# Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle

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"There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government."[1]

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"The majestic equality of the law [forbids] the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[2]

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1. Alexander Hamilton, Address to the Constitutional Convention (June 29, 1787).
2. ANATOLE FRANCE, LE LYS ROUGE, ch. 7 (1894).

## I. THE EXTRA-LEGAL ORIGINS OF THE EQUAL PROTECTION PRINCIPLE

This symposium seeks to explore contemporary issues and future trends in equal protection jurisprudence. Where we are, in other words, and where we are going. But it would also seem appropriate to ask where we have been, and how did we get here? The equal protection principle that "likes should be treated alike" has been integral to western culture for thousands of years.[3] Indeed, the notion of equality has biblical origins,[4] as in the New Testament, where the "golden rule"—do unto others as you would have others do unto you—is set out.[5] Implicit in this rule is an admonition that to treat others properly, justly, one must treat them equally.

Plato, the Greek philosopher, once noted that laws make people equal even though they are unequal in wisdom and ability.[6] Aristotle argued, however, that like things should be treated alike, but unalike things should be treated unalike in proportion to their inherent differences.[7] Aristotle's proposition, that justice or fairness can be measured by the proportional equality of treatment given individuals, is today a dominant force in Western thought.[8] Several later philosophers, including Thomas Hobbes, recognized a "natural right" to equality. In the eighteenth century, Rousseau and Locke argued that "equality" was the original human state, that humans were born equal, that it was "society" that broke the bond between humans and that equality, and that human disputes, when they occurred, were over how much inequality individuals should be willing to tolerate.[9]

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3. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

4. JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION § 1:2 (2003) (citing the golden rule as the foundation of universal antagonism toward inequality); *see also* John Marquez Lundin, *The Law of Equality Before Equality Was Law*, 49 SYRACUSE L. REV. 1137, 1144 (1999) (noting multiple New Testament references to equality principles).

5. *Matthew* 7:12 (King James) ("Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets."); *see also* KUSHNER, *supra* note 4, at § 1:2.

6. THE REPUBLIC OF PLATO, Book I, 338, 355 at 16, 37 (A. Bloom trans., 1968); *see also* KUSHNER, *supra* note 4, at § 1:2.

7. Aristotle directly acknowledged the relationship between justice and equality by stating that the two were synonymous: that which is just is equal, and that which is unjust is unequal. ARISTOTLE, ETHICA NICOMACHEA V.3.1131a-1131b (W. Ross trans., 1925); *see also* Westen, *supra* note 3, at 543.

8. Westen, *supra* note 3, at 543. Roman Stoic philosophers advocated equality of status and treatment, and decried discrimination on the basis of sex, class, or race, as contrary to the laws of nature. KUSHNER, *supra* note 4, at § 1:2.

9. Jean Jacques Rousseau, *A Dissertation on the Origin and Foundation of the Inequality of Mankind*, *in* 38 GREAT BOOKS OF THE WESTERN WORLD 333-66 (Robert Maynard Hutchins ed., 1982); John Locke, *Two Treatises of Government*, *in* CAMBRIDGE

Interestingly, the common belief in the justice of equal treatment is not based solely on religious, social and political philosophy. Human behavioral studies have shown that, by nature, individuals simply do not respond favorably to treatment that is dissimilar to that received by others similarly situated.[10] This is true regardless of whether the perceived unequal treatment is superior or inferior. In a 2002 study regarding the unequal treatment of siblings, for example, researchers found that inequality negatively impacted both siblings.[11] When siblings perceive that they are being treated fairly, each child is less prone to problems such as depression and anxiety, and more likely to have higher self-esteem.[12] Researchers found that even the child who receives better treatment than a sibling "may have difficulties if they don't believe that the better treatment was deserved."[13]

Human beings, therefore, intuitively reject unfairness. But is this human tendency to reject inequality an evolved behavior, or solely a learned behavior derived from cultural influences? There is some evidence that it is genetic.[14] A 2003 study by researchers working with Capuchin monkeys suggests that evolution may play a role in the human attraction to equality. In this study, pairs of these South American primates were placed next to each other and trained to exchange a small rock with their human handlers within sixty seconds.[15] When one monkey successfully exchanged the rock within the time limit, she was rewarded with a piece of cucumber.[16] The other partner who made a swap received either the same reward as their partner (a cucumber), or a better reward (a grape, a more desirable food), even though they had done less work or, in some cases, no work at all.[17]

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TEXTS IN THE HISTORY OF POLITICAL THOUGHT 269-72 (Peter Laslett ed., 1988); *see also* Ronald C. Griffin, *Coming To Terms With Equality*, 35 WASHBURN L.J. 431, 434 (1996).

10. Samuel Bowles & Herbert Gintis, *Is Equality Passé? Homo Reciprocans and the Future of Egalitarian Politics*, BOSTON REV. (Oct./Nov. 1998), *available at* http://bostonreview.net/BR23.6/bowles.html (last visited Feb. 16, 2004).

11. Jim Barlow, *Fairness of Sibling Treatment Key to Its Impact, Study Shows, available at* www.news.uiuc.edu/scitips/02/0924siblings.html (last visited Feb. 13, 2004).

12. *Id.*

13. *Id.*

14. Nicholas Wade, *Genetic Basis to Fairness, Study Hints*, N.Y. TIMES, Sept. 18, 2003, at A27; *see also* Sean Markey, *Monkeys Show Sense of Fairness, Study Says, at* http://news.nationalgeographic.com/news/2003/09/0917_030917_monkeyfairness.html (last visited Feb.11, 2004).

15. Sean Markey, *Monkeys Show Sense of Fairness, Study Says, at* http://news.nationalgeographic.com/news/2003/09/0917_030917_monkeyfairness.html (last visited Feb. 11, 2004).

16. *Id.*

17. *Id.*

The response to the unequal treatment was "astonishing."[18] Those primates who witnessed unfair treatment and failed to benefit from it often refused to conduct future exchanges with the human researchers.[19] The Capuchins even refused to eat the cucumbers they had earned, and in some cases, hurled their cucumbers at the human researchers.[20] They desired not merely a reward for their efforts, but a reward that was fair and proportional relative to that being received by the other monkeys. The results of the study led the researchers to conclude that human aversion to unfairness was evolved and not simply a social construct,[21] that there is some "evolutionary reason why we [humans] do not like being treated unfairly."[22]

## II. PRE- FOURTEENTH AMENDMENT EQUAL PROTECTION

The Fourteenth Amendment did not represent the birth of equal protection law.[23] In 1620, the Mayflower Compact contained an agreement to enact "just and equal laws,"[24] and the Declaration of Independence stated that it is "self-evident" that "all men are created equal."[25] These same principals were articulated in early state constitutions, many of which contained "equality" or "impartiality" provisions.[26] The Massachusetts Constitution, for example, provided that "all men are born free and equal,"[27] and the Oregon Constitution declared that "all men . . . are equal in rights."[28] Other state constitutions contained similar provisions that entailed only slight variations on the "free and equal" theme.[29]

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18. *Id.*

19. *Id.*

20. Sean Markey, *Monkeys Show Sense of Fairness, Study Says, at* http://news.nationalgeographic.com/news/2003/09/0917_030917_monkeyfairness.html (last visited Feb. 11, 2004).

21. *Id.*

22. *Id.*

23. *See generally*, EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 9-28 (2003).

24. MAYFLOWER COMPACT (1620), *reprinted in* 5 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 15 (1975).

25. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

26. Lundin, *supra* note 4, at 1156.

27. MASS. CONST. art. I (1780), *reprinted in* 5 SWINDLER, *supra* note 24, at 93; *see also* Lundin, *supra* note 4, at 1145.

28. OR. CONST. art. I, § 1 (1857), *reprinted in* 8 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 205 (1975); *see also* Lundin, *supra* note 4, at 1145.

29. *See* ILL. CONST. art. VIII (1818), *reprinted in* 3 WILLIAM F. SWINDLER, SOURCES

During this antebellum period, however, the concept of "judicial review" was in its infancy.[30] State courts did not view state constitutional provisions as enforceable but rather as "principles of government" that were descriptive, or hortatory, as opposed to normative.[31] They were considered more a declaration of political truths or aspirations than a limit on state action,[32] and hence there was hesitancy on the part of the judiciary to require equal treatment as a guarantee that derived from the positive law.[33] Still, in at least some state courts, there were a significant number of influential pre-Fourteenth Amendment equal protection decisions relating to (1) "partial laws" (referred to in modern state constitutions as "special legislation"), (2) business classifications, and (3) racial classifications.

Perhaps the most complete body of early "equal protection" law in state courts dealt with "partial" or special laws.[34] State courts repeatedly invalidated laws that singled out a particular class or person as the recipient of special rights or the carrier of extra burdens.[35] For example, in the 1814 case of *Holden v. James*,[36] the plaintiff sought to recover funds from the administrator of an estate.[37] Massachusetts law provided that such a suit had to be commenced within four years from the time of the creation of the estate,"[38] but the state legislature passed an act that extended by one year the statute of limitations with respect to "the several actions, suits, and claims" that Holden might bring.[39] Holden subsequently filed suit within

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AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 244 (1975); FLA. CONST. art. I, § 1 (1838), *reprinted in* 2 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 317 (1975); IND. CONST. art. I, § 1 (1846), *reprinted in* 3 SWINDLER, *supra* note 29, at 378; N.H. CONST. Part I, art. I (1784), *reprinted in* 6 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 344; OHIO CONST. art. VIII § 1 (1802), *reprinted in* 7 SWINDLER, *supra* note 25, at 553; PA. CONST. art. I, *reprinted in* 8 SWINDLER, *supra* note 28, at 278; *see also* Lundin, *supra* note 4, at 1189 n.33.

30. Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1205 (1985).

31. *Id.*

32. *Id.*

33. *See* Lundin, *supra* note 4, at 1140-41 (stating that like the language in the Declaration of Independence, state constitutional equality guarantees were often hortatory rather than prohibitory).

34. Partial laws in this context refer to laws that apply exclusively to a particular class or individual. Such laws may impose burdens or grant benefits.

35. Lundin, *supra* note 4, at 1158-59.

36. 11 Mass. 396 (1814).

37. *Holden*, 11 Mass. at 398.

38. *Id.* at 399.

39. *Id.* In essence, the special act provided that Holden could commence all claims as he may have against the Ranger Estate in the same manner as if the suit had been brought within the statute of limitations. The act provided, however, that the action must be brought within one year of the passage of the act. *Id.*

the year provided by the special act.[40] After hearing arguments, however, the Supreme Judicial Court of Massachusetts invalidated the special act.[41] The court did not expressly rely on the "free and equal clause" of the Massachusetts Constitution, but stated that:

> It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances, or that any one should be subjected to losses, damages, suits, or actions from which all others, under like circumstances, are exempted.[42]

Other state courts employed similar reasoning in striking down "partial" laws,[43] but several state courts did address "special legislation" through state constitutional provisions. For example, in Tennessee and Iowa courts interpreted their states' "law of the land" (due process) provisions to require general laws binding on all members of the community.[44] This different methodology, however, illustrates the inconsistent manner in which state courts enforced equality during the antebellum era; whether and on what basis they would invalidate unequal laws was open to speculation.[45]

Prior to the Civil War state courts also had occasion to evaluate statutory classifications distinguishing between businesses. In the 1854 case of *Webb v. Baird*, for example, an Indiana statute authorized courts to require attorneys to defend indigent clients without compensation in civil suits.[46] The Indiana Supreme Court noted that the professional services of attorneys are no more at the mercy of the public than "the goods of the merchant, or the crops of the farmer, or the wares of the mechanic,"[47] and rejected the contention that attorneys have an "honorary duty . . . or

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40. *Id.*

41. *Id.* at 405.

42. *Holden*, 11 Mass. at 405.

43. *See* Williams, *supra* note 30, at 1201; *see also* Durkee v. City of Janesville, 28 Wis. 464, 467 (1871); Reed v. Wright, 2 Greene 15, 1849 WL 156 at *9 (Iowa 1849) (stating that "laws affecting life, liberty and property must be general in their application, operating upon the entire community alike").

44. Williams, *supra* note 30, at 1202; *see also* Vanzant v. Waddel, 10 Tenn. 230, 239 (1829).

45. *See* Lundin, *supra* note 4, at 1143.

46. Webb v. Baird, 6 Ind. 13, 1854 WL 3268 at *1 (1854).

47. *Id.*

reciprocal obligation . . . to the body politic" which was sufficient to support being required to work for the government for free.[48] The gratuitous defense law was held to "trespass unjustly upon the rights and generous feelings of the bar, levying upon that class a discriminating and unconstitutional tax."[49]

Another case that dealt with differential treatment of businesses under a state constitution was the 1868 case of *Nashville v. Althrop*.[50] This case, decided the same year the Fourteenth Amendment was ratified, dealt with a municipal law that imposed a different manner of taxation on merchants who sold their products by sample as compared to merchants who sold their products in a different manner.[51] The Tennessee Supreme Court acknowledged that municipalities had the power to impose a reasonable tax on their merchants, but struck down the ordinance nonetheless,[52] stating that the authority granted to municipalities cannot enable them to discriminate between persons exercising the same privilege.[53]

Finally, in the early to mid-1800s, state courts also began to more frequently scrutinize laws that classified citizens on the basis of race. A significant landmark was the 1836 case of *Commonwealth v. Aves*, which abolished slavery in Massachusetts.[54] In *Aves*, a Louisiana resident went to visit her father in Massachusetts and brought "a colored female child, named Med" with her.[55] She eventually became ill and left the girl in the care of the father.[56] When a petition for a writ of habeas corpus was filed on the child's behalf,[57] a judge granted the writ of habeas corpus,[58] and the case was argued before the Supreme Judicial Court of Massachusetts.[59]

Chief Justice Lemuel Shaw ruled that the "free and equal clause" of the 1780 Massachusetts Constitution had effectively abolished slavery because "it is contrary to natural right and the plain principals of justice."[60] He wrote that the state constitution was "plain and explicit" in providing that "all men are born free and equal, and have certain natural, essential,

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48. *Id.* at *2.
49. *Id.* at *3.
50. Mayor of Nashville v. Althrop, 45 Tenn. 554, 1868 WL 2153, at *1 (1868).
51. *Id.*
52. *Id.* at *2.
53. *Id.*
54. Commonwealth v. Aves, 35 Mass. 193 (1836).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 194.
59. *Id.* at 195.
60. *Aves*, 35 Mass. at 210.

and unalienable rights."[61] Justice Shaw reasoned that "it would be difficult to select words more precisely adapted to the abolition of Negro slavery."[62]

However, there was a different outcome thirteen years later, in 1849, when the issue of school segregation came before the Massachusetts Supreme Court in *Roberts v. City of Boston*.[63] In *Roberts*, the city of Boston had established two primary schools "for the exclusive use of colored children."[64] The teachers at these schools possessed the same qualifications and received the same compensation as the teachers in other like schools in the city.[65] When Sarah Roberts applied for admission to the school nearest her home, she was denied entrance based on her skin color.[66] Sarah challenged the city's school assignment policy under the free and equal clause of the Massachusetts Constitution.[67]

The case was argued before the Massachusetts Supreme Court, and in an opinion that appeared to be inconsistent with the reasoning employed in *Aves*, the court upheld the segregation plan.[68] In declining to give teeth to the "free and equal" provision under these circumstances, Justice Shaw now argued that deference to the legislature was appropriate: "[t]he proper province of a declaration of rights and constitution . . . is to influence and direct the conscience of legislators in making laws, rather than to limit and control them."[69] Anticipating *Plessy v. Ferguson* by almost 50 years, Justice Shaw rejected the contention that the maintenance of separate schools would tend to deepen and perpetuate prejudice, stating that prejudice is "not created by law, and probably cannot be changed by law."[70] This was the uncertain state of "equal protection" law as the nation moved toward the Civil War.

## III. THE CIVIL WAR AND THE FOURTEENTH AMENDMENT

The Fourteenth Amendment was necessary because even though the Thirteenth Amendment, ratified in 1865, gave constitutional sanction to the

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61. *Id.*
62. *Id.*
63. 59 Mass. 198 (1849).
64. Roberts, 59 Mass. at 199.
65. *Id.*
66. *Id.*
67. *Id. See also* Williams, *supra* note 30, at 1204.
68. *Roberts*, 59 Mass. at 210.
69. *Id.* at 206-07.
70. *Id. See also* Williams, *supra* note 30, at 1205 (stating that "unhappily, [the Roberts case] supplied the separate but equal doctrine which lasted another century").

"emancipation proclamation" of 1863, separate "black codes" in the Southern states still existed by 1866.[71] Consequently, the post-Civil War radical Congress enacted the Civil Rights Act of 1866 to prohibit unequal treatment in state civil legal matters.[72] President Andrew Johnson vetoed the Act, however, because in his view the law had no basis in any of the constitutionally granted powers,[73] so Congress began working on the Fourteenth Amendment to retroactively ratify the 1866 Act. But the Fourteenth Amendment, ultimately ratified in 1868, ended up using far more sweeping general terms than the acts it was designed to sustain.[74] In other words, it was not based on race as the 1866 Civil Rights Act had been, but was much broader in potential scope.[75]

The most common theory used to explain this change is that, in order to assure passage, the so-called "radical republicans" in Congress, who supported business and corporate interests, had to be appeased by the anti-slavery forces.[76] Emerging national entrepreneurs wanted protection from state regulation intended to protect local interests from corporate abuses and indifference. The Fourteenth Amendment's language, therefore, was reluctantly broadened by anti-slavery forces to at least potentially protect corporations and other "persons" in order to guarantee passage.[77] Thus, the Fourteenth Amendment, which may have been initiated largely to eliminate the continued subjugation of the former slaves, actually served to nationalize the protection of individual rights for everyone, allowing for

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71. New laws were being enacted that limited the rights of former slaves to such an extent that their newfound freedom was of little value. *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 864 (14th Ed. West 2001) [hereinafter SULLIVAN & GUNTHER].

72. *Id.*

73. *Id.*

74. *Compare* U.S. CONST. amend. XIV *with* 42 U.S.C. § 1981 (2003) *and* 42 U.S.C. § 1982 (2003).

75. The principle aim of the Fourteenth Amendment was to incorporate into the federal constitution the fundamental rights that individuals already possessed under a general theory but that states had failed to adequately enforce, rather than to create new rights. Lundin, *supra* note 4, at 1143.

76. It was clear that the amendment would not easily be passed. The Reconstruction Congress contained a number of representatives from southern states who were determined to reject the Fourteenth Amendment. Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1217 (1999). The amendment's passage was only obtained when the leading congressional republicans circumvented the technical rules for constitutional amendments, impeached the president and threatened ongoing military occupation of the South. *Id.*

77. *See generally* Howard Jay Graham, *"The Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938).

uniform national standards of fairness and equality applicable everywhere.[78]

The Fourteenth Amendment, it is worth noting, did not articulate a new right but rather a new means of *protecting* rights that had not been consistently enforced under many state constitutions.[79] The Amendment provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws."[80] Such simple sounding language has proven difficult to interpret. Indeed, equal protection jurisprudence has been described as incoherent, "rudderless," unprincipled and ultimately astonishing.[81] It is by now clear, however, that any statutory classification scheme must be reasonably related to the purpose of the legislation,[82] and that those who are similarly situated must be similarly treated.[83]

The ultimate scope and force of the equal protection clause was not apparent from the start. In the *Slaughterhouse Cases*,[84] in 1873, a Louisiana law chartered a corporation granting a few butcher-shareholders a twenty five-year monopoly over butchering in three counties, including New Orleans, and destroying the rights of the remaining butchers to maintain their trade. Plaintiffs argued, *inter alia*, that this was not equal protection of the laws.[85] The Court found, however, that this zoning

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78. SULLIVAN & GUNTHER, *supra* note 71, at 411 (stating that the post-civil war amendments were a sign of growing national concern with protection of individual rights from state action).

79. Lundin, *supra* note 4, at 1146.

80. U.S. CONST. amend. XIV.

81. Lundin, *supra* note 4, at 1146.

82. This is a variation of the rationality requirement imposed in the examination of due process claims. *See* SULLIVAN & GUNTHER, *supra* note 71, at 601.

83. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949) [hereinafter Tussman]; Melanie E. Meyers, Note, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184 (1986). *See also* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 470 (1985) (Marshall, J., concurring in part and dissenting in part) (stating that the principle of the Fourteenth Amendment is that there is a "constitutional judgment that [any] two individuals or groups are entitled to be treated equally with respect to something"). By the same token, those who are not similarly situated need not be similarly treated. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464 (1981) (rejecting an attack on the California statutory rape law which punished the male, but not the female, participant in intercourse when the female was under eighteen and not the male's wife, even if the male was also under eighteen because the law realistically reflected the fact that the sexes are not similarly situated because only women become pregnant); Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (rejecting a challenge to a law authorizing registration of males for a potential military draft but not females because women may not legally serve in combat, and thus are not similarly situated to men for purposes of registration for the draft).

84. 83 U.S. 36 (1873).

85. *Slaughterhouse*, 83 U.S. at 36.

regulation was one of the "most necessary and frequent exercises of the [police] power" and a rational means of accomplishing proper ends, improving public health and welfare.[86] Besides, Justice Miller noted, it was "clear" that the intent of the Fourteenth Amendment was to rectify slavery, a matter of "personal servitude," not property or "economic servitude."[87] Justice Miller went on to state:

> We do not say that no one else but the negro can share in this protection . . . . But what we do say . . . is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it. . . .
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> . . . We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.[88]

These pronouncements, though eventually quite wrong, began a period of extreme reluctance to refer to or enforce the Equal Protection Clause, a period that would last over sixty years.[89] This was the case even though Justice Field, in his *Slaughterhouse* dissent, set the stage for what would become the premise of modern equal protection doctrine by writing:

> [There is an] equality of right . . . throughout the whole country, [which] is the distinguishing privilege of citizens of the United States. . . . [G]rants of exclusive privileges . .

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86. *Id.* at 63.

87. *See id.* at 68.

88. *Id.* at 72, 81.

89. The Supreme Court set the groundwork for "substantive due process" as a basis for striking state laws in the 1870s and 1880s. *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1876); Mugler v. Kansas, 123 U.S. 623 (1887). It may be no coincidence, therefore, that the rare use of equal protection doctrine to strike a law between the 1880s and the 1940s occurred the same year as Allgeyer v. Louisiana, 165 U.S. 578 (1897), where "substantive" due process was first used to strike a state law. *See* Gulf C. & S.F. Ry. Co. v. Ellis, 165 U.S. 150 (1897) (overturning a law under which only railroads had to pay attorneys'' fees in certain cases).

> . [are] opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal and impartial laws.[90]

## IV. THE POST-CIVIL WAR ERA

The first significant striking of a state law under the equal protection clause came seven years after *Slaughterhouse*, in *Strauder v. West Virginia*,[91] where a black man appealed his conviction for murder by a jury from which blacks were excluded by law.[92] The Court said:

> [The words of the Fourteenth Amendment] contain a necessary implication of a positive immunity, or right, . . . to exemption from unfriendly legislation against them [because of race], . . . exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of rights that others enjoy, . . . and reducing them to the condition of a subject race.[93]

The *Strauder* decision, reasoning as did *Slaughterhouse* from the historical "anti-slavery" purpose of the Amendment, implied and enforced a "presumption" that race-based legislation is purposeless, invidious and repugnant to the Equal Protection Clause. This decision, of course, was not an example of the "strict scrutiny" seen in equal protection decisions after the 1940s. Nevertheless, it was an important recognition that, given the Fourteenth Amendment, some more demanding form of judicial scrutiny was required for race-based legislation.

The broader reading of the Fourteenth Amendment urged by the dissenters in the *Slaughterhouse Cases*—and to some extent conceded by the majority[94]—was ultimately applied by the Court just a few years later in

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90. Slaughterhouse Cases, 83 U.S. 36, 109-11 (1873).
91. 100 U.S. 303 (1879).
92. *Strauder*, 100 U.S. at 304.
93. *Id.* at 307-08.
94. *Slaughterhouse*, 83 U.S. at 72 ("We do not say that no one else but the negro

*Yick Wo v. Hopkins*.[95] In *Yick Wo*, the challenged law, while not discriminatory on its face, in *application* denied permits to run laundries to ethnic Chinese.[96] The Court held for the Chinese laundrymen and expanded the scope of equal protection analysis in a number of ways.[97] Equal protection now applied to aliens, as well as citizens of all races, and the holding broadened the scope of protection from political rights, such as voting and jury service, to economic rights.[98] However, ten years after *Yick Wo*, the Court's decision in *Plessy v. Ferguson*[99] made it clear that while political and economic rights would now be equally protected, this would not be the case with so-called "social" rights.[100] As a result of *Plessy*, separation of the races would be acceptable in daily life for at least another sixty years.[101]

## V. THE PROGRESSIVE ERA

After *Yick Wo*, and immediately after *Plessy*, as the Court began to move into the "progressive era" (1890 to 1925), three observations would have seemed reasonable. First, while equal protection doctrine might be available to remedy inequitable treatment on the basis of race, separate but equal treatment of the races would be sufficient. Second, with one rare exception,[102] the evolving federal equal protection doctrine seemed unlikely to address disparate treatment of economic liberties. Third, if economic liberties were to be protected, it would be under principles of "substantive due process," a doctrine with a long, historic tradition of protecting rights deemed "fundamental" as a matter of natural law.[103]

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can share in this protection").

95. 118 U.S. 356 (1886).

96. *See Yick Wo*, 118 U.S. at 366-68.

97. *Id.* at 374.

98. Lundin, *supra* note 4, at 1201-05.

99. 163 U.S. 537 (1896).

100. In *Plessy*, the Court sustained a Louisiana law requiring "equal but separate" accommodations for "white" and "colored" railroad passengers. The Court argued that while the Fourteenth Amendment was intended to enforce equality, it could not be intended to abolish all distinctions based on color or to enforce social as compared to political equality. 163 U.S. at 551.

101. Until *Brown v. Board of Education*, 349 U.S. 294 (1954).

102. Gulf Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150 (1897). The only other significant use of equal protection to strike an economic law during the progressive era occurred in *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

103. The tradition began, in the United States, as early as *Calder v. Bull*, 3 U.S. 386 (1798). After *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), substantive due process soon became the preferable justification for striking anti-business legislation.

This later trend of using substantive due process arose even though lack of equal treatment under law might have made more sense as a justification for several important decisions during that era. In the famous pivotal case of *Lochner v. New York*,[104] for example, a state labor law prohibiting the employment of bakery employees for more than ten hours per day or sixty hours per week was challenged as an irrational interference with contractual rights.[105] The Court, supported by what was now a generation of emerging "economic due process" dicta, held that the statute unreasonably deprived the plaintiff's employees of their liberty to contract without due process.[106]

In *Lochner*, however, the Court was faced with a state "health and safety regulation" of only one, obviously politically ineffective, small portion of the entire food industry, bakeries, raising what today would be an "under-inclusiveness" equal protection argument.[107] Yet the Court chose not to hold that bakery owners' equal protection rights were violated in that they were treated differently than, say, butchers, who were in an even more dangerous occupation but were nevertheless *un*regulated.[108]

During the 1920s and early 1930s, the Court continued to strike statutes that restricted businesses, as in *Lochner*, because the state's purpose was simply unwise,[109] even though the use of an equal protection justification might have been more rational, deferential to legislatures, and politically acceptable.[110] But toward the end of the era, by the time of *Weaver v. Palmer Bros.*,[111] in 1926, subtle changes were afoot. *Weaver* involved a challenge to a law prohibiting the use of cut up rags ("shoddy") in the manufacture of bedding.[112] The Court ostensibly struck the law as unfair and unreasonable, based on the substantive due process of *Lochner*,[113] but the Court also suggested that the law was really unjustifiable *discrimination*.[114]

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104. 198 U.S. 45 (1905).

105. *Lochner*, 198 U.S. at 46.

106. *Id.* at 53.

107. *See* Ry. Express Agency v. New York, 336 U.S. 106, 111-12 (Jackson, J., concurring) (1949).

108. *See Lochner*, 198 U.S. at 46.

109. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

110. *See Ry. Express*, 336 U.S. at 111-12 (Jackson, J., concurring).

111. 270 U.S. 402 (1926).

112. *Weaver*, 270 U.S. at 409.

113. *Id.* at 415.

114. *Id.* at 414-15. The law allowed the use of other stuffing materials if they were sterilized and labeled, but not the rags, even if they were sterilized and labeled. *Id.*

Decisions like *Weaver* were consistent with the few, rare economic equal protection decisions that had also emerged during the progressive era. In 1911, for example, in *Lindsley v. Natural Carbonic Gas Co.*,[115] a challenge was made to a New York statute that prohibited the drawing and collecting of carbonic acid gas by pumps or other artificial appliances from any well. The fear was that this practice tended to interfere with the rights of others to make such draws on the water.[116] The challengers, however, claimed that this inherent classification, "artificial appliances" as compared to natural means, was arbitrary and a denial of equal protection.[117] The *Lindsley* court failed to strike the law, holding that if there were any set of facts that could reasonably be conceived that would sustain the law, the existence of those facts is presumed to have been present when the law was enacted.[118]

This newly articulated "rational basis" standard of review was used with a much different result toward the *end* of the progressive era. Nine years after *Lindsley*, in *F.S. Royster Guano Co. v. Virginia*,[119] a state law taxed the income of local corporations from business done outside and inside the state, but exempted entirely the out-of-state income of local corporations which did no local business. Here, the law *was* found to be a matter of arbitrary discrimination violating the Equal Protection Clause.[120] In striking the law, the court articulated a modified, more demanding version of the "rational basis" standard of review. The *Royster Guano* standard required that: "the *classification* [*system,* not just the law itself,] must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[121]

The subtle distinction between the rules in *Lindsley* and *Royster Guano* became the subject of debate on the Court by 1949 in *Railway Express Agency v. New York*,[122] where a law which prohibited advertising on vehicles for pay, but which nevertheless allowed business owners to advertise on their own delivery trucks, was found not to violate equal

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115. 220 U.S. 61 (1911).
116. *Id.* at 73.
117. *Id.* at 79.
118. *Id.* at 78 (following the deference to the legislature called for by the means ends principle of *M'Culloch v. Maryland*, 17 U.S. 316 (1819)).
119. 253 U.S. 412 (1920).
120. *Id.* at 417.
121. *Id.* at 415.
122. 336 U.S. 106 (1949).

protection.[123] Justice Douglas, for the majority,[124] and Justice Jackson in his concurrence,[125] agreed on the result but argued for the differing standards of review articulated in *Lindsley* and *Royster Guano,* respectively. Justice Douglas acknowledged that classifications in laws must be treated with deference unless the purposes of the law are illusory.[126] If the classification has a relation to a legitimate purpose, even hypothetical considerations will allow the law to stand.[127] Justice Jackson, in concurrence, however, suggested that *Royster Guano*, with its requirement that there must be a rational basis not just for the law but also for the *distinctions* in the law, provided the better standard of review.[128] This debate continues to this day.[129]

## VI. THE EARLY MODERN ERA

By the beginning of the "modern era" (between 1937 and 1944), three important decisions would drastically shift the course of equal protection doctrine and create the basis for the contemporary analytical framework. The first of these, *Carolene Products*,[130] a seemingly innocuous "economic

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123. *Ry. Express*, 336 U.S. at 109.
124. *Id.*
125. *Id.* at 111.
126. *Id.* at 110.
127. *Ry. Express*, 336 U.S. at 110.
128. *Id.* at 115.
129. Between 1949 and the early 1970s, the Supreme Court mostly maintained traditional deference toward economic and social legislation as against equal protection challenges. For subsequent exercises of *Lindsley* deferential review after *Railway Express*, see *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) (sustaining an Oklahoma law, the effect of which was to make illegal the fitting or duplicating of lenses by opticians without a prescription from an ophthalmologist or optometrist because even though this may be a "needless, wasteful requirement in many cases . . . it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . [It] is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."). *See also* New Orleans v. Dukes, 427 U.S. 297 (1976) (sustaining a 1972 New Orleans ordinance which exempted pushcart food vendors who had "continually operated the same businesses for at least eight years" from a prohibition against such vendors in the French Quarter); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (sustaining a state statute requiring all state police officers to retire at age fifty). Beginning in the 1980s, however, we saw the re-emergence of the standard of review debate over economic and social laws begun in *Railway Express*. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980). By 1985, showing far less deference, the Court actually struck an economic regulation. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (rejecting a tax preference for local insurance companies).
130. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

due process" opinion, would ultimately (and radically) re-structure equal protection doctrine. In that case, the Court simply sustained a law regulating "filled" milk as against a substantive due process challenge.[131] This was nothing new, as such challenges had already lost their viability four years earlier in *Nebbia v. New York*.[132] Nevertheless, *Carolene Products* produced one of the most important footnotes in Supreme Court history. It suggested the future possibility of "heightened" judicial scrutiny, a sort of "two-tiered" standard of review, under the Equal Protection Clause:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the constitution [or is directed at religious, national, or racial minorities.] . . . [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[133]

Only four years later, the influence of "footnote 4" revitalized equal protection doctrine in the modern era as both a means of protecting fundamental rights that were significantly impacted and classes of persons subject to "suspect" disparate treatment. In *Skinner v. Oklahoma*,[134] the second of the pivotal decisions of this era, a state law required the sterilization of those convicted a third time for a crime involving "moral turpitude." However, the statutory definition of "moral turpitude" included grand larceny, but not embezzlement.[135] Justice Douglas, for the majority, held that the statute amounted to invidious discrimination with regard to marriage and procreation, which he deemed "one of the basic civil rights of man." Justice Douglas stated that in such circumstances, "strict scrutiny of the classification . . . is essential."[136]

In articulating a new fundamental right, and invoking a new, higher standard of review, though, Justice Douglas sought to avoid justifying his

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131. *Id.* at 151.
132. 291 U.S. 502 (1934).
133. *Carolene*, 304 U.S. at 152 n.4.
134. 316 U.S. 535 (1942).
135. *Id.* at 536.
136. *Id.* at 541 (emphasis added).

decision under the rubric of substantive due process, an approach out of favor after 1938 as improper "second-guessing" of legislatures. Many statutes, however, can be viewed as either unreasonable laws or unreasonably *discriminatory* laws.[137] In choosing the later view of the law, Justice Douglas was able to frame the question in equal protection terms instead of relying on substantive due process. Rather than "second guessing" the legislature, Justice Douglas tacitly acknowledged the legislative purpose but saw the case as invidious legislative antipathy toward those who were generally poor thieves, as compared to those who tended to be wealthier embezzlers.[138] This choice made "political" sense, as would be made clear seven years later in *Railway Express Agency v. New York*,[139] because under-inclusive laws are often evidence of corruption or invidious motives to which courts should be far more sensitive than laws enforced too broadly.[140]

The Court in *Skinner*, therefore, borrowed from discredited "substantive due process" the practice of articulating without clear textual basis a "fundamental right to procreate."[141] The Court also leaned on the "substantive due process" case, *Carolene Products*, to justify the appropriateness of "higher scrutiny," but strictly scrutinized and protected that right as a matter of equal protection.[142] This new "fundamental rights" strand of equal protection would ultimately expand, especially during the

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137. See for example, *Zablocki v. Redhail*, 434 U.S. 374 (1978), where it was argued by different Justices that either theory would justify the result. In *Zablocki*, a Wisconsin law provided that any resident "having minor issue" not in his custody which he is under an obligation to support by any court order could not marry without court approval. 434 U.S. at 375. The majority decided the case as a matter of equal protection based on substantive due process precedent on the question of the existence of a "fundamental right." *Id.* at 382.

138. *See Skinner*, 316 U.S. at 540.

139. 336 U.S. 106 (1949).

140. Justice Jackson stated that "invalidation . . . on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable." *Id.* at 112. Justice Jackson contrasted this with the use of the Equal Protection Clause, which he said "does not disable [the government] from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader (or narrower) impact." *Id.*

141. The cases serving as precedent for this right, after all, were two *Lochner*-era cases: *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

142. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (pointing to a substantive due process right to sexual privacy but extending it to single people as a matter of equal protection). *See also* Zablocki v. Redhail, 434 U.S. 374 (1978).

1960s, to include rights of personal mobility,[143] voting,[144] and access to courts.[145]

The third case of great significance in the early modern era was *Korematsu v. United States,*[146] in 1944. There, a military order during the Second World War that excluded all persons of Japanese ancestry from designated areas on the west coast was sustained.[147] Justice Black, however, broke new ground by declaring that notwithstanding the narrow holding of the case, "all legal restrictions which curtail the civil rights of a single racial group are immediately *suspect*" and "courts must subject them to the most *rigid scrutiny.* Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[148]

Still, this was not "strict scrutiny" as we have known since the mid-sixties.[149] While the need to defer to the military in wartime was obviously a "compelling state interest," satisfying one demand of modern "strict scrutiny," the majority neither required nor applied the other modern requirement, a "least restrictive means" test.[150] Nevertheless, racial distinctions were now expressly required to meet a much higher level of scrutiny[151] even though the decision announcing this principle was one of the few rare cases in which a classification based on race or ancestry has

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

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

145. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963).

146. 323 U.S. 214 (1944).

147. *Korematsu*, 323 U.S. at 216.

148. *Id.* (emphasis added).

149. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (articulating the modern strict scrutiny standard for substantive due process); Loving v. Virginia, 388 U.S. 1 (1967) (setting forth strict scrutiny standard for equal protection).

150. Such a requirement was suggested, by implication, in Justice Murphy's dissent. Justice Murphy wrote that the deprivation of Japanese-American's rights was not "reasonably related to [avoiding] a public danger that is so imminent . . . as not to admit of delay [or] to permit the intervention of ordinary constitutional processes to alleviate the danger." *Korematsu*, 323 U.S. at 234. In *Korematsu*, however, although the fundamental rights of the plaintiff were clearly infringed, the Court used relatively deferential review, allowing this law to stand because of the special circumstances created by the war with Japan. *See* Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1224-25 (1991).

151. This was clearly not the case for gender-based distinctions during this era. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130 (1873) (finding Illinois could deny bar admission on the basis of gender); Goesaert v. Cleary, 335 U.S. 464 (1948).

*survived* "strict scrutiny."[152] However, though *Korematsu* provided somewhat more demanding scrutiny than had already been seen in *Strauder* and *Yick Wo*, it remained to be seen what impact this newly articulated requirement of "strict" scrutiny might have on the long-standing *Plessy* notion that "separate but equal" treatment of the races was acceptable.

This question was answered ten years later, in *Brown v. Board of Education,*[153] where black children sought admission to public schools in their community on a non-segregated basis.[154] They had been denied this due to laws requiring segregation by race.[155] After nearly sixty years, the Court finally revisited *Plessy v. Ferguson* and faced directly the question of whether similarly situated but segregated public schools really amounted to equal protection. The schools for blacks and whites in Topeka, Kansas, were found to be equal.[156] But, the Court said its decision "[could] not turn on merely a comparison of tangible factors in the Negro and white schools involved."[157] A unanimous Court found that:

> [E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . [I]t is doubtful [today] that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[158]

This was because non-tangibles, like the value of social and intellectual interaction, are very important in education, and because separating young children solely because of race:

> [G]enerates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . The impact is greater when

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152. *See, e.g.*, Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (pointing out that strict scrutiny has usually been "strict in theory, but fatal in fact").

153. 347 U.S. 483 (1954).

154. *Brown*, 347 U.S. at 488.

155. *Id.* at 486.

156. *Id.* at 486 n.1.

157. *Id.* at 492.

158. *Id.* at 493.

> it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.[159]

The problem, of course, would be the difficulty in implementing a *remedy* for those subjected to generations of "separate but equal" education. *Brown II*,[160] decided the following year, required the integration of public schools with "all deliberate speed,"[161] but it would take many more years—and much litigation[162]—to develop some contours for remedying public school racial segregation, and to establish the legitimacy of affirmative action as a means of doing so.[163]

## VII. THE 1960S

By the 1960s there was a two-tiered approach to equal protection analysis. Under this "new" or modern equal protection, where a "suspect class" or "fundamental right" is implicated in a statutory classification, the government has the burden of proving a close congruence between the scope of the regulation and its aim or purpose. That is, the law must serve a compelling state interest or purpose and be narrowly tailored to meet that interest.[164] All other legislative classification schemes not directed at such classes or rights would receive the traditional, deferential rational basis test.

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159. *Id.* at 494.

160. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

161. *Id.* at 301.

162. This struggle included resolving, step-by-step over the years, problems created by the difference between *de jure* and *de facto* discrimination. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Keyes v. Sch. Dist., 413 U.S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Missouri v. Jenkins, 495 U.S. 33 (1990). A more recent example of federal litigation over the issues in *Jenkins* is discussed in this symposium issue. P. Michael Mahoney & Scott Paccagnini, *Declare Victory and Go Home: The Practical Ramifications of the Seventh Circuit's Interpretation of Missouri v. Jenkins in School Desegregation Cases*, 24 N. ILL. U. L. REV. 683 (2004).

163. These efforts culminated quite recently in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

164. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (Powell, J.,

One problem, however, was that even though the "suspect class" strand of equal protection doctrine continued to cause intensified scrutiny of only racial, ethnic and nationality classes, the "fundamental interests" strand threatened to approach *Lochner*-era substantive due process.[165] This later strand seemed to potentially include a wide variety of interests: welfare benefits,[166] freedom from exclusionary zoning in housing opportunities,[167] and equitable school financing,[168] among other things. Nevertheless, today the only interests actually protected under the "fundamental interests" strand continue to be primarily voting,[169] access to courts,[170] interstate mobility,[171] and liberties articulated in the Bill of Rights.[172]

Another problem was that "new equal protection" was not so much a form of analysis as it was mere categorization.[173] If the Court categorized the case as appropriate for strict scrutiny, the government almost always lost; if the traditional test was to be used, the government almost never lost.[174]

## VIII. POST-1970: THE POST-MODERN ERA

Discontent with the "two-tier approach" grew in the courts in the early 1970s.[175] Certain new classification schemes were given an "intermediate"

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concurring) (stating that a race-based law is "constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest"). *See also*, Loving v. Virginia, 388 U.S. 1 (1967).

165. SULLIVAN & GUNTHER, *supra* note 71, at 603.

166. *See* Dandridge v. Williams, 397 U.S. 471 (1970); Lindsey v. Normet, 405 U.S. 56 (1972).

167. City of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

168. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

169. Reynolds v. Sims, 377 U.S. 533 (1964).

170. Griffin v. Illinois, 351 U.S. 12 (1956).

171. Shapiro v. Thompson, 394 U.S. 618 (1969); Sosna v. Iowa, 419 U.S. 393 (1975).

172. Wealth classifications, however, would not be subject to strict scrutiny. James v. Valtierra, 402 U.S. 137 (1971).

173. *See, e.g.*, Gunther, *supra* note 152, and accompanying text. Professor Gunther urged the Court to engage in rationality review with "bite" or intensified review of means even in economic or social laws, a demand for evidence of the rational relationship between means and ends and no hypothesizing as to either rationality or the state goal. *Id.*

174. *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238 (1995) (denying that, at least in the area of affirmative action, the assertion that strict scrutiny is "strict in theory but fatal in fact" is true).

175. SULLIVAN & GUNTHER, *supra* note 71, at 603-04.

level of scrutiny, e.g., those based on gender,[176] alienage,[177] and illegitimacy.[178] These cases receive a heightened scrutiny that is somewhat less demanding than strict scrutiny.[179] Moreover, and perhaps more importantly, the Supreme Court will now intervene under equal protection even without using "strict scrutiny" language in situations where strict scrutiny had not previously been used.[180]

There has also been an effort by some members of the Court to find new standards that would narrow the gap between the "tiers" by creating a "sliding scale" of scrutiny,[181] or one standard formula for equal protection analysis. These efforts, though not yet explicitly acknowledged by a majority of the Court, became evident in an increasing number of decisions in the 1970s which spoke of minimum scrutiny but actually engaged in a more demanding rational basis review and found statutes unconstitutional.[182] This more exacting scrutiny was seen, early on, in

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176. *See* Reed v. Reed, 404 U.S. 71 (1971).

177. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (applying strict scrutiny to strike law denying welfare benefits to aliens). *But see* Sugarman v. Dougall, 413 U.S. 634 (1973) (finding "political or governmental function" exception can allow mere deferential review of discrimination against aliens).

178. *See* Clark v. Jeter, 486 U.S. 456 (1988) (calling for the "intermediate" standard of review); Lalli v. Lalli, 439 U.S. 259 (1978).

179. Statutory classifications based on gender, alienage, or illegitimacy must serve important (though not compelling) government objectives and be substantially related (not most narrowly tailored) to accomplishing those objectives. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

180. *See* Romer v. Evans, 517 U.S. 620, 627 (1996) (striking a state constitutional amendment "[that] withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and . . . forbids reinstatement of these laws and policies"); Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). *See generally* Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209 (1999).

181. *See, e.g.*, Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 321 (1976) (J. Marshall dissenting) (outlining the dangers of the two-tiered approach and stating that "[t]here is simply no reason why a statute that [forces police officers to retire at age fifty] should be judged by the same minimal standards of rationality that we use to test economic legislation that discriminates against business interests"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) ("[T]he level of scrutiny employed in an equal protection case should vary with "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn'"). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969).

182. Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring)

> There is only one Equal Protection Clause. . . .
>
> [W]hat 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

challenges to distinctions in entitlement programs,[183] and more recently, with regard to certain classes of persons not previously afforded strict scrutiny, such as homosexuals[184] and the mentally retarded.[185]

In the mid-1970s, three additional classifications evoked some degree of heightened or "intermediate" scrutiny—gender, alienage,[186] and illegitimacy.[187] To some extent, the application of heightened scrutiny to these classes was justified by way of analogy to existing "suspect" classes,[188] in other instances it followed from the trend toward more demanding rational basis review. For example, these intertwining doctrinal developments, which lead to the notion of "intermediate" scrutiny, are perhaps best illustrated in the area of gender-based discrimination. In *Reed v. Reed*,[189] in 1971, the Court overturned an Idaho statutory preference for men over women who were competing to administer estates. However,

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> decisions that actually apply a single standard in a reasonably consistent fashion.

*Id.* at 211-12. *See also* Cleburne, 473 U.S. at 451 (1985) (Stevens, J., concurring) ("[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so-called "standards" adequately explain the decisional process").

183. *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (purporting to apply traditional rationality review in striking down a "food-stamp" law providing assistance only to "households" defined as "related persons," and even though this arguably would be rational "one-step-at-a-time" legislation, because a "related persons" distinction for purpose of including hungry people in this program was irrational); Jimenez v. Weinberger, 417 U.S. 628 (1974) (striking a federal welfare program which denied disability benefits to some but not all illegitimates born after the onset of the parent/wage-"earner's disability). *See also* James v. Strange, 407 U.S. 128 (1972).

184. Romer v. Evans, 517 U.S. 620 (1996).

185. Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). Arguably, this sort of judicial review may yet be extended to the mentally ill. Schweiker v. Wilson, 450 U.S. 221, 231 n.13 (1981) (Blackmun, J.) ("We . . . intimate no view as to what standard of review applies to legislation expressly classifying the mentally ill as a discrete group").

186. Graham v. Richardson, 403 U.S. 365 (1971) (using strict scrutiny to strike laws denying welfare benefits to aliens). *But see* Sugarman v. Dougall, 413 U.S. 634 (1973) (stating "political or government function" exception can allow for mere rationality review in some circumstances).

187. Clark v. Jeter, 486 U.S. 456 (1988) (articulating intermediate standard of review in this area). *See also* Trimble v. Gordon, 430 U.S. 762 (1977); Levy v. Louisiana, 391 U.S. 68 (1968).

188. As Justice Powell said in *San Antonio Independent School District v. Rodriguez*, "[T]he traditional indicia of suspectness" are that the "class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process." 411 U.S. 1, 28 (1973).

189. 404 U.S. 71 (1971).

using what appeared to be traditional "rational basis" review rather analogizing from "suspectness" cases, the Court ruled that: "[a] mandatory preference of one gender over another merely to avoid hearings on the question is "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."[190]

Just two years later, in *Frontiero v. Richardson*,[191] the Court sustained an equal protection challenge to a federal law permitting male soldiers an automatic dependency allowance for their wives but requiring servicewomen to prove by affidavit that their husbands were dependent before receiving an allowance. In *Frontiero*, however, a plurality of the Court made a fairly elaborate argument for gender as a "suspect" classification scheme. Justice Brennan found implicit support for this in *Reed*'s departure from 'traditional' rational basis analysis, and argued that "what [aligns sex] with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[192] Nevertheless, in a concurring opinion, which created the majority, Justices Powell and Blackmun decided on the basis of *Reed* and argued that "suspectness" need not be found.[193]

By 1976 in *Craig v. Boren*,[194] the Court compromised and formally adopted an "intermediate" rather than "strict" standard of review for gender-based discrimination.[195] In *Craig*, an Oklahoma law prohibited the sale of "non-intoxicating" 3.2 percent beer to males between eighteen and twenty-one but not to similarly-aged females.[196] The ostensible and otherwise legitimate purpose was to reduce traffic fatalities among young men, who had a statistically significant greater number of traffic violations as a class than a similarly aged class of women.[197] Justice Brennan, this time writing for the Court, overturned the law. He held that classifications by gender must serve "important" governmental objectives and must be "substantially related" to the achievement of those objectives.[198]

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190. *Reed*, 404 U.S. at 76.

191. 411 U.S. 677 (1973).

192. *Frontiero*, 411 U.S. at 686.

193. *Id.* at 692.

194. 429 U.S. 190 (1976).

195. This case marked the emergence of a consensus that intermediate (heightened) scrutiny is the appropriate standard of review for gender classifications. It also made it clear that even if gender-based discrimination is directed against males, rather than females, the same scrutiny will apply. *Craig*, 429 U.S. at 199.

196. *Id.* at 192.

197. *Id.* at 200.

198. *Id.* at 197.

Justice Brennan wrote: "Increasingly outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas [are no] more than loose-fitting characterizations incapable of supporting statutory schemes premised on their accuracy."[199] Soon thereafter, it became clear that for gender discrimination to be found and for such schemes to receive "intermediate" scrutiny, the discrimination must be based on gender, not some other legitimate basis.[200]

By the 1980s, in *Mississippi University for Women v. Hogan*,[201] the Court not only affirmed that a majority of the Court continued to adhere to "intermediate scrutiny" for sex discrimination, but clarified both the nature of intermediate scrutiny, and the extent to which affirmative action will satisfy such scrutiny. In *Hogan*, a young man who lived in a university town applied to its nursing school but was denied admission on the basis of gender as a matter of state law.[202] He was allowed to audit courses, however, with the understanding that he would obtain his degree elsewhere.[203] These policies were justified as affirmative action intended to provide educational opportunities in compensation for prior sex discrimination against women.[204]

The Court held that intermediate scrutiny continues to be the standard of review, even if males and not females are disadvantaged,[205] and that "the validity of a classification must be determined through reasoned analysis" rather than through "the mechanical application of traditional, often

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199. *Id.* at 198.

200. *Compare* Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating a New York law granting mothers of illegitimates the right to block adoptions by simply withholding consent while fathers had to prove that it was contrary to the "best interests of the child" because the state did not offer an important justification other than gender for distinguishing between fathers and mothers in the burdens imposed upon them) *with* Parham v. Hughes, 441 U.S. 347 (1979) (rejecting an attack on a Georgia law which denied a father, but not a mother, the right to sue for the wrongful death of an illegitimate unless he had legitimated the child since mothers and fathers of illegitimates are not similarly situated: only fathers can unilaterally legitimate children). If the Court is not faced with true gender discrimination, a deferential rational basis review may be used and the state will be permitted to take only "one step at a time" toward its goal. Geduldig v. Aiello, 417 U.S. 484, 492 (1974) (excluding "disability that accompanies normal pregnancy and childbirth" from California's health insurance system was not invidious discrimination because the scheme was not based on gender and classes may be dissimilarly treated if not for reasons of gender).

201. 458 U.S. 718 (1982).

202. *Hogan*, 458 U.S. at 720.

203. *Id.* at 720-21.

204. *Id.*

205. *Id.* at 723.

inaccurate, assumptions about the proper roles of men and women."[206] Finally, the state can establish an asserted benign or compensatory purpose "only if members of the gender benefited by the classification scheme actually suffer a disadvantage related to the classification."[207] Most recently, in *United States v. Virginia*,[208] the Court reaffirmed these views. There, the Virginia Military Institute (VMI), the sole single-sex school among Virginia's public institutions of higher learning, used an "adversative method" of training not available elsewhere for women to instill physical, moral and mental discipline in its male cadets.[209] In response to this suit, VMI proposed a parallel program for women located at a private liberal arts school for women.[210] Striking this disparate treatment, the Court held, in a somewhat more elaborate formulation than *Hogan,* that:

> Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. . . . The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. . . .
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> [Inherent differences between men and women] may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.[211]

As for those cases in which "rational basis" review was the articulated standard, but the analysis was more akin to strict scrutiny, *Cleburne v. Cleburne Living Center*[212] and *Romer v. Evans*[213] are most noteworthy. In *Cleburne*, a city denied a special use permit for the operation of a group home for the mentally retarded under an ordinance requiring permits for

206. *Id.* at 726.
207. *Id.* at 728.
208. 518 U.S. 515 (1996).
209. United States v. Virginia, 518 U.S. at 520.
210. *Id.* at 526.
211. *Id.* at 531-34 (internal citations omitted).
212. 473 U.S. 432 (1985).
213. 517 U.S. 620 (1996).

such homes for that class as well as other classes of individuals.[214] The Court said that:

> Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate. [215]

The Court found that the lesser standard of rational basis review was appropriate,[216] but that even under that "lesser standard" the record did not indicate any rational basis for believing that the [group] home would pose any special threat, and thus the law was invalid as applied.[217] The Court noted that "mere negative attitudes or fears" are inadequate to sustain such differential treatment."[218]

Justices Marshall, Brennan and Blackmun concurred with the result but dissented in several other respects. First, Justice Marshall writing for the group, argued that:

> 'Cleburne's vague generalizations for classifying the "feeble-minded" with drug addicts, alcoholics, and the insane, and excluding them where the elderly, the ill, the boarder, and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible assumptions or outmoded and perhaps invidious stereotypes. . . .
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> . . . Rather than leaving future retarded individuals to run the gauntlet of this overbroad presumption, I would affirm the judgment of the Court of Appeals in its entirety and would strike down on its face the provision at issue.[219]

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214. *Cleburne*, 473 U.S. at 435.
215. *Id.* at 446.
216. *Id.* at 435.
217. *Id.* at 448.
218. *Id.*
219. *Id.* at 464, 478 (Marshall, J., dissenting).

Secondly, and quite presciently, Justice Marshall stated:

> I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for the city of 'Cleburne's equal protection violation. The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet 'Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation. . . .
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> . . . .
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> The refusal to acknowledge that something more than minimum rationality review is at work here is . . . unfortunate in at least two respects. The suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for . . . courts to subject economic and commercial classifications to similar and searching "ordinary" rational-basis review--a small and regrettable step back toward the days of [*Lochner*].[220]

While it may not turn out to be "Lochnerizing," exactly, more demanding judicial scrutiny may be in the offing for some forms of "economic and social" legislation. There were concurring and dissenting opinions as early as the 1940s arguing for the protection of economic minorities through some form of heightened review, particularly where invidious motives may have been at hand. Justice Douglas, for example, voted to invalidate the regulations in *Kotch v. Board of Riverboat Pilots*[221] and *Goessart v. Cleary*.[222] In those cases, the state was not just granting benefits, but was perpetuating economic advantages for a favored group, while disadvantaging other groups by reason of consanguinity or gender. This was different than later cases, such as *New Orleans v. Dukes*,[223] where the losers in the legislature, hot dog venders, where not permanently disadvantaged minorities, and thus the need for judicial protection was arguably less.[224]

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220. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. at 456, 459-60.

221. 330 U.S. 552 (1947).

222. 335 U.S. 464 (1948).

223. 427 U.S. 297 (1976).

224. The principle of the Fourteenth Amendment is that there is a "constitutional judgment that two individuals or groups are entitled to be treated equally. . . . With regard

In the post-modern era, arguments for greater protection for "economic or social policy minorities" have surfaced again. So has the debate begun in 1949 in *Railway Express Agency v. New York.* In *United States Railroad Retirement Board v. Fritz*,[225] for example, the Court sustained an effort by Congress to reduce excess or "windfall" benefits to railroad retirees by cutting benefits for those not actually working for the railroad when these statutory benefits were enacted. Justice Rehnquist, for the majority, conceded that the Court had "not been altogether consistent" in deciding the standard of review in social and economic legislation between *Lindsley* and *Royster Guano.*[226]

Justice Stevens, concurring, suggested that while identification of an actual purpose was not necessary, the Court should at least ascertain some legitimate motivation proper for an impartial legislature.[227] Any "adverse impact" should have been viewable by the enacting Congress "as an acceptable cost of achieving a larger goal."[228] Justices Brennan and Marshall agreed with Justice Stevens. They noted in their dissent, however, that the proper approach was to be found in *Johnson v. Robison*,[229] where eight members of the Court agreed on the *Royster Guano* standard.[230]

## IX. THE PRESENT AND THE FUTURE: EMERGING TRENDS IN EQUAL PROTECTION

Given the modern turmoil over standards of review, including the proper approach to rational basis review of economic or social regulation, it is not surprising that several recent federal court decisions have signaled that a more demanding review of economic regulations may take hold.[231]

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to economic and commercial matters, no basis for such a conclusion exists . . . [because] [t]he structure of economic and commercial life is a matter of political compromise, not constitutional principle." *Cleburne*, 473 U.S. at 470-71 (Marshall, Brennan and Blackmun, JJ., concurring and dissenting).

225. 449 U.S. 166 (1980).

226. *Id.* at 174.

227. *Id.* at 180-81.

228. *Id.* at 181.

229. 415 U.S. 361 (1974).

230. *Fritz*, 449 U.S. at 183.

231. *See, e.g.*, Cornwell v. Cal. Bd. of Barbering, 962 F. Supp. 1260 (S.D. Cal. 1997) (challenging a law requiring a cosmetology license to run a hair-braiding shop); Brown v. Barry, 710 F. Supp. 352 (D.DC. 1989) (challenging a law prohibiting bootblack stands on public space); Craigmiles v. Giles, 110 F. Supp.2d 658 (E.D. Tenn. 2000) (requiring funeral director license to sell caskets) (cited and discussed in this symposium by Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's*

Timothy Sandefur explores this area in his provocative opening piece of the issue.[232] On this fiftieth anniversary of the decision in *Brown v. Board of Education*,[233] it would also seem appropriate to discuss still unresolved issues in the area of segregation and affirmative action. Consequently, this symposium offers Professor Mark Cordes' thoughts on the recent *Grutter* and *Gratz* decisions and the future for race-conscience admissions programs in higher education.[234] Christopher J. Schmidt makes the case against Justice O'Connor's intriguing suggestion, in those cases, that affirmative action in higher education will most likely be unnecessary in twenty-five years.[235] Michael Fridkin explores a different possible implication of *Grutter* and *Gratz*, that a path may now be open to non-remedial justifications for racial preferences not just in public education but also in allocating public benefits.[236] The future of school desegregation litigation is the focus of the article by Judge P. Michael Mahoney and Scott Paccagnini.[237]

This issue also contains intriguing articles about a topic currently in the news—same-sex marriage. Professor Mark Wojcik examines the potential impact of these marriages on our institutions of culture, arguing that it would be irrational to not afford same-sex marriages the same respect as opposite-sex couples.[238] Professor Robert Laurence, also looking to the battles ahead for recognition of same-sex marriage, offers insights that might be gleaned from hundreds of years of conflict between Indian tribes and the North American dominant society.[239] Finally, the symposium includes a discussion of the protection of Indian cultural

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*Rationality Review Isn't Enough*, 24 N. ILL. U. L. REV. 457 (2004)).

232. Sandefur, *supra* note 231.

233. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

234. Mark Cordes, *Affirmative Action After Grutter and Gratz*, 24 N. ILL. U. L. REV. 691 (2004).

235. Christopher J. Schmidt, *Caught in a Paradox: Problems with Grutter's Expectation that Race-Conscious Admissions Programs will end in 25 Years*, 24 N. ILL. U. L. REV. 753 (2004).

236. Michael K. Fridkin, *The Permissibility of Non-Remedial Justifications for Racial Preferences in Public Contracting*, 24 N. ILL. U. L. REV. 509 (2004).

237. P. Michael Mahoney & Scott Paccagnini, *Declare Victory and Go Home: The Practical Ramifications of the Seventh Circuit's Interpretation of Missouri v. Jenkins in School Desegregation Cases*, 24 N. ILL. U. L. REV. 683 (2004).

238. Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589 (2004).

239. Robert Laurence, *What Could American Indian Law Possibly Have to Do with the Issue of Gay-Marriage Recognition?: Definition Jurisprudence, Equal Protection and Full Faith and Credit*, 24 N. ILL. U. L. REV. 563 (2004).

property as compared to that of other minorities.[240] All in all, this symposium promises to be a stimulating read.

240. Sherry Hutt, *If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans*, 24 N. ILL. U. L. REV. 527 (2004).