ARTICLES

NORTHERN LIGHTS—EQUAL PROTECTION ANALYSIS IN ALASKA

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I. INTRODUCTION

The people of Alaska have included in their constitution[1] a provision guaranteeing to all persons the equal protection of the laws.[2] This section and the other sections of Alaska's Declaration of Rights are not exceptional in their formulation.[3] The Declaration essentially restates the traditional substantive and procedural rights found in the Bill of Rights[4] and the fourteenth amendment[5] of the United States

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1. The Constitution of the State of Alaska was ratified by the voters of the state on April 24, 1956. It had been drafted at a convention that met from November 8, 1955, to February 5, 1956. The constitution went into effect upon Alaska's admission as a state of the United States on January 3, 1959. LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, 1 CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATE, Alaska iii (1982). *See generally* FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION (1975). The Alaska Constitution is modeled primarily after the United States Constitution, and to a lesser degree on the constitutions of Hawaii and New Jersey. *Id.* at 67.

2. The guarantee is contained in the constitution's first article, the Declaration of Rights. The Declaration of Rights protects many of the same fundamental rights as the federal Bill of Rights, including the rights of free speech, free assembly, and due process. The equal protection guarantee is contained in ALASKA CONST. art. I, § 1:

> Inherent Rights. The constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

3. Dionisopoulos, *Indiana, 1851, Alaska 1956: A Century of Difference in State Constitutions,* 34 IND. L.J. 34, 37-39 (1958). *See* A. STRUM, TRENDS IN STATE CONSTITUTION-MAKING 1966-1972, at 45-46 (1973).

4. U.S. CONST. amend. I-X.

5. U.S. CONST. amend. XIV, § 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

Constitution. Although Alaska's wording that "all persons are equal and entitled to equal rights, opportunities, and protection under the law" is somewhat different from the federal guarantee that no state shall "deny to any person within its jurisdiction the equal protection of the laws," the Alaska Supreme Court has given little heed to the difference in language between the state and federal equal protection provisions. The Alaska Supreme Court has, however, given great attention to the development of an independent analytical doctrine with which to apply the state equal protection guarantee. In the hands of the Alaska Supreme Court, equal protection under the state constitution is significantly different from equal protection under the federal Constitution.

This article is an examination and evaluation of these differences. As such, it is in keeping with the now well-established emphasis on the importance of state constitutional law as a contemporary source of protection for civil rights and liberties in an era of perceived United States Supreme Court retreat.[6] At a minimum, the Alaska court's approach is an interesting example of state judicial activism. But it is much more. Academically, the equal protection analysis adopted by the Alaska court is of broader interest because it closely approximates the analytical approach Supreme Court Justice Thurgood Marshall has long argued should be employed under the federal Constitution.[7] Thus, Alaska provides a case study and, perhaps, an appropriate model for the nation. Practically, the Alaska Supreme Court has provided attorneys in Alaska with a broad and powerful litigation tool for challenging state and local government classifications.

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they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. *See, e.g.,* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977); Collins, *Reliance on State Constitutions — Away from a Reactionary Approach,* 9 HASTINGS CONST. L.Q. 1 (1981); Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts,* 33 SYRACUSE L. REV. 731 (1982); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976); Linde, *E Pluribus — Constitutional Theory and State Courts,* 18 GA. L. REV. 165 (1984) [hereinafter cited as *E Pluribus*]; Linde, *First Things First: Rediscovering the States' Bills of Rights,* 9 U. BALT. L. REV. 379 (1980) [hereinafter cited as *First Things First*]; Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C.L. REV. 353 (1984); *Developments in the Law — The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324 (1982); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution,* 29 STAN. L. REV. 297 (1977); *Project Report: Toward an Activist Role for State Bills of Rights,* 8 Harv. C.R.-C.L. L. Rev. 271 (1973).

7. *See infra* text accompanying notes 104-31.

Much of the development of the independent state approach to equal protection analysis in Alaska has taken place in response to the state court's dissatisfaction with the equal protection doctrine of the United States Supreme Court. In order to better understand the evolution of the Alaska constitutional doctrine, this article begins with a summary of the development of federal doctrine under the fourteenth amendment. Next, the article considers the development of equal protection analysis under the state constitution from the initial close tracking of the federal standards to the articulation and refinement of Alaska's own sliding scale, balancing approach. Finally, the article seeks to evaluate the Alaska equal protection analysis.

II. OVERVIEW OF FEDERAL EQUAL PROTECTION DOCTRINE

A. Equal Protection Analysis Prior to the Warren Court[8]

The fourteenth amendment[9] to the United States Constitution was proposed by Congress in 1866 and ratified in 1868. As a product of radical reconstruction following the Civil War, the amendment reflected Congress's desire to ensure a sound constitutional foundation for protection of the rights of recently freed former slaves.[10] Although an early decision of the Supreme Court indicated that the Court doubted "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 the equal protection clause,[11] the Court soon acknowledged that the clause's broad language was not limited merely to racial classifications.[12] As Professor Bickel observed: "[S]ection I of the fourteenth amendment, on its face, deals not only with racial discrimination, but also with discrimination whether or not based on color. This cannot have been accidental. . . ."[13] Thus the broad language of the equal protection clause

8. The "Warren Court" refers to the United States Supreme Court under Chief Justice Earl Warren, who served from 1953 to 1969. *See infra* text accompanying notes 38-40.

9. U.S. CONST. amend. XIV. The equal protection clause provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Id. § 1.

10. *See generally* Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1 (1955); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U.L.Q. 421.

11. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

12. *See, e.g.,* Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886) (holding that corporations as well as natural persons are protected by the equal protection clause).

13. Bickel, *supra* note 10, at 60.

afforded, at least potentially, a wide scope for judicial review of state legislative classifications.

Until the Warren Court era, however, the Supreme Court only infrequently used the equal protection clause to increase federal control of state actions. Although the Supreme Court did utilize the clause to strike down some discrimination against blacks[14] and Asians,[15] the Court also acquiesced to the end of reconstruction efforts and to the imposition of Jim Crow segregation by its acceptance of the infamous doctrine of "separate but equal."[16] The equal protection clause was almost never utilized in challenges to social and economic legislation, and when the clause was invoked, the Court employed a deferential standard of review.[17] In fact, in 1927, near the height of the era of judicial activism in using the due process clause of the fourteenth amendment to strike down economic legislation, Justice Holmes could scornfully label an equal protection argument as "the usual last resort of constitutional arguments."[18]

One aspect of federal equal protection doctrine from the pre-Warren Court period is of particular interest both because it continues

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14. *See* Strauder v. West Virginia, 100 U.S. 303 (1879).

15. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

16. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

17. Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949), is the leading study of equal protection doctrine prior to the Warren Court era. Professor Gunther has characterized federal equal protection during this period as follows:

> Traditionally, equal protection supported only minimal judicial intervention in most contexts. Ordinarily, the command of equal protection was only that government must not impose differences on treatment "except upon some reasonable differentiation fairly related to the object of regulation," as Justice Jackson put it in the Railway Express case. . . . That "old" variety of equal protection scrutiny focused solely on the *means* used by the legislature: it insisted merely that the classification in the statute reasonably relate to the legislative purpose. Unlike substantive due process, equal protection scrutiny was not typically concerned with identifying "fundamental values" and restraining legislative ends. And usually that rational classification requirement was readily satisfied: the courts did not demand a tight fit between classification and purpose; perfect congruence between means and ends was not required; judges allowed legislators flexibility to act on the basis of broadly accurate generalizations and tolerated considerable overinclusiveness and underinclusiveness in classification schemes. Only in special, limited contexts was equal protection found to have a deeper bite during most of its history — most notably in racial discrimination cases, in view of this historical background of the 14th Amendment.

G. GUNTHER, CONSTITUTIONAL LAW 587 (11th ed. 1985).

18. Buck v. Bell, 274 U.S. 200, 208 (1927). Nevertheless, during the period from 1900 to the mid-1930's, the Supreme Court did strike down some 20 state and local economic regulatory statutes as violative of equal protection. II DORSEN, BENDER, NEUBORNE & LAW, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 342-43 (4th ed. 1979).

to be an issue today and because it has been an issue influential in the development of an independent equal protection standard under the Alaska Constitution. As indicated, the Supreme Court applied a deferential standard when reviewing challenged economic and social legislation. The Court would inquire only to determine that the legislature had some rational basis for its choice of the classification used in the challenged enactment. But the Court articulated the standard by which to determine such rationality in very different language. Some formulations were deferential in the extreme, while other statements of the standard implied a considerable scope for judicial review of legislative judgments. These divergent standards continued to exist and to be employed by the Court, often with disregard for their apparent inconsistency. In fact, these divergent standards continue to be employed and hotly debated today.[19]

The Supreme Court's opinions in *Lindsley v. Natural Carbonic Gas Co.*,[20] a 1911 decision, and *F. S. Royster Guano Co. v. Virginia*,[21] a 1920 decision, are classic examples of the polar extremes of the Court's formulations of the rational basis test. In *Lindsley*, the Court articulated the standard as follows:

> The rules by which this contention [that the legislative classification violates equal protection] must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[22]

In contrast, the *Royster* standard suggests a substantial, active role for a court reviewing an equal protection challenge to economic regulatory legislation. Here the Court stated: "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated

19. GUNTHER & SCHAUER, CONSTITUTIONAL LAW 148 (10th ed. 1980 & Supp. 1984).

20. 220 U.S. 61 (1911).

21. 253 U.S. 412 (1920).

22. 220 U.S. at 78-79.

alike."[23] Controversy continues to swirl around the Supreme Court's continuing use of these divergent standards. As discussed below, the Warren Court's apparent adoption of a standard of review even less demanding than the *Lindsley* formulation and the Burger Court's[24] subsequent sporadic use of the more rigorous *Royster* standard is one source of criticism of contemporary federal equal protection doctrine.[25] Additionally, the Alaska Supreme Court's preference for the more active judicial review of the *Royster* standard is perhaps the primary factor leading to the state court's adoption of its independent equal protection doctrine.[26]

Two decisions of the 1940's are particularly important in setting the stage for the development of contemporary equal protection doctrine under the Warren and Burger Courts. One is *Korematsu v. United States.*[27] Although *Korematsu* is best known for upholding the removal and internment of Japanese Americans from the American west coast during World War II, a holding that "falls into the ugly abyss of racism,"[28] the majority opinion written by Justice Black did state that racial classifications are "immediately suspect" and that "courts must subject them to the most rigid scrutiny."[29] This notion was to become a foundation of the first branch of the Warren Court's equal protection doctrine: suspect classification equal protection analysis.

The second decision, *Skinner v. Oklahoma ex rel. Williamson,*[30] is a more complicated precursor to modern equal protection development. In *Skinner,* the plaintiff challenged an Oklahoma statute which provided that individuals who committed two or more felonies involving moral turpitude could be ordered sterilized. The act, however, provided that " 'offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.' "[31] In short, white-collar criminals would not be subject to sterilization, while individuals such as Skinner, who had been convicted of chicken stealing once and armed robbery twice, could be sterilized.

Justice Douglas, the author of the Court's *Skinner* opinion, faced a doctrinal dilemma. He acknowledged the normal deference shown

23. 253 U.S. at 415.

24. The "Burger Court" refers to the United States Supreme Court under its current Chief Justice, Warren Burger, who has served since 1969.

25. *See infra* text accompanying notes 41, 79-83.

26. *See infra* sections III A. and B.

27. 323 U.S. 214 (1944).

28. *Id.* at 233 (Murphy, J., dissenting).

29. *Id.* at 216.

30. 316 U.S. 535 (1942).

31. *Id.* at 537.

to legislative classifications: "[i]f we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised."[32] But Justice Douglas decided the Court could nevertheless find that the statute violated equal protection because the Court was dealing with "legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[33] The United States Constitution, of course, nowhere explicitly identifies procreation as a fundamental right. Douglas possibly could have found such an interest to be a fundamental right had he employed substantive due process analysis. He then could have asserted directly that the state's interests supporting the legislation did not justify the burden placed on the "right." Such an approach was inconceivable, however, to a Court that had only recently terminated the so-called *Lochner* era[34] and rejected economic substantive due process.[35] Instead, Justice Douglas ignored the issue of the source of the fundamental right to procreate, renounced any intention to engage in substantive due process analysis, and insisted instead that the issue involved was one of equal protection. As he explained:

> We mention these matters [that Skinner might be deprived of a basic liberty] not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." . . . When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.[36]

Thus, the Court applied strict scrutiny to the classification

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32. *Id.* at 540.

33. *Id.* at 541.

34. Lochner v. New York, 198 U.S. 45 (1905). Substantive due process review refers to the idea that "due process of law" imposes restrictions upon the substance of what governments may do or the subject matter over which they may act and not solely upon the procedures by which they may do it. The doctrine was often invoked during the period between the turn of the century and the mid-1930's to overturn statutes regulating economic affairs. *Lochner* is generally regarded as the first of the economic substantive due process cases. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 436-43 (2d ed. 1983).

35. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

36. *Skinner*, 316 U.S. at 541 (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

because the classification affected what Justice Douglas found to be a basic right, not because classifications between different kinds of felonies were inherently suspect. In this way *Skinner* laid the foundation for the second major branch of the Warren Court's equal protection doctrine: fundamental rights equal protection analysis.[37]

B. Equal Protection Analysis in the Warren Court

Earl Warren was appointed to the Supreme Court as Chief Justice in 1953. On May 17, 1954, the Court issued its unanimous opinion written by Chief Justice Warren in *Brown v. Board of Education.*[38] In overturning the doctrine of separate but equal,[39] the Court also initiated an era of revolutionary judicial activism that reached its height during the 1960's. By the end of that decade, the Warren Court had articulated a comprehensive new equal protection doctrine. The new doctrine utilized two quite distinct levels of review: rational basis and strict scrutiny.[40]

During this period, the Court applied a very passive form of judicial review to challenged classifications in social and economic legislation. The Warren Court standard was even more deferential to the legislature than the standard articulated in *Lindsley.* The Court would uphold such a classification if it could conceive of a possible rational basis that would justify the legislature's decision. For example, Chief Justice Warren described the lower tier, rational basis test in 1969 as follows:

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.[41]

In sharp contrast to this highly deferential standard, the other,

37. The suggestion that a more active judicial review was justified when basic rights or "discrete and insular minorities" were involved had previously been made by Justice Stone in his famous footnote 4 in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

38. 347 U.S. 483 (1954).

39. Although *Brown* itself only abandoned the doctrine of separate but equal in the field of public education, subsequent *per curiam* opinions prohibited segregation in other state facilities and services. *See,* GUNTHER, *supra* note 17, at 639 n.1.

40. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972); *Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065 (1969).

41. McDonald v. Bd. of Election, 394 U.S. 802, 809 (1969); *see, e.g.,* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

more strict level of review produced a degree of judicial intervention and searching review of legislative classification previously unknown under the equal protection clause. The Warren Court applied this strict scrutiny in two sets of circumstances: when the Court concluded that the classification involved a suspect criterion such as race or when the Court found that the classification impinged upon a fundamental right.[42] Under the heightened review of the Warren Court's second tier, the Court examined a challenged classification both as to its means, which it required to be "necessary," and as to its "ends," which it required to be "compelling." If the classification was not necessary to achieve a compelling state interest, the legislation violated equal protection.

Under this two-tier scheme, the determinative stage of the analysis was the initial stage, when the Court decided which level of review to apply. For, as Professor Gunther observed in an often-quoted passage: "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."[43]

The suspect classification branch of the Court's strict scrutiny approach was not highly controversial.[44] The approach scrupulously maintained the suspect nature of racial classifications, previously indicated in *Korematsu,*[45] and established the suspectness of classifications based on alienage[46] and national origin.[47] The main issue involved in this aspect of the Court's analysis was the extent to which other classifications such as wealth, gender, mental retardation, and others could be added to the ranks of the suspect. Advocates of such expansions were quick to realize, for example, that if wealth could be established as a suspect classification, a fundamental reordering in access to governmental assistance might be accomplished.[48] Questions as to the expansion of suspect classifications remained for the Burger Court.

By far the most controversial aspect of the Warren Court's equal protection doctrine was the fundamental rights equal protection analy-

42. Shapiro v. Thompson, 394 U.S. 618 (1969), is regarded as the court's first full statement of fundamental rights equal protection analysis.

43. Gunther, *supra* note 40, at 8 (footnote omitted).

44. *See generally* Brest, *Foreword: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1 (1976).

45. *See supra* text accompanying notes 27-29. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967).

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

47. *See, e.g.,* Hernandez v. Texas, 347 U.S. 475 (1954).

48. *See* Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969).

sis. Justice Harlan's dissenting opinion in *Shapiro v. Thompson*[49] expressed the main points of criticism. In *Shapiro* the majority opinion had overturned legislation establishing one year residency requirements before an applicant was eligible for welfare benefits. The opinion reasoned that the distinction between new and longer-term residents placed a burden on the indigent person's right to travel that was not justified by any compelling state interest. Although Justice Harlan recognized a constitutional source for the right to travel,[50] he found the majority's fundamental rights equal protection approach to be "particularly unfortunate and unnecessary."[51] To Harlan, the doctrine was unfortunate because he concluded that "[v]irtually every state statute affects important rights" so that "to extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'super-legislature.' "[52] Harlan felt the doctrine was unnecessary because, if the right was assured by the Constitution, infringements of the right could be dealt with directly.[53] However, if the classification affected matters that were not mentioned in the Constitution, he knew of "nothing which entitles this Court to pick out particular activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test."[54]

Despite such cries of alarm over the potential for judicial activism under the fundamental rights equal protection doctrine, the Warren Court, in fact, added few interests to the list of fundamental rights.[55] Such rights were limited to criminal appeals,[56] voting,[57] and interstate travel.[58] At the time of transition from the Warren to the Burger Court, however, advocates and commentators were seeking to push forward the frontiers of highly protected interests.[59]

C. Equal Protection Analysis in the Burger Court

The change in Justices from the Warren Court to the Burger Court has not produced a sharp repudiation of the equal protection doctrine of the 1960's. On the surface at least, during the 1970's and 1980's the Supreme Court has largely retained the doctrinal outline of

49. 394 U.S. 618, 655-77 (1969) (Harlan, J., dissenting).
50. *Id.* at 663-71.
51. *Id.* at 661.
52. *Id.*
53. *Id.* at 661-62.
54. *Id.* at 662.
55. Gunther, *supra* note 40, at 8-9.
56. *E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).
57. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
58. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).
59. Gunther, *supra* note 40, at 9-10.

the Warren Court two-tier analysis.[60] Within that general doctrinal framework, however, the Burger Court has made it clear that the upper level of equal protection review is not expanding. The Court has not explicitly declared new classifications to be suspect[61] nor has it found additional rights to be fundamental under the equal protection clause.[62] Still, the Burger Court has muddied the waters and obscured the rigid doctrinal lines of the Warren Court's approach. Increasingly the Court has determined cases without articulating a standard of review and applied a *sui generis* analysis that is neither as weak as rational basis review nor as strong as strict scrutiny and is highly dependent on the particular facts of the case.[63] With regard to some classifications such as gender, this approach has been formalized to the point that many refer to a third tier of review: "intermediate level" review or "heightened scrutiny."[64]

The Burger Court's retreat from the broad implications of the strict scrutiny doctrine was most clearly shown in *San Antonio Independent School District v. Rodriguez,*[65] where parents from a school district with a low property tax base challenged the Texas school finance system, which permitted wealthy school districts to spend much greater sums per student while taxing residents at much lower rates than residents of poor districts. The parents asserted that strict scrutiny should be used to review the system because wealth should be regarded as a suspect classification and because education should be regarded as a fundamental right. Concerning wealth, the majority opinion written by Justice Powell found that the class the plaintiffs sought to represent was too amorphous to reflect a meaningful wealth classification.[66] In addition, the Court indicated that in its prior wealth cases the class members had been completely unable to pay for a desired benefit and, therefore, absolutely deprived of the benefit, circumstances not present in the Texas school finance system.[67] The Court concluded that the system did "not operate to the peculiar dis-

60. GUNTHER, *supra* note 17, at 589, 591; Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection,* 48 MO. L. REV. 587, 589-90 (1983). *But cf.* City of Cleburne, Texas v. Cleburne Living Center, — U.S. —, 105 S. Ct. 3249 (1985), discussed *infra* note 78.

61. *See, e.g.,* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (Court declined to apply heightened review to differential treatment based on age).

62. *See, e.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Court declined to add education as a fundamental guaranteed right).

63. *See, e.g.,* Plyler v. Doe, 457 U.S. 202 (1982).

64. *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976); *see generally,* Comment, *The "Substantial Relation" Question in Gender Discrimination Cases,* 52 U. CHI. L. REV. 149 (1985).

65. 411 U.S. 1 (1973).

66. *Id.* at 28.

67. *Id.* at 19-25.

advantage of any suspect class."[68] In addition to rejecting wealth as a suspect classification, subsequent cases have also rejected efforts to add age[69] or mental retardation[70] to the list of suspect classifications.

In *Rodriguez,* the majority also refused to expand fundamental rights protected under equal protection to include a right to education. Although Justice Powell acknowledged the importance of education, he stated that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[71] Citing Justice Harlan's dissent in *Shapiro,* which said that applying strict scrutiny to so many important interests would place the court in the role of a "super-legislature,"[72] Justice Powell concluded:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. 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.[73]

The majority then went on to find that education was not explicitly made a right under the Constitution nor was it implicitly guaranteed as necessary to effectuate the right to vote or to speak.[74]

In other decisions the Burger Court has declined to find interests in housing[75] or welfare benefits[76] to be fundamental for purposes of fundamental rights equal protection analysis. In fact, those rights "implicitly" guaranteed by the Constitution have been limited to those that the Warren Court previously identified.[77] Thus it appears that a majority of the Burger Court has preserved the doctrinal structure of the Warren Court's strict scrutiny analysis for suspect classifications and classifications burdening fundamental rights, but has refused to

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68. *Id.* at 28.

69. Vance v. Bradley, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement,* 427 U.S. at 307.

70. *City of Cleburne,* 105 S. Ct. at 3249.

71. *Rodriguez,* 411 U.S. at 30.

72. *Id.* at 30-31. *See supra* text accompanying notes 49-54.

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

74. *Id.* at 35-39. The Court did note that there was no indication that under the Texas system each child was not given at least the opportunity to acquire basic skills, and left open the question of the constitutionality of an absolute educational denial.

75. Lindsay v. Normet, 405 U.S. 56 (1972).

76. Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

77. Note, *Alternative Models of Equal Protection Analysis: Plyler v. Doe,* 24 B.C.L. REV. 1363, 1372 (1983).

expand the application of that doctrine to new areas.[78]

The Burger Court's departure from the doctrines of the Warren Court is more readily apparent with regard to classifications involving less than strict scrutiny. Reaction against the rigidity of the strict two-tier model would almost inevitably have led to some more varied options for judicial review. To date, however, the Court has not agreed upon any set formula. Equal protection doctrine below the level of strict scrutiny has become and remains an area of considerable confusion.

One area of doctrinal confusion is in the present Court's treatment of economic and social legislation. As Justice Powell has observed, "The Court has employed numerous formulations for the 'rational basis' test. . . . Members of the Court continue to hold divergent views on the clarity with which a legislative purpose must appear, . . . and about the degree of deference afforded the legislature in suiting means to ends, compare [*Lindsley*] with [*Royster Guano*

78. The Court's most recent equal protection decision may indicate that even the doctrinal stalwart of the tiers of review may have lost the support of a majority of the Court. In *City of Cleburne,* 105 S. Ct. at 3249, the Court considered the city's appeal from a decision of the Fifth Circuit Court of Appeals, which had held that mental retardation was a "quasi-suspect" classification so that in reviewing a statute utilizing it, a court must apply "intermediate-level" scrutiny. The opinion of the Court was written by Justice White and rejected the doctrinal analysis of the court of appeals. White outlined the traditional two-tiered format of rational basis review for most legislation and strict scrutiny if a statute classifies by race, alienage, or national origin. *Id.* at 3254-55. He also noted that gender classifications called for a "heightened standard of review." *Id.* at 3255. White found, however, that the Fifth Circuit was mistaken when it applied heightened review to the classification based on retardation: a mere rational basis standard should apply. *Id.* at 3255-58. Nevertheless, the opinion concluded that the particular use of mental retardation as a criterion for the zoning decision challenged in the suit lacked a rational basis. *Id.* at 3258-60.

What is of particular interest to the status of equal protection doctrine, however, are the two additional opinions filed in the case. Justice Stevens, joined by Justice Burger, expressed his view that the two-tiered analysis was inadequate and that all cases should be decided by a rational basis approach. Under Stevens's rational basis approach, however, the word rational "includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *Id.* at 3261 (Stevens, J., concurring). Justice Marshall, joined by Justices Brennan and Blackmun, wrote an opinion concurring in the judgment in part and dissenting in part. Justice Marshall reiterated his long-held view (discussed *infra* in Section II. D.) that the level of scrutiny should vary with the importance of the interest adversely affected and the invidiousness of the basis upon which the classification is drawn. He concluded that: "When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes." *Id.* at 3265 (citations omitted). In *Cleburne,* therefore, five Justices have joined opinions expressing equal protection doctrines different from the more traditional formulation contained in Justice White's opinion for the Court. It thus appears that the doctrinal disarray of the Burger Court has further increased.

Co.]."[79] Although the Burger Court has most frequently followed the extreme deference of the Warren era,[80] majorities in some cases have employed a more rigorous standard.[81] Professor Gunther analyzed the early Burger Court cases that applied a less deferential standard in a study that proposed that the Court employ a heightened inquiry into the appropriateness of legislative means.[82] Although the United States Supreme Court has not settled on such an analysis, the Gunther article has been influential in the initial development of Alaska's equal protection doctrine.[83]

The Burger Court has also taken steps to occupy the doctrinal ground between rational basis and strict scrutiny review. These developments are most clearly shown in cases involving gender classifications. At first, the Court declined to adopt strict scrutiny in reviewing gender classifications and, in conformity with the two-tier doctrine, indicated that it would apply a rational basis standard of review. The Court's decisions striking down such classifications, however, reveal that the level of review actually applied by the Court was certainly higher than rational basis.[84] In 1976, in *Craig v. Boren,*[85] the Court began to acknowledge that in judging the constitutionality of gender classifications it applied a standard more rigorous than rational basis but less demanding than strict scrutiny. Justice Brennan's opinion stated a standard that was clearly more searching than rational basis: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[86] Still, the course of the Court's view of the appropriate standard to apply to gender classifications has not been smooth. In 1973, a four-Justice plurality opinion had indicated that classifications based on sex were inherently suspect,[87] yet in 1981 a majority applied the intermediate test laxly to review gender classification in the Selective

79. Schweiker v. Wilson, 450 U.S. 221, 243 n.4 (1981) (Powell, J., dissenting) (citations omitted). *See supra* text accompanying notes 20-25.

80. *See, e.g.,* United States R.R. Bd. v. Fritz, 449 U.S. 166 (1980); New Orleans v. Dukes, 427 U.S. 297 (1976).

81. *E.g.,* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); *see also* Johnson v. Robison, 415 U.S. 361 (1974).

82. Gunther, *supra* note 40.

83. *See infra* Section III.B.

84. *E.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

85. 429 U.S. 190 (1976).

86. *Id.* at 197. Justice Powell explicitly acknowledged that this standard was greater than rational basis but less than strict scrutiny. 429 U.S. at 210-11 n.* (Powell, J., concurring).

87. Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion of Brennan, J., joined by Douglas, White, and Marshall, J.J.).

Service Act.[88] One year later, Justice O'Connor, who had joined the Court in the interim, wrote an opinion for a five-Justice majority that applied the intermediate scrutiny standard rigorously.[89] Furthermore, Justice O'Connor specifically noted that since the statute in question did not survive the majority's intermediate level review, the Court "need not decide whether classifications based upon gender are inherently suspect."[90] The Burger Court has followed a similar up and down course in its application of an intermediate level of review to classifications based on illegitimacy.[91]

The Burger Court has also had a tendency to decide tough equal protection cases through the use of analyses that are highly dependent on the specific facts of the case and that do not necessarily articulate how the opinion fits into a more general equal protection doctrine. *Plyler v. Doe*[92] affords an excellent example of this confusing analysis. Undocumented alien children attending public schools challenged a Texas statute that cut off all state funding to a local school district if the district admitted such children without charging them tuition for their publicly provided education. The Court, in an opinion delivered by Justice Brennan, found that the statute denied the undocumented children the right to equal protection, but the opinion's analysis did not track closely the analysis previously articulated by the Court. The Court found that undocumented resident aliens were not a suspect class.[93] While the Court noted that "persuasive arguments" supported the state's position that it could withhold its benefits from "those whose very presence within the United States is the product of their own unlawful conduct,"[94] those arguments were weaker when applied to minor children of undocumented aliens, children who could neither control their parents' conduct nor their own status.[95] Justice Brennan stated, "It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United

88. Rostker v. Goldberg, 453 U.S. 57 (1981).

89. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

90. *Id.* at 724 n.9.

91. *Compare* Trimble v. Gordon, 430 U.S. 762 (1977) (applying heightened scrutiny to strike down an intestate succession law barring inheritance by illegitimate children from their fathers), *with* Lalli v. Lalli, 439 U.S. 259 (1978) (upholding a law forbidding illegitimate children from inheriting from their fathers by intestate succession unless paternity was established by judicial finding during father's lifetime); *compare Trimble* and *Lalli with* Mills v. Habluetzel, 456 U.S. 91 (1982), and Pickett v. Brown, 462 U.S. 1 (1983) (cases striking down 1 and 2 year limits respectively from the time of birth for suits by illegitimate child for purpose of obtaining child support). *See* Seeburger, *supra* note 60, at 598-603.

92. 457 U.S. 202 (1982).

93. *Id.* at 219 n.19.

94. *Id.* at 219.

95. *Id.* at 219-20.

States."[96] Here the Court seemed to indicate that it would judge the statute on a rational basis standard. The opinion continued, however. While it acknowledged that education is not a fundamental right granted by the Constitution, the opinion stressed the general importance of education to society. The Court further noted that denying education to the undocumented children would impose "a lifetime hardship" upon them, and "[t]he stigma of illiteracy will mark them for the rest of their lives."[97] Justice Brennan concluded:

> In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.[98]

This standard — that the statute will be judged by its rationality but that its rationality will be determined by the importance of the ends the government is seeking to achieve — certainly does not fit within any of the traditional formulations of the rational basis test, nor does it conform to any rigid notion of the newly developed intermediate level review.[99] It is rather a standard derived from and unique to the particular circumstances of the issue before the Court.[100] Four dissenting Justices strongly criticized the use of this unique approach,[101] while Justice Marshall, who advocates such an approach in all cases, praised it.[102]

As even this brief overview makes clear, the equal protection doctrine of the past quarter century is laden with areas of controversy. Contemporary doctrine in particular is characterized by many starts and many stops, with all too few clear guidelines for enduring policy. As would be expected, such an area of doctrinal uncertainty has provided a fertile field for critical commentaries. It is beyond the scope of this article to attempt to survey this literature other than to list some

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96. *Id.* at 220.

97. *Id.* at 223.

98. *Id.* at 223-24.

99. *See id.* at 217-18 & n.16.

100. *Id.* at 239 (Powell, J., concurring).

101. *Id.* at 244 (Burger, J., dissenting, joined by White, Rehnquist, and O'Connor, J.J.). Justice Burger stated:

> [B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases. In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public education . . . . If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.

Id. (citation and footnote omitted).

102. *Id.* at 231 (Marshall, J., concurring). Justice Marshall's views are considered *infra* Section II.D.

of the most frequently referred-to examples in the margin,[103] and to attempt to make appropriate references to this literature when relevant to the evaluation of the Alaska Supreme Court's equal protection doctrine contained in Section IV below. The views of one persistent critic and proponent of a different approach to federal equal protection analysis must be considered in some detail, however. He is Justice Thurgood Marshall. Justice Marshall's views have provided an important stimulus to the development of Alaska's independent doctrine. Consequently, to the extent that equal protection doctrine in Alaska approximates Marshall's approach, developments in the state give some basis for examining the workability of his suggestions.

D. Justice Marshall's Sliding Scale, Balancing Approach to Equal Protection Analysis

Over the past fifteen years, Justice Marshall has developed an equal protection analysis that differs from the expressed doctrine of the Supreme Court. He has developed his approach in two ways: by writing opinions dissenting from the Court's failure to extend relief because of its rigid application of the two-tier model[104] and by writing concurring opinions asserting that the process through which the Court actually reached its decision was his approach, although the majority opinion referred to traditional doctrine or failed to discuss the doctrinal basis of its holding at all.[105] Justice Marshall's suggested analysis has been considered in a number of commentaries, some of which make proposals similar to those of the Justice.[106]

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103. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Barrett, *Judicial Supervision of Legislative Classifications — A More Modest Role for Equal Protection?* 1976 B.Y.U. L. REV. 89; Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses,* 50 S. CAL. L. REV. 689 (1977); Lupu, *Untangling the Strands of the Fourteenth Amendment,* 77 MICH. L. REV. 981 (1979); Nowak, *Realigning the Standards of Review under the Equal Protection Guarantee — Prohibited, Neutral and Permissive Classification,* 62 GEO. L.J. 1071 (1974); Perry, *Modern Equal Protection: A Conceptualization and Appraisal,* 79 COLUM. L. REV. 1023 (1979); Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945 (1975).

104. Marshall v. United States, 414 U.S. 417, 432-33 (1974) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90-91 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-30 (1970) (Marshall, J., dissenting).

105. *Cleburne,* — U.S. —, 105 S. Ct. at 3265-68 (Marshall, J., concurring in part and dissenting in part); *Plyler,* 457 U.S. at 230-31 (Marshall, J., concurring).

106. Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause,* 29 STAN. L. REV. 663 (1977); Wilkinson, *supra* note 103, at 989-98; Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection,* 1977 DUKE L.J. 143; Note, *Alternative Models of Equal Protection*

Justice Marshall first articulated his sliding scale approach in dissent in *Dandridge v. Williams,*[107] a case in which the Court upheld a state regulation that increased welfare benefits as the number of children in a family increased but imposed a maximum limit. Because the Court found the regulation to be in the social and economic sphere, it applied the deferential rational basis test[108] and found in favor of the state. Justice Marshall decried the Court's rigid application of the two-tiered approach. Merely labelling a regulation as social or economic ignored the vast difference between a classification in a business regulation and one that denied public assistance to a child because of "the size of the family into which the child permits himself to be born."[109] In Justice Marshall's view, the Court avoided undertaking any analysis of the justification for such a classification "by focusing upon the abstract dichotomy between two different approaches to equal protection problems" that had been utilized by the Court.[110] To him, the case "simply def[ied] easy characterization in terms of one or the other of these 'tests.' "[111] Marshall asserted that the Court should apply a balancing approach.

> In my view, equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed 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 asserted state interests in support of the classification.[112]

Applying his analysis to the facts of the case, Justice Marshall concluded that the regulation violated the equal protection clause.[113]

Justice Marshall expanded upon his views in *San Antonio In-*

Analysis: Plyler v. Doe, 24 B.C.L. REV. 1363 (1983); Comment, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine,* 14 HARV. C.R.-C.L. L. REV. 529, 545-47 (1979); Comment, *Equal Protection: A Closer Look at Closer Scrutiny,* 76 MICH. L. REV. 771, 869-86 (1978).

107. 397 U.S. 471 (1970).

108. *Id.* at 484-85.

109. *Id.* at 519 (Marshall, J., dissenting).

110. *Id.*

111. *Id.* at 520.

112. *Id.* at 520-21. Justice Black had used language similar to Marshall's in a 1968 opinion for the Court although the opinion ultimately applied a strict scrutiny standard. *See* Williams v. Rhodes, 393 U.S. 23, 30 (1968) ("In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." (footnote omitted)).

113. 397 U.S. at 522-30.

dependent School District v. Rodriguez,[114] where the Court upheld the Texas system of school finance under a narrow application of the two-tiered approach.[115] In *Rodriguez,* Marshall not only asserted that the Court should employ his approach, he also maintained that his analysis more accurately reflected the process the Court actually employed in reaching its equal protection decisions than did the Court's own statement of its doctrine. For Marshall, "A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause."[116] He concluded that: "This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interests adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[117]

Justice Marshall compared his analysis to the Court's narrow view of fundamental rights equal protection analysis. Justice Powell's opinion for the majority limited application of the fundamental rights doctrine to those rights explicitly or implicitly found in the Constitution.[118] Marshall made clear that his approach would afford at least some degree of heightened protection to a broader range of interests.

> 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.[119]

Given the close relationship that he found between education and the exercise of the right of free speech and the right to vote in federal elections, Justice Marshall concluded that state classifications affecting equality of educational opportunity should be scrutinized with more rigor than the majority's rational basis review.[120]

In *Massachusetts Board of Retirement v. Murgia,*[121] Justice Marshall was the only dissenter from the Court's *per curiam* opinion upholding a law mandating retirement for uniformed state police officers who reached age fifty. To Marshall, the Court's opinion finding that

114. 411 U.S. 1, 70-137 (1973) (Marshall, J., dissenting). Justice Marshall's dissent was joined by Justice Douglas.

115. *See supra* text accompanying notes 63-72.

116. *Rodriguez,* 411 U.S. at 98-99.

117. *Id.* at 99.

118. *See supra* text accompanying note 71.

119. *Rodriguez,* 411 U.S. at 102-03 (Marshall, J., dissenting).

120. *Id.* at 110-17.

121. 427 U.S. 307, 317-27 (1976) (Marshall, J., dissenting).

age was not a suspect classification and so applying a deferential rational basis test exemplified the shortcomings of the traditional approach. Marshall understood that the extreme "all or nothing" nature of the traditional test had made the Court wary of extending the list of suspect classifications. Since very few, if any, statutes can withstand strict scrutiny, by labelling a classification as "suspect" the Court would virtually preclude any use of that criterion.[122] He noted, however, that in the area of gender and illegitimacy classifications the Court had nevertheless applied "a reasonably probing look at the legislative goals and means, and at the significance of the personal rights and interests invaded."[123] The Court had done so, however, without articulating a doctrine to account for its heightened scrutiny. In Justice Marshall's view, the Court's practice of deciding cases based on factors outside the scope of its articulated doctrine created problems. Government officials, lower court judges, and individuals were given no notice as to applicable standards and were left to make *ad hoc* judgments of a classification's constitutionality.[124] Marshall also felt that such an approach was unpredictable and "present[ed] the danger that . . . relevant factors will be misapplied or ignored."[125] Additionally, Marshall observed in *Rodriguez* that: "Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process."[126] Finally, in setting forth his views, Justice Marshall has been careful to note that he does not intend his doctrine to produce different results at either the upper end of the scale where, for example, racial classifications are involved,[127] or at the bottom end where purely economic regulatory classifications are presented.[128]

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122. *Id.* at 319.

123. *Id.* at 320.

124. *Id.* at 321.

125. *Id.*

126. *Rodriguez,* 411 U.S. at 110.

127. *Murgia,* 427 U.S. at 319 n.1 (Marshall, J., dissenting).

> Some classifications are so invidious that they should be struck down automatically absent the most compelling state interests, and by suggesting the limitations of strict scrutiny analysis I do not mean to imply otherwise. The analysis should be accomplished, however, not by stratified notions of "suspect" classes and "fundamental" rights, but by individualized assessments of the particular classes and rights involved in each case. Of course, the traditional suspect classes and fundamental rights would still rank at the top of the list of protected categories, so that in cases involving those categories analysis would be functionally equivalent to strict scrutiny. Thus, the advantages of the approach I favor do not appear in such cases, but rather emerge in those dealing with traditionally less protected classes and rights. (reference omitted).

128. *See id.; Dandridge,* 397 U.S. at 520.

Justice Marshall has continued to articulate his sliding scale approach to equal protection analysis and to urge its adoption by the Court. Although his view and similar views of others have garnered some support among the other Justices,[129] Justice Marshall's approach has not been explicitly adopted by the United States Supreme Court.[130] The Alaska Supreme Court, however, with occasional reference to Justice Marshall,[131] has adopted such a sliding scale approach to equal protection analysis under the Alaska State Constitution. Let us turn to a consideration of the development of the Alaska equal protection doctrine.

III. THE DEVELOPMENT OF AN INDEPENDENT EQUAL PROTECTION STANDARD UNDER THE ALASKA CONSTITUTION

A. State and Federal Congruence: 1959 to 1976[132]

From statehood until the mid-1970's, the Alaska Supreme Court consistently applied federal equal protection analysis and standards when ruling on equal protection issues under the state's own constitutional guarantee of equal protection. *Leege v. Martin*[133] was the Alaska Supreme Court's first opinion relying on the equal protection guarantee of article I, section 1 to strike down a state statute. In *Leege* the court held unconstitutionally discriminatory a statutory provision that prohibited the granting of a stay pending appeal of court orders

129. *See supra* note 78; Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring); Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring).

130. *But see City of Cleburne,* 105 S. Ct. at 3249.

131. *See, e.g.,* State v. Ostrosky, 667 P.2d 1184, 1193 n.13 (Alaska 1983); *see also* Thomas v. Bailey, 595 P.2d 1, 14 nn.15 & 16 (Alaska 1979) (Rabinowitz, J., concurring); State v. Adams, 522 P.2d 1125, 1127 n.12 (Alaska 1974); State v. Wylie, 516 P.2d 142, 150 n.16 (Alaska 1973).

132. Prior to Alaska's admission to statehood on January 3, 1959, the equal protection standards applied in the Territory of Alaska were the same federal standards that would have applied to any state within the union. The Organic Act of the Territory included a uniformity clause which provided that "the constitution of the United States and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States." Organic Act of the Territory of Alaska, ch. 387, 37 Stat. 512 (1912). In a leading pre-statehood decision, the United States Court of Appeals for the Ninth Circuit said that whether the fourteenth amendment applied to Alaska for the same reasons the fifth amendment did or whether it applied by virtue of the Organic Act, "the tests and standards to be applied are the same." Alaska Steamship Co. v. Mullaney, 180 F.2d 805, 817 (9th Cir. 1950). The court went on to state: "We therefore approach the arguments made with respect to alleged inequality [and] arbitrary classifications . . . with the assumption that the validity of the Act must be judged by the same standards of due process and of equal protection that would be applied in the case of similar legislation by a state . . . ." *Id.* at 818.

133. 379 P.2d 447 (Alaska 1963).

requiring forfeiture of commercial fishing licenses. The court equated state and federal equal protection by saying that the state "constitutional guarantee of equal treatment, like the equal protection clause of the federal constitution, is the embodiment of the fundamental principle that all men are equal before the law."[134] In *Leege* and in virtually every other early equal protection case the Alaska Supreme Court illustrated its equal protection analysis by citing federal cases and applying federal equal protection standards.[135]

The initial stages of the court's discomfort with the existing federal equal protection analysis can be seen in several opinions beginning in 1973. In these cases the Alaska Supreme Court made clear, often in footnotes, that it interpreted recent decisions of the Supreme Court of the United States as indicating a "discontent" with that Court's own inflexible two-tier approach and cited with approval the now famous analysis of that development published by Professor Gunther in 1972.[136] At this point, however, the Alaska court did not formally adopt an equal protection standard different from the two-tier approach nor did it attempt to separate its analysis under article I, section 1 of the state constitution from its interpretation of the federal standard under the fourteenth amendment. A closer examination of one of these opinions, *Lynden Transport, Inc. v. State,*[137] is illustrative.

In *Lynden Transport,* the court, in an opinion by Justice Boochever, upheld an equal protection challenge to a provision of the Alaska Motor Freight Carrier Act[138] that required nonresident carriers to show public convenience and necessity to acquire intrastate operating authority even though those carriers already had interstate operating authority, but "grandfathered" in resident carriers possessing interstate authority. In striking down this provision of the statute, the court restated the general formulation of the two-tiered federal standard.[139] The court concluded that the classification was not based

134. *Id.* at 451-52, *citing* Griffin v. Illinois, 351 U.S. 12 (1955).

135. *Leege,* 379 P.2d at 451-52. *See also* Hoffman v. State, 404 P.2d 644, 646 (Alaska 1965); *In re* Mackay, 416 P.2d 823, 851-52 (Alaska 1964); Nelson v. State, 387 P.2d 933, 935 (Alaska 1964).

136. Lynden Transport, Inc. v. State, 532 P.2d 700, 706 n.10 (Alaska 1975); State v. Adams, 522 P.2d 1125, 1127 n.12 (Alaska 1974); State v. Wylie, 516 P.2d 142, 145 n.4 (Alaska 1973); *see also* Ravin v. State, 537 P.2d 494, 498 (Alaska 1975). Each of these opinions cites Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

137. 532 P.2d 700 (Alaska 1975).

138. The challenged residency requirement is set forth in the court's opinion. *Id.* at 703. The entire section as amended is contained in the appendix to the opinion. *Id.* at 718-19.

139. A duality of standards has been evolved in determining violations of the equal protection clause. If legislation interferes with a fundamental constitutional right or involves a suspect classification, it will be the subject of strict

on a suspect criterion nor did it impinge on a fundamental right.[140] Nevertheless, the court found that no legitimate rational basis supported the legislation's discrimination against nonresident motor carriers.[141] In reaching these conclusions the court made no effort to establish an independent basis for its ruling under the state constitution.[142]

In *Lynden Transport,* the court did, however, indicate in a footnote that it was aware of criticism of the federal equal protection approach. The court stated:

> It has been suggested that there is mounting discontent with the rigid two-tier formulation of the equal protection doctrine, and that the United States Supreme Court is prepared to use the clause more rigorously to invalidate legislation without expansion of "fundamental rights" or "suspect" categories and the concomitant resort to the "strict scrutiny" tests. We are in agreement with the view that the Supreme Court's recent equal protection decisions have shown a tendency towards less speculative, less deferential, more intensified means-to-end inquiry when it is applying the traditional rational basis test and we approve of this development.[143]

Note that while the court approved of what it saw as a movement toward federal change, it took no action to bring about that change directly under the state constitution. For the time being the court was willing to wait for federal developments in equal protection analysis.[144]

> judicial scrutiny, and the burden is on the state to establish a compelling state interest justifying the discrimination. Otherwise, the legislation will be examined to determine whether it rationally furthers a legitimate state purpose.

Id. at 706 (citations omitted).

140. *Id.* at 707.

141. *Id.* at 707-11.

142. The court said simply: "We conclude that the provision of the 1972 amendment limiting the grant of expanded routes according to residency violates the equal protection clauses of the United States and Alaska constitutions." *Id.* at 711 (footnote omitted). The opinion contains no separate discussion of the Alaska Constitution's equal protection provision.

143. *Id.* at 706 n.10 (citing Gunther, *supra* note 136 (other citations omitted)).

144. The Alaska Court did not express the same reticence with regard to its view of state independence in interpreting the state constitution's due process protection, ALASKA CONST. art. I, § 7, as it had done with regard to equal protection. In Bush v. Reid, 516 P.2d 1215, 1219-20 (Alaska 1973), the court seemed to go out of its way to assert its independence:

> We further declare that we would reach an identical result in interpreting the due process provisions of the Alaska Constitution alone, finding as we do that Justice Harlan's insightful analysis of the social compact applies with equal force to our constitution. We have several times held that "we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution." Finding as we do that "civil death" of parolees violates the spirit and intention of the Alaska Constitu-

B. First Steps to Independence: *Isakson v. Rickey*

The Alaska Supreme Court began to establish its own independent equal protection test in *Isakson v. Rickey.*[145] In this opinion by Justice Erwin, the court announced that it was applying a "new standard" which the court said would "close the wide gap between the two tiers of equal protection by raising the level of the lower tier from virtual abdication to genuine judicial inquiry."[146] The court also referred to this standard as a "modified rational basis test."[147]

The court developed the test in the context of a challenge to one provision in a legislative scheme to limit entry into the state's threatened fisheries.[148] Efforts to protect Alaska's fisheries from overuse and to do so in a way that both is fair to those who depend on fishing for their livelihood and maintains the economic viability of the industry have frequently come before the legislature and the courts. The nature of the limited entry licensing scheme developed by the legislature and of court challenges to the limited entry program have been discussed by others and need not be repeated here.[149] Some detailed consideration must be given to the facts of *Isakson,* however, in order to understand and evaluate the equal protection analysis employed by the state supreme court.

The Limited Entry Act provided that permits to enter the fishery would be based on a ranking of the relative hardship caused by denial of a permit examined in light of the applicants' prior involvement in and dependence on fishing.[150] Based on the experience of an earlier attempt to limit entry, the legislature was aware that many persons would seek to enter the fishery prior to the effective date of the legislation and be grandfathered in as eligible to apply for the new limited entry permits.[151] Even as it deliberated, the legislature was aware that

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tion, we would not be impeded in our constitutional progress by a narrower holding of the United States Supreme Court.

Id. (footnote omitted). Commentators have recognized the Alaska court's independence in due process analysis. Comment, *An Application of the New Equal Protection: Expansion of Convict Property Rights,* 4 UCLA-ALASKA L. REV. 294, 341 (1975); *see also* Comment, *Tarnef v. State: Miranda Is Alive and Well in Alaska,* 4 UCLA-ALASKA L. REV. 92 (1974). *But cf.* Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447 (Alaska 1974).

145. 550 P.2d 359 (Alaska 1976).

146. *Id.* at 363.

147. *Id.*

148. ALASKA STAT. §§ 16.43.010-.270 (1973).

149. Groseclose & Boone, *An Examination of Limited Entry As a Method of Allocating Commercial Fishing Rights,* 6 UCLA-ALASKA L. REV. 201 (1977); Owers, *Court Tests of Alaska's Limited Entry Law,* 11 UCLA-ALASKA L. REV. 87 (1981).

150. Groseclose & Boone, *supra* note 149, at 208; Owers, *supra* note 149, at 88.

151. Owers, *supra* note 149, at 90-91.

such a rush on gear licenses was already taking place.[152] The Limited Entry Act took several steps to avoid the effects of this license rush. The act provided that the date at which relative hardship would be determined would be January 1, 1973, a date shortly before the rush to obtain gear licenses began.[153] In addition, the act provided that only persons who had fished as holders of gear licenses before January 1, 1973, would be eligible for entry permits.[154]

This limited entry scheme created two classifications that were subsequently challenged. One was the distinction between those who held or had held gear licenses and those who did not hold such licenses. The other classification distinguished between those who obtained gear licenses before January 1, 1973, and those who obtained gear licenses after that date but before the requirement for limited entry permits went into effect. *Isakson* involved a challenge to the second classification.[155] Fishermen who had not possessed gear licenses prior to the cutoff date but who had subsequently obtained them challenged the state's refusal to accept their application for a limited entry permit.[156]

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152. *Id.* at 91.

153. ALASKA STAT. § 16.43.260(d) (1973).

154. ALASKA STAT. § 16.43.260(a) (1973), as enacted and as considered in *Isakson* provided:

> The commission shall accept applications for entry permits only from applicants who have harvested fishery resources commercially while participating in the fishery as holders of gear licenses issued under [ALASKA STAT.] § 16.05.536–16.05.670, before January 1, 1973.

1973 Alaska Sess. Laws ch. 79, § 3. The section was subsequently amended. 1974 Alaska Sess. Laws ch. 126, § 3.

155. The *Isakson* opinion at times used very broad language that arguably applied to both classifications. Although the State of Alaska interpreted *Isakson* as only holding unconstitutional the use of the classification between those who obtained gear licenses before January 1, 1973, and those who obtained gear licenses after that date, and not the limiting requirement of possession of such a license at any time, Owers, *supra* note 149, at 97, this question was not finally resolved until the court held that the narrow interpretation of *Isakson* was correct. Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1259-61 (Alaska 1980). *See* Owers, *supra* note 149, at 97-102.

156. The court characterized the constitutional challenge in this manner:

> Specifically, appellants argue that the legislature devised the January 1, 1973, cut-off date to facilitate the Commission's selection process by eliminating those applicants whom they believed would be unable to demonstrate the hardship necessary for an entry permit. From this base they submit that the January 1, 1973, date results in a classification which is overbroad and underinclusive. Appellants point out that a person who has retired or discontinued commercial fishing prior to January 1, 1973, is allowed to apply for a free permit regardless of the degree of hardship he would suffer by being excluded from the fisheries simply by virtue of fortuitously holding a gear license before the cut-off date. On the other hand, persons such as appellants, are precluded from even submitting an application because they

Isakson acknowledged that "[i]n the past this court has applied the traditional tests in analyzing equal protection problems."[157] Still the court noted that its recent decisions had expressed "a growing dissatisfaction with the two-tiered test."[158] The court viewed the recent decisions as having already "articulated a 'rational basis' test that was more demanding than the standard used in previous cases."[159] The court quoted from its opinion in *State v. Wylie:*

> Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[160]

This standard, which quotes the language of the United States Supreme Court in *Royster Guano Co. v. Virginia,*[161] had actually been used in *Wylie* in conjunction with references to the Gunther article to state the Alaska court's view of what it saw to be an evolving federal standard.[162] But *Isakson* states the test as an independent standard adopted under the Alaska Constitution. This independence is clearly indicated by the court's further characterization of the test:

> It is this more flexible and more demanding standard which will be applied in future cases if the compelling state interest test is found inappropriate. As a result, we will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard . . . . This new standard will, in short, close the wide gap between the two tiers of equal protection by raising the level of the lower tier from virtual abdication to genuine judicial inquiry.[163]

The court next stated how it would apply the "new" analysis. First, the court must determine if the compelling state interest standard is applicable by examining the classification to see if it was based on a suspect criterion or if it impinged upon a fundamental right.[164] Since it found neither to be present in the case of the cutoff date for

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> became gear license holders after January 1, 1973. This is so despite the fact that they have engaged in commercial fishing endeavors in previous years and have invested large amounts of money in gear and vessels with the intention of fishing commercially for a living in the future. Thus, they submit, the classification is unconstitutional.

Isakson, 550 P.2d at 361.

157. *Id.*

158. *Id.* The recent decisions discussed by the court are those cited *supra* note 136.

159. *Isakson,* 550 P.2d at 362.

160. *Id.* (footnote omitted) (quoting State v. Wylie, 516 P.2d 142, 145 (Alaska 1973)).

161. 253 U.S. 412, 415 (1920).

162. State v. Wylie, 516 P.2d 142, 145 n.4 (Alaska 1973); *see also supra* text accompanying notes 136-44.

163. *Isakson,* 550 P.2d at 362-63.

164. *Id.* at 363.

eligibility to seek a limited entry permit, the court applied its new rational basis standard.[165] To do so, the court stated, "we must first look at the purpose of the challenged legislation."[166] True to its word, the court did so with new vigor.

Although the state argued that the purpose of the requirement that applicants for a limited entry permit must have held a gear license by January 1, 1973, was to prevent a rush on gear licenses, the court rejected this as the purpose of the cutoff date.[167] Because another provision stated that the relevant degree of hardship would be determined as of that date, the gear license rush would already be effectively deterred.[168] The court concluded that the legislature would not have enacted two provisions with the same purpose in mind and that the second provision must, therefore, have a different purpose.

> When the Act is viewed as a whole, it becomes apparent that the contested provision was inserted because it was assumed that those persons who obtained gear licenses after January 1, 1973, would be unable to demonstrate the requisite hardship for an entry permit. Hence, for the sake of administrative convenience, it was decided that they need not even submit applications to the Commission. In essence, the purpose of the provision was to segregate hardship and non-hardship cases at the application phase of the permit issuance process.[169]

In light of this purpose, the court asserted that the issue it would have to determine was: "does holding a gear license before January 1, 1973, bear a fair and substantial relation to the purpose of the legislation, which is the segregation of hardship and non-hardship cases?"[170] The court concluded that the cutoff date did not bear such a fair relationship but rather was both underinclusive and overinclusive. The classification was underinclusive because it excluded persons who were highly dependent upon and actively involved in the fishery at the cutoff date but who had not then acquired a gear license.[171] On the other hand, the classification was overinclusive in that it allowed persons who had received gear licenses in the past but were no longer actively engaged in the fishery to apply for entry permits.[172]

The court concluded that the statute's means were not sufficiently related to its ends and so that portion of the Limited Entry Act setting the cutoff date was a violation of equal protection principles.[173] The

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165. *Id.*
166. *Id.*
167. *Id.* at 363-65.
168. *Id.* at 364.
169. *Id.*
170. *Id.* at 365.
171. *Id.*
172. *Id.*
173. *Id.*

court had not established complete independence from federal standards, however, since it concluded its opinion by stating that the challenged section "violates appellants' equal protection rights guaranteed by the *state and federal* constitutions."[174]

The *Isakson* opinion has been criticized both for the test that it adopted and for its application of the test to the facts. One commentator, Mr. Owers, has summarized his views on *Isakson* in this way:

> The *Isakson* court's more demanding standard relies, first upon a mistaken reading of United States Supreme Court decisions applying a middle-level standard of scrutiny in areas involving individual rights, and secondly, upon an expressly overruled line of cases. In reality, the test is nothing more than the revival of old notions of substantive due process under the rubric of equal protection. Nevertheless, later Alaska Supreme Court decisions have uncritically followed *Isakson's* approach to equal protection analysis despite its dubious underpinnings.[175]

Owers's first two criticisms are related to his conclusion that the United States Supreme Court overruled *Royster.*[176] Owers asserts that because the United States Supreme Court explicitly overruled its opinion in *Morey v. Doud,*[177] which quoted the standard articulated in *Royster* as its standard, *Royster* had itself been implicitly overruled.[178] The United States Supreme Court's continued frequent citation of *Royster,* however, clearly shows this assertion to be incorrect.[179] In fact, a sharp debate continues on the United States Supreme Court, particularly between Justices Rehnquist and Brennan, over whether the *Royster* standard or a more deferential standard of rational basis review is appropriate.[180]

Mr. Owers's criticism of *Isakson* as representing a revival of sub-

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174. *Id.* at 366 (footnote omitted) (emphasis added). The Alaska Supreme Court's conclusion that the cutoff date violated fourteenth amendment equal protection standards was a mere *pro forma* statement based upon no independent analysis of federal cases. The conclusion was surely wrong in light of the United States Supreme Court's subsequent opinion in City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam), which upheld the use of a cutoff date for grandfathering in street vendors in New Orleans. *Dukes* states a very deferential standard of rational basis review. *Id.* at 303-04.

175. Owers, *supra* note 149, at 95.

176. 253 U.S. 412 (1920) (applying a "fair or substantial relation" standard under the equal protection clause of the fourteenth amendment to strike down a Virginia statute taxing out of state income of corporations doing business in Virginia, but exempting Virginia corporations).

177. 354 U.S. 457 (1957), *overruled by,* City of New Orleans v. Dukes, 427 U.S. 297 (1976).

178. Owers, *supra* note 149, at 94.

179. In Johnson v. Robison, 415 U.S. 361, 374-75 (1974), for example, eight Justices joined in an opinion that explicitly applied the *Royster* standard.

180. GUNTHER & SCHAUER, *supra* note 19, at 159-60.

stantive due process in the guise of equal protection raises an issue of considerable difficulty. This criticism challenges the basic legitimacy of such activist judicial review in a democratic society. If valid, such criticism might apply with equal force to the fully developed equal protection analysis now employed by the Supreme Court of Alaska and to the analysis suggested by Justice Marshall. For this reason this article will consider whether the Alaska equal protection analysis is distinguishable from substantive due process after reviewing the full development of the Alaska equal protection approach.[181]

Although the Alaska Supreme Court identified the standard it announced in *Isakson* as a "new test," the standard is not new in its formulation. Earlier Alaska cases had also repeated the *Royster* language as the appropriate standard of review in rational basis cases.[182] But the *Isakson* opinion is "new" because it announces that Alaska will use this formulation as its rational basis test independent of the standard employed by the United States Supreme Court. Certainly, the test was also new in the vigorous manner in which the court employed it to overturn a state legislative classification in an economic and natural resources regulatory scheme. The Alaska Supreme Court's independence soon made itself unmistakably clear when the court adopted a truly new test to apply to all equal protection analysis under the state constitution in *State v. Erickson.*[183]

C. True Independence: *State v. Erickson*

Although the Alaska Supreme Court applied its *Isakson* formulation of an equal protection standard in some cases,[184] the court quickly moved to establish a more complete independence from federal doctrine by announcing a single, uniform analysis to be applied in all cases raising equal protection claims under article I, section 1, of the Alaska Constitution. The court's action came in *State v. Erickson,*[185] a case in which criminal defendants challenged the constitutionality of Alaska's statute classifying cocaine use as the use of a narcotic. The defendants

181. *See infra* Section IV.

182. *E.g.,* State v. Wylie, 516 P.2d 142, 145 (Alaska 1973).

183. 574 P.2d 1 (Alaska 1978).

184. *See, e.g.,* State v. Reefer King Co., 559 P.2d 56, 65 (Alaska 1976).

185. 574 P.2d 1 (Alaska 1978). In addition to the equal protection issue discussed *infra, Erickson* also addressed due process and privacy challenges to Alaska's prohibition of the possession or sale of cocaine. *Cf.* Ravin v. State, 537 P.2d 494 (Alaska 1975) (upholding a privacy challenge to the criminalization of private possession and use of marijuana). *See* Note, *Alaska's Right to Privacy Ten Years After Ravin v. State: Developing a Jurisprudence of Privacy,* 2 ALASKA L. REV. 159 (1985), for a discussion of *Ravin* and the Alaska right to privacy.

were charged with the sale or possession of a narcotic drug,[186] since cocaine was defined as a narcotic under the state statute.[187] The defendants asserted that pharmacologically cocaine was not classified as a narcotic and was more similar to amphetamines in its effects.[188] Because possession or sale of narcotics is punished more severely by the state than the possession or sale of amphetamines, the defendants alleged that the purported misclassification denied them equal protection.[189]

Justice Boochever, writing for the court,[190] began his equal protection analysis by reiterating that in prior cases the court had "expressed increasing dissatisfaction with the traditional two-tier test" and had finally altered that test.[191] As the court stated: "*Isakson* modified the test at the lower, non-fundamental right level by requiring a more exacting scrutiny."[192] The opinion next addressed the full spectrum of equal protection analysis and stated that it would use an analysis independent of the federal analysis to the fullest extent possible. The court acknowledged that when fundamental rights or suspect classifications as recognized by the United States Supreme Court were involved, the Alaska court was required to apply the compelling state interest test.[193] The court then declared its independence:

> In applying the Alaska Constitution, however, there is no reason why we cannot use a single test. Such a test will be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, the results of this test will be essentially the same as requiring a "compelling state interest"; but, by avoiding outright categorization of fundamental and non-fundamental rights, a more flexible, less result-oriented analysis may be made.[194]

In applying this approach, the court stated that it must first determine whether a fundamental right or suspect classification was involved that would require application of the federal compelling state

186. *Erickson,* 574 P.2d at 3. The offense was defined in ALASKA STAT. § 17.10.010 (1962) (repealed 1982 Alaska Sess. Laws ch. 45, § 26).

187. ALASKA STAT. § 17.10.230 (13) (Supp. 1970) (repealed 1982 Alaska Sess. Laws ch. 45, § 26), *quoted in Erickson,* 574 P.2d at 3 n.7.

188. *Erickson,* 574 P.2d at 10.

189. *Id.* at 11.

190. Justices Rabinowitz, Connor, and Burke joined in the opinion. Justice Matthews concurred in an opinion that questioned the propriety of the privacy test employed by the court but did not mention the equal protection analysis. *Id.* at 23-24.

191. *Id.* at 11.

192. *Id.*

193. *Id.*; *see infra* text accompanying notes 216-19.

194. 574 P.2d at 11-12 (footnote omitted) (citing Gunther, *supra* note 136).

interest test. It concluded that neither was present in *Erikson* and that it was therefore free to apply the state constitutional test of equal protection.[195] The court outlined the procedures to be followed in applying the new test:

> Initially, we must look to the purpose of the statute, viewing the legislation as a whole, and the circumstances surrounding it. It must be determined that this purpose is legitimate, that it falls within the police power of the state. Examining the means used to accomplish the legislative objectives and the reasons advanced therefore, the court must then determine whether the means chosen substantially further the goals of the enactment. Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved.[196]

Applying the test to the facts, the court concluded that the legislature specifically had intended to regulate cocaine as a drug that was potentially harmful to the health and welfare of society and to penalize its possession and use in a manner similar to the legislature's treatment of the possession and use of opiates. The court concluded, contrary to the defendants' assertion, that the legislature did not intend only to proscribe those drugs that were pharmacologically similar to opium in their effect. "We conclude that the legislature intended to regulate drugs that adversely affect the health and welfare of society. Only if cocaine is not harmful to health and welfare of society to any substantial degree, could we hold this purpose to be invalid."[197] After reviewing evidence of cocaine's harmfulness and potential harmfulness, the court concluded that the penalties placed on the drug's use were substantially related to achieving the legislature's purpose.[198] On the basis of this analysis, the court rejected the equal protection claim.

In concluding its equal protection consideration in this manner, the court did not expressly engage in the final balancing that seemed required by the procedure the court had outlined for applying its new test. In defining those procedures, the court stated: "Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved."[199] This statement suggested that the evaluation and balancing of the interest asserted by the individual challenging the state's classification was the last step in the equal protection analysis. Earlier in the *Erickson* opinion, however, the court stated with regard to its new approach: "Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate

195. *Id.* at 12.
196. *Id.*
197. *Id.* at 16.
198. *Id.* at 16-18.
199. *Id.* at 12.

governmental objective."[200] This statement suggested that the interest asserted by the individual would be evaluated in an initial balancing that would establish the degree of justification to be required of the state. In *Erickson,* the court apparently utilized the second approach. The ambiguity as to when the balancing of interests was to occur remained, however, until clarified by recent opinions of the court that are discussed in the next section.

D. Refining the Alaska Test: *State v. Ostrosky* and *Alaska Pacific Assurance Co. v. Brown*

Application of the *Erickson* equal protection test in subsequent cases has not always followed a level road. In fact, in one instance, Justice Rabinowitz noted in dissent "the court's apparent sub silentio interment of the balancing element of Alaska's equal protection test."[201] In retrospect, the Justice's alarm appears to be overdrawn because, in general, the cases following *Erickson* may be characterized as attempting to apply its approach. Nevertheless, the question of when to balance the individual's interest versus that of the state, at the beginning or at the end of the Alaska analysis, remained muddled.

The court directly addressed this issue in *State v. Ostrosky.*[202] This case considered a number of challenges to the restrictions of the Limited Entry Act and to those provisions of the act that permitted the transfer of entry permits by sale or inheritance.[203] In considering the equal protection challenges raised in *Ostrosky,* Justice Matthews's opinion first outlined the standards of review under the United States Constitution[204] but quickly turned to a comparison of the review under Alaska's own state standards.

> The approach we have taken under the state equal protection clause is somewhat different. In contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to strict scrutiny. The applicable standard of review for a given case is to be determined by the

200. *Id.*

201. Rose v. Commercial Fisheries Entry Comm'n., 647 P.2d 154, 165 n.6 (Alaska 1982) (Rabinowitz, C. J., dissenting).

202. 667 P.2d 1184 (Alaska 1983). Justice Rabinowitz dissented in *Ostrosky, id.* at 1195-98, but did not question the majority's formulation of the equal protection analysis. Justice Rabinowitz adopted and further clarified the *Ostrosky* approach in his majority opinion in Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984).

203. 667 P.2d at 1185. The Limited Entry Act is described *supra* text accompanying notes 149-54.

204. *Ostrosky,* 667 P.2d at 1192. The Alaska court expanded its description of the federal approach from two tiers to three by inclusion of the intermediate level of review. *Id.* The intermediate level of review was described earlier. *See supra* text accompanying notes 84-91.

> importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme. As legislation burdens more fundamental rights, such as rights to speak and travel freely, it is subjected to more rigorous scrutiny at a more elevated position on our sliding scale. Likewise, laws which embody classification schemes that are more constitutionally suspect, such as laws discriminating against racial or ethnic minorities, are more strictly scrutinized.[205]

The court indicated that this was the approach previously articulated in *State v. Erickson* and quoted that part of *Erickson* which indicated that balancing the individual's interest against the state's interest was inherent in the first step of the Alaska equal protection analysis.[206] The court then continued its analysis:

> Having selected a standard of review on the *Erickson* sliding scale, we then apply it to the challenged legislation. This is done by scrutinizing the importance of the governmental interests which it is asserted that the legislation is designed to serve and the closeness of the means-to-ends fit between the legislation and those interests. As the level of scrutiny selected is higher on the *Erickson* scale, we require that the asserted governmental interests be relatively more compelling and that the legislation's means-to-ends fit be correspondingly closer. On the other hand, if relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness in the means-to-ends fit will be tolerated. . . . As a minimum, we require that the legislation be based on a legitimate public purpose and that the classification "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ."[207]

If any question remained as to when the court would balance the individual's interest against the state's interest, it was removed by the court's discussion of this issue in a footnote. The court stated:

> Other language in *Erickson* suggests that a balancing of the individual rights asserted against the state's objective is to take place as a process separate from the identification and application of the appropriate standard of review. . . . Such a process is neither useful nor necessary because the selection of the standard of review on the sliding scale reflects an assessment of the importance of the individual rights, and the standard when selected posits the degree of importance which the government objective must have and the required closeness of fit between the means used to achieve that ob-

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205. *Ostrosky,* 667 P.2d at 1192-93 (Footnote 13 is omitted but is discussed individually in the text. *See infra* text accompanying note 209.).

206. *Id.* at 1193 (quoting State v. Erickson, 574 P.2d 1, 11-12 (Alaska 1978)). That portion of *Erickson* quoted by the court in *Ostrosky* is set out in the text. *See supra* text accompanying note 194.

207. *Id.* (citations omitted) (Footnote 14 is omitted but is discussed individually in the text. *See infra* text accompanying note 208).

> jective and its achievement. Thus, balancing is inherent in the process of selection and application of the standard of review and is not itself a separate step.[208]

Thus, *Ostrosky* makes clear that the weight of the interest asserted by the individual is to be considered initially in determining what level of review is to be applied.

Another footnote in *Ostrosky* is also of particular interest because in it the court explicitly recognized the similarity of the approach it had adopted to the analysis put forward by Justice Marshall and others on the United States Supreme Court. The Alaska court stated in part that "[t]he flexible scale we use resembles the 'spectrum of standards' of which Justices Marshall and White have written with respect to federal equal protection."[209] Surprisingly, this recognition is one of the few times that the court makes any mention of Justice Marshall's suggested federal approach.

In *Alaska Pacific Assurance Co. v. Brown,*[210] Justice Rabinowitz, a dissenter in *Ostrosky,* wrote an opinion strongly endorsing the *Ostrosky* formulation of the Alaska equal protection analysis. Justice Rabinowitz carefully pointed out the shift that had occurred from *Erickson* to *Ostrosky.* He noted that *Erickson* required the court first to assess "the state purposes behind challenged legislation," second to evaluate "the relationship between the chosen means and the asserted goals of the statute," and third to weigh "the state's interest in the means chosen as balanced against the nature of the constitutional right infringed."[211] However, Justice Rabinowitz observed, *Ostrosky* "formally revised the order of the analytical stages of *Erickson.*"[212] Under the new order of analysis:

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review. Thus, the initial inquiry under article I, section 1 of Alaska's constitution goes to the level of scrutiny. . . . Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.

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208. *Id.* at 1193 n.14 (citation omitted).
209. *Id.* at 1193 n.13.
210. 687 P.2d 264 (Alaska 1984).
211. *Id.* at 269.
212. *Id.*

> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.[213]

Cases such as *Ostrosky* and *Brown* clearly show that the Supreme Court of Alaska has taken great care to articulate and refine an independent state constitutional analysis for equal protection claims. While the supreme courts of some states have moved to constitutional independence largely in reaction to particular results in United States Supreme Court decisions, a process that has been criticized,[214] the Alaska court has developed an independent doctrine in response to the confusion and inconsistency that characterizes recent United States equal protection analysis. It remains for us to give some evaluation of the doctrine that the Alaska Supreme Court has produced.

IV. SOME OBSERVATIONS ON ALASKA EQUAL PROTECTION DOCTRINE

A. Independent and Adequate State Grounds

Alaska is free to interpret and enforce the provisions of its constitution as it sees fit so long as it does not contravene the requirements of federal law or the United States Constitution. Under the supremacy clause[215] the state may not enforce a lower level of equal protection than that established by the United States Supreme Court. This principle is well recognized by the Alaska court[216] even if, on occasion, the court has incorrectly judged the standards of the federal Supreme Court.[217] Still, the Alaska court is free to interpret the language of its constitution differently than the United States Supreme Court would interpret comparable language in the federal Constitution.[218] The United States Supreme Court has specifically recognized

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213. *Id.* at 269-70.

214. *See, e.g.,* Collins, *supra* note 6.

215. U.S. CONST. art. VI, cl. 2.

216. *E.g.,* Williams v. Zobel, 619 P.2d 422, 427 (Alaska 1980), *rev'd on other grounds,* 457 U.S. 55 (1982); State v. Erickson, 574 P.2d 1, 11 (Alaska 1978).

217. *See* Zobel v. Williams, 457 U.S. 55 (1982).

218. *See, e.g.,* Robison v. Francis, No. 3011, slip op. at 30-31 (Alaska Jan. 17, 1986). In Breese v. Smith, 501 P.2d 159 (Alaska 1972), the court expressly noted its independence:

> While some of the terms of article I, section 1 parallel the language of various federal constitutional provisions, we have repeatedly held that this court is not obliged to interpret our constitution in the same manner as the

that "[a] state court may, of course, apply a more stringent standard of review as a matter of state law under the State's equivalent to the Equal Protection or Due Process Clauses."[219] In addition, in some cases in which the Supreme Court has concluded that a state court improperly applied federal equal protection standards under the fourteenth amendment, some Justices have expressly indicated that the state could reach the questioned result if it so desired under the state constitution.[220]

Furthermore, under the United States Supreme Court's interpretation of its exercise of appellate jurisdiction, the Court will not review state court rulings on state law even though the Supreme Court properly has the case before it on issues of federal law.[221] In addition, under the doctrine of the independent and adequate state ground, the Supreme Court is without jurisdiction to review a state court decision even when a federal issue may be erroneously decided if a separate state ground of decision would nevertheless lead to the same outcome.[222] As Justice Jackson stated:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.[223]

The present status of the independent and adequate state ground doctrine is controversial, however. In the face of increased state court activism the Supreme Court has tightened the requirements of the doctrine. While in the past the Court might strain to find that a decision was based on an independent state ground so as to avoid addressing an issue of federal law, the Burger Court, particularly in cases

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Supreme Court of the United States has construed parallel provisions of the federal Constitution.

Id. at 167 (footnotes omitted) (state due process afforded student liberty to choose their hair length). *See generally* Brennan, *supra* note 6, at 498-502. For an extensive examination of the Alaska Supreme Court's independence in interpreting the state constitutional provisions affecting criminal procedure see Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981,* 18 GONZ. L. REV. 221 (1983) [hereinafter cited as *State Guarantees*].

219. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981).

220. *See, e.g.,* Idaho Dep't of Employment v. Smith, 434 U.S. 100, 103 (1977) (per curiam) (Brennan, J., dissenting in part, joined by Marshall, J.)

221. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1875).

222. *See, e.g.,* Brennan, *supra* note 6, at 501; Welch, *Whose Federalism? — The Burger Court's Treatment of State Civil Liberties Judgments,* 10 HASTINGS CONST. L. Q. 819, 833-34 (1983).

223. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

involving issues of criminal procedure, has held that if the ground of decision is unclear, the Court will presume that it is dependent on the federal ground.[224] The Court did state, however, that, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."[225] Some critics see the Court's new requirement of a clear statement as a threat to federalism and as a reflection of the Burger Court's desire to stifle state opinions going beyond the Court's own views.[226] Other commentators see the Court's policy of assuming that ambiguous decisions are based on federal law in the absence of a clear statement as a reasonable compromise between state autonomy and federal supremacy.[227] Whatever one's view of the Burger Court's gloss on the independent and adequate state ground rule, a careful state court guided by effective counsel can ensure the independence of its decisions based on state law.[228]

The Supreme Court of Alaska, with its long tradition of independent reliance on the state constitution,[229] should readily be able to satisfy the Burger Court's requirement of an articulated statement of its independent state grounds. Satisfying the requirement should be particularly easy for the Alaska court to accomplish in equal protection cases because it has adopted a policy of addressing the state constitutional issue first. Justice Dimond's majority opinion in *Williams v. Zobel* provides an example: "Because the tax statute is violative of the Alaska Constitution, we do not reach the question of whether it

224. Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

225. *Id.* at 1041.

226. *See, e.g.,* Collins, *Plain Statements: Supreme Court's New Requirement,* 70 A.B.A. J. 92 (March 1984); Welch, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long,* 59 NOTRE DAME LAW. 1118 (1984); Welch, *supra* note 222.

227. *See, e.g.,* Schlueter, *Federalism and Supreme Court Review of Expansive State Court Decisions: A Response to Unfortunate Impressions,* 11 HASTINGS CONST. L. Q. 523 (1984); Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges,* 59 NOTRE DAME LAW. 1079 (1984).

228. One commentator has suggested, "[T]he wisest course is for lawyers to separate all state law arguments from federal ones and request the reviewing court to do likewise." Collins, *supra* note 226, at 93. Justice Hans Linde, writing for the Supreme Court of Oregon in a case on remand from the United States Supreme Court, has issued a generic statement of independence:

> Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon Law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines.

State v. Kennedy, 295 Or. 260, 267, 666 P.2d 1316, 1321 (1983). *See E Pluribus, supra* note 6, at 173-79.

229. Alaska from its inception as a state has taken its constitution seriously and adopted an activist and innovative stance in interpreting its provisions. *State Guarantees, supra* note 218, at 261.

violates the federal constitution."[230] In addition, the Alaska Supreme Court has indicated that it will apply only its own heightened rational basis analysis, and will not apply the federal analysis, in cases where there is no allegation that a fundamental right or suspect class is involved. For, as the court stated, "[S]ince the intensified rational basis test adopted in Alaska subjects legislative classifications to greater scrutiny than the federal rational basis test, we think it appropriate to limit our discussion to whether the challenged regulations satisfy the state equal protection standard."[231] The approach of addressing state claims first and foregoing consideration of federal claims when the ruling on the state claim is in favor of the appellant has long been advocated by Justice Hans Linde of the Oregon Supreme Court.[232] This technique effectively avoids any difficulty with the United States Supreme Court's heightened independent and adequate state grounds requirement.

B. Alaska's Approach Compared to the Federal Approaches

1. *Substantive Due Process.* The foregoing discussion indicates that the Alaska Supreme Court is fully authorized under our federal system to pursue an independent equal protection analysis under the state constitution and that, with careful draftsmanship, the state court should have little difficulty protecting its state grounds from interference by a less activist United States Supreme Court. The most important question, however, remains to be answered: Is the Alaska sliding scale equal protection analysis an appropriate judicial doctrine? Although the balancing of individual interest versus state interest that is at the core of the analysis inevitably subjects the court to the charge that it is substituting its views for those of the legislature, the sliding scale approach is an effective doctrine and is preferable to the present doctrinal disarray of the United States Supreme Court. So long as the Alaska Supreme Court does not apply an overly strict level of review

230. 619 P.2d 422, 429 (Alaska 1980), *rev'd on other grounds,* 457 U.S. 55 (1982). *But cf.* Schafer v. Vest, 680 P.2d 1169, 1171 n.9 (Alaska 1984) (the court first held that the state's longevity Bonus Program was unconstitutional under the United States Constitution and thus found it unnecessary to consider whether the program violated the Alaska Constitution); Robison v. Francis, No. 3011, slip op. at 28-29 (Alaska Jan. 17, 1986) (the court first held that the Alaska Local Hire statute violated the privileges and immunities clause of the United States constitution and thus found it unnecessary to consider whether it also violated the equal protection clause of the Alaska Constitution).

231. Rose v. Commercial Fisheries Entry Comm'n, 647 P.2d 154, 158 (Alaska 1982) (citation omitted); *accord* Anchorage Educ. Ass'n v. Anchorage School Dist., 648 P.2d 993, 996-97 n.7 (Alaska 1982).

232. Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981) (Linde, J.); *First Things First, supra* note 6; Linde, *Without "Due Process": Unconstitutional Law in Oregon,* 49 OR. L. REV. 125 (1970).

to economic regulatory legislation at the bottom end of its sliding scale and carefully articulates the factors and their weights that lead it to adopt a particular level of scrutiny, the Alaska approach may be distinguished from a pure exercise of substantive due process.

As the previous consideration of *Isakson v. Rickey*[233] makes clear, from the beginning of the Alaska Supreme Court's development of its own equal protection analysis the court has insisted on applying a more demanding review of social and economic legislation than the extremely deferential test applied by the United States Supreme Court.[234] In *Isakson* the court rejected as the actual purpose of a challenged classification a purpose that was plausible in light of the legislative history and the wording of the statute and one that was strongly asserted by the state.[235] The court found that that purpose was already served by other provisions of the statute and posited for itself the purpose of the classification.[236] Viewed most critically, the *Isakson* court rejected the asserted purpose and chose its own "real" purpose for the classification as a straw man and then quickly concluded that the classification did not have a "fair and substantial relation" to that real purpose. To a judicial realist, *Isakson* would be a fine example of a court shaping its analysis to reach a predetermined result.[237] The decision has been criticized as a revival of economic substantive due process in which the court has merely substituted its view of appropriate policy for that of the legislature.[238]

Criticism of the *Isakson* opinion is appropriate. Alaska, of course, could utilize an analytical system that includes economic substantive due process in interpreting its constitution. Some states continue to do so.[239] But such a course by the Alaska court would be ill-advised and might seriously threaten support for the court. If the court had continued to second-guess plausible legislative purposes in

233. 550 P.2d 359 (Alaska 1976) (discussed *supra* section III. B).

234. The Alaska Supreme Court continues to apply the heightened rational basis standard. *E.g., State v. Ostrosky,* 667 P.2d 1184 (Alaska 1983); *see supra* text accompanying note 207.

235. 550 P.2d at 363-65; *see supra* text accompanying notes 167-68; Owers, *supra* note 149, at 90-91, 95-97.

236. 550 P.2d at 364-65; *see supra* text accompanying note 169.

237. *See generally* Note, *Legislative Purpose, Rationality, and Equal Protection,* 82 YALE L.J. 123 (1972).

238. Owers, *supra* note 149, at 95. *See generally* Howard, *supra* note 6, at 879-91 (application of a "real and substantial relation" test may result in a "substantially stricter review of economic regulations than the federal courts are willing to pursue"); Linde, *Due Process of Law Making,* 55 NEB. L. REV. 197 (1976).

239. Howard, *supra* note 6, at 879-91. Older studies on state use of economic substantive due process include Hetherington, *State Economic Regulation and Substantive Due Process of Law,* 53 NW. U. L. REV. 226 (1958); Paulson, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91 (1950).

applying its sliding scale equal protection analysis to economic regulations, it would have undermined any effort to legitimize its analysis as equal protection doctrine rather than as merely due process wrapped in equal protection terminology. Fortunately, the court has moved away from such hyperactivity at the bottom end of its sliding scale. Two of the cases that illustrate this movement involved, as *Isakson* did, challenges to provisions of the Limited Entry Act. In *Commercial Fisheries Entry Commission v. Apokedak,*[240] the court resolved an ambiguity in its *Isakson* decision[241] and upheld the Act's basic requirement that limited those who could apply for entry permits to persons who had held gear permits at some time in the past.[242] In doing so, the court did not insist on determining "the purpose" of the particular challenged provision as it had done in *Isakson.* Rather, the court recognized that, "[s]eldom, if ever, will a statutory scheme, especially one as complicated as the Limited Entry Act, have a single monolithic purpose. The legislature usually acts with a variety of purposes in mind and each of these purposes deserves judicial recognition."[243] The court then continued in a footnote:

> This is not to say that the judiciary is required to hypothesize or invent purposes, something *Isakson's* intensified scrutiny test specifically rejects. Close examination of the statutory scheme will usually yield several concrete legislative purposes having a substantial basis in reality, even if these purposes are not specifically identified in a statutory purpose clause.[244]

The court found four "broad purposes" behind the legislation.[245] Concluding that the gear license requirement bore a fair and substantial relationship to at least one of these purposes, the court held that the classification did not violate the state equal protection guarantee.[246] The court noted that in individual cases the classification might produce extreme hardship and that the legislature might have done better in producing regulation more neatly designed to accomplish its purpose. "But equal protection, even under Alaska's stricter standard, does not demand perfection in classification. If it did, there would be few laws establishing classifications that would sustain an equal protection challenge."[247] The Alaska Supreme Court has demonstrated in subsequent cases such as *Rose v. Commercial Fisheries Entry Com-*

240. 606 P.2d 1255 (Alaska 1980).

241. *See supra* note 155.

242. 606 P.2d at 1263-64. For a discussion of the facts surrounding *Apokedak* and its holding, see Owers, *supra* note 149, at 98-102.

243. 606 P.2d at 1264 (omitted footnote set forth *infra* text accompanying note 244).

244. *Id.* at 1264-65 n.39.

245. *Id.* at 1265.

246. *Id.* at 1266-68.

247. *Id.* at 1267 (footnote omitted).

mission[248] and *Anchorage Education Association v. Anchorage School District*[249] that the respect shown in *Apokedak* for legislative decisions made in economic regulatory classifications will now be the rule and the inquiry in *Isakson* the exception.

Even if the Alaska Supreme Court avoids merely substituting its judgment for that of the legislature when evaluating economic regulations, is the state equal protection analysis really nothing more than a variation of the United States Supreme Court's fundamental rights equal protection analysis? Can the Alaska equal protection analysis be distinguished from substantive due process? After all, under the Alaska doctrine, the court looks at the interest identified by the party as affected by the challenged classification and assigns to that interest some degree of importance or weight. Under the doctrine the court may give great weight to an interest that is neither directly expressed nor closely related to an interest expressed in the state constitution.

2. *Fundamental Rights Equal Protection Analysis.* The United States Supreme Court's fundamental rights equal protection analysis supplies a useful comparison with the Alaska analysis. Under that doctrine the Court applies "strict scrutiny" and requires a "compelling" state interest in order to justify a classification that burdens a "fundamental right." The doctrine has been roundly criticized both on the Court and by commentators who question the Court's basis for finding a right to be fundamental,[250] and insist that if the right is fundamental under the Constitution, it should be afforded protection directly.[251] While the development of this doctrine is understandable historically,[252] the critics are quite correct in questioning its present acceptability. In its essence, the fundamental rights equal protection doctrine is an exercise of substantive due process.[253]

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248. 647 P.2d 154, 159-60 (Alaska 1982).

> The allocation of a limited economic resource — here, a limited entry permit — necessarily requires the creation of a system of classification . . . . While this court subjects any such classification to scrutiny to assure that the system is consistent with the equal protection clause of the Alaska Constitution, we remain mindful that the legislature enjoys broad discretion when distributing scarce economic benefits. To require a reasonable nexus between legislative means and ends is not to demand perfection in classification.

Id.

249. 648 P.2d 993 (Alaska 1982). For a discussion of the opinions in *Anchorage Education Ass'n, see* Note, *The Alaska Supreme Court and the Rights of Public School Teachers as Employees: A Suggested Response to Judicial Limitation of Collective Bargaining Rights,* 1 ALASKA L. REV. 79 (1984).

250. *See supra* text accompanying notes 54 and 71-73.

251. *See supra* text accompanying note 53; Perry, *supra* note 103, at 1075.

252. *See supra* text accompanying notes 30-37.

253. *See, e.g.,* Lupu, *supra* note 103; Comment, *Equal Protection and Due Process:*

The Alaska sliding scale analysis and Supreme Court Justice Marshall's approach are sufficiently different from substantive due process to escape much of this criticism. The federal fundamental rights equal protection analysis has a rigid all-or-nothing quality. Once a fundamental right is found to be affected, the doctrine requires the state to bear the enormous burden of showing a compelling interest for the use of the classification. By contrast, the Alaska approach has none of this rigid quality. Its focus is on the state's justification for its differential treatment of the individual making the equal protection claim. The analysis is not concerned with whether or not the individual's interest is fundamental. It is concerned only with determining whether the state's treatment of some persons differently from other persons is justified. In making that determination, the court evaluates the importance of the individual's interest, but it does so only for the purpose of determining the appropriate degree of justification the state must possess to validate the classification. In applying the sliding scale analysis, the weight judicially accorded the individual's interest exists only within the parameters of that analysis. Outside of those confines it has no "substance." This method is in sharp contrast to the federal doctrine where presumably once an interest has been held to be "fundamental" it would be so for all constitutional purposes and its "substance" would be protected as a due process liberty.[254] This fear of creating new protected rights has been a strong constraint on the expansion of the federal review doctrine. Because the Alaska analysis affords a weight to the interest only for the purpose of evaluating the particular equal protection claim, the state court need not feel so constrained to limit its judicial scrutiny.[255]

Although the Alaska approach to equal protection analysis is distinguishable from substantive due process, it does involve an explicit judicial balancing of interests. Balancing approaches in constitutional adjudication have been criticized as inappropriate by several commen-

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Contrasting Methods of Review Under Fourteenth Amendment Doctrine, 14 HARV. C.R.-C.L. L. REV. 529, 537-41 (1979). *See also* Perry, *supra* note 103, at 1074-83.

254. Perry, *supra* note 103, at 1075.

255. In a famous concurrence, arguing that equal protection should be a preferred ground of decision, Mr. Justice Jackson stated:

> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. . . . Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
>
> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.

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

tators.[256] Critics assert that balancing tests permit judges to make essentially *ad hoc* decisions based on their own value judgments: the way in which the judge defines the interests involved and the weights he or she assigns to them predetermine the results. Then, as one critic suggests, "As soon as he finishes measuring the unmeasureable, the judge's next job is to compare the incomparable."[257]

Other commentators have supported balancing approaches and recommended balancing models for equal protection analysis.[258] Supporters of balancing believe that the approach requires judges to openly state and evaluate the factors that lead them to their decisions. The rationale of the decision, thus exposed, is then fully open for rational criticism. The comments of one supporter of balancing in the first amendment context are also applicable to equal protection balancing:

> Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them — more particularized and more rational at least than the familiar parade of hallowed abstractions, elastic absolutes, and selective history. Moreover, this approach should make it more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason. It should also make their accounts more rationally auditable.[259]

These observations have special weight in light of developments on the federal level where, as we have seen, the Court has insisted on a formal doctrine of rigid tiers, yet has rendered many opinions that hardly seem consistent with that doctrine. The Alaska Supreme Court has developed its sliding scale analysis in large part in response to this confusion. To the extent that the Alaska court applies its sliding scale test in a principled manner, its opinions will display clearly the balance the court has struck in determining the level of review to apply to a classification and will identify each specific factor that led to that result.[260] The real advantage of the Alaska sliding scale approach will

256. *E.g.*, Frantz, *The First Amendment in the Balance,* 71 YALE L.J. 1424 (1962); *see* Barrett, *supra* note 103, at 126-27, 129; *E Pluribus, supra* note 6, at 186-87 (state constitutional law need not follow federal doctrines, if one is able to persuade the state court of something better); Comment *supra* note 253, at 545-47 (criticism of Justice Marshall's proposed equal protection balancing).

257. Frantz, *Is the First Amendment Law? — A Reply to Professor Mendelson,* 51 CALIF. L. REV. 729, 748 (1963).

258. *See* authorities cited *supra* note 106; Perry, *Constitutional "Fairness": Notes On Equal Protection and Due Process,* 63 VA. L. REV. 383 (1977); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection,* 40 U. CHI. L. REV. 807 (1973).

259. Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance,* 50 CALIF. L. REV. 821, 825-26 (1962).

260. Professor Gunther has identified "the single most important trait in a Justice committed to the balancing approach: a capacity to identify and evaluate separately

be in the middle range of interests between those interests to which the federal doctrine has applied only a rational basis review and those to which it has applied strict scrutiny.[261] This is the area where federal cases have been most inconsistent and where Justice Marshall and advocates of equal protection balancing have suggested that adoption of a sliding scale approach would have its greatest effect.[262] Opinions of the court suggest the Alaska Supreme Court agrees with this observation.[263]

C. A Final Defense of Alaska's Independent Approach

Each of the issues considered in appraising the Alaska equal protection doctrine — its relation to due process and the propriety of its balancing — are in a sense expressions of a more basic issue concerning the legitimacy of the Alaska Supreme Court's active judicial review. The legitimacy of judicial review on the federal level is an issue that has long preoccupied constitutional scholars and its consideration is beyond this endeavor.[264] Recently, however, commentators have begun to consider the special factors, factors perhaps unique to a particular state, that may inform and support the role of judicial review in state courts.[265] These factors include the text, history, doctrine, and structure of the Constitution and the particular social or moral values of the state.[266]

In considering equal protection under the state constitution, the

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each analytically distinct ingredient of the contending interests." Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell,* 24 STAN. L. REV. 1001, 1035 (1972).

261. At least one writer has expressed the fear that the use of balancing in equal protection analysis might produce a diminution of protection against racial or national origin discrimination. Comment, *supra* note 253, at 532. This fear would appear to be unfounded for Alaska. First, if the federal Court continues to apply strict scrutiny to such classifications, the supremacy clause will require invalidation of such classifications even in the unlikely event the Alaska court sought to strike a balance at some lower level of review. Second, unlike the federal Constitution, the Alaska charter has an explicit prohibition against the denial of any civil or political right because of race, color, creed, sex, or national origin. ALASKA CONST. art. I, § 3. This express protection should afford a continued guarantee against discrimination.

262. Wilkinson, *supra* note 103, at 989-98; Note, *supra* note 106, at 1391-97.

263. *See, e.g.,* State v. Erickson, 574 P.2d 1, 11-12 (Alaska 1978).

264. *See, e.g.,* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); J. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

265. *E Pluribus, supra* note 6, is particularly useful since the author explores the relationship between constitutional theories and state courts. *See* Howard, *supra* note 6; Galie, *supra* note 6.

266. *E Pluribus, supra* note 6, at 179-93; Howard, *supra* note 6, at 934-44; Williams, *supra* note 6, at 397-402.

Alaska Supreme Court has been preoccupied with doctrine, as has this commentary. The preoccupation is understandable given the absence of coherent federal doctrine. Yet it is the content of the equality that is protected that ultimately determines the legitimacy of the review. In defining that content, the Alaska court has many factors on which to draw. In asserting its independence in other constitutional contexts, the court has, for example, protected a male student's right to wear long hair in light of the state's particular traditional concern for the "preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles."[267] The court has also found that the requirement of selecting jurors from within a fifteen-mile radius of trial violated state constitutional guarantees of a fair and impartial jury in light of the juxtaposition of widely scattered native villages and concentrated white urban areas in the state.[268] The history and character of Alaska have also been important in the state's independent interpretation of equal protection. For example, the Alaska court has continued to apply a stringent protection of the right to travel or the right to interstate migration under the state constitution in spite of a softening of federal concern for classifications creating durational residency requirements.[269] At least one justice has explained that "[t]he uniquely important status of right-to-travel protection in the Alaska Constitution reflects, in part, an awareness of the distinctive character of this state in attracting many new residents to participate in Alaska's growth and expansion."[270] In applying its independent equal protection analysis, the Alaska Supreme Court should continue to draw upon the state's unique traditions and environment to legitimate its active judicial review.

Finally, there are two additional sources from which the court can gain support for its independent analysis and for the independent content to the equality protected in Alaska. These are the particular words of the state constitutional text and the history of its enactment.[271] Here again the court in fact has relied on such bases in asserting independence in other areas. For example, in applying standards higher than those required by the United States Supreme

267. Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972); *see* Howard, *supra* note 6, at 928-29.

268. Alvarado v. State, 486 P.2d 891 (Alaska 1971); *see* Galie, *supra* note 6, at 769-71.

269. Note, *Durational Residency Requirements: The Alaska Experience,* 6 UCLA-ALASKA L. REV. 50 (1976). For a discussion of the Alaska right to travel and residency requirements, see Note, *Alaska Pacific Assurance Co. v. Brown: The Right to Travel and the Constitutionality of Continuous Residency Requirements,* 2 ALASKA L. REV. 339 (1985).

270. Thomas v. Bailey, 595 P.2d 1, 16 (Alaska 1979) (Rabinowitz, J., concurring) (footnote omitted).

271. Howard, *supra* note 6, at 935-37; *E Pluribus, supra* note 6, at 181-86.

Court regarding searches and seizures, the Alaska court has relied upon the explicit protection for privacy contained in the state constitution as an important support.[272] The Alaska Supreme Court has not yet relied upon the distinct language of article I, section 1, or the history of its enactment in developing its equal protection analysis. Recently, however, Justice Burke has indicated in two concurring opinions that the particular language and history of the state equal protection guarantee should be utilized as a basis for independent state decisions. In *Schaefer v. Vest,*[273] the court affirmed *per curiam* a lower court ruling that the state's longevity bonus program violated federal equal protection standards. Burke, then Chief Justice, concurred and indicated that he would base the decision on independent state grounds.[274] Justice Burke felt that these grounds went further than the federal guarantee:

> Alaska's founding fathers were not content merely to echo the requirements of the fourteenth amendment, which guarantees all persons "equal protection of the laws." They intended to provide the citizens of this state with broader protection than they are entitled to under the Constitution of the United States. Thus, they adopted a provision that is quite different in its terminology, declaring "that all persons are equal and entitled to equal rights, opportunities, *and* protection under the law."
>
> The proceedings of the Alaska Constitutional Convention make it abundantly clear that this difference is one of substance, rather than mere style.[275]

To Justice Burke, the bonus program that rewarded only those residents who were domiciled in the territory prior to statehood was intended to accomplish exactly the opposite result from providing all persons with equal rights and opportunites.[276] In another brief concurrence, Justice Burke has reiterated his view that the protection provided under the state constitution "appears to be greater than that

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272. ALASKA CONST. art. I, § 22; *see State Guarantees, supra* note 218, at 234-35.

273. 680 P.2d 1169 (Alaska 1984).

274. *Id.* at 1172 (Burke, C.J., concurring).

275. *Id.* (quoting ALASKA CONST. art. I., § 1) (emphasis added). Justice Burke continued:

> Delegate Awes, for example, in explaining this choice of language to the Convention, stated: "We do mean all three [guarantees]. I think [such language] means [people] are entitled to equal rights, equal opportunities, *and* equal protection under the law." . . . Delegate Johnson, phrasing it somewhat differently, stated: "There are two things that are provided for here. One is that all persons are equal under the law and the other is that they are entitled to equal rights and opportunities under the law. They are two separate and distinct things."

680 P.2d at 1172 (citations omitted).

276. *Id.*

provided by the federal equal protection clause."[277] Thus it appears that, having adopted an independent analytical approach, the Alaska Supreme Court may expand the bases relied upon for the content and legitimacy of the court's independent guarantee of equality.

V. CONCLUSION

The Supreme Court of Alaska initially approached equal protection issues as if the standards of the state and federal constitutions were the same. By the 1970's, however, the court began to express frustration with the increased doctrinal inconsistency of the United States Supreme Court. The Alaska court took a partial step toward an independent analysis in *Isakson v. Rickey* by adopting the *Royster Guano Co.* standard as its own under the state constitution when considering challenges to economic regulatory statutes. Soon, however, the court announced in *State v. Erickson* that it would apply a uniform, sliding scale analysis in all cases raising state equal protection claims. After further refinement in *State v. Ostrosky,* the court has settled on its analysis.

In considering equal protection claims, the Alaska court has concentrated on developing its unique analytical doctrine. Now that the sliding scale approach is fully articulated, the court can turn to more elaborately developing the content of equality in Alaska in light of the text, history, and traditions that inform its judicial decisionmaking. As the Alaska Supreme Court continues to apply its sliding scale approach independently, other jurisdictions would do well to take note. Perhaps these northern lights are more than just an interesting phenomenon; perhaps they are a north star that could guide other courts.

277. Adams v. Pipeliners Union 798, 699 P.2d 343, 352 n.1 (Alaska 1985) (Burke, J., concurring).