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David A. Dittfurth

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# A THEORY OF EQUAL PROTECTION

DAVID A. DITTFURTH*



## I. INTRODUCTION

Any student of our Constitution learns very early that the legal significance of its provisions cannot be determined by reference to the words of the document itself. The Constitution has meaning as

* B.A. 1965, University of Texas; J.D. 1967, University of Texas; LL.M. 1972, University of Texas. Professor of Law, St. Mary's University School of Law. The author wishes to acknowledge and express appreciation to Stephen Morris, Helen Schwartz, and Nancy Kerr for their assistance in researching this article.

a legal force only to the extent courts give it that effect,[1] and the courts to which litigants most frequently bring constitutional issues when there is a choice available are federal courts.[2] At the apex of the federal court system is, of course, the United States Supreme Court, which is not only the supervisor of that court system but is also the ultimate authority on the legal meaning of the Constitution.[3] In this article the focus on the Supreme Court as a constitutional lawmaker is not intended as a denigration of the importance in this regard of other federal courts, state courts, or of nonjudicial governmental bodies, but as a recognition of the unique power and prestige of the Supreme Court in the formulation of law through discovery of the meaning of the Constitution. The Supreme Court is unique as a constitutional authority both

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1. In *Marbury v. Madison*, Chief Justice John Marshall first declared the existence of the power of judicial review, that is, the power of courts to interpret and apply the Constitution as the supreme law in cases before them. He reasoned that the Constitution was established as the fundamental law by the people, who possess the ultimate authority to determine the nature and limits of their future government. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). If an act of government is contrary to the Constitution, it thus represents action beyond that authorized by the people as the ultimate sovereign and must be void. *Id.* at 177-78. Since it is undeniably the function of courts to decide cases by the application of law, they must have the power to determine what rules are law. It follows, therefore, that courts must be able to determine whether a pertinent rule is inconsistent with the Constitution, and to do so they must be able to determine the meaning of the applicable constitutional provision in order to discern any conflict between it and the pertinent rule. *Id.* at 178-79.

2. The federal district courts have original jurisdiction over cases arising under the Constitution. This judicial power is authorized by article III of the Constitution and has been conferred by Congress. *See* 28 U.S.C. §§ 1331, 1343(a)(3) (1976 & Supp. IV 1980). One important inducement for choosing to initiate constitutional challenges in federal court is the independence federal judges have from popular control. Federal judges of article III courts are appointed for life and their compensation cannot be reduced during their term. *See* U.S. CONST. art. III, § 1. Federal jurisdiction over constitutional issues is not, however, exclusive of state courts. For example, many constitutional questions arise in defense of criminal prosecutions in state court.

3. The Supreme Court is the only federal court directly established by the Constitution and is authorized by it to exercise appellate review of cases arising under the Constitution. *See* U.S. CONST. art. III. As a practical matter, the Court is the final authority on the Constitution because it possesses the power to review the judicial decisions on constitutional issues of other courts. The power to review lower federal court decisions has been conferred by Congress in 28 U.S.C. §§ 1252, 1254 (1976). The Supreme Court also has power under 28 U.S.C. § 1257 (1976) to review decisions on constitutional issues by state courts. This grant of power was held to be constitutional in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the Supreme Court held that it could also constitutionally exercise the power to review state criminal proceedings and that the eleventh amendment did not restrict that power.

because of its power to create constitutional law and because of its symbolic position in this society as bearer of the Constitution as aegis.[4] It is not, therefore, surprising that this body of nine appointed Justices[5] is the focus both of constitutional scholarship and of the criticism aimed at constitutional law.

One of the most important areas of constitutional law is that derived from the Equal Protection Clause of the fourteenth amendment. One author has noted that the substantive doctrine concerning equal protection and that concerning freedom of expression have become the two most important categories in the whole corpus of constitutional law.[6] Governmental decisionmakers must consider equal protection doctrine since they are frequently required to discriminate among those arguably qualified in order to determine who must bear the burden of governmental action or receive the benefits of governmental largess. A decision to discriminate is often the result of political compromise, limited objectives, limited resources, prejudice, or a blend of these reasons; and this failure to treat equally all those who are arguably similarly situated as to those burdens or benefits prompts equal protection challenges.[7]

The Supreme Court has, however, provided inadequate guide-

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4. Alexander Bickel described this as the "mystic" function of the Supreme Court. A. BICKEL, THE LEAST DANGEROUS BRANCH 32 (1962). The Court not only protects freedom with the Constitution through judicial review but also is symbolically joined with the Constitution because it alone, among governmental bodies, can personify the continuity represented by the Constitution. *See id.* Also, because of its independence and continuity, the Supreme Court is in a better position to elaborate the essential values contained in the Constitution even in the face of popular hostility. Philip Bobbitt refers to this as the expressive function of the Court, whereby it gives "concrete expression to the unarticulated values of a diverse nation." P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 211 (1982).

5. The Justices of the Supreme Court are appointed by the President with the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. The Court consisted of only six members when it was originally established and this number was changed to seven in 1807, to nine in 1837, to ten in 1864, and finally to nine in 1869. *See* 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3507, at 19-22 (1975). Presently the Supreme Court consists of a Chief Justice and eight Associate Justices. 28 U.S.C. § 1 (1976).

6. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 5 (1982).

7. "A major legislative program may require hundreds of decisions, which will be expressed as statutory classifications. Any of these classifications may be challenged as denying equal protection." *Developments In the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969).

lines for determining such challenges.[8] The Court has developed a multi-tiered approach whereby different tests are used according to the degree of "suspectness" attached by the Court to the type of classification being challenged.[9] One bringing a challenge under equal protection must first place the challenged classification in a suspect category in order to make the government justify its classification. The government, of course, must argue that the challenged classification is not one of those which has been deemed suspect or should be deemed suspect so as to enjoy the application of the lowest tier approach which favors it.[10]

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8. The inadequacy of a tiered approach to equal protection analysis has lead not only to confusion of those who must use these rules but also to extensive fragmentation of the Court itself. *See* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 3 (1977). As Mr. Karst has noted, "Surely we are near the point of maximum incoherence of equal protection doctrine." *Id.* at 3.

9. Gerald Gunther noted in 1972 that the Burger Court had begun to go beyond the rigid two-tier approach to use equal protection even when the challenged classification was not "suspect." This development he described as the giving of new "bite" to equal protection without applying strict scrutiny. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972). Justice Marshall has contended that the Court's equal protection decisions no longer fall into a pattern that can be explained by the Warren Court's two tiers. Instead, the Court has applied a spectrum of standards which "comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

10. In *McGowan v. Maryland*, the Court upheld a Sunday closing law which banned the sale of certain products while allowing the sale of others. Chief Justice Warren stated that equal protection is violated only when the classification is based on grounds "wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequity." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). This kind of economic regulation is, therefore, to be considered valid under equal protection "if any state of facts reasonably may be conceived to justify it." *Id.* at 426. If there are plausible reasons for a classification, it is constitutionally irrelevant whether this reasoning did actually motivate the enactment of that classification. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980). The Court has, however, at least in dictum indicated recently that some patently irrational discriminations may not withstand even the deferential rational basis test. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 441-42 (1982) (separate opinion by Blackmun, J.). Although it is often said that the lowest tier of equal protection analysis applies to general economic or social welfare regulation, the more accurate view is that judicial scrutiny will be applied only when the Supreme Court finds reason to be especially suspicious of a particular type of classification. *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 426 (1982) (claimant denied a hearing because of the hearing commission's own delay).

Under the Warren Court's two-tier analysis the government had the heavy burden of justification whenever a classification was categorized as one made either on the basis of such suspect characteristics as race or nationality or in regard to interests the Court saw as "fundamental," such as voting, interstate migration, or access to criminal justice.[11] If the classification was not one of those to which the Court applied "strict scrutiny," deference was given the legislative choice so that all doubts were resolved in favor of constitutionality.[12] On this lower tier the challenged classification was presumed constitutional, while a classification on the upper tier was presumed unconstitutional. The placement of a case on one tier or the other was exceedingly significant under the Warren Court's analysis since these presumptions were, in reality, almost irrebuttable.[13]

The Burger Court added alienage classifications to the Warren Court's list of those inherently suspect[14] but has subsequently qualified the significance of this designation by determining that a state may legitimately reserve for citizens those positions in government that involve the formulation or implementation of broad public policy decisions.[15] The Burger Court has also identified other bases which require "heightened" judicial scrutiny but which are not so inherently suspect as to require the strictest scrutiny.[16]

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11. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1972).

12. The only case between the late 1930's and today in which the Supreme Court used equal protection to strike down a purely economic regulation was Morey v. Doud, 354 U.S. 457 (1957). That decision was held erroneous and overruled by the Court in New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam).

> It would seem . . . that in fiscal and regulatory matters, the Court has not only entertained a presumption of constitutionality and placed the burden on the challenging party to show that the law has no reasonable basis, but has in fact almost abandoned the task of reviewing questions of equal protection.

*Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969).

13. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

14. "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority." Graham v. Richardson, 403 U.S. 365, 372 (1971).

15. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 445-46 (1982); Ambach v. Norwick, 441 U.S. 68, 76-78 (1979); Foley v. Connelie, 435 U.S. 291, 299-300 (1978).

16. The very deferential standard was expressly held inapplicable to illegitimacy classi-

For instance, classifications based on gender are at least suspicious in that many prove to be unjustified in the Court's analysis but are not inherently suspect.[17] To describe equal protection analysis today, therefore, one must speak of at least a three-tiered rather than a two-tiered approach.[18] Classifications on the highest tier are given the strictest judicial scrutiny, those on the middle tier are given heightened scrutiny, and those on the lowest tier are given virtually no scrutiny.

Although the Burger Court has not added to the Warren Court's list of fundamental interests,[19] it applied heightened scrutiny in the *Plyler*[20] case to what was described in the dissent as a "quasi-suspect" class harmed by discrimination in regard to a "quasi-fundamental" interest.[21] In the *Zobel*[22] case the Court struck down a state preference for long-term residents even though this prefer-

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fications in 1977. Trimble v. Gordon, 430 U.S. 762, 767 (1977). The Warren Court had, however, begun this trend earlier. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968). In 1976 the court determined that gender-based classifications must serve an important governmental objective and be substantially related to that objective. Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977). As Justice Powell noted in *Craig*, such classifications require a "more critical examination" than would be applied to classifications that were neither suspect nor relating to fundamental interests. *See* Craig v. Boren, 429 U.S. 190, 210 (Powell, J., concurring).

17. In *Frontiero v. Richardson*, a plurality opinion by Justice Brennan suggested that because sex is an immutable and obvious characteristic which has nothing to do with one's abilities and because women, on account of their sex, have been the victims of pervasive discrimination, any gender-based classification should be deemed suspect. 411 U.S. 677, 686-87 (1973). A majority of the Court did not accept this placement on the highest tier but did vote to strike the challenged gender-based classification on the basis of *Reed v. Reed*. *See id.* at 691 (Stewart, J., concurring); *id.* at 691 (Powell, J., Burger, C.J., and Blackmun, J., concurring).

18. In *Reed v. Reed* the Supreme Court struck down a gender-based classification while purporting to apply only the rational basis, lowest tier test. 404 U.S. 71, 76 (1971). This language implicating as it does the deferential approach cannot, therefore, adequately explain the lack of deference given the state by the Court. One can only conclude that the Court saw some reason to be suspicious of gender-based classifications such that some degree of searching examination short of the strictest scrutiny was required. This heightened scrutiny falls somewhere between the lowest and highest tiers established by the Warren Court. *See* Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 951 (1975).

19. In the *Rodriguez* case the Court refused to find that public education was a fundamental interest. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). Furthermore, Justice Powell stated that an interest is not fundamental so as to require strict scrutiny unless it is "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34.

20. Plyler v. Doe, ___ U.S. ___, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

21. *Id.* at ___, 102 S. Ct. at 2409, 72 L. Ed. 2d at 817.

22. Zobel v. Williams, ___ U.S. ___, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982).

ence did not deter interstate migration. Four Justices in the majority, however, placed emphasis on the suspicious nature of any classification based solely on duration of residence.[23]

Even though classifications made on the basis of race are the most vulnerable to equal protection challenge,[24] the Burger Court has upheld a racial classification which was sufficiently related to the goal of remedying the present effects of past discrimination against blacks.[25] This "benign" discrimination by Congress was closely examined by the Court, but the level of scrutiny was not so high as that given discrimination that disadvantages racial minorities.[26] It may well be, as some members of the Court have openly urged, that the level of scrutiny drops to the middle tier when racial discrimination operates in favor of a minority race for this benign purpose.[27] Considering *Fullilove* and those cases decided since 1976 in which the Court has upheld even nonbenign gender-based discrimination against males,[28] it appears that the vulnerability of a classification depends in large part on the nature of the disadvantaged class. To put it another way, a classification is deemed suspect or suspicious primarily because its past uses are rather obviously based on arbitrary preferences that disadvantage a usually powerless group. When that group is not disadvantaged, the classification, though still subjected to scrutiny, is more likely to withstand equal protection analysis because it is more likely to have arisen from rational decisionmaking.[29]

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23. "[R]esort to duration of residence as the basis for a distribution of state largesse . . . closely track[s] the constitutionally untenable position that the longer one's residence, the worthier one is of the State's favor." *Id.* at ___, 102 S. Ct. at 2318, 72 L. Ed. 2d at 685 (Brennan, J., concurring).

24. Indeed, Justice Stewart long contended that racial discrimination is by definition a violation of equal protection. *See* Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting); Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring).

25. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980).

26. "As a threshold matter, we reject the contention that in the remedial context the Congress must act in a *wholly* 'colorblind' fashion." *Id.* at 482 (emphasis added).

27. Justices Marshall, Brennan, and Blackmun joined the majority in *Fullilove* but used the "substantial relationship" test usually applied for middle-tier or heightened scrutiny analysis. *See id.* at 521 (Marshall, J., concurring).

28. *See* Rostker v. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

29. Even a gender-based classification disadvantaging males will fall, however, if it is based on "archaic and stereotypic notions" as to the proper place or role of men and women in our society. *See* Mississippi Univ. For Women v. Hogan, ___ U.S. ___, ___, 102 S. Ct. 3331, 3336, 73 L. Ed. 2d 1090, 1098 (1982).

It might seem to some litigants that the process of placing an equal protection issue on the appropriate tier for analysis is as if they had stepped into an elevator with the plaintiff pushing the button for the highest floor and the defendant pushing the button for the lowest. The elevator moves, however, not only in accordance with the electric impulses received in this manner but also in accordance with those received from some unknown source which often causes the doors to open between floors. Following this process one exits into a world of adjectives and adverbs which would have perplexed even Alice after her adventures. For each tier the applicable test is stated in terms of the relationship of the challenged classification to a governmental purpose. On the lowest tier the classification need be only *rationally* related to a *legitimate* governmental interest.[30] To satisfy heightened but not strict scrutiny, the government must prove its classification has a *substantial* relation to an *important* governmental interest;[31] and on the highest tier it must prove the classification is *necessary* to achieve a *compelling*[32] or *overriding*[33] governmental interest. These modifiers can and have been on occasion replaced by others which provide no greater clarity. In *Fullilove*[34] Chief Justice Burger, in announcing the judgment of the Court, said that a congressional program seeking to remedy the present effects of past racial discrimination must be "narrowly tailored" to achieve that end.[35] Justice Powell, on the other hand, thought the means must be "reasonably necessary" to achieve that end.[36] Justice Marshall did not deem benign racial discrimination to be inherently suspect so he applied the middle-tier analysis, requiring the program to serve "important governmental objectives and [be] substantially related to achievement of those objectives."[37] In *Rostker v. Goldberg*,[38] the draft registration case, Justice Rehnquist found that "[a]nnounced degrees of 'deference' " and "levels of 'scrutiny' . . . may all too

30. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).
31. *See* Lalli v. Lalli, 439 U.S. 259, 271 (1978).
32. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969).
33. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).
34. Fullilove v. Klutznick, 448 U.S. 448 (1980).
35. *Id.* at 480.
36. *Id.* at 515 (Powell, J., concurring).
37. *Id.* at 519 (Marshall, J., concurring).
38. 453 U.S. 57 (1981).

readily become facile abstractions used to justify a result."[39] He then held, for the majority, that the registration of only males for the draft was "not only sufficiently but closely related to Congress's purpose in authorizing registration."[40]

To understand why this uncertainty exists on the Court, one must recognize that the Supreme Court develops equal protection doctrine while in the midst of a fundamental constitutional debate.[41] On one hand there is the argument that the Court must develop doctrine to deal with governmental inequality as it affects people in society today. On the other hand there is the argument that life-tenured judges who are not directly accountable to the voters should not interpret the Constitution according to their own values. Raoul Berger is perhaps as responsible as anyone for intensifying this debate on the legitimacy of constitutional lawmaking.[42] His argument is twofold. First, he contends the specific intentions of the framers of the fourteenth amendment are clear and show limited objectives.[43] In addition, he argues that the Court cannot legitimately cause the Constitution to have legal effect beyond those specific intentions.[44]

The nine Justices of the Supreme Court must decide difficult modern equal protection cases which frequently involve emotionally charged issues having important implications while debate surrounds their power to mold constitutional protection according to the conditions of this age. Considering this background and the disparate philosophies of the Justices, it is not at all remarkable that "bright line" rules have not evolved.

## II. ORIGINAL INTENT[45]

The Congress voted to propose the fourteenth amendment on

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39. *Id.* at 69-70.

40. *Id.* at 79.

41. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703-06 (1975).

42. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

43. *See id.* at 407.

44. *See id.* at 408.

45. There exists a rather serious question whether anyone today can hope to accurately discern the intent of the majority of the people responsible for the proposal and ratification of the fourteenth amendment. *See generally* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Wofford, *The Blinding Light: The Uses of*

June 13, 1866,[46] and the proposal was formally submitted on June 16.[47] The southern states were required by statute to adopt the fourteenth amendment as one of the conditions for obtaining representation in Congress,[48] but the ratification process was still more unusual in that several northern states attempted to rescind their earlier ratifications.[49] On July 9, 1868, after ratification by the required number of states Congress by resolution requested Secretary of State Seward to submit a list of the ratifying states.[50] He did so by proclamation on July 20, 1868, noting that two states had

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*History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964). A distinction can be made in this regard between the Thirty-Ninth Congress which proposed the fourteenth amendment and the state legislatures which ratified it. Who, in other words, are the "framers" of the fourteenth amendment? The state legislatures, representing the people of the United States, were responsible for making the amendment part of the Constitution and, after all, it is the people's Constitution not Congress's. Logically, therefore, the understanding of these bodies as to the meaning they intended to become part of the Constitution should be controlling. *See* C. ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT v-vi (1981). These state legislatures, however, did not maintain verbatim records of their debates on the fourteenth amendment and their intent can only be gleaned from evidence such as governors' messages, committee reports, records of motions and votes, and from newspaper reports of the legislative debates. *See id.* at v; C. FAIRMAN & S. MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY 162 (1970). Without direct evidence showing the specific concerns of those legislatures, there tends to be greater support for the conclusion that the ratifiers took the Equal Protection Clause as it read, that is, as a more general prohibition of inequality. *See* C. ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT 46-47, 58-60 (1981). Others have dealt with this lack of evidence by assuming the state legislatures had notice of the intent of the Thirty-Ninth Congress and, in effect, adopted its intent through their ratification. *See* Bickel, *The Original Understanding And The Segregation Decision*, 69 HARV. L. REV. 1, 7 (1955). This issue is beyond the scope of this article because of two reasons. First, assuming the original intent cannot be sufficiently proved—and a further issue would arise in defining "sufficiently"—does not justify ignoring original intent as a restriction on the exercise of judicial review. The burden can be placed on the proponent of an equal protection right to prove the framers intended such a right to exist. Failure to prove intent sufficiently would then result in failure of that constitutional challenge. Second, the specificity of the concerns of the framers has been admitted so as to allow concentration on the real issue, which is whether their specific intentions in 1867 or 1868 should control our Constitution in 1983 or our children's Constitution in succeeding years.

46. *See* Bickel, *The Original Understanding And The Segregation Decision*, 69 HARV. L. REV. 1, 54-55 (1955).

47. *See* 14 Stat. 358 (1866).

48. *See* 14 Stat. 428 (1867); C. FAIRMAN & S. MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY 206 (1970).

49. *See* Coleman v. Miller, 307 U.S. 433, 448-49 (1939); C. FAIRMAN & S. MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY 168-69, 178 (1970).

50. *See* Coleman v. Miller, 307 U.S. 433, 448 (1939).

attempted to rescind their ratifications.[51] On July 21 Congress nullified these attempted rescissions by declaring the fourteenth amendment was part of the Constitution. Finally, on July 28, 1868, Seward proclaimed it adopted.[52] This congressional decision on the legality of the attempts to rescind a prior ratification was ultimately deemed controlling by the Supreme Court when it held that such matters were political questions as to which Congress possessed the final authority.[53]

Section 1 of the fourteenth amendment begins by establishing the rule that all persons born or naturalized in the United States are citizens thereof, thereby overruling the Supreme Court's decision in *Dred Scott v. Sanford*.[54] It then proceeds to prohibit the states from abridging the privileges or immunities of United States citizens, from depriving any person of life, liberty, or property without due process of law, and from denying any person the equal protection of the laws.[55] Section 5 of the amendment grants Congress power to enforce these and the other provisions of the fourteenth amendment.[56]

Even in the absence of any legislative history, one would assume that the Thirty-Ninth Congress would not have proposed such a significant addition to the Constitution unless motivated by the existence of serious immediate concerns. Acting in the aftermath of the Civil War, which had been caused at least in part by the slavery issue, and the recent ratification of the thirteenth amendment,[57] Congress was confronted by activity in some southern

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51. *Id.* at 448-49.

52. *Id.* at 449.

53. *Id.* at 450.

54. 60 U.S. (19 How.) 393 (1857); *see also* Afroyim v. Rusk, 387 U.S. 253, 262 (1967).

55. Section 1 of the fourteenth amendment provides as follows:

> 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 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.

U.S. CONST. amend. XIV, § 1.

56. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

57. The thirteenth amendment was declared to have been ratified on December 18, 1865. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED, H.R. Doc. No. 539, 94th Cong., 2d Sess. 14 (1976).

states which reestablished many of the legal deprivations characteristic of slavery. These southern states had, in the winter of 1865-66, passed what were known as Black Codes. Although the codes varied from state to state with some even providing rights to blacks not previously enjoyed, others prohibited blacks from owning land, voting, engaging in any activity other than domestic service, or leaving their jobs without suffering the forfeiture of earned pay.[58] The members of the Thirty-Ninth Congress viewed the more restrictive of the codes as representative of all and pointed to their enactment as evidence that an unrepentant South was seeking to reestablish substantially the same system that had been one of the causes of the Civil War.[59]

Congress had, on April 9, 1866, overridden the veto of Andrew Johnson to enact into law the Civil Rights Act of 1866,[60] which expressly provided the right to "citizens, of every race and color" to make and enforce contracts, be parties in court, to own and convey real and personal property, to enjoy the full benefit of all laws for the security of person or property enjoyed by white persons, and to be subject to like punishment and none other.[61] Many Republicans, including Bingham of Ohio who was the primary draftsman of section 1 of the fourteenth amendment, believed the Civil Rights Act was beyond the constitutional power of Con-

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58. *See* J. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES 506 (1971); Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 474 (1982).

59. *See generally* J. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES 509 (1971).

60. Civil Rights Act, ch. 31, § 1, 14 Stat. 27 (1866) (current version codified at 42 U.S.C. §§ 1981, 1982 (1976)).

61. The original version of section 1 read as follows:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof of the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

*Id.*

gress.[62] This concern and the belief that the rights enumerated in the Civil Rights Act should not be left to the mercy of later Congresses[63] fueled the move to propose what became the fourteenth amendment.[64]

When considered apart from the other clauses in section 1 of the fourteenth amendment, the Equal Protection Clause reads, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[65] The words are general and when read literally express no limitation on the equal protection which states are forbidden to deny. Raoul Berger argues, however, that limited meaning should be ascribed to these words because the evidence shows that the members of the Thirty-Ninth Congress were motivated to propose them so as to secure for blacks only that equality provided in the Civil Rights Act of 1866.[66]

It is not disputed that in proposing the fourteenth amendment Congress was strongly motivated by a concern for blacks and for the equality of their treatment under state law in regard to the particular rights or privileges enumerated in the Civil Rights Act of 1866.[67] Furthermore, the debates of the Thirty-Ninth Congress support the conclusion that its members did not intend by its ratification to bring about political equality in regard to the right to vote or run for public office or the social equality of the black and white races.[68] Considering this evidence, Alexander Bickel con-

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62. *See* Bickel, *The Original Understanding And The Segregation Decision*, 69 HARV. L. REV. 1, 22 (1955).

63. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 23 (1977); C. FAIRMAN & S. MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY 125 (1970).

64. *See* J. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES, 511 (1971); Bickel, *The Original Understanding And The Segregation Decision*, 69 HARV. L. REV. 1, 24 (1955); Frank & Munro, *The Original Understanding Of "Equal Protection Of The Laws,"* 50 COLUM. L. REV. 131, 140 (1950).

65. U.S. CONST. amend. XIV, § 1.

66. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 169 (1977); *see also* C. FAIRMAN & S. MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY 125-26 (1970).

67. *See* Bickel, *The Original Understanding And The Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955); *see also* C. FAIRMAN & S. MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY 142-43 (1970).

68. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 170-71, 410-11 (1977).

> Thus, the original understanding of the equal protection clause—actually, of section one in its entirety—was that it forbade every state to discriminate against any of its

cluded that section 1 of the fourteenth amendment was not meant by these men to apply to jury service, suffrage, antimiscegenation statutes, or segregation.[69] In summary, the debates in the Thirty-Ninth Congress indicate that those who proposed the fourteenth amendment intended the Equal Protection Clause as an immediate protection for blacks in regard to a limited number of rights and only to the extent those rights were enjoyed by whites.[70]

Alexander Bickel has argued, however, that though this evidence would be conclusive as to the interpretation of a statute, the fourteenth amendment is something quite different and the framers were necessarily aware of that difference.[71] He suggests that one reason the Thirty-Ninth Congress did not simply use the language of the Civil Rights Act in their proposal is that they were aware it was a constitution they were writing—an organic document that because of its unique function and permanence must contain language which allows for unforeseen future problems. Thus, the language of the Equal Protection Clause itself indicates that the members of the Thirty-Ninth Congress also intended to do precisely what they did do—propose a general constitutional prohibition of inequality under law. This generalized prohibition was to operate, however, as an ideal in that it would await implementation as novel problems arose.[72] This visionary purpose did not in-

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residents on the basis of race *with respect to certain sorts of rights* (and the protection of those rights)—those pertaining to physical security, freedom of movement, and capacity to contract and own property. Of course, by contemporary lights, the original understanding of equal protection is exceedingly narrow.

Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1027-28 (1979).

69. Bickel, *The Original Understanding And The Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).

70. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 179 (1977); C. FAIRMAN & S. MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY 157 (1970).

71. *See* Bickel, *The Original Understanding And The Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955).

72. *Id.* at 63.

[Bingham's] framing of the fourteenth amendment provides additional evidence that the phrases of section 1 were intended to be broad, not narrow; general, not specific; open-ended, not limited. Unless Bingham is to be entirely discounted, his framing also counsels that the text of the fourteenth amendment is constitutional in scope, not statutory in precision.

Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L.

terfere with the need to deal with the immediate concerns or fears of the framers because achievement of the ideal through lawmaking would remain in the hands of Congress through its section 5 power. Of course, it was known that advances could be made by the Supreme Court, but the framers had no reason to believe at the time that the Court would move too rapidly in achieving their vision of perfect equality.[73]

## III. Beyond Original Intent On Race

Although the Supreme Court did not move rapidly after the ratification of the fourteenth amendment in 1868 to pursue an ideal of equality, it did soon begin to take a view of equal protection broader than was justified by the framers' specific intent. In fact, one characteristic of the Court's dealings with the Equal Protection Clause is that it has always exercised some degree of discretion in determining the demands of equal protection. Whatever one may argue the Court ought to be doing, it has from the beginning not decided equal protection issues solely through analysis of the historical evidence of the original intent.

In the *Slaughter-House Cases*[74] in 1873, the Court for the first time discussed the Equal Protection Clause.[75] In this decision, the Court noted that the language of the fourteenth amendment was not limited to the protection of blacks[76] but held that history clearly showed that it was primarily meant to protect that race from the oppressions experienced immediately after the Civil War.[77] The Court expressly refused to declare that no other group could enjoy this protection but said that a strong case would have to be presented before other groups could be protected.[78] In *Strauder v. West Virginia*,[79] the Court in 1880 reversed the conviction of a black man because West Virginia defined "eligible" jurors

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Rev. 462, 494 (1982).

73. *See* Bickel, *The Original Understanding And The Segregation Decision*, 69 Harv. L. Rev. 1, 64 (1955).

74. 83 U.S. (16 Wall.) 36 (1873).

75. *See id.* at 66-73, 80-82.

76. *See id.* at 71-72.

77. *See id.* at 81.

78. *See id.* at 81.

79. 100 U.S. 303 (1880).

to include only white males.[80] The Court said that although the Equal Protection Clause speaks in general terms, it implies "an immunity from inequality of legal protection, either for life, liberty, or property."[81] This immunity included the right to be free from racial discrimination in regard to the selection of one's jurors. This list of "immunities" as to which racial discrimination was prohibited was, perhaps, not meant to add anything to the list of interests (or rights) with which the framers were concerned, although evidence exists to indicate that the Thirty-Ninth Congress did not wish to grant blacks the right to serve as jurors.[82]

To point up the injustice of the West Virginia law, the Court in *Strauder* used a hypothetical case in which blacks became the majority in a state and precluded white males from serving on juries. In such a case, the Court concluded, no one would contend this was not a "denial to white men of the equal protection of the laws"[83] because this kind of discrimination was inconsistent with the "spirit of the amendment."[84] The Court also saw the state's discrimination against blacks to be "a brand upon them, affixed by the law," a legal assertion of their inferiority that would be "a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[85] The Court was discussing the injustice of excluding black males from the list of eligible jurors, but this language and the hypothetical indicate the Court had begun to recognize that any law which disadvantaged a group solely because of race was inconsistent with the essential meaning of the Equal Protection Clause.

In 1886 the Court decided *Yick Wo v. Hopkins*.[86] In that case a

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80. *See id.* at 304, 312.

81. *Id.* at 310.

82. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 158, 239 (1977). *But see* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1028 (1979).

83. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

84. *Id.* at 308.

85. *Id.* at 308. Michael Perry finds this language in *Strauder* to be suggestive of a broader understanding by the Court of equal protection, that is, when any law affixes such a "brand" it must fall. The Court as early as 1880, therefore, had begun to stray from the confines of the original intent. *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1028-29 (1979).

86. 118 U.S. 356 (1886).

San Francisco County ordinance prohibited the operation of a laundry in a wooden building without the consent of the board of supervisors.[87] Three hundred and ten of the laundries in the county, out of a total of three hundred and twenty, were constructed of wood.[88] Yick Wo and approximately two hundred other Chinese aliens who had been operating their laundries in wooden buildings sought permission to continue operation, but all of their petitions were denied. On the other hand, all of the petitions save one addressed to the board of supervisors by those who were not Chinese were granted.[89] Subsequently, Yick Wo and more than one hundred and fifty of his countrymen were arrested for operating their businesses without permission.[90]

The Court in *Yick Wo* held that the fourteenth amendment applies to protect all persons within the territorial jurisdiction of a governing entity "without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[91] The Court said that even though a law is fair and impartial on its face, if it is administered "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights" this amounts to a denial of the equality required by the Constitution.[92] No justification having been shown for the manner in which this ordinance was administered, the Court was forced to conclude that no reason existed except "hostility to the race and nationality" of Yick Wo. The discrimination was, therefore, a denial of equal protection.[93] The Court reasoned that it was the essence of slavery and, therefore, the contradiction of freedom that "one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another . . . ."[94]

The San Francisco ordinance could be justified as a reasonable attempt to promote fire safety, but the administration of it could

87. *See id.* at 357.
88. *See id.* at 358-59.
89. *See id.* at 359.
90. *See id.* at 359.
91. *Id.* at 369.
92. *Id.* at 373-74.
93. *See id.* at 374.
94. *Id.* at 370.

not be so explained. The Supreme Court noted that it need not engage in speculation as to the operation of the ordinance since the facts of discriminatory administration were shown.[95] These facts, in turn, illustrated that the primary motive for this discrimination was hostility toward Chinese aliens.[96] Although it can be said that the discrimination was based on the race of the affected classes, the nationality and alien status of the disadvantaged class also caused the Court to suspect that hostility or bias had motivated those who administered the ordinance. As the Court put it, "Can a court be blind to what must necessarily be known to every intelligent person in the State?"[97]

In 1896, the Court decided *Plessy v. Ferguson*,[98] from which was derived the rule that a law requiring separate but equal facilities for blacks was not a violation of equal protection. In that case a challenge was made to a Louisiana law that required all railway carriers to provide equal but separate accommodations for the white and black races.[99] Homer Plessy had insisted on being seated in a coach for white passengers because he claimed he was seven-eighths Caucasian and one-eighth African, but he had been arrested because the authorities either did not believe him or thought seven-eighths was not sufficient.[100] The Supreme Court concluded that the Equal Protection Clause was intended to provide only political equality of the races before the law as opposed

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95. *See id.* at 373.

96. The courts ordinarily do not engage in psychoanalysis of a legislature or of governmental officials to determine an "evil" motive. As Justice Cardozo noted, this is a "wise and ancient doctrine." United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardoza, J., dissenting). It is a wise doctrine because this kind of analysis probably cannot be managed by judges or, if it could, be applied to a collection of legislators or officials to determine conclusively or even convincingly a collective dominant motive or purpose. Even if standards existed for the effective use of this mode of analysis, its use would be an unseemly intrusion into the area of legislative power and would likely cause legislators to become more secretive of the purposes of reasoning behind legislation. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 208-10 (1962). In *Yick Wo*, however, the Court was able to see the "unequal hand" of government through the objective facts of the ordinance's administration and no psychoanalysis was required to determine motive. *See id.* at 213. What else but racial prejudice could cause the denial of a license to all Chinese and the grant of a license to almost all whites when the Chinese laundries were as safe as those owned by whites?

97. 118 U.S. 356, 363 (1886).

98. 163 U.S. 537 (1896).

99. *See id.* at 540.

100. *See id.* at 541-42.

to social equality.[101] Political equality, as the Court viewed it, was affected only when the law's differentiation between the races "implied a legal inferiority in civil society" which reduced the black race to its previous condition of servitude.[102] The fallacy the Court saw in Plessy's challenge to the segregation required by Louisiana law was that his argument assumed that "enforced separation of the two races stamps the colored race with a badge of inferiority."[103] The Court reasoned that even if this were so, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[104] One would assume that if the decision did depend on whether a badge of legal inferiority was imposed by the law, the Court should have also examined the legitimacy of this construction by blacks; but it did not.

The equal protection issue was thus reduced to whether the Louisiana law was a reasonable regulation. The Court held that, considering the "large discretion" enjoyed by the legislature, that body could justify its action by "reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[105] In other words, since the people wanted separation of the races in public facilities, the state could require it through law.[106] Moreover, the Court concluded the races could not be forced to commingle through law since "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."[107] Whatever the justification for this conclusion, it was largely irrelevant to the

101. *See id.* at 544.

102. *Id.* at 545.

103. *Id.* at 551. In *Strauder* the Court had described the denial to blacks of the right to serve on juries as a "brand . . . affixed by law, an assertion of their inferiority . . . ." Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

104. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

105. *Id.* at 550. Peace and order would presumably be served because the law reduced the likelihood that white people would need to resort to violence to exclude black people who might wish to sit in cars with whites. In other words, to avoid lawless action by whites, blacks were excluded by law from railway cars in which whites were seated.

106. *See id.* at 551. The "people" to whom the Court referred could only have included those white people who did not wish to share a railway car with blacks, since the Court recognized that black people may view this separation as a sign of their inferiority.

107. *Id.* at 551.

constitutional issue presented in *Plessy*. Plessy did not seek to require the Louisiana legislature to mandate the commingling of the races, only not to mandate the separation of the races. Without this law, the races could have commingled on railway cars as they wished, and any commingling which did occur would be the result of private choices not of governmental compulsion.

One need not engage in psychoanalysis to realize that the Louisiana legislature separated the races because of the wish to keep blacks out of the cars in which whites would sit.[108] The first Justice Harlan, in his now famous dissent in *Plessy*, made this point by noting that it was obvious to all that the Louisiana law "had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people" from those occupied by whites.[109] His position was that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[110] Since the Louisiana law was obviously intended and had the effect of maintaining a class system based on race, he found it inconsistent with that equality guaranteed by the fourteenth amendment.[111] Justice Harlan looked backward from the law's separation of the races to find that this separation was enacted because of the wish to exclude blacks. In other words, he saw what the majority failed to see or refused to admit, that the Louisiana legislature was moved to segregate because of racial prejudice against black people. It was this motive which to him made the law a violation of equal protection even though the law itself only required separate but equal facilities for the races.

The separate-but-equal analysis used in *Plessy* made constitutionally irrelevant the state's reason for legally-enforced separation of the races in public facilities. The Court could not have otherwise ignored "what must necessarily be known to every intelligent person,"[112] that is, that the Louisiana law was enacted to exclude a whole race because it was perceived to be degraded and unworthy

108. If only one passenger car were available, the railroad was required to divide it by constructing a partition. Railroad officials were also prohibited from using their discretion in this regard and were subject to criminal penalties for failing to separate the races. *See id.* at 552-53 (Harlan, J., dissenting).

109. *See id.* at 557 (Harlan, J., dissenting).

110. *Id.* at 559 (Harlan, J., dissenting).

111. *See id.* at 560 (Harlan, J., dissenting).

112. *See* Yick Wo v. Hopkins, 118 U.S. 356, 363 (1886).

of sharing public accommodations with whites. Laws establishing racial segregation quite literally put blacks "in their place," but the Court in *Plessy* made this realization irrelevant by imposing an abstract logic which began with the irrebuttable presumption that if equal facilities were provided no violation of equal protection could exist.[113] One weakness of this rule as a protection for segregation did finally become significant when the Court began to give greater scrutiny to unfounded claims that equal facilities were being provided, especially in regard to educational opportunities;[114] however, for nearly sixty years this presumption, which was contradicted by all pertinent empirical evidence, allowed the white majority in numerous states to bar blacks from full enjoyment of public services and facilities. This presumption was finally excised from the law in *Brown v. Board of Education* in 1954.[115]

In *Brown* the Court was squarely confronted with the validity of the separate-but-equal rule because the record showed that the racially-segregated public schools in question were substantially equal in regard to tangible items.[116] The Court held that racial segregation in public schools was a violation of equal protection,[117]

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113. The Louisiana law considered in *Plessy* expressly required railroads to provide "*equal* but separate accommodations for the white and colored races." Plessy v. Ferguson, 163 U.S. 537, 540 (1896) (emphasis added). The Court did not consider whether the railway car available to Homer Plessy was an equal facility, presumably because he was arguing that he should not be separated regardless of the facilities available. Considering only the face of the statute one might, therefore, be led to the conclusion that no "inequality" had been created since both races were treated to "equal" facilities.

114. *See, e.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637, 639, 642 (1950) (Oklahoma statute requiring that blacks enrolled at institutions of higher education attended by whites be segregated violated right to equal protection of the laws); Sweatt v. Painter, 339 U.S. 629, 631-32, 636 (1950) (violation of Equal Protection Clause to deny qualified blacks admission to University of Texas Law School, offering instead admission to newly established state law school for blacks); Sipuel v. Board of Regents of Univ. of Okla., 332 U.S. 631, 632-33 (1948) (per curiam) (Equal Protection Clause requires that blacks qualified to enter state professional school be admitted); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349-50 (1938) (repugnant to fourteenth amendment to afford whites in-state legal education but require black residents to go out of state).

115. 347 U.S. 483 (1954).

116. *See id.* at 492.

117. *See id.* at 495. In a companion case the Court held unconstitutional segregation in the public schools in the District of Columbia. Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). Since this segregation was the result of federal law, the fourteenth amendment which restricts the action of states was not directly applicable. The Court determined that the Due Process Clause of the fifth amendment, which does restrict the federal government, includes an equal protection component since both due process and equal protection stem

but this decision was not based on the conclusion that the framers intended such a result since the Court found the evidence of original intent to be inconclusive.[118] The Court reasoned that the separation of black children in public education generates a "feeling of inferiority," especially because it is mandated by law, which causes them to suffer from a lack of motivation to learn.[119] Such laws, therefore, hindered the educational development of black children and thereby deprived them of educational benefits white children enjoyed.[120] Thus, the Court concluded, separate public schools for the races could not be equal or be made equal because separation itself deprived black children of equal educational opportunities.

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from the "American ideal of fairness." *Id.* at 499. The Court reasoned that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than on the states. *Id.* at 500. Whatever may be the persuasiveness of this reasoning, the Court did not find its conclusion in the intent of the framers or in the language of the fifth amendment. *See* J. ELY, DEMOCRACY AND DISTRUST 32-33 (1980).

118. *See* Brown v. Board of Educ., 347 U.S. 483, 489 (1954). Raoul Berger sees this statement in *Brown* as a "veiled declaration" that the Court was ignoring the framers' intent so as to "revise" the Constitution in light of modern problems. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 131 (1977). One can just as accurately say that the Court applied the constitutional mandate of equal protection in light of the society existing in 1954 when the *Brown* case was decided rather than in light of the conditions prevailing in 1867 or 1868. Berger's description is framed so as to support his argument that the meaning or mandate of equal protection should be determined solely by strict adherence to the framers' specific intent in proposing and ratifying the Equal Protection Clause as part of the fourteenth amendment. The second description is founded on a recognition of the limits that should be placed on the constitutional significance of the framers' intent:

> The notion that the framers' specific intentions define an inviolable core of constitutional meaning . . . founders upon the same difficulty as to the notion, more clearly rejected by history, that those intentions establish the outer limits of permissible constitutional development: the issues for which subsequent generations have sought constitutional answers are not those that the framers addressed.
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> . . . . . .
>
> More fundamentally, we live in a world that they could not have contemplated, even in fantasy.

Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1068-69 (1981).

119. *See* Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

120. *See id.* at 494. The Court used as evidence for this proposition psychological and social science materials. *See id.* at 494 n.11. If the Court's decision in *Brown* does rest on this evidence of harm to black children in that this alone shows unequal treatment, does the inherently-unequal rule collapse when new, contradicting social science evidence arises? *See* Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-58 (1955). The answer is no because the Court could still find, as did Justice Harlan in *Plessy*, that the dominant motive for segregation was racial prejudice and whether quantifiable educational harm was caused thereby would be irrelevant.

Being "inherently unequal," segregation of the public schools was necessarily in violation of the guaranty of equal protection of the laws.[121]

Although the Court stressed the importance of public education in *Brown*, calling it the "most important function of state and local governments,"[122] it subsequently struck down laws which segregated public facilities of lesser importance.[123] These later cases show that the inherently-unequal rule is tied neither to education nor to the psychological harm caused blacks by legal separation of the races. If separation of the races is inherently unequal regardless whether the facilities provided blacks are equal and regardless of the interest affected, the conclusion that inequality exists must derive from the intention of the governmental agency responsible for segregation rather than from any quantifiable effect of the law itself. The Court realized in *Brown*, as Justice Harlan had realized in *Plessy*, that laws separating the races in public facilities were unequal because they were the result of a purposeful exclusion of blacks from the facilities used by the politically dominant white race. Since these laws would not have been enacted but for the intention to implement the belief by whites that blacks were not worthy enough to associate with them, one must conclude that segregation laws achieved for whites the benefits they sought at the expense of the powerless black race. Thus, when racial prejudice is the primary motivation for a law segregating the races that law is always unequal in its treatment of the groups.

Perhaps if candor had seized the majority in *Plessy*, those men would have been forced to recognize that the Louisiana legislature had assumed blacks as a class were too impure, unclean, or unwor-

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121. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

122. *See id.* at 493.

123. *See* Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam) (segregation prohibited in courtroom); Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam) (law requiring segregation of publicly operated restaurant held invalid); New Orleans City Park Improvement Ass'n v. Detiege, 252 F.2d 122 (5th Cir.), *aff'd per curiam*, 358 U.S. 54 (1958) (city cannot segregate public park); Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir.), *vacated per curiam*, 350 U.S. 879 (1955) (city cannot segregate municipal golf course); Dawson v. Mayor of Baltimore, 220 F.2d 386 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (segregation prohibited at public beach); Bynum v. Schiro, 219 F. Supp. 204 (E.D. La. 1963), *aff'd per curiam*, 375 U.S. 395 (1964) (segregated city auditorium prohibited); Dorsey v. State Athletic Comm'n, 168 F. Supp. 149 (E.D. La. 1958), *aff'd per curiam*, 359 U.S. 533 (1959) (segregation prohibited at athletic events); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956) (segregation prohibited on city buses).

thy to associate with the white race and that this hopelessly broad and unexamined assumption was the impetus for the legislature's separation of the races in railway cars. As Justice Harlan realized, these laws "proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches" with whites.[124] Since the same assumption was the moving force behind the segregation of public schools, the Supreme Court did not even discuss in *Brown* any purported justification for the states' action. Segregation was, therefore, inherently unequal because it was obviously intended to be so; and it was a violation of equal protection because bias in regard to race was deemed unacceptable by the Court as a motive for legal classification.

## IV. Beyond Race

### A. *Classification Based on Alienage*

In *Truax v. Raich*,[125] the Supreme Court held invalid under equal protection an Arizona law which required all employers of five or more employees in the state to hire at least eighty percent native-born citizens or qualified electors.[126] Raich was a resident alien whose job was to be terminated because of this law.[127] The Court conceded that a state may favor its own citizens when it had a "special public interest" in doing so, such as in regard to the regulation or distribution of the public domain, common property, or the resources of the people of that state but found the Arizona law not to be so limited.[128] Since no special reason for protecting

124. *See* Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

125. 239 U.S. 33 (1915).

126. *See id.* at 35.

127. *See id.* at 36.

128. *See id.* at 43. The special public interest doctrine concerned three particular types of public interests. First, a state was deemed to have a special interest justifying preference for its own citizens in regard to employment on public works even to the extent of prohibiting the employment of aliens. *See* Crane v. New York, 239 U.S. 195, 198 (1915); Heim v. McCall, 239 U.S. 175, 193 (1915). A state could also, consistent with equal protection, prohibit aliens from taking its wild game. *See* Patsone v. Pennsylvania, 232 U.S. 138, 144-45 (1914). The people of a state were said to have a special property right in this "common property," such that the taking of wild game was not a general privilege or immunity. *See* McCready v. Virginia, 94 U.S. 391, 395 (1877). A state also possessed the power to prohibit aliens from inheriting immovable property located in that state. *See* Blythe v. Hinckley, 180 U.S. 333, 341-42 (1901); Hauenstein v. Lynham, 100 U.S. 483, 484 (1880).

citizens existed and the challenged provision affected every business with more than five employees regardless of the nature of business done, the Court concluded that the reason for the classification was a bias in regard to the affected classes.[129]

In 1971 in *Graham v. Richardson*[130] the Court announced that classifications based on alienage were "inherently suspect" and would be subjected to strict scrutiny.[131] The laws challenged in *Graham* prohibited the grant of state welfare benefits to aliens.[132] The Court noted that the disadvantaged aliens were as needy as resident welfare recipients and otherwise as qualified for the benefits. The Court, noting the tendency of states to favor their own citizens,[133] found the alien class to be a "discrete and insular" minority for whom judicial concern was appropriate.[134] Aliens, like blacks, form a distinct, isolated class so that they can be more easily separated from the populace at large as the focus of governmental hostility. Moreover, since aliens constitute a powerless minority, without even the right to vote, none of the usual political restraints exist which would cause legislators to question their own biases or to fear acting on that basis. Considering these factors against the background of the inequalities to which aliens had been subjected, the Court had reason to be suspicious of the state's

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129. The Court found sufficient evidence of this bias in the statute itself.

> The purpose of an act must be found in its natural operation and effect [citations omitted], and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title . . . . It is an act aimed at aliens, as such, in the businesses described.

Truax v. Raich, 239 U.S. 33, 40-41 (1915).

130. 403 U.S. 365 (1971).

131. *See id.* at 376. Although the fifth amendment's requirement of due process requires the same type of equal protection analysis applicable to state action when federal law is challenged, the federal government has unique interests and responsibilities in regard to aliens which may justify its classification on that basis when such action could not be constitutionally undertaken by a state. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). Because the federal government has a variety of legitimate and important reasons for dealing with aliens differently, the Supreme Court will not presume those actions are invidious. *See* Matthews v. Diaz, 426 U.S. 67, 78-80 (1976). In other words, the Court has less reason to be suspicious of alienage classifications by Congress and will analyze these according to a lesser or narrower standard of review. *Id.* at 81-82.

132. *See* Graham v. Richardson, 403 U.S. 365, 366-67 (1971). As an alternative ground for the decision, the Supreme Court held that these state laws encroached on the exclusive power of the federal government to control the admission of aliens. *See id.* at 377-78.

133. *See id.* at 371-72 & n.5.

134. *See id.* at 372.

motives in denying needy alien residents welfare benefits and reason to scrutinize the justifications proffered for this treatment.[135]

The states argued that their discrimination was justified solely by their special public interest in favoring their own citizens in the grant of state money.[136] The special public interest doctrine stood for the proposition that the citizens of a state were more deserving of certain special benefits provided or controlled by that state.[137] The Court held that this doctrine was insufficient as a legitimate basis for classifying in regard to alienage because it was based on the fiction that a privilege, as opposed to a right, can be restricted for citizens; but the Court had previously rejected the notion that constitutional rights can be made to depend on whether a benefit is labeled a "right" or a "privilege."[138]

The Court also held that concern for the fiscal integrity of their welfare programs was not a sufficient justification for the states' discrimination against aliens.[139] Although saving taxpayers' money is a legitimate governmental purpose, that purpose does not explain why the savings were to be obtained at the expense of some needy residents simply because they were aliens. The facts in *Graham* do support the inference that aliens were chosen because of the perception of that class as somehow less deserving of these benefits. In the language of the Court's decision in *Yick Wo*, the alien plaintiffs in *Graham* were being subjected, as to their means of living, to the "mere will" of the state legislatures because no other motive independent of the wish to favor citizens and disfavor aliens existed to explain and to justify denying them welfare benefits.

Strict scrutiny as applied in *Graham* is significant because it means the Court will refuse to accept conclusory statements by the state in justification of an already suspect classification. The state, therefore, had to persuade the Court that the reason for the distinctions made in these laws was not hostility toward aliens or, viewed another way, favoritism toward citizens. What is most significant is that the Court was dealing with a type of classification

135. *See id.* at 371-72.
136. *See id.* at 372.
137. *Cf.* Truax v. Raich, 239 U.S. 33, 39-40 (1915).
138. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971).
139. *See id.* at 375-76.

which it had good reason to suspect might well be based on an arbitrary decision. History, judicial experience, and the nature of the classes affected would lead most people to suspect that the state legislatures involved were likely to have been motivated by bias rather than a rational determination of relevant qualifications.

By 1978 the Court had, however, held that a state could without violating equal protection reserve for citizens "state elective or important nonelective executive, legislative, and judicial positions."[140] Being responsible for the formulation and execution of public policy decisions, these governmental officers are the ones who, in a real sense, run the government through their discretionary authority.[141] It is reasonable for voters to insist that their governors be persons who have some minimum permanent alliance to this country and its form of government through the status of citizenship. Reserving these government positions to those who are citizens is not, therefore, seen by the Court as being motivated primarily by the assumption that aliens in general are less deserving.[142]

## B. *Classification Based on Gender*

In 1971 the Court was confronted with a challenge to an Idaho

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140. This language comes from dictum in Sugarman v. Dougall, 413 U.S. 634, 635, 643, 647 (1973). The Court first upheld an alienage classification supported by this justification in Foley v. Connelie, 435 U.S. 291, 300 (1978).

141. *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

142. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 439-41 (1982) (California statute requiring peace officers be citizens held constitutional; therefore, state could limit probation officers as peace officers to citizens); Ambach v. Norwick, 441 U.S. 68, 73-74 (1979) (New York law preventing certification of aliens as public school teachers not violative of equal protection); Foley v. Connelie, 435 U.S. 291, 296-97 (1978) (New York law requiring state police be United States citizens not violative of equal protection).

When a state seeks to justify an alienage classification by alleging it serves such a sovereign function, it must satisfy a two-step test. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982). First, the state must show that its restriction is not "so broad and haphazard as to *belie* the . . . claim that it is only attempting to ensure that an important function of government be in the hands of those having the 'fundamental legal bond of citizenship.' " *Id.* at 442 (emphasis added). The barring of aliens from any permanent position in a wide variety of state civil service jobs, some involving policy making and some involving only menial labor, would be too broad. *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973). Second, the state must be able to show that the position reserved for citizens is one which carries with it the power to formulate or execute broad public policy decisions. Cabell v. Chavez-Salido, 454 U.S. 432, 440-41 (1982). Lawyers are not officers of the government in this sense so aliens cannot be prevented from being admitted to the bar. *In re* Griffiths, 413 U.S. 717, 733 (1973).

law which required the appointment of a male petitioner as administrator of an estate whenever a male and female, standing in the same relation to the deceased, filed competing petitions.[143] In this case, *Reed v. Reed*, the adoptive parents of a deceased child filed competing petitions to be named as administrator of his estate; and the state court, finding both possessed the minimum qualifications but without determining the relative capabilities of the two, chose the father on the basis of this state law.[144] The Supreme Court declared that since the Idaho law provided such different treatment solely on the basis of sex, it was "subject to scrutiny under the Equal Protection Clause."[145] Without explaining why it was suspicious of such classifications, the Court proceeded to inquire into the justification for this disparate treatment. The state argued that its objective was to provide a means by which such contests could be resolved without requiring a hearing on the relative merits of the petitioners, which would add expense and delay to the process. The Court held that, although reduction of the workload of courts was a legitimate goal, this end could not be accomplished by giving one sex an absolute preference.[146]

Two years later in *Frontiero v. Richardson*,[147] Justice Brennan, in an opinion joined by three other Justices, explained that our country has had a long history in which discrimination against women has been rationalized on the basis of the perceived need to protect them from the harshness of reality.[148] On this basis laws were justified which prevented women from holding office, serving on juries, suing in their own name, or, as married women, holding property.[149] He also noted that sex was a characteristic that, like race and nationality, was determined by birth not choice and, therefore, rarely had any relevance to an individual's "ability to perform or contribute to society" or to that individual's other qualifications or merit.[150] Because of this history, he reasoned, classifications based on gender should be considered suspect and sub-

143. *See* Reed v. Reed, 404 U.S. 71, 72-73 (1971).
144. *See id.* at 73.
145. *See id.* at 75.
146. *See id.* at 76.
147. 411 U.S. 677 (1973).
148. *See id.* at 684-85.
149. *See id.* at 685.
150. *See id.* at 686.

jected to strict judicial scrutiny. Although the Court held the law challenged in *Frontiero* to be in violation of equal protection,[151] a majority of the Justices did not support Justice Brennan's conclusion that sex was a suspect classification.[152]

It was not until 1976 that the Court finally described the standard to be used in determining the constitutionality of gender-based classifications.[153] The Court in *Craig v. Boren* declared that classifications based on gender "must serve important governmental objectives and must be substantially related to achievement of those objectives."[154] In his concurring opinion, however, Justice Stevens expressed skepticism about the tiered analysis of equal protection challenges, viewing it as more of an explanation of result than a standard for decision. He went on to say that he suspected "that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms."[155]

### C. *Classification Based on Illegitimacy*

In 1968 the Supreme Court decided two cases, *Levy v. Louisiana*[156] and *Glona v. American Guarantee & Liability Insurance Co.*,[157] in which classifications based on illegitimacy of birth in a Louisiana statute were held to be in violation of equal protection.

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151. *See id.* at 691.

152. Justice Stewart concurred only in the judgment, citing *Reed*. *See id.* at 691 (Stewart, J., concurring). Justice Powell, joined by Chief Justice Burger and Justice Blackmun, found it unnecessary to characterize gender as a suspect basis for classifications. *See id.* at 691 (Powell, J., concurring).

153. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

154. *See id.* at 197. Justice Brennan wrote the opinion of the Court in which this standard was announced, and Justices White and Marshall joined without opinion. Justice Powell wrote a concurring opinion in which he expressed some concern about Justice Brennan's broad interpretation of *Reed* but agreed that gender-based classifications should be subjected to a higher level of scrutiny than allowed under the rational basis/due deference approach. *See id.* at 210 (Powell, J., concurring). Justice Blackmun concurred in Justice Brennan's opinion except to the extent of the discussion of the twenty-first amendment. *See id.* at 214 (Blackmun, J., concurring). Justice Stevens accepted this middle-tier approach though he expressed concern for the tiered approach as a whole. *See id.* at 211-12 (Stevens, J., concurring).

155. *See id.* at 212 (Stevens, J., concurring).

156. 391 U.S. 68 (1968).

157. 391 U.S. 73 (1968).

The *Levy* case arose when a suit was brought on behalf of illegitimate children to recover for the wrongful death of their mother.[158] The Louisiana wrongful death statute allowed a "child" to bring a suit for the death of a parent, but the Louisiana courts defined this term to include only legitimate children.[159] On the basis of the record the Supreme Court found that the deceased was the natural mother of the children for whom the suit was brought, that she had lived with and supported them as a mother, and that she had acted in every other way as a mother of the children.[160] It also determined that illegitimate children were "persons" within the scope of the Equal Protection Clause regardless whether the state viewed them as nonpersons in the legal sense.[161]

The critical issue in *Levy* was framed by the Court in the following terms: "When the child's claim of damage for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate?"[162] Or, to put it another way, since the illegitimate children were subject to all of the responsibilities that must be borne by legitimate citizens, why would a state legislature deprive them of the right to recover damages solely because they were born to parents who were not married? The Court answered its question in *Levy* by concluding that illegitimacy of birth is no reason at all for denying children their interest in recovering for the harm done their mother.[163]

A mother was suing in *Glona* for the wrongful death of her son, and the same Louisiana statute prevented her from recovering solely because the son was illegitimate.[164] The Court recognized that the state was classifying on this basis so as to punish for the commission of the sin of extramarital sexual intercourse.[165] In *Glona*, unlike *Levy*, the party who had committed this sin was being deprived of the statutory benefit.[166] Nevertheless, the Court

158. *See* Levy v. Louisiana, 391 U.S. 68, 69 (1968).
159. *See id.* at 70.
160. *Id.* at 70.
161. *Id.* at 70.
162. *Id.* at 71.
163. *See id.* at 72.
164. *See* Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 74 (1968).
165. *See id.* at 75.
166. *See id.* at 75.

determined that creating a windfall for tortfeasors who cause the death of illegitimates, which was the effect of the Louisiana law, was an irrational way of punishing the sin of extramarital sexual intercourse.[167] Furthermore, under the Louisiana statute the mother could have recovered for the wrongful death of a legitimate child even though she might also be the parent of another illegitimate child, that is, be obviously guilty of the sin.[168] The right to recover under the Louisiana statute was also a property right which could ordinarily be inherited; but grandparents, although innocent of the sin, were deprived of a right to recover for the death of the illegitimate offspring of their children.[169] In this way Justice Douglas's statement for the Court was clearly true—the fact of the illegitimacy of a tort victim became a total windfall for the tortfeasor responsible for his or her death. The life of an illegitimate child was thereby rendered less valuable than that of a legitimate child even though the child could not be responsible for the wrongdoing which allegedly prompted the state's action. The state's reason for such unequal treatment was its concern for sin, but to the extent the Louisiana law punished illegitimates the state's sole motive could only have been based on the assumption that those children were, as a class, morally sullied by their parents' wrongdoing and, therefore, less worthy than legitimate children.

Justice Harlan, dissenting in both cases, expressed perplexity in the face of the Court's rulings that Louisiana could not make distinctions on the basis of this legal status since the existence of a biological relationship alone provided no greater proof of lost love or lost economic support.[170] Justice Douglas responded by pointing out that the issue was not which relationship was more rational but whether the state could justify its classification solely on the legitimacy status of children;[171] therefore, when a state gives value to a child's life or gives a child the right to recover for a parent's life, it cannot deny these rights or that value to children who are otherwise equally qualified solely because they are deemed morally

167. *See id.* at 75.

168. *See* Levy v. Louisiana, 391 U.S. 68, 69 n.1 (1968).

169. *See id.* at 69 n.1.

170. *See* Glona v. American Guarantee & Liability Ins. Co., 391 U.S 73, 79-80 (1968) (Harlan, J., dissenting) (dissent also applies to Levy v. Louisiana, 391 U.S. 68 (1968)).

171. *See id.* at 75-76.

unworthy as a class. The Court did not choose the biological relationship over the legal relationship; it instead denied the state power to treat so differently two children when both had enjoyed the same living arrangements or relationships with their mothers, solely because one was labeled in law as illegitimate because of no fault of his own.

When, however, the arbitrary assumption of unworthiness does not appear to be the primary moving force behind such legislative enactments, the Court has allowed classifications on the basis of illegitimacy to stand.[172] When a state imposes a more onerous requirement on one claiming to be the illegitimate child of a man who has died without leaving a will, the state may well be motivated by the need to provide for the orderly disposition of property at death. Also under these circumstances there exists the danger that unscrupulous persons could by making false claims extort settlements from the legitimate heirs. To allow these claims on the same footing as any other would make estates vulnerable to such extortion because the alleged father, being dead, could not dispute the claim. Moreover, no inference can ordinarily be drawn against paternity just because the claimant had not cohabited with or been supported by the deceased. Experience shows that the male parent of an illegitimate child often neither cohabits with nor supports such children; and, unlike mothers who give birth, there would not exist any medical evidence definitely connecting the father with the child.

Justice Brennan, in his dissent in *Lalli v. Lalli*, contended that the state might under these circumstances simply increase the usual burden of proof from a preponderance of the evidence to a standard requiring clear and convincing evidence, thereby allowing true claims by illegitimates while reducing the danger posed by false ones.[173] The Court held, however, that the state need not do the best possible job in assuring that all natural children recover. It reasoned that equal protection does not focus on fairness in the abstract "but on whether the statute's relation to the state interests . . . is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment."[174] Since it is the Supreme Court

172. *See* Lalli v. Lalli, 439 U.S. 259 (1978).
173. *See id.* at 279 (Brennan, J., dissenting).
174. *See id.* at 273.

which will ultimately decide whether the relationship is so "tenuous" as to lack sufficient "rationality," the crucial question, at least when judicial scrutiny is applied, is how does the state prove rationality or, conversely, how does the challenger prove insufficient rationality.

In *Trimble v. Gordon* the challenged Illinois law allowed an illegitimate child to recover from his father's estate only if the father and mother had intermarried and the father had also acknowledged the child.[175] Deta Trimble had been judicially declared the child of Sherman Gordon during his lifetime, and he was ordered to pay for her support.[176] She was prevented from inheriting from his estate through intestate succession solely because he had never married her mother.[177] Viewing the operation of the law in this case and assuming the legislature intended this result, it becomes very difficult to conclude that the state was primarily concerned with providing protection against spurious claims by persons alleged to be the illegitimate children of the deceased. The record in *Trimble* more strongly supports the conclusion that the state was primarily motivated by the assumption that illegitimate children were morally or otherwise unworthy of sharing the estate with a man's legitimate family unless he had cleansed them of their "shame."

In *Lalli*, a not overly generous New York law at least permitted an illegitimate child to inherit if, during the father's lifetime, a court of competent jurisdiction had declared his paternity in a proceeding initiated within two years after the child's birth.[178] The Supreme Court was not concerned with the two-year limitation period because no paternity proceedings had ever been initiated and the question was not presented for decision.[179] The claimant in

175. *See* Trimble v. Gordon, 430 U.S. 762, 764-65 (1977).

176. *See id.* at 764.

177. *Cf. id.* at 765.

178. *See* Lalli v. Lalli, 439 U.S. 259, 261-62 (1978).

179. *See id.* at 267 n.5. A one-year limitation on paternity suits, running from the birth of the child, was held a violation of equal protection in Mills v. Habluetzel. *See* ___ U.S. ___, ___, 102 S. Ct. 1549, 1556, 71 L. Ed. 2d 770, 779 (1982). There is also reason to believe that even longer periods which were not in accord with those allowed for support claims by legitimate children would be unconstitutional. *See id.* at ___, 102 S. Ct. at 1558, 71 L. Ed. 2d at 782 (O'Connor, J., joined by Burger, C.J., Brennan and Blackmun, JJ., concurring); *id.* at ___, 102 S. Ct. at 1558, 71 L. Ed. 2d at 782 (Powell, J., concurring); *see also* Pickett v. Brown, ___ U.S. ___, 103 S. Ct. 2199, ___ L. Ed. 2d ___ (1983) (two-year limitation period on

*Lalli* had filed with the state court a notarized document signed by the alleged father in which he, in consenting to the claimant's marriage, referred to the claimant as "my son." There were also affidavits by others who swore the alleged father had openly acknowledged the claimant as his son.[180] The Court held that this "evidentiary" requirement of the New York law was not so tenuously related to the state's legitimate purpose as to lack sufficient rationality.

It is difficult to discern the difference between the statute challenged in *Trimble* and the one challenged *Lalli* that prompted the Court to find the latter but not the former sufficiently related to the end of protecting estates against spurious claims.[181] Both statutes would be effective in avoiding the swearing match which might otherwise occur if the claims of alleged illegitimate children were allowed subject only to the usual preponderance of the evidence standard. Both statutes prevented such claims even when there existed credible evidence beyond the testimony of the claimant to prove paternity.[182] Justice Powell, writing for the Court in *Lalli*, distinguished *Trimble* by arguing that the Illinois statute was excessively restrictive of these claims while the New York statute in *Lalli* did not disqualify an "unnecessarily large number of children born out of wedlock."[183]

He went on to explain this difference by noting the legislative history of the statute in *Lalli* which "clearly illustrates" the state's desire to protect the rights of illegitimates to the extent practicable while also protecting estates from spurious claims.[184] He concluded that the New York law "represents a carefully considered legislative judgment as to how this balance best could be achieved."[185] Thus, he based his decision in *Lalli* on the evidence which proved the New York legislature had been motivated by "legitimate" considerations. In writing for the Court in *Trimble*, Justice Powell saw

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paternity suits by certain illegitimate children violates equal protection).

180. *See* Lalli v. Lalli, 439 U.S. 259, 262-63 (1978).

181. In *Lalli*, Justice Blackmun argued that *Trimble* should be overruled because he was not convinced by the plurality's explanation of the differences between the two cases. *See id.* at 277 (Blackmun, J., concurring).

182. *See id.* at 272-73.

183. *Id.* at 273.

184. *Id.* at 274.

185. *Id.*

the essential question to be whether the state's attempt was "carefully tuned" to its legitimate ends so as to not broadly discriminate against illegitimates.[186] In that case, however, the Illinois statute was so broad as to belie the legislature's claim that it had been primarily moved to make such a classification by the fear of spurious claims.[187]

These two decisions did not turn solely on the degree to which the state statutes adequately balanced the interests of illegitimates and estates.[188] They turned instead on the Court's conclusion, reached after considering the statutes and their operation, that the legislature of New York had been primarily motivated by the desire to deal with the danger of spurious claims while the legislature of Illinois had not.

### D. *Classification in Regard to Voting*

In *Reynolds v. Sims*[189] the Court held that the Equal Protection Clause prohibits a state from diluting the weight of a citizen's vote in regard to representation in the state legislature solely because of that citizen's place of residence.[190] In *Reynolds*, the rural-dominated Alabama state legislature, though required to do so by the state constitution, had failed to periodically reapportion itself to reflect population shifts or growth.[191] As a result, according to the 1960 census, 25.1% of the state's population resided in senatorial districts from which a majority of the members of the Alabama Senate were elected, and 25.7% of the state's population resided in counties which could elect a majority of the members of the Alabama House of Representatives.[192] One county with a population of 13,462 was represented by two seats in the House, while another county with 314,301 residents had only three seats. One county with a population of over 600,000 was represented by only one senator, while one senator also represented another county with only 15,417 residents.[193]

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186. Trimble v. Gordon, 430 U.S. 762, 772 (1977).
187. *See id.* at 772-73.
188. *Cf.* Lalli v. Lalli, 439 U.S. 259, 274 (1978).
189. 377 U.S. 533 (1964).
190. *See id.* at 566.
191. *See id.* at 540-41.
192. *See id.* at 545.
193. *See id.* at 545-46.

The Court declared that the concept of equal protection is to be viewed as requiring equal or uniform treatment in regard to people who stand "in the same relation to the governmental action questioned . . . ."[194] Since there existed no question but that the voters in populous counties were as qualified as the voters in sparsely populated counties, the only basis for diluting the effect of the votes of the first group while inflating the effect of the votes of the latter group was their respective places of residence. The Court held that place of residence was not a legitimate basis for such differentiation.[195]

The Court also said that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."[196] It is not surprising, therefore, that the "right"or interest in equal voting power has played a significant part in the use of *Reynolds v. Sims* as an equal protection precedent. Looking beyond this important interest for a moment, however, one can see two possible reasons for the Alabama legislature's continuation of a system which gave preference to rural voters at the expense of urban voters. First and most obvious, the members in control of the legislature, being dependent on the existing system for their reelection and their continuing control in the legislature, maintained the system because it was in their personal and political interest to do so. In other words, the representatives in the Alabama legislature continued the system because it continued them in power. Second, their action may have been influenced by the self-serving notion that rural residents were more stable and more capable and, therefore, more worthy of controlling state government.

The Court explained the need for its scrutiny by noting that ours is a representative form of government which is nothing less than "self-government through the medium of elected representatives."[197] If government is to be truly representative, there must be effective participation by every citizen. To argue that government should be controlled by a minority of the qualified voters goes against the very essence of this concept of representative democracy. Moreover, to allow those who draw their governing power

194. *Id.* at 565.
195. *See id.* at 568.
196. *Id.* at 567.
197. *Id.* at 564-65.

from this minority-control system to continue it solely because it serves their interests is to surrender some part of the people's right of self-government.

Although the Court was prompted to consider this equal protection challenge because of the serious implications of the harm caused, Alabama's classification was one which, because of of its very nature, compelled the Court to suspect that the legislature's motives were not legitimate. Once scrutiny was applied, the Court needed only to hold that continuation of the existing system even in the face of a state constitutional mandate to reapportion could not be justified by legislative self-interest. As Justice Clark noted in his concurrence, the Court needed only to find that the system clearly revealed "invidious discrimination . . . and [is] therefore violative of the Equal Protection Clause."[198] In addition, the assumption that rural voters are more worthy of controlling government must also fail as a justification since, as the Court stated, "[a] citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm."[199]

Two years later in *Harper v. Virginia Board of Elections*,[200] the Supreme Court cited *Reynolds* for the proposition that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[201] Stating that the ability to pay a fee has no relation to voter qualifications, the Court in *Harper* held that a tax of $1.50 imposed as a prerequisite for voting was a violation of the Equal Protection Clause.[202] The state argued that since it can demand a fee for a driver's license, it should also be able to demand a reasonable fee for voting as long as it is uniformly applied.[203] The Court dispensed with this argument with the terse statement that the interest of a state "when it comes to voting, is limited to the power to fix qualifications."[204]

The state contended, in essence, that the poll tax was simply a way of collecting revenue and was not set so high as to deprive anyone of the right to vote. There were two defects in this position.

198. *Id.* at 588 (Clark, J., concurring).
199. *Id.* at 568.
200. 383 U.S. 663 (1966).
201. *Id.* at 667.
202. *See id.* at 670.
203. *See id.* at 668.
204. *Id.* at 668.

First, the poll tax revenue was not collected for the purpose of paying the administrative costs of elections. It instead went to support public schools or was returned to the counties for general purposes.[205] Second, the primary penalty for failure to pay the tax was denial of the right to vote, not enforcement of the tax as a financial obligation.[206] The state's argument was weakened by these facts because the first indicated that a rather arbitrary[207] process existed for determining the amount of the tax and the second indicated that the state's primary concern seemed to be the restriction of the franchise rather than the collection of tax revenue.

In this light it becomes more understandable why the Court, already suspicious of discrimination in regard to voting after *Reynolds*, would not believe the state had an adequate reason for restricting the voting rights of those citizens who were unable to pay the fee. Assuming the legislature gave thought to the matter, the facts tend to lead to the conclusion that the poll tax was imposed primarily because of some unspoken preference for those with sufficient resources or, perhaps more accurately, for those to whom the payment of the tax would be less of an inconvenience. Or, it might be said that the poll tax appears to have been enacted as a result of the notion that those who could not or would not pay $1.50 did not deserve the "privilege" of voting. Since the state's justification was being "meticulously scrutinized," it had the burden of showing that its action did not arise from such unacceptable notions, and it failed to carry that burden.

### E. *Classification in Regard to Access to Justice*

In *Griffin v. Illinois*,[208] a state law provided the right of appeal to all defendants convicted in a criminal case. In order to take advantage of this right a stenographic transcript of the trial proceedings was required.[209] The petitioners, Griffin and Crenshaw, after having been convicted sought to have a transcript provided them

205. *See id.* at 664 n.1.

206. *See id.* at 664 n.1.

207. The process was arbitrary because nothing but the will of those establishing the tax controlled the amount chosen. If $1.50 could be chosen, so could a larger amount; and since the amount was not related to the costs of administering elections, no standard existed by which the set fee could be evaluated.

208. 351 U.S. 12 (1956).

209. *See id.* at 16.

without cost because they were without funds to pay for it.[210] Although the Illinois law allowed a free transcript under some circumstances,[211] it did not provide for one in their case. As the Court saw the case, these individuals, because they had no money to purchase a transcript, were denied the right to obtain adequate appellate review even though the record of their trial might contain errors that would otherwise require reversal.[212] This, the Court held, violated equal protection.[213]

Justice Black, speaking for the Court, discussed the importance of the concept of equal justice under which all persons come before the law to be judged on their guilt or innocence, not on the basis of their status.[214] He went on to find that the ability of one to pay an amount of money in order to obtain adequate appellate review has no relationship to his guilt or innocence.[215] Even though due process does not require a state to provide a right to appeal in criminal cases, once it chooses to do so, he reasoned, it cannot deny that right to some defendants solely because they are poor.[216]

In *Griffin* there was no other reason for denying the petitioners appellate review since they had not failed to abide by time limits in seeking review, nor had the Illinois appellate court denied review on the ground their allegations of error were insufficient. They had been unable to obtain adequate appellate review solely because they were unable to obtain a transcript, and they were unable to obtain the transcript solely because they had no money with which to pay for it. Assuming the existence of error at trial has a direct relation to the question of defendant's guilt, one can conclude that being able to pay for a transcript could become the crucial factor in determining guilt or innocence in a criminal prosecution. Although the Court hesitated to require the state to pay for transcripts to remedy this unequal treatment,[217] it clearly did find that the state could not justify the inequality by contending that it

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210. *See id.* at 13.

211. *See id.* at 15 (free transcripts allowed for appeals involving constitutional questions, but not trial errors such as sufficiency of evidence).

212. *See id.* at 16.

213. *See id.* at 19.

214. *See id.* at 16-17.

215. *See id.* at 17-18.

216. *See id.* at 18.

217. *See id.* at 20.

was seeking to save money.[218] The state was not, of course, responsible for anyone's poverty, but it could not discriminate in this fashion on the basis of one's ability to pay because the financial ability of a defendant is irrelevant to questions of his guilt or innocence.

Although today the "poor" have shown that they are not always a politically powerless minority perhaps, in part because as to certain issues they may constitute a majority, the more limited class of indigent, convicted criminals does fit within the powerless category. One need only describe the class in these terms to recognize how a legislature might be prompted to conclude that its members are not deserving of what might be viewed as "extra" state protection, that is, the provision of state moneys. It can be argued, therefore, that it is the nature of this disfavored class which also justifies the application of judicial scrutiny because it shows how a legislature might tend arbitrarily to disfavor this group. Judicial scrutiny is called for not so much because a right to equal justice is denied but because the facts available in these circumstances provide support for the conclusion that equal treatment was denied without good reason.

### F. *Classification in Regard to Interstate Migration (Based on Duration of Residence)*

The Court's decision in *Shapiro v. Thompson*[219] held unconstitutional the laws of several states and of the District of Columbia which withheld welfare benefits from residents until they had resided in that jurisdiction for at least one year.[220] The separate appeals decided in this case all presented the same basic issue, that is, whether indigent residents could be denied welfare, even though they were otherwise qualified, solely because they had not satisfied a one-year residency requirement.[221] These challenges were brought by persons who for various reasons had moved to or returned to jurisdictions imposing this requirement. In one case a teenage unwed mother who was pregnant moved to Connecticut to live with her mother and was forced to apply for welfare when her

218. *Cf. id.* at 17-18.
219. 394 U.S. 618 (1969).
220. *See id.* at 622-27.
221. *See id.* at 627.

mother became unable to support her. Being pregnant, she was unable to work or enter a job training program.[222] In another case a mother, suffering from cancer, had moved with her three children to Washington to be near members of her family.[223] Another appellee had upon her return to the District of Columbia been committed to a mental hospital and though eligible for release to a foster home could not be transferred because her transfer depended on welfare payments for the foster home care.[224] In another case an appellee and her five minor children had moved to Pennsylvania to live with her father but was forced to apply for welfare when he lost his job.[225]

The Court found that the one-year residency requirement created two classes of needy resident families which were indistinguishable except that the disfavored class consisted of members who had not resided in the respective jurisdictions for one year prior to application.[226] The states and the District of Columbia presented a variety of justifications for this distinction. In one category were the governmental interests which the Court found to be totally unacceptable as justifications for the one-year residency requirement. In the other category were those interests the states claimed were promoted by the one-year requirement, which although legitimate were not accepted because the Court did not believe they actually prompted the enactment of the one-year requirement.

In the first category were the arguments that the requirement deterred migration into the states by indigents and thereby protected the funds available to assist long-term residents,[227] discouraged migration by those indigents who would otherwise flock to states with higher benefits,[228] and generally operated to preserve benefits for long-term residents to compensate them for their past tax contributions to the community.[229] The Court found the evidence indicated that the most likely reason for the one-year resi-

222. *See id.* at 623.
223. *See id.* at 624.
224. *See id.* at 624.
225. *See id.* at 626.
226. *See id.* at 627.
227. *See id.* at 627-28.
228. *See id.* at 631.
229. *See id.* at 632.

dence requirement was to keep indigents from moving into the states[230] and concluded that the requirement was well suited to accomplish that end.[231] Achieving this purpose through discrimination which operated to deprive new residents of welfare benefits was, however, deemed constitutionally unacceptable because it conflicted with the right to travel, which the Court found was implicitly protected by other constitutional provisions.[232] As the Court saw it, a state could not justify unequal treatment of similarly situated persons by attempting to pursue an end which is inconsistent with constitutional protections independent of equal protection.[233]

The Court found the second argument, deterrence of those who might migrate for higher benefits, based on a nonrebuttable presumption that all who apply in their first year of residence had come to that jurisdiction solely to obtain higher benefits.[234] This presumption was totally devoid of any factual basis in the cases before the Court[235] and, more importantly, was necessarily based on the assumption that those who enter a state for this reason are unworthy of welfare assistance.[236] The Court also found unacceptable the state's purpose of rewarding long-term residents for their past tax contributions.[237] Even overlooking defects in this argument as applied to this case, such as the past residence in those states by some of the plaintiffs, the Court was unable to accept this justification because to do so would be to accept the proposition that every governmental benefit or service could be apportioned according to tax contributions.[238] This would mean a state could openly provide the best education, police protection, or fire protection to the wealthy or to those who had because of long-term residence paid larger amounts in taxes while providing these services in reduced degrees to new residents or the less wealthy.

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230. *See id.* at 628.
231. *See id.* at 629.
232. *See id.* at 629-31.
233. *See id.* at 631.
234. *See id.* at 631.
235. *See id.* at 631.
236. *See id.* at 631-32. The Court found no real difference between moving to a state to obtain higher welfare benefits and moving to a state to enjoy its better educational or other governmental benefits. *See id.* at 632.
237. *See id.* at 632.
238. *See id.* at 632-33.

Behind all these arguments was the interest in saving money or protecting the fiscal integrity of those programs a state had established. Although this is a legitimate concern, the Court concluded that the states may not accomplish this purpose by making invidious—that is, unjustifiable distinctions—between otherwise similarly qualified classes of its citizens.[239] The effort to save money does not explain why the states chose to do so at the expense of a class of indigent residents whose members had not resided one year in the state. In the other category were proffered justifications based on the state's alleged attempts to facilitate fiscal planning, provide an objective test for residence, minimize the opportunity for welfare fraud, and encourage early entry into the work force.[240] In considering the evidence the Court was not convinced that these reasons played any part in the enactment of the one-year requirement.[241]

The Court said that since the states and the District of Columbia had classified in regard to the fundamental right of interstate travel or migration, the classification was to be judged under a stricter standard so that the states must show the unequal treatment promoted a compelling state interest.[242] That burden could not be carried because they were unable to convince the Court that anything other than the direct discriminatory effect of this requirement was intended. Long-term residents were given benefits and new arrivals were not primarily because the legislatures believed new residents did not yet deserve state welfare payments.

In *Zobel v. Williams*[243] the Court held that an Alaskan scheme for distributing that government's windfall oil revenues to its adult citizens, based on the length of residence in Alaska, was a violation of equal protection.[244] Although Justice O'Connor concurred in the judgment on another ground,[245] Justice Rehnquist was the lone dissenter, criticizing the Court for citing right-to-travel cases because those involved state laws which impeded the ability to mi-

239. *See id.* at 633.
240. *See id.* at 633-34.
241. *See id.* at 634-38.
242. *See id.* at 638.
243. ___ U.S. ___, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982).
244. *See id.* at ___, 102 S. Ct. at 2310, 72 L. Ed. 2d at 675.
245. *See id.* at ___, 102 S. Ct. at 2322, 72 L. Ed. 2d at 689 (O'Connor, J., concurring).

grate to those states.[246] The Alaskan plan would hardly deter anyone from moving to Alaska since new arrivals would be rewarded for establishing that residence.[247] Joined by Justice Stevens, Chief Justice Burger determined, however, that the law did not even pass the minimum rationality test.[248] In other words, the state could not show that its discrimination on the basis of length of residence was rationally related to a legitimate governmental interest.

Justice Brennan, writing for three other members of the Court, placed emphasis on the essence of the fundamental interest in having the freedom to travel which, he reasoned, arose from the concept of equal citizenship.[249] The substance of this concept is drawn from "the ideal of equal protection [which] requires attention" to current individual needs because these are the only relevant characteristics for determining the legitimacy of discriminations between persons.[250] He viewed discrimination on the basis of a past event, such as when one moved to the state, as contrary to this concept and, as well, contrary to the Citizenship Clause of the fourteenth amendment.[251] In short, because any discrimination in regard to duration of residence is invariably based on the "unstated premise that 'some citizens are more equal than others,'" equal protection must prohibit this type of discrimination.[252]

It is difficult to disagree with Justice Rehnquist's conclusion that Alaska did not negatively affect migration to that state. If the Alaskan grant of funds to new residents had any effect, it would be to encourage the residents of other states to move there. Also, the rational basis test applied by Chief Justice Burger has traditionally called for little or no judicial scrutiny and operates with a presumption of constitutionality which requires a challenger to carry the burden of showing that no possible justification for the challenged inequality could exist. Under this approach actual justifica-

246. *See id.* at ___, 102 S. Ct. at 2324-25, 72 L. Ed. 2d at 691-93 (Rehnquist, J., dissenting).

247. *See id.* at ___, 102 S. Ct. at 2324, 72 L. Ed. 2d at 692 (Rehnquist, J., dissenting).

248. *See id.* at ___, 102 S. Ct. at 2315, 72 L. Ed. 2d at 681.

249. *See id.* at ___, 102 S. Ct. at 2316-18, 72 L. Ed. 2d at 681-85 (Brennan, J., concurring).

250. *See id.* at ___, 102 S. Ct. at 2318, 72 L. Ed. 2d at 684 (Brennan, J., concurring).

251. *See id.* at ___, 102 S. Ct. at 2318, 72 L. Ed. 2d at 684-85 (Brennan, J., concurring).

252. *See id.* at ___, 102 S. Ct. at 2318, 72 L. Ed. 2d at 685 (Brennan, J., concurring).

tion is rarely needed by the state.

Justice Brennan in his opinion stated that "those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare."[253] This is because, he explained, the length of one's residence "has only the most tenuous relation to the actual service of individuals to the State."[254] Viewed in a different way, this opinion indicates that Justice Brennan and three other Justices did not believe the Alaska legislature had been motivated to make this distinction because of the belief that the longer one had resided in Alaska, the greater the contributions to the state. As he saw it, "resort to duration of residence as the basis for a distribution of state largesse does closely track the constitutionally untenable position that the longer one's residence, the worthier one is of the State's favor."[255]

Again it can be seen that it is not so much interference with the right to travel which prompts judicial scrutiny. It is, instead, a realization of the likelihood that unequal treatment of new residents is so often the result of an arbitrary decision which causes the Court to be suspicious of such classifications. This suspicion is justified because the political and, in this case, the financial self-interest of elected officials is well served by preferring established residents who will constitute the overwhelming majority of the voting populace and will invariably control all elements of power and influence in the state. New residents will be, as a class, politically and otherwise powerless to protect themselves against the biased actions of a legislature. In effect, elected officials will have great incentive to favor established residents and no reason to fear the reaction of new residents when they do so.

### G. *Quasi-Suspect and Quasi-Fundamental Interests*

Although the Court in *San Antonio Independent School District v. Rodriguez*[256] appeared to have set itself firmly against the identification of any new fundamental interests in equal protection analysis while holding that the right to equal provision of educa-

253. *See id.* at ___, 102 S. Ct. at 2318, 72 L. Ed. 2d at 684 (Brennan, J., concurring).
254. *See id.* at ___, 102 S. Ct. at 2318, 72 L. Ed. 2d at 684 (Brennan, J., concurring).
255. *Id.* at ___, 102 S. Ct. at 2318, 72 L. Ed. 2d at 685 (Brennan, J., concurring).
256. 411 U.S. 1 (1973).

tional services was not such an interest,[257] a majority of the Court in the recent case of *Plyler v. Doe*[258] accepted the argument that when a state discriminates against the school age children of illegal aliens by preventing their enjoyment of a free public education, at least heightened scrutiny must be applied.[259] In *Plyler*, two Justices concurred stressing the importance of the interest affected but did not call for the strict scrutiny which would be prompted by the identification of education as a fundamental interest.[260] Chief Justice Burger, in his dissent, characterized this mixed approach as one in which a quasi-suspect class and a quasi-fundamental interest were combined in order to require intensified scrutiny.[261]

Justice Brennan, writing the opinion of the Court, agreed that education was not a fundamental interest and also conceded that undocumented aliens could not be considered a suspect class because their illegal residence could well be relevant to the achievement of legitimate governmental objectives.[262] The Court, therefore, could not presume that a distinction made on the basis of legality of an alien's residence was irrational and arbitrary. Justice Brennan did insist, however, that a state must be furthering some "substantial goal" before it could constitutionally deprive the school age children of undocumented aliens, who could not be held responsible for their illegal status, of such an important interest.[263] In a footnote he explained what had prompted the Court to treat certain classifications as suspect.

> Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal . . . . Legislation

257. *See id.* at 35-38. The Court stated that before an interest could be deemed fundamental for equal protection purposes it must be explicitly or implicitly guaranteed in some other provision of the Constitution. *See id.* at 33-34.

258. ___ U.S. ___, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

259. *See id.* at ___, 102 S. Ct. at 2402, 72 L. Ed. 2d at 808.

260. *See id.* at ___, 102 S. Ct. at 2404, 72 L. Ed. 2d at 810 (Blackmun, J., concurring); *id.* at ___, 102 S. Ct. at 2406, 72 L. Ed. 2d at 813 (Powell, J., concurring).

261. *See id.* at ___, 102 S. Ct. at 2409, 72 L. Ed. 2d at 817 (Burger, C.J., dissenting).

262. *See id.* at ___, 102 S. Ct. at 2398, 72 L. Ed. 2d at 803.

263. *See id.* at ___, 102 S. Ct. at 2398, 72 L. Ed. 2d at 803.

> imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.[264]

Also, when a legislature denies a benefit to or imposes a burden on a class because of characteristics or circumstances over which the members have no control, it will often be acting in an irrational manner. If we assume government grants a benefit for the ultimate purpose of either encouraging the action rewarded or providing for those unable to provide for themselves, denial of the benefit to one because of some circumstance over which that person has no control appears incongruous and contradictory. Moreover, a legal burden is usually imposed to deter certain action, so why would a rational person seek to penalize someone because of a circumstance which that person cannot affect? In this light the Court was justifiably suspicious when Texas decided to penalize school age children because their parents had illegally entered the United States.[265]

The majority of the Court in *Plyler*, including the concurring Justices, emphasized the importance of education as a way to escape poverty or other disabilities of lower class status.[266] State denial of welfare for the support of the dependent children of illegal aliens would, apparently, not require justification by the state. Even if the absence of an interest with the "class mobility" importance of education were not a sufficient distinction, it might be argued that such benefits are paid to parents, who would not be innocent of their illegal status, to assist them in supporting their families. There are, however, other benefits which would be more directly denied the minor children of undocumented aliens, such as free nonemergency medical care. These minor children, innocent of any responsibility for their illegal status, would be similarly situated in all relevant qualifications with legal, indigent residents requiring such care. Under these circumstances the Court might well conclude, using the reasoning of Justice Brennan, that the state should come forward to justify its unequal treatment. On the other

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264. *Id.* at ___, 102 S. Ct. at 2394 n.14, 72 L. Ed. 2d at 799 n.14.

265. *See id.* at ___, 102 S. Ct. at 2396, 72 L. Ed. 2d at 801.

266. *See id.* at ___, 102 S. Ct. at 2398, 72 L. Ed. 2d at 803; *id.* at ___, 102 S. Ct. at 2404, 72 L. Ed. 2d at 810 (Blackmun, J., concurring); *id.* at ___, 102 S. Ct. at 2406, 72 L. Ed. 2d at 813 (Powell, J., concurring).

hand, the Court could choose to go no further than *Plyler*, which is grounded in part on the serious effect of deprivation of education. An interest is, however, important only in regard to some purpose or end; and although education can be seen as necessary to class mobility, so can job training or relief from debilitating physical ailments or relief from starvation.[267] In short, even with the education emphasis in *Plyler* the Court could logically move to strike other laws which directly deprive the minor children of illegal aliens of sorely needed public support. This is because in the underlying logic of equal protection deprivations of this class of people is not likely to be based on a rational decision but instead derived from broad, unsubstantiated, and unjustified assumptions as to the worthiness of these children for state aid.

## V. THEORY

To discover the obscure message in the equal protection opinions written by the Supreme Court over more than a century requires one to examine the language of those opinions in a different light and to theorize as to the possible meanings of that language. The reader of such an attempt must wonder why those Justices did not clearly articulate their message if it was intended. There is no simple answer to this question, but there are reasons for the obscurity.

The Supreme Court labors under a dual obligation in deciding cases brought before it. First, the Court must decide issues which can be described as very difficult. Those cases that can be adequately decided by the mechanical application of precedent rarely reach the Court unless the challenge is to the existing law itself. In a sense, therefore, issues come before the Court precisely because they require policy decisions and because that exercise of judgment is required of the final arbiter of constitutional law. Second, the Supreme Court decides cases through stated reasoning in opinions. These opinions provide a basis for criticizing the decision and for predicting the outcome of future cases. In anticipation of criticism the Court often strains to align its decision with the original intent of the framers while dealing with questions that were never considered by them.[268] In using the Court's opinions as precedent there is

267. *Cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

268. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975).

always the tendency to simplify intricate reasoning so as to derive a shorthand statement of a manageable rule. The need for simplification thus operates to obscure further that which the Justices may have only glimpsed dimly or may have feared to explain openly. In addition, the cases show that the "meaning" of the Equal Protection Clause has never been static; it is the ever-changing product of elaborations necessitated by the variety of circumstances to which equal protection has been applied.[269]

As a result of all this, any attempt to create an answer for the conundrum of equal protection requires both the writer and the reader to use their imaginative faculties. It is often said that imagination is not the strong suit of lawyers, but then what other profession could have held so stolidly to a separate-but-equal conception for over fifty years while living in the maw of such depressingly real contradictions. Imagination is but an intellectual tool; it was used by the Supreme Court to construct a fiction in *Plessy* and to dismantle it in *Brown*. In this article imagination is used to allow one to walk away from the commands of established doctrine and return from a different direction to the questions of what is equal protection law and should it be so.

A different perspective is also necessary for judging the legitimacy of the Supreme Court's use of its interpretive discretion. This society should be concerned about the control it has over government; but, the need for control over the Supreme Court cannot be weighed without also asking what society wants from the Court. Do we, for instance, wish to create a "super-bureaucracy" for fear of a "super-legislature"? "Activism" does not tell us much of the humane forces which often seem to prompt decisions; it does, however, tell us of the critic's stand on the abstract institutional issue raised. There is more to the Constitution and the Supreme Court's use of it, however, than is captured in buzz-words or the statements of legal rules and philosophies. Justice is not done solely through rules; it is done by persons who possess authority and a strong sense of the fair application of rules. Anyone who has sought to correct the error of a computer through correspondence with that machine can realize how strict adherence to rigid rules sometimes sacrifices fairness. Before, therefore, we judge the Court, we should examine how it has attempted to do justice

269. *Cf.* Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1068 (1981).

through the Equal Protection Clause.

The opinions of the Court in the foregoing cases evidence one primary decision which is, one must admit, not openly stated. Simply put, this is the Supreme Court's interpretation of the Equal Protection Clause as a prohibition of arbitrary governmental differentiation between people in the imposition of burdens or in the provision of benefits. Even though in the fundamental-interest cases the Court tends to speak of an individual's right to vote, to travel, or to have access to justice, equal protection decisions in general can only be explained, as a first step, by recognizing the Court's constant concern for the arbitrariness of the motives for challenged governmental classifications. The implications of this interpretation are moderated by the Court's further realization that every governmental classification cannot be scrutinized for arbitrariness. This is evidenced by the use of judicial scrutiny only once a particular type of classification has been identified as suspect or suspicious. Few would doubt, considering the realities of the legislative process, that in far more instances than those identified by the Court lawmakers are motivated by self-interest, bias, or other questionable concerns. Unless, however, a classification is one of those lifted out of the lowest tier, the Court gives such deference to the legislature that no reason need be given for its decision. In consequence, these nonsuspicious classifications are beyond equal protection in the sense that the legislature has the power to use them at will.[270]

To make constitutional law in light of its interpretation of the Equal Protection Clause while recognizing the impossibility of immediately transforming this absolute into effective law, the Court has used what can be described as a two-step evidentiary process. The first step involves deciding when a court should scrutinize the government's justification for a classification, and the second step involves the application of that scrutiny.

The first step is reflected in the Court's identification of a classification as suspect or at least suspicious. A truly suspect classification faces the strongest presumption of unconstitutionality precisely because the Court cannot conceive of a legitimate use for

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270. *Cf.* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969).

such a classification.[271] It is given the strictest scrutiny in the sense that the Court confronts such a classification with the certain knowledge that it was the result of prejudice or some other arbitrary motive. Suspicious classifications are scrutinized because of the probability that they are arbitrary but are not given the strictest scrutiny because factual differences do exist which might conceivably justify different treatment. For example, physical differences between males and females may justify different treatment of the sexes when the state seeks to regulate teenage pregnancy.[272] Most often, however, distinctions made because of gender have sprung from assumptions as to the role or place of men and women in society and not from thoughtful consideration of factual evidence.[273]

The common element of the cases declaring the need for some degree of scrutiny is the existence of evidence drawn from history, judicial experience, and the face of the statute or its practical operation to prove that the type of classification is one which by its very nature is not likely to have been enacted because of a thoughtful consideration of the relevant qualifications of members of the disfavored class. For instance, the Court has found suspicious the denial of the ability to freely socialize or to enter and enjoy public facilities because of darker skin pigmentation,[274] the denial of administrator status because of the absence of a penis and the possession of a womb,[275] and the denial of equivalent legislative representation in a representative democracy because one has an address in an urban rather than a rural area.[276] Further evidence of the likelihood of arbitrariness is provided by the political powerlessness of the disfavored class since, recognizing political realities, one can assume that officials will allow their prejudices free rein or at least take less care whenever those who will bear the burden of their action can do little about it. An elected official

271. As Justice Stewart has stated, "detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated." Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 478 (1981) (Stewart, J., concurring).

272. *See id.* at 471-73.

273. *See* Mississippi Univ. For Women v. Hogan, ___ U.S. ___, ___, 102 S. Ct. 3331, 3336-37 nn.10-11, 73 L. Ed. 2d 1090, 1098-99 nn.10-11 (1982).

274. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

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

276. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

need not be fearful at election time if he or she has victimized illegal alien children,[277] convicted criminals,[278] or new residents when benefits have thereby been provided or preserved for law-abiding citizens or long-term residents.[279]

Once sufficient reason for suspicion is held to exist, the Court calls for judicial examination thereafter of that type of classification to discover in each case whether the government has in fact acted arbitrarily. Although the statement of the test to be applied once a classification is thus placed under judicial scrutiny varies, the government at a minimum must prove to a court's satisfaction that the primary motivation for the making of the challenged classification was not an arbitrary one. Although the Supreme Court speaks of the affirmative obligation of showing sufficient relationship to an important and legitimate governmental end, these adjectives alone provide no aid in presenting an equal protection case or predicting its outcome. If, however, these terms are viewed in relation to the Court's search for arbitrariness, one must conclude that when the Court determines that a classification is sufficiently related to a legitimate end, it is concluding that the classification was not the result of arbitrary decisionmaking. Restated, the government's burden is to prove that the primary motivation for the enactment of a suspect or suspicious classification cannot be described as arbitrary while the challenger seeks to prove that it should be so described.

The Court has, however, stated that it is a "familiar principle of constitutional law that [it] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[280] One reason for this principle is that a legislature consists of a variety individuals driven by different impulses, and the Court cannot be assured that the speeches of a few found in a legislative history represent the thoughts of a majority.[281] Moreover, inquiry into motive smacks of psychoanalysis which as a process of analysis is unlikely to be judicially manageable. Furthermore, inquiry

277. *See* Plyler v. Doe, ___ U.S. ___, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

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

279. *See* Zobel v. Williams, ___ U.S. ___, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982); Shapiro v. Thompson, 394 U.S. 618 (1969).

280. United States v. O'Brien, 391 U.S. 367, 383 (1968).

281. *See id.* at 384.

into the subjective motive of legislators can only be accomplished by looking to what they said in debates or speeches pertaining to a law's enactment. If the Court used these statements as significant factors in determining constitutionality, free and open legislative debate might be chilled. Finally, to determine motivation a court might even be required to call legislators to testify as to personal and legislative motives.[282]

Recently, however, the Court has established the requirement of a showing of intentional or purposeful discrimination as a prerequisite for an equal protection violation.[283] This requirement is imposed whenever a statute challenged as being discriminatory in regard to some suspect or suspicious basis does not discriminate on its face but has effects which turn on that basis.[284] Under these circumstances, the challenger must begin by submitting proof that the government was "motivated in part by a . . . discriminatory purpose."[285] If the challenger succeeds, the burden shifts to the government to prove that the statute would have been enacted "even had the impermissible purpose not been considered."[286] The prima facie showing of "a discriminatory motivation" can be overcome, therefore, by the government's showing that the dominant or primary motivation, that which was most responsible for the enactment, was nondiscriminatory. In effect, the challenger must prove that the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[287]

Satisfying the showing of discriminatory intent or purpose appears at first glance only to bring the case to the point at which the Court would have begun if the particular type of discrimination alleged had been apparent on the face of the statute. This appear-

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282. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 215 (1962). *But see* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268 (1977).

283. *See* Rogers v. Lodge, ___ U.S. ___, ___, 102 S. Ct. 3272, 3276-77, 73 L. Ed. 2d 1012, 1018-19 (1982); City of Mobile v. Bolden, 446 U.S. 55, 62 (1980); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976); Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

284. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

285. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

286. *See id.* at 270 n.21; Washington v. Davis, 426 U.S. 229, 241 (1976).

287. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

ance is deceiving, however, because the analysis leading up to the conclusion that discriminatory intent existed must include consideration of the purported nondiscriminatory purpose of the challenged statute.[288] In other words, if discriminatory intent is established, nothing remains to be done because the usual analysis given the alleged legitimate, nondiscriminatory purposes has already been completed. Once discriminatory intent is shown in regard to a basis previously determined by the Court to be suspect or suspicious, nothing can remain because this proof has established that the government was predominantly motivated by the wish to discriminate on that basis. If a statute discriminates on its face in regard to a suspect or suspicious basis, the challenger is saved from his obligation of proving discriminatory motive and the government must begin by proving that the primary motive was nondiscriminatory.

The Court's concern for using motive is, in reality, a concern for the type of evidence needed in this regard. In *Rogers v. Lodge*[289] a lower federal court had used various patterns of local governmental discrimination to prove that an at-large voting system was maintained because of purposeful racial discrimination; the Supreme Court affirmed this holding because it was not clearly erroneous.[290] Justice Powell in his dissent contended that the Court was thereby inviting the federal courts "to engage in deeply subjective inquiries into the motivations of local officials . . . ."[291] Justice Stevens likewise criticized the Court in *Rogers* for using a "subjective approach" to determine the motivations behind challenged governmental action.[292]

It is clear that discriminatory effects alone are not sufficient. "Discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[293] As can be seen, the constitu-

288. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 n.21 (1977). In the *Feeney* case the Court held that the challengers had failed to show intentional discrimination on the basis of gender because, considering the "totality of legislative actions," the challenged veterans' preference law was intended simply to prefer veterans over nonveterans, which is not a suspicious classification, rather than men over women. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 280 (1979).

289. ___ U.S. ___, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982).

290. *See id.* at ___, 102 S. Ct. at 3279-81, 73 L. Ed. 2d at 1022-24.

291. *Id.* at ___, 102 S. Ct. at 3282, 73 L. Ed. 2d at 1026 (Powell, J., dissenting).

292. *See id.* at ___, 102 S. Ct. at 3286, 73 L. Ed. 2d at 1030 (Stevens, J., dissenting).

293. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252,

tional fact which is ultimately determinative is not simply intent since "normally the actor is presumed to have intended the natural consequences of his deeds,"[294] yet a statute is unconstitutional only when the legislature took action "'because of,' not merely 'in spite of,' its adverse effects . . . ."[295] To take action "because of" discriminatory effects means the legislature was primarily motivated by the desire to accomplish those ends. Determining the primary motivation for a legislative enactment can be accomplished without psychoanalysis of the legislature by presuming that body intended to achieve the foreseeable effects of its enactment and by asking what type of thought process would most likely underlie this action. Assuming the legislature is effective in doing what it decides to do in enacting a statute, what sort of decision is most strongly evidenced by the challenged provision? When there exists credible evidence in the legislative history relevant to this issue, it should be used but should not be determinative. The reason is that, as previously noted, this evidence can never be conclusive.

To derail this logic the government must successfully argue that even though its statute discriminates, on its face, in regard to a presumedly arbitrary basis, a different, nondiscriminatory end was intended; therefore, the discriminatory motive was not the moving force behind that enactment. To do so the government must prove that the statute can be reasonably said to accomplish that legitimate end so that the Court is convinced that this was why the government acted as it did. When the challenged statute is not discriminatory on its face, the burden is on the challenger to prove that the primary motivation was the desire to cause the foreseeable discriminatory impact of the law. This burden cannot be carried solely by proving discriminatory impact;[296] but if, in addition, a clear pattern of action unexplainable on other grounds exists or the sequence of events leading up to the challenged action shows the intent to discriminate,[297] a court can conclude that the primary motive was to discriminate on a suspect or suspicious basis. If so, the statute falls because this basis has already been identified as

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264-65 (1977).

294. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

295. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

296. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977).

297. *See id.* at 266-67.

one presumed to be the result of arbitrary decisionmaking and because the purported justifications have already been deemed irrelevant in the process.

"Arbitrary" discrimination is that which is motivated primarily by the whim, will, or caprice of the decisionmaker. On the other end of the spectrum are those enactments which, though they include classifications, spring from a thoughtful consideration of the merits or abilities of individuals. The absence of a precise line between permissible and impermissible inequality is inherent in the nature of the Court's interpretation, and the Court must implement this reading in the context of a variety of circumstances and in the face of often subtle attempts to promote the prejudices of officials. The Court does not, however, confront the question of arbitrariness as an open issue in each case. It first considers the type of classification abstracted from the particular facts of a case to determine if in light of history, experience, and the nature of the classification and the classes, there exists a sufficient probability of arbitrariness to consider the classification inherently suspicious or suspect. If so, then it turns to the facts of the particular case placing the burden on the government of proving nonarbitrariness to the Court's satisfaction. What the Court usually finds as arbitrary is that discrimination which ultimately springs from unexamined assumptions by officials as to the relative, general worth of the favored and disfavored classes. Such an assumption is evidenced by the willingness of government to punish or deprive a large number of individuals regardless of their responsibility or guilt because of a shared characteristic which alone has no apparent relevance to the government's purported end. It is also evidenced by an unwillingness to deprive those who should be affected if the government has a legitimate concern but who do not share the characteristic upon which the classification is based. Overinclusiveness and underinclusiveness support the conclusion that government acted primarily because of preconceived notions or biases.

It was this sort of decisionmaking which characterized the inequalities that plagued blacks before the fourteenth amendment became part of the Constitution. The Court has drawn from that experience the essential danger of inequality caused by government and construed it to be the heart of the prohibition contained in the Equal Protection Clause. This construction can therefore be justified in history and by reference to the fundamental principle that

in a society in which the people are the ultimate sovereign, officials are not authorized to govern arbitrarily.

After establishing the presumption of arbitrariness, the Court usually begins its examination of a particular case by evaluating the similar situation of the favored and disfavored classes in regard to the burden or benefit created by the provision to which the classification relates. Emphasis is placed on those characteristics, shared by these classes, which would ordinarily be defined as qualifications for the burden or benefit. To the extent the classes share these qualifications one would naturally question the different treatment. Determining what are the qualifications for a benefit or burden is the Court's way of identifying those factual characteristics which a rational legislature would have considered significant in making its decision. As the Court finds greater commonality of qualifications the legislative decision to treat such similar classes differently becomes nothing more than a decision to discriminate on the challenged basis. Considering that this similar situation analysis invariably follows a determination that classifications made on the challenged basis are suspicious because they are unlikely to be rationally related to any legitimate governmental purpose, the realization that the primary end was to establish such a classification for its own sake is tantamount to the conclusion that the government acted arbitrarily.

Moreover, whenever examination of proffered justifications leads to the realization that government enacted a suspicious classification without any independent purpose, a court can reasonably infer that government was motivated by an unexamined assumption as to the relative general worthiness of the favored and disfavored classes. Action on this basis is arbitrary because it is totally divorced from a rational consideration of individual needs or merits. The legislature has, in essence, acted on the basis of what it thinks of the respective classes in the abstract rather than on the basis of fact. In other words, the government would have acted to treat people unequally as a matter of its own whim or will. This sort of action is expected of absolute monarchs, but the Court has determined under equal protection that at least ideally people in this society should not be treated unequally when this action results from a substantial disregard of relevant facts.

The judicial examination of an equal protection issue, therefore, revolves around the attempt to determine what purpose indepen-

dent of the intent to discriminate is served by a challenged law. This "legitimate" purpose must, at a minimum, be framed so that it can serve to explain why the legislature chose to victimize the disfavored class in order to achieve its end. It is not, for example, sufficient to argue that the state sought to save money because this leaves unexplained the choice of a particular class to bear the burden of this endeavor. Whether the alleged purpose is "important" or "compelling" seems in the cases to be a question answered without any discernable reference point. The significance of these adjectives cannot be adequately understood except in the context of the overall analysis of an equal protection issue. The Court will not reevaluate the legislature's factual basis to determine whether it can find a more reasonable alternative.[298] The degree of importance required of a purported governmental purpose is, instead, directly related to the degree of persuasiveness required of the government in overcoming the presumption of arbitrariness that has been attached to a challenged classification. In other words, these adjectives do not describe purported governmental purposes as much as they describe the weight of evidence required to persuade the Court that the government did, in good faith, attempt to act on a factual rather than an arbitrary basis. When the strictest scrutiny is applied, the state must be able to show that it was forced or compelled to discriminate as it did.[299] Likewise, an important governmental end or purpose is one which provides sufficient evidence to justify the inference that the legislature was moved by it in spite of the discriminatory nature of the means.

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298. *See* Lalli v. Lalli, 439 U.S. 259, 274 (1978).

299. In the *Korematsu* case the Supreme Court in a rare decision upheld a classification based on race. Korematsu v. United States, 323 U.S. 214 (1944). While stating that all legal restrictions of the "civil rights of a single racial group are immediately suspect," the Court upheld the conviction of an American citizen of Japanese descent for remaining in an area in California from which all of Japanese descent had been excluded by an authorized military order. *See id.* at 216. In justification of its decision, the Court stated the following:

> To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the military area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency . . . demanded [the exclusion] . . . . We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

*Id.* at 223-24.

In summary, the first stage in the Supreme Court's analysis of equal protection issues is to determine whether evidence or experience shows that by its very nature the type of classification challenged is likely to have been enacted because of arbitrary decision-making. If the court finds sufficient evidence to be suspicious, the presumption of arbitrariness is attached and must be rebutted by the government. The next step involves consideration of the proffered legitimate purposes of the classification. When a challenged statute is discriminatory on its face, these purposes must be framed in terms of an indirect effect or objective of the classification; and the government must show that under the circumstances it was truly moved by the need to use the discriminatory means to achieve that end.

## VI. JUSTIFICATION

This description of the underlying logic of equal protection decisions not only indicates the reason this area of law defies explanation by reference to simple standards but also points up the discretion the Court has assumed in making equal protection law. The interpretation of the Equal Protection Clause as a prohibition of arbitrary discrimination has far-reaching implications in that it opens the way for increased limitation of the government's power to classify, or, more precisely, it suggests that in the future further judicial control of the manner in which government makes these decisions is to be expected.

The most persistent criticism of the Supreme Court's expansion in constitutional protection of individual liberties is the claim that this expansion represents nothing less than an assumption of power by the judiciary that was never intended and, therefore, is an usurpation of power reserved to the electorally-accountable branches of government, federal and state.[300] The judicial power to interpret the Constitution and apply it as law is not the focus of this criticism: it is the manner by which the Court exercises its discretion in determining the constitutional protection for individuals against governmental regulation. Chief Justice Burger in his dissent to the decision in *Plyler* criticized the majority for employ-

300. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 351-52, 362 (1977).

ing the fourteenth amendment so as to become an "omnipotent and omniscient problem solver" which strikes down laws that do not meet its "standards of desirable social policy."[301] Justice Rehnquist has also criticized those on the Court who would read into the general words of the Equal Protection Clause their own values and policy decisions.[302] These criticisms gain special force when one recognizes that the Justices of the Supreme Court are appointed, not elected, and serve until they either die, resign, or are convicted after impeachment.[303] To this degree of independence, it is argued, we should not also add the power to declare the supreme law of the land unrestricted by the requirement that the Court refer to some value choice made by the framers. The spectre which arises from these points pictures judicial dictators who like Orwell's proverbial pigs in *Animal Farm* rewrite the Constitution daily as they see fit.

To make judicial review by the Court "legitimate," commentators have made various suggestions. The most radical change is proposed by Raoul Berger who contends that the Court should be restricted in the exercise of judicial review to the specific meaning intended by the framers.[304] The dominant value of this suggestion is that, if imposed on the Court, it would limit the Court's power to interpret the Equal Protection Clause broadly and thereby leave greater power to those governmental officials who are more electorally-accountable.[305] No one would seriously argue that there

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301. *See* Plyler v. Doe, ___ U.S. ___, ___, 102 S. Ct. 2382, 2408, 72 L. Ed. 2d 786, 816 (1982) (Burger, C.J., dissenting).

302. He found the Court's expansive reading of the Equal Protection Clause to be an unjustified intrusion into areas under legislative control.

> [M]ore than a century of decisions . . . have . . . produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass "arbitrary," "illogical," or "unreasonable" laws. Except in the area of the law in which the Framers obviously meant it to apply—classifications based on race or on national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.

Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

303. *See* U.S. CONST. art. III, § 1.

304. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 407-09 (1977).

305. "Electorally-accountable" is a term borrowed from Michael J. Perry. *See* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 9 (1982).

should be no concern for possible abuses of the power of judicial review as exercised by the Supreme Court or that there is no value in having decisions made by representative bodies of government. The point is, however, that the Supreme Court is not beyond control even though its members are not elected or appointed for definite terms; furthermore, there are distinct values to society in allowing the Court to exercise interpretive discretion as it has.

As Alexander Bickel stated, "[T]o say that the Supreme Court lays down the law of the land is to state the ultimate result."[306] The Court does, of course, have power to affect directly the litigants in the case before it; but to make its declarations of constitutional law effective in all like situations, it must depend largely on the consent of those affected or on the enforcement powers of the other branches of the federal government.[307] When the persons to whom a constitutional mandate is directed refuse to obey it, the Court by itself possesses no brute power by which obedience can be coerced. For its statement of law to have broad practical effect in society, the Court must depend on the willingness of the elected officials in the federal legislature to use their powers to appropriate funds for long-term enforcement efforts or of the President to muster forces to immediately coerce obedience by recalcitrants.[308] One need only consider the inability of the Court to effect broad based change by its own decision in the area of school segregation to realize that the Court lacks the essential power of a dictator, that is, the ability to bludgeon the populace into compliance with its dictates.[309]

In addition to this inherent limitation are other controls which spring from what we know as the system of checks and balances that operates between the branches of the federal government. First, Justices of the Supreme Court are appointed by the President with the advice and consent of the Senate.[310] Since 1869 on

306. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1978).

307. *See id.* at 91-94.

308. *See* THE FEDERALIST No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

309. *Cf.* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 92 (1978).

310. U.S. CONST. art. II, § 2, cl. 2. Lawrence Tribe suggests that this process is "entirely political, and [that] the sometimes quite rapid turnover in the Supreme Court's membership suggests that the federal judiciary may be more capable of adapting to changes in the political consensus" than one might expect. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-6, at 50 (1978).

the average approximately three Justices have been appointed by each President.[311] Since 1930 there is a close correlation between the percentage of time one of the major political parties held the White House and the percentage of Justices appointed.[312] This indicates that a President, who perhaps more than any other elected official can speak for the country's majority, has substantial power to appoint Justices who share his philosophy.

The President cannot, of course, control a Justice after appointment, but the Congress has power to restrict the Court's appellate jurisdiction[313] and to determine the number of Justices who will constitute the Court.[314] The power to regulate the Court's appellate jurisdiction is not unlimited in that that at some point particularized withdrawal of jurisdiction from the Court would be beyond Congress's power.[315] Also, Congress cannot cancel the term of a member of the Court after his or her apointment in order to reduce the number of Justices.[316] The only power of removal resting

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311.

| | Mean | Median | Range |
|---|---|---|---|
| Tenure of (in years): | | | |
| Chief Justices | 13.53 | 11.0 | 4-34 |
| Associate Justices | 15.68 | 15.0 | 1-36 |
| All Justices | 15.39 | 14.5 | 1-36 |
| All Justices Since 1930 | 13.18 | 10.0 | 1-36 |
| Justices Currently Sitting | 12.67 | 12.0 | 1-26 |
| Key U.S. Senate Members* | 12.50 | 12.0 | 4-27 |

*Composed of chairmen of the sixteen standing Senate committees.

| | All Justices | Justices Since 1930 |
|---|---|---|
| Justices who died in office | 48 (50%) | 6 (27.2%) |
| Justices who retired/resigned | 48 (50%) | 16 (72.8%) |
| Average age at appointment | 53.6 | 55.0 |

Justices appointed per President since 1869: 2.95
(approximately 1 Justice every 19.5 months)

| | Democrats | Republicans |
|---|---|---|
| Justices appointed since 1930 | 15 (68.1%) | 7 (31.9%) |
| Presidential tenure (in years) since 1930 | 32 (64.0%) | 18 (36.0%) |

Sources: 1981 U.S. CODE CONG. & AD. NEWS lxxv-xcii
1 CONG. INDEX (CCH 10,501-517 (1981-82))
G. GUNTHER, CONSTITUTIONAL LAW, Appendix A (10th ed. 1980)

312. *See supra* note 311.

313. U.S. CONST. art. III, § 2, cl. 2; *see also* Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1869).

314. *See* 28 U.S.C. § 1 (1976); *supra* note 311.

315. *See generally* Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out Of The Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

316. This is the consequence of the constitutional provision of life tenure. The indepen-

with Congress is that which can be exercised through conviction after impeachment; however, this power has not been frequently used.[317]

Even without direct action of the other branches of the federal government, the average tenure of Justices does not support the fears engendered by the term "life" tenure. For instance, the median tenure of Justices currently sitting on the Supreme Court is twelve years, which is also the median tenure of those United States Senators who currently hold the powerful chairmanships of the sixteen standing committees of the Senate.[318] The median tenure of all Supreme Court Justices ever appointed is a bit higher, being fourteen and a half years; but considering only those justices appointed since 1930, the median tenure is only ten years.[319]

It should also be noted that especially in recent years the Court rarely speaks as with one mind. There are currently nine members of the Court and these members frequently differ as to the constitutional issues before the Court and as to the legitimacy of the Court's power to interpret the Constitution expansively. In short, the modern Court cannot be characterized as one single-mindedly pursuing the aggrandisement of its own power.

The Court, though it exercises the power to interpret all provisions of the Constitution, can only be accurately characterized as a counter-majoritarian force when it makes law to implement the constitutional protections for individual liberties. When it interprets constitutional provisions which assign governmental powers to the federal government or reserve powers to the states, a decision necessarily leaves to one or the other of these electorally-accountable entities the particular power in issue. If, however, it finds an individual to be constitutionally protected from governmental control or punishment, the Court must restrict the power of electorally-accountable officials to act. Although this action is counter-majoritarian in that the decision of elected representa-

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dence of Justices and of all article III judges is also assured by the provision that prevents Congress from reducing their compensation during their term of office. *See* U.S. CONST. art. III, § 1.

317. *See* E. BARRETT, CONSTITUTIONAL LAW 525 (5th ed. 1977). The only four convictions obtained, however, were of judges. *Id.*

318. *See supra* note 311.

319. *See supra* note 311.

tives, who assumedly represent the majority will,[320] is frustrated, the other effect is that all individuals in this society gain a freedom from governmental intrusion or regulation. It is well accepted that individual liberties were written into the Constitution for the very purpose of protecting individuals against even the majority will. These provisions, therefore, necessarily stand for the fundamental proposition that in some instances even elected officials must be limited in favor of the freedom of the people.

In another sense, to recognize that the Supreme Court exercises important powers does not lead inevitably to the conclusion that those powers should be limited. All governments, especially the legislative and executive branches of the federal government, have greatly increased in power since 1868. State and local governments have grown to the extent that they touch the lives of individual citizens in far more ways than did local government in the early days of this country. With the continuing growth of government and the ever-increasing pervasiveness of regulation, an individual's protection from and control over his or her governors becomes more difficult to maintain through the vote. One question that may be asked then is whether the individual's place in society vis-a-vis government can be maintained as intended by the framers of the fourteenth amendment if it is read as applicable only to the conditions prevailing in 1868.

One must also realize that as a consequence of restricting the Court a power vacuum will be created which will be filled by other governmental entities. Recent history should have provided sufficient evidence to convince us that government tends to enlarge itself and to extend its reach regardless of the outcry of the voters. Experience would indicate that government has continued to grow in size and reach because the interests of government officials is thereby served and that this interest is ever present and compelling even in the face of complaints by the public. Although one

320. To argue this point requires one to overlook the many instances in which legislative bodies have acted in disregard of the popular will. *See* Reynolds v. Sims, 377 U.S. 533 (1964). Even without considering instances in which special-interest legislation is enacted or in which the political interests of legislators affect the laws enacted, common experience indicates that elected representatives do not and probably cannot poll their constituents on every issue. This is not to say this system should be abandoned, but reality does indicate that elected officials represent the will of the people in what may often be a significantly imperfect fashion.

might wish it otherwise, the only truly effective restraint on the power of government over an individual arises from an independent Supreme Court with the power to adapt the Constitution to the present realities of our society. As a result, the decision to restrain the Court's power to control government through the Constitution would inevitably free government to engage in further regulation and, in the case of equal protection, free government to operate as its own will dictates regardless of relevant facts.

The people do, presumably, possess the power to amend the Constitution so as to restrain government when it cannot be controlled by the vote. If the fear is that government is out of control, however, the people cannot hope for great success in obtaining protection in this manner since Congress itself has always proposed constitutional amendments and the state legislatures ordinarily determine whether they should be ratified.[321] Moreover, if one is primarily seeking protection against tyranny by the majority, amendment of the Constitution is even less feasible since a supermajority of three-fourths of the states must ratify a proposed amendment before it can take effect.[322]

Amending the Constitution is, on the other hand, available as a check on a Supreme Court which might abuse its powers. If the Court ever reached this point it would not have failed to have enraged the majority of people and to have frustrated Congress and the legislatures of the states.[323] In addition to overruling particular constitutional decisions, these governmental bodies, with their control over the amending process and with the support of an aroused populace, could effectively halt the overreaching of such a destructive force by writing into the Constitution what is presently absent, that is, a specific mode of legitimate constitutional interpretation, the consistent violation of which could stand as an impeachable offense.

What has been argued by some is that the Court has reached this point by taking unto itself a power which is tantamount to the power to amend the Constitution. The Court has "rewritten" the

321. U.S. CONST. art. V.

322. *Id.*

323. The process of constitutional amendment has been used four times in our history to overrule constitutional decisions by the Supreme Court. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-6, at 50-51 & n.8. (1978).

Constitution, however, only if one first assumes that the only way the Constitution can be "written" is as the framers specifically intended. Raoul Berger argues that only by interpreting the fourteenth amendment as the framers specifically intended can the Court legitimately exercise its power of judicial review, but we must remember that he is only presenting an argument. This argument is often made to appear as if it were founded on the one indisputably legitimate basis for determining the validity of constitutional law making, but the framers can no longer determine what the Constitution means.[324] Their power over the fourteenth amendment ended with its ratification, and their intentions can only be given constitutional significance to the extent present and future generations decide to do so. It is our decision, not theirs, which will determine the legitimacy of the Court's interpretation and application of the Constitution, and that decision should not be made without first deciding what part we wish the Constitution to play in this society.

If instead of perceiving the Equal Protection Clause as containing a specific rule with a static meaning, one views it as the statement of an ideal, the Court's extension of its protection beyond the framers' intent no longer appears to be a rewriting or reinterpretation. Rather than revising the Constitution as it sees fit, the Court can be seen as striving to achieve that demand. As an ideal, the Equal Protection Clause represents the framers' vision of a state of perfect freedom from arbitrary unequal treatment and their decision to commit the nation to the pursuit of this ultimate goal. Should we not assume that the framers knew it was a Constitution they were amending and thus in order for their proposal to have significance for future generations also knew it must be flexible enough to stand as a guide even when totally unforeseen conditions and problems arose? As a constitutional commitment to such a goal of perfect equality, the Equal Protection Clause will have perpetual significance since no matter what advances are made in our imperfect society, perfect equality will never be achieved. This is

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324. As Terrance Sandalow put it, we use history to help us "see more clearly the choices we now confront. Yet, however useful an understanding of the past may be in clarifying those choices, it cannot determine our response to them. That prerogative—and burden—belongs to the present." Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1072 (1981).

the essential value of an ideal; because it can never be completely attained, it will always continue to exist as a guide. Most significant, however, is the commitment to the pursuit of that ideal for this commitment assures future generations that the Constitution will stand as an effective force regardless of the different forms of unjustifiable inequality which appear.

This conception of the Equal Protection Clause is also in accordance with the popular view of the Constitution as a symbol of the American ethos of limited government and as a document containing the formal statements evidencing this nation's perpetual commitment to individual freedom. Should the Constitution become limited in its current significance to those specific problems confronted by its framers and consequently no longer a guide for a modern generation confronted by different concerns, it will lose its power not only as law but also as a symbol. It would then truly be little more than a "prolix code" which gradually would become of interest only to historians.

This is not to say that only the Supreme Court can protect the Constitution and guide the pursuit toward its ideals or that the Court cannot abuse the powers allowed it. To dismantle the mechanism which through our history has fulfilled this function, however, requires strong evidence that the Court has gone seriously wrong in moving us toward constitutional ideals. Radical change in a system which has brought us to a point of personal freedom unequaled by other nations requires more than disagreement with particular decisions or the undifferentiated fear that the Court may go too far. It seems irrefutable that if the Equal Protection Clause is to have continued significance in a society in which changing conditions and novel societal problems are the rule, some entity must be allowed discretion to react to new, unforeseen inequities. The Supreme Court is insulated from the political process and can, therefore, more freely make decisions which would be too politically dangerous for elected officials. The protection from unequal treatment of those who, as has been seen in the cases, do not possess influence, wealth, or potential voting power can realistically only come from such an entity. It is to be expected that when the Court does act to protect these groups which have historically been the victims of the majority's prejudices, that the majority or at least the dominant factions in society would become hostile to the Court. The existence of this hostility does not mean the Court has

abused its power, only that it has exercised it.

In determining whether the Court has so abused its power to pursue through constitutional law the ideal of equal protection, one must look to those cases which represent significantly new applications of equal protection and consider whether they evidence a pattern of consistently unjustifiable decisions. While considering these individual decisions, one should hold in abeyance the concern prompted by claims that the Court is acting illegitimately by making equal protection law beyond the intent of the framers. The tendency of critics is often to determine the legitimacy of a constitutional decision solely by reference to the value of the standard used as a limit on the Court's power. Yet, the ultimate question can only be whether the Court has so consistently acted contrary to our conception of the Constitution that it *should be limited* by a force outside its own control.

In reviewing the cases previously discussed, one general characteristic can be seen. The circumstances of those cases pose situations which all to some extent touch one's sense of fairness. To put it another way, it can be said that in each of these cases the Court was prompted to act as it did at least in part by its sense of justice or concern for fair and equal treatment. This kind of concern has contributed to the Court's formulation of its equal protection analysis.

Although thoughtful members of the public, assuming they had the power and the obligation to decide these cases, might have decided differently, these decisions evidence a Court which has acted reasonably and responsibily to pursue an ideal of equality. The Court's conception of this ideal does not require equal treatment of all or perfect equality of effects; it is founded on the premise that equal protection must instead prohibit arbitrary governmental classifications or differentiation. This notion permits the existence of that flexibility necessary to deal adequately with novel problems and allows the Court to strike down those actions that emanate from the desire to maintain society according to the preconceptions of the politically powerful. The history of equal protection has, therefore, been a history of the constitutional erosion of the government's power to rule without reason, to treat similarly qualified persons differently because of what officials think of them, to lump people together for group treatment without regard for their individual merit or ability, and to treat people unequally so as to

serve the personal interests of the decisionmakers rather than the interests of the public.

It must be admitted that in acting upon its own sense of fairness and equality the Supreme Court has not developed a formal process of analysis which narrowly channels its discretion. One would, of course, hope that with conscious development the process would become better defined and standardized; but as long as we wish the Court to possess, at least in part, the power to do justice while making constitutional law, we must realize that discretion is required.