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I. INTRODUCTION

The equal protection clause of the fourteenth amendment to the United States Constitution consists of the facially simple mandate, "[No State] shall deny to any person within its jurisdiction the equal protection of the laws." Despite the appearance of simplicity, this clause has been the subject of substantial litigation and scholarly comment.[1] A complex analytical structure has been superimposed over the language of the equal protection clause, creating dramatically different

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1. The cases and articles on the equal protection clause are too numerous to even attempt a representative listing. Some of the excellent articles on equal protection analysis include: Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection*, 1976 B.Y.U.L. REV. 89 (1976); Gunther, *The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972): Nowak, *Realigning the Standards of Review under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); Wilkenson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Forum, *Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975). *See also* THE CONSTITUTION OF THE STATES OF AMERICA, ANALYSIS AND INTERPRETATION (L. Jayson ed. 1973) (1978 Supp. J. Killian ed.); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, 517-686 (1978); B. SCHWARTZ, CONSTITUTIONAL LAW, A TEXTBOOK (2d ed. 1979); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 991-1135 (1978).

legal approaches to equal protection questions depending on the character of the classification involved and the nature of the private interests being affected. Mr. Justice Powell, writing for the Court in *Maher v. Roe*,[2] recently remarked, "The basic framework of analysis of [an equal protection] claim is well-settled . . . ."[3] This well-settled framework, according to Mr. Justice Powell, requires the Court to use "strict judicial scrutiny" in evaluating the constitutionality of legislation which "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution."[4] In other situations, where strict judicial scrutiny is not required, the Court will merely examine the legislation "to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination."[5]

In fact this framework is not well-settled. It has been attacked by members of the Court as not completely logical,[6] not very helpful,[7] too rigid,[8] and as not accurately portraying what the Court in fact does in analyzing equal protection questions.[9] A federal district judge, attempting to apply the analysis mandated by the Supreme Court to a case involving alleged sex discrimination, remarked that he had "an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea."[10]

The framework Mr. Justice Powell described is known as the two tiered approach to equal protection analysis,[11] with situations calling for strict judicial scrutiny comprising the upper tier and all other situations comprising the lower tier. These tiers are also indentified as the

2. 432 U.S. 464 (1977).
3. *Id.* at 470.
4. *Id.*
5. *Id.* (quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)).
6. Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring).
7. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring).
8. San Antonio School Dist. v. Rodriguez, 411 U S. 1, 98 (1973) (Marshall, J., dissenting).
9. Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (Marshall, J., dissenting).
10. Vorchheimer v. School Dist. of Philadelphia, 400 F. Supp. 326, 340-41 (E.D. Pa. 1975) (Newcomer, J.), *rev'd*, 532 F.2d 880 (3d Cir. 1976), *aff'd per curiam by an equally divided court*, 430 U.S. 703 (1977).
11. Craig v. Boren, 429 U.S. 190, 210-11 n.* (1976) (Powell, J. concurring); 429 U.S. at 211-12 (Stevens, J., concurring); 427 U.S. at 318; Gunther, *The Supreme Court 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8, 17 (1972) [hereinafter cited as Gunther, *Newer Equal Protection*].

strict scrutiny test (upper tier or tier two)[12] and the rational basis test (lower tier or tier one).[13]

According to the well-settled framework, the upper tier (tier two) consists of two categories or branches calling for strict judicial scrutiny. The category dealing with legislation which operates to the disadvantage of some suspect class has been labeled the "suspect classification" branch.[14] The other category dealing with legislation which impinges upon a fundamental right has been labeled the fundamental interests branch.[15] From its inception it has been the more controversial aspect of strict scrutiny. The controversy stems from doubts about the appropriateness of applying equal protection analysis to legislation affecting fundamental rights.[16]

The purpose of this article is to examine cases involving equal protection challenges to legislation affecting fundamental rights to determine the extent to which the Court's performance comports with the Court's rhetoric. Part II of this article provides a summary of equal protection analysis in general and part III provides a summary of equal protection and fundamental rights. Parts IV and V address the question of what connection between the law and the fundamental right results in strict judicial scrutiny. This examination will reveal that perhaps there is no pea in this judicial shell game. The Court does not consistently use strict scrutiny in equal protection cases involving fundamental rights, nor has the Court clearly articulated the criteria which determine when strict scrutiny will be used. There are some clues, or perhaps tentative suggestions, of when strict scrutiny will be used, but it is necessary to look under several shells to find this judicial pea; year to year the pea may move to a different shell, and it may be disappearing altogether.

II. EQUAL PROTECTION ANALYSIS

Before examining in detail the fundamental rights branch of equal

12. 427 U.S. at 311; J. NOWAK, R. ROTUNDA, AND J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 524 (1978) [hereinafter cited as NOWAK, ROTUNDA AND YOUNG]; Gunther, *Newer Equal Protection*, *supra* note 11, at 8.

13. 427 U.S. at 314; City of New Orleans v. Dukes, 427 U.S. 297, 304 (1976).

14. Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting); Gunther, *Newer Equal Protection*, *supra* note 11, at 8; *Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969).

15. 394 U.S. at 660-61 (Harlan, J., dissenting). *See* Gunther, *Newer Equal Protection*, *supra* note 11, at 8; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969).

16. Zablocki v. Redhail, 434 U.S. 374, 391-92 (1978) (Stewart, J., concurring).

protection strict scrutiny, it is useful to review generally the basic concepts of equal protection analysis currently used by the Supreme Court. The command of the equal protection clause of the fourteenth amendment is that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This does not mean that all persons must be treated identically or even given an equal opportunity.[17] The state may inflict punishment on those who kill with malice aforethought, *i.e.*, murder, without punishing everyone in the state. The state may hire people with the highest qualifications for a job, even though this discriminates against a person without the qualifications. In essence, the command of the equal protection clause is that persons similarly situated must be treated equally.[18] If persons are treated differently under the law, there must be some rational basis for that difference in treatment.[19]

Legislation will usually contain criteria identifying who is subject to the legislation and who is not. Such criteria, or classifications, provide the basis for determining whether persons are similarly situated. With respect to the murder law illustration, the relevant criterion may be, "Those who kill with malice aforethought are guilty of murder." The classification is "killing with malice aforethought." All those who kill with malice aforethought are subject to the punishment imposed by the law. Those who do not kill with malice aforethought are not similarly situated and therefore are not subject to the punishment.

However, the task of identifying whether two persons treated differently are similarly situated cannot constitute the entire equal protection analysis. If this were the entire analysis, the equal protection clause would have no significance because no two people are ever similarly situated in all respects. The requirement of treating similarly situated persons equally would not, in itself, even address racial discrimination,[20] which is clearly one of the key purposes of the equal protection clause.[21] Blacks could be treated differently than whites because they are not similarly situated; they belong to a different race.

17. Tigner v. Texas, 310 U.S. 141, 147 (1940).

18. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Barbier v. Connolly, 113 U.S. 27, 32 (1885).

19. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

20. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 345 (1949).

21. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873).

Equal protection analysis requires more than merely identifying some difference between the groups receiving different treatment. The analysis requires that the basis for the differing treatment, the legislative classification, bear a specified relationship to a constitutionally permissible legislative purpose.[22] At a minimum the classification must bear a rational relationship to the legislative purpose,[23] though in some circumstances equal protection analysis requires that the classification must also be necessary to the achievement of the legislative purpose.[24]

To analyze the relationship of the classification to the purpose of the law, the Court must first identify the legislative purposes, ends, or objectives. Included in this inquiry into legislative purpose or ends is the problem of whether the Court should require the legislature to articulate its purposes, or whether the Court will speculate or hypothesize purposes in the absence of legislative articulation. A further problem is whether the Court should accept, as truthful, legislative articulation of ends, or should attempt to determine whether the articulated purposes are merely a pretext for some other, disguised purpose. The answer to these questions varies with the equal protection test utilized.

Some criterion for judging the validity of the relationship of the classification to the legislation purpose is necessary. One criterion used by the Court is the effectiveness of the means in achieving the ends. This involves the concepts of "overinclusiveness" and "underinclusiveness."[25] When a classification includes within the scope of the law persons who are not necessary to the accomplishment of the legislative purpose, the classification is overinclusive. When the classification fails to include persons within the scope of the legislation who are necessary to the accomplishment of the legislative purpose, the classification is underinclusive. For example, assume the legislature is seeking criteria for identifying people who will be skillful drivers. The criteria are being sixteen years or older and passing a written test. If there are people

22. *In re* Griffiths, 413 U.S. 717, 721-22 (1973). The Court in several cases has declared certain purposes to be constitutionally impermissible, despite their possible importance. Deterring in-migration of indigents is an impermissible purpose. Shapiro v. Thompson, 394 U.S. 618, 631 (1969). Racial discrimination or segregation, for its own sake, is constitutionally impermissible. 413 U.S. at 722 n.8.

23. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

24. *In re* Griffiths, 413 U.S. 717, 722 (1973); Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); Loving v. Virginia, 388 U.S. 1, 11 (1967).

25. *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348-53 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1084-87 (1969).

who are sixteen years or older and can pass a test but are unskilled, they would nevertheless be qualified to drive under this law. Some people would be included within the scope of the legislation, though their inclusion would not serve the legislative purpose. To that extent, the law would be overinclusive with respect to the legislative goal of identifying skilled drivers. If there are some people who would be skilled and could pass the test before they became sixteen, then to that extent the law would be underinclusive with respect to the legislative goal of identifying skilled drivers. That is, some people would not be included within the scope of the legislation, though their inclusion would serve the legislative purpose. Note that it is possible for a law to be both overinclusive and underinclusive at the same time.

Most legislation cannot take into account sufficient special circumstances or individual characteristics to make the classification used neither overinclusive nor underinclusive. Legislation must generalize, and of necessity is imprecise in many instances. The Court has traditionally recognized this and has given the legislative judgment considerable deference.[26] At the same time, to the extent constitutional limits are intended to protect individuals or groups from legislative misconduct, there must be some point at which this deference to the legislature will give way to an inquiry into the legislature's conduct. To accommodate the competing concerns for deference to the legislature and protection for the individual's right to equality, the Court has developed the two tiered framework of analysis for equal protection challenges. This two tiered analysis, the well-settled framework identified by Mr. Justice Powell,[27] results in varying degrees of judicial scrutiny of the legislative purpose and of the effectiveness of the legislative classification as a means of achieving that purpose. There are two variables in this analysis—the purpose and the means. Examination of the purpose involves both identification of the purpose and, in some instances, evaluating the legitimacy and importance of the purpose. Examination of the means involves at least a cursory examination of the overinclusiveness or underinclusiveness of the means in relation to the ends. In some instances the analysis considers the impact of the classification on groups or interests, and whether alternative means, less harmful to the groups or interests, might be available to accomplish the same purpose.

26. Califano v. Jobst, 434 U.S. 47, 53 (1977); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955); Gunther, *Newer Equal Protection, supra* note 11, at 45

27. Maher v. Roe, 432 U.S. 464, 470 (1977).

The logical starting point for equal protection analysis should be identifying the alleged inequality.[28] This requires examination of the classification used in the legislation: who is included within the scope of the law and who is excluded. Assuming the law is administered as written,[29] the challenger of the law will be claiming that the classification excluding him from the benefit of the law, or imposing on him the burdens of the law, denies him equal protection of the law.[30] The general rule, the deferential approach or the "rational basis test," presumes that the law is constitutional[31] and the burden is on the challenger to demonstrate that there is no rational connection between the classification and the legislative purpose.[32] Such a challenge requires identification of the legislative purpose to determine whether the classification rationally serves that purpose. Under the deferential approach, the Court works backwards to the purpose. After identifying the classification, the Court will uphold the law if it can hypothesize or conceive[33] of any legitimate legislative purpose which would be served by the classification. In deciding whether the classification serves that hypothetical purpose, the Court will tolerate a considerable degree of overinclusiveness and underinclusiveness.[34] This approach is in fact so deferential that one leading commentator and members of the Court have identified the analysis as minimal scrutiny in theory, but virtually no scrutiny in fact.[35] Such total deference under this basic rule is a major reason

28. Califano v. Boles, 441 U.S. —, 99 S. Ct. 2767, 2775 (1979).

29. Normally a law will be evaluated on its face. In some circumstances a law which on its face would only be subject to a rational basis test might be subjected to a more demanding level of analysis where it can be shown that the law was intentionally being applied in a discriminatory manner. Washington v. Davis, 426 U.S. 229, 241 (1976); *cf.* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (dealing with discriminatory enforcement but decided before the development of the tier system).

30. It should be noted that with respect to equal protection challenges, even though the challenger to the law may succeed in having the Court hold the classification in violation of the equal protection clause the challenger may not obtain the benefit or be relieved of the burdens of the law. Instead the legislature might choose to deny the benefits or impose the burdens more universally to satisfy the requirements of equal protection, leaving the challenger in the same position as before. *E.g.*, Stanton v. Stanton, 421 U.S. 7, 17 (1975). Nevertheless, despite the fact that the challenger may in effect be challenging the benefits others receive or complaining that the burdens are not placed on others, the challenger still has standing to challenge the law. Orr v. Orr, 440 U.S. 268, 271-73 (1979).

31. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (*per curiam*); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40-41 (1973); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

32. *See* Mathews v. Lucas, 427 U.S. 495, 510 (1976).

33. McGowan v. Maryland, 366 U.S. at 426.

34. Vance v. Bradley, 440 U.S. 93, 108 (1979).

35. Gunther, *Newer Equal Protection, supra* note 11, at 8. *E.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 320-21 (Marshall, J., dissenting).

many members of the Court are dissatisfied with current equal protection analysis.[36]

The deferential analysis fails to provide any meaningful judicial protection for equality under the law. As a general rule the only limit to the legislature's discretion is the voters' control at election time. However, with respect to discrimination against racial minorities, the Court has long recognized that greater judicial protection is necessary. In part this is explained by judicial recognition that a primary purpose of the fourteenth amendment equal protection clause was protection of racial minorities.[37] Also, in part, this is explained by the fact that the remedy of the ballot is no remedy at all for a politically powerless and disfavored minority.[38] The recognition of the need for greater judicial scrutiny of classifications discriminating against racial minorities has led the Court to the use of a very strict and searching evaluation of such classifications. When a classification discriminates against a racial minority,[39] the usual presumption of constitutionality is reversed.[40] Such racial classifications are constitutionally suspect.[41] The law is presumed unconstitutional and the burden is on the state to justify the law.[42] To justify the law the state must demonstrate to the Court that there is a constitutionally permissible purpose.[43] Because classifications discriminating against racial minorities are suspect, if the same purpose can be achieved by nonracial classifications or classifications imposing a lesser burden on the minority, then the more discriminatory

36. *E.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 320-21 (Marshall, J., dissenting).

37. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873).

38. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (dicta).

39. The Court has required strict scrutiny not only for discrimination against blacks, but also against other racial minorities. An example is the Japanese in Korematsu v. United States, 323 U.S. 214 (1944). Discrimination involving Indians, however, has often been treated not as discrimination on the basis of race, but rather discrimination on the basis of tribal status. *See, e.g.*, United States v. Antelope, 430 U.S. 641 (1977). While discrimination *against* a racial minority requires strict scrutiny, the constitutional analysis to be used for discrimination in favor of a racial minority is still unsettled. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), Mr. Justice Powell required strict scrutiny, *id.* at 291, but Justices Brennan, White, Marshall and Blackmun would have utilized the test from the gender classification cases, *id.* at 358-62. The other four justices did not articulate the test they would have utilized since they did not address the constitutional issue.

40. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973); Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969); U.S. v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

41. Korematsu v. United States, 323 U.S. 214, 216 (1944).

42. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972).

43. *See* note 22 *supra*.

racial classification will not be sustained.[44] This is often identified as the less burdensome, less discriminatory, or less drastic means test.[45] Selection of a less discriminatory means is not sufficient as long as there is yet another less drastic means;[46] hence, this requirement is really for the *least* burdensome or discriminatory means available.

Finally, even if the discriminatory classification is necessary to achieve a legitimate state purpose, the Court goes one step further in the analysis. Because the means to achieve the end are suspect, it might be that the harm done by the classification outweighs the benefits to be gained by achieving the state's purpose. Therefore, the Court requires that the purpose be a compelling one.[47]

Not mentioned thus far is how the underinclusiveness of the classification enters into the analysis. Where the law is drastically underinclusive with respect to a purported end, it might appear that the classification is not a rational means to the legislative end, since the classification serves the end so poorly. However, the Court has been extremely tolerant of underinclusiveness when applying the rational basis test.[48] Additionally, in applying the rational basis test, the Court has allowed the legislature to address a problem one step at a time.[49] However, when utilizing heightened scrutiny the Court is less tolerant of underinclusiveness,[50] though the Court has rarely discussed the reasons for this. Obviously, the congruence between the legislative goal and the effect of the classification is not as great where there is substantial underinclusiveness or overinclusiveness. Where overinclusiveness is the problem, the vice is that the law has a greater discriminatory or burdensome effect than necessary.[51] The vice of underinclusive classifications is not as apparent. The flaw with the analysis, which permits underinclusive laws as a permissible first step, is that the legislature

44. McLaughlin v. Florida, 379 U.S. 184, 196 (1964). *Accord, In re* Griffiths, 413 U.S. 717, 722 (1973).

45. *E.g.*, San Antonio School Dist. v. Rodriguez, 411 U.S. at 16-17.

46. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979). Mr. Justice Blackmun criticized the general requirement of "least drastic means" because "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Id.* at 188-89 (Blackmun, J., concurring). He compared this to the Court's use of substantive due process to strike down economic legislation. *Id.*

47. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); *In re* Griffiths, 413 U.S. at 722-23.

48. Vance v. Bradley, 440 U.S. 93, 108 (1979); Williamson v. Lee Optical, Inc., 348 U.S. 483, 488-89 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

49. Williamson v. Lee Optical, Inc., 348 U.S. at 488-89.

50. Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975).

51. *See* text accompanying notes 44-46, *supra*.

may not be contemplating any further action. The first step is really the final step, since the legislative objective is narrower than the one identified or conceived by the Court, and perhaps is an illegitimate objective or one that would be unpopular if disclosed. The actual purpose may involve special interests which the legislature does not wish to disclose to the electorate, and therefore the law is disguised as merely the first step in a general regulatory pattern.[52]

Alternatively, instead of attempting to covertly aid a special interest, the legislature may be singling out an unpopular minority. Here too, elimination of underinclusiveness serves an important function. As suggested by Mr. Justice Jackson's concurring opinion in *Railway Express Agency v. New York*:[53]

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[54]

In essence, Mr. Justice Jackson was calling for the application of the basic command of equal protection, that similarly situated persons be treated similarly, to be made a reality rather than a hollow promise.[55] Even under a heightened scrutiny that falls short of strict scrutiny (*e.g.*, scrutiny of sex discrimination) the Court is willing to search beyond the asserted purpose to determine whether it is in fact a pretext.[56] Dramatically underinclusive classifications suggest that the asserted purpose may really be a pretext for some other, perhaps illegitimate purpose.[57]

The strict scrutiny imposed when the classification discriminates

52. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27-30 (1974).

53. Railway Express Agency v. New York, 336 U.S. 106 (1949).

54. *Id.* at 112-13 (Jackson, J., concurring).

55. *Id.*

56. Califano v. Webster, 430 U.S. 313, 317 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

57. First National Bank of Boston v. Bellotti, 435 U.S. 765, 792-93 (1978); Tussman & ten-Broek, *The Equal Protection of the Laws*. 37 CALIF. L. REV. 341, 379 (1949).

against a racial minority is so demanding that it has been suggested that it is strict in theory, but fatal in fact.[58] Whether or not this is true with respect to racial classifications, what is labeled strict scrutiny in the context of fundamental rights is not invariably fatal and is substantially more deferential than the strict scrutiny applied to discrimination against racial minorities.[59]

The strict scrutiny applied to discriminations against racial minorities has also been applied to discrimination based on nationality or national origin,[60] and in a more controversial context, to discrimination against persons residing in the United States but lacking United States citizenship, *i.e.*, resident aliens.[61]

The use of strict scrutiny with respect to resident aliens provides an interesting illustration of how the Court avoids strict scrutiny when the analysis is more demanding than the desired result can tolerate. Without abandoning formal adherence to the well-settled framework of analysis, the Court has used deferential equal protection analysis rather than strict scrutiny for federal laws discriminating against aliens[62] and has created categorical exceptions to strict scrutiny of state legislation discriminating against resident aliens.[63]

Other than discriminations against racial and national minorities, and in some instances against resident aliens, the Court has not been willing to identify other classifications as suspect and subject to strict scrutiny. This formal two tiered structure has left a void. What is to be done with other classifications, where total deference to the legislature leaves inadequate protections for groups without sufficient political power for self-protection and subject to a continuation of a historical pattern of discrimination? The inflexibility of the rigid two tiered analysis makes the members of the Court reluctant to add new suspect classifications, yet at the same time the very deferential analysis provides no judicial protection.

The response to this rigid two tiered analysis has been the creation

58. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting); Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting); Gunther, *Newer Equal Protection*, *supra* note 11, at 8.

59. *See* text accompanying notes 124-32, *infra*. See also notes 132-33, *infra*.

60. Hernandez v. Texas, 347 U.S. 475 (1954) (Mexican-Americans).

61. Nyquist v. Mauclet, 432 U.S. 1 (1977); Graham v. Richardson, 403 U.S. 365 (1971).

62. Fiallo v. Bell, 430 U.S. 787 (1977); Mathews v. Diaz, 426 U.S. 67 (1976).

63. Ambach v. Norwick, 441 U.S. 68 (1979); Foley v Connelie, 435 U.S. 291 (1978).

of what many have identified as a middle tier.[64] The clearest illustration of this middle tier analysis is found in cases dealing with classifications based on gender or sex. Over the past nine years the Court has articulated an increasingly more demanding equal protection test for sex classifications. The analysis the Court purports to use is clearly more demanding than the rational basis text, both in rhetoric and in result. The current version of the test requires that the sexual classification be substantially related to an important governmental purpose.[65] In addition, there are indications that the Court will be reluctant to accept any conceivable basis as the legislative purpose, and thus, will be more willing to search into the legislative motives to ascertain whether the alleged purpose is in fact a pretext.[66] Finally there are suggestions that where the middle tier approach is used the presumption of constitutionality accorded a statute under the rational basis test is undermined, if not reversed as with the tier two analysis.[67]

This middle tier analysis has been employed consistently with respect to sexual classifications, but the Court has not openly embraced the middle tier analysis and added it officially to the two tiered analysis.[68] Nevertheless, there is recognition by a majority of the Court that the analysis being applied in challenges to sexual classifications is in fact stricter than the general rational basis test.[69] The middle tier analysis may in fact foreshadow the collapse of the rigid two tiered system. A majority of the Court appears ready to abandon formally the rigid two tiered approach if something better could be found to take its place.[70]

With respect to classifications based on illegitimacy of birth, the

64. Craig v. Boren, 429 U.S. 190, 210-11 n.* (1976) (Powell, J., concurring); Gunther, *Newer Equal Protection*, *supra* note 11, at 1. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-30, -31 (1978).

65. Craig v. Boren, 429 U.S. 190, 197 (1976). *Accord*, Orr v. Orr, 440 U.S. 268, 279 (1979).

66. Califano v Webster, 430 U.S. 313, 317 (1977) (*per curiam*); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

67. Parham v. Hughes, 441 U.S. 347, 351 (1979) (opinion of Mr. Justice Stewart, joined by Justices Burger, Rehnquist, and Stevens). On this point, however, it is probable that the dissenters, who desired greater protection, would agree that the presumption is at least undermined.

68. Craig v. Boren, 429 U.S. at 210 n.* (Powell, J,, concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-22 (1976) (Marshall, J., dissenting); Gunther, *Newer Equal Protection*, *supra* note 11, at 18-20. *See* NOWAK, ROTUNDA & YOUNG, *supra* note 12, at 524-27.

69. Craig v. Boren, 429 U.S. at 210 n.* (Powell, J., concurring.); *cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 358-59 (1978) (Brennan, White, Marshall and Blackmun, J., concurring in part and dissenting in part) (dicta).

70. *E.g.*, Craig v. Boren, 429 U.S. at 212 (Stevens, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 318, 321 (1976) (Marshall, J., dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

Court uses a test which appears to be more demanding than the rational basis test, but in rhetoric and result is less demanding than the test currently being applied to sexual classifications. If the middle tier can be thought of as a tier 1½, the test being applied to illegitimacy classifications might be somewhere between 1¼ and 1⅓.[71]

The recent case involving the use of racial classifications to aid racial minorities, *Regents of the University of California v. Bakke*,[72] provides further evidence that the Court may be ready to resort to a middle tier approach for a variety of purposes. Of the five justices that addressed the equal protection issue in *Bakke*, four advocated the use of a middle tier analysis (the analysis used for sexual discrimination) in cases involving discrimination in favor of racial minorities.[73] The fifth, Mr. Justice Powell, while insisting in theory on a strict scrutiny analysis (tier two), suggested that in some circumstances use of racial classifications for benign purposes would in fact meet the demands of strict scrutiny.[74] This suggests that Mr. Justice Powell's strict scrutiny is something less than the strict scrutiny of suspect classifications discriminating against racial minorities. Challenges to discrimination against racial minorities have almost always been successful in the Supreme Court.

The last aspect of the Court's equal protection analysis involves classifications affecting the exercise of fundamental rights. Here the Court has been very inconsistent in its analysis. While purporting to use strict scrutiny, the Court has used judicial scrutiny ranging from tier one rational basis to tier two strict scrutiny in many cases where the law affected the exercise of fundamental rights. This will be demonstrated in the discussion of the fundamental rights branch of equal protection analysis which follows. This provides yet another illustration that the Court is deviating substantially from the well-settled framework that Mr Justice Powell presents.

III. EQUAL PROTECTION AND FUNDAMENTAL RIGHTS

According to the well-settled framework of analysis,[75] legislation

71. *Compare* Lalli v. Lalli, 439 U.S. 259 (1978) *with* Trimble v. Gordon, 430 U.S. 762 (1977).
72. 438 U.S. 265 (1978).
73. *Id.* at 358-62 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part).
74. *Id.* at 316-19 (Powell, J., announcing judgment of Court and joined in part by other justices).
75. Maher v. Roe, 432 U.S. 464, 470 (1977).

impinging upon the exercise of fundamental rights requires strict scrutiny. The origin of this branch of strict scrutiny can be traced to *Skinner v. Oklahoma*.[76] In *Skinner* an Oklahoma statute required sterilization of those convicted three or more times for crimes of moral turpitude, but specific crimes such as embezzlement were excluded. Because the law involved the right of procreation, a right the Court identified as fundamental, the law was subjected to strict scrutiny.[77] Mr. Justice Douglas could find no justification for applying the law to those convicted of larceny but not those convicted of embezzlement.[78]

Although *Skinner* was decided in 1942, before the Court had developed the current theory of equal protection analysis, it has served as an important precedent for the fundamental rights branch of strict scrutiny.[79] During the 1950s and 1960s the Court addressed equal protection challenges to laws involving racial discrimination. It became apparent that the Court was developing a constitutional double standard, with strict and demanding scrutiny of racial discrimination and deferential equal protection scrutiny of most other laws. During this period, however, the right to a meaningful appeal in a criminal case and the right to an equal vote were two issues which resulted in heightened scrutiny for classifications affecting fundamental rights. These decisions were made before the well-settled framework was developed, and thus the analysis used by the Court does not comport with the current articulated framework. To this day these two issues—the right to vote and the right to a meaningful appeal in a criminal case—do not fit comfortably into the Court's analytical framework.

In 1956 the Court held, in *Griffin v. Illinois*,[80] that although there was no constitutional right to a criminal appeal, where an appeal was granted by the state, it could not be made to turn on the wealth of the criminal defendant. Therefore a law conditioning the right to appeal on the defendant's ability to pay for a transcript was held to deny the accused equal protection of the law.[81] This doctrine was expanded to include not just the right to appeal, but the right to a meaningful appeal. In *Douglas v. California*,[82] the Court held that a person entitled

76. 316 U.S. 535 (1942).
77. *Id.* at 541.
78. *Id.* at 541-43.
79. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716, 735 (1969).
80. 351 U.S. 12 (1956).
81. *Id.* at 18.
82. 372 U.S. 353 (1963).

by state law to an appeal was entitled to appointed counsel on appeal if he could not afford counsel. In *Ross v. Moffitt*[83] the Court drew the line, however, and said this right to counsel only extended as far as the first appeal as of right, and did not require the state to provide counsel for discretionary appeals.[84]

These cases were criticized by Mr. Justice Harlan[85] as being concerned with due process, not with equal protection. As far as Mr. Justice Harlan was concerned, the question was whether the deprivation of liberty entitled the defendant to certain procedures such as appeal and assistance of counsel on appeal. The state was not denying anyone the appeal—that was merely the consequence of the defendant's financial situation.[86]

Although the equal protection analysis of the right to appeal was not identified as strict scrutiny, the level of judicial scrutiny was clearly more than the rational basis test.[87] According to the modern well-settled framework, because there was no classification based on race, sex, alienage, or illegitimacy, heightened scrutiny could only be explained if there was an effect on the exercise of a fundamental right. The right being affected was not constitutionally guaranteed apart from the equal protection clause; there is no constitutional right to appeal.[88] The Court's logic is circular. The right was based on the requirement of equality, and thus differential treatment based on ability to pay violated this right to equality.[89] The Court could have avoided the circularity using either of two approaches. The first would have been to identify that the discrimination is against the poor and to require heightened scrutiny for discrimination against the poor. There were suggestions in the opinions that the Court was leaning in that direction.[90] However, the Court has since rejected the use of indigency or

83. 417 U.S. 600 (1974).

84. *Id.* at 610.

85. Douglas v. California, 372 U.S. 353, 360 (1963) (Harlan, J., dissenting); Griffin v. Illinois, 351 U.S. 1, 29 (1956) (Harlan, J., dissenting).

86. 351 U.S. at 34 (Harlan, J., dissenting).

87. In *Griffin* the Court stated that "the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence." *Id.* at 17-18. However, requiring all persons to pay for a transcript and refusing to provide one for free does bear a rational relationship to conserving fiscal resources. Since under the rational basis test a rational relation to any conceivable purpose is sufficient, the Court was applying a scrutiny more rigid than the traditional rational basis test.

88. *Id.* at 18 (citing McKane v. Durston, 153 U.S. 684, 687-88 (1894)).

89. *Id.* at 18-19.

90. "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored" Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) (citing as authority,

poverty as triggering heightened scrutiny.[91] The other approach would have been to recognize that the right to appeal is constitutionally fundamental, even though not expressly required by the Constitution. The worry the Court had was that this would make the category of constitutionally protected fundamental rights too open-ended. The Court was reluctant to follow this course and has now specifically rejected an open-ended approach to identifying rights as fundamental.[92]

The most recent case involving rights of the poor and the criminal process is *Bounds v. Smith*.[93] The Court held that prisoners who are indigent are entitled to either legal assistance or access to a law library to assist them in litigating post-conviction matters. The Court's analytical framework in this area was so ambiguous that the constitutional basis for the decision was the "constitutional right of access to the courts,"[94] with no indication of whether this was really grounded on due process or equal protection.[95] Thus, in the area of meaningful access to the criminal courts, the Court has articulated a right grounded in the equal protection clause itself, but has not identified the level of analysis and has not used the language of strict scrutiny.

The line of cases dealing with equality in the criminal justice system has an interesting parallel with respect to access to the civil courts. In this civil area the Court has recognized that, at least with respect to access to the courts for obtaining a divorce, there is a fundamental right under the due process clause that requires a heightened scrutiny.[96] But with respect to bankruptcy filings[97] and challenges to administrative decisions reducing welfare benefits,[98] neither due process nor equal protection requires anything more than a rational basis analysis. Nevertheless, without explanation of its reasons, the Court held unconstitutional a law requiring defendants in forcible entry and detainer actions to post a double bond before an appeal would be allowed.[99] The Court

inter alia, Douglas v California, 372 U.S. 353, 360 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956)). *Accord*, McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 795 (9th ed. 1975).

91. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973); James v. Valtierra, 402 U.S. 137, 142-43 (1971).

92. San Antonio School Dist. v. Rodriguez, 411 U.S. at 35; Dandridge v. Williams, 397 U.S. 471, 485 (1970).

93. 430 U.S. 817 (1977).

94. *Id.* at 821, 828.

95. *Id.* at 839 (Rehnquist, J., dissenting).

96. Boddie v. Connecticut, 401 U.S. 371 (1971).

97. United States v. Kras, 409 U.S. 434 (1973).

98. Ortwein v. Schwab, 410 U.S. 656 (1973).

99. Lindsey v. Normet, 405 U.S. 56 (1972).

stated that the classification was arbitrary and irrational,[100] something it never does under the usual deferential approach.[101] This result could be explained under the articulated framework if equal access to the courts were a fundamental right. The double bond clearly impinged on that right. Yet, if that was the rationale, it went unarticulated.

These cases leave a very unsettled framework. There is an intersection of due process and equal protection, but there is no clear articulation of why or when heightened scrutiny will be used in this area. Some writers have attempted to fit these cases involving access to the courts into the well-settled framework by suggesting that the Court is really using strict scrutiny without expressly articulating that it is doing so.[102] However, the results in this area are too inconsistent to validate that proposition. If the Court were really using strict scrutiny, then the results would be difficult to explain with respect to counsel for discretionary appeals, bankruptcy filings, and administrative reduction of welfare benefits. Additionally, while it is understandable that the access to the courts cases decided in the 1950s and 1960s do not use the rhetoric of the yet to be developed well-settled framework of analysis, *Moffitt* and *Bounds* were decided after the development of the framework. Yet, in neither of these two cases is there reference to the well-settled framework of analysis. Perhaps a more accurate explanation is that the cases involving access to the courts do not fit in the well-settled framework because there is more to the analysis being used by the Court than is presented in the well-settled framework.

The other issue involving heightened scrutiny but not fitting in the analytical framework involves the right to vote. In the early 1960s the Court held that the equal protection clause included the principle of one man, one vote [103] Though there was no constitutional right to vote for state officials,[104] where the vote was granted by state law, each of those possessing the right to vote was entitled to a vote of equal weight.[105] This area of equal protection analysis has had a unique pattern, unlike the general fundamental rights equal protection analysis,

100. *Id.* at 79.

101. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320-21 (1976) (Marshall, J., dissenting); Gunther, *Newer Equal Protection*, *supra* note 11, at 8.

102. *E.g.*, Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1494 & n.49 (1970); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071, 1085 n.75 (1974).

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

104. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966); Reynolds v. Sims, 377 U.S. at 552-62.

105. *Id.* at 568; *accord*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

with litigation centering on how much precision is required in making the votes equal.[106] Since this special analysis does not help explain the general fundamental rights analysis, no more will be said about the apportionment cases. However, the apportionment cases established that the right to vote on an equal basis is a fundamental constitutional right.[107] Because this right to vote on an equal basis is a fundamental right, the Court, in a series of cases beginning with *Harper v. Virginia State Board of Elections*,[108] concluded that classifications restricting the right to vote require strict scrutiny.[109] *Harper* thus signals the renaissance of the fundamental rights branch of equal protection analysis that was suggested twenty-four years earlier in *Skinner*. Again, as with the line of cases decided under *Griffin* and *Douglas*,[110] the constitutional basis for the fundamental right was somewhat circular—it was a right implicit in the equal protection clause itself rather than explicitly recognized elsewhere in the Constitution. As with the criminal justice cases, there was an undertone of concern with poverty that could have been used to explain the Court's decision, but again, this approach was rejected.[111]

Later election cases where criteria other than wealth were involved, such as property ownership[112] or having children living within the school district,[113] indicated that strict scrutiny would be required because the right to vote on an equal basis was being affected, not because the persons being deprived of the vote were poor. These cases clearly establish the existence of the fundamental rights branch of equal protection strict scrutiny, though they do not provide much guidance as to the parameters of this branch.

Beginning in 1969 and continuing throughout the 1970s, the Court required strict scrutiny for laws affecting fundamental rights. The category of fundamental rights requiring strict scrutiny expanded beyond the rights based on the equal protection clause itself (the right to vote

106. *E.g.*, Gaffney v. Cummings, 412 U.S. 35 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Abate v. Mundt, 403 U.S. 182 (1971); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

107. Reynolds v. Sims, 377 U.S. at 554-55.

108. 383 U.S. 663 (1966).

109. *Id.* at 670; *accord*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

110. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *See* notes 80-92 *supra* and accompanying text.

111. San Antonio School Dist. v. Rodriguez, 411 U.S 1, 35 (1973); Dandridge v. Williams, 397 U.S. 471, 480-81 (1970).

112. Kramer v. Union School Dist., 395 U.S. 621; Cipriano v. City of Houma, 395 U.S. 701 (1969).

113. Kramer v. Union School Dist., 395 U.S. 621.

on an equal basis and equal access to the criminal justice system). Among the fundamental rights triggering the use of strict scrutiny are the right to travel,[114] right to marry,[115] and freedom of speech.[116] From the outset there was considerable criticism of this approach. A primary criticism was that the Court was picking and choosing the rights it considered fundamental.[117] Several justices have complained that this was an unjustified intrusion by the Court into the province of the legislature, reminiscent of the overly intrusive intervention of the Court into legislative policy during the first third of the century.[118] That earlier intrusive philosophy had been rejected consistently by the Court in the years since 1937.[119]

In 1973 Mr. Justice Powell indicated that the Court was drawing limits on the use of the fundamental rights branch of equal protection analysis. In *San Antonio School District v. Rodriguez*,[120] Mr. Justice Powell stated that it was not the role of the Court to "pick out particular human activities, characterize them as 'fundamental,' and give them added protection."[121] Only those constitutional rights "explicitly or implicitly guaranteed by the Constitution" would provide the basis for strict scrutiny under the equal protection clause.[122] He then proceeded to enumerate some of the rights appropriately receiving strict scrutiny.[123]

The *Rodriguez* case suggested that the Court was adhering to the basic framework already developed. Classifications affecting fundamental rights would still receive strict scrutiny, but there would not be any further expansion of this approach. However, as with a shell game, appearances are deceptive. Cases decided in the past eight years indicate there is much more to this game than meets the eye. Though the

114. Shapiro v. Thompson, 394 U.S. 618 (1969).

115. Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

116. San Antonio School Dist. v. Rodriguez, 411 U.S. at 34 n.75; Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

117. Shapiro v. Thompson, 394 U.S. 618, 662 (1969) (Harlan, J., dissenting).

118. *See, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring); 434 U.S. at 395-96 (Stewart, J, concurring); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 178-85 (1972) (Rehnquist, J., dissenting); 394 U. S. at 660-62 (Harlan, J., dissenting).

119. *See, e.g.*, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535-37 (1949); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 450 (1978); *cf.* Whalen v. Roe, 429 U.S. 589, 596-97 (1977).

120. 411 U.S. 1 (1973).

121. *Id.* at 31 (quoting Shapiro v. Thompson, 394 U.S. at 642 (Stewart, J., dissenting)).

122. *Id.* at 33-34.

123. *Id.* at 34 nn.73-76.

Court has recognized that freedom of speech is clearly fundamental for purposes of equal protection analysis,[124] in several cases the Court has upheld classifications and refused to apply strict scrutiny in analyzing laws affecting freedom of speech.[125] The Court has struck down some durational residency requirements as impermissibly affecting the right to travel,[126] but has upheld other durational residency requirements utilizing something far less than strict scrutiny.[127] Though the Court has recognized the right of a woman to choose, in consultation with her doctor, to have an abortion during the first three months of pregnancy,[128] the Court has specifically rejected the use of strict scrutiny for government action which made such a constitutional right illusory for many.[129] Within months after applying the rational basis test to legislation imposing a severe hardship on a person exercising the right to marry,[130] the Court held that strict scrutiny must be used to analyze laws imposing barriers on the right to marry.[131] Additionally, in cases involving both the fundamental right to vote on an equal basis and the fundamental right to associate with others for the advancement of political beliefs, the Court used a variety of tests, striking down some laws and upholding others.[132] The remainder of this paper will examine the analysis that is in fact being used by the Supreme Court with respect to laws affecting the exercise of fundamental rights. The question to be addressed is what impact on the exercise of a fundamental right triggers the use of strict scrutiny.

IV. TRIGGERING FUNDAMENTAL RIGHTS STRICT SCRUTINY

Equal protection strict scrutiny, when applied in the manner sug-

124. *Id.* at 34 n.75.

125. *E.g.*, Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976). *See* text accompanying notes 231-251, *infra.*

126. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

127. *E.g.*, Sosna v. Iowa, 419 U.S. 393 (1975).

128. Roe v. Wade, 410 U.S. 113 (1973).

129. Maher v. Roe, 432 U.S. 464 (1977).

130. Califano v. Jobst, 434 U.S. 47 (1977).

131. Zablocki v. Redhail, 434 U.S. 374 (1978).

132. Restrictions on access to the ballot have been found unconstitutional, though the level of scrutiny was not always clear. Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968). But in other cases the Court has found that restrictions on the access to the ballot were constitutional, again without much clarity as to the standards applied. Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). Similarly, with respect to the right to vote the Court has upheld some restrictions, *e.g.*, Marston v. Lewis, 410 U.S. 679 (1973), but invalidated others, *e.g.*, Kusper v. Pontikes, 414 U.S. 51 (1973). *See generally* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L. J. 1071, 1083-89 (1974).

gested in the well-settled framework, will almost always prove fatal to the classification being challenged.[133] Even if the state can demonstrate a compelling governmental interest, it is unlikely that the state will be able to demonstrate that it could not have achieved its objectives in a less burdensome manner. As Mr. Justice Blackmun recently observed, "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any

133. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting); Gunther, *Newer Equal Protection, supra* note 11, at 8. With respect to the fundamental rights branch of strict scrutiny, another qualification must be made. Concern with the rigidity of strict scrutiny and its devastating effect on many areas of traditional governmental regulation has led members of the Court to seek ways to reduce the impact of the fundamental rights branch of strict scrutiny. The Court has limited the potential impact in three ways. One method is to require a greater impact or burden on the exercise of the fundamental right before requiring strict scrutiny. This approach is the subject of this section.

Another method is to limit the scope of the definition of the fundamental rights. Using this approach, the impact or burden on the exercise of an activity is irrelevant because the activity is, by definition, nonfundamental. There are several illustrations of this approach in recent terms of the Court. For example, in Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978), the city exercised police jurisdiction over persons residing outside the city limits, but these persons were not entitled to vote for the officials making and enforcing these laws. The challengers sought strict judicial scrutiny because, they argued, they were being denied the fundamental right to an equal vote. Instead of applying strict scrutiny the Court found that persons not living within the city had no right to vote in city elections. Therefore only a rational basis was required to sustain the law. *Id.* at 70. *See also* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973), for a similar definitional avoidance of strict scrutiny for laws affecting the right to vote.

Califano v. Aznavorian, 439 U.S. 1, 70 (1978), is another case where strict scrutiny was avoided by watering down the definition of the fundamental right. Social security disability benefits were terminated for the period a person was out of the country in excess of thirty days. Aznavorian claimed that provision should be subjected to fundamental rights strict scrutiny because it penalized the right to travel. The Court found that strict scrutiny was not required because international travel, while basic and important, was not a fundamental constitutional right. *Id.* at 176-77.

The third method the Court uses to limit the impact of strict scrutiny is to water down the level of scrutiny while purporting to apply strict scrutiny. In other words, though the Court finds that there is a sufficient impact on a right that is identified as fundamental, and strict scrutiny is triggered, the Court will accept governmental interests as compelling that might not be accepted as compelling where racial discriminations or other suspect classifications were involved. Or the Court might not rigorously search to determine if there were less restrictive or burdensome means available. *See, e.g.*, Storer v. Brown, 415 U S. 724 (1974) "While it is true that the Court purports to examine into 'less drastic means,' its analysis is wholly inadequate." *Id.* at 760 (Brennan, J., dissenting). *See also* Marston v. Lewis, 410 U.S. 679 (1973) (upholding a 50 day durational residency requirement for the right to vote without requiring the state to show that there were no less restrictive means available).

These last two methods are beyond the scope of this article. Watering down the fundamental right concerns the nature of the right itself, independent of the well-settled framework of equal protection analysis. Watering down strict scrutiny is a departure from the well-settled framework and independent of the question of when strict scrutiny is to be used. This paper will focus on the first method—the determination of when a classification affecting a fundamental right will be subjected to strict scrutiny.

situation . . . ."[134] Thus, under the well-settled framework the crucial question is whether the classification will be subjected to the rational basis test or the strict scrutiny test. The answer to this question determines whether the law will be found constitutional or unconstitutional. With respect to laws which discriminate against identifiable groups, it is the nature of the classification on the face of the law or as intentionally applied that will determine whether strict or heightened scrutiny will be required. However, with respect to the fundamental rights branch of equal protection analysis it is usually[135] the effect of the classification on the exercise of the fundamental right that triggers the use of strict scrutiny.

In cases involving fundamental rights equal protection challenges, the Court has used a variety of terms to describe the connection between the classification and the fundamental right which will require the use of strict scrutiny. Among the terms used to describe the connection, the Court has spoken of classifications which, in relation to the exercise of the fundamental right, touch on,[136] serve to penalize,[137] unduly burden,[138] constitute a direct impact rather than an incidental effect,[139] significantly interfere,[140] or sufficiently burdens to constitute coercion.[141] Other terms have been used by the Court, but there has been little attempt to clarify the criteria. It has become apparent, however, in several cases rejecting the use of strict scrutiny, that not just any effect on the exercise of the right will suffice. The purpose of this section is to explore the nature of the connection between the classification and the exercise of the fundamental right which will trigger the use of strict scrutiny.

The line of cases involving equal protection challenges to laws affecting the fundamental right of interstate travel illustrates how the Court has approached the question of what connection between the classification and the fundamental right is sufficient to trigger strict

134. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring).

135. A major exception where the nature of the classification, rather than its effect on the exercise of the fundamental right, is used to trigger strict scrutiny is the case of content classifications and freedom of speech. This exception is the subject of the next section of this paper.

136. Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

137. *Id.* at 634; *accord*, Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972).

138. Maher v. Roe, 432 U.S. 464, 473 (1977).

139. Califano v. Aznavorian, 439 U.S. 170, 177 (1978); Zablocki v. Redhail, 434 U.S. 374, 386-87 & n.12 (1978).

140. Zablocki v. Redhail, 434 U.S. at 386.

141. *Id.* at 387.

scrutiny. In *Shapiro v. Thompson*,[142] an Illinois law imposing a one year durational residency requirement for welfare benefits was challenged. The Court found that the durational residency requirement served to penalize the exercise of the fundamental right to travel by denying welfare benefits to those who had chosen to exercise their right to travel or migrate to Illinois. Citing, *inter alia*, *Skinner v. Oklahoma*,[143] the Court required a compelling state interest[144] and the use of less drastic means.[145] Later in the opinion the Court suggested a very loose connection when it said, "Since the classification here *touches on* the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard . . . ."[146]

In *Dunn v. Blumstein*[147] the Court stressed that strict scrutiny could be required even if the law did not in fact deter anyone from exercising their constitutional right of interstate travel. It was sufficient that the classification acted to penalize those who did exercise their constitutional right.[148]

Two years later the Court indicated that strict scrutiny was not required merely because a classification impinged to some extent on the right to travel. In *Memorial Hospital v. Maricopa County*[149] the Court struck down a one year durational residency period that was a prerequisite for an indigent receiving nonemergency medical care. Mr. Justice Marshall noted that the Court had upheld durational residency requirements such as a one year period for lower tuition at state colleges.[150] In *Maricopa County*, however, the classification penalized the right to travel by denying basic necessities of life. This was sufficient to trigger strict scrutiny.[151] Mr. Justice Marshall distinguished the college tuition case by noting that governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.[152] In this case the governmental benefit being denied was medical care, which he viewed to be as much a basic necessity of life to

142. 394 U.S. 618 (1969).
143. 316 U.S. 535, 541 (1942).
144. Shapiro v. Thompson, 394 U.S. at 634.
145. *Id.* at 637.
146. *Id.* at 638 (emphasis added).
147. 405 U.S. 330 (1972).
148. *Id.* at 339-41.
149. 415 U.S. 250 (1974).
150. *Id.* at 259 (referring to Vlandis v. Kline, 412 U. S. 441, 452-53 n.9 (1973)).
151. Memorial Hosp. v. Maricopa County, 415 U.S. at 259-61.
152. *Id.* at 259.

an indigent as the welfare assistance in *Shapiro*.[153] This focus on the importance of the benefits being denied is relevant in determining the effect of the classification on the exercise of the fundamental right. Presumably, the greater the value of the benefits being lost, the greater the deterrent effect on exercising the fundamental right of interstate travel. However, Mr. Justice Marshall expressly stated that the importance of the benefit being denied is of constitutional significance independent of the deterrent effect. He indicated that the penalty involved in *Dunn v. Blumstein*, losing the right to vote for a year, is of greater constitutional significance than being denied college tuition benefits. Yet it is not unlikely that the latter could have the greater deterrent impact on the right to travel.

Under the well-settled framework, the loss of the fundamental right to an equal vote is constitutionally more significant than denial of college tuition benefits because the voting rights might require strict scrutiny independent of the right of interstate travel, whereas a law affecting tuition benefits would not. Where neither nonemergency medical payments nor college tuition benefits are constitutionally guaranteed rights, under the well-settled framework the significance of the benefit being denied should only be as to how the denial relates to the exercise of the fundamental right of interstate travel.[154] Mr. Justice Marshall's approach, involving weighing of the benefits being denied, introduces into the analysis a spectrum of interests. Mr. Justice Marshall has stated on many occasions that his analysis is not the same analysis the Court purports to use.[155] His concern is not just with the effect the classification has on the fundamental right. Instead of the rigid two tier analysis, Mr. Justice Marshall would concentrate on three factors, the "character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[156] Even if an interest being

153. *Id.* at 259 & n.14.

154. A state may not interfere with the exercise of a fundamental constitutional right without the justification demanded by the particular constitutional provision involved. States may deny benefits or impose conditions on the receipt of the benefits, so long as there is any rational basis for those conditions. Dandridge v. Williams, 397 U.S. 471, 484-85 (1970). However, the state may not condition the granting of the benefit on the waiver of a constitutional right. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 627 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

155. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317-27 (1976) (Marshall, J., dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

156. Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

affected were not a fundamental right, if the interest were sufficiently important, heightened (but less than strict) scrutiny could be required.[157] Under Mr. Justice Marshall's analysis, denial of governmental benefits relating to necessities of life might receive heightened scrutiny even where a fundamental right (such as the right to travel) was not involved at all.[158]

The difficulty in Mr. Justice Marshall's approach is that it is a substitute for the two tier approach rather than an explanation of when strict scrutiny will be required. Under the two tiered approach, a right is fundamental or it is not. One does not rank fundamental rights in a hierarchy to determine whether strict scrutiny will be applied.[159] The nature of the penalty is theoretically significant only to the extent it defines the connection of the classification to the fundamental right. In numerous other cases the Court has refused to apply strict scrutiny, or even heightened scrutiny, though necessities of life were being denied, absent a sufficient connection with the fundamental right to trigger strict scrutiny.[160]

Approximately a year after Mr. Justice Marshall wrote for the Court in *Maricopa County*, Mr. Justice Rehnquist, who had dissented in that case, wrote for the Court in *Sosna v. Iowa*.[161] *Sosna* involved an equal protection challenge to a one year residency period as a prerequisite to filing a petition for divorce in state court. Mr. Justice Rehnquist found this residency requirement constitutional and distinguishable from the ones in previous cases. He made no explicit reference to Mr. Justice Marshall's "necessities of life" approach, though the use of that approach for the right to divorce might have supported his conclusion. He also did not utilize the penalty or deterrence concepts developed in *Shapiro* and *Dunn*. In fact he made no reference to the two tiered analysis, to strict scrutiny, or to rational basis. His approach

157. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 319-21 (Marshall, J., dissenting).

158. *E.g.*, Dandridge v. Williams, 397 U.S. at 520-21 (1970) (Marshall, J., dissenting).

159. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

> [T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative social significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether eduation 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.

Id. Cf. Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 561 (1976) (rejecting a hierarchy with respect to first and sixth amendment rights).

160. Califano v. Jobst, 434 U.S. 47 (1977) (loss of welfare benefits); Ortwein v. Schwab, 410 U.S. 656 (1973) (reduction of welfare benefits); Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) (limitation on welfare benefits).

161. 419 U.S. 393 (1975).

was premised on the fact that the Court in *Shapiro* and *Maricopa* had expressly disclaimed the proposition that durational residency requirements could never be imposed.[162] In his view, those cases involved a simple balancing where the only governmental interests asserted, budgetary or recordkeeping considerations, were "insufficient to outweigh the constitutional claims of the individuals."[163] In *Sosna*, by contrast, Mr. Justice Rehnquist identified state interests involved in granting divorces that were long-standing and sufficient to outweigh the individual interests.[164] He buttressed this by noting that Sosna was not irretrievably foreclosed from receiving some part of what she sought, as was the case in *Shapiro, Dunn, and Maricopa County*. She would eventually qualify for the adjudication she sought; it would merely be delayed.[165]

Mr. Justice's Rehnquist's analysis sheds little light on when strict scrutiny is required and when it is not, as he too ignores or rejects the well-settled framework. He has expressly stated on several occasions that he rejects strict scrutiny for fundamental rights, and in fact the two tier analysis in general.[166] The void left by Mr. Justice Rehnquist's failure to explain or justify the doctrinal deviation from *Shapiro* and *Dunn* was not even filled by a convincing factual distinction. His claim that the benefit Sosna sought, the ability to file a petition for divorce, was merely delayed and not denied as in *Shapiro*, *Dunn*, and *Maricopa County*, is not very convincing. While it might have been extremely difficult for Shapiro to survive the year without welfare, it was not terribly inconvenient for Dunn to get along without voting for a year or impossible for the indigent in Maricopa County to postpone nonemergency medical care for a year. Furthermore, to the extent Dunn lost the right to vote for one year, Sosna lost the right to get divorced and the correlative right to remarry[167] for that year.

Curiously, Mr. Justice Rehnquist applied a greater degree of scru-

162. *Id.* at 406.

163. *Id.*

164. Among the interests of the state were legitimate concerns with the effect of divorce on the parties, affecting such matters as property rights and custody and support of children. Additionally the state was legitimately concerned with avoiding intermeddling in matters in which another state has paramount interest and with minimizing the susceptibility of its own divorce decrees to collateral attack. *Id.* at 406-09.

165. *Id.* at 406.

166. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting) (attacking Court's equal protection analysis in general); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 178-85 (1972) (Rehnquist, J., dissenting) (attacking fundamental rights strict scrutiny).

167. The Court has not suggested that the fundamental right to marry only applies to the first marriage. Therefore, barriers on the right to divorce for the purpose of remarrying do impinge upon the right to marry. Though the Court has not yet decided this point, see Boddie v. Connecti-

tiny to the durational residency requirement in *Sosna* than would be required by the tier one rational basis test. He claimed to be using the same approach as in *Shapiro*, *Dunn*, and *Maricopa County* when he balanced the state interests against the constitutional rights of the individuals to determine the constitutionality of the residency requirement.[168] He thus demanded more than that the law not be a wholly irrational means to achieving the state interests. Therefore, *Sosna* is best read not as an opinion explaining the fundamental rights branch of strict scrutiny, but as an alternative to the two tiered analysis. Mr. Justice Rehnquist and Mr. Justice Marshall appear to be playing the same shell game. Neither accepts the two tiered analysis and therefore neither plays by those rules. The resulting doctrinal confusion arises from the fact that, in each case, Mr. Justice Rehnquist or Mr. Justice Marshall was writing for a majority which purports to utilize the two tiered analysis. As long as a majority of the Court joins in opinions rejecting the two tiered analysis, little light is shed on how the well-settled framework functions.

In another right to travel case, *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*,[169] Mr. Justice Brennan, writing for the Court, rejected a claim that strict scrutiny was required. In this case, which did not involve durational residence requirements, a tax was imposed on airlines for each commercial airline passenger. Though the tax affected the right to travel by increasing the cost of travel, the Court held that strict scrutiny was not needed because the tax would in fact aid interstate travel. The revenues raised by the tax would be used to support the airport, therefore facilitating rather than burdening interstate travel.[170] Mr. Justice Brennan rejected the claim that *Crandall v. Nevada*,[171] invalidating a tax of one dollar on everyone leaving Nevada, was controlling. *Crandall* was distinguishable because it involved direct interference with the right to travel.[172] Thus, Mr. Justice Brennan concluded, the strict scrutiny required by *Shapiro* was inapplicable. Implicit in this approach is the idea that only direct interference, rather than indirect interference, is sufficient to trigger strict scrutiny.

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cut, 401 U.S. 371 (1971), for heightened scrutiny where access to the courts for purposes of obtaining a divorce was restricted.

168. Sosna v. Iowa, 419 U.S. 393, 406 (1975).

169. 405 U.S. 707 (1972).

170. *Id.* at 714.

171. 73 U.S. (6 Wall.) 35 (1868).

172. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707, 713 (quoting Hendrick v. Maryland, 235 U.S. 610, 624 (1915)).

There is no clear articulation of this principle in Brennan's opinion, though this approach is suggested strongly in some later opinions. The distinction between direct and indirect burdens had been used by the Court in a variety of other contexts with mixed success.[173] Its use in fundamental rights equal protection challenges will be evaluated in the context of two recent cases involving the fundamental right to marry.

Before examining the marriage cases, a major case involving the fundamental right to have an abortion will be analyzed. It was in *Maher v. Roe*[174] that Mr. Justice Powell claimed that the two tiered approach, including strict scrutiny for laws impinging on fundamental rights, was well-settled. Mr. Justice Powell's opinion in *Maher* indicates that the substantiality of the effect of the classification on the exercise of the fundamental right may, in some instances, be the criterion for triggering strict scrutiny. In *Maher* the appellees claimed that a state policy of paying medical costs of childbirth for indigent women, but not medical costs of abortion, impinged on the fundamental right of women to choose to have an abortion.[175] The Court, in a footnote, rejected the analogy to *Shapiro* and *Maricopa County*.[176] The Court stated that those cases involved penalties, comparable to criminal fines, imposed on one who had recently exercised a constitutional right. Here by contrast there was no penalty. Even if there was a state-created obstacle in obtaining an abortion, the fundamental right of the woman was defined as the right to be free from unduly burdensome interference. Had the state terminated a woman's welfare benefits because she chose to have an abortion, there would have been a penalty analogous to that in *Shapiro*, but that was not the situation in this case.[177] Thus, the Court suggested that there must be some element of retribution in-

173. The Court has used the distinction between direct and indirect effect, impact, or connection to determine when Congress could regulate local activity which affected interstate commerce. Carter v. Carter Coal, 298 U.S. 238, 307-10 (1936). However, this approach was abandoned for an approach which looked at the substantiality of the impact. Wickard v. Filburn, 317 U.S. 111, 122-25 (1942). Nevertheless, with respect to the question of whether states may regulate in a manner which affects interstate commerce, there is still discussion of whether the effect is direct or indirect. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). With respect to the first amendment ban on establishment of religion, the Court has recently switched from a test that focused on effects being primary or secondary to a test of whether the effect was direct and immediate or remote and incidental. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973).

174. 432 U.S. 464 (1977).

175. *Id.* at 471.

176. *Id.* at 474 n.8.

177. *Id.*

volved for there to be a penalty, and that any other state-created interference must be unduly burdensome.

The discussion of the unduly burdensome nature of the obstacle suggests a requirement of substantiality of effect of the classification on the fundamental right, a suggestion developed by the next series of cases involving the fundamental right to marry.[178] Additionally, the concept of *unduly* burdensome suggests the idea of less burdensome alternatives. This creates substantial doctrinal confusion because it puts the cart before the horse. Under this analysis an inquiry into less burdensome means is necessary to determine if strict scrutiny is required. Under the two tiered approach, only if strict scrutiny is required does the Court inquire into less burdensome means.[179]

The approach in *Maher* actually suggests an alternative to the two tiered analysis rather than an explanation of it. Like Mr. Justice Marshall's approach, heightened scrutiny is required without the need for a specified connection between the classification and the fundamental right. However, unlike Mr. Justice Marshall's approach, there must be a fundamental right present, not just important interests. Mr. Justice Powell appears to be using a heightened scrutiny while rejecting strict scrutiny, though he claims that he is using the well-settled two tiered framework. In fact Mr. Justice Powell had taken a position in an earlier case very similar to Mr. Justice Marshall's approach. He stated in *Weber v. Aetna Casualty and Surety Co.*[180] that the essential inquiry under either rational basis or strict scrutiny is inevitably a dual one: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[181] For Mr. Justice Powell all equal protection challenges involved a balancing, with the Court giving stricter scrutiny where the classifications "approach sensitive and fundamental personal rights."[182] Thus, implicit in Mr. Justice Powell's analysis in *Maher*, and explicit in his opinions

178. *See* text accompanying notes 183-94, *infra*.

179. A possible exception involves challenges to laws discriminating on the basis of sex. The asserted test, whether the sexual classification is substantialy related to an important government purpose, Craig v. Boren, 429 U.S. 190, 197 (1976), does not explicitly take into account whether there are less restrictive means. Nevertheless, in several cases the Court has found that the objectives could have been achieved with nondiscriminatory means, thus suggesting that in some cases the court will look at means without requiring strict scrutiny. *Cf.* Orr v. Orr, 440 U.S. 268, 281 (1979); Reed v. Reed, 404 U.S. 71, 76 (1971).

180. 406 U.S. 164 (1972).

181. *Id.* at 173.

182. *Id.* at 172.

elsewhere, is an approach different than the one described in the well-settled framework articulated at the outset of his opinion in *Maher*.

The two cases decided by the Supreme Court in the 1977-78 term involving the fundamental right to marry provide a current indication of what triggers strict scrutiny. The Court will focus on the directness and substantiality of the burden or obstacle in the way of the exercise of the fundamental right. Additionally, the Court suggests that the legislative purpose may be important.

In *Zablocki v. Redhail*[183] the Court applied strict scrutiny to strike down a law denying the right to marry to a person who had not made child support payments unless he received permission from a state court.[184] Previously that term, in *Califano v. Jobst*,[185] the Court had applied the rational basis test to uphold a law which terminated the social security disability benefits of someone who married. The consequence of the law was to deny Jobst necessities of life and impose a substantial financial obstacle to his marriage. This was comparable to terminating benefits for exercising the fundamental right to marry. Nevertheless, the Court used the rational basis test in *Jobst*. According to Mr. Justice Powell in *Maher*, terminating benefits for exercising a fundamental right would be like the penalty in *Shapiro*.[186] Why was strict scrutiny required in *Zablocki* but not in *Jobst*? In *Zablocki* the Court explained the difference as follows:

> [W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.[187]

The Court went on to state, "The directness and substantiality of the interference with the freedom to marry distinguishes the instant case from Califano v. Jobst."[188] There the law was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage." There was no "direct legal obstacle," and "there was no

183. 434 U.S. 374 (1978).
184. *Id.* at 383.
185. 434 U.S. 47 (1977).
186. Maher v. Roe, 432 U.S. 464, 474 n.8 (1977).
187. Califano v. Jobst, 434 U.S. at 386-87 (citation omitted).
188. *Id.* at 387 n.12.

evidence that the laws significantly discouraged, let alone made 'practically impossible' any marriages." In fact, Mr. Justice Marshall noted, the provision had not deterred the individual who challenged the law from getting married.[189]

Mr. Justice Marshall found that in *Zablocki*, because of the legal requirements, some persons were absolutely prevented from getting married, others would be "sufficiently burdened" so that they would be coerced into foregoing the right to marry, and others would "suffer a serious intrusion into their freedom of choice."[190] This suggests several connections between the law and the fundamental right ranging from a complete obstacle to a serious intrusion. Mr. Justice Marshall finally concluded that strict scrutiny is required because the classification "significantly interferes with the exercise of a fundamental right."[191]

The criterion thus articulated is "significant interference." But the opinion suggests that the interference is significant when it is "direct and substantial."[192] This picks up threads from the cases previously discussed. It was the lack of a direct obstacle that was a major factor in distinguishing *Jobst*. But as previously suggested, the concept of direct versus indirect connection or obstacle is one that provides little guidance.[193]

The opinion in *Zablocki* suggests that the substantiality of the interference is also an important factor. Left ambiguous is whether interference which fails to prevent exercise of the right may be considered substantial. Mr. Justice Marshall distinguished *Jobst*, in part, by noting that the law had not significantly discouraged exercise of the right, and in fact Jobst, himself, had not been deterred. Mr. Justice Marshall thus undercut his emphasis in *Maricopa County* on penalty rather than actual deterrence. Also Mr. Justice Marshall seems to have abandoned his focus on necessities of life, since Jobst was losing welfare benefits as a consequence of exercising the right to marry.

Mr. Justice Marshall, writing for the Court in *Zablocki*, seems to be adhering more closely to the well-settled framework than did Mr. Justice Powell in *Maher* or Mr. Justice Marshall, himself, in many of the right of interstate travel cases. In *Zablocki* the focus of analysis is purely on the connection between the classification and the fundamen-

189. *Id.*
190. *Id.* at 387.
191. *Id.* at 388.
192. *Id.* at 386-87.
193. *See* note 173 *supra*.

tal right. Though the analysis may not be very searching, some criteria are suggested: burdens must be direct and substantial and not just any burden will require strict scrutiny. While deterrence will be a factor in determining substantiality of the burden, it is not determinative unless it amounts to a complete obstacle. The Court's opinion in *Zablocki* provides, perhaps, the clearest articulation of the triggering factor of any of the recent cases. This is probably due to the need to distinguish *Jobst*, decided just a few months earlier, involving an alleged burden or penalty on the same fundamental right. As both cases involved the same right, they could not be distinguished based on the significance of the right, and it was therefore necessary for the Court to focus on the criteria for triggering strict scrutiny. The approach in *Jobst* and *Zablocki* appears far more demanding with respect to the triggering mechanism that the approach in *Shapiro* or *Maricopa County*. Perhaps this is a reflection of the Court's dissatisfaction with the rigidity of the two tiered analysis. The Court unanimously agreed that the result in *Jobst*, upholding the law, was acceptable. Rigid application of strict scrutiny in *Jobst*, with the demand for the least burdensome alternative, might have resulted in the law being declared unconstitutional.

In conclusion, the cases focusing on the connection between the law and the fundamental right which will trigger scrutiny are in harmony in perhaps only one respect: they clearly indicate that the framework of analysis is *not* well-settled. The Court appears dissatisfied with the rigidity of the well-settled framework and escapes that straightjacket in two ways. One method is to engage in a judicial balancing of the rights affected, implicitly or explicitly, and then select the level of analysis which will provide the desired result. The other is to engage in the balancing and then reach the result, ignoring the well-settled framework. As in a shell game, following the pea is complicated by illusions and judicial sleight of hand.

As Mr. Justice Stevens suggested in *Craig v. Boren*,[194] the Court may in fact be applying one standard to all cases, the standard suggested by Mr. Justice Marshall, balancing the nature of the classification, the individual interests affected, and the governmental interest being pursued.[195] If so, it would be more instructive and honest to articulate that standard and balance openly.[196] The reluctance of the

194. 429 U.S. at 212 (1976) (Stevens, J., concurring).
195. Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting).
196. *Cf.* Craig v. Boren, 429 U.S. at 212 (Stevens, J., concurring).

Court to do so is probably due to the criticism that the Court is thereby creating rights.[197] Recognition that drawing lines requires the exercise of judgment based on the facts of each case should be an adequate response to the idea of totally precluding any judicial balancing. To the criticism that neutral principles or guidelines are necessary to reduce judicial discretion,[198] Mr. Justice Marshall's suggestion that the Court use the present two tier system as a guideline to define parameters of analysis[199] might be a partial response.

V. CONTENT NEUTRALITY AS THE FACTOR TRIGGERING STRICT SCRUTINY

As indicated in the last section, the Court has used a variety of factors to trigger strict scrutiny, but without any consistency. At a minimum, however, some effect on the exercise of the fundamental right must have been present before strict scrutiny was required. In one special area, equal protection challenges to classifications relating to freedom of speech, the Court appears to have used a factor to trigger strict scrutiny without any analysis of what effect the classification had on the exercise of the fundamental right. That factor is lack of content neutrality. Lack of content neutrality as a factor triggering strict scrutiny has also followed the shell game pattern, and in several cases has vanished as a triggering criteria—though laws relating to speech have not been content neutral, the Court has nevertheless failed to apply equal protection strict scrutiny to the law. This section will analyze those cases and indicate that content neutrality is in fact a first amendment freedom of speech concept, and it has been misapplied to equal protection analysis.

The first case where the Supreme Court applied fundamental rights equal protection strict scrutiny to a law allegedly affecting free speech was *Police Department of Chicago v. Mosley*.[200] The challenge was to a Chicago ordinance which prohibited picketing near schools,

197. Shapiro v. Thompson, 394 U.S. at 662 (Harlan, J., dissenting).

198. *Cf.* Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 675-78 (1966) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 520-27 (1965) (Black, J., dissenting). *See generally* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

199. Massachusetts Bd. of Retirement v. Murgia, 427 U.S 307, 319 n.1 (1976) (Marshall, J., dissenting). See the conclusion of this article for additional discussion of alternatives to a rigid two tiered system or a standardless balancing system.

200. 408 U.S. 92 (1972).

but made an exception for peaceful labor picketing of a school.[201] Without any discussion of how the ordinance penalized, burdened, or affected freedom of speech, Mr. Justice Marshall noted that an equal protection issue was raised by the fact that some picketing was treated differently than other picketing. Though *Mosley* is cited as a case requiring fundamental rights scrutiny,[202] Mr. Justice Marshall's articulation of the test to be used is somewhat ambiguous. He stated that content classifications were never permitted.[203] This per se rule is more rigid than strict scrutiny, which in theory would permit classifications infringing fundamental rights when they were necessary to achieve a compelling governmental interest. Yet Mr. Justice Marshall also stated that the classification must suitably further an appropriate government interest.[204] For this proposition he cited a case dealing with a classification based on sex,[205] a case dealing with a classification based on illegitimacy,[206] and one of the strict scrutiny right to travel cases.[207] As classifications based on sex and illegitimacy do not require strict scrutiny, Marshall's citation of these cases leaves the standard of review in this case imprecise. Marshall did utilize more than a rational basis test, however, because the ordinance *affected* expressive conduct.[208] What triggered the use of the more rigorous scrutiny? Mr. Justice Marshall, after noting that the equal protection claim was "closely intertwined with the First Amendment interests,"[209] went on to mix the two constitutional protections together. Mr. Justice Marshall failed to utilize the equal protection analysis of *Shapiro*. He did not examine whether the law penalized or deterred or interfered in any way with first amendment rights. In fact Mr. Justice Marshall was using the concept of content neutrality, a first amendment doctrine, to trigger the use of strict scrutiny in this case. He also misstated the first amendment doctrine when he said, "But above all else, the First Amendment means that government has no power to restrict expression because of its message,

201. *Id.* at 94 n.2.
202. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 34 n.75 (1973). Mr. Justice Marshall, author of *Mosley*, cites *Mosley* as an application of strict scrutiny in his dissent in *San Antonio School Dist. Id.* at 99.
203. 408 U.S. 92, 96 (1972).
204. *Id.* at 95.
205. Reed v. Reed, 404 U.S. 71, 75-77 (1971).
206. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).
207. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).
208. Police Dep't of Chicago v. Mosley, 408 U.S. at 101.
209. *Id.* at 95.

its ideas, its subject matter, or its content."[210] Despite this assertion, content neutrality is not an absolute requirement of the first amendment. The first amendment has been interpreted to forbid laws which are overbroad and unduly burden freedom of speech.[211] Thus, even where government has sufficient justification to restrict speech, it must narrow its regulation to address only the speech which creates a clear and present danger,[212] which is obscene,[213] or which falls within some other area of permissible restraint.[214] This may, of necessity, lead to restricting speech based on the content.[215]

Content neutrality is only a requirement of first amendment analysis where the government seeks to justify restrictions on speech as merely regulation of time, place, or manner of speech.[216] Such restrictions on time, place, and manner are not subjected to the same intensive level of analysis applied where the law is aimed at restricting speech because of the message or content.[217] Where a law restricts the time, place, and manner of some speech content, but not other speech content, this defeats the claim that the law is not concerned with the message or the content of the speech. Such a law is not per se unconstitutional—it must instead be tested by the more demanding analysis utilized for laws aimed at suppressing speech.[218]

Mr. Justice Marshall's focus on content neutrality substituted for any analysis of whether the classification affected free speech. Evidence that it was a lack of content neutrality rather than an effect on

210. *Id.*

211. Street v. New York, 394 U.S. 576, 592 (1969); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

212. Garrison v. Louisiana, 379 U.S. 64, 70 (1964).

213. Miller v. California, 413 U.S. 15, 23-24 (1973).

214. Gooding v. Wilson, 405 U.S. 518, 521-24, 528 (1972) (fighting words); *cf.* New York Times v. Sullivan, 376 U.S. 254, 285 (1964) (false and defamatory statements). *See generally* Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHIC. L. REV. 81, 82 (1978).

215. F.C.C. v. Pacifica Foundation, 438 U.S. 726, 744-46 (1978). The portion of Mr. Justice Stevens' opinion dealing with this point is joined by only two other justices. However, Mr. Justice Powell, joined by Mr. Justice Blackmun, wrote separately on this point. Mr. Justice Powell disagreed with the suggestion by Mr. Justice Stevens that some speech protected by the first amendment was more valuable and deserving of greater protection than other speech also protected by first amendment. He did not appear to disagree with the proposition that protected speech may be distinguished from unprotected speech on the basis of content. *Id.* at 761.

216. Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977).

217. *Id.*

218. *Id.* at 93-97. In *Mosley* Mr. Justice Marshall had stated that content neutrality was an absolute requirement of the first amendment, but in *Linmark*, after finding that the law made a content classification and could not be justified as a restriction on time, place or manner of speech, he stated, "If the ordinance is to be sustained, it must be on the basis of the township's interest in regulating the content of the communication. . . ." *Id.* at 94.

free speech which triggered heightened analysis under the equal protection clause is provided by contrasting *Mosley* with another case decided the same day. In *Grayned v. City of Rockford*,[219] the Court heard a challenge to a law which restricted demonstrations near schools. This law was broader in scope than the one in *Mosley* in that there was no exception for labor picketing, but at the same time it was narrower because it was limited to those persons making noise or diversions while school was in session. There was no equal protection challenge. The Court upheld the ordinance and rejected a first amendment challenge to the law. The Court analyzed this as a reasonable regulation of time, place, and manner.[220] The ordinance in *Mosley* also might have been attacked on first amendment grounds in that it was broader than necessary because it was not limited to noisy picketing and it applied 1/2 hour before and after school was in session. This impact on speech might have been sufficient to invalidate the law under a first amendment analysis.[221] Ironically, the reason Mr. Justice Marshall used to strike down the law in *Mosley* was that the statute was too narrow—it excluded labor picketing. If that equal protection problem was solved by amending the ordinance to eliminate the exception for peaceful labor picketing, the ordinance would have imposed greater burdens on speech and been even more subject to an overbreadth challenge. This highlights one of the dangers of equal protection analysis. Inequality can be eliminated by imposing the burden on more persons or on less persons. When fundamental rights are involved, eliminating the equal protection issue by expanding the class subjected to the burden may run directly counter to other constitutional guarantees such as due process and freedom of speech. This suggests that when dealing with fundamental rights, perhaps the primary concern should not be with equality but with liberty.[222]

Because Mr. Justice Marshall addressed the underinclusiveness of the Chicago ordinance, the exclusion for labor picketing, and did not

219. 408 U.S. 104 (1972).

220. *Id.* at 115-121.

221. Compare with the ordinance in *Mosley* an anti-noise ordinance upheld the same day in *Grayned*. The *Grayned* ordinance was limited to the time while school was in session, and was limited to noises or diversions which disturb or tends to disturb the peace or good order of such school session. 408 U.S. at 107-08. The Court noted that it specifically did not interfere with the ordinary functioning of the school. *Id.* at 119-20.

222. Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1493 (1970); Case Comment, *Equal But Inadequate Protection: A Look at* Mosley *and* Grayned, 8 HARV. C.R.-C.L. L. REV. 469, 474-78, 485 (1973). *But cf.* Karst, *Equality as a Central Principles in the First Amendment*, 43 U. CHIC. L. REV. 20 (1975).

discuss the overinclusiveness (nonnoisy picketing when school was not in session), his concern appeared to be solely with the use of a content classification, not with its effect on free speech. This analysis could prove to be counterproductive to free speech interests because it leads to more restrictions rather than less.[223]

The Supreme Court next addressed a fundamental rights equal protection challenge to a law affecting freedom of speech in *Erznoznik v. City of Jacksonville*.[224] In this case a Jacksonville, Florida, ordinance prohibited the exhibition of movies containing nudity in drive-in movie theaters where the screen was visible from the street.[225] The state suggested several justifications for the ordinance. These justifications were found to be directed at speech and impermissible under the first amendment.[226] Finally the State suggested that the ordinance was justified as a traffic regulation designed to avoid distraction of passing motorists.[227] The Court noted that, with respect to this objective, the ordinance was uninclusive because there were many things other than nudity which could distract motorists. The Court stated that under deferential equal protection analysis underinclusive laws are presumed constitutional, but that there was less force to this presumption where the law classified because of content. The Court then cited *Mosley* for the proposition that " 'under the Equal Protection Clause, not to mention the First Amendment itself,'. . . even a traffic regulation cannot discriminate on the basis of content unless there are *clear reasons* for the distinctions."[228] Again the rhetoric of the Court was far less demanding than tier two, but more intensive than the rational basis test. Heightened scrutiny was triggered in *Erznoznik* because of the content classification, yet the Court did not explicitly require strict scrutiny. Perhaps there was no resort to strict scrutiny because even with less demanding scrutiny the law was invalid because the state offered no justification whatsoever for the content classification.[229] Since the law directly and substantially impaired the ability to show movies protected

223. *See* Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. REV. 89, 110-11 (1976) (text preceeding n.106); Case Comment, *Equal But Inadequate Protection: A Look at* Mosley *and* Grayned, 8 HARV. C.R.-C.L. L. REV. 469, 470-71, 474-78, 485 (1973).

224. 422 U.S. 205 (1975).

225. *Id.* at 206-207.

226. *Id.* at 208-214.

227. *Id.* at 214.

228. *Id.* at 215 (emphasis added).

229. *Id.* at 215.

by the first amendment,[230] the Court should have used the strict scrutiny test if it was adhereing to the well-settled framework for fundamental rights equal protection analysis.

The reluctance of the Court to clearly identify strict scrutiny as the appropriate equal protection analysis for laws affecting freedom of speech was carried further in several other cases. In *Young v. American Mini Theaters, Inc.*,[231] the Court considered the constitutionality of a Detroit zoning ordinance which restricted the location of certain types of businesses, including adult bookstores and adult movie theaters. What made the bookstores and movie theaters "adult" and thus subject to the ordinance was the content of the material sold or exhibited. This law restricted, on the basis of content, the ability of an establishment to show movies at a given location at least as much as the law in *Erznoznik*. As the ordinance was not limited to unprotected speech and classified based on content, one would have expected the Court to follow *Mosley* and *Erznoznik*, but the Court did not. First the Court rejected the first amendment attacks to the ordinance on the ground that the burdens were slight.[232] As to the challenge based on the content classification, there was no majority opinion. Mr. Justice Stevens, writing for himself and three other justices, analyzed the ordinance under the deferential equal protection test. He distinguished but did not overrule *Mosley* on the ground that the Constitution does not require absolute content neutrality. He then determined that the content classification was justified here because there was a factual basis to demonstrate that the law would have its desired effect on maintaining neighborhoods. Mr. Justice Stevens further found that the result might be different if the ordinance had the effect of suppressing or greatly restricting access to lawful speech.[233] This analysis of Mr. Justice Stevens is quite deferential, but even in this opinion there is the hint that, if the impact on speech were more substantial, heightened scrutiny might be used.[234]

Mr. Justice Powell provided the fifth vote to uphold the ordinance, but he wrote his own opinion.[235] He also found that the effects on

230. It was conceded that the ordinance applied to non-obscene films protected by the first amendment. *Id.* at 208. The discriminatory nature of the ordinance created an economic deterrent to showing films containing nudity. *Id.* at 211-12 n.8.

231. 427 U.S. 50 (1976).

232. *Id.* at 60, 63.

233. *Id.* at 71 n.35.

234. *Id.*

235. 427 U.S. 50, 73 (Powell, J., concurring).

speech were incidental and minimal. He rejected the equal protection challenge, finding that *Erznoznik* was distinguishable. He stated that in *Erznoznik* "the ordinance was not *rationally* tailored to support its asserted purpose as a traffic regulation,"[236] whereas in *Young* the "ordinance . . . affect[ed] expression only incidentally."[237] Mr. Justice Powell suggests that *Erznoznik* failed the rational basis test, and is not authority for heightened scrutiny. Such a suggestion ignores the express statement in *Erznoznik* that underinclusive laws are acceptable under the rational basis test but were not acceptable in *Erznoznik* where the classification turned on the subject matter of expression.[238]

Despite the inconsistency of Mr. Justice Stevens' and Mr. Justice Powell's opinions in *Young*, with the use of content classifications to trigger heightened equal protection scrutiny in *Mosley* and *Erznoznik*, none of the four dissenters discussed the equal protection issue. Instead, they all used the first amendment to attack the lack of content neutrality.[239]

These cases may not be reconcilable. Sometimes content classifications alone may trigger heightened scrutiny, but not the true tier two strict scrutiny. However, where the effect on speech is indirect or minimal, and no penalty is found, either the rational basis test will be used or the heightened scrutiny will be satisfied. Apart from the special effect in some cases of lack of content neutrality, these cases appear to parallel the approaches and inconsistencies in other fundamental rights cases.

Some other recent cases suggest that while content neutrality remains an important issue of first amendment analysis, it may have vanished as an aspect of fundamental rights equal protection analysis. The pea of content neutrality may no longer be under any of the shells.

In *Lehman v. City of Shaker Heights*,[240] the city allowed advertising on its buses, but banned political advertising. The Court found that the buses were not a public forum and therefore there was no deprivation of first amendment rights.[241] The four dissenters objected that

236. *Id.* at 83 (emphasis added).
237. *Id.* at 84.
238. 422 U.S. 205, 215 (1975).
239. Young v. American Mini-Theaters, Inc., 427 U.S. 50, 87-88 (Stewart, J., dissenting); *Id.* at 88-96 (Blackmun, J., dissenting).
240. 418 U.S. 298 (1974) (plurality opinion).
241. *Id.* at 301-303. Though the opinion of Mr. Justice Blackmun was a plurality opinion joined only by three other justices, on this issue a fifth justice, Douglas, agreed. 418 U.S. at 305-08 (Douglas, J., concurring).

"[o]nce a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based *solely* upon subject matter or content."[242] This argument noting lack of content neutrality failed to persuade the majority to use strict scrutiny or heightened scrutiny of any variety. In fact none of the five justices voting to sustain the law even addressed the equal protection issue. If content classification alone were accepted as sufficient to trigger heightened scrutiny as suggested by *Mosley* and the dissenters in *Lehman*, *Lehman* would have been decided the other way.[243]

In *Greer v. Spock*[244] the Court upheld the power of the commandant of Fort Dix to exclude all political speakers while allowing persons to come on the base to speak on nonpolitical matters. The Court decided that the first amendment claims were not adequate to invalidate the exclusion because the military base was not a public forum.[245] Again the Court ignored the equal protection claims. The dissents were based primarily on first amendment grounds, though Mr. Justice Brennan discussed the content neutrality issue.[246]

It is interesting to note that even the dissenters in *Greer* and *Lehman* dissented primarily because they felt the government violated the first amendment. If there was a violation of the first amendment this should have been enough to justify applying strict scrutiny under equal protection analysis, but even when the dissent did mention equal protection they spoke not of equal protection strict scrutiny but rather of the requirement of content neutrality.

In the most recent case dealing with a fundamental rights equal protection challenge to a law affecting freedom of speech, *Jones v. North Carolina Prisoners' Union*,[247] the Court did not ignore the equal protection issue. Instead the Court summarily dismissed the challenge, and appears to have put to rest the idea that content classification alone

242. *Id.* at 315 (Brennan, J., dissenting) (emphasis in original).

243. Some writers have distinguished between thematic versus ideological content classifications. P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 254-55 (1977 Supp.). This distinction would explain singling out certain categories of speech, based on theme or subject matter, while maintaining a strict requirement of neutrality as to ideology or point of view. This distinction may be useful, in general, but it does not, in itself, serve to reconcile *Lehman* with *Mosley*, since the ordinance in *Mosley* was based on the subject matter, labor picketing. Nor does it suffice to reconcile *Lehman* with *Erznoznik*, since on its face the content classification in *Erznoznik* related to a subject—nudity.

244. 424 U.S. 828 (1976).

245. *Id.* at 836-838.

246. *Id.* at 863, 866, 868-69 n.16 (Brennan, J., dissenting).

247. 433 U.S. 119 (1977).

can justify heightened scrutiny. The appellees objected to regulations which interfered with prison union activities including meetings and bulk mailings. Mr. Justice Rehnquist found that first amendment speech rights were barely implicated.[248] The inmates and the district court relied primarily on the equal protection clause. Mr. Justice Rehnquist stated that because a prison was not a public forum deference should be given to the prison administrators.[249] In essence, Mr. Justice Rehnquist stated that the reason for treating groups of prisoners differently would have to be shown to be irrational[250] before the equal protection clause would provide a remedy. Even the dissent did not quarrel with the equal protection analysis.

Though the Court found that there was no public forum in *Jones*, *Lehman*, or *Greer*, there was a content discrimination. The government allowed some speech and prohibited other speech based on content. Thus it now appears clear that the mere appearance of content classifications will not trigger heightened scrutiny, contrary to *Mosley*. Unless there is a substantial or significant impairment of freedom of speech, sufficient perhaps to amount to a violation of the first amendment, the equal protection clause will not provide significant protection for that fundamental right. If there is a substantial impairment of the first amendment right, then there really is no need for the equal protection analysis.[251]

VI. CONCLUSION

If anything is well-settled with respect to equal protection analysis, it is that the framework articulated by Mr. Justice Powell in *Maher v. Roe* is not an accurate representation of how the Court approaches fundamental right equal protection challenges. The two tiered framework, if it ever did have validity, is clearly disintegrating with respect to classifications such as sex, alienage, illegitimacy and discrimination

248. *Id.* at 130.

249. *Id.* at 133-136.

250. "Thus appellants need only demonstrate a rational basis for their distinctions between organizational groups." *Id.* at 134.

251. The one possible area where equal protection might appear to provide protection not available under the first amendment is with respect to underinclusive content classifications. Under the equal protection requirement of content neutrality, strict scrutiny would be required even though no free speech were prohibited or penalized. In fact, the Court has used first amendment analysis, without resort to equal protection analysis, to deal with underinclusive content discrimination. *E.g.*, Schacht v. United States, 398 U.S. 58 (1970).

in favor of racial minorities. It is the fundamental rights branch, however, that has been and still is the most unsettled.

Strict scrutiny of classifications affecting fundamental rights is not always as fatal as strict scrutiny of suspect classifications, but its use is still very strong medicine. The Court's reluctance to use strict scrutiny unless it desires to see the law invalidated has led to a variety of approaches to what has become the crucial issue: What connection between a classification and a fundamental right will trigger strict scrutiny? Despite numerous cases addressing this question, no clear pattern emerges, since most of the opinions appear to be conclusions rather than explanations. Recent cases suggest that there must be more than an incidental impact—there must be something amounting to a direct and substantial impact. Yet in several cases, the Court has not clearly articulated the test being used, nor has the Court applied any test consistently. With respect to laws which classify on the basis of the content of the expression, for a while the Court appeared inclined to apply strict scrutiny without any inquiry into the effect of the classification on the exercise of the fundamental right. The Court appears to have stepped back from this position too. It is using content discrimination as a first amendment test. Under equal protection analysis the Court is now focusing on the effect of the classification on the exercise of first amendment rights.

The problem for the observer of this judicial shell game is not just that the pea is difficult to follow, it is the likelihood that there is no pea at all. Despite the dissatisfaction with the two tiered framework, a majority of the Court has not been able to agree on anything to substitute for it. The judge or the attorney who is attempting to follow the mandate of the Supreme Court is in the position of either having to apply a test that is not completely logical, is not very helpful, and does not accurately portray what the Court in fact does, or, in the alternative, having to apply a test of his own creation in the hope that it will prove acceptable to a majority of the Court.

The reasons for the confusion and inconsistency are many. A basic reason for much of the confusion is that in many instances equal protection analysis is not really the appropriate vehicle for protecting fundamental rights. In many of the cases the concern is not with equality, but with whether the right should be burdened at all. In fact, as noted, utilization of equal protection analysis may in some situations

suggest a broadening of the restrictions, thus further burdening the fundamental right.

Another major reason for the inconsistency in applying strict scrutiny to fundamental rights is that strict scrutiny is a potent medicine which might kill the patient. It was this difficulty the Court faced when it desired to use strict scrutiny to invalidate the restrictions on marriage in *Zablocki*, without subjecting all the traditional laws regulating marriage and classifications on the basis of marital status to strict and fatal scrutiny. The rigidity of the two tiered analysis has proved unsatisfactory in solving this dilemma.

Differing attitudes of the justices toward the appropriate role for the Court in supervising legislative activity has also resulted in greatly divergent attitudes toward the proper equal protection test. For those justices concerned with overstepping their authority and inclined to defer to the legislative judgment, strict scrutiny and heightened scrutiny have transcended the appropriate boundaries of judicial action. For those justices concerned with protection of minorities, powerless groups, and fundamental interest, tier one is far too deferential and the rigid two tiered analysis constitutes a judicial abdication of the responsibility of protecting all but a few groups or interests. As of yet the two groups of justices have not been able to identify an approach satisfactory to a majority.

The delineation of the standard of analysis the Court purports to use has also been clouded by the fact that justices will join in opinions notwithstanding the fact that the analysis of the author differs from the analysis they have used in other opinions. For example, most, but not all of the opinions of Mr. Justice Marshall reject the two tiered approach and do not use the rhetoric of the well-settled framework. Nevertheless, justices that adhere to the two tiered framework join in his opinions to make Mr. Justice Marshall's view that of the Court. Mr. Justice Rehnquist, when writing separately, also is critical of the two tier framework, and when writing for the majority does not use the rhetoric of that approach. Nevertheless, justices who frequently join in the opinions to which Mr. Justice Rehnquist so strenuously objects, have on occasion provided the votes necessary to make Mr. Justice Rehnquist's rhetoric that of a majority of the Court. The willingness of justices to join in opinions taking very different and sometimes inconsistent approaches to equal protection analysis may indicate more of a concern with results rather than with mechanical rules or tests. Perhaps

this pragmatism reflects the fact that supervising the concept of equality involves difficult line drawing, not readily susceptible to rules or generalizations, and a fortiori, not susceptible to the two rigid categories of the well-settled framework.

Perhaps a more accurate explanation of how the Court decides when to apply fundamental rights strict scrutiny is that the Court decides which classifications have an undesirable effect and need to be invalidated. The Court then suggests that the effect on a fundamental right is direct, substantial, unduly burdensome, or whatever formula a majority can agree on. The triggering of strict scrutiny, then, is not the test, it is the conclusion—that the law is unconstitutional because surely there are less burdensome ways the legislature could have achieved its purposes.

To suggest that the members of the Court decide what result is desired and then justify that result is not to condemn the Court. Writers have cautioned against confusing the process of discovering the appropriate answer with the process of justifying the result. Even advocates of that position, however, suggest that while the judicial opinion need not explain the process by which the decision was reached, the Court is under an obligation to provide a reasoned justification.[252] As illustrated above, in the area of fundamental rights strict scrutiny, the Court has often failed to provide a convincing justification, and certainly has not provided a consistent explanation. It is this failure that leaves the lower courts in such a difficult situation.

Assuming that the two tiered analysis is too rigid to be appropriately applied whenever there is any effect on the exercise of fundamental rights, what is to take its place? The suggestion that the appropriate approach is a balancing one, weighing the importance of the individual interest affected and the importance of the governmental purpose being advanced, provides too little guidance. For example, in a recent case involving balancing of burdens on interstate commerce against state interests, the Supreme Court noted that the trial judge had applied the correct test and identified the correct factors to balance. However, the Court concluded that the trial judge had given too much weight to one factor and not enough to the other, and hence his balance was incorrect and had to be reversed.[253] This suggests the problem with balancing—

252. *See generally* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 2-5, 1086-111 (1975).

253. Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U S. 366, 375 (1976).

the outcome would never be certain until the last appellate court had spoken. The Court's experience with a test of reasonableness in the context of fourth amendment search and seizures and its experience with obscenity cases where there was no clear standard portend the nature of the problem. Every case must be appealed because the outcome in the Supreme Court is unpredictable. At least with the two tiered analysis, for most classifications the outcome is predictable.

Balancing tests may constitute too much of an intrustion into the legislative process for many justices. Currently there is a minimum threshold which must be crossed before the Court will intervene and second-guess the legislative judgment. With respect to the nature of the classification, that threshold is the presence of a classification based on race, sex, alienage, or illegitimacy. With respect to individual interests, the threshold is the sufficient impact on a fundamental right. Presumably even advocates of a balancing approach would have to develop certain minimum threshold criteria before the Court would second-guess the legislature. Perhaps the real difference between advocates of the tier system and the balancing system is one of where to set the minimum threshold. Finally balancing tests often ignore whether there are less restrictive means to accomplish the same end.[254]

Perhaps a compromise solution is to add more tiers to the two tiered analysis to eliminate the great gap between tier one and tier two, yet provide more guidance than would a pure balancing approach. One question that must be faced is whether additional tiers would constitute additional rhetoric or whether they would have some meaning. Let it suffice to note that the terms describing burdens of persuasion in evidence appear to have some significance beyond mere rhetoric. One might think of tier two as requiring the state to justify the need for the law beyond a reasonable doubt, tier 1½ as requiring the state to justify the law by clear and convincing evidence, tier 1⅓ as requiring the state to justify the law by a preponderance, and tier one as requiring the challenger to bear the burden of persuasion beyond a reasonable doubt. Additional refinement could be added between tier one and tier two by reducing the burden on the challenger from beyond a reasonable doubt (equivalent to tier one today) to demonstrating by a preponderance that the law was not justified (close to tier 1⅓, but slightly more deferential to the state). This suggestion is not intended to provide a new framework of analysis, for it does not address many questions that

254. P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 990 (1975).

must be addressed.[255] Its sole purpose is to suggest that additional tiers may provide guidance and not just constitute additional rhetoric. As candor compelled Mr. Justice Powell to concede that there may be more than two tiers, candor compels the recognition that even additional tiers cannot be anything more than guidelines.

Four or five tiers, rather than two, reduces the unfairness of an all or nothing approach, but still draws arbitrary lines. An illustration of this is an A-B-C-D-F grading system versus a pass/fail grading system. Hard cases will still make bad law where one searches for fixed and mechanical rules. Where the facts call for an exception to the guidelines, the Court should not be locked in by tests intended merely to provide guidance. Mr. Justice Marshall, a leading proponent of balancing, has conceded that the two tiered analysis (and a fortiori multiple tiers), provides useful guidelines.[256]

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255. Not addressed in this illustration is the question of what constitutes justification for a law. Is the analysis to focus on the legislative means as well as the legislative ends? When focusing on the legislative ends, what is required to justify discrimination or restrictions on individual rights?

A thorough consideration of alternatives to the two tiered framework of equal protection analysis would have to address several issues that have not been given adequate consideration by the Court. For example, most discussions usually suggest that the two tiered framework and pure balancing are the only two alternatives. This ignores the complex nature of the problem. In fact the two tiered analysis may be a form of balancing, but with threshold requirements. While it may be that no balancing occurs absent a classification based on race, sex, alienage, or illegitimacy, once one of those criteria is present the Court may engage in balancing. It is a very demanding balancing, and perhaps only perfunctory, when an invidious racial classification is present. But the results with respect to sex, alienage, and illegitimacy indicate that at least some justices are engaging in a balancing before or after they articulate the appropriate level of scrutiny.

When fundamental rights are affected, the Court may also be engaged in a balancing, but one involving several factors, not just two. The two factors identified by Mr. Justice Powell are the nature of the fundamental personal right endangered and the importance of the governmental interest being promoted. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972). In addition to these factors the Court should, and does, consider the degree to which the individual interest is impaired (this is basically the question addressed in part IV of this article) and the extent to which the law furthers the governmental interest (the effectiveness of the means). *See, e.g.*, P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 988-90 (1975).

Another factor in the analysis is the discriminatory or burdensome nature of the means. How this fits in a balancing approach is in fact a question of considerable complexity, beyond the scope of this article. This too is a question that must be analyzed in more depth than the Court has done in the past. At a minimum, these questions should be addressed. Is the availability of less restrictive means truly an independent requirement, or will it be a factor in the balancing—*i.e.*, where the governmental interest clearly outweighs the private right affected, will the least restrictive means test be applied less rigidly? Where the burden on the individual right is great, should less restrictive means be demanded even though the less restrictive means cannot achieve completely the governmental purpose?

256. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 n.1 (1976) (Marshall, J., dissenting). These tiers used for guidance should be viewed as expressions of policy rather than mechanical rules or tests. The Court's struggle to develop standards with respect to the death penalty provides a useful analogy. The Court has held in Furman v. Georgia, 408 U.S. 238 (1972), that unguided discretion in imposing the death penalty is unconstitutional. Some states reacted by eliminating all discretion. States instituted mechanical rules that dictated when the

The Court will still be faced with difficult challenges, especially in the area of fundamental rights strict scrutiny. Additional tiers may provide more flexible guidelines. This in turn may provide a middle ground for those who are reluctant to use strict scrutiny for all fundamental rights and those who desire judicial supervision whenever important individual interests are involved. Perhaps a willingness to use a middle tier approach with respect to fundamental rights will reduce the importance of the triggering device. Where heightened scrutiny is not automatically fatal, the Court may be willing to look at the effect of the legislation in every case. The approach where the Court has looked at whether a classification unduly burdens the exercise of a fundamental right before it decides whether to apply strict scrutiny may already provide the seed for that middle tier approach.

The well-settled framework of analysis for fundamental rights strict scrutiny does resemble a shell game. Hiding the pea has accomplished only confusion. The shells must be removed from the game. The Court should recognize that no mechanical formulation is likely to answer all the cases involving fundamental rights equal protection challenges. As H. L. Mencken has observed, there is a simple answer to every complex problem, and it is wrong.[257]

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death penalty must be imposed. The Court found this was too rigid and was also unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976). The approach that found constitutional acceptance was that used by the American Law Institute in section 210 of the 1962 Proposed Official Draft of the Model Penal Code. Gregg v. Georgia, 428 U.S. 153 (1976). Mitigating and aggravating circumstances were identified in the Georgia statute to provide guidance for the exercise of discretion in imposing the death penalty.

It might be possible to think of the equal protection tiers as providing some guidance or points of reference for the decisionmaker. For example, the presence of certain classifications could be thought of as aggravating circumstances and the presence of certain governmental interests could be thought of as mitigating circumstances. Precedent could provide guidance as to how much weight these factors should receive. For example, the Court has indicated that sex-based classifications call into question the constitutionality of a law, but not as much as racial classifications. In terms of mitigating factors, administrative convenience would carry substantially less weight than protection of public health and safety. Protecting constitutional rights such as free speech or remedying past constitutional violations would carry considerable weight as mitigating factors. This approach would leave things still somewhat unsettled, but at least the analysis would more accurately reflect what the Court was actually doing, and in that sense, not leave lawyers and judges feeling that they were playing a shell game.

257. Forum, *Equal Protection and the Burger Court*, 2 HASTINGS CON. L.Q. 645, 645 (1975).