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Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?

Edward L. Barrett, Jr.*

I. INTRODUCTION

In *Yick Wo v. Hopkins,* the United States Supreme Court asserted that the Fourteenth Amendment guarantee of equal protection of the laws "is a pledge of the protection of equal laws." Nine decades later, however, neither the members of the Supreme Court nor constitutional law scholars are able to find substantial agreement as to how far the courts should go in invalidating legislation because it is not "equal." This lack of agreement is not surprising since judicial review under the equal protection clause raises broad problems as to the respective roles of courts and legislatures.

Judicial review of legislation has long been a settled feature of our government structure. The Constitution imposes a wide variety of constraints upon the legislative process that operate as guidelines for the exercise of judicial review. Many of these constraints are relatively specific—"No Person shall be a Representative who shall not have attained to the Age of twenty-five Years"—and have posed no problems for the courts. Most of the litigation, however, has resulted from the broader constitutional provisions that, in effect, designate certain interests as protected. For example, the commerce clause has been construed as protect-

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The author gratefully acknowledges the contributions of John Poulos, Carol Bruch, and Jean Love in commenting on early drafts of this article.

1. 118 U.S. 356, 369 (1886).

2. For convenience, this article uses the general term *legislation* to encompass all forms of legislative activity—federal, state, and local. Lawmaking that takes the form of administrative rule-making or other less formal methods of creating law is ignored. It is assumed that the Fifth Amendment imposes the substance of the equal protection limitation on the federal government.

No attempt has been made to adorn this "think-piece" with elaborate footnote documentation. The discussion is limited to the jurisprudence of the United States Supreme Court.

3. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), marked the beginning of judicial review in this country.

ing the interest in freedom of trade among the states.\textsuperscript{5} The First Amendment protects the interest, among others, in freedom of speech and the press; the Fourth Amendment, the interest in privacy of person, premises, and possessions against indiscriminate official interference; and the Fifth and Sixth Amendments, taken together, the interest in providing a fair trial for persons accused of crime. The effect of constitutional provisions such as these is to invalidate legislation that conflicts with the protected interest. When such legislation is challenged in court, the judiciary faces the difficult task of interpreting and applying the relevant constitutional provisions to the legislation.

The Fourteenth Amendment provision that no state shall "deny to any person within its jurisdiction the equal protection of the laws," however, does not describe such an easily definable protected interest, and thus raises a number of difficult analytical problems. It can be interpreted as protecting the interest in equality, as implied by the assertion in \textit{Yick Wo} that it constitutes a pledge of the protection of "equal laws." Yet it is clear that it cannot be a guarantee that every law shall apply equally to every person, for almost all legislation involves classifications placing special burdens on or granting special benefits to individuals or groups. Hence, the Supreme Court has held from the beginning that the clause "does not deny to States the power to treat different classes of persons in different ways.\textsuperscript{6} But if equal protection does not deny the power to classify—to treat different classes of people in different ways—then what is its effect?

The Supreme Court today finds in the equal protection clause three analytically separate limitations on legislative power. First, the Court holds that certain bases for classification may be used, if at all, only in unusual circumstances—they are "suspect" classifications. In one of the earliest cases, the Court said of the equal protection clause: "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States . . . ." \textsuperscript{7} Later, it extended the protection to prohibit classification based generally on race or

\begin{footnotes}
\item[6.] Reed v. Reed, 404 U.S. 71, 75 (1971). For a recent article asserting that the equal protection clause creates a value of "constitutional equality" and that the focus of the Court should be on determining the categories of equality which courts should enforce see Wilkinson, \textit{The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality}, 61 VA. L. REV. 945 (1975).
\item[7.] Strauder v. West Virginia, 100 U.S. 303, 307 (1880).
\end{footnotes}
nationality. More recently, it has proscribed classifications based on alienage and, arguably, those based on sex and illegitimacy. In effect, the Court is saying that equal protection constitutes a guarantee of "equal laws" to the extent that it substantially limits the power of legislatures to use certain bases for classification.

The Court has not clarified the circumstances under which suspect classifications may be justified. It has said that such classifications must be subjected to the "most rigid scrutiny," but has not made it clear whether the classifications are per se invalid or whether they may be sustained if necessary to achieve a legitimate state objective. Even if they may be sustained, the questions of how important the state interest must be, and how closely related the classification must be to that interest, have not been answered. Also undefined is the standard used to determine whether a particular classifying trait is "suspect."

Second, the Supreme Court holds that legislative classifications which burden constitutionally protected interests are invalid if not closely related to important or substantial governmental objectives. The rule as articulated by the Court is that a classification burdening a protected interest unconstitutionally denies equal protection unless it can be demonstrated that the classification advances a "compelling" state interest, that it is closely related to that state interest, and that a less burdensome classification would not adequately serve the governmental interest. This second limitation applies whether or not the legislature

9. Graham v. Richardson, 403 U.S. 365 (1971); see discussion in Section II, C, 1, infra.
10. See discussion in Section II, C, 2, infra.
11. See discussion in Section II, C, 3, infra.
13. For an excellent analysis of these issues see P. BREST, PROCESS OF JUDICIAL DECISION MAKING—CASES AND MATERIALS 477-92 (1975) [hereinafter cited as BREST].
14. The Court has also characterized this doctrine as applying when the classification burdens a fundamental interest. Apparently the Court now utilizes the term fundamental in this context to mean only interests "explicitly or implicitly guaranteed by the Constitution." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). This issue is further discussed in Section III infra.

Mr. John Poulos contributed a number of ideas to this article. One of his criticisms has, however, increased the awkwardness of expression apparent at many points. The Court usually speaks of the right to vote, the right to travel, the right to speak, and so forth, and it is easy to use such terminology. As Poulos notes, however, the word right represents the conclusion one reaches after determining that the constitutionally pro-
uses a constitutionally suspect classifying trait. A number of questions are raised by this formulation. What does equal protection analysis add to the substantive constitutional protection of the interest? How substantial must the burden on the protected interest be? How important must the asserted governmental interest be? How close must the relationship be between the classification and the state interest? What is the scope of the protection afforded under this approach?

Third, the Court holds that legislation may be invalid when a classification made therein is not rationally related to a legitimate state purpose. While equal protection does not deny the right to classify, it does deny

the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”

This limitation applies whether or not the legislature uses a constitutionally suspect classification or burdens a constitutionally protected interest. The major question under this analysis is the extent of the protection accorded to the interest in freedom from irrational classifications. To what extent does this third limitation require legislatures to identify social goals and make only those classifications that are rationally related to those goals?

Three cases will serve to illustrate the distinctions among these applications of equal protection. In the first, a statute excluding resident aliens from the receipt of welfare benefits was held invalid because “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.” In the second, a statute denying welfare assistance to residents who had not resided within the state for a year was held invalid because it served “to penalize the exercise” of the constitutionally protected “right” to travel and

the state had not shown that the statutory scheme was "necessary to promote a compelling governmental interest." Finally, a statute providing lower welfare payments for dependent children than for the aged was upheld because it did not use a suspect classification, burden a constitutionally protected interest, or fail the general test of rationality—there was some relationship between the classification and the state objective.

As noted above, each of these three approaches raises a series of questions. It is the purpose of this article to analyze each approach in light of these questions. The article proceeds from a point of view generally favoring confinement of judicial review to the application of those constraints upon legislation that can be found, in some principled manner, in the Constitution. As will be seen, the conclusion that equal protection should play a more modest role is not necessarily a conclusion that the courts should not extend similar protections through application of other constitutional provisions.

II. SUSPECT CLASSIFICATIONS

A. The General Scope of the Doctrine

What is the general scope of the protection afforded by the doctrine that equal protection makes certain classifying traits constitutionally "suspect?" Essentially, the protection forbids all legislation which discriminates against—singles out for special treatment—those possessing a certain trait. It should not matter whether the burden imposed is large or small since the evil is in the use of the classification. Conversely, since the suspect classification doctrine applies only when the trait is used as a basis for imposing a burden, the doctrine should not serve to invalidate legislation that imposes even severe burdens on persons possessing the classifying trait, provided it also imposes the same burdens on others. Hence, this doctrine is quite distinct from the

20. The author first became aware of constitutional problems at a time when the Court was using expansive interpretations of equal protection and due process largely to protect economic vested interests—a fact which has left a lingering suspicion that generally the courts may not be relied upon to serve the people's interests any better than do the political processes. In any event, the analysis which follows hopefully will be useful even to those who seek a more activist role for the courts.
21. The Court analyzed the problem in almost this fashion in Graham v. Richardson, 403 U.S. 365 (1971).
22. The point is involved in cases where the Court denies a claim under equal protec-
more common constitutional provisions that extend substantive protection to particular interests. First Amendment cases illustrate this distinction. A law requiring only particular ethnic organizations to obtain a permit from the chief of police before using a public park for meetings would be invalid under suspect classification analysis because it makes a classification based on race or national origin, and under First Amendment analysis because it unduly burdens the exercise of First Amendment rights. But a law requiring any group to obtain a permit from the chief of police before using the public park for a meeting might be held invalid as unduly burdening First Amendment interests in its application to an ethnic organization or any other organization seeking to use the park for political meetings, even though it does not single out either ethnic or political groups for special treatment.

A major question posed by suspect classification analysis is whether there are any situations in which legislation utilizing a suspect classification can be upheld. In analogous cases involving constitutionally protected interests the Supreme Court has said, in effect, that legislation discriminating against the interests will be held invalid without concern as to the extent of the burden imposed. Should the result be the same when a suspect classification is involved? In recent decades, the Court has not upheld any legislation utilizing a suspect classification. It has said, however, that such a classification might be upheld if the state demonstrates that the classification is necessary to the attainment of an important or "compelling" state interest.

Since the suspect classification doctrine began with race, this article will first examine these questions in the context of racial classifications. Thereafter, the article will examine the same questions, as well as the question of which classifications beyond race are constitutionally suspect, in the context of classifications related to alienage, sex, and illegitimacy.
B. Racial Classifications

The equal protection clause was clearly intended to invalidate at least certain racial classifications.\(^{27}\) In the first case arising under the Fourteenth Amendment, the Supreme Court said:

\[\text{It is not difficult to give a meaning to [the equal protection clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.}^{28}\]

A few years later, in \textit{Strauder v. West Virginia},\(^{29}\) the Court invalidated a law limiting jury service to white persons. It said of the clause:

\[\text{What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?}^{30}\]

While these cases could have been read as holding only that the black race is a constitutionally suspect classification, the Court soon extended the interpretation to include classifications based on other races and nationalities.\(^{31}\) The Court now states that the “clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”\(^{32}\)

What is the scope of this doctrine? Does it forbid all racial classifications, or does it permit them to some extent? In \textit{Korematsu v. United States},\(^{33}\) the only case in which the Court has directly upheld a racial classification, the Court said:

\[\text{It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immedi-}\]


\(^{29}\) 100 U.S. 303 (1880).

\(^{30}\) \textit{Id.} at 307.


\(^{32}\) \textit{Loving v. Virginia}, 388 U.S. 1, 10 (1967).

\(^{33}\) 323 U.S. 214 (1944).
ately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.34

More recently, the Court stated in *Loving v. Virginia*:35

At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny," . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.36

Given that racial classifications are not prohibited absolutely, when might such classifications be permitted? Two narrowly limited types of cases appear to justify racial classifications without detracting from the policy considerations that make such classifications suspect. The first type of case involves situations in which race is substantially congruent with some significant7 social policy. If it can be shown, for example, that a particular disease is almost wholly confined to members of a particular racial group, it should not be a violation of equal protection to limit to members of that group the regulations necessary to prevent the disease from spreading.38 The second type of case involves a racial classification, used only for the duration of an emergency, that is the only available classification to avert a serious public danger. For example, if a race riot erupts in a prison, it should be permissible to immediately separate the races until it is possible to identify and deal with the troublemakers on a nonracial basis.39

But beyond cases of these types, should a state be permitted to use racial classifications where it can show that there is a close

34. Id. at 216.
35. 388 U.S. 1 (1967).
36. Id. at 11.
37. This limitation is important. The point is discussed in BREST, supra note 13, at 488-89.
38. There may be, of course, other constitutional objections to such a program. See, e.g., Comment, Constitutional and Practical Considerations in Mandatory Sickle Cell Anemia Testing, 7 U.C.D.L. Rev. 509 (1974).
39. The point is discussed in Posner, The Defunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1, 25-26 [hereinafter cited as Posner]. If the result in *Korematsu* is justifiable, it is on an application of this principle. It does not derogate from the principle itself to believe that the facts did not warrant its application there.
correlation between race and an important state objective? In cases involving racial segregation, the Court has long held that such segregation cannot be justified by showing that it will prevent violence and disorder in the community. The current situations in Boston and Louisville demonstrate that a community can have very important interests at stake that could be protected by permitting the continuance of segregation found by the courts to be unconstitutionally discriminatory. Yet the courts have clearly held that such interests are not sufficiently compelling to justify continuing the discrimination.

A similar situation relating to the constitutionality of racial classification involves the validity of so-called "benign discrimination." For example, can legislation designed to aid minority racial groups be upheld? If so, on what theory? Most commentators have suggested that the constitutional question should be resolved in terms of the relationship of the classification to the state objective and the importance of that objective. Supporters of benign discrimination have suggested that the showing of a close relationship either to a compelling state interest or, less rigidly, to a substantial or significant state interest, might justify the use of racial classifications. One commentator has gone further and argued that racial classifications made by a white majority to its own disadvantage should be upheld upon a mere showing of some relationship to a legitimate state interest.

The difficulty with these formulations is that they appear to relax significantly the general standards by which suspect classifications have been judged. If a state interest in expanding the opportunities for a disadvantaged racial group is sufficiently important to justify imposing burdens on others because of their race, why is not the state interest in preventing violence and bloodshed sufficient to justify the discrimination involved in perpetuating a neighborhood school policy in Boston? Of course, if

40. See, e.g., Cooper v. Aaron, 358 U.S. 1, 16 (1958); Buchanan v. Warley, 245 U.S. 60, 81 (1917).
45. For a useful exposition of the point of view that benign discriminations violate
the equal protection clause were held, as the Court originally suggested, to make suspect only legislation discriminating \textit{against} the black race, or by reasonable extension, other minority races subjected to community discrimination, this problem would disappear. Just as the privileges and immunities clause proscribes placing special burdens on nonresident citizens but permits placing special burdens on residents, so equal protection could be construed as not rendering suspect those classifications that burden majority or advantaged races. Both judicial decisions and wise policy, however, appear to militate against adopting such a restrictive meaning for equal protection in the context of racial classifications.

Another approach is possible that arguably would permit some forms of benign discrimination without running afoul of the basic values underlying the doctrine that race is a suspect classification. The original intention of equal protection was to protect the former slaves from discriminatory legislation. From this history, it is possible to generalize as a constitutional goal a society in which race is irrelevant as a basis for governmental action. Given this goal, some classifications based on race may be justifiable to the extent and for the period necessary to compensate for the effects of past discrimination and to bring a racial group to a social, political, and economic level at which the treatment of race as irrelevant will not leave the group at a disadvantage. The Supreme Court has taken this approach in school desegregation cases, holding that racial classifications may be used to eliminate the effects of past official discrimination. One could move beyond these cases to argue more broadly that where members of a racial group are not fairly represented in the community—in education, employment, and housing—because of a history of community (if not overt governmental) discrimination, then legislation designed to assist that group to achieve fair representation is consistent with equal protection.

Even this argument for upholding some benign discrimina-

equal protection see Posner, \textit{supra} note 39. For an elaborate rejoinder to Posner see Sandalow, \textit{supra} note 42. Sandalow suggests that an argument can be made for using race as a basis for preferential law school admissions policies, not because race is equated with deprivation, but because race is socially significant, and important community values can be served only by achieving a substantial representation of certain racial groups in law schools and eventually in the bar. On this basis, racial preferences might be the only feasible means of achieving the goal. \textit{Id.} at 682-92.

tion creates a number of difficult problems. Must such affirmative assistance be limited to those members of the discriminated group who are still suffering from the discrimination, or can it be given solely on the basis of the possession of the racial characteristic? That is, can special assistance be provided only to poor and deprived members of the minority group, or may it be given to all? How long is the preference justified? In other words, when has the group achieved sufficient parity with other groups that the need for preference ends? How are allocations of limited resources to be made among competing disadvantaged groups? How substantial shall the preference be? Is parity to be achieved rapidly or slowly? This last question can also be phrased in terms of how much of the burden of past discrimination must be discharged by the present generation. These are incredibly difficult problems that are currently being addressed in a fumbling fashion at the administrative level with little guidance from the courts and none from the Supreme Court. 47

In any event, more careful analysis would facilitate the proper disposition of cases involving racial classifications. Since the Court in recent years has not found any racial classifications to be constitutional, one can argue that the issue is not significant. But as the pressure to recognize some forms of racial classifications, particularly benign classifications, is felt, careful analysis will be necessary. If the Court is to permit some forms of racial classification, it must do so on the narrowest possible grounds if it is not to reverse history and provide constitutional justification for forms of discrimination now clearly forbidden.

C. Other Suspect Classifications

The language of the equal protection clause gives no basis for treating some but not other classifications as suspect. The history of the Fourteenth Amendment, however, supports the conclusion that the clause was intended to restrict the use of race as a classifying factor. Upon what basis, then, can it be determined whether other classifying factors should be singled out as constitutionally suspect?

47. The only significant discussion of any of these problems at the level of the Supreme Court is found in Justice Douglas’ dissent in DeFunis v. Odegaard, 416 U.S. 312, 320 (1974). A majority of the Court found the case to be moot and did not reach the merits.

The answer depends largely on how one reads the basic policies underlying the intent to limit racial classifications. If racial classifications were made suspect because race is an immutable and involuntary characteristic of individuals, then the list of classifications potentially subject to being treated as suspect is long. Sex, height, age, illegitimacy, physical disabilities, and intelligence are all relatively immutable and involuntary characteristics, yet it is quite clear that at least some of them are commonly used in legislative classifications. It can be argued, however, that race is a suspect classification not only because it is an immutable characteristic but also because it is rarely relevant to a nondiscriminatory legislative purpose. According to this line of reasoning, sex classifications, for example, would be suspect because they are often not relevant to a legitimate legislative purpose;\(^{49}\) age classifications, on the other hand, would not be suspect because of the many clearly relevant reasons for singling out at least the very young and the very old for special treatment.

If one asserts, however, that equal protection is intended to give special protection to members of groups that have suffered a history of community discrimination\(^{50}\) or to members of a “discrete and insular” minority,\(^{51}\) the problem is more complex. Such an approach suggests that race classifications should be held invalid only when they burden members of disadvantaged minority races. With respect to sex, this approach would justify invalidating only classifications burdening females, since only women have suffered a history of community discrimination, and neither sex can be said to be a “discrete and insular” minority.

Unfortunately, the Supreme Court has not clearly identified the basis for its decisions to label some classifications, other than racial, as “suspect.” An examination of those classifications that have been held suspect or appear likely to be held suspect in the future will illustrate the problem.

1. **Alienage**

To date, a majority of the Court has explicitly recognized only one classification other than race as suspect—alienage. In *Graham v. Richardson*,\(^{52}\) the Court held that

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50. *Id.* at 684.
52. *Id.* at 365.
 classifications 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... for whom such heightened judicial solicitude is appropriate.53

The Court’s analysis suggests that only classifications discriminating against aliens are suspect. Classifications which benefit aliens and impose burdens on citizens presumably are not suspect.

In many ways, however, the alienage cases do not fit comfortably into the suspect classification mold. While the Court has invalidated state legislation limiting welfare payments to aliens,54 excluding them from government jobs,55 and refusing to license them as lawyers,56 it has recognized that states may deny aliens the right to vote and to hold an appropriately defined class of important public positions.57 Even the Constitution distinguishes in many places between aliens and citizens,58 and the Court has held that Congress has broad powers to determine which aliens may immigrate to the United States, the terms and conditions under which they may remain, and the conditions of their naturalization.59 It seems inconsistent to hold aliens subject to such a wide variety of governmental regulations singling them out for special treatment, and yet at the same time hold that alienage constitutes a suspect classification. Arguably, it would be more consistent with the constitutional structure for the Court to deal with these cases under the supremacy clause.60 Congress has broad powers over aliens, and when it determines that they shall be admitted to permanent residence, state regulations excluding them from access to at least the ordinary means of economic survival in the community can be invalidated as inconsistent with the congressional determination.61 In this context, the ap-

53. Id. at 372.
54. Id. at 383.
58. The point is discussed by Justice Rehnquist in his dissent in Sugarman, id. at 651.
61. In Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 419 (1948), the Court relied principally on a federal preclusion argument. Equal protection was mentioned, but the reference may have related to the fact that the alienage classification also classified by race. In Graham, federal preclusion was an alternative ground of decision. 403 U.S. 365,
proach could be similar to that taken under the commerce clause, wherein state regulation of commerce is invalidated when found to conflict with an express or implied policy of Congress. Using a suspect classification approach limited only to certain kinds of regulations makes it difficult for courts to distinguish in a principled way alienage classifications that are constitutionally permissible from those that are not.

2. *Sex*

The latest candidate for inclusion in the list of suspect classifications is sex. Of the six sex-discrimination cases decided in the past four years, the Court held the legislation invalid in the four cases in which the classification disadvantaged females, but upheld it in the two cases in which the classification benefitted females. A majority of the Court asserts that it has not decided whether sex is a suspect classification; in each case where legislation was found invalid, the Court held that the offending classification did not bear a rational relationship to a legitimate state objective. In the latest of these cases, *Stanton v. Stanton*, the Court held invalid a Utah law requiring a divorced father to support male children to age 21, but female children only to age 18, stating:

376-77. The Court also indicated, however, that Congress could not specifically authorize the states to impose restrictions on aliens because it "does not have the power to authorize the individual States to violate the Equal Protection Clause." *Id.* at 382. Neither *Sugarman* nor *Griffiths* mentioned the federal preclusion ground, relying wholly on equal protection.


64. *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). The Court did reject a challenge to a state disability insurance system that excluded the disabilities resulting from normal pregnancy, but analyzed the case as not making a classification based on sex. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). The Court said that the legislation, in excluding disability payments to workers for disability resulting from normal pregnancy, divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes. For an argument to the contrary see Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532 (1974).


We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect. . . .

. . . .

We therefore conclude that under any test—compelling state interest, or rational basis, or something in between—[the statute] . . . does not survive an equal protection attack.\textsuperscript{67}

Despite this rhetoric, it appears that the Court is in fact treating at least female sex as a suspect classification. For example, the first of the six sex classification cases, Reed v. Reed,\textsuperscript{68} is most easily explained as a suspect classification case. The legislation established classes of persons entitled to administer the estate of intestates and provided that where several persons were equally entitled to the right, males must be preferred to females. The state argued that this classification was justified because it reduced the workload on probate courts by eliminating one class of contests. The Court said the question was whether the classification bore "a rational relation to a state objective." It recognized that reducing workload was an objective of "some legitimacy,"\textsuperscript{69} but instead of determining the question of rational relationship,\textsuperscript{70} the Court said that:

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . .\textsuperscript{71}

This holding suggests that sex is a suspect classification and therefore invalid. Choice by lot, although equally unrelated to the ability to administer, would be held valid. Thus, the holding turns not on the relationship between the classification and the objective, but instead upon the utilization of a suspect, as opposed to a nonsuspect, classification to achieve the objective.

Since Reed, the Court's opinions have failed to articulate a satisfactory rationale for the results reached. In the second case involving a sex classification, \textit{Frontiero v. Richardson},\textsuperscript{72} Justice Brennan, speaking for a plurality of the Court, argued that sex

\textsuperscript{67} Id. at 13, 17.
\textsuperscript{68} 404 U.S. 71 (1971).
\textsuperscript{69} Id. at 76.
\textsuperscript{70} Presumably, any criteria for selection other than relative merits as an administrator, whether lot, sex, age, residence, or citizenship, would equally relate to the goal of reducing workload.
\textsuperscript{71} 404 U.S. at 76 (1971).
\textsuperscript{72} 411 U.S. 677 (1973).
should be treated as a suspect classification. The reasons he gives for his conclusion, however, appear to support the more limited position that only those classifications burdening women are suspect. He notes that the country has "had a long and unfortunate history of sex discrimination," but immediately makes it clear that he means a history of discrimination against women. This history, he says, is one reason for making sex a suspect classification. He goes on to say that because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth," the imposition of special burdens on members of a particular sex should be held invalid. He then notes that what "differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." But this argument, which would support making all sex classifications suspect, is confused by his conclusion that statutory distinctions between the sexes "often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."

The later cases also fail to clarify the Court's rationale. In Kahn v. Shevin, the Court upheld legislation granting a special tax exemption for widows. Justice Douglas, who had joined Justice Brennan in his Frontiero opinion, wrote for the Court that no more than minimal rationality was required because states have always been given "large leeway" in making tax classifications. Justice White, who had also joined the Brennan opinion in Frontiero, dissented, arguing in effect that all sex classifications, not just those discriminating against women, were suspect. Justice Brennan also dissented, arguing that a policy of providing

73. Id. at 684.
74. Id. at 686.
75. Id. (footnote omitted).
76. Id. at 687.
78. Id. at 355. This opinion can almost be taken as holding that male sex is not a suspect classification. Cf. Austin v. New Hampshire, 420 U.S. 656 (1975), holding invalid a special tax on the incomes of nonresidents as violative of the privileges and immunities clause. There the Court said that tax classifications are tested by a stricter standard when a constitutionally protected interest is burdened:

When a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion.

Id. at 662.
special benefits for needy women who had been subject to a history "of purposeful discrimination and neglect" was proper, but said that the statute should be held invalid because it extended the protection to all widows rather than just to needy widows.\textsuperscript{79}

In \textit{Schlesinger v. Ballard},\textsuperscript{80} the Court upheld a military regulation allowing women line officers to avoid mandatory discharge for a longer period of service in one rank without promotion than the period allowed for men. A majority of the Court upheld the regulation as rationally related to the problem that women had fewer opportunities for advancement because they were not eligible for combat missions or sea duty. Justice Brennan, in dissent, examined the legislation and determined that the purpose of the legislation could not have been compensatory. He therefore concluded that a permissable basis for the discrimination did not exist.\textsuperscript{81}

In \textit{Weinberger v. Wiesenfeld},\textsuperscript{82} the Court held invalid a section of the Social Security Act that provided that benefits based on the death of a covered wife were payable only to her children, while benefits based on the death of a covered husband were payable to his surviving spouse as well as the children. Justice Brennan, speaking for the Court, recognized that there was empirical support for the conclusion that men are more likely than women to be primary supporters of their spouses and children, but said that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."\textsuperscript{83} Again, he seems to say that sex is a suspect classification, but uses language suggesting that it is the "denigration of the efforts of women" which is the basis for the result.

Finally, in \textit{Stanton v. Stanton},\textsuperscript{84} the Court held that a state could not require parental support obligations to males until age 21 but to females only until age 18. The Court found it unnecessary to decide whether classifications based on sex are suspect; rather, it opted to follow the \textit{Reed} holding that to be valid a classification must be reasonable and rest upon a ground or difference substantially related to the object of the legislation. Applying this standard, the Court rejected an attempt to justify

\textsuperscript{80} 419 U.S. 499 (1975).
\textsuperscript{81} Id. at 520.
\textsuperscript{82} 420 U.S. 636 (1975).
\textsuperscript{83} Id. at 645.
\textsuperscript{84} 421 U.S. 7 (1975).
the distinction on the ground that education was more necessary for boys, who had the responsibility to provide a home. The Court asserted that such a distinction reflected "the role-typing society has long imposed" on women.85

One can debate whether there is a principled basis for finding sex classifications to be suspect under equal protection.86 Certainly elimination of sex bias was not one of the purposes of the framers of the Fourteenth Amendment.87 The second section of the amendment recognized a right to restrict voting to males,88 and it took the Nineteenth Amendment to eliminate sex as a qualification for voting. Yet it can be argued that in important respects women have suffered a history of community discrimination that, by analogy to the situation of minority races, justifies making at least female sex a suspect classification. Such a limitation to female sex fits closely with what the Court has been doing, if not with what it has been saying. If this is the appropriate analysis, then the most significant difference between equal protection and the proposed Equal Rights Amendment89 may be that

85. Id. at 15.
86. For an excellent and balanced discussion see Ginsburg, Gender and the Constitution, 44 U. CIN. L. REV. 1 (1975).

Frequently this question and similar ones are answered in terms which suggest that it is the duty of courts to eliminate all bad or unwise legislation. See, e.g., Johnson, Sex Discrimination and the Supreme Court—1971-1974, 49 N.Y.U.L. REV. 617 (1974):

Remedies [for those seeking gender equality] are available, if judges can only be persuaded to use them. It is an awesome task to convince a comfortable and overwhelmingly male judiciary that the existing pattern of legally-enforced sex discrimination is so pernicious as to violate the federal Constitution. The effort is gathering momentum, as increasing numbers of judges join those who have already recognized this anachronistic culture excrescence for what it is: stupid, wasteful and morally reprehensible.

Suppression of the efforts of people to lead independent lives is not among the legitimate powers of government. In our system, responsibility for the ultimate vindication of this truth lies with the courts. In the area of sex discrimination, the recent performance of the Supreme Court has ranged from acceptable to inexcusably poor.

Id. at 691-92.

88. The section provided for a reduction of representation in Congress to states which denied the right to vote "to any of the male inhabitants of such State" who were 21 and citizens.
89. Senate Comm. on the Judiciary, Equal Rights For Men and Women, S. REP. No. 689, 92d Cong., 2d Sess. 2 (1972). Section 1 would provide: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." For a discussion of the amendment and its background with references to the already extensive literature see R. Ginsburg, Constitutional Aspects of Sex-Based Discrimination 107 (1974).
the latter, if adopted, will make sex, rather than female sex, a suspect, if not virtually forbidden, classification. In any event, the area could be clarified if the Court would face the issue directly. An explicit determination of the basis for categorizing sex as a suspect classification is essential to a rational and consistent determination of the question of whether laws favoring females are to be upheld.

3. Illegitimacy

The Supreme Court has invalidated classifications based on illegitimacy in a number of recent cases. In each case the Court has purported to apply the general limitation that a classification is invalid if not rationally related to a legitimate state purpose. But here, as in the sex cases, the results, as opposed to the rhetoric, of the decisions are consistent with the theory that illegitimacy is a suspect classification. In six of the seven cases before it, the Court has held the classification invalid.90 A basis for this result is difficult to derive from the Constitution, however, since legal preferences for legitimate children, reflecting religious and social preferences for traditional family relationships, have a long tradition in our law.91 Moreover, some language in these opinions suggests that the Court may be in the process of extending constitutional protection to a particular interest rather than making the classification suspect. Thus, in Weber v. Aetna Casualty & Surety Co.,92 the Court said that imposing society's condemnation of irresponsible liaisons beyond the bonds of marriage. . . . [on] the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.93

Again, it would seem that needed clarity would be given this area of the law if the Court would directly confront the question of whether it is using equal protection to create a suspect classifica-

93. Id. at 175 (footnote omitted).
tion, or finding elsewhere in the Constitution protection for the interest not to be subjected to legal burdens which do not relate to individual responsibility or wrongdoing.

4. **Wealth**

Despite the Court's assertion in *Harper v. Virginia Board of Elections*\(^4\) that "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored," the Court has yet to determine that classifications based on wealth are suspect and therefore subject to special scrutiny. In *San Antonio Independent School District v. Rodriguez*,\(^5\) the Court noted that it had "never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . ."\(^6\) Nor is it likely that the Court will move in that direction since the great bulk of legislation bears differently on individuals in relation to their economic status. The Court properly realizes that wealth classifications can be challenged only if they impose burdens on interests which are protected by the Constitution.

5. **Other Classifications**

The question remaining is whether the Court will categorize other classifications based on personal characteristics as constitutionally suspect. It seems likely that the answer to this question is no. Classifications based on age (e.g., laws relating to juveniles, compulsory retirement laws, old-age benefits), educational background, marital status, and other characteristics of individuals are so common that judicial scrutiny based solely on the nature of the classification seems both inappropriate and unlikely.

III. **Classifications Burdening Constitutionally Protected Interests**

A. **The Scope of the Doctrine**

A second aspect of modern equal protection doctrine holds that classifications violate the equal protection clause if they burden constitutionally protected individual interests and are not closely related to "compelling" state interests. If a complainant shows that a classification "serves to penalize the exercise" of a

\(^4\) 383 U.S. 663, 668 (1966).
constitutional "right," the state must show that the classification is "necessary to promote a compelling governmental interest" or it will be held invalid. The concern in these cases is not with the classifying factor, but rather with the importance of the state interest asserted and the closeness of the relationship between the classification and that interest. Initially, one wonders why it is necessary to utilize equal protection at all when the interest is independently protected by the Constitution. If the legislation is inconsistent with the constitutional protection already accorded the interest, is it not invalid without need for reference to equal protection? Is equal protection simply irrelevant or does it extend some additional protection? If so, what protection and why?

When the Supreme Court tests legislation alleged to be inconsistent with the constitutional protection accorded to a particular interest, it applies two general rules. First, legislation that discriminates against constitutionally protected interests will normally be held invalid. In some cases, the Court reaches this result simply by applying the underlying constitutional provision. In other cases, it asserts that it is a denial of equal protection to single out a constitutionally protected interest for discriminatory treatment. The most difficult task in this area is to determine when, if ever, such discriminatory legislation should be upheld. In theory, it seems that legislation discriminating against a constitutionally protected interest should be upheld only where the particular application of the interest involved would uniquely harm an important governmental interest. Some of the cases do

98. The fact that discriminatory burdens placed on constitutionally protected interests will be held invalid, even though the same burdens might not be invalid if imposed generally, is best illustrated by a series of tax cases. The Court holds that tax classifications generally are presumed constitutional. See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (upholding statute imposing tax on personal property of corporations but not of individuals). Yet it holds invalid taxes that discriminate against interstate commerce, Memphis Steam Laundry v. Stone, 342 U.S. 389 (1952); against foreign corporations which have been admitted to do local business, Whyy v. Glassboro, 393 U.S. 117 (1968); against the press, Grosjean v. American Press Co., 297 U.S. 233 (1936); and against citizens of other states, Austin v. New Hampshire, 420 U.S. 656 (1975).
101. The privileges and immunities clause of art. IV, § 2 is given such a reading with respect to the rights of the citizens of one state in another:

[The clause] does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that
talk about upholding such legislation when it is "tailored to serve a substantial governmental interest," but cases actually upholding such discrimination are rare.

The second general rule used in this analysis is that even where legislation does not discriminate against a constitutionally protected interest, if it burdens such an interest so as to be inconsistent with the constitutional protection accorded the interest, the legislation is invalid. Application of this principle frequently entails a weighing process, that is, determining whether the state interest asserted is sufficiently important to justify the particular burden on the protected interest. In this context, the Court often simply states that if the governmental interest is sufficiently substantial to justify the burden, then the standard for testing the particular relationship is only that of reasonableness. In a First Amendment case, for example, the Court has said: "A State or municipality may protect individual privacy [the governmental interest] by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content."

Use of equal protection in lieu of applying directly the constitutional provision protecting an interest significantly changes the focus of the analysis. Where legislation discriminates against a constitutionally protected interest, equal protection analysis is irrelevant. If it has any impact, it may be to weaken the protection normally accorded to the constitutional interest in-


103. Lehman v. Shaker Heights, 418 U.S. 298 (1974) may be one of those exceptions. See the discussion in Stone, supra note 100, at 275-80.

104. Balancing is done most overtly in commerce clause cases. See, e.g., Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). A dispute raged for years in the Supreme Court over whether balancing of interests was appropriate in First Amendment cases. For a useful survey of that dispute see G. GUNThER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1049-54 (9th ed. 1975) [hereinafter cited as GUNThER]. At any rate, there is little doubt that a recurrent theme in First Amendment cases is one of balancing the competing interests.

In the case of legislation that burdens, but does not discriminate against the protected interest, equal protection analysis utilizing the compelling state interest standard appears to extend greater protection than would be accorded simply by applying the substantive constitutional restraint. The Court uses the existence of a burden on the constitutionally protected interest to require the classification to meet the compelling state interest test without significant concern for the seriousness of that burden. Thus, a regulation which imposes even a minor burden on a protected interest may be held to require the state to show that it has a compelling state interest and that the classification is closely related to that interest. The result is to shift attention away from determining the scope of the constitutional protection accorded the interest and toward simply evaluating the magnitude of the state's interest and the closeness of the relationship between the classification and that interest. That this shift in attention changes the result is suggested by the fact that whenever the Court has applied the standard of close relationship to a compelling state interest it has held the legislation invalid.\(^\text{106}\)

At an earlier stage, it appeared that the Court was going to extend this compelling state interest test to classifications that burdened "fundamental" or important interests not expressly protected in the text of the Constitution. For example, the Court held that although the Constitution did not establish a "right to vote" in state elections, regulations imposing restrictions on voting would violate equal protection unless shown to be closely related to a compelling state interest.\(^\text{107}\) Advocates urged the Court to extend this reasoning to hold that interests such as those in welfare and education were sufficiently fundamental to require that classifications burdening them be justified as closely related to a compelling state interest.\(^\text{108}\) Had the Court done so, it is apparent that it would have been, in effect, extending substan-

\(^{106}\) Cf. note 143 and accompanying text infra.

\(^{107}\) Two cases dealing with the regulation of elections appear to be the major exceptions. American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974). In Storer, the Court appeared to apply a diluted version of the test by requiring that the state have a compelling interest, but that the classification need be only reasonably related to it. Id. at 736. See also Buckley v. Valco, 96 S. Ct. 612, 670-72 (1976).

\(^{108}\) Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627-30 (1969). The point and the cases are discussed in more detail in the next portion of the article.

\(^{109}\) The strategy on welfare is discussed in Sparer, The Right to Welfare in The Rights of Americans—What They Are—What They Should Be 65 (N. Dorsen ed. 1971). In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973), it was argued that education is a fundamental right which requires the application of the compelling state interest doctrine to classifications burdening it.
tive constitutional protection to those interests under the guise of equal protection. In *San Antonio Independent School District v. Rodriguez*, however, the Court refused to take this step.

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found in weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.\(^{111}\)

The initial development of the doctrine that equal protection compelled strict scrutiny of classifications that burdened constitutionally protected interests came in the voting and election cases. The history of that development will be examined first, followed by a review of the cases dealing with other constitutionally protected interests.

**B. Cases Relating to Voting and Elections**

The Constitution as originally adopted authorized the states to establish the qualifications for voting—even for voting for members of Congress.\(^{112}\) But a series of amendments has restricted that state power. The Fifteenth Amendment forbids abridging the right to vote "on account of race, color, or previous condition of servitude;" the Nineteenth Amendment, "on account of sex." The Twenty-fourth Amendment provides that the right to vote for federal officers shall not be denied or abridged for the "failure to pay any poll tax or other tax," and the Twenty-sixth Amendment provides that the right of citizens 18 years of age or older to vote in federal or state elections shall not be denied or abridged "on account of age."

As late as 1959, the Court, in upholding a state literacy test for voting, said, "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . . absent of course the discrimination which the Constitution condemns,"\(^{113}\) but added:

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111. Id. at 33-34.
We do not suggest that any standards which a State desires to adopt may be required of voters. But there is a wide scope for exercise of its jurisdiction. Residence requirements, age, [and] previous criminal record . . . are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.\textsuperscript{114}

Four years later the Court began the process of limiting these broad state powers. In \textit{Gray v. Sanders},\textsuperscript{115} invalidating the Georgia county-unit system of voting, and \textit{Reynolds v. Sims},\textsuperscript{116} requiring numerical equality for legislative districts, the Court recognized the power of the states to set general qualifications for voting, but held that all citizens possessing those qualifications are constitutionally entitled to vote and to have their votes counted and weighed equally with those cast by other citizens. In \textit{Gray} the Court referred to such general concepts as the phrase "we the people"\textsuperscript{117} in the preamble to the Constitution, and the "conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments."\textsuperscript{118} In \textit{Reynolds}, the Court stated that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."\textsuperscript{119} But instead of directly constructing a constitutionally protected right to vote out of those materials, the Court in each case held that the equal protection clause forbade any dilution or debasement of the "right to vote."

Soon after \textit{Gray} and \textit{Reynolds}, the Court proceeded to use the equal protection clause to restrict the authority of the states to impose certain qualifications on voting. Restrictions based on military service,\textsuperscript{120} payment of poll taxes,\textsuperscript{121} real property owner-

\textsuperscript{114} Id. at 51.
\textsuperscript{115} 372 U.S. 368 (1963).
\textsuperscript{116} 377 U.S. 533 (1964).
\textsuperscript{117} 372 U.S. at 380.
\textsuperscript{118} Id. at 381.
\textsuperscript{119} 377 U.S. at 555.
\textsuperscript{120} Carrington v. Rash, 380 U.S. 89 (1965). Again the Court spoke broadly of "matters close to the core of our constitutional system," but ultimately held that the limitation constituted an "invidious discrimination" in violation of equal protection. Id. at 96.
\textsuperscript{121} Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). The Court ignored the constitutional history created by the adoption of the Twenty-fourth Amendment proscribing the use of poll taxes in voting for federal officers. The Court appeared to derive from equal protection the principle that the power of the states to set qualifications is limited to qualifications germane to the voter's "ability to participate intelligently in the electoral process." Id. at 668.
ship,\textsuperscript{122} and duration of residence\textsuperscript{123} were invalidated because the states had not shown that they were closely related to a compelling state interest.\textsuperscript{124} The Court's mode of analysis is best illustrated by \textit{Kramer v. Union Free School District No. 15}.\textsuperscript{125} A statute which provided that only otherwise qualified voters who were either parents of children or owners or lessors of real property could vote in school district elections was held violative of equal protection. The Court said that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized"... because statutes distributing the franchise constitute the foundation of our representative society."\textsuperscript{126} Although this language might be taken as establishing a constitutionally protected interest in voting, the Court went on to say that the constitutional protection accorded by equal protection is limited to legislation which "grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others."\textsuperscript{127} The Court further indicated that such legislation is valid only if "the exclusions are necessary to promote a compelling state interest."\textsuperscript{128}

It would be difficult for the Court to read into the Constitution a constitutionally protected interest in voting.\textsuperscript{129} In this area,

\begin{itemize}
\item \textsuperscript{123} Dunn v. Blumstein, 405 U.S. 330 (1972).
\item \textsuperscript{124} The doctrine was also applied in the apportionment cases which are not reviewed here. See generally, Casper, supra note 112; Developments in the Law—Elections, 88 HARV. L. REV. 1111 (1975).
\item \textsuperscript{125} 395 U.S. 621 (1969).
\item \textsuperscript{126} Id. at 626.
\item \textsuperscript{127} Id. at 627.
\item \textsuperscript{128} Id.
\item For an excellent discussion of the Kramer case see Lee, Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District No. 15, 15 ARIZ. L. REV. 457 (1973).
\item \textsuperscript{129} The Court's difficulty was highlighted in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). The Court's holding that only interests explicitly or implicitly protected by the Constitution called for strict scrutiny of classifications burdening them required an explanation of the voting cases. The Court said in a footnote: "The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though... 'the right to vote in state elections is nowhere expressly mentioned.'" Id. at 34 n.74. Later the Court noted that "the right to vote, \textit{per se}, is not a constitutionally protected right..." Id. at 35 n.78. Justice Stewart, concurring, said that if there were a right to vote "both the Fifteenth Amendment and the Nineteenth Amendment would have been wholly unnecessary." Id. at 59 n.2. Justice Marshall, dissenting, asked: "I would like to know where the Constitution guarantees... the right to vote in state elections..." The voting cases and some others were, he said,
\end{itemize}
more than in almost any other, the people have spoken through piecemeal amendments to the Constitution itself. Hence, one can understand the reluctance of the Court to find in equal protection a general ban on state-imposed qualifications despite its view that the "right to vote" is "of the essence of a democratic society" and that "statutes distributing the franchise constitute the foundation of our representative society." 

According the interest in voting partial or indirect protection through equal protection is an unsatisfactory solution, however, because it focuses attention on the importance of the state's interest and the relationship of the classification to that interest rather than on the relationship between the burden imposed on the interest in voting and the state interest. The problem is illustrated by the most recent voting case, Hill v. Stone. There the Court had before it a statute providing that to qualify to vote in city bond elections one must have "rendered" (listed) any real or personal property he might own with the assessor for taxation. The burden imposed was not large since any amount of property was sufficient to qualify the voter if it was listed, whether or not any tax was in fact paid. The state suggested that the purposes of the requirement were, first, to extend some protection to property owners who would bear the direct burden of retiring the bonded indebtedness and, second, to facilitate enforcement of the tax laws. The Court focused its examination on the relationship of the classification to the state interests asserted. It said that if the classification meant that anyone owning property even of minimal value could vote, then it would not serve either the interest of selecting voters in relation to their prospective liability for the bonded indebtedness or that of enforcing the state tax laws. But had the Court sought to determine whether the statute violated a constitutionally protected interest in voting, it would have more directly emphasized the balance between the magnitude of the burden and the importance of the state interest. Under such an analysis, acceptance of the state's argument that the impact on access to the franchise was minimal could result in the conclusion that the legislation need only be a reasonable means of satis-

has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

Id. at 100.

fying a legitimate but not necessarily "compelling" state interest. Thus, the state interest might not need to be so important nor the classification so closely related as under the Court's equal protection analysis.

In conclusion, application of the Constitution to regulations relating to voting and elections would be greatly facilitated if, either by judicial construction or constitutional amendment, direct constitutional protection were given to the interest in participating in the electoral process.

C. Cases Relating to Travel and Interstate Migration

The first case in which the Court clearly articulated the doctrine that equal protection requires application of the compelling state interest standard to classifications burdening constitutionally protected interests involved the interest in freedom of travel. In Shapiro v. Thompson, the Court invalidated a law requiring a year's residence in the state to qualify for welfare payments. The Court reasoned that the Constitution requires "that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." The legislative classification burdening recent residents could not be justified as a means of discouraging indigents from entering the state to obtain larger benefits since that purpose is inconsistent with the interest in freedom of travel. Other justifications advanced by the state, relating largely to administrative problems and the detection of fraud, were held insufficient since the classification was not closely enough related to the state's purposes. The Court said that a mere rational relationship was not enough:

[ln moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."

Significantly, the Court did not discuss the extent of the burden placed on the interest in freedom of travel or relate that burden to the state interests involved.

134. Id. at 629. For a recent review of the background and development of the "right to travel" see Comment, A Strict Scrutiny of the Right to Travel, 22 U.C.L.A.L. Rev. 1129 (1975).
In Dunn v. Blumstein, the Court, in holding invalid a durational residence requirement for voting, elaborated on the test to be applied. First, the Court said that it is not necessary to show that the classification actually deterred travel; the "compelling-state-interest test" would be triggered by any classification which serves to penalize the exercise of the "right" to travel. Next, it said that the "right" to travel is an unconditional personal right, the exercise of which may not be conditioned absent a compelling state interest. Finally, in rejecting as insufficient the state interests asserted, the Court elaborated on the nature of the compelling state interest test:

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," . . . and must be "tailored" to serve their legitimate objectives.

The Court was saying that even a minor burden on the interest in travel required the state to show both that it had a compelling interest and that the classification was so closely related to that objective that it was the least burdensome method available.

Both Shapiro and Dunn are consistent with a more direct approach that makes unnecessary the use of equal protection analysis. In each, the Court recognized a constitutionally protected interest. It referred to the interest as the interest in freedom of travel, but apparently only the narrower interest in freedom of interstate migration was involved. In each, the burden was placed only on persons who had recently migrated. Therefore, the statutes could easily have been held invalid because they discriminated against the exercise of a constitutionally protected interest, and such discrimination could not be justified since the recent residents, as such, did not present any unique evil. In

137. Id. at 343 (citation omitted).

[T]he right to travel was involved in only a limited sense in Shapiro. The Court was there concerned only with the right to migrate, "with intent to settle and abide" or, as the Court put it, "to migrate, resettle, find a new job, and start a new life."
Dunn, the Court directly articulated this notion: "Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions only on those persons who have recently exercised that right."139 But then, as in Shapiro, the Court confused the issue by suggesting that such discriminatory legislation might be upheld if necessary to promote a compelling state interest.

The confusion introduced by this unnecessary suggestion, that a discriminatory law burdening the exercise of a constitutionally protected interest can be upheld if necessary to satisfy a compelling state interest, was underscored in Memorial Hospital v. Maricopa County.140 In Shapiro and Dunn it was reasonably clear that when the Court referred to durational residence requirements as penalizing the interest in travel, it meant that the requirements discriminated against the exercise of the interest—that is, imposed the burden only on those who had recently migrated. But in Memorial Hospital, the Court explained the notion of penalty in another way. It said that in Shapiro "the Court found denial of the basic 'necessities of life' to be a penalty."141 Accordingly, the Court indicated that a durational residence requirement for lower college tuition would be valid, even though it was discriminatory and burdened the exercise of the interest in migration, since the interest in attending college was not as vital as the interest in welfare in Shapiro or medical care in Memorial Hospital.142 This is indeed a strange result: to hold that the validity of discriminatory classifications burdening the exercise of constitutionally protected interests depends on whether or not the classifications burden other interests which are not constitutionally protected.

The confusion thus introduced led the Court to uphold a

139. 405 U.S. at 342 (footnote omitted). See also McCarthy v. Philadelphia Civil Service Comm'n, 96 S. Ct. 1154 (1976) (holding that a requirement that city employees reside in the city did not violate the "right" to travel).

140. 415 U.S. 250, 262 (1974). There the Court held invalid a state statute requiring a year's residence in a county as a condition to receiving nonemergency hospitalization or medical care at county expense. Its search for a basis other than discrimination may be explained by the fact that the restriction was upon recent residents coming from other counties in the state as well as from outside the state. It still should be possible, however, to interpret the statute as discriminating against migration. The recent resident who had come from another state was treated differently than persons who had resided longer in the county. The fact that recent residents coming from other counties in the state were similarly treated should be irrelevant to the issue.

141. 415 U.S. at 259.

142. The Court was also reacting to dictum in Vlandis v. Kline, 412 U.S. 441, 452 (1973) suggesting that lower resident tuition fees in state educational institutions could be conditioned on durational residence requirements.
durational residence requirement for divorce in Sosna v. Iowa. Based on such precedents as Dunn, Shapiro, and Memorial Hospital, it appears that this argument should have been decisive unless the state could show that, with respect to determining the crucial jurisdictional issue of residence, the recent resident presented problems not presented by other residents. The Court, however, rejected the argument and proceeded to decide the case as though it involved a nondiscriminatory burden on the exercise of the interest in freedom of migration. Using the notions developed in Memorial Hospital, the Court said that the burden on the complainant was not as heavy as in the cases involving welfare, voting, or medical care since she was not irretrievably foreclosed from obtaining some part of what she sought—by waiting she could obtain the same divorce decree sought upon her arrival in the state. Against this lower burden on the interest, the Court said, must be weighed the more substantial state interests in insuring that those who seek a divorce from its courts be genuinely attached to the state, and in insulating divorce decrees from collateral attack. Significantly, the Court spoke neither of compelling state interests nor of the requirement that the classifications be closely tailored to such state interests.

Sosna leaves this area of the law in a state of complete confusion—a confusion created mainly by the use of equal protection analysis in cases where it is neither necessary nor proper. In Sosna, equal protection analysis led the Court to uphold a discriminatory classification burdening the exercise of a constitutionally protected interest without recognizing the general approach in other areas that holds such discrimination unconstitutional whatever the extent of the burdens imposed. Further, the Court appeared to reject the notion that nondiscriminatory statutes burdening the exercise of constitutionally protected interests are invalid, whatever the extent of the burden, unless closely related to a compelling state interest. Instead, the Court balanced the extent of the burden on the interest in migration against the state interests asserted in much the same manner as it does, for

143. 419 U.S. 393 (1975).
144. Id. at 405.
example, in First Amendment cases where the burden is not discriminatory.\textsuperscript{145}

Here, as in the voting cases, both clarity of analysis and consistency in result would be achieved if the Court abandoned the use of equal protection and decided the cases by determining whether the particular legislation conflicts with the constitutionally protected interest in freedom of migration. On this basis, most, if not all, durational residence requirements would be found invalid as discriminatory burdens upon the exercise of that interest.

\textbf{D. Cases Relating to Other Constitutionally Protected Interests}

To date, the Court has applied equal protection analysis to hold classifications burdening the exercise of constitutionally protected interests invalid, unless closely related to compelling state interests, only in cases involving voting, elections, and durational residence requirements. Whether the Court will discover other constitutionally protected interests to which it will apply the rule remains to be seen.

It is worth noting, however, that the Court has recently been establishing the contours of a constitutionally protected interest in privacy without using the equal protection clause. In a series of cases, the Court has held that the interest in privacy is a "liberty" protected by the due process clause.\textsuperscript{146} The cases have focused on the scope of the protection accorded rather than on the classifications and their relationships to the state interests involved. Nevertheless, the Court has borrowed an approach from the equal protection cases. In \textit{Roe v. Wade},\textsuperscript{147} for example, the Court analyzed whether forbidding abortions unconstitutionally interfered with the interest in privacy as follows: (1) There is a

\textsuperscript{145} For an argument that the right to travel should be unhinged from equal protection in order to broaden its scope see Note, Freedom of Travel and Exclusionary Land Use Regulations, 84 YALE L.J. 1564 (1975). For an alternate method to analyze these cases, see the suggestion that "newcomers" be regarded as a suspect class in McCoy, Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class? 28 VAND. L. REV. 987 (1975).

\textsuperscript{146} See, e.g., Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); \textit{cf.} Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Discussion of the constitutional basis and the scope of the interest in privacy is beyond the scope of this article. The literature on the subject is already enormous. For a useful review of cases and articles see GUNTHER, supra note 104, at 616-56.

\textsuperscript{147} 410 U.S. 113, 152-56 (1973).
constitutionally protected interest in privacy. (2) That interest is broad enough to encompass a woman’s decision to terminate her pregnancy because of the significant detriment that would be imposed on her by denying her the choice. (3) Since the legislation burdens the exercise of this interest in privacy, it can be sustained only if it is justified by compelling state interests and the legislation is narrowly drawn to express only those interests.

All of this terminology may be no more than an elaborate way of saying that the validity of a statute burdening the interest in privacy is determined by weighing the extent of the burden against the importance of the state interests. If so, the language changes nothing. It may, however, suggest a more mechanical approach: if the interest in privacy is burdened, whether substantially or not, the regulation must be necessary to achieve a compelling state interest. Such an interpretation would tend to extend to the interest in privacy a measure of protection greater than that normally accorded other constitutionally protected interests.

The most recent case, Cleveland Board of Education v. LaFleur, suggests that the Court may not be departing from the normal mode of weighing the state interest against the burden on the interest in privacy. In holding invalid mandatory maternity leave regulations for pregnant teachers the Court referred to the "heavy burden" imposed on the protected interest. Instead of speaking in terms of a compelling state interest, it said that the "rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty."
IV. FREEDOM FROM IRRATIONAL CLASSIFICATIONS

A. Introduction

The preceding portions of this article have discussed the application of equal protection to cases where the basis for classification is found to be constitutionally proscribed or suspect, and to cases where the classification burdens a constitutionally protected interest. The question now to be addressed is to what extent the equal protection clause also imposes on legislation a requirement that classifications be reasonably related to a legitimate legislative purpose. Does the clause extend constitutional protection to an interest in freedom from arbitrary or irrational classifications? If so, what is the scope of that protection?

The analytical problems involved in answering such questions are formidable. Suppose that a legislature enacts a law with a preamble expressing its concern with the rising accident and death rate on the highways, and an operational section imposing a one-year suspension from driving for any person who has been twice convicted within a two-year period of either driving in excess of the speed limit or reckless driving. Obviously, this classification is both underinclusive and over-inclusive with regard to the legislative purpose. It will not impose suspensions on many drivers whose performance on the highways contributes to the accident rate and it will suspend some drivers who do not contribute to that rate. How does one decide whether classifications of this kind are forbidden by the constitutional interest in freedom from irrational classifications?

One can say that here, as with other constitutionally protected interests, the courts should balance the state interest in-
volved against the interest in freedom from irrational classifications. How should that balance be struck, or the balancing model constructed? There are at least five possibilities. The Court could balance (1) the level of irrationality of the legislation—the extent to which the classification departs from perfect correlation with the legislative purpose—against the state interest in maintaining the normal political processes in our democratic society (which necessarily produce less-than-perfect classifications); (2) the level of irrationality against the state interest in economy and efficiency achieved by making the particular classifications; (3) the level of irrationality against the nature and extent of the burden on the individual affected by the classification (e.g., if the individual is imprisoned or denied welfare or education, the classifications would have to be more rational than if his business were made less profitable or his property less valuable); (4) the level of irrationality against the invidiousness of the basis upon which the classification is drawn (e.g., a classification based on lack of wealth would have to be more rational than one based on ability to pass a driving test); and (5) the importance of the state interest being served by the legislation against the nature and extent of the burden on the individual, or the relative "invidiousness" of the classification.

B. Level of Irrationality v. State Interest in Maintenance of Normal Political Processes

Equal protection has a minimal impact when the balance is between the level of irrationality and the state interest in maintaining the normal political processes. Under this analysis, almost all legislation is upheld. Posner has recently presented the argument for this position,\textsuperscript{153} asserting that the legislative process does not attempt to promote some general conception of the public good:

Many public policies are better explained as the outcome of a pure power struggle—clothed in a rhetoric of public interest that is a mere figleaf—among narrow interest or pressure groups. The ability of such groups to obtain legislation derives from their money, votes, cohesiveness, ability to make credible threats of violence or other disorder if their demands are not met, and other factors all totally unrelated to the abstract merit of the policy at issue.\textsuperscript{154}

\textsuperscript{154} \textit{Id.} at 27.
From this he concludes that it is a mistake to require as a constitutional standard

that legislation, to withstand a challenge based on alleged arbitrariness or discrimination, be reasonably related to some general social goal. The real “justification” for most legislation is simply that it is the product of the constitutionally created political process of our society.\textsuperscript{155}

Tussman and tenBroek,\textsuperscript{156} in their pioneering article a quarter of a century ago, took the opposite approach. They recognized that political considerations result in legislative classifications that are not closely related to a general legislative objective because of the necessity to accommodate the conflicting interests of various groups:

If we accept the pressure group theory, a law is properly the resultant of pressures exerted by competing interests . . . . The demand for equal laws becomes meaningless in this context. The legislature, on this view, is simply the focal point of competing forces—a social barometer faithfully registering pressures. Can the Court demand of a barometer that it ignore pressure?\textsuperscript{157}

Nevertheless, they asserted that the constitutional protection of equal laws is a constitutional command that the legislatures rise above such pressures and serve the general good, and that “the triumph of private or group pressure marks the corruption of the legislative process.” Hence, they concluded that “legislative submission to political pressure does not constitute a fair reason for failure to extend the operation of a law to those similarly situated whom it leaves untouched.”\textsuperscript{158}

It appears that the Court follows the Posner approach with respect to most legislation challenged under the equal protection clause. In \textit{Railway Express Agency, Inc. v. New York},\textsuperscript{159} the Court said that it is by “practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered.” In \textit{McGowan v. Maryland},\textsuperscript{160}

\footnotesize
\begin{enumerate}
\item \textsuperscript{155} Id. at 28-29. Posner does suggest that there may be “extreme cases of discriminatory state action” which are so “palpably inconsistent” with equal protection as to be unconstitutional, “such as forbidding left-handed people to obtain drivers’ licenses in order to reduce automobile pollution.” Id. at 29 n.56.
\item \textsuperscript{156} Tussman \& tenBroek, \textit{The Equal Protection of the Laws}, 37 CALIF. L. REV. 341 (1949).
\item \textsuperscript{157} Id. at 350.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} 336 U.S. 106, 110 (1949).
\item \textsuperscript{160} 366 U.S. 420 (1961).
\end{enumerate}
the Court said that the states are permitted

[a] wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests 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 inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.\footnote{161}{Id. at 425-26. This same approach will be found in a number of more recent cases. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores Inc., 414 U.S. 156 (1973); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).}

Thus, the Court strikes down few classifications as irrational because it could do so

only if we substituted our judgment on the facts of which we can be only dimly aware for a legislative judgment that reflects a vivid reaction to pressing fiscal problems. . . . We cannot [do this] and stay within the narrow confines of judicial review, which is an important part of our constitutional tradition.\footnote{162}{Id. at 365. There are approximately 23 cases since 1947 in which the Court has purported to apply only a standard of rational relationship and has held legislation unconstitutional thereunder. Ten of these cases involved classifications based on sex or illegitimacy. See CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. No. 92-82, 92d Cong., 2nd Sess. 1597-1783 (1973).}

\section*{C. Level of Irrationality v. State Interest in Economy and Efficiency}

The second possibility, that the level of irrationality should be balanced against the state interest in economy and efficiency in government, is closely related to the first. The emphasis here is on the relative costs of attempting to classify people by characteristics closely related to the legislative purpose, as opposed to using a less rational but more easily applied classification. Thus, a state could justify a requirement that one pass a bar examination to practice law, although the process will exclude some who would make good lawyers and include some who would not, since means more closely related to individual fitness are much more expensive and introduce greater possibilities of individual judgments based on inadmissible factors.

The Court has recently used this approach to limit the line of cases holding that statutes making conclusive presumptions
are normally invalid. In *Weinberger v. Salfi*, the Court upheld a provision in the Social Security Act imposing a duration-of-relationship requirement for wives and stepchildren of deceased wage earners, saying:

[T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. . . . Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.\(^{164}\)

How much more rigorous the judicial review inherent in this approach is than that inherent in the balancing of the level of irrationality against the realities of the legislative process depends, of course, upon how much deference to legislative judgment the Court intended by the phrase "could rationally have concluded."\(^{165}\)

**D. Level of Irrationality v. Nature and Extent of Burden**

Problems of a different nature arise if it is held that the balance is between the level of irrationality of the classification and the nature and extent of the burden placed upon the person attacking the classification. On what principled basis can the Court sort out the individual interests that require more precise classifications from those that do not? The Court often refers to the difference between legislation affecting "personal" interests and legislation affecting "economic and social" interests. To the extent that this means that personal interests protected under some other constitutional provision merit a close examination of and balancing against legislative interests affecting them, there is no difficulty. But to the extent that it means, as Justice Mar-

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163. 422 U.S. 749 (1975).
164. *Id.* at 777.
shall has often suggested in dissenting opinions,\textsuperscript{166} that the Court should weigh the societal importance of interests that are not otherwise constitutionally protected, the distinction presents genuine problems as to the scope of judicial review. Why should the Court decide, for example, whether legislation limiting educational opportunities is more important than legislation limiting the occupancy of houses to single families, with the result that a classification in the first case must be more closely related to a legitimate legislative purpose than in the second? Certainly, equal protection analysis does not help answer the question.\textsuperscript{167}

\textbf{E. Level of Irrationality v. Nature of Classifying Factor}

Similar problems arise when the balance is between the level of irrationality of the classification and the nature of the classifying factor being used. As we have seen, the Court has found that race, nationality, and alienage are constitutionally suspect classifications. With respect to sex and illegitimacy, however, the Court has said that it need not decide whether they are suspect classifications because it has been able to find the classifications used to be irrational and arbitrary. Yet a reading of the cases makes it clear that the Court's real objection has been to the classifying factor, with the result that in sex and illegitimacy cases the Court requires legislatures to use classifications more closely related to a legislative purpose than it would with respect to legislation using other classifying factors.\textsuperscript{168} The question, then, becomes one of deciding whether equal protection is restricted to a limited number of classifications considered suspect or whether it permits the Court to rank (perhaps along a scale with an infinite number of gradations) classifying factors, some requiring more precision in classification than others.


\textsuperscript{167} For the view that the Court should balance the competing policies see Note, Legislative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123, 154 (1972): Because the disputes that arise under the rubric of the Equal Protection Clause have to do with the relative merits of competing public policies, judicial decisions obscure the central issues in such cases to the extent that they are based on discussions of a statute's rationality. The nature of the conflict between the political values at stake as well as the underlying bases of judicial reasoning would be made more explicit if the competing public policies were weighed outright without diversionary discussions regarding a statute's rationality.

\textsuperscript{168} See the discussion in Section II, supra.
F. Importance of State Objective v. Nature and Extent of Burden or Nature of Classifying Factor

Finally, one must consider whether in cases such as these the Court should also weigh the importance of the state objective. The Court has not yet purported to do so. Instead, as Gunther has noted, in recent cases in which the Court has invalidated statutes purportedly under the rational basis standard, it has required that the classification substantially further—be more than minimally related to—the state objective, and that the objective be a real rather than an imagined or illusory one. Justice Marshall himself, in his dissenting pleas for the Court to apply a spectrum of standards, has not clearly said that the importance of the state objective must be weighed in the balance when neither a constitutionally protected interest nor a suspect classification is involved. Indeed, the Court has been concerned with the importance of the state objective only in those cases where the Court was in fact identifying either an interest as constitutionally protected or a classifying factor as suspect.

G. Future of the Irrationality Approach

The most important issue posed for the future is the extent to which the Court will move to require the states to show that legislative classifications bear more than a minimal relationship to an articulated, or possibly even genuine, legislative purpose. Will the Court develop a calculus of interests that, although not


The nature of our inquiry into the justifications for state discrimination is essentially the same in all equal protection cases: We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests.

Justice Marshall goes on to say that the compelling state interest standard applies when constitutionally protected interests are burdened. He does not clarify whether in other cases the close scrutiny should go only to the identification of the state interest and the relation of the classification to it or whether the importance of the state interest should also be weighed.


otherwise accorded constitutional protection, require "more perfect" classifications when they are burdened? Recent cases suggest that the Court will not adopt the Marshall formulations. Enormous problems of workload will result if the door is opened to imaginative counsel to seek court review of wider and wider areas of legislation.\(^\text{173}\) Furthermore, the Court is uncomfortable with openly determining that some interests are to be accorded more constitutional protection than others without a point of constitutional reference more precise than the equal protection clause. But the pressures to find some basis for invalidating "bad" legislation will continue to be felt, and one can expect the Court from time to time to seize upon the irrationality of classifications as a basis for expressing its displeasure with the substance of such legislation.\(^\text{174}\)

V. Conclusion

What, then, should be the role for equal protection? What limitations can it fairly be said to impose on the legislative process?

First, history makes it clear that the equal protection clause was intended to invalidate legislation singling out the black race for special burdens. From this, there is little difficulty in generalizing a similar protection for other racial and national groups that have suffered a history of community discrimination. To conclude that all classifications based on race or nationality are constitutionally suspect extends the reach of this interpretation somewhat further, but certainly not unacceptably so. The current dispute over the validity of "benign discrimination" poses

\(^{173}\) No attempt has been made in this article to review the cases in the lower federal courts and the state courts where the workload problem will appear. The extent to which some courts are willing to use equal protection analysis to invalidate ordinary legislative choices is indicated by the experience with automobile guest statutes. The California Supreme Court held the California guest statute invalid as not bearing a substantial and rational relationship to what the court conceived to be the legislative purposes. Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 338 (1973). The mixed reception that this opinion received in other courts is reviewed in Comment, The Constitutionality of Automobile Guest Statutes: A Roadmap to the Recent Equal Protection Challenges, 1975 B.Y.U.L. Rev. 99. In a later opinion upholding another portion of the California guest statute, the California court indicated the need to restrict the expansive role it had assumed in applying equal protection. Schwalbe v. Jones, 16 Cal. 3d 514, 546 P.2d 1033, 128 Cal. Rptr. 321 (1976).

\(^{174}\) For a quite different point of view regarding the issues treated in this section and in portions of the other sections see Goodpaster, The Constitution and Fundamental Rights, 15 Ariz. L. Rev. 479 (1973).
sharply the question whether the special protection is accorded to all races or only to those that have suffered community discrimination. An even broader reach of interpretation is involved in the question of whether other criteria, such as alienage, sex, and illegitimacy, should be treated as constitutionally suspect. The Court has so held with respect to alienage, but has purported not to decide the issue for classifications based on sex and illegitimacy. It appears, however, that the Court is in fact treating female sex and illegitimacy as suspect classifications.

Second, equal protection has no significant role to play with respect to classifications burdening constitutionally protected interests. Legislation discriminating against such interests can be, and often has been, invalidated without using equal protection analysis. Legislation that burdens such interests but does not discriminate against them is normally tested by balancing the importance of the state interest against the extent of the burden on the protected interest. Those cases suggesting that a mere showing of any burden on a constitutionally protected interest requires the state to demonstrate that the classification is closely tailored to a compelling state interest constitute a misapplication of the equal protection doctrine. That misapplication may divert attention away from the normal process of balancing the magnitude of the burden on the protected interest against the importance of the state interest served. This relatively recent aspect of equal protection analysis, one applied in only a narrow range of cases, should be abandoned as unnecessary and confusing.

Third, a major question remains unresolved regarding the extent to which equal protection extends protection to an interest in freedom from irrational classification. In fact, the Court rarely overturns legislative classifications merely because they are found to be irrational. Recent cases indicate that the Court may be examining more closely classifications that impinge on a variety of personal interests not otherwise accorded constitutional protection. This trend raises significant and difficult problems to the extent that it portends any substantial degree of judicial supervision of the classifications contained in the vast outpourings of federal and state legislatures. Its continuance would pose problems both of legitimacy and workload for the Court. One can therefore predict that judicial use of the equal protection clause to invalidate legislation not involving either suspect classifications or burdens on constitutionally protected interests will, as in the past, be a relatively unusual event.