignoring precedent. This approach to constitutional adjudication is unprincipled and likely to cause unnecessary uncertainty in future cases.[48] Moreover. at a time when members of the

[47] Justice Rehnquist's opinion stresses the "special district" aspect of a flood control and irrigation project. Two calamities in the western United States during 1976 involving flood control projects illustrate the interests of all residents in the affairs of such "special districts." The collapse of the Teton Dam in Idaho destroyed millions of dollars of property, farmland and non-farmland, in the flood plain below the dam. In Colorado, a flash flood in Big Thompson Canyon took over 100 lives and destroyed millions of dollars of property. Residents of these and similar districts can be expected to be less than enamored by proposals which restrict the franchise that determines the development of similar enterprises. Justice Rehnquist's minimum scrutiny standard would sacrifice these concerns too readily. It is precisely this danger that the Court sought to avoid by its holding in *Kramer*, a danger which has been let in the back door by *Salyer*'s "special district" exception. The *Salyer* decision is to be admired neither for its specific holding nor for its unarticulated grounds for refusing to apply strict scrutiny to legislation which disenfranchises affected citizens.

[48] The remarks of Professor Wechsler speak well to this problem, although made in the context of the shared powers of the three coordinate branches of government:

> The Courts have both the title and the duty when a case is properly before them to review the actions of other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). Neither *Sosna* nor *Salyer* meets this standard. Another commentator put it this way: "According to common understanding, the general rule is that an appellate court is obliged to follow, or else somehow distinguish, its own earlier decisions, or at the least those elements of the case known as the *ratio decidendi*." Wise, *The Doctrine of Stare*

Court have expressed concern over the Court's growing docket, this approach to decisionmaking can only encourage more appeals in areas of law that heretofore appeared settled.

II. ALTERNATIVES TO TRADITIONAL TWO-TIER ANALYSIS

The Burger Court's rejection of a rigid, two-tier equal protection analysis has been most evident in those cases where strict scrutiny has not been applied. For a time the Court experimented with the conclusive presumption doctrine of due process. Apparently, because this doctrine became little more than a surrogate for strict scrutiny and threatened to invalidate just about any law to which it was applied, this experiment seems to have been abandoned. Meanwhile, the Court has used minimum scrutiny with a vigor which, *at times,* clearly exceeds its deferential reputation. The problem lies in understanding what gives rise to the Court's varying degrees of analysis.

A. *Conclusive Presumptions*

An irrebuttable presumption exists if proof of one fact is conclusive evidence of the existence of a second fact. Constitutionally, the doctrine has its roots in the due process clause. Except for the Burger Court's brief fling in the area, the conclusive presumption doctrine has had an obscure career.[49]

Decisis, 21 WAYNE L. REV. 1043, 1045 (1975). It is true, of course, that constitutional holdings are more open to reexamination than those based on nonconstitutional issues. Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 177 (Rehnquist, J., dissenting). *See* Justice Frankfurter's dissent in Morey v. Doud, 354 U.S. 457, 472 (1957). Nonetheless, in *Sosna* and *Salyer* we find Justice Rehnquist engaging in the kind of decisionmaking by "brute force" to which he objected in *Weber.* 406 U.S. at 177. *See also* Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293 (1976).

[49] The oldest and "best" known of the first generation of conclusive presumption cases is Schlesinger v. Wisconsin, 270 U.S. 230 (1926). That case held unconstitutional a statute which made any gift within six years of death taxable as though it had been made in anticipation of death. Heiner v. Donnan, 285 U.S. 312 (1932), struck down a similar statute as applied to a young man who had made a gift and was then struck dead by a bolt of lightning. Among other conclusive presumption cases are: Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942) (Stone, C.J., concurring); United States v. Provident Trust Co., 291 U.S. 272 (1934); Ferry v. Ramsey, 277 U.S. 88 (1928). Carrington v. Rash, 380 U.S. 89 (1965), struck down a portion of the Texas Constitution, relying on equal protection instead of the conclusive presumption doctrine. Texas denied members of the armed forces the right to vote in Texas as long as they were in the military, if they had not been Texas residents before joining the military. The more recent conclusive presumption, due process cases can be, and probably should have been, analyzed in terms

Stanley v. Illinois[50] is the first of the truly important conclusive presumption cases decided by the Burger Court.[51] The Illinois statute in question made an unwed father unfit to retain the custody of his children after the death of the mother. Although he might be able to regain custody of his children as their guardian or by adoption, legally he was a stranger to them. No evidence was admissible to prove fitness to retain custody. Justice White's majority opinion, which alternated between equal protection and due process analyses, held that this administrative shortcut to determining parental unfitness deprived both the father and his children of due process.[52] Chief Justice Burger would have reached an opposite result because he could find the word "presumption" nowhere in the statute.[53]

With *Vlandis v. Kline*[54] this new doctrine began to take

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of equal protection. *See* Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974).

[50] 405 U.S. 645 (1972). Comment, *The Emerging Constitutional Protection of Putative Father's Constitutional Rights*, 70 MICH. L. REV. 1581 (1972).

[51] *Stanley* was preceded by Bell v. Burson, 402 U.S. 535 (1971). No one dissented from *Bell*, but Chief Justice Burger and Justices Black and Blackmun concurred in the result. *Bell* invalidated a portion of the Georgia motor vehicle responsibility statute which automatically suspended the license of an uninsured motorist who had been involved in an accident and who was unable to or did not post a security. No hearing was held on the question of fault before the license was suspended and any offer of evidence regarding fault was not accepted. Thus postured, the case had heavy overtones of the procedural due process seen in Goss v. Lopez, 419 U.S. 565 (1975), and Goldberg v. Kelly, 397 U.S. 254 (1970). As eventually developed by the Burger Court, the conclusive presumption doctrine leaned more toward substantive due process. *See* Justice Rehnquist's dissent in Vlandis v. Kline, 412 U.S. 441, 463 (1973).

[52] Among the decisions subsequent to *Stanley* which have arrived at similar results are Willmott v. Decker, 56 Hawaii 462, 541 P.2d 13 (1975), and Phillips v. Horlander, 535 S.W.2d 72 (Ky. 1975). California has extended *Stanley* to uphold the right of a putative father to prove that he is the natural father, of a child born of a woman married to another man, in order to rebut the strong presumption that a child born to a married woman is a legitimate child of that marriage. *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975). *See* Comment, In re Lisa R.—*Limiting the Scope of the Conclusive Presumption Doctrine*, 13 SAN DIEGO L. REV. 377 (1976). New York has refused to grant the unwed natural father a right to prevent the mother from putting the child up for adoption for the reason that the father could use this veto power to harm both the mother and the child. *In re* Malpica-Orsini, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975). *See* Comment, *Constitutional Law—Fourteenth Amendment Equal Protection—Rights of the Unwed Father—Consent to Adoption*, 61 CORNELL L. REV. 312 (1976). *But see* Adoption of Walker, 360 A.2d 603 (Pa. 1976).

[53] Justice Blackmun joined in this dissent. Justices Powell and Rehnquist did not participate.

[54] 412 U.S. 441 (1973).

shape. This case held unconstitutional the residency-nonresidency classifications employed by many states to determine who would be required to pay higher tuition at state colleges and universities. Connecticut classified students as state residents or as nonresidents at the time of their applications for admission. Once designated as a nonresident, students were required to pay nonresident tuition rates for as long as they attended the state institution. Justice Stewart rejected the proferred justifications of administrative convenience and fiscal conservation. Due process, he said, would not permit a permanent classification of nonresidency when such classification

> is not necessarily or universally true in fact . . . when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.[55]

It was not the existence of two classifications which offended due process but the absence of any means to rebut the classification which imposed a heavier financial burden on those initially classified as nonresidents. While the state could maintain the basic classifications, it had to provide some means for determining which students had, subsequent to their admission, become bona fide state residents.[56]

Dissatisfaction within the Court with this mode of constitutional analysis is evident in the concurring and dissenting opinions. Justice White's concurrence was based on his finding that the legislation invidiously discriminated against several classes of bona fide state residents. He objected to the Court's use of due process, finding it a surrogate form of analysis for a problem rooted in equal protection.[57] Chief Justice Burger's dissent also

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[55] *Id.* at 452. The plaintiff in this case had married a life-long Connecticut resident, had acquired a Connecticut driver's license and car registration, and had registered to vote in Connecticut.

[56] The Court noted that it had previously upheld a Minnesota statute which allowed students to prove they had become bona fide residents and were therefore qualified for in-state tuition rates. Starns v. Malkerson, 401 U.S. 985 (1971), *aff'g* 326 F. Supp. 234 (D. Minn. 1970). Presence in Minnesota for one year was required before evidence of bona fide residency would be accepted.

[57] Justice White also concluded that the Court was using a spectrum of standards in equal protection cases rather than a two-tier model:

> [I]t must now be obvious, or has been all along, that, as the Court's assess-

argued that the Court was applying equal protection and had "sub silentio" adopted strict scrutiny without stating what constitutionally protected interest had been impinged. In addition, he argued that the Court's reasoning threatened thousands of statutes employing presumptions similar to the one held unconstitutional in this case. This concern was amplified in Justice Rehnquist's dissent. For him the majority opinion was a return to substantive due process.[58]

Disagreement over the use of the conclusive presumption doctrine intensified in *Cleveland Board of Education v. LaFleur.*[59] This case upheld the challenge by pregnant teachers to school policies which compelled them to go on leave several months before the time they were to give birth. By way of defense, the schools argued that these arbitrary dates approximated periods during which pregnant teachers would be incapacitated and unfit to teach. In addition, the schools claimed that these policies facilitated classroom continuity and the school board's search for suitable replacement teachers.[60] The majority of the Court found that

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> ment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.

412 U.S. at 459.

[58] *See* note 26 *supra.*

[59] 414 U.S. 632 (1974). Subsequent to *Vlandis* but prior to *LaFleur,* the Court decided United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973). *Murry* struck down an amendment to the Food Stamp Act which denied benefits to any household in which there resided another person who was ineligible for food stamps. The Court reasoned that a presumption which conclusively made all individuals in such a household ineligible for food stamps "is often contrary to fact," and therefore violated due process. *Murry* is significant, less for this holding than because it is practically indistinguishable from a companion case, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), which struck down another provision in the Food Stamp Act amendment, applying equal protection rather than due process. When read together, these cases show the conclusive presumption doctrine to be a transparent substitute for equal protection. Note, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From* Rodriguez *to* LaFleur, 62 GEO. L.J. 1173, 1190 (1974); Comment, *Constitutional Law—Two Eligibility Criteria Created by the 1971 Amendment to the Food Stamp Act Ruled Unjustifiably Discriminatory and Violative of Due Process,* 78 DICK. L. REV. 788 (1974).

[60] At the district court level, the schools urged other reasons in support of this policy, such as a desire to save children from seeing an obviously pregnant woman. 414 U.S. at 641 n.9. These arguments were not pursued in the Supreme Court. Although the case came to the Court solely on constitutional grounds, the Court noted that the policies in question presumptively violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (Supp. II, 1972), and regulations issued pursuant thereto by the Equal Employment Opportunity

these policies impinged on liberties regarding marriage and family life, liberties within the ambit of due process. Again, with Justice Stewart at the helm, the Court said that the presumptions of incapacity and unfitness were neither necessarily nor universally true, and, therefore, impermissibly burdened the decision to beget children. Administrative convenience "alone" could not justify what was otherwise a violation of due process.

The concurring and dissenting opinions clearly rejected the conclusive presumption doctrine in theory and as applied. Justice Powell concurred, relying on equal protection.

> 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.[61]

It is in Justice Rehnquist's dissent, however, that the future of this doctrine is told. He outlines two irreconcilable goals in American law and its English antecedents. At the one extreme is individualized decisionmaking in the administration of governmental programs in order to meet the equities of each individual case. At the other extreme is lawmaking by broad classifications, without consideration of individual equities, which avoids decisionmaking by politically unaccountable, faceless bureaucrats capable of imposing, even if only subjectively, their own preferences and discriminations. More simply, the difference between individualized determinations and legislation by classification is the classic conflict between the rule of individuals and the rule of law. Justice Rehnquist finds in the conclusive presumption doctrine an attack on the essence of lawmaking itself. Legislating, by definition, involves drawing lines between those who shall be included and those who shall be excluded from a governmental program. To deny this power to legislatures is a return to the era of substantive due process.[62] Moreover, the idea of individually tailored governmental decisions is a Trojan horse. Hidden within are millions

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Commission, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10 (1975). 414 U.S. at 638-40 n.8. In General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976), the Supreme Court held that the EEOC regulation referred to in *LaFleur* and *Geduldig*, in so far as it applied to pregnancy disabilities, is an inaccurate construction of Title VII.

[61] 414 U.S. at 652.

[62] Sewell, *Conclusive Presumptions And/Or Substantive Due Process of Law*, 27 OKLA. L. REV. 151, 160-61 (1974).

of bureaucrats. Given the choice between demanding that legislatures draft laws discretely and requiring that governmental decisions be determined on the facts of each case, Justice Rehnquist's arguments carry the day.[63]

In addition to this doctrinal debate, the conclusive presumption doctrine posed two other problems. First, what degree of scrutiny is appropriate in cases applying this doctrine? Second, when should this doctrine, rather than equal protection, be applied?

Notable for its absence in *Stanley, Vlandis*, and *LaFleur* is any discussion of the degree of scrutiny required by the conclusive presumption doctrine. While two-tier analysis is commonly associated with equal protection, this form of analysis has a due process analogue.[64] To members of the Court[65] and commentators[66] alike, irrebuttable presumption analysis looked suspiciously like strict scrutiny in disguise. Indeed, in the principal cases in which the doctrine evolved, the objectives of administrative convenience and budgetary conservation were quickly dismissed as totally inadequate justifications.[67]

Faced with the emergence of a new due process doctrine, which seemed to apply strict scrutiny, and always keeping in mind the limitation placed on strict scrutiny in the equal protection context by *Rodriguez*, lower courts[68] and commentators[69]

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[63] Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues*, 24 CATH. U.L. REV. 217, 229-30 (1975).

[64] *E.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973). *See generally* McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 988-95 (1975).

[65] *See* Chief Justice Burger's dissent in Vlandis v. Kline, 412 U.S. at 460.

[66] Canby, *The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism*, 1975 ARIZ. STATE L.J. 1, 25; Note, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From* Rodriguez *to* LaFleur, 62 GEO. L.J. 1173 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1534-36 (1974).

[67] For further discussions of the irrebuttable presumption doctrine see Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 U. COLO. L. REV. 653 (1976); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); Comment, *Constitutional Law—The Conclusive Presumption Doctrine*, 54 N.C.L. REV. 460 (1976).

[68] Totally bedeviled, some lower courts took up the practice of basing their holdings on alternative constitutional grounds, equal protection and conclusive presumptions, thus proving again that the conclusive presumption doctrine is in reality little more than a

searched for the alchemic secret which seemed to turn an otherwise pedestrian case of equal protection minimum scrutiny into one of conclusive presumptions. Proof that conclusive presumption analysis would not reveal a principled ground of difference from equal protection analysis came in two cases striking down amendments to the Food Stamp Act.[70] The amendments were aimed at eliminating abuses in the Food Stamp program, but Congress sought to achieve this objective by means which were more clearly aimed at harming politically unpopular groups—college students and "hippies." Factually, the problems presented by the challenges to these amendments were nearly identical. In one case, Congress sought to deny food stamps to any household which contained a person over 18 years of age who had been claimed as a federal income tax dependent by a person ineligible for food stamps in the two previous years. The statute was aimed at college children of wealthy parents. The scheme, however, excluded many who were otherwise eligible for food stamps and who were disqualified only because they lived in the same household with someone who had been claimed as a tax dependent. In the second case, Congress had sought to exclude from the program any person who lived in a household containing one or more unrelated persons. This scheme was aimed at "hippies" but included many more. In the first case, the Court struck down the legislation as an impermissible conclusive presumption while in the second case, decided on the basis of equal protection, the Court held that a Congressional desire to harm a discrete group was wholly irrational. In both cases the amendments were held to be overinclusive of those who were denied benefits in light of the abuses which Congress sought to eradicate.

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surrogate for equal protection. Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976); Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 96 S. Ct. 1752 (1976); Hurley v. Van Lare, 380 F. Supp. 167 (S. & E.D.N.Y. 1974), *vacated and remanded with instructions to dismiss as moot*, 421 U.S. 338 (1975).

[69] "Since the weapon of irrebuttable presumption analysis is always available and is inevitably lethal if applied to the full extent of its rhetoric, the question becomes one of determining when and for what generally inarticulated reasons the Court will trot it out." Canby, *The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism*, 1975 ARIZ. STATE L.J. 1, 25 (1975).

[70] United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (conclusive presumption) and United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (equal protection). For commentary see authorities cited in note 59 *supra*.

Yet the two cases were decided on different constitutional grounds. Search as one will, there is no reason to be found why two identical problems should be decided on different constitutional grounds, unless the two forms of analysis are really the same.

Thus, by the time of *LaFleur,* three fundamental problems inhered in the conclusive presumption doctrine: Doctrinal disagreement over its legitimacy; uncertainty over the degree of scrutiny it required; and, difficulty in discerning when it, rather than equal protection, should be applied. By 1975 a majority of the Court was prepared to lay to rest this constitutional Dr. Jekyll-Mr. Hyde routine, and in *Weinberger v. Salfi,*[71] the Court, per Justice Rehnquist, set out to limit the doctrine.[72] In *Weinberger,* the district court had ruled that a Social Security program which provided benefits only to widows who had been married to the deceased insured for more than nine months was unconstitutional as creating a conclusive presumption that all marriages of shorter duration had been fraudulently entered into for the purpose of obtaining Social Security benefits. In reversing that decision, the Supreme Court effectively dealt with the three problems inherent in conclusive presumptions. First, the Court dealt with the legitimacy of the doctrine by holding it was to have no wider scope than the holdings of prior cases in which it had been applied.

> We think the District Court's extension of the holdings of *Stanley, Vlandis,* and *LaFleur* to the eligibility requirement in issue here would turn the doctrine of these cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.[73]

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[71] 422 U.S. 749 (1975), *limited in sex discrimination cases by* Califano v. Goldfarb, 45 U.S.L.W. 4237 (U.S. Mar. 2, 1977). *See* note 139 *infra.*

[72] Interestingly, Justice Stewart joined in Justice Rehnquist's opinion. It may be that Justice Stewart, the author of the Court's opinions in *Vlandis* and *LaFleur* and the Justice who seemed the strongest advocate of the new doctrine, has been convinced by the dissents of prior cases.

[73] 422 U.S. at 772. It should be observed that prior cases were limited to their facts but not overruled. They can, therefore, be relied upon in cases dealing with forms of discrimination falling within their holdings. *LaFleur* was cited, subsequent to *Salfi,* as authority in Turner v. Department of Employment Security & Bd. of Review, 423 U.S. 44 (1975). *Turner* overturned a Utah unemployment compensation statute which made women ineligible for benefits over an 18-week period covering the 12 weeks prior to the expected birth and for 6 weeks thereafter. *Accord,* Sylvara v. Industrial Comm'n, 550 P.2d

Second, having limited the doctrine's scope, Justice Rehnquist went on to announce what level of scrutiny would be applied to these cases in the future. Henceforth , due process would be violated " 'only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.' "[74] Individualized determinations are no longer necessary "when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments . . . they might be expected to produce."[75] Third, having defined the appropriate degree of review as minimum scrutiny, the Court makes it unnecessary to determine when this doctrine, rather than equal protection, should be applied, as both doctrines apply the same degree of review and should produce identical results.[76]

Any doubts that the Court had, for all practical purposes, buried conclusive presumptions were put to rest during the Court's 1975 Term. The Court ignored a perfect invitation to apply this doctrine in *Massachusetts Board of Retirement v. Murgia,*[77] passing the opportunity by in favor of equal protection. At issue was the forced retirement of a police officer who had passed a rigorous physical only four months earlier.[78] The retirement schedule was justified by the need for assuring public protection through the "physical preparedness of . . . uniformed officers." However, since the officer had recently been found physically fit, the statutory presumption of unfitness at age 50 was obviously not universally true. The case was an appealing one for the application of the conclusive presumption doctrine, since the state already had a routine physical examination program as a reasonable alternative means for ascertaining the critical fact

868 (Colo. 1976) (*Sylvara* is a rare example of a state's attorney general confessing error on appeal and urging the state supreme court to rule a statute unconstitutional).

[74] 422 U.S. at 768, *quoting* Fleming v. Nestor, 363 U.S. 603, 611 (1960). Federal district court judges have found this statement a thinly veiled adoption of the "rational basis" approach to equal protection. Alcala v. Burns, 410 F. Supp. 1024, 1027 (S.D. Iowa 1976), *on remand from* 420 U.S. 575 (1975); Gurmankin v. Costanzo, 411 F. Supp. 982, 989-93 (E.D. Pa. 1976).

[75] 422 U.S. at 785.

[76] Rebuttable presumptions do not raise constitutional problems unless the presumption itself is arbitrary. Lavine v. Milne, 96 S. Ct. 1010 (1976).

[77] 96 S. Ct. 2562 (1976).

[78] Up to age 40 officers were examined every two years. Between 40 and 50, the officers had to pass an even more rigorous physical every year.

of fitness. The Court was careful to emphasize its respect for older persons and the importance of employment.[79] Nonetheless, applying equal protection, the Court upheld the statute.[80] Although clearly applicable, at least in its pre-*Salfi* formulation, the irrebuttable presumption doctrine was not even mentioned.

In another decision, *Mathews v. Lucas*,[81] the Court sustained a Social Security survivors' benefit scheme which disqualified illegitimates if they could not show that the insured natural parent was living with or supporting them at the time of that parent's death. Legitimate children did not need to prove either fact. Even though the program was overinclusive of those illegitimates who were *not* dependent in fact, the Court upheld the classification on the ground of administrative convenience,[82] clearly identifying the "applicable level of scrutiny"[83] as minimum scrutiny.[84]

The Court's experiment with the conclusive presumption doctrine was short lived. It was obvious almost from the beginning that the doctrine was a substitute for equal protection. In its dissatisfaction with equal protection, the Court seemed to be looking for an alternative ground of decision. As an alternative ground, the conclusive presumption doctrine seemed promising. In time, this new doctrine became more rigid than the doctrine

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[79] Comparing this case with *LaFleur* it is obvious that classifications based on sex are especially disfavored by the Court. In *LaFleur*, the interference with employment was only temporary. In *Murgia*, employment was permanently terminated. Although the impact of the sex-based discrimination in *LaFleur* was not as severe as the age-based discrimination in *Murgia*, the Court found an equal protection violation only in the case of sex discrimination.

[80] In dissent, Justice Marshall urged that the Court should have applied a sliding-scale equal protection analysis rather than a two-tier analysis. He did not advocate conclusive presumption analysis. 96 S. Ct. 2562, 2568.

[81] 96 S. Ct. 2755 (1976).

[82] Prior to *Salfi*, administrative convenience was an especially unpopular justification in conclusive presumption cases.

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972) (footnote omitted). In *LaFleur* the Court added, "[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process." 414 U.S. at 647.

[83] 96 S. Ct. at 2764, *citing Salfi*, 422 U.S. at 772.

[84] The dissenters would have sustained the attack on this legislation, relying on Jiminez v. Weinberger, 417 U.S. 628 (1974), which was decided on equal protection grounds.

it was intended to supplement, and the Court decided to abandon this new doctrine before it could gain wide application. Practically, as an evolving doctrine of constitutional law, the conclusive presumption doctrine does not appear to have a future.[85]

B. *Minimum Scrutiny*

While strict scrutiny has hardly been a paragon of stability, and conclusive presumptions for a time engendered confusion, they pale before the fate of "traditional," deferential, minimum scrutiny in the Burger Court. Today, minimum scrutiny could be likened to a patient who has undergone plastic surgery. Whether the changes which have been wrought are merely cosmetic or are more substantial is a question to which there may not yet be a certain answer.

1. Economic Regulation

Most traditional discussions of minimum scrutiny somewhere make the observation that with one exception, *Morey v. Doud*,[86] the Warren Court never used this level of scrutiny to invalidate legislation. *Morey* invalidated an Illinois statute regulating money orders which gave preferential treatment to American Express because of that corporation's acknowledged fiscal integrity. Late in the 1975 Term, *Morey* was overruled in *City of New Orleans v. Dukes*.[87] In the area of economic regulation, *Dukes* held, only "invidious discrimination, the wholly arbitrary act" will violate equal protection.[88] The Court's language implies that an especially wide berth will be afforded legislation regulating economics, apparently wider than will be allowed in matters of social legislation.[89]

In overruling *Morey*, the Court adopted the views set forth in the dissenting opinions of Justices Black and Frankfurter in *Morey*. In both *Morey* and *Dukes* the constitutional challenge focused on legislative classifications which were reasonably based

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[85] *See* note 73 *supra*.

[86] 354 U.S. 457 (1957). *But see* Rinaldi v. Yaeger, 384 U.S. 305 (1966).

[87] 96 S. Ct. 2513 (1976).

[88] *Id.* at 2517, *citing* Ferguson v. Skrupa, 372 U.S. 726 (1963), which upheld a statute limiting the practice of debt adjustment to attorneys. *Dukes* involved a city ordinance limiting the number of pushcart vendors who could operate in an area of New Orleans to those who had been so engaged for a specified number of years.

[89] *E.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

on *present facts* and the legislative failure to provide for classification modifications in the event those facts changed in the future so as to make the present classification unreasonable. In *Morey* the majority seized upon this legislative failure to provide for modifications in the event of future changes as the ground for holding the legislation was arbitrary. Justice Frankfurter objected to this speculative ground for ruling that the statute violated equal protection. Should that contingency ever arise, he argued, there would be time enough to strike down the legislation. Many times before, he urged, the Court had at one time found a statute constitutional only to reach a different result when presented with changed circumstances.[90] As indicated by its adoption of this dissent in *Dukes,* the Court will, in future economic regulation cases, look to the actual effects of legislation in determining its constitutionality, rather than speculating on abstractions and possibilities.[91]

While prior decisions had indicated that the Court would not strike down economic legislation unless it was "wholly irrelevant to the achievement of the State's objective,"[92] there is a strong suggestion in *Dukes* that in this area there will be an even more deferential approach than is typical of low-tier scrutiny.[93] Two implications suggest themselves from this case. First, if the Burger Court adheres to the rhetoric of two-tier equal protection

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[90] 354 U.S. at 474.

[91] Justice Marshall did not join the Court's opinion in *Dukes,* but concurred in the judgment without opinion. This is interesting because he has elsewhere indicated a strong preference for upholding legislative judgments in the area of economic regulation.

> I find it hard to understand why a statute which sends a man to prison and deprives him of the opportunity even to be considered for treatment for his disease of narcotics addiction, while providing treatment and suspension of prison sentence to others similarly situated, should be treated under the same minimal standards of rationality we apply to statutes regulating who can sell eyeglasses or who can own pharmacies. This case does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls . . . .

Marshall v. United States, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting) (footnotes and citations omitted). *See* Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting). Justice Marshall's unwillingness to go along with a hard-and-fast rule in this area may be understandable in view of his opposition to any form of rigid analysis and his preference for a sliding-scale approach. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (dissenting opinion).

[92] McGowan v. Maryland, 366 U.S. 420, 425 (1961).

[93] *See, e.g.,* Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

in its traditional formulation, then social legislation may also come under this new, lowered level of scrutiny. Although there may be spill-over to this effect, especially in cases where it is difficult to determine whether the legislation is economic or social in nature, this possibility does not seem to be what the Court had in mind. A second interpretation might be that the Court has abandoned or is setting the stage for an abandonment of two-tier analysis. At the one extreme the Court could retain strict scrutiny for suspect classifications and fundamental, constitutional interests. At the other extreme it would apply a highly deferential minimum scrutiny in the field of economic regulation. Of course, that leaves social legislation in the middle—but just where cannot be said. It may be that social legislation will still be reviewed on the reasonable basis test of *Dandridge v. Williams.*[94] Justice Stewart's opinion in that case, however, begins with the premise that there is no reason for judging social and economic legislation by different standards under the equal protection clause.[95] That argument has been undercut by *Dukes.* In any case, the logic of Justice Stewart's argument rings hollow, as the fourteenth amendment was adopted in response to interferences with the exercise of social rights. Business advocates obtained the benefits of this amendment only by way of judicial afterthought. Regardless, government in a republic has as its *raison d'etre* the service of its natural citizens, economics being only subsidiary means to that end. Every reason exists, therefore, for subjecting social legislation to more exacting scrutiny than economic regulation. The Court's decision in *Dukes* may pave the way for articulation of an intensified standard of scrutiny in the area of social legislation. While the Court seems to have in fact adopted such an approach in some cases,[96] it has done so while adhering to the rhetoric of a rigid two-tier equal protection. The decision in *Dukes* makes it easier, should the Court wish to seize the opportunity, to articulate or formalize a standard for reviewing social legislation which conforms to what the Court has done in practice. Four of the concurring and dissenting opinions in *Craig v. Boren,*[97] a 1976

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[94] *Id.* at 487.

[95] *Id.* at 485-86.

[96] *E.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[97] 97 S. Ct. 451 (1976). In Stanton v. Stanton, 421 U.S. 7 (1975), Justice Blackmun

Term case involving sex discrimination, state that the thrust of the majority's opinion is the establishment of a "middle-tier" analysis for gender-based discrimination. It is of course entirely possible, if not more likely, that *Dukes* represents a narrow exception to what will otherwise remain a two-tier form of equal protection.[98] Nonetheless, the possibilities are intriguing.

2. Gunther's Means-Oriented Test and Marshall's Sliding Scale

Two models of a "newer" equal protection have emerged. Professor Gunther's review of the 1971 Term led him to conclude the Court had adopted a "means-focused, relatively narrow, preferred ground of decision."[99] He described the model as being interventionist without applying strict scrutiny.[100] He predicted that the Court would examine the *means* chosen to further a particular legislative purpose, forsaking a review of legislative purpose, the latter inquiry being too close to substantive due process.[101] With respect to the intensity of review, the model "would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends."[102] The

found a state statute setting different ages of majority for men and women unconstitutional "under any test—compelling state interest, or rational basis, or something in between." *Id.* at 17. *See also* Note, *The Mandate for a New Equal Protection Model,* 24 CATH. U.L. REV. 558, 559 n.10 (1975).

[98] For other developments in corporate equal protection see Blackmun, *The Implications of Lehnhausen v. Lake Shore Auto Parts Co.: Weakening or Eliminating Equal Protection for Corporations as a Class,* 16 ARIZ. L. REV. 41 (1974).

[99] Gunther, *supra* note 2, at 20.

[100] *Id.* at 18-20, 33-37.

[101] *Id.* at 21, 26-30. The model has been betrayed in at least one decision. In United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), the Court held that a congressional desire to harm "hippies" as a group could not be a permissible purpose under the equal protection requirement of the fifth amendment's due process clause. For commentary on this aspect of Gunther's model see Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications,* 62 GEO. L.J. 1071, 1071-72 (1974); Note, *The Mandate for a New Equal Protection Model,* 24 CATH. U.L. REV. 558, 561-63 (1975); Comment, United States Department of Agriculture v. Moreno—*The "Red Herring" of Social Welfare,* 23 DEPAUL L. REV. 1485 (1974).

[102] Gunther, *supra* note 2, at 20.

> It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on

sliding-scale approach which Justice Marshall has advocated is the second model for a "newer" equal protection.[103] This model would focus "upon 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 state interests asserted in support of the classification."[104] The more invidious the classification, the more important the interest affected, and the less important the governmental interest, the more rigorous should be the Court's analysis.[105]

The Supreme Court has never formally adopted either model. Indeed, the Court has never brought these two theories together in a head-to-head clash, but the Second Circuit did in *Village of Belle Terre v. Boraas.*[106] In examining an exclusionary

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the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.

Id. at 21. *See also* Justice Frankfurter's dissent in Morey v. Doud, 354 U.S. 457 (1957).

[103] Justice Marshall's most recent exposition of this model came in his dissent in Massachusetts Bd. of Retirement v.Murgia, 96 S. Ct. 2562, 2568 (1976). His most elaborate statement of this model was in dissent in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70-133 (1973). From time to time other Justices have flirted with the idea of a sliding scale. Justice Powell articulated a sliding scale in Weber v. Aetna Cas. & Sur. Co., 409 U.S. 164, 172-73 (1972). Such an approach was noticeably absent in his more elaborate opinion for the Court in *Rodriguez.* However, Justice Blackmun adopted the sliding scale proposed by Justice Powell in Mathews v. Lucas, 96 S. Ct. 2755, 2761 (1976). Justice Blackmun may have also been alluding to a sliding scale in Stanton v. Stanton, 421 U.S. 7, 17 (1975). In Vlandis v. Kline, 412 U.S. 441, 458-59 (1973), Justice White proclaimed that the Court has all along used a spectrum of standards in equal protection. Finally, Justice Stevens' concurring opinion in Craig v. Boren, 97 S. Ct. 451, 464-65 (1976), implicitly seems to adopt a sliding-scale method of analysis. Although his opinion specifically rejects two-tier and three-tier analysis, and conversely, specifically adopts a single standard, that single standard is strongly suggestive of a sliding scale.

[104] Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. at 2569. Other cases in which Justice Marshall has articulated this approach are: City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 96 S. Ct. 2036 (1976); Sosna v. Iowa, 419 U.S. 393 (1974) (Marshall, J., dissenting); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Marshall v. United States, 414 U.S. 417 (1974) (Marshall, J., dissenting); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (Marshall, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting); Police Dep't v. Mosley, 408 U.S. 92 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Richardson v. Belcher, 404 U.S. 78 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471 (1970) (Marshall, J., dissenting). *See* Justice Black's opinion in Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[105] This is really little more than a sophisticated balancing test. Note, *The Mandate for a New Equal Protection Model,* 24 CATH. U.L. REV. 558, 585-87 (1975).

[106] 476 F.2d 806 (2d Cir. 1973), *rev'd,* 416 U.S. 1 (1974). For an excellent discussion of the conflicting majority and dissenting opinions in the court of appeals, see Note, Boraas v. Village of Belle Terre: *The New, New Equal Protection,* 72 MICH. L. REV. 508

zoning ordinance Judges Mansfield and Oakes applied "a flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it."[107] The intensity of review under this test would depend on the relative value of the rights affected.[108] To pass muster, the majority judges in *Boraas* observed, legislative classifications must "*in fact*" have a substantial relationship to a legitimate purpose.[109] The dissenting judge, Timbers, declined the invitation to apply this test. Although he admitted that Supreme Court decisions indicated a departure from traditional two-tier analysis, he did not feel the Court had gone so far as to adopt the sliding-scale approach. He applied Gunther's model, but he did so less by way of conviction than by way of argument.[110] In four sentences, however, he was able to capture the nature of the conflict between these two models.

> A "sliding scale" approach may be appropriate in some contexts, but it seems to me inappropriate here. A court should not be required to attempt the impossible task of first assessing the precise value of the right or interest and then increasing or decreasing the intensity of its scrutiny accordingly. This approach would confer upon a judge wide discretion to overturn state and local legislation based largely on his own estimate of the value of competing interests—a highly abstract and individualistic determination.
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> The recent Supreme Court decisions, in my view, require a judge to make only the narrow value judgments needed in evaluating means.[111]

(1974). The sliding scale was also applied by Justice Roberts in dissent in McIlvaine v. Pennsylvania, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974). Note, *The Constitutional Challenge to Mandatory Retirement Statutes*, 49 ST. JOHN'S L. REV. 748, 749-52 (1975).

[107] 476 F.2d at 814. *Compare* Justice Marshall's model in text accompanying note 104 *supra*.

[108] 476 F.2d at 821 (Timbers, J., dissenting).

[109] *Id.* at 815 n.8.

[110] *Id.* at 822. Judge Timbers was unconvinced that Supreme Court cases relied upon by the majority judges offered sound bases for formulating a general invigorated theory of minimum scrutiny. For example, he found Reed v. Reed, 404 U.S. 71 (1971), to reflect "an unexpressed special suspicion of sex classifications." 476 F.2d at 820. He also argued that Eisenstadt v. Baird, 405 U.S. 438 (1972), was so closely related to Griswold v. Connecticut, 381 U.S. 479 (1965), as to justify intense scrutiny on that basis alone. 476 F.2d at 820-21.

[111] 476 F.2d at 821 (footnote omitted). In a footnote, Judge Timbers indicated the Supreme Court may have adopted this "means-focused test" as a "technique to avoid the

What Timbers was rebelling against here is the same thing that bothered the Supreme Court in *Rodriguez*. The sliding scale does not articulate fixed standards for determining which interests and classifications should weigh more heavily than others—the critical element in deciding what degrees of scrutiny to apply. In this respect the sliding scale is a near mirror-image of the Warren Court's ill-defined process for identifying suspect classifications and fundamental constitutional interests—an approach the Supreme Court rather resoundingly rejected in *Rodriguez*.[112] But to this objection, Justice Marshall gave an answer of sorts in *Rodriguez*, and whether or not he had in mind Judge Timbers' objections, his answer is at least responsive to the question Judge Timbers raised.

> The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this Court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws," . . . . 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. . . . Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.[113]

However much Justice Marshall feels this gives certainty to the process of determining the relative degree of scrutiny which should be applied, the similarity of this approach to that of the

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troublesome value judgments required to identify new and fundamental interests." *Id.* at 821 n.3. At the time this was written *Rodriguez* had not yet been decided. *Id.* at 827 n.1 (Timbers, J., dissenting from denial of reconsideration en banc).

[112] *See* text accompanying notes 9-32 *supra*.

[113] 411 U.S. at 102-03 (footnote omitted).

Warren Court and the strong rejection of that approach by the Burger Court in *Rodriguez* would *seem* to destine Marshall's sliding scale to heroic dissents and oblique references in occasional, marginally important decisions.[114]

In contrast to the apparent rejection of Marshall's sliding scale, Gunther's model has never been clearly rejected by the Court and has been often cited. Yet, it remains in limbo. In the first place, insofar as it predicted that the Court would look to the *means* rather than the *ends* of legislative choices, it has not been entirely accurate.[115] More significant, its emphasis on a means-oriented rather than "purposes" analysis has the appearance of a semantic argument akin to the debate over whether the chicken or the egg came first. For example, in *United States Department of Agriculture v. Moreno*[116] the Court spoke of the denial of food stamps to "hippies" as being an impermissible legislative *purpose*. In that *Moreno* finds the purpose, rather than the means, a violation of equal protection, it violates a cardinal principle of the Gunther model. It is, however, possible to reconcile this case with the model, because, although the Court may have been particularly upset with a vicious classification, it may be argued that the classification did not rationally further the legislative goal of preventing welfare fraud. So construed, *Moreno* is a "means-focused" opinion and consistent with Gunther's model. An examination of some of the other cases on which Gunther relies would, conversely, show that they could be construed as inconsistent with the model. *Weber v. Aetna Casualty & Surety Company*[117] is an example. Here the Court examined a workmen's compensation system which disadvantaged illegitimate children seeking recovery upon the death of the insured. The scheme was rationalized by the state as protecting and furthering legitimate family ties. Striking the statute down could be interpreted as consistent with Gunther's model, since the means chosen did not substantially further this interest. On the other hand, a close

[114] A watered-down version of the sliding scale is visible in Marshall's opinion for the Court in City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 96 S. Ct. 2036 (1976). Arguably, this case is an example of how a balancing of the respective rights and interests can result in a relatively less intense degree of scrutiny under the sliding-scale approach.

[115] United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

[116] *Id.*

[117] 406 U.S. 164 (1972).

reading of the case suggests that the Court was most offended by the apparent statutory purpose of visiting punishment for the parent's sins on the heads of the illegitimate children.[118] Thus construed, *Weber* is, like *Moreno,* inconsistent with the Gunther model. Likewise, some of the Court's decisions dealing with gender-based discriminations can be analyzed as consistent or inconsistent with Gunther's model, depending on whether one prefers means or purpose-focused analysis. The Court's decisions in the area of sex would seem to be better explained, moreover, as resulting from a rebuttable judicial presumption, that gender-based discriminations do not serve a constitutionally permissible purpose.[119] The fact that these cases are at least as susceptible to purpose-focused as means-focused analysis undermines the credibility of the Gunther model. It would be a mistake for litigants who are urging that a statute be found unconstitutional to couch their arguments solely in terms of whether the means substantially further a legitimate state purpose, and to assume that the purpose is legitimate. Litigants should also argue, in an appropriate case, that the purpose behind the legislation, whether facially apparent or to be inferred from a history of similar discriminations, is one that is not within the state's power to pursue. However the courts write their opinions, the legitimacy of the underlying purpose will continue to play an important role. To some this will be a return to substantive due process, but such complaints are the usual last resort of constitutional dissents.[120]

Gunther's model also seems inadequate in describing the degree or intensity of review which the Court would apply. Gunther's only statement with regard to the intensity of review under this "interventionist" model was that it would require

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[118] *Accord,* Jimenez v. Weinberger, 417 U.S. 628 (1974).

[119] Craig v. Boren, 97 S. Ct. 451 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). In his concurring opinion in *Craig v. Boren, supra,* Justice Stevens found the statute which set a higher minimum age for men than women in the purchase of 3.2 beer "a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket." 97 S. Ct. at 465 (footnote omitted). *See also* the majority and dissenting opinions in Mathews v. Lucas, 96 S. Ct. 2755 (1976). Judge Timbers said, in his dissent in *Boraas v. Village of Belle Terre,* that the Supreme Court's opinions reflect "an unexpressed special suspicion of sex classifications." 476 F.2d at 820.

[120] *Cf.* Buck v. Bell, 274 U.S. 200 (1927).

"legislative means to substantially further legislative ends."[121] This tells us very little about the actual intensity of review or how it differs from old minimum scrutiny. More significantly, to the extent that Gunther's model predicted intensified review on a general rather than selective basis, it is erroneous.[122] Beyond the areas of sex and illegitimacy, intensified scrutiny has enjoyed little application.[123] As a caveat, intensified review in *Eisenstadt v. Baird*[124] can be attributed to its resemblance to *Griswold v. Connecticut*[125] and the unusual penalty, pregnancy, which the statute would inflict for premarital and extramarital sex.[126]

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[121] Gunther, *supra* note 2, at 20.

[122] Among the cases where intensified review is glaringly absent are: Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976) (employment of "aged" persons); City of New Orleans v. Dukes, 96 S. Ct. 2513 (1976) (economic regulation); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (exclusionary zoning); Marshall v. United States, 414 U.S. 417 (1974) (criminal law); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education and poverty); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (voting).

[123] *See* note 110 *supra*. Occasionally intensified scrutiny is applied in the area of criminal law. James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972). Thus, while the Court seems unwilling to follow Douglas v. California, 372 U.S. 353 (1963), or Griffin v. Illinois, 351 U.S. 12 (1956), in applying strict scrutiny to these areas of criminal law, United States v. MacCollom, 96 S. Ct. 2086 (1976) and Ross v. Moffit, 417 U.S. 600 (1974), the Court will reserve intensified review for the most noxious of schemes, *James v. Strange, supra*, and *Jackson v. Indiana, supra*. In *James*, Kansas had a system for recouping attorney's fees from indigent criminal defendants. In order to facilitate collection of this debt, the state deprived the debtor of the usual exemptions afforded to other debtors, such as the homestead exemption. The Supreme Court found this measure deprived the indigent debtor of the equal protection of the laws afforded to other debtors, because it deprived this narrow class of debtors of the means to keep their families together and made it more difficult for this class of persons to get on their feet again financially. *Jackson v. Indiana, supra*, is less a hallmark of intensified review than of revulsion to a proceeding that bore not the slightest trappings of fairness, and for that reason could have been decided on due process grounds alone. A 27-year-old, mentally-deficient, deaf-mute, who could neither read nor write and who was only able to communicate by sign-language at the level of a pre-school child, was committed to custody until he became capable of understanding the criminal charges which were filed against him. As his attorney pointed out, the defendant's mental condition was permanent and he would never gain the ability to understand the charges against him so as to be able to stand trial. In effect, the defendant had been committed to confinement for life, a term much longer than that provided for the acts with which he was charged. In addition, it is much more difficult to obtain the defendant's release from custody of this nature than from civil custody which is imposed because of the defendant's inability to care for himself. Altogether, this was too much for the Supreme Court.

[124] 405 U.S. 438 (1972).

[125] 381 U.S. 479 (1965).

[126] The reach of either *Griswold* or *Eisenstadt* as a general constitutional attack on statutes criminalizing nonmarital sex was apparently restricted in Doe v. Common-

Even in respect to gender-based classifications,[127] and those relating to illegitimacy,[128] the Court's application of intensified review has been erratic. Among the Court's decisions relating to gender-based discriminations, *Kahn v. Shevin*[129] and *Geduldig v. Aiello*[130] take a condescending approach rather than what might be described as an intensified form of review.[131] *Kahn* upheld a

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wealth's Atty., 96 S. Ct. 1489 (1976), *aff'g without opinion* 403 F. Supp. 1199 (E.D. Va. 1975). For a discussion of this case see Comment, Doe v. Commonwealth's Attorney: *Closing the Door to a Fundamental Right of Sexual Privacy*, 53 DENVER L.J. 553 (1976).

[127] Among the most significant Burger Court cases considering gender-based discrimination are: Craig v. Boren, 97 S. Ct. 451 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). *Weinberger, Schlesinger*, and *Frontiero* arose under federal law and therefore applied fifth amendment equal protection. Johnson v. Robison, 415 U.S. 361 (1974); Bolling v. Sharpe, 347 U.S. 497 (1954).

[128] Burger Court decisions implicating the rights of illegitimate children include: Mathews v. Lucas, 96 S. Ct. 2755 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971). Two decisions from the Warren Court should also be kept in mind when considering the rights of illegitimates: Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) and Levy v. Louisiana, 391 U.S. 68 (1968).

[129] 416 U.S. 351 (1974). For commentary see Erickson, Kahn, Ballard *and* Wiesenfeld: *A New Equal Protection Test in "Reverse" Sex Discrimination Cases?*, 42 BROOKLYN L. REV. 1 (1975); Note, *Preferential Economic Treatment for Women: Some Constitutional and Practical Implications of* Kahn v. Shevin, 28 VAND. L. REV. 843 (1975).

[130] 417 U.S. 484 (1974). For a 1976 Term case closely following *Geduldig* but doing so under Title VII see, General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976). For commentary on *Geduldig* see Larson, *Sex Discrimination as to Maternity Benefits*, 1975 DUKE L.J. 805; Schair, *Sex Discrimination: The Pregnancy-Related Disabilities Exception*, 49 ST. JOHN'S L. REV. 684 (1975); Note, *Sex Discrimination in Employee Benefits*, 17 WM. & MARY L. REV. 109 (1975); Comment, *Pregnancy Disability Benefits Under State-Administered Insurance Programs*, 24 CATH. U.L. REV. 263 (1975); Comment, Geduldig v. Aiello: Pregnancy *Classifications and the Definitions of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975).

[131] Schlesinger v. Ballard, 419 U.S. 498 (1975), can also be criticized for taking a paternalistic approach to gender-based discrimination. This case upheld a mandatory retirement program for naval officers which had the effect of forcing earlier retirement for male officers than female officers. A majority of the Court upheld this plan as being based on a realistic assessment that promotional opportunities were more readily available in the Navy to men than women. Since mandatory retirement for male officers was related to promotions, the majority felt this scheme was fair. Justices Brennan, Douglas, Marshall, and White dissented. Justice Brennan would have measured all gender-based discrimination by the compelling interest standard, as he regards sex as a suspect classification. He went on to say that a benign racial or gender-based classification might pass that test, if in fact the differential treatment was both intentional and designed to achieve equality for all groups who were not equally situated. He did not find these factors present

tax exemption for widows, but similarly situated widowers were not granted the exemption. Florida justifiedthe special treatment of widows as compensating them for the extensive economic discrimination against women generally and as a method of alleviating loss of income by reason of the death of the marital party who was more likely providing marital income. Since sex is not recognized as a suspect classification, the majority found that this ameliorative *purpose* rationally justified the legislation.[132] Brennan's dissent lashed out at this reasoning as exemplary of stereotyping which has characterized women as helpless and weak. Although he would agree that women had been discriminated against as a class, and that legislation for the purpose of assisting economically disadvantaged women would serve a compelling interest, the Florida statute failed to satisfy the standard of strict scrutiny which he believed was appropriate because it was not narrowly drawn for the benefit of *needy* widows only.[133] Statutes such as those in *Kahn,* which provide a benefit to widows generally, and not merely to those who have been victims of discrimination, discriminate against widowers in violation of equal protection. In any event, the majority's position in *Kahn,* affording preferential treatment to widows generally, not merely those who are victims of discrimination, and at the same time allowing similarly situated widowers to be denied this benefit, would seem to fall short of anything like intensified review.

The majority position in *Geduldig v. Aiello* is even more irreconcilable with an intensified form of review. There, a California disability insurance program provided substitute income to those unable to work because of a disability not covered by workmen's compensation. With some very narrow exemptions all disabilities were covered, except for pregnancy. The majority upheld this discrimination on the transparently specious reasoning that

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in *Ballard* and he criticized the majority for going too far in imagining justifiable purposes which "may" underlie the congressional scheme, as the legislative history did not support a congressional intent to benefit women naval officers as a disadvantaged class. For commentary see Erickson, Kahn, Ballard, *and* Wiesenfeld: *A New Equal Protection Test in "Reverse" Discrimination Cases?,* 42 BROOKLYN L. REV. 1 (1975).

[132] In reaching this holding, the Court relied upon Muller v. Oregon, 208 U.S. 412, 419-20 (1908) wherein it was observed that the physical condition of women justified special protective legislation for women as a class. 416 U.S. at 356 n.10. *Muller* is a model of paternalism.

[133] *See* text accompanying note 39 *supra.*

the program did not deny benefits on the basis of sex, but did deny benefits on the basis of an "objectively identifiable physical condition with unique characteristics."[134] To this the Court gratuitously added that there was no risk for which men were covered and women were not and vice versa.[135] Justice Brennan's dissent again urged that classifications based on sex be subject to strict scrutiny.[136]

Gunther predicted the Court would employ a form of intensified scrutiny which would require legislative means to substantially further legislative ends. He did not suggest the Court would apply varying degrees of review. Court decisions would indicate, however, that it has not been applying one, intensified degree of review. In *Kahn* and *Schlesinger v. Ballard*[137] the Court seemed

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[134] 417 U.S. at 496 n.20.

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those in *Reed, supra,* and *Frontiero, supra.* . . .
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> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

Id. at 496-97 n.20. To illustrate the hypocrisy of this crafty definition of the relevant classes, the following hypothetical is posed. A similar insurance program includes all disabilities except sickle cell anemia. As a practical matter, only Blacks acquire this disease. Paraphrasing footnote 20: "The program divides potential recipients into two groups—diseased Blacks and nondiseased persons. While the first group is exclusively black, the second includes Blacks and non-Blacks." This logic is sophistic. The system described is racially discriminatory. For the same reasons, the system in *Geduldig* discriminated on the basis of sex. For a similar critique see Justice Brennan's dissent in General Elec. Co. v. Gilbert, 97 S. Ct. 401, 416 n.5 (1976).

[135] 417 U.S. at 496-97. In the field of race, the Court has held that mere equal application of the laws is not an end to constitutional inquiry under the equal protection clause. Loving v. Virginia, 388 U.S. 1, 8-9 (1966).

[136] 417 U.S. at 503. Justice Brennan rejected the majority's conclusion that the increased costs to the program for extending coverage to pregnancy disabilities could justify this exclusion. 417 U.S. at 501 n.5. *Geduldig* came before the Court postured solely on the constitutional issues. Guidelines issued by the Equal Employment Opportunity Commission in 1972 would forbid such practices under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000 (1970). EEOC, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10 (1975). In a 1976 Term case the Supreme Court held that the Commission's regulation was an inaccurate interpretation of Title VII. General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976).

[137] 419 U.S. 498 (1975).

to apply a reduced level of intensity when reviewing legislation which treated women *more favorably* than men, while it applied a more intense review in *Frontiero v. Richardson*[138] when the only question involved was discrimination *adversely* affecting women. In *Craig v. Boren,* a case involving discrimination against men, Justice Brennan said that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives,"[139] a test which four

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[138] 411 U.S. 677 (1973).

[139] 97 S. Ct. 451, 457 (1976). In Califano v. Goldfarb, 45 U.S.L.W. 4237 (U.S. Mar. 2, 1977), a plurality of four Justices applied this more intense form of review in affirming a lower court decision which found unconstitutional sex discrimination in social security survivors benefits under the Federal Old Age, Survivors and Disability Insurance Act, 42 U.S.C. §§ 401-31 (1970). Under the plan, widows of insured husbands were entitled to benefits as a matter of law on the death of the husband. Widowers of insured wives were eligible only if they could show that at the time of the wife's death, she was providing more than one-half of the husband's support. Justice Brennan's plurality opinion for affirmance was joined by Justices Marshall, Powell, and White. Justice Stevens filed a separate opinion for affirmance. Justice Brennan found in this program discrimination against the women who had contributed social security taxes. Their spouses would not receive the same protection as the spouses of male insureds, since male survivors who could not prove dependency would not receive benefits at all, whereas survivors of male insureds received the benefits in all cases, even if they were not in fact dependent. Relying on Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Frontiero v. Richardson, 411 U.S. 677 (1973), Justice Brennan concluded that a program which presumes all women are dependent on their spouses is a product of traditional "role-typing" which has been found to violate equal protection. In contrast to Justice Stevens and the dissenters, Justice Brennan refused to analyze this scheme in terms of discrimination against the surviving husband, which would have brought the case closer to Kahn v. Shevin, 416 U.S. 351 (1974). More importantly, he distinguished Weinberger v. Salfi, 422 U.S. 749 (1975), which had held that social welfare programs would violate the constitution only if the discriminations they created were "'utterly lacking in rational justification.'" 422 U.S. at 768, *quoting* Fleming v. Nestor, 363 U.S. 603, 611 (1960). Where, as in *Califano v. Goldfarb,* the discrimination is based on gender-based classifications, *Craig v. Boren* requires the classification to satisfy the more rigorous intermediate standard: It must serve "important governmental objectives and must be substantially related to the achievement of those objectives." 97 S. Ct. at 457.

Justice Stevens agreed with the four dissenters that the program should be measured against the justification of administrative convenience espoused in Mathews v. Lucas, 96 S. Ct. 2755 (1976). Alternatively, he would have upheld the program had it been motivated by a congressional desire to cushion the widow's loss of the income-producing spouse, as in Kahn v. Shevin, 416 U.S. 351 (1974). Unlike the dissenters, however, Justice Stevens found that this scheme satisfied neither of these justifications. In so doing, he relied on data in Justice Rehnquist's dissenting opinion which showed that about 10% of all widows were not in fact dependent. Payments to nondependent widows thus cost the government approximately $1 billion dollars annually. 45 U.S.L.W. at 4243 n.5. Considering the rather staggering costs imposed for the purpose of "administrative convenience," Justice Stevens could not accept this as justifying the different treatment of widows and widowers. Since

other Justices found to be the equivalent of "middle-tier" analysis. But then, in *Geduldig,* the Court seemed to have retreated all the way back to traditional, deferential minimum scrutiny. In this setting it would be unrealistic to argue that the Court has applied one degree of intensified review in cases dealing with sex. Indeed, the levels of review in this area seem paternalistic, depending on what the Justices believe is best on a case-by-case approach.[140]

Thus, Professor Gunther's model, while it has never been repudiated by the Supreme Court, fails to explain the Court's modes of analysis. Rather than one intensified level of review, there seem to be many. Economic regulation, receiving the least scrutiny, is the bottom line. Strict scrutiny is the upper limit. In between there are varying degrees of review. Decisions in the area of sex have not been favored with a consistent intermediate intensity of review, and the same is true of decisions affecting illegitimates.[141]

Oddly enough, just where Gunther's model fails, Marshall's sliding scale seems to succeed, though maybe not as he would wish. Insofar as the Court's scrutiny bears the marks of consistency at all, it seems to depend on the majority's view of the nature of the classification,[142] the importance of the interest af-

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there was no evidence that Congress had in fact intended this differential treatment to compensate widows as the victims of historic sex discrimination, he was also unwilling to uphold discrimination against widowers on the bald assertion that it was so intended by Congress.

[140] Erickson, Kahn, Ballard, *and* Wiesenfeld: *A New Equal Protection Test in "Reverse" Sex Discrimination Cases?,* 42 BROOKLYN L. REV. 1, 53 (1975); Comment, Geduldig v. Aiello: Pregnancy *Classifications and the Definition of Sex Discrimination,* 75 COLUM. L. REV. 441, 456-62 (1975). The Court's attitude can best be summarized in the words of one of its members, Justice Stewart: "[T]he female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her." HARV. L. SCH. REC. 15 (March 23, 1973), *quoted in* Ginsburg, *Gender and the Constitution,* 44 U. CIN. L. REV. 1, 15 (1975). The inferior legal and economic status of women is the product of this chivalrous mode of thought. *See* Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (plurality opinion).

[141] *Compare* Mathews v. Lucas, 96 S. Ct. 2755 (1976) *with* Jimenez v. Weinberger, 417 U.S. 628 (1974). *Compare* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) *with* Labine v. Vincent, 401 U.S. 532 (1971).

[142] Classifications relating to sex have been regarded more suspiciously than any other classification excepting those actually ranked as suspect classifications. *E.g.,* Craig v. Boren, 97 S. Ct. 451 (1976); Stanton v. Stanton, 421 U.S. 7 (1975). Illegitimacy is regarded less suspiciously than sex. Mathews v. Lucas, 96 S. Ct. 2755 (1976). Almost every other

fected,[143] and the importance of the governmental interest promoted by the legislative program.[144] The difference between Justice Marshall's sliding scale and that of other Justices who apply it or recognize it[145] is probably less in the mechanics of the test than it is in the more subjective evaluation of what importance should be attached to the various elements that are weighed in the balance. While Justice Marshall has articulated a "nexus

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classification is given even less scrutiny than sex and illegitimacy: *E.g.*, age, Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976); poverty, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[143] The only interests which have consistently demanded much in the way of intensified review are those relating to the conduct of family life and the decision of whether or not to beget children. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Eisenstadt v. Baird, 405 U.S. 438 (1972). Other traditionally important interests, such as employment, education, housing, and welfare, have not seemed to merit the Court's intensified review. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

[144] Administrative convenience and fiscal conservation are the two governmental interests most frequently advanced. Mathews v. Lucas, 96 S. Ct. 2755 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974). The number and variety of governmental interests that can be advanced is as endless as the advocate's imagination.

[145] Justice Blackmun, Stanton v. Stanton, 421 U.S. 7, 17 (1975), Justice Powell, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-73 (1972), and Justice White, Vlandis v. Kline, 412 U.S. 441, 459 (1973) (concurring opinion), have variously advocated or recognized a sliding-scale approach to equal protection. Justice Stevens may have done so inferentially in Craig v. Boren, 97 S. Ct. 451 (1976) (Stevens, J., concurring). Chief Justice Burger criticized this approach in Vlandis v. Kline, 412 U.S. 441, 461 (1973) (dissenting opinion), as did Justice Stewart in his concurring opinion in *Rodriguez*, 411 U.S. at 59.

At least three members of the Court, the Chief Justice and Justices Stewart and Rehnquist, have clung to the view that the only legislation which will violate equal protection is that which is totally lacking in rationality, in the spirit of McGowan v. Maryland, 366 U.S. 420 (1961), and Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). The Chief Justice expressed his preference for this standard in Craig v. Boren, 97 S. Ct. 451, 467 (1976) (Burger, C.J., dissenting). Justice Stewart concurred in *Rodriguez* because the legislative scheme was not wholly arbitrary and capricious, although he would admit that it was "chaotic and unjust." 411 U.S. at 59. Justice Rehnquist has carried this absurd standard one step further. He has said that equal protection "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." Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 183 (Rehnquist, J., dissenting). At least in application, if not in articulation, Justice Stewart's threshold for an equal protection violation measured by what is "totally irrational" is lower than that of the Chief Justice and Justice Rehnquist. Compare the concurring opinion of Justice Stewart with the dissenting opinions of the Chief Justice and Justice Rehnquist in Craig v. Boren, 97 S. Ct. 451 (1976). Justice Powell rejected that standard for measuring an equal protection violation, condemning the discrimination against illegitimates in *Weber* as "illogical and unjust." 406 U.S. at 175.

theory" for weighing these interests,[146] that theory was rejected by the majority in *Rodriguez*. But the "nexus theory" may have been rejected by the majority in *Rodriguez* less because of the theory per se, than because of Marshall's interpretation of it. Marshall is, of course, associated with that wing of the Court which has emphasized the importance of individual liberties and civil rights in the constitutional setting. By contrast, the majority Justices in *Rodriguez* have leaned in the other direction, strengthening governmental powers. The "nexus theory" to which the *Rodriguez* majority objected was one which valued highly the rights of citizens generally. This majority has, nonetheless, applied a "nexus theory" of its own, more selective and narrow, and possibly more subjective than Marshall's. Justice Marshall's standard for intensifying review would depend upon the connexity between the right denied and rights enshrined in the Constitution. By contrast, the Burger Court has intensified review in only a few areas, and then inconsistently. It seems evident, however, that the degree of review is a function of which interests are deemed more important and which classifications are suspicious, if not suspect, in the minds of a majority of the Burger Court.

CONCLUSION

In 1968 Richard Nixon promised to appoint more conservative Justices to the Supreme Court. His four appointees have combined to form the core of the present conservative majority. This majority's reaction against the broader implications of the "new" equal protection is reflected in its reformulation of equal protection analysis.

The most dramatic change has occurred in the area of strict scrutiny. Although strict scrutiny is of relatively recent vintage, the new majority was unable or unwilling to throw it out completely. Instead, by *narrowly* reading precedent, the Court limited the range of cases to which it would apply the compelling interest standard. Willing to make hard-nosed distinctions from some of the Warren Court's less tightly reasoned opinions, this new majority was able to restrict strict scrutiny without actually overruling prior decisions.

Seemingly at the expense of strict scrutiny, traditional or

[146] *See* text accompanying notes 28-32, 113 *supra*.

minimal scrutiny found itself armed with new strength, sometimes. While the Court has attempted to clothe its restriction of strict scrutiny with the appearance of objectivity, developments with respect to minimum scrutiny have been highly subjective and selective. For the most part, the invigorated and varying degrees of review have been carried out under the guise of a single standard—the traditional, deferential rational basis test. It is clear, however, that the traditional rational basis test has not always been applied. Depending upon the classification or interests involved, the Court may apply more stringent levels of review, very much in the nature of Justice Marshall's sliding scale. The principal differences between Justice Marshall and the majority on this point are two. First, Justice Marshall weighs more heavily civil rights and civil liberties than does the Burger Court majority, which more frequently gives great weight to the interests of the government. Second, Justice Marshall admits that he applies a sliding scale.

From the model bequeathed to it by the Warren Court, the Burger Court has fashioned an equal protection more to its liking and manipulation. On the one hand, it has narrowly interpreted precedent in the area of strict scrutiny, thereby forcing more decisions to be decided by lower tier scrutiny. On the other hand, by selectively and subjectively escalating the intensity of review to be applied in the lower tier, the Court has been able to achieve the same results as by strict scrutiny, without being locked into a holding that the classification is suspect or that the interest is fundamental in the constitutional sense. Consequently, the Court has given itself the freedom to arrive at diametrically opposed results in future cases involving the same classification or interest.

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