THE "NEW" EQUAL PROTECTION *

by

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> The law, in its majestic equality, forbids the rich as well as the poor, to sleep under bridges, to beg in the streets, and to steal bread.
> —ANATOLE FRANCE

> Equal protection remains a body of doctrine in flux.
> —GERALD GUNTHER

DOCTRINE OF EQUAL PROTECTION

The Philippine Constitution provides in Article IV, Section 1: "...nor shall any person be denied the equal protection of the laws." This provision mirrors the American Constitution, Amendment XIV, Section 1: "No State shall...deny to any person within its jurisdiction the equal protection of the laws."

Although Justice Holmes, with Olympian *savoir-faire,* could describe the equal protection clause as "the last resort of constitutional arguments",[1] the guarantee is today nothing less than "the single most important concept in the Constitution for the protection of individual rights."[2] The equal protection clause has been transmuted into the keystone of the Bill of Rights because of the demise of the doctrine of substantive due process, a development marked by the decision in the American case of *West Coast Hotel v. Parrish,*[3] decided in 1937.

But while today the equal protection clause could be described as the sheet anchor of human rights, at the same time the concept of equality itself is being buffeted by waves of skepticism. Professor Peter Westen of

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* Fourteenth Dean Jorge C. Bocobo Memorial Lecture delivered on 14 January 1983 at the U.P. Law Center Lecture Hall.

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[1] Buck v. Bell, 274 U.S. 208 (1927). In this opinion written by Justice Holmes, the U.S. Supreme Court upheld a sterilization statute. This case was decided in 1927, before the decision in Skinner v. Oklahoma, 316 U.S. 535 (1942), for which see text accompanying footnote 51. *Skinner* established the basis for the fundamental rights—strict scrutiny analysis under the equal protection clause. The U.S. Supreme Court will probably no longer follow *Buck* today, since a sterilization status impairs fundamental rights, and the impairment would have to be justified by a compelling state interest.

[2] J. NOWAK, R. ROTONDA, AND J.N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 517 (1978).

[3] 300 U.S. 379 (1937). See NOWAK, *supra* note 2, at 404-10.

the University of Michigan, in an article entitled "The Empty Idea of Equality", published recently in the *Harvard Law Review,* argues:[4]

> Equality is as important and unimportant—as good and bad—as the moral and legal standards by which it is measured. To say two people are legally equal means that some moral or written law exists that treats them the same, but it says nothing at all about the content of the law. Aristotle's principle that "equals should be treated equally" means: people who by law should be treated the same should by law be treated the same. It is perfectly true. But it is not very interesting.

The thesis that without preliminary regard to the facts, a meta-empirical "presumption of equality" cannot be sustained, is wittily demonstrated by J. R. Lucas.[5] His proof starts with the following syllogism:

> All men are men
> All men are equally men
> All men are equal.

But if we substitute the term "numbers" for the term "men" in this syllogism, the result is a fallacy:

> All numbers are numbers
> All numbers are equally numbers
> All numbers are equal.

Thus, the presumption of all equality will not hold, if it is based only on the argument that all persons are human, without empirical inquiry.

Evils arise when, without adequate empirical basis, equality is treated, even if only presumptively, as the equivalent of justice. Firstly, the presumption of equality might result in a decision based on a mere mechanical test of burden of proof, which would not necessarily be a just decision. Secondly, even if the opponent rebuts the presumption of equality by showing justice-relevant differences, such differences require criteria other than equality, for justice requires, not equality, but differentiation in distribution or treatment. Finally, when justice is reduced to equality, habits of thought develop which obfuscate the two basic tasks of identifying and explicating differences between human beings which are relevant to making justifiable discriminations between them, and of the values basing this justification; and of structuring justice-precepts corresponding to these differences and related values. We are thus warned that while equality beckons as a *tabula in naufragio* for the socially shipwrecked, "there is no pot of justice", according to Professor Julius Stone of the Hastings College of Law, "at the end of the rainbow of equality."[6]

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[4] *The Concept of Equality: Peter Westen States His Thesis,* 26 Law Quadrangle Notes 7 (Spring 1982).

[5] Lucas, *Against Equality,* 40 PHILOSOPHY 296 (1965).

[6] Stone, *Equal Protection and the Search for Justice,* 22 ARIZ. L. REV. 16 (1980).

In the United States, the original understanding of the equal protection clause was that it prohibited only certain acts of discrimination based on race.[7] From this starting point, the U.S. Supreme Court moved forward by interpreting the clause to prohibit any governmental action proceeding from the premise that one person is by virtue of race morally inferior to another.[8] The concept of equal protection relies on the notion that "although not every person is the moral equal of every other person, there are some traits and factors—of which race is the paradigmatic example—by virtue of which no person ought to be deemed morally inferior to any other person;"[9] in sum, the principle of moral equality. In carrying out the view that race is morally irrelevant, the Court has ruled that any race-dependent decision which results in disadvantage to non-whites is presumed to be unlawful, and the presumption is overthrown only when it is shown that the decision is substantially related to a weighty governmental interest that cannot otherwise be served.[10]

In the past decade, the Court has gone beyond race to other disfavored bases of governmental action, under "the more general proposition that it is unjust to treat a person as morally inferior to another by virtue of any morally irrelevant trait or for government to take action predicated on the view that a person is inferior to another by virtue of *any* morally irrelevant trait."[11] The identification of "morally irrelevant" traits and factors is problematic, but the list probably includes, apart from race, gender, illegitimacy, and, where the Constitution does not provide otherwise, alienage.

If gender does not indicate anything about the moral worth of a person, then any governmental action based on the view that one person

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[7] See R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). He concludes that the equal protection clause was not intended to serve as a charter for the political and racial equality of the blacks, but only as a constitutional protection of the rights enumerated in the Civil Rights Act of 1866. *Id.*, at 23.

[8] *See* Strauder v. West Virginia, 100 U.S. 303 (1880), where a broader understanding of the Fourteenth Amendment is suggested by the language of the Court on p. 308. *See also* Plessy v. Ferguson, 163 U.S. 537 (1896), the infamous case where the Court appeared ready to accept the principle that *any* law based on racial inferiority would be offensive to equal protection, at pp. 544, 551. *See also* Brown v. Board of Education, 347 U.S. 483 (1954) and Loving v. Virginia, 388 U.S. (1967), which firmly establish this broader understanding of equal protection.

[9] Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1031 (1979).

[10] *See* opinion of Powell, J. in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *See also* Village of Arlington Heights v. Metropolitan Dev. Corp. 429 U.S. 252 (1977). Under the condition that there should be no racially neutral way to serve a weighty governmental interest, the U.S. Supreme Court has sustained only two race-dependent decisions disadvantaging nonwhites: Korematsu v. United States, 323 U.S. 214 (1944); and Hirabayashi v. United States, 320 U.S. 81 (1943).

[11] Perry, *supra* note 9, at 1051. But what should be the criterion of moral relevance? "If a trait or other factor indicates nothing about a person's choices or activities, and if further it indicates nothing about the person's physical or mental capacity—in the form of native talent, acquired skills, temperament, or the like—to make particular choices or engage in particular activities, that trait or factor ought to be deemed morally irrelevant." *Id.*, at 1066.

is by virtue of gender morally inferior to another, would violate equal protection.[12] In this respect, the moral criticism of law would state the case thus: "[W]omen are supposed incapable of full public life in the world of work and politics; accordingly, on paternalistic grounds women are by law or convention denied the right to participate in that world, or are given that right only in special areas in terms of special protections not accorded men."[13] This thesis is well documented in the International Women's Year issue of the *Philippine Law Journal*, published in 1975.[14]

Illegitimacy indicates nothing about a person's moral status; what it may indicate is something about the moral status of the person's parents. Any governmental action based on the view that a child, because he is illegitimate, is morally inferior to, and less deserving than another, is said to violate equal protection.[15] Justice Stevens has argued that the sovereign should firmly reject the tradition of thinking of illegitimates as less deserving persons, writing: "The fact that illegitimacy is not as apparent to the observer as sex or race does not make this governmental classification any less odious."[16]

Unlike gender and illegitimacy, alienage seems to be a morally relevant status, in the sense that the concept of citizenship itself implies the existence of a favored group. Hence, although in 1971, the U.S. Supreme Court declared that classifications based on alienage are subject to close judicial scrutiny,[17] in 1976 the same Court reaffirmed that the federal power over aliens is subject only to narrow judicial review.[18] The 1976 doctrine, however, is not equal protection doctrine, but a doctrine justified by the supremacy clause of the U.S. Constitution, specifically the principle that no state may take action that would interfere with congressional immigration policy.[19] Moreover, were the Court to deem alienage as a morally irrelevant status, this would be tantamount to denying the validity of what the

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[12] *See. e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976); Califanu v. Goldfarb, 430 U.S. 199 (1977); Califano v. Webster, 430 U.S. 313 (1977). For a casebook treatment of this topic, see K. DAVIDSON, R.B. GINSBURG, AND H.H. KAY, SEX-BASED DISCRIMINATION (1974).

[13] D. RICHARDS, THE MORAL CRITICISM OF LAW 174 (1977).

[14] 50 PHIL. L. J. 1-147 (1975). The contents of this issue are: Cortes, *Women's Rights under the 1935 Constitution*, at 1; San Diego, *Women in Family Law*, at 25; Ziga, *Women in Politics and Government*, at 36; Romero, *Women and Labor: Is the Economic Emancipation of the Filipino Working Woman at Hand?* at 44; Ricafrente, *International Labor Standards for Working Women*, at 55; Sanvictores, *Women and Business*, at 80; Soriano, *Women and Education*, at 88; and *Documents* at 103.

[15] *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Cas & Sur. Co., 406 US 164 (1972); Gomez v. Perez, 409 U.S. 535 (1973); Trimble v. Gordon, 430 U.S. 762 (1977). *But see* Labine v. Vincent, 401 U.S. 532 (1971); Mathews v. Lucas, 427 U.S. 495 (1976); Lalli v. Lalli, 439 U.S. 259 (1978).

[16] Stevens, J., joined by Brennan and Marshall, JJ., dissenting, in Mathews v. Lucas, 427 U.S. 523 (1976).

[17] Graham v. Richardson, 403 U.S. 372 (1971).

[18] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

[19] The U.S. Const. Art. 1, Sec. 8 provides that the federal government has exclusive jurisdiction over immigration and naturalization matters.

Constitution itself does—treating aliens and citizens differently for certain purposes.[20]

In brief, like race-dependent decisions, gender-dependent decisions and illegitimacy-based classifications are now generally disfavored. While alienage is, without more, not a reliable indicator of moral worth, the Court must abide by alienage-based classifications drawn by the Constitution itself.[21]

While government may not act to disadvantage one person relative to another for a morally irrelevant reason, government continually classifies whenever it formulates a rule, usually by enacting a law. The legislature specifies the class of persons that a law will govern, e.g., those qualified to apply for a driver's license, or those qualified for admission to movies of a certain category. The equal protection clause should not be taken to mean that states cannot discriminate among classes of people,[22] for, in the words of Justice Frankfurter: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[23] In an equal protection case, therefore, the threshold question is whether similarly situated individuals are being treated differently.[24] Under the equal protection clause, the government may classify persons or "draw lines" in the creation and application of laws, provided that the classifications are not based upon impermissible criteria or arbitrarily used to burden a group of individuals. The government classification must relate to a proper governmental purpose.[25] In brief, equal protection guarantees that similar people will be dealt with in a similar manner, and that people of different circumstances will not be treated as if they were the same.[26]

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[20] Perry, *supra* note 9, at 1066.

[21] See the Phil. Constitution, Art. XIV, "The National Economy and the Patrimony of the Nation." Sec. 5 limits the operation of public utilities to citizens, or to corporations or associations organized under the laws of the Phil. at least 60% of the capital of which is owned by citizens. Sec. 9 likewise limits the disposition, exploration, development, exploration, or utilization of natural resources. Sec. 11 imposes the same limitation on the holding of lands of the public domain. Sec. 14 imposes the same limitation on the transfer or conveyance of private lands, save in cases of hereditary succession, except that, under Sec. 15, a natural-born citizen of the Philippines who has lost his Philippine citizenship may be a transferee of private land, for use by him as his residence.

See also Art. XV, "General Provisions". Sec. 7(1) imposes the same limitation based on citizenship on the ownership and management of mass media. Sec. 7(2) further provides that the governing body of every entity engaged in commercial telecommunications shall in all cases be controlled by citizens. Sec. 8(7) imposes the citizenship limitation on educational institutions, other than those established by religious orders, mission boards, and charitable organizations. The control and administration of educational institutions shall be vested in citizens.

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

[23] Tigner v. Texas, 310 U.S. 141, 147 (1940).

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

[25] J. NOWAK, *op. cit., supra* note 2 at 519.

[26] Tussman and tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

How does the Court determine the existence of a classification? Firstly, the law may establish the classification "on its face", i.e., by its own terms, it classifies persons for different treatment. Secondly, the law may establish the classification in its "application", i.e., the government officials who administer the law are applying it with different degrees of severity to different groups of persons who are described by some suspect trait. Thirdly, the law may establish the classification in its "purpose and effect", i.e., in reality, it constitutes a device designed to impose different burdens on different classes of persons.[27]

Throughout the American cases, the U.S. Supreme Court has held that statistical proof is usually relevant, but rarely determinative. Overwhelming statistical proof might establish a *prima facie* case. The Court has treated statistics as a form of proof which is of great worth in the Civil Rights Act cases, somewhat less in the discriminatory application cases, and very little in the "effect" cases.[28]

An introductory overview to the concept of equal protection might consider that for many years, in the United States it was not equal protection but substantive due process that provided the cutting edge during the decades of extensive Court interference with state economic legislation under the Fourteenth Amendment, which is reproduced in the Philippine Constitution. Since the ordinary command of equal protection was only that government must not impose differences in treatment "except upon some reasonable differentiation fairly related to the objection of regulation,"[29] the result was that the Courts were extremely deferential to legislative judgments.

When the Court abandoned the so-called *Lochner*[30] variety of substantive due process scrutiny in the 1930s,[31] and instead applied traditional equal protection scrutiny, the predictable result was that economic legislation easily survived Court examination. However, in the late 1960s, the Warren Court went further than using equal protection to support only minimal judicial intervention; it began to use equal protection as a far-reaching umbrella for judicial protection of "fundamental" rights not specified in the Constitution.[32] Thus, equal protection has replaced substan-

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[27] J. NOWAK, *op. cit., supra* note 2 at 527.

[28] Id., at 528-535.

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

[30] Lochner v. New York, 198 U.S. 45 (1905). From this decision up to the 1930's, the Supreme Court invalidated on substantive due process grounds, many laws such as those concerning regulation of wages, prices, and employment relations. As in *Lochner,* the decisions typically carried dissents by Holmes, Brandeis, Stone, and Cardozo. The modern Court has repeatedly insisted that it has abandoned the evils of the *Lochner* philosophy.

[31] *See,* for example, Nebbia v. New York, 291 U.S. 502 (1934) and West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[32] G. GUNTHER AND N. DOWLING, CONSTITUTIONAL LAW, CASES AND MATERIALS 983-84 (1970); G. GUNTHER, CONSTITUTIONAL LAW, 657-58 (1975).

The two-tiered standard of review in equal protection analysis is also discussed in G. GUNTHER, CONSTITUTIONAL LAW 671-72 (10th ed. 1980).

tive due process as a tool for wider-ranging review. Is there any difference, then, in the method of analysis under the due process clause and under the equal protection clause? It would seem that if the governmental act classifies persons, it will be subjected to equal protection analysis; otherwise, it would be subjected to due process analysis. Equal protection tests whether the classification is properly drawn, while procedural due process tests the process to find out whether an individual falls within or without a specific classification.[33]

STANDARDS OF JUDICIAL REVIEW

In order that a law can be said to comply with the equal protection clause of the Constitution, there must be a sufficient degree of relationship between the perceived purpose of the law and the classification which the law makes. This determination is left with the Court, in the exercise of its power of judcicial review. The choice of a standard of review reflects whether the Court will assume the power to override democratic political process, or whether it will limit the concept of a unique judicial function.[34] In any event, there are at least three standards of judicial review over equal protection cases:[35]

Firstly, the old equal protection doctrine applies the *rational relationship test.* The Court will uphold a classification, if it bears a rational relationship to an end of government which is not prohibited by the Constitution.

Secondly, the new equal protection doctrine applies the *strict scrutiny test.* The Court will not accept every permissible government purpose as sufficient to support a classification. Instead, it will require the government to show that it is pursuing a "compelling" or "overriding" end, i.e., one whose value is so great that it justifies the limitation of fundamental constitutional values. Moreover, the Court reserves for itself the right to make an independent determination of whether the classification is necessary to promote that compelling interest. The Court applies this standard of review in two categories of civil liberties cases: (a) when the governmental act classifies people in terms of their ability to exercise a fundamental right; and (b) when the government classification distinguishes between persons, in terms of any right, upon some "suspect" basis, such as race, national origin, or alienage.

Thirdly, the newer equal protection dostrine of the past ten years has gone beyond the so-called two-tiered level of review, and applies the *intensified means test.* According to Professor Gerald Gunther of Stanford

33 J. NOWAK, *supra* note 2 at 518-19.
34 *See* Tussman and tenBroek, *supra* note 26 at 266.
35 J. NOWAK, *op. cit., supra* note 2 at 522-27.

University, who apparently originated the term "two-tiered" and also initiated analysis of this third standard of review,[36] the Court should accept the articulated purpose of the legislation, but it should closely scrutinize the relationship between the classification and the purpose. The newer equal protection is sometimes said to apply the middle-level test,[37] the balancing test,[38] or the equality test.[39]

Under the rational relationship test, to use the language of a 1979 American decision,[40] "legislative classifications are valid unless they have no rational relationship to a permissible state objective," and thus a classification will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legislative purposes that we can only conclude that the legislature's actions were irrational." The rational relationship test could be important when there is no plausible difference between the disadvantaged class and those not disadvantaged.[41] This test could also be important if the government attaches negative significance to a difference, other than a personal trait, between the disadvantaged class and others not disadvantaged that is not morally relevant.[42] But, on the whole, since nothing suggests that legislators make irrational judgments, the rational relationship test is of little consequence as a tool of judicial review.[43]

Because the rational relationship test is lenient,[44] and virtually assures the survival of challenged legislation, the U.S. Supreme Court adopted the two-tiered standard of review, by applying the strict scrutiny test. The result has been, in the words of Professor Gunther, that "strict in theory (is) fatal in fact,"[45] meaning that when the strict scrutiny test is applied, almost invariably the statutory classification is struck down for being

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36 Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 17 (1972).

37 See Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classification,* 62 GEO L. J. 1071 (1974).

38 See Marshall, J. in Dandridge, v. Williams, 397 U.S. 471, 519-22 (1970) (dissenting); and in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (dissenting). See also Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?* B.Y.U. L. REV. 89 (1976); and Simson, *A Method of Analyzing Discriminatory Effects Under the Equal Protection Clause,* 29 STAN. L. REV. 663 (1977).

39 See Wilkinson, *The Supreme Court, The Equal Protection Clause and the Three Faces of Constitutional Equality,* 62 VA. L. REV. 945 (1975).

40 Parham v. Hughes, 99 S. Ct. 1742, 1743-44 (1979), quoting in part Vance v. Bradley, 440 U.S. 93, 97 (1979).

41 See O'Brien v. Skinner, 414 U.S. 524 (1974).

42 See United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973).

43 Perry, *op. cit., supra* note 9 at 1067-74.

44 See, for example, Warren, C.J., in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961): "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."

45 Gunther, *supra* note 36 at 8.

violative of the equal protection clause. This new equal protection doctrine is based on two strands: fundamental rights and suspect classes.

However, there are certain sensitive, but not suspect, classes; and there are certain important, but not necessarily fundamental, interests. Hence, in the early 1970s, the American Court began applying the intensified means test, which constitutes an intermediate standard of review between the rational relationship test and the strict scrutiny test.[46] This third standard of review seems to be open-ended. For example, in Justice Marshall's view, the Burger Court has used a "spectrum of standards,"[47] to examine the "substantiality of the state interests sought to be served" and the "reasonableness of the means by which the State has sought to advance its interests"[48] by gauging the extent to which "constitutionally guaranteed rights" depend upon the affected individual interest.[49]

TWO-TIERED STANDARD OF REVIEW

Under the two-tiered standard of review of the new equal protection doctrine, the first tier consists of the rational relationship test, and the second tier consists of the strict scrutiny test. Strict judicial scrutiny is applied when legislation impinges on fundamental rights, or implicates suspect classes, and legislation is upheld only if it is "precisely tailored to further a compelling governmental interest."[50] Thus, it becomes important to determine whether or not a given right is deemed "fundamental", and whether or not a given class is "suspect".

What are "fundamental rights"? American cases indicate that they include the following rights:

a. *Marriage and Procreation.* In *Skinner v. Oklahoma,*[51] a 1942 case, the American Court emphasized the view that "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidous discriminations are made against groups or types of individuals." In ruling that Oklahoma's Habitual Criminal Sterilization Act ran afoul of the equal protection clause, the Court characterized marriage and procreation as basic civil rights, since they are "fundamental to the very existence and survival of the race." This opinion written by Justice Douglas has been praised as "a *doctrinal* foundation" for the "most significant constitutional development of our time."[52]

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[46] *See e.g.,* Trimble v. Gordon, 430 U.S. 762, 767 (1977). See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082 (1978).

[47] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

[48] *Id.,* at 124.

[49] *Id.,* at 102.

[50] McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

[51] 316 U.S. 535 (1942). This decision initiated the contemporary concept of a constitutionally protected "right of privacy" in sexual matters.

[52] Karst, *Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process Formula,'* 16 U.C.L.A. L. REV. 716 (1969).

The right to freedom of choice in marriage relationships is itself a fundamental right. The majority of the American justices voting in the 1973 case of *Roe v. Wade*[52a] also found that the right to privacy, which included the woman's right to an abortion, was "fundamental". Some limitations on the right to an abortion could be supported by two state interests—the interest in the health of the mother, and in the life of the fetus. Two justices dissented.

b. *Voting.* The Court has used the equal protection clause to fashion a fundamental right to vote, describing it as one of those rights that "is preservative of other basic civil and political rights," in *Reynolds v. Sims*,[53] decided in 1964. Therefore, the strict scrutiny test applies.[54]

c. *Fair Administration of Justice.* That this is a fundamental right has been established through a series of related decisions,[55] beginning with *Griffin v. Illinois*,[56] decided in 1956. For example, in *Griffin*, the Court held that the state had to provide a defendant with a stenographic transcript of criminal trial proceedings, where that was necessary to his appeal.

d. *Interstate Travel.* The right to travel between and among the states of the American federation has been recognized as a fundamental constitutional right, starting with the landmark decision in *Shapiro v. Thompson*.[57] The Court invalidated statutes which denied welfare benefits to persons who had not resided within the jurisdiction for at least one year, since a residency requirement deters the entry of indigent persons into these jurisdictions, thereby limiting their right to engage in interstate travel.

e. *Other Constitutional Rights.* It could be that all other constitutional rights[58] are fundamental, such as the basic rights of political association under the First Amendment of the American Constitution.[59] In any event, equal protection analysis is likely to be unnecessary, because under laws which classify persons in terms of their abilities to exercise rights which have specific recognition in the first eight Amendments,[60] the denial

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[52a] 410 U.S. 113. (1973).

[53] 377 U.S. 533, 562 (1964).

[54] See Kramer v. Union School District, 395 U.S. 621, 626 (1969). See also Harper v. Virginia Board of Elections, 383 U.S. 663, 666 (1966).

[55] Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Burnett, 365 U.S. 708 (1961); Johnson v. Avery, 393 U.S. 483 (1969); Mayer v. Chicago, 404 U.S. 189 (1971); Wolf v. McDonnell, 418 U.S. 539 (1974); Bounds v. Smith, 430 U.S. 817 (1977); Douglas v. California, 372 U.S.; 353 (1963); Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Rinadi v. Yeager, 384 U.S. (1966); James v. Strange, 407 U.S. 128 (1972).

[56] 351 U.S. 12 (1956).

[57] 394 U.S. 618 (1969).

[58] E.g., the right to free exercise of religion, Sherbert v. Verner, 374 U.S. 398 (1963); and the right to freedom of association, Bates v. City of Little Rock, 361 U.S. 516 (1960).

[59] Williams v. Rhodes, 393 U.S. 23 (1968).

[60] The first eight Amendments refer to the following rights: freedom of religion, speech, press, and the right to assemble peaceably and petition the Government for redress of grievances; right to keep and bear arms; right against accepting a soldier

of the right to one class of persons is likely to be held a violation of the specific guarantee. It remains to be seen whether, under the Court's "extremely flexible sliding scale,"[61] the concept of "fundamental rights" would eventually embrace such rights as: education; food, shelter, and other necessities of life; the right to engage in a particular occupation; liberty of contract; or even use of property.[62]

At present, what remains is an entire universe of individual interests which do not constitute fundamental rights. There are at least four particular interests that the Court has refused to declare as fundamental. These are welfare or governmental subsistence payments,[63] housing,[64] education[65] and government employment.[66]

Like "fundamental rights", "suspect classes" is an evolving concept. In the 1973 case of *San Antonio Independent School District v. Rodriguez*,[67] a suspect class was defined as any group that is "saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection from the majoritarian political process." Suspect classes include the following:

a. *Race or National Origin.* As already indicated, racial discrimination was a major target of the equal protection clause, but it was in the 1944 case of *Korematsu v. United States*,[68] that the American Court held: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately 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." In the 1967 case of *Loving v. Virginia*,[69] the Court categorically abadoned the rational relationship test for statutes containing racial classifications.

In the 1977 case of *Castañeda v. Partida*,[70] the American Court struck down a system for juror selection, on the basis of statistical proof showing a vastly disproportionate impact on members of racial minorities from a subjective selection process. The Court overturned the use and review of questionnaires or other qualifications for jury service. If the statistics

to be quartered in the house; right against unreasonable searches and seizures; right to criminal justice and due process of law; right to a speedy and public trial; right of trial by jury; right against excessive bail, excessive fines, and cruel and unusual punishments.

61 Karst, *supra* note 52 at 744.
62 GUNTHER, *supra* note 32 at 1047.
63 *See* Dandridge v. Williams, 397 U.S. 471 (1970).
64 *See* James v. Valtierra, 402 U.S. 137 (1971).
65 *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).
66 *See* Massachusetts Bd. of Retirement v. Murgia, 327 U.S. 307 (1976).
67 411 U.S. 1, 28 (1973).
68 323 U.S. 214 (1944).
69 388 U.S. 1 (1967).
70 430 U.S. 482 (1977).

give rise to an inference of racial discrimination, the evidence of racial imbalance must be clearly rebutted by the government.

b. *Alienage.* In the 1973 case of *In re Griffiths,*[71] the Court invalidatel a state court requirement of citizenship for admission to the bar, holding that, because alienage is a suspect classification, the classification must promote a substantial state interest.

Although it has conducted meaningful review of other criteria, the Court has not yet considered as suspect classifications such criteria as illegitimacy,[72] gender,[73] or wealth.[74] In his dissenting opinion in a 1975 case, Justice Marshall declared that the Court is reluctant to create new suspect classes or fundamental rights that invoke strict scrutiny.[75]

Parenthetically, under the proposed Equal Rights Amendment[76] to the U.S. Constitution, there should be strict scrutiny of legislative classifications claimed to recognize only one class, in order to insure that there is no sex-based discrimination.[77]

The latest American case on equal protection is the pending case of *Doe v. Plyer.*[78] The case arose from the amendment in 1975 of the Texan Education Code, so as to limit tuition-free basic education to "citizens of

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[71] 413 U.S. 717 (1973). *See also* Graham v. Richardson, 403 U.S. 365 (1971).

[72] *See* Levy v. Louisiana, 391 U.S. 68 (1961). *But see* Weber v. Aetna Cas. Sur. Co., 406 U.S. 164, 176 (1972) (Powell, J.)

[73] *See* Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973). In *Reed,* the Supreme Court broke from the tradition of great judicial deference and engaged in independent judicial review of a statute which discriminated on the basis of sex, without declaring sex to be a suspect class. In *Frontiero,* Justice Brennan, in a plurality opinion, stated that sex was a suspect class, after examining the history and nature of discrimination against women. But this view of sex as a suspect class never gained the support of a majority of justices voting in a single case.

[74] *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). *But see* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) (dictum). Legislative actions which burden poor persons as a class draw the so-called wealth classifications. The American Court considers such actions to be regulations concerning economic and social welfare policy, and thus will uphold them under the rational relationship test. But the Court will apply the strict scrutiny test if the classification which is based upon wealth, imposes a burden on the exercise of fundamental rights. The consistent ruling of the Court has been that the government is not permitted to restrict the ability to engage in fundamental constitutional rights on the basis of individual wealth. See Douglas v. California, 372 U.S. 353 (1963); Harper v. Virginia Board of Election, 383 U.S. 663 (1966); Boddie v. Connecticut, 701 U.S. 371 (1971).

[75] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-19 (1975) (Marshall, J., dissenting).

[76] The E.R.A. states: "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

"Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"Section 3. The amendment shall take effect two years after the date of ratification."

[77] See Brown, Emerson, Falk, and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L. J. 871 (1971).

[78] 458 F. Supp. 569 (E.D. Tex. 1978), *affd.,* 628 F. 2d. 448 (5th Circ. 1980), *prob. juris noted,* No. 80-1538 (1981).

the United States or legally admitted aliens."[79] Under the amendment, individual school districts could either bar undocumented alien[80] children or charge them tuition. In 1977, the Tyler Independent School District (TISD) imposed an annual tuition fee of $1,000 on undocumented children, thus effectively excluding from public schools the children of undocumented families. When the law was challenged, the U.S. District Court for the Eastern District of Texas held that the amendment violated the equal protection clause. The U.S. Court of Appeals for the Fifth Circuit upheld the district court, basing its decision exclusively on the ground of equal protection clause. The U.S. Court of Appeals for the Fifth Circuit upheld the district court, basing its decision exclusively on the ground of equal protection. The case is pending resolution in the U.S. Supreme Court, which heard oral arguments on 1 December 1981.

If the Supreme Court holds that the Fourteenth Amendment applies to undocumented children, the question of the kind of scrutiny to apply to the statute, will arise. In the light of the ruling in *Rodriguez*,[81] the Fifth Circuit "declined to find that complete denial of free education to some children is not a fundamental right."[82] On the question of alienage, the Court ruled that although undocumented aliens were not *per se* a suspect class, the Texas statute may warrant strict scrutiny[83] if the group displays the same indicia that have rendered other racial and ethnic minorities "suspect".[84] Moreover, it was unnecessary for the Court to dwell on this difficult question,[85] since the challenged provision could crumble even under the gentle rational basis test.[86]

Apparently, the likelihood is slim that the Court will declare undocumented aliens suspect, because of its demonstrated reluctance in the past. But if the Court rules that the challenged statute violates the Constitution because it discriminates; and moreover, if the Court rules that undocumented

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[79] TEX. EDUC. CODE ANN. tit. 2, Sec. 21.031 (Vernon 1976).

[80] "Undocumented alien" is believed to be a preferable term to "illegal alien", since an alien's unauthorized presence in the United States is not a crime under the Immigration and Nationality Act of 1952 (INA), Ch. 477, 66 Stat. 163.

[81] See text accompanying footnote 67, *supra*.

[82] 628 F. 2d. at 457.

[83] *Contra*, Note, *Equal Treatment of Aliens*, 31 STAN. L. REV. 1069, 1080 (1979): "... the court has indicated that classification of illegal or non-immigrant aliens are not suspect and therefore do not invoke strict scrutiny," citing Elkins v. Moreno, 435 U.S. 647 (1978) and De Canas v. Bica, 424 U.S. 351 (1976).

[84] *Id.*, at 458.

[85] *Id.* See text accompanying footnotes 17-18 *supra*. In the cited case of *Graham*, the Supreme Court ruled that "aliens as a class are a prime example of a 'discrete and insular minority' .... for whom .... heightened judicial solicitude is appropriate." *Id.* at 372, quoting United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938). The Court has never repudiated this ruling, but has modified it in such recent cases as: Ambach v. Norwich, 441 U.S. 68 (1979), where the Court applied a "political community" exception to strict scrutiny, and upheld state legislation prohibiting aliens from working as public school teachers; and Foley v. Conmalie, 435 U.S. 291 (1978), where the Court applied the "political community" exception to strict scrutiny and upheld state legislation prohibiting aliens from serving as police officers.

[86] 628 F. 2d. at 458.

aliens are properly within the territorial jurisdiction of the state in which they reside, and hence entitled to at least minimum equal protection, this would already constitute a significant advance in constitutional jurisprudence.[87]

A NOTE ON "BENIGN" CLASSIFICATIONS AND AFFIRMATIVE ACTION

The U.S. Supreme Court has held that racial classifications which discriminate against minorities are inherently "suspect", and will be subject to "strict scrutiny". and upheld only if necessary to promote a "compelling" state interest. But does the same standard of review apply to government action which discriminates in favor of racial or ethnic minorities? This is the question of "benign" discrimination, with respect to which Justice Brennan wrote that "[f]ew constitutional questions in recent years have stirred as much debate."[88]

Under the American Constitution, the issue is whether reasonable affirmative action programs are permissible, or whether they violate a "color-blind" principle of the Fourteenth Amendment. The debate has focused on three practices: using quotas in making public housing assignments to insure that housing is integrated; giving minority members preferential treatment in hiring and promotions to atone for past discriminatory actions; and adopting preferential admission programs for minority students at universities and professional schools.[89]

The U.S. Supreme Court addressed the issue in 1978, in the case of *Regents of the University of California v. Bakke*.[90] A majority of five Justices held that the Supreme Court of California erred in prohibiting the University from establishing race conscious programs in the future.[91] They drew from the equal protection clause their view that the use of race as a criterion is not prohibited in "benign" discrimination remedying disadvantages of members of a group resulting from past unlawful discrimination. Even though the university admission program was in fact, as well as purport, benign and thus did not deny the principle of the moral equality of the races, Justice Brennan and Justice Powell agreed that a preferential program ought to be subject to a standard of review stricter than the rational relationship test. Justice Brennan urged application of an intermediate standard,[92] while Powell argued for the strictest standard.[93]

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[87] Hull, *Undocumented Aliens and the Equal Protection Clause: An Analysis of Doe v. Plyler*, 48 BROOK. L. REV. 73 (1981).

[88] DeFunia v. Odegaard, 416 U.S. 312, 350 (1974).

[89] J. NOWAK, *supra* note 2 at 584.

[90] 428 U.S. 265 (1978). For a full analysis of the case, see: Stone, *Equal Protection in Special Admissions Programs—Forward from Bakke*, 6 HAST. CONST. L. Q. 719-50 (1979); *A Symposium:* Regents of the University of California v. Bakke, 67 CALIF. L. REV. 1 (1979); *Bakke Symposium: Civil Rights Perspectives*, 14 HARV. C.R.-C.L.L. REV. 1 (1979).

[91] 438 U.S. at 320.

[92] *Id.* at 356-62.

[93] *Id.* at 300-05.

Brennan sustained the university program and the principle of preferential treatment, while Powell, who wrote the majority opinion, rejected the program but endorsed the principle of preferential treatment in academic admissions. Under the program, sixteen of one hundred seats in the medical school were reserved for minority students, and Powell pointed out that its principal evil was that a non-minority applicant like Bakke was effectively precluded from competing for any of these sixteen seats.[94] The *ratio decidendi* of *Bakke* is that criteria for race-conscious university admissions, including race, will be entitled to First Amendment protection if they are actually or at least rationally related to the goal of educational diversity.

In the Philippines, the issue of "benign" classifications and affirmative governmental action does not necessarily fall under equal protection doctrine, since it is covered by a specific provision in the Constitution. Article XV, Section 11 states that: "The State shall consider the customs, traditions, beliefs, and interests of national cultural minorities in the formulation and implementation of state policies." Legislation under this constitutional provision would have to show only a rational relationship to state policy in order to survive judicial challenge. In most cases, there would be no need to apply the intermediate standard or the strictest standard of judicial review, as in *Bakke.*

APPRAISAL OF TWO-TIERED STANDARD

The two-tiered standard of judicial review carries with it the risk of conceptional confusion, in that the Court might be led to conceptualize in equal protection terms the issue posed by a line or classification drawn on the basis of the exercise of a constitutional right.[95] Thus, it becomes necessary to heed the warning that "equal protection is not a catchall norm to be invoked whenever government makes impermissible distinctions between classes of persons, a principle so indeterminate as to be vacuous."[96]

Outright criticism of the two-tiered standard was voiced by Justice Harlan in his dissenting opinion in *Shapiro v. Thompson.*[97] At the outset, he stated the rule thus: "[S]tatutory classifications which either are based upon certain 'suspect' criteria or affect 'fundamental rights' will be held to deny equal protection unless justified by a 'compelling' governmental interest." Calling this the "compelling interest" doctrine, he identified its two branches: the branch of the "suspect" criteria, and the branch of the "fundamental right."

Harlan wrote that the branch of the "suspect" criteria is sound when applied to racial classifications, but he believed that its recent extensions

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[94] *Id.* at 318 n. 52.

[95] *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969); Police Department v. Mosley, 408 U.S. 92 (1972); and Maher v. Roe, 432 U.S. 464 (1977).

[96] Perry, *supra* note 3 at 1077.

[97] 394 U.S. 618 (1969).

were unwise, because, for one thing, the criterion of "wealth" apparently was added to the list of "suspects" as an alternative justification for the rationale in *Harper v. Virginia Board of Elections,*[98] and Harlan did not consider wealth a "suspect" statutory criterion. He cautioned that when, as in *Williams v. Rhodes*[99] and the instant case of *Shapiro,* a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution, then there is no need for any resort to the equal protection clause; in such instances, the Court may invalidate any undue burden upon those rights under the Fourteenth Amendment's due process clause.

Harlan wrote further that the branch of the "fundamental right" is even more troublesome, and is particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. The American Court has held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation, the right to receive greater or smaller wages or to work more or less hours, and the right to inherit property. To extend the "compelling interest" rule to all such cases would go far toward making the Court a "super-legislature."

The branch of the "fundamental right" is also unnecessary. When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the due process clause. And Harlan stressed: "But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental', and give them added protection under an unusually stringent equal protection test..."

Notwithstanding such criticism, the two-tiered standard has its sympathetic observers. It has been described as a result of the "egalitarian revolution" to which the Warren Court gave crucial support. The thesis is that while some classifications may be far from irrational, they are nonetheless unconstitutional because they produce inequities; furthermore, a state can deny equal protection of the laws by treating unequals equally. Since total equality is impossible and undesirable, the judiciary in the name of the Constitution must select the areas in which equality is to be imposed. Such a selection is based on the Supreme Court's identification of fundamental interests, interests that carry relatively high priorities for the development of the nation's underdeveloped sectors.[100]

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[98] 383 U.S. 663, 668 (1966).
[99] 393 U.S. 23 (1968).
[100] Karst and Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection,* SUP. CT. REV. 39, 57 (1967)

As a technique of equal protection analysis, the two-tiered standard is evocative of the old due process analysis. This has evoked the comment that the "new" equal protection method "involves the Court in a sculpting and ranking of values not essentially different from what occurs under 'substantive due process' "[101] because of the preoccupation with "fundamental" rights. This preoccupation seems to have begun with the judicial belief that the rights to speak, publish, associate, and vote—subsumed under the freedom of communication—are paramount political rights, in the sense that in a constitutional democracy, they take priority, not only over other individual rights, but also over the authority of the government itself. This principle of the primacy of political rights ultimately results in the suspension of the presumption of constitutionality for regulations affecting such rights.

When this school of thought focused on the necessity of equality before the law, the result was to interpret the constitutional command for even-handed justice into a mandate for "strict scrutiny" of classificatory schemes that might result in invidious discrimination, or, in sum, the suspension of the presumption of constitutionality for statutes that impinge on fundamental rights or establish suspect criteria for classification. Thus, when judicial power is sought to be applied against a private citizen, government officials in effect bear the burden of proving that they have scrupulously respected the fundanmental rights of the individual.[102]

With the advent of the new legal equality, can equal opportunity be far behind? In the United States, the federal Supreme Court has declared it the duty of government to take positive action to reduce social discrimination. In the Philippines, this need not necessarily be a judicially interpreted function of the equal protection clause, since the Philippine Constitution[103] makes the positive commands in Article II that: "The State shall promote social justice to ensure the dignity, welfare, and security of all the people" (Section 6); it "shall establish, maintain, and ensure adequate social services in the field of education, health, housing, employment, welfare, and social security to guarantee the enjoyment by the people of a decent standard of living" (Section 7); and it " shall afford protection to labor, promote full employment and equality in employment, ensure equal work opportunities regardless of sex, race, or creed" (Section 9). Therefore, in the Philippines it will not always be necessary to extend the two-tiered standard of review to cases involving social discrimination, for in our

[101] Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 17, and n. 25 (1969).

[102] W. MURPHY AND J. TANNENHAUS, COMPARATIVE CONSTITUTIONAL LAW, 16 (1977).

[103] See also the Irish Constitution, Articles 40 and 45: "The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of citizens. The State shall strive to promote the welfare of the whole people by serving and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life."

legal system, the Constitution itself commands the government to take affirmative action to ensure equal opportunity.

MODELS FOR AN OPEN-ENDED STANDARD

The old equal protection places only slight restraint on legislation. This approach of the traditional, limited judicial scrutiny was described by Professors Tussman and tenBroek in their classic article published in 1949:[104]

> The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And "the very idea of classification is that of inequality." In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification.
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> The essence of this doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.
>
> [W]here are we to look or the test of similiarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.

Under the traditional approach, the ideal limit of reasonableness is reached when the public mischief sought to be eliminated is interchangeable with the trait, as the defining character of characteristics of the legislative classification. Problems arise only when the law makes an "under-inclusive" classification, *i.e.,* all who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include. Problems of another variety also arise when the law makes an "over-inclusive" classification, *i.e.,* the classification imposes a burden upon a wider range of individuals than are included in the class of those trainted with the mischief at which the law aims.[105]

In any event, when the Court uses the traditional approach by applying the rational relationship test, independent judicial enforcement of the equal protection guarantee is virtually eliminated.[106] Conversely, when the Court uses the new approach by applying the strict scrutiny standard, the result has been that the standard is almost impossible to meet.[107] Since the Court,

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[104] Tussman and tenBroek, *supra* note 26 at 341.
[105] *Id.*
[106] Gunther, *supra* note 36 at 19, 21.
[107] *Id.* at 8.

when it reviews legislation, performs different functions, it needs to employ different approaches. Accordingly, a model could be drawn for determining the approach that the Court should take.

The model drawn by Professor John E. Nowak of the University of Illinois consists of three legislative categories and their standards of review: (1) *Suspect-prohibited classifications.* Whenever a classification burdens persons on the basis of their race, the Court would invalidate the law unless the legislature can prove that the classification is necessary to achieve a compelling state interest. This standard will be almost impossible to meet; (2) *Neutral classifications.* A classification is "neutral" whenever it treats persons in a dissimilar manner on the basis of some inherent human characterestic or status (other than racial heritage), or limit the exercise of a fundamental right by a class of persons. Applying the demonstrable basis standard of review, the Court should validate a statute only if the means used bear a factually demonstrable relationship to a state interest capable of withstanding analysis; (3) *Permissive classifications.* Under the conceivable basis standard, whenever legislation treats classes in a dissimilar manner but does not employ a prohibited or neutral classification as the basis of dissimilar treatment, the Court will uphold the legislation so long as there is any conceivable basis upon which the classification could bear a rational relationship to the state end.[108]

Another model has been drawn by Professor Gary Simson of the University of Texas, who sees the Burger Court as moving away in various respects from the two-tiered standard, or the *discriminatory basis* test, to the *discriminatory effect* test. His model is based upon the prescribed balance between discriminatory effect and governmental justification: (1) Courts should first decide whether the individual interest affected by the classification before them is fundamental, significant, or insignificant; (2) Courts should determine whether the disadvantage to the affected interest is total, significant, or insignificant; (3) Courts next should ascertain whether the interest informing the classification is compelling, significant, insignificant, or unlawful; and (4) Courts should determine the necessary, significant, insignificant, or non-existent character of the relationship between means and end. After these factors have been assembled, courts should compare the product representing the discriminatory effect, *nature of the affected interest x magnitude of disadvantage,* with the product representing the state's justification, *nature of the state's interest x relationship between means and end.* This proposed model deviates dramatically from the Warren Court's two-tiered approach.[109]

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[108] Nowak, *op.cit., supra* note 37 at 1093-94.

[109] Simson, *op. cit., supra* note 38 at 678-80. That this model does not resolve certain problems is discussed in pp. 709-11.

THE PHILIPPINE EXPERIENCE

The Philippine Supreme Court continues to apply the permissive criteria of the traditional equal protection, exemplified by a much-quoted statement of the American Supreme Court from the twenties: "[T]he 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."[110] The Philippine paraphrase of this traditional approach was made by Justice Laurel in *People v. Vera*: "[T]he classification,...to be reasonable must be based on substantial distinction which make real differences. it must be germane to the purposes of the law; it must not be limited to existing conditions only, and must apply equally to each member of the class."[111]

Thus, the Philippine Court has applied the rational relationship test to equal protection cases, more notably to cases involving alienage,[112] which is apparently considered a morally relevant status because of constitutional differences in the treatment of aliens and citizens.[113] However, prescinding from the constitutional provisions,[114] equal protection analysis must consider that unless relevant factors infringe upon the legislative classification, alienage as an indicator of moral worth is unreliable;[115] and where the classification is tantamount to oppression, it will not survive even the lenient test of rational relationship.[116] Under the two-tiered standard, the American Court has applied the strict scrutiny test to alienage, for being in the category of a "suspect" classification.[117]

The Philippine Court, while ostensibly applying the rational relationship test, was implicitly applying the strict scrutiny test in *People v. Vera*,[118] where it held that the Philippine Probation Act was unconstitutional because application of the statute depended upon salary approporiations for probation officers by the provincial boards. The ostensible application of the rational relationship test is supported by the language of Justice Laurel, who required a "reasonable" classification.[119] But the implicit application of the strict scrutiny test is supported by his argument that since residents of a

110 F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

111 65 Phil. 56, 126 (1937).

112 See *Ichong v. Hernandez*, 101 Phil. 1155 (1957), where Justice Labrador, upholding the nationalization of the retail trade in the Philippines, described as "the prerogative of the lawmaking power" the authority to classify on the basis of alienage.

113 *See* Co Chiong v. Cuaderno, 83 Phil. 242 (1949).

114 See note 21, *supra.*

115 See Perry, *op.cit.*, *supra* note 9 at 1060-65.

116 Yu Cong Eng v. Trinidad, 271 U.S. 500. *Cf.* Young v. Rafferty, 33 Phil. 556, where the Supreme Court struck down a BIR regulation for exceeding the powers delegated by the legislature. *But cf.* Kwong Sing v. Manila, 41 Phil. 103.

117 In re Griffiths, 410 U.S. 717(1973).

118 *Supra* note 111.

119 65 Phil. 126 (1937).

province would be deprived of the benefits of probation if the provincial board failed to appropriate the necessary amount for probation officers, the statute was unconstitutional for being discriminatory. In effect, therefore, the Court was suspicious of a classification based upon the wealth of a province. In effect, it was applying the technique of the "suspect" criterion, which distinguishes the strict scrutiny test. Perhaps because of the affinity with the strict scrutiny test, Chief Justice Fernando has written of the implicit "rigidity" of the *Vera formulation*.[120] It is a pity that the tentative shift in equal protection analysis in *Vera* was not pursued in later cases.

Parenthetically, in the case of *San Antonio School District v. Rodriguez*,[121] the U.S. Supreme Court rejected the proposition that wealth is a "suspect" criterion. Texas public schools were financed through three district channels: state grants to each school district to provide a specified minimum level of education; certain federal grants; and suplements to district budgets provided by property taxes raised within each district. The amount of money from the third source varied widely from district to district, depending on the value of taxable property located within each jurisdiction. Parents in a poor and heavily Mexican-American area brought suit, claiming that the equality of public education offered by Texas depended on the wealth of each school district, and thus deprived children living in poorer regions of equal protection. Justice Powell ruled that "at least where wealth is involved the equal protection clause does not require absolute equality or precisely equal advantages," and "that the Texas system does not operate to the peculiar disadvantage of any suspect class." He found that the Texas plan satisfied the rational relationship test. In his dissent, Justice Marshall argued that the strict scrutiny test should have been applied, because education is a fundamental interest.

In an unfortunate development, the Philippine Court leaned over backwards and placed judicial imprimatur on government action discriminating against a cultural minority in the next case of *People v. Cayat*.[122] Under challenge was Act No. 1639 which made it unlawful for any native of the Philippines who was a member of a non-Christian tribe to possess or drink intoxicating liquors, other than native liquors. In upholding the constitutionality of the Act, Justice Moran ruled that the legislative classification was "unquestionably reasonable" because it was designed to insure peace and order among non-Christian tribes. But to burden someone because of his status as a member of a cultural minority runs counter to the most fundamental concept of equal protection. The use of the rational relationship test in this case resulted in a decision which today would be considered distasteful. It runs counter to the opinions of American justices

120 E. FERNANDO, THE CONSTITUTION OF THE PHILIPPINES 547 (1977).
121 *Supra* note 47.
122 68 Phil. 12 (1939).

who use the strict scrutiny test to determine whether the law is invidious, when it makes a "suspect" classification based on race or national origin.

The Canadian Supreme Court decided a case similar to *Cayat* in the correct manner. Under the Canadian Indian Act, it was a crime for an Indian to be drunk off a reserve, while it was an offense for a white to be drunk only in a public place. In *The Queen v. Drybones,*[123] Justice Ritchie ruled that the law "means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offense punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offense or having been subject to any penalty."

One Philippine case which offered the lost opportunity to apply the strict scrutiny test was *Laurel v. Misa,*[124] which involved the question of fairness in the criminal justice system. The Philippine Congress passed Act No. 682 extending the detention period from six hours for persons charged with criminal offenses (as provided for by the Penal Code, Article 128), to six months for persons charged with political offenses, i.e., collaboration with the war-time Japanese regime. In upholding the statute, the Court applied only the rational relationship test, stating: "The point to be determined, then, is whether the differentiation in the case of the political prisoners is unreasonable or arbitrary." It stressed the leniency of the rational relationship test by declaring that "so long as reasons exist in support of the legislative action, courts should be careful not to deny it." The Court thus implied that any reason would be considered sufficient for supporting the legislative classification. But criminal detention impinges upon the right to liberty, which is decidedly a fundamental right. Hence, the Court should have conducted a strict scrutiny of the statute, the survival of which should have been predicated on a compelling state interest, and not just any reason supportive of the legislative action. It could very well have found that the physical impossibility of filing within six hours criminal informations against 6,000 political detainees at the close of the war, and hence the danger of setting such detainees loose, was such a compelling state interest.

The failure in *Laurel* to apply the strict scrutiny test to legislative action infringing on a fundamental right under the criminal justice system hardly merits emulation. It is from this perspective that the later cases should be considered. One example is the case of *Nuñez v. Sandiganbayan,*[125] decided *en banc* on 30 January 1982. Petitioner was accused of estafa through falsification of public and commercial documents before the *Sandigan-*

[123] S.C.R. 282 (1970).
[124] 76 Phil. 372 (1946).
[125] Nos. L-50581-50617, January 30, 1982, 111 SCRA 433, 444-46 (1982).

bayan, a special court provided for under the Constitution,[126] and created by presidential decree[167] in 1978. Nuñez assailed the validity of the decree on the ground, *inter alia,* that it violated the equal protection guarantee, for allegedly infringing on the right to appeal.[128] In dismissing the petition, Chief Justice Fernando apparently applied the rational relationship test by, in effect, finding "support in reason."[129] However, he also stated that "the classification satisfies the test announced by this Court through Justice Laurel in *People v. Vera,*"[130] which, as already noted, he has previously characterized as a rigid formulation. Evidently, the Chief Justice was applying two tests: the traditional rational relationship test, and the rigid test in *Vera,* which, at this point in Philippine jurisprudence, can be described as amorphous content in search of category. This lengthy search in Philippine jurisprudence can be abbreviated by adopting the category which the American Court has labelled under the two-tiered standard of judicial review, as the category of cases calling for strict judicial scrutiny.

SCENARIO FOR THE "NEW" EQUAL PROTECTION

The cases decided by the Philippine Court on equal protection grounds[131] are not distinguished by doctrinal departure from the old equal protection, notwithstanding the rise in the national consciousness of the need to safeguard human rights and to promote equality in opportunity. Indeed, the tired slogan of Filipino politicians, that "those who have less in life should have more in law," should be taken on a serious level as an invitation to affirmative action on the part of the government, and perhaps the formulation of "benign" classifications. Contemporary developments argue for expanding the contours of constitutional equality, by adopting strict judicial scrutiny in cases where the laws seek to restrict fundamental rights or to classify on the basis of suspect criteria. For notwithstanding the presumption of constitutionality, certain basic values call for substantive restraint on legislation, and in such cases, the equal protection guarantee

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[126] Philippine Constitution, Art. XIII, Sec. 5: "The Batasang Pambansa shall create a special court, to be known as *Sandiganbayan,* which shall have jurisdiction over criminal and civil cases involving graft and corrupt practices and such other offenses committed by public officers and employees, including those in government-owned or controlled corporations, in relation to their office as may be determined by law."

[127] Pres. Decree No. 1486 (1978), as amended by Pres. Decree No. 1606 (1978).

[128] In Memorandum of Petitioner, 7-8, he contended: "The *Sandiganbayan* proceedings violates petitioner's right to equal protection, because—appeal as a matter of right became minimized into a mere matter of discretion;—appeal likewise was shrunk and limited only to questions of law, excluding a review of the facts and trial evidence; and—there is only one chance to appeal conviction, by certiorari to the Supreme Court, instead of the traditional two chances; while all other *estafa* indictees are entitled to appeal as a matter of right covering both law and facts and to two appellate courts, i.e., first to the Court of Appeals and thereafter to the Supreme Court."

[129] Nuñez v. Sandiganbayan, *supra* at 444.

[130] *Id.,* at 445.

[131] See this paper's Appendix, "Philippine Cases on Equal Protection."

must undergo a change in character, from a tool of marginal intervention to a weapon of major cutting edge.

The two-tiered standard of judicial review in equal protection cases is open-ended, in the sense that its criteria and its directions need to be defined.[132] Except when applied in cases involving racial classifications, it has been criticized "as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle."[133] And in the application of this doctrine, the American Court has been criticized as an illegitimate policy-maker, under the argument that the judiciary is not an electorally accountable branch.[134] Apart from this constitutional issue, the Court has also been criticized on the doctrinal issue because, it is claimed, the Court has not only enforced the value judgments in the Fourteenth Amendment, but also enforced value judgments that are not part of the "original understanding."[135]

Admittedly, in the American system, the equal protection clause has been the most prolific source of major judicial innovations in the last quarter century.[136] This circumstance is partly explained by the dual character, shared by the Philippine Court, of the U.S. Supreme Court as both a political and judicial institution. In reply to accusations indicated in phrases of recent titles, such as "imperial judiciary,"[137] "government by judiciary,"[138] "disaster by decree,"[139] and "democracy and distrust,"[140] it has been explained: "The Court is *political* in the sense that in the course of interpreting the American Constitution policy changes are made within a social, economic, partisan, and bureaucratic context and, to some extent, reflect conditions as they currently exist...Yet, the Court is a *judicial* institution in terms of its forms, procedures, and in terms of the style and even to an extent the substance of judicial decision-making."[141]

Surely, it is too late in the day for this observation to come as a surprise. It was Alexis de Tocqueville who said that: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[142] In the Philippines, the equal protection clause, phrased as it is after the American model, may pose problems of legislative and administrative classifications, of linkages between legal and socio-

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132 G. GUNTHER AND N. DOWLING, *supra* note 32 at 1946.
133 Trimble v. Gordon, 430 U.S. 762, 777 (1977). (Rehnquist, J., dissenting).
134 R. BERGER, *supra* note 7.
135 Perry, *supra* note 9.
136 *Id.*, at 1024.
137 Glazer, *Toward an Imperial Judiciary?*, 41 THE PUBLIC INTEREST 104-23 (1975).
138 R. BERGER, *supra* note 7.
139 L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).
140 J. ELY, DEMOCRACY AND DISTRUST (1980).
141 S. GOLDMAN, CONSTITUTIONAL LAW AND SUPREME COURT DECISION-MAKING 1-2 (1982).
142 I. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (P. Bradley ed. 1954).

economic opportunity, of equal rewards, and, most fundamentally, of the extent of the compatibility of political liberty and economic equality.[143] In the resolution of these problems, the "new" equal protection could prove to be a useful and equitable technique of julicial analysis, in the hands of a Supreme Court sentient to the continuing need to prevent invidious discrimination against disadvantaged victims of legislative classification or in the exercise of certain fundamental rights by the Filipino people, as a justice constituency.

[143] W. MURPHY, *supra* note 102 at 311-12.

APPENDIX

Philippine Cases on Equal Protection

U.S. v. Mendezona, 2 Phil. 353 (1903)
Roman Catholic Church v. Mun. of Tarlac, 9 Phil. 450 (1907)
U.S. v. Suneulong, 30 Phil. 381 (1915)
Churchill & Tait v. Rafferty, 32 Phil. 580 (1915)
Beaumont & Tenny v. Herstein, 34 Phil. 127 (1916)
Churchill v. Concepcion, 34 Phil. 969 (1916)
Mitsui Bussan Kaisna v. Manila E.T.R. & L. Co., 39 Phil. 624 (1919)
Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919)
Smith, Bell & Co. v. Natividad, 40 Phil. 136 (1919)
Kwong Sing v. City of Manila, 41 Phil. 103 (1920)
PPI v. Gabriel, 43 Phil. 641 (1922)
Philippine National Bank v. De Poli and Wise & Co., 44 Phil. 763 (1923)
Yu Cong Eng. v. Trinidad, 271 US 500 (1926)
People v. Vera, 65 Phil. 56 (1937)
People v. Cayat, 68 Phil. 56 (1939)
Laurel v. Misa, 76 Phil. 372 (1946)
People v. Carlos, 78 Phil. 535 (1947)
Manila Electric Co. v. Public Utilities Employees' Asso., 79 Phil. 409 (1947)
Co Chiong v. Cuaderno, 83 Phil. 252 (1949)
Co Chiong v. Mayor of Manila, 83 Phil. 257 (1949)
Eastern Theatrical Co., Inc. v. Alfonso, 83 Phil. 852 (1949)
People v. Isnain, 85 Phil. 648 (1950)
Salgado v. de la Fuente, 87 Phil. 343 (1950)
Evangelista v. Castillo, 87 Phil. 572 (1950)
Manila Race Horse Trainers' Asso., Inc. v. de la Fuente, 88 Phil. 60 (1951)
Everett Steamship Corp. v. Chuahiong, 90 Phil. 64 (1951)
Tolentino v. Board of Accountancy, 90 Phil. 83 (1951)
People v. de Guzman, 90 Phil. 132 (1951)
Tang Seng Hoo v. de la Fuente, 90 Phil. 605 (1951)
Davao Stevedores Mutual Benefit Asso. v. Compania Maritima, 90 Phil. 847 (1952)
Church v. La Union Labor Union, 91 Phil. 163 (1952)
Juan Luna Subdivision, Inc. v. Sarmiento, 91 Phil. 371 (1952)
Association of Customs Brokers, Inc. v. Municipal Board, 93 Phil. 107 (1953)
Uy Matiao & Co., Inc. v. City of Cebu, 93 Phil. 300 (1953)
Borja v. City Treasurer, 94 Phil. 1032 unrep. (1953)
Punsalan v. Municipal Board of Manila, 95 Phil. 46 (1954)
Suarez v. Santos, 96 Phil. 302 (1954)
Provincial Governor of Rizal v. Encarnacion, 96 Phil. 967 unrep. (1954)
Re Petitions for Admission to the Bar, 50 Off. Gaz. 1602 (1954)
Tibon v. Auditor General, 96 Phil. 786 (1955)
Tan Se Chiong v. Director of Posts, 97 Phil. 971 (1955)
Lutz v. Araneta, 98 Phil. 148 (1955)
Ichong v. Hernandez, 101 Phil. 1155 (1957)
Manansala v. Heras, 103 Phil. 575 (1958)
People v. Solon, 110 Phil. 39 (1960)
Felwa v. Salas, 18 SCRA 606 (1966)
Viray v. City of Caloocan, 20 SCRA 791 (1967)

Rafael v. Embroidery and Apparel Control and Inspection Board, 21 SCRA 336 (1967)
Ormoc Sugar Co., Inc. v. Treasurer of Ormoc City, 22 SCRA 603 (1968)
Gomez v. Palomar, 25 SCRA 827 (1969)
Luque v. Villegas, 30 SCRA 408 (1969)
J.M. Tuason and Co. v. Land Tenure Administration, 31 SCRA 413 (1970)
Director of the Bureau of Telecommunications v. Aligaen, 33 SCRA 368 (1970)
In Re Subido, 35 SCRA 1 (1970)
Tan Ty v. Land Tenure Administration, 35 SCRA 250 (1970)
Imbong v. Ferrer, 35 SCRA 28 (1970)
Gumabon v. Director of Prisons, 37 SCRA 420 (1971)
Central Bank v. Cloribel, 44 SCRA 307 (1972)
Victoriano v. Elizalde Rep. Workers' Union, 59 SCRA 54 (1974)
Basa v. Federacion Obrera de la Industria Tabaquera y Otros Trabajadores de Filipina (FOITAF), 61 SCRA 93 (1974)
Magtoto v. Manguera, 63 SCRA 4 (1975)
Sanidad v. Commission on Elections, 73 SCRA 333 (1976)
Bradman Co., Inc. v. CIR, 78 SCRA 10 (1977) ,
Lirag Textile Mills, Inc. v. Reparations Commission, 79 SCRA 675 (1977)
Anucension v. National Labor Union, 80 SCRA 350 (1977)
Peralta v. Comelec, 82 SCRA 30 (1978)
Monark International, Inc. v. Noriel, 83 SCRA 114 (1978)
Villegas v. Chiong Thai Pao Go, 36 SCRA 270 (1978)
Asociacion de Agricultores de Talisay-Silay v. Talisay-Silay Milling Co., Inc., 88 SCRA 294 (1979)
Gutierrez v. Cantada, 90 SCRA 1 (1979)
Vera v. Cuevas, 90 SCRA 379 (1979)
Dumlao v. Commission on Elections, 95 SCRA 392 (1980)
Marinas v. Siochi, 104 SCRA 423 (1981)
Nunez v. Sandiganbayan, 111 SCRA 444 (1982)