Fordham Law Review

Volume 41 | Issue 3 Article 5

1973

Equal Protection in Transition: An Analysis and a Proposal

EQUAL PROTECTION IN TRANSITION: AN ANALYSIS AND A PROPOSAL

I. INTRODUCTION

The fourteenth amendment to the United States Constitution contains three of the most important and controversial clauses to be found in the entire document: equal protection, due process, and privileges and immunities. Thus, it is not surprising that the judicial history of the amendment since its ratification in 1868, has been one of constant definition and redefinition, interpretation and reinterpretation. As the then Professor Frankfurter stated it:

> The words of these provisions are so unrestrained, either by their intrinsic meaning, or by their history, or by tradition, that they leave the individual Justice free, if, indeed, they do not actually compel him, to fill in the vacuum with his own controlling conceptions . . . .[1]

While the intrinsic meaning of concepts such as fairness and equality remains unclear, and the historical debate is far from concluded, tradition or rather precedent has deprived the equal protection clause of the flexibility required to meet new issues. It is the thesis of this Comment that by way of response to this dilemma the equal protection decisions of the 1971-1972 term of the Supreme Court[2] are harbingers of a new approach to equal protection adjudication.

II. THE DEVELOPMENT OF EQUAL PROTECTION STANDARDS

The Supreme Court's first pronouncement as to the meaning of the equal protection clause occurred in the *Slaughter-House Cases*[3] where, although primarily concerned with interpreting the privileges and immunities clause, Mr. Justice Miller, in a statement noteworthy for its historical[4] rather than predictive accuracy, said:

> We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.[5]

---

1. Frankfurter, Twenty Years of Justice Holmes' Constitutional Opinions, 36 Harv. L. Rev. 909, 914 (1923) (footnote omitted).

2. See cases cited at notes 87-88 infra.

3. 83 U.S. (16 Wall.) 36 (1873).

4. "Although there is little doubt that Republicans would have approved of restraints upon regulation of business had they thought of it, we have not found anywhere even a single intimation that this possibility did in fact occur to them. In other words, there was no contemporary understanding of the relation of equal protection to business regulation." Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 50 Colum. L. Rev. 131, 143 (1950) (footnote omitted).

5. 83 U.S. at 81. As Thomas Reed Powell said of Justice Miller's pronouncement: "Notwithstanding this early judicial doubt, the members of the race for whom the clause was primarily designed have shared its protection lavishly with others." Powell, The Supreme

It was not until 1886 that the potential for using the equal protection clause as a check upon the police power of a state began to be realized. Then, in *Yick Wo v. Hopkins*,[6] the Court invalidated a San Francisco ordinance which, although on its face a neutral regulation of the operation of laundries in wooden buildings, had been applied so as to discriminate against Chinese proprietors. In that same year, the Court, in *Santa Clara v. Southern Pacific R.R.*,[7] accepted without discussion the proposition that corporations were persons within the meaning of the fourteenth amendment.[8]

The period from 1889 to 1918[9] saw a vast proliferation in the number of equal protection challenges[10] to state economic regulation. Although a few of these cases resulted in findings of unconstitutional discrimination,[11] the great bulk of the statutes were upheld.[12] At the same time that the Court slowly expanded the scope of the equal protection clause to protect corporations, it began in cases such as *Barbier v. Connolly*[13] and *Lindsley v. Natural Carbonic Gas Co.*,[14] to explicate the basic guidelines for evaluating an equal protection challenge. Under this traditional approach, which the Court still employs, anal-

---

Court and State Police Power, 1922-1930 (pt. IX), 18 Va. L. Rev. 597, 635 (1932) [hereinafter cited as Powell, State Police Power].

6. 118 U.S. 356 (1886).

7. 118 U.S. 394 (1886).

8. Id. at 396. See Graham, The "Conspiracy Theory" of the Fourteenth Amendment (pts. 1-2), 47 Yale L.J. 371, 48 Yale L.J. 171 (1938).

9. The primary source utilized in the compilation of the number of statutes invalidated under the equal protection clause was Legislative Reference Service, The Constitution of the United States, S. Doc. No. 39, 88th Cong., 1st Sess. 1403-1537 (1964, Small & Jayson eds.). Other sources are noted when relied upon.

10. Professor Warren found that between 1889 and 1918 inclusive, there were over 790 Supreme Court decisions under the due process and equal protection clauses. 2 C. Warren, The Supreme Court in United States History 741 (1926). See also Warren, The Progressiveness of the United States Supreme Court, 13 Colum. L. Rev. 294 (1913). It is difficult to distinguish which cases relied upon equal protection rather than due process, or due process rather than equal protection, in that violation of both clauses was alleged as a matter of course. In fact, however, the due process issue was usually predominant. See text accompanying notes 23-27 infra. This constant inclusion of near frivolous equal protection claims caused Justice Holmes to reflect that "[i]t is the usual last resort of constitutional arguments . . . ." Buck v. Bell, 274 U.S. 200, 208 (1927).

11. There were approximately six economic statutes invalidated during this period. See, e.g., Atchison, Topeka & Santa Fe Ry. v. Vosburg, 238 U.S. 56 (1915) (invalidating a statute permitting shipper to recover attorney's fee from carrier but not permitting carrier to do the same); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902) (statute exempting agricultural products and live stock raisers from antitrust laws), questioned, Tigner v. Texas, 310 U.S. 141, 147 (1940).

12. See Warren, The Progressiveness of the United States Supreme Court, 13 Colum. L. Rev. 294 (1913). See also B. Moore, The Supreme Court and Unconstitutional Legislation (1913).

13. 113 U.S. 27, 31 (1885).

14. 220 U.S. 61, 78-79 (1911).

ysis[15] of the challenged statute begins with the identification of the trait which forms the basis of the legislative classification.[16] Next, an attempt is made to ascertain the purpose[17] of the law; and finally, the relationship of the purpose to the trait is scrutinized. Under this test, "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective,"[18] and there is no reasonable basis which can be found to justify the classification.[19] Additionally, the statute is presumed to be constitutional and the burden of proving the irrationality of the classification is upon the party bringing the challenge.[20] As Professors Tussman and tenBroek put it in their now classic treatment of the equal protection clause:

> The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.[21]

From 1918 to 1937, the Court utilized the traditional test as a "shield" in order "to protect interests of business and property against discriminatory state action."[22] The period from 1931 to 1937 inclusive stands out in that during those eight years the Court invalidated eleven state tax and economic regulatory statutes[23] compared with only twelve invalidations from the date of the amend-

15. The formulation of the paradigmatic equal protection approach is found in Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 344-53 (1949) [hereinafter cited as Tussman & tenBroek].

16. It is not always clear what trait the classification has been based upon. Cf. Bode v. National Democratic Party, 452 F.2d 1302, 1306 (D.C. Cir. 1971), cert. denied, 404 U.S. 1019 (1972).

17. "The purpose of a law may be either the elimination of a public 'mischief' or the achievement of some positive public good." Tussman & tenBroek 346. It is also possible that the purpose of a statute could in and of itself be impermissible.

18. McGowan v. Maryland, 366 U.S. 420, 425 (1961). See also Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

19. As the Court stated in Lindsley: "[I]f any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." 220 U.S. at 78. See, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

20. See, e.g., McDonald v. Board of Elections, 394 U.S. 802, 808-09 (1969); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79 (1911).

21. Tussman & tenBroek 344 (footnote omitted).

22. R. Harris, The Quest for Equality 58 (1960).

23. See, e.g., Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936) (invalidating statute excluding newly formed corporations from the coverage of a statute permitting small milk dealers to undersell larger ones); Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) (invalidating in part a Florida chain store tax); Smith v. Cahoon, 283 U.S. 553 (1931) (invalidating statute exempting vehicles carrying fish and milk from insurance requirements). It is interesting to note that Brandeis, Cardozo and Stone (except for two cases in which Stone did not participate) dissented from all of the invalidations save Smith v. Cahoon, which was unanimous.

ment's enactment to 1930.[24] This is not to suggest that the Court usually relied upon the equal protection clause when invalidating state statutes. On the contrary, it was substantive due process with its requirement that legislation be "a fair, reasonable and appropriate exercise of the police power of the State . . ."[25] that provided the basis for these decisions. In fact, between 1918 and 1937 when the Court relied upon the equal protection clause less than twenty times to declare statutes unconstitutional, it turned to substantive due process in more than one hundred cases.[26] This, as Professor Powell said at the time, "indicates the comparative unimportance of the clause."[27]

From the point of view of both equal protection and due process as checks upon state social and economic legislation, the "constitutional revolution"[28] of 1937 resulted in an almost total abandonment of the Court's exercise of the reviewing function, thereby practically guaranteeing a finding of constitutionality.[29] As a result, the case of *Morey v. Doud*,[30] wherein the Court struck down an Illinois statute which specifically exempted the American Express Company from the requirements of licensing and regulation in the sale of money orders, is the only instance of a state statute embodying economic regulations being invalidated on either due process or equal protection grounds since 1938.[31] During the same time span a small number of state tax statutes were held to be invidiously discriminatory,[32] but prior to the Court's 1971-1972 term no state social legislation had been found unconstitutional in a decision explicitly applying the traditional standard. There were, however, four equal protection decisions[33] in which the Court invalidated state statutes without explaining

24. See, e.g., Frost v. Corporation Comm'n, 278 U.S. 515 (1929) (invalidating statute requiring individuals to obtain licenses for operating cotton gins, but exempting stock cooperatives); Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922) (invalidating statute requiring that railroads pay opponent's attorney's fee on appeal notwithstanding the railroads' success in the appellate court). See Powell, State Police Power.

25. Lochner v. New York, 198 U.S. 45, 56 (1905).

26. This approximation was arrived at by a comparison of the statistics in B. Wright, The Growth of American Constitutional Law 113, 154 (1942) with those presented by Warren, The Progressiveness of the United States Supreme Court, 13 Colum. L. Rev. 294 (1913).

27. Powell, State Police Power 631.

28. See E. Corwin, Constitutional Revolution, Ltd. (1941).

29. See McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Sup. Ct. Rev. 34, commenting that since 1937 the Court's decisions in the areas of substantive due process and equal protection have left "little doubt as to the practical result: no claim of substantive economic rights would now be sustained by the Supreme Court. The judiciary had abdicated the field." Id. at 38.

30. 354 U.S. 457 (1957); see text accompanying notes 81-85 infra.

31. G. Gunther & N. Dowling, Constitutional Law 981 (8th ed. 1970). See also 42 Minn. L. Rev. 1174 (1958).

32. See, e.g., Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Hillsborough v. Cromwell, 326 U.S. 620 (1946). See generally R. Harris, supra note 22, at 57-81. But see Allied Stores, Inc. v. Bowers, 358 U.S. 522, 532 (1959) (Brennan, J., concurring).

33. Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guar. & Liab. Ins. Co.,

whether it was using the traditional or active review standard. While these cases were generally disregarded by both the Court and the commentators, it is suggested that they in fact presaged the "new" equal protection test discussed herein.[34]

In 1932, at the nadir of the use of due process as a substantive check upon state legislation, Thomas Reed Powell observed that "[e]qual protection and due process are handmaidens that help each other with their tasks. One may be doing less only because the other is doing more."[35] By 1942, however, with the Court having firmly rejected substantive due process, and applying the equal protection clause with extreme deference to legislative judgments, both were doing less, and neither was doing more. Thus, when the Court was faced, in *Skinner v. Oklahoma ex rel. Williamson*,[36] with a statute permitting sterilization of felons who had been convicted three times, but exempting certain white collar crimes from its coverage, the equal protection and due process clauses did not provide viable authority for invalidating the statute.[37] Justice Douglas, however, found that procreation was "one of the basic civil rights of man"[38] and revitalized the equal protection clause by demanding "strict scrutiny"[39] rather than a rational relationship. *Skinner* was, as Gunther and Dowling have said, "potent seed."[40] It was conceived in the vacuum left by the Court's rejection of substantive due process, and it grew into the strict scrutiny or active review equal protection standard.

Under this test,[41] the rationality of the purpose-classification relationship is not at issue; rather, the burden is placed squarely upon the state to demonstrate that the statute "promote[s] a compelling governmental interest,"[42] that

---

391 U.S. 73 (1968); Rinaldi v. Yeager, 384 U.S. 305 (1966); Baxstrom v. Herold, 383 U.S. 107 (1966).

34. See text accompanying notes 163-76 infra.

35. Powell, State Police Power 640.

36. 316 U.S. 535 (1942).

37. Cf. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 21, 43 (1972) [hereinafter cited as Gunther]. See also note 29 supra.

38. 316 U.S. at 541.

39. Id.

40. Gunther & Dowling, supra note 31, at 1032.

41. See generally Comment, The Evolution of Equal Protection—Education, Municipal Services and Wealth, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 103 (1972) [hereinafter cited as Evolution of Equal Protection]; Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969) [hereinafter cited as 1969 Developments—Equal Protection].

42. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis omitted). See also Dunn v. Blumstein, 405 U.S. 330, 335 (1972). In comparison, see the language of the Court in Bullock v. Carter, 405 U.S. 134 (1972), wherein the strict standard was said to require that the classification be "reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." Id. at 144. The use of "reasonable" to modify "necessary" and "legitimate" rather than "compelling" could indicate a more lenient application of the strict review standard.

the classification is "necessary" to promote that interest,[43] and that there is no "reasonable [way] to achieve those goals with a lesser burden on constitutionally protected activity . . . ."[44] The determination as to whether a statute is to be tested under the strict scrutiny or traditional approach turns upon an examination of the trait used as the basis of the classification, and the nature of the interest affected by the classifying statute. If the classifying trait is one deemed "suspect" as are race,[45] alienage,[46] and national origin,[47] or if the statute impinges upon a "fundamental interest" such as the right to travel,[48] the right to vote,[49] the right to procreate[50] or the rights of criminal defendants,[51] then the statute is said to "trigger" active review. On the other hand, if neither a suspect classification nor a fundamental right are at issue, the statute is tested under the traditional restrained review approach. Using this two-tiered approach there is never an independent decision to employ the traditional test, there is only the determination as to whether or not active review is called for.

The basic distinction between the two approaches is that while the traditional test requires that those who "are similarly situated be similarly treated,"[52] active review demands that the state justify by a compelling governmental interest any impingement upon fundamental rights or the creation of suspect classifications.[53] Thus, it is only the traditional approach that even purports to concern itself with equality, or more precisely, with distinctions among people and the relationship of purposes to classifications. Active review, on the other hand, is similar to the due process of the 1930's in that it imposes " 'substantive' limits upon the exercise of the police power."[54] From a practical point of view, where the traditional test is easy to satisfy, the active review standard is an exacting one which places "a heavy burden of justification . . . on the State, and

43. 394 U.S. at 634.

44. 405 U.S. at 343; cf. Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969).

45. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

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

47. See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954); Oyama v. California, 332 U.S. 633 (1948).

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

49. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Free School Dist., 395 U.S. 621 (1969).

50. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

51. See, e.g., Williams v. Illinois, 399 U.S. 235 (1970); Griffin v. Illinois, 351 U.S. 12 (1956).

52. Tussman & tenBroek 344.

53. See text accompanying notes 41-44 supra.

54. Tussman & tenBroek 343. Justice Harlan was very critical of this development and termed this use of equal protection a " 'wolf in sheep's clothing' " and a "masquerade . . . for subjective judicial judgment . . . ." Williams v. Illinois, 399 U.S. 235, 259 (1970) (concurring opinion) (emphasis deleted). Justice Harlan's use of a due process rationale in Boddie v. Connecticut, 401 U.S. 371 (1971), derives from, and is a partial vindication of, the above.

[emphasizes] that the statute will be closely scrutinized in light of its asserted purposes."[55] To date, application of the strict review standard has in every case resulted in a finding of unconstitutionality. As Chief Justice Burger stated last term: "So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."[56]

III. A Critique of the Two-Tiered Approach

If one had to identify a common theme running throughout the constitutional decisions of the Warren Court it would surely be egalitarianism. From the demise of separate but equal in *Brown v. Board of Education*[57] to the birth of one man one vote in *Baker v. Carr*[58] and its progeny,[59] the Court brought the "egalitarian revolution"[60] to bear on numerous political and social problems. Many were critical of the path taken,[61] but as Professor Kurland has recently commented, "[t]o the extent that the Warren Court has opened new frontiers, it has been in the development of the concept of equality as a constitutional standard."[62] At the same time, however, the Court can be charged with "failures of method"[63] in its handling of the equal protection issue. As it had evolved by the late 1960's, the two-tiered approach suffered from a fatal lack of flexibility. Those statutes involving suspect classifications or fundamental interests were reflexively found unconstitutional, while all others were almost sure to be found devoid of equal protection defects. As one three-judge court put it in 1970: "There is something rigid about today's law regarding constitutional reasonability, courts being forced to choose between the strict standard of *Shapiro* [*v. Thompson*[64]] and the highly permissive one of *Carmichael* [*v. Southern Coal & Coke Co.*[65]]."[66]

While the Court was recently undergoing rapid changes in personnel, there were no indications that the two-tiered equal protection test was not to be re-

55. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

56. Id. at 363-64 (Burger, C. J., dissenting).

57. 347 U.S. 483 (1954).

58. 369 U.S. 186 (1962).

59. See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

60. The phrase is from Professor Kurland, The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 Harv. L. Rev. 143, 144 (1964).

61. For critiques of the effectiveness of the Court's use of equal protection see, e.g., A. Bickel, The Supreme Court and the Idea of Progress 13-14, 103-81 (1970); Kurland, Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined, 35 U. Chi. L. Rev. 583 (1968). Contra, Wright, Professor Bickel, The Scholarly Tradition, and the Supreme Court, 84 Harv. L. Rev. 769, 791-93 (1971).

62. P. Kurland, Politics, the Constitution, and the Warren Court 98 (1970).

63. Bickel, supra note 61, at 11.

64. 394 U.S. 618 (1969).

65. 301 U.S. 495 (1937).

66. Romero v. Hodgson, 319 F. Supp. 1201, 1202 (N.D. Cal. 1970), aff'd mem., 403 U.S. 901 (1971).

tained. The test's inflexibility was increasing, however, and decisions such as *Dandridge v. Williams*,[67] *James v. Valtierra*[68] and *Lindsey v. Normet*[69] strongly suggested that the Court would be hesitant to find new suspect classifications or fundamental interests. This had the effect of freezing the nature of equal protection challenges which would be accorded strict scrutiny, and thus relegating all others to consideration under the traditional standard and almost certain validation of the statute under attack.[70] Some commentators, in fact, took these decisions as a portent of the "increasing submergence of the equal protection clause at the hands of the Burger Court . . . ."[71]

It is thus not surprising that the development of an alternative approach had been urged by Mr. Justice Marshall in his dissent in *Dandridge v. Williams*[72] and reiterated last term in *Richardson v. Belcher*.[73] In *Dandridge*, Marshall criticized what he termed the "abstract" and "a priori" nature of the two-tiered approach[74] which had permitted the majority to state that "social welfare" statutes would be evaluated by the same rational basis test as statutes involving economic regulations, notwithstanding the admission that the alleged discrimination against large families in the distribution of funds under the Aid to Families with Dependent Children Program involved "the most basic economic needs of impoverished human beings."[75] As Justice Marshall put it in *Richardson v. Belcher*: "Judges should not ignore what everyone knows, namely that legislation regulating business cannot be equated with legislation dealing with destitute, disabled, or elderly individuals."[76] In addition to the limitations of the two-tiered approach in dealing with social welfare statutes, analysis of those cases decided since 1937[77] in which the Court purported to apply the

67. 397 U.S. 471 (1970) (upholding a Maryland statute placing a ceiling on funds payable to a single family under Aid to Families with Dependent Children, thereby allocating less money per child in larger families). One commentator termed Dandridge the "enfant terrible of the Burger Court . . . ." Evolution of Equal Protection 127 (italics ommitted).

68. 402 U.S. 137 (1971) (upholding a California constitutional provision requiring a local referendum before low rent housing could be built and refusing to denominate wealth a suspect classification).

69. 405 U.S. 56 (1972). The Court rejected the contention that the right to housing was fundamental. "[T]he Constitution does not provide judicial remedies for every social and economic ill. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." Id. at 74.

70. Contra, Evolution of Equal Protection 127-30, 144-46.

71. The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 134 (1971). See also Goodpaster, The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts, 56 Iowa L. Rev. 223, 223-25 (1970) [hereinafter cited as Goodpaster].

72. 397 U.S. at 520-21 (Marshall, J., dissenting).

73. 404 U.S. 78, 90-92 (1971) (Marshall, J., dissenting).

74. 397 U.S. at 520-21 (Marshall, J., dissenting).

75. Id. at 485 (opinion of the Court).

76. 404 U.S. at 90; see text accompanying notes 63-66 supra; cf. Goodpaster 247-48.

77. Decisions prior to 1937 also failed to actually apply the traditional approach with

traditional equal protection test discloses that rarely, if ever, does the Court actually consider whether or not there was a rational relationship between the statutory purpose and classification.[78] Rather, in almost all instances the Court has used James Bradley Thayer's rule of "clear mistake."[79] That is, the Court, regardless of the purpose-classification relationship, exercises extreme judicial restraint and upholds the statute unless "those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."[80] Even the decision in *Morey v. Doud*,[81] where the Court found a lack of rational relationship, fails to evince adherence to the often repeated traditional test. In *Morey*, the Court struck down a statute which seemed to have rationally taken account of the preeminence of the American Express Company in the business of selling money orders.[82] As one commentator has described the decisional process in *Morey*:

> The dissent and the majority opinions proceed from the same general rules, but they reach opposite results because neither the general contours of equal protection nor judicial glosses on it are subject to calculation in mathematical exactitude or logical symmetry.[83]

Of even more importance is the observation that *Morey* gives "the impression that the court changes the rules without notice and smuggles in values other than those permitted by the theory."[84] Thus, if "intelligibility is an important criterion of judicial action, the classical test is a questionable technique."[85] In light of the uncertainties resulting from the application of the traditional test, as well as its rigidity and lack of analytic coherence, there was a pressing need for a viable alternative if the Court was to effectively utilize the equal

---

any consistency. See Tussman & tenBroek 368-73. See also Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123 (1972) [hereinafter cited as Note, Legislative Purpose].

78. It has been argued that "[c]ourts do not in fact use the rationality requirement to strike down statutes, because it is impossible to do so." Note, Legislative Purpose 154. While it is agreed that the Court has been unsuccessful in applying the rational basis test consistently, it will be argued that it can be reformulated so as to be an effective judicial tool. See the discussion of the reformulated equal protection test at text accompanying notes 156-255 infra.

79. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893); see A. Bickel, The Least Dangerous Branch 35-46 (1962).

80. Thayer, supra note 79, at 144. As Charles Black has written of Thayer's rule: "An automatic and invariable 'deference to the legislature,' rationalized to suit the occasion, is the precise logical and practical equivalent of the withdrawal by the courts from the function of reviewing statutes for constitutionality." C. Black, The People and the Court 208 (1960).

81. 354 U.S. 457 (1957).

82. See J. Coons, W. Clune & S. Sugarman, Private Wealth and Public Education 327 (1970) [hereinafter cited as Coons, Clune & Sugarman].

83. Harris, supra note 22, at 68.

84. Coons, Clune & Sugarman 328.

85. Id. For a similar analysis of Morey v. Doud see R. Dixon, Democratic Representation 148-49 (1968) [hereinafter cited as Dixon].

protection clause as a check upon state statutes which neither impinge on fundamental interests nor rest upon suspect classifications.

IV. *Reed v. Reed, Eisenstadt v. Baird* AND AN OUTLINE FOR A NEW EQUAL PROTECTION ALTERNATIVE

Until the 1971 term of the Supreme Court, the observation that the "functional differences between the two standards of judicial review [of equal protection cases were] so great that in any case the choice of a standard [was] likely to determine the ultimate decision"[86] correctly described the practical reality of the manner in which the Court was applying the two-tiered or bipartite approach. During the 1971 term, however, in six[87] of the nine[88] equal protection cases decided without the invocation of the strict scrutiny test,[89] the Court found the challenged statutes violative of the equal protection clause.[90] Analysis of these decisions, with special emphasis upon *Reed v. Reed*,[91] and *Eisenstadt v. Baird*,[92] strongly suggests that either the Court employed a new equal protection test or that it has significantly revised the traditional approach.[93]

In *Reed*, the Supreme Court was presented with an opportunity to declare that classifications based upon sex were suspect and thus trigger active review.[94] Although the Court refused to take this step, it nevertheless unanimously in-

86. Evolution of Equal Protection 113.

87. James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lindsey v. Normet, 405 U.S. 56 (1972) (invalidating and upholding in part); Reed v. Reed, 404 U.S. 71 (1971).

88. The three cases in which the challenged statutes were upheld are: Jefferson v. Hackney, 406 U.S. 535 (1972); Schilb v. Kuebel, 404 U.S. 357 (1971); Richardson v. Belcher, 404 U.S. 78 (1971). In Lindsey v. Normet, 405 U.S. 56 (1972), the Court also upheld part of the challenged statute.

89. The strict scrutiny cases from the 1971 term are: Police Dep't v. Mosley, 408 U.S. 92 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Mayer v. City of Chicago, 404 U.S. 189 (1971); and its companion case, Britt v. North Carolina, 404 U.S. 226 (1971).

90. The cases of Stanley v. Illinois, 405 U.S. 645 (1972); and Humphrey v. Cady, 405 U.S. 504 (1972), have been omitted from consideration. The former because it is a due process rather than an equal protection decision, and the latter because it resulted in a remand and contains little analysis. For a discussion of the criteria used in the compilation of a similar list see Gunther 11 n.48.

91. 404 U.S. 71 (1971).

92. 405 U.S. 438 (1972).

93. The Court in Eisenstadt said: "But just as in Reed v. Reed, 404 U.S. 71 (1971), we do not have to address the statute's validity under that [the active review] test because the law fails to satisfy even the more lenient equal protection standard." 405 U.S. at 447 n.7.

94. Many commentators had urged this outcome. See, e.g., Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1516 (1971); Comment, Are Sex-Based Classifications Constitutionally Suspect?, 66 Nw. U.L. Rev. 481 (1971).

validated an Idaho statute which required a mandatory preference for males over females, "without regard to their individual qualifications as potential estate administrators,"[95] when a male and a female of equal entitlement and qualifications had both filed applications for letters of administration. The Court accepted Idaho's contention that the statutory purpose was to reduce probate court workloads by eliminating certain contests as to who would be the administrator. It held, however, that to do so by discriminating on the basis of sex was "to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ."[96] Such a holding does not seem logically debatable, but it is difficult to reconcile with earlier decisions on sex discrimination such as *Goesaert v. Cleary*[97] and *Hoyt v. Florida*[98] which "suggest an almost unlimited range of legislative discretion in making distinctions on the basis of sex in all phases of governmental activity."[99] Thus, while the Court refused to denominate sex a suspect classification, it did say, if only for the purpose of being an administrator, men and women are similarly situated and therefore must be similarly treated. The most important issue in *Reed*, however, was who bears the burden of proof as to the purpose-classification relationship; that is, does the state have to show that there is a distinction between men and women which warrants different treatment, or must the plaintiff show that there is no difference between the sexes which is rationally related to the statutory purpose? As Professor Reinstein has cogently argued, the burden of proof issue is crucial in practically every constitutional decision:

> the *results* of significant cases, as well as much of their precedential value, can now be viewed in retrospect as having turned on how the Court treated the evidence upon which each side relied. How heavy a presumption of constitutionality was afforded to the state; would the Court look beyond the record and accept an argument of mere rationality; or was the state required to produce evidence to justify its actions . . . .[100]

If the test used in *Reed* and followed in *Eisenstadt* does in fact put the burden of justification on the state,[101] then *Reed* stands for the proposition that there is a "general obligation to treat the sexes alike,"[102] and it is for

95. 404 U.S. at 74.

96. Id. at 76.

97. 335 U.S. 464 (1948) (upholding a statute barring most women from being bartenders).

98. 368 U.S. 57 (1961) (upholding a statute exempting women from jury duty unless they specifically requested it).

99. Harris, supra note 22, at 76.

100. Reinstein, The Welfare Cases: Fundamental Rights, the Poor, and the Burden of Proof in Constitutional Litigation, 44 Temp. L.Q. 1, 3 (1970). See also P. Freund, Review of Facts in Constitutional Cases, in Supreme Court and Supreme Law 47-54 (E. Cahn ed. 1954); Dixon 133-34, 148-49.

101. See text accompanying note 214 infra for an example of the state meeting the burden.

102. Struck v. Secretary of Defense, 460 F.2d 1372, 1378 (9th Cir.) (Duniway, J., dissenting from denial of petition for a hearing), vacated and remanded on issue of mootness, 41 U.S.L.W. 3346 (U.S. Dec. 18, 1972).

the state to satisfactorily explain any disparate treatment.[103] Taking this approach rather than declaring sex itself to be a suspect classification has much to commend it. The test used in *Reed* affords the Court greater flexibility in dealing with the more complex issues of sex discrimination that are sure to arise in the future than it would have under an active review standard triggered by a suspect classification. At the same time, it renders it likely that statutes based upon male-female distinctions without differences will be struck down.[104] Thus, through the use of a new equal protection standard, the Court was able to state its opposition to sex discrimination,[105] without setting a precedent which could too rigidly determine the pattern for future developments,[106] be they in the form of judicial decisions, state and federal legislation, or a constitutional amendment.

Writing for a unanimous Court in *Reed*, Chief Justice Burger, in a paragraph quoted in its entirety by the Court in *Eisenstadt*,[107] explicated the following formula for testing statutes under the equal protection clause:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relation* to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).[108]

The reliance on the *Guano* case and the quotation of its language is both unusual and revealing. Between 1943 and 1971 *Guano* was cited only four

---

103. See also Sedler, The Legal Dimensions of Women's Liberation: An Overview, 47 Ind. L.J. 419 (1972), interpreting Reed to stand for the proposition that if "a neutral nonsexual alternative classification that would better accomplish the objective was readily available" then Reed would mandate the statute's invalidation. Id. at 448.

104. See, e.g., LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir.), petition for cert. filed, 41 U.S.L.W. 3315 (U.S. Nov. 27, 1972) (No. 72-777) (invalidating mandatory unpaid maternity leave for teachers five months pregnant); Bennett v. Dyer's Chop House, 41 U.S.L.W. 2243 (N.D. Ohio, Oct. 26, 1972) (invalidating restaurant rule excluding women from 11:00 a.m. until 1:30 p.m.). But see Cohen v. Chesterfield County School Bd., 41 U.S.L.W. 2390 (4th Cir., Jan. 15, 1973) (en banc) (upholding mandatory unpaid maternity leave for teachers five months pregnant), petition for cert. filed, 41 U.S.L.W. 3464 (U.S. Feb. 15, 1973) (No. 72-1129).

105. This alone is no mean contribution in that "[t]he Court's influence . . . goes well beyond the formal limits of its decrees. Its opinions are often the voice of the national conscience. It shapes as well as expresses our national ideals." Cox, The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 97 (1966) (footnote omitted).

106. Cf. A. Bickel, The Least Dangerous Branch (1962).

107. 405 U.S. at 446-47.

108. Reed v. Reed, 404 U.S. 75-76 (emphasis added) (citations omitted).

times in Supreme Court majority opinions. Of these cases, one was decided under the strict review standard,[109] one was *Rinaldi v. Yeager*,[110] another was *Morey v. Doud*,[111] and the last was *Allied Stores v. Bowers*,[112] wherein *Guano* was relied upon to illustrate the "point beyond which the State cannot go without violating the Equal Protection Clause."[113] Additionally, it had become common practice for the Court to cite *McGowan v. Maryland*[114] and its extremely permissive standard[115] when reiterating the traditional equal protection formula. A comparison of the salient features of the traditional standard as set forth above with those of the test formulated in *Guano* and applied in *Reed* and *Eisenstadt*, discloses three significant differences. First, *Guano* discusses the standard which the purpose-classification relationship must meet in positive terms. That is, rather than stating negatively that only the absence of a rational relationship will suffice to invalidate a statute, *Guano* says that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ."[116] This change of emphasis seems to indicate a shift in the burden of proof from the shoulders of those attacking the statute, to those of the state defending it. While most federal and state courts citing the *Reed-Guano* language have not explicitly acknowledged that its application involves a shifting of the burden of proof or in fact a new approach,[117] in *Brenden v. Independent School District 742*,[118] the court, in striking down a public high school rule which prohibited girls from competing with or against boys in interscholastic athletics, said that "[i]t is incumbent upon the defendants [*the state*] to show the existence of a rational relationship between the objective sought to be achieved by the rule and the classification utilized in reaching that objective."[119]

The second difference to be noted is that the *Reed-Guano* test requires that the trait-classification relationship be a "fair and substantial" one, a standard

109. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

110. 384 U.S. 305, 309 (1966); see text accompanying notes 33-34 supra, notes 167-71 infra.

111. 354 U.S. 457, 465; see text accompanying notes 81-85 supra.

112. 358 U.S. 522, 527 (1959).

113. Id.

114. 366 U.S. 420 (1961).

115. See text accompanying notes 15-21 supra.

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

117. See, e.g., Karr v. Schmidt, 460 F.2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972) (upholding high school hair length regulation); Wilson v. Moore, 346 F. Supp. 635 (N.D.W. Va. 1972) (upholding statute forbidding holding another government job while sitting in the state legislature); Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala.), prob. juris. noted, 41 U.S.L.W. 3183 (U.S. Oct. 10, 1972) (No. 71-1694) (upholding federal statute containing presumption that married male servicemen had dependent wives, but requiring married females to present actual proof of dependent husbands). But see cases cited at note 126 infra.

118. 342 F. Supp. 1224 (D. Minn. 1972). For an opposite holding on the issue of sexually integrated athletics based upon a narrow interpretation of Reed, see Buchas v. Illinois High School Ass'n, 41 U.S.L.W. 2277 (N.D. Ill. Nov. 15, 1972).

119. 342 F. Supp. at 1232-33. See also Lamb v. Brown, 456 F.2d 18, 20 (10th Cir. 1972).

semantically more demanding than the mere rational relationship which satisfies the traditional test. The First Circuit in *Wark v. Robbins*,[120] while denying the claim of a male convict that the imposition of a greater punishment upon men escaping from a penitentiary than that imposed upon women escaping from a reformatory violated the equal protection clause, noted that *Reed* "arguably suggested" an "intermediate approach" somewhere in between the relaxed traditional standard and rigorous strict scrutiny test.[121] Although the court said that the plaintiff had the burden of proving that in regard to escape from markedly different penal institutions men and women were similarly situated,[122] it found the essence of *Reed* to be the requirement that there in fact be "a substantial relation to a legitimate state objective."[123]

The third difference, and perhaps the most important one for those "rule skeptics"[124] who follow the suggestion to "watch what we do, not what we say," is that the Court in *Guano, Reed, Eisenstadt* and four other cases decided during the 1971 term,[125] as well as many lower courts, following[126] these cases have found the challenged statute to be unconstitutional. This "functional" or "behavioral" observation,[127] plus analysis of the Court's language, leads to the conclusion that a new equal protection test something in between the traditional test and the strict scrutiny test has been devised. A fourth indicia of a new test which is not found in the *Guano-Reed* language is the approach to the ascertainment of legislative purpose utilized by Justice Brennan in his plurality opinion in *Eisenstadt v. Baird.*

Baird, a well known advocate of birth control,[128] had been arrested following

120. 458 F.2d 1295 (1st Cir. 1972).

121. Id. at 1296-97 & n.4.

122. Id. at 1297. The basic distinction relied upon by the court was that the risk of violence was greater for men escaping due to the tighter security at male institutions.

123. Id. at 1297 n.4.

124. See generally W. Rumble, American Legal Realism (1968).

125. See cases cited at note 87 supra.

126. These courts have cited Reed as a restatement of the traditional test, but have then gone on to invalidate statutes which the traditional standard would in all liklihood have condoned. See, e.g., LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir.), petition for cert. filed, 41 U.S.L.W. 3315 (U.S. Nov. 27, 1972) (No. 72-777) (invalidating mandatory upaid maternity leave for teachers five months pregnant); Moreno v. Dep't of Agriculture, 345 F. Supp. 310 (D.D.C.), prob. juris. noted, 41 U.S.L.W. 3312 (U.S. Dec. 4, 1972) (No. 72-534) (invalidating a federal statute defining "household" to include only related individuals for purposes of the food stamp program); Cooper v. Nix, 343 F. Supp. 1101 (W.D. La. 1972) (invalidating Louisiana State University housing regulation requiring all students under 23 to live on campus).

127. The analysis of a case in terms of outcome (which party won and which lost), is useful in providing "a more realistic setting for examining the relevance of doctrinal refinements." Sedler, Standing, Justiciability, and All That: A Behavioral Analysis, 25 Vand. L. Rev. 479, 481 (1972).

128. Mr. Baird had previously been arrested in New York and convicted in New Jersey in connection with displaying contraceptives. In State v. Baird, 50 N.J. 376, 235 A.2d 673 (1967), his conviction was overturned on narrow statutory grounds. For background on Baird's earlier activities see Dienes, The Progeny of Comstockery—Birth Control Laws Return to Court, 21 Am. U.L. Rev. 1, 45-47 (1971).

a lecture he delivered at Boston University in 1967 during the course of which he had exhibited various items used as means of contraception, and presented a package of vaginal foam to a young woman in the audience. He was tried and convicted in Massachusetts Superior Court for violating a statute[129] which prohibited the selling or giving away of instruments or articles intended to be used for the prevention of conception, unless the individual receiving the device was married and had a doctor's prescription. The United States Supreme Court, in a 6 to 1 decision,[130] held that the purpose of the statute had neither been to discourage premarital intercourse[131] nor to protect the health needs of the citizenry,[132] but was "simply . . . a prohibition on contraception," on moral grounds,[133] and that as such it ran afoul of the strictures of the equal protection clause in that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[134] While this decision is sure to have an important impact on the concept of the individual's right to privacy, it is only the equal protection element which concerns us here.

Attempting to determine the legislative purpose of a challenged statute is an undertaking that often "involves the Court in the thornier aspects of judicial review."[135] As Mr. Justice Brennan said of the statute in question in *Baird*: "The legislative purposes that the statute is meant to serve are not altogether clear."[136] Under the traditional approach the Court usually presumed that the legislature acted "constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent . . ."[137] and then attributes "to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification."[138] Less frequently, the

129. Mass. Gen. Laws Ann. ch. 272, §§ 21-21A (1970).

130. 405 U.S. at 439. Mr. Justice Brennan wrote the plurality opinion in which Justices Douglas, Stewart and Marshall joined. Justice Douglas concurred on first amendment grounds; Justice White, joined by Justice Blackmun, concurred on narrow statutory grounds and alternatively on overbreadth as applied to married persons. Chief Justice Burger dissented, and Justices Powell and Rehnquist did not participate. The division within the Court raises doubts as to the precedential value of Eisenstadt.

131. See text accompanying notes 143-49 infra.

132. See text accompanying notes 150-54 infra.

133. 405 U.S. at 452.

134. Id. at 453.

135. Tussman & tenBroek 367. "[T]he search for purpose can become mere ascription by the court of those legislative objectives which seem to assist a judgment already reached upon other grounds." Coons, Clune & Sugarman 328. This manipulation of legislative purpose is well documented in Note, Legislative Purpose, supra note 77, passim.

136. Eisenstadt v. Baird, 405 U.S. 438, 442 (1972).

137. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969). It has recently been argued that: "It is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it." Note, Legislative Purpose 128.

138. 1969 Developments—Equal Protection 1078 (footnote omitted); see, e.g., McGowan v. Maryland, 366 U.S. 420, 426 (1961); Allied Stores v. Bowers, 358 U.S. 522, 528-29 (1959). In Allied Stores the Court noted that it did not know the legislature's purpose in enacting

Court would look more closely and attempt to isolate the purpose which appeared most probable.[139]

In *Eisenstadt*, however, the Court's approach closely approximated the search for legislative purpose utilized in a case where a statute's meaning is at issue, thus requiring the Court to "try to divine the intended consequences of a statute so as to be able faithfully to give rise to them."[140] The Court in *Eisenstadt* indulged in none of the reaching out for *any* purpose that would facilitate validation of the statute; rather, it probed rigorously, and skeptically evaluated each purpose put forward by Massachusetts. In a sense, *Eisenstadt* shifted the burden on the issue of purpose. More precisely, the Justices created one and put it on the state rather than, as in the past, assuming it themselves.[141] As the court said in *Wark v. Robbins*, "the state must do more than allow a court to speculate . . . ."[142]

The first purpose proffered by the state in *Eisenstadt* was the discouragement of premarital sexual intercourse.[143] While conceding that a state could "regard the problems of extramarital and premarital sexual relations as '[e]vils . . . of different dimensions and proportions, requiring different remedies . . .,' "[144] Justice Brennan added that "we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law."[145] The rationale for this determination was not grounded on a finding of either impermissible purpose, or the lack of a "fair and substantial relation" between statutory purpose and objective; rather, the Court stated that it was "unreasonable to assume" that the birth of an unwanted child was intended to serve as a punishment for fornication[146] and that in light of the ready availability of contraceptive devices from without the state, the statute would not in reality discourage fornication.[147] Further, since fornication is punishable as a misde-

---

the statute, nor was this important in that there were many reasonable purposes which the Court itself could conceive to justify the statute. Id. at 528-29.

139. 1969 Developments—Equal Protection 1078. Whichever approach the Court used however, it would usually go to great lengths to state at least one valid purpose. In fact, as one commentator has stated: "Classifications have been upheld by virtue of their relation to goals it is clear the legislature had not thought of." Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1225 (1970) (footnote omitted). Recently in James v. Valtierra, 402 U.S. 137 (1971), and Labine v. Vincent, 401 U.S. 532 (1971), the Court upheld statutes without making clear their purposes. The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 126-27 & nn. 25-28 (1971).

140. Bickel, supra note 79, at 62.

141. See note 138 supra.

142. 458 F.2d 1295, 1297 n.4 (1st Cir. 1972).

143. 405 U.S. at 448. The Supreme Court of Massachusetts had relied upon this purpose in upholding the statute at issue in Sturgis v. Attorney Gen., 358 Mass. 37, 260 N.E.2d 687, 690 (1970).

144. 405 U.S. at 448.

145. Id.

146. Id.

147. Id. at 448-49. The sections did not regulate the distribution of contraceptives to be used for the prevention of disease. Thus the sale or giving away of a condom to an

meanor, while violations of the statute here in question are felonies carrying a sentence of up to five years in prison, the Court, adopting the language of the First Circuit, said that it was " 'hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor.' "[148] The Court thus refused to accept the deterrence of fornication as the statute's purpose on the theory that, in reality, the statutory scheme could not accomplish that purpose with some undefined degree of efficacy, and that the use of disparate jail sentences would impute to the Massachusetts legislature a theory of penal deterrence which the Court "could not believe" the legislature would choose.[149]

The second legislative objective asserted by the state was the protection of public health.[150] The Court rejected this assertion, however, noting that the available evidence suggested that it was actually the protection of morals, rather than health, which had been intended, and further, that even if it were in fact a health measure, "the statute would be both discriminatory and overbroad."[151] It would be discriminatory in that the health needs of the unmarried are at least as urgent as those of the married,[152] and its overbreadth[153] would result from the fact that the statute required even married persons to obtain a prescription for all contraceptives to be used for the prevention of pregnancy, while the Court acknowledged that "not all contraceptives are potentially dangerous."[154]

The Court, in what one judge has termed "a searching inquiry to determine the *actual* purpose of the Massachusetts contraceptive legislation,"[155] thus

---

unmarried person would be legal whereas if the article were a diaphragm or birth control pill, there would be a per se violation. Cf. Commonwealth v. Corbett, 307 Mass. 7, 29 N.E.2d 151 (1940).

148. 405 U.S. at 449, citing Eisenstadt v. Baird, 429 F.2d 1398, 1401 (1st Cir. 1970), aff'd, 405 U.S. 438, 449 (1971).

149. See 84 Harv. L. Rev. 1525, 1527-28 (1971) for a critical analysis of the similar reasoning that had been used by the Eisenstadt court of appeals.

150. See Dienes, supra note 128, at 88-93 for an extended discussion of the health aspects.

151. 405 U.S. at 450.

152. The application of impermissible "under-inclusion" is very rare in traditional equal protection cases. Tussman & tenBroek 348-50.

153. The use of the overbreadth doctrine in a traditional equal protection case is also somewhat surprising in light of Justice Stewart's comments in Dandridge v. Williams to the effect that overreaching should not be used to invalidate a state economic or social regulation, but was only to be applied when a Bill of Rights freedom was impinged upon. 397 U.S. at 484-85; see Comment, Cash Deposits—Burdens and Barriers in Access to Utility Services, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 630, 641 (1972). While Dandridge probably overstated the case in eschewing any use of overreaching (see Tussman & tenBroek 351-52) its reappearance in Eisenstadt along with under-inclusion is another indication that a unique equal protection test was being applied. Cf. 84 Harv. L. Rev. 1525, 1527 n.12 (1971).

154. 405 U.S. at 451 (footnote omitted).

155. Abele v. Markle, 342 F. Supp. 800, 811 n.18 (D. Conn.) (Newman, J., concurring)

analyzed and rejected the arguments that the challenged statutory scheme was either a health measure or was intended to deter premarital intercourse. The Court's approach to the problem of legislative purpose, its reliance upon the *Guano* substantial relationship test and the concomitant shifting of the burden of proof, as well as the finding that the proffered statutory purposes were unreasonable and overbroad, does not in any instance resemble the often articulated methods of the traditional equal protection test. On the basis of the decisions in *Reed* and *Eisenstadt* it must at the very least be said that to test a statute by the traditional standard no longer guarantees its vindication. It seems preferable, however, to acknowledge, as the Court did not, that a new test somewhere in between the abdication of the traditional test and overt activism of strict scrutiny is being employed.

V. A Proposed Reformulation: *Reed-Guano-Eisenstadt* and Reasonableness of Impact

Given the existence of a new equal protection test, a number of questions present themselves: What are its contours? How will it be applied? And when will the Court use it rather than the strict review or traditional tests?

One of the basic criticisms of the rational relationship requirement of the traditional test was the Court's apparent inability to apply it with any degree of consistency.[156] To remedy this, it is suggested that in evaluating statutes challenged under the equal protection clause the Court should search for what Professor Dixon has termed "constitutional reasonableness," that is, "reasonableness of impact rather than strict logic or rational consistency in legislative distinctions and classifications."[157] The question the Court considers is not whether there is "internal consistency in classification systems," but rather if the *burden* placed upon the group characterized by the trait is reasonable or acceptable in light of the state's purpose in enacting the statute.[158]

Use of the above test unavoidably involves the Court in an examination of legislative ends, but significantly, it does not require "a value laden" appraisal of the *legitimacy* of ends.[159] The distinction is far from spurious. Examination of ends is a necessary and valuable component of all judicial decisions.[160] The days when judges could be said to find the law rather than make it are bygone. It is now universally accepted that judges, and especially Supreme Court Justices, do in fact make policy.[161] With this in mind, it seems desirable to ask that the Justices openly state and defend their policy preferences and considerations of legislative ends. Only in this way can decisions resting on unarticulated

(emphasis added), appeal docketed, 41 U.S.L.W. 3298 (U.S. Nov. 16, 1972) (No. 72-730). For a critical treatment see Note, Legislative Purpose 124-28.

156. See text accompanying notes 80-85 supra.

157. Dixon 158.

158. Id.

159. See Gunther 21, 23, 48.

160. See generally B. Cardozo, The Nature of the Judicial Process (1921).

161. Compare United States v. Butler, 297 U.S. 62 (1936), with G. Schubert, Judicial Policy-Making (1965).

major premises be avoided. In addition, meaningful equal protection decisions must concern themselves with ends due to the fact that equality is an entirely relational concept which cannot be given any content without an examination of both legislative ends and means.

Analysis of the decisions of the 1971 term suggest that the Court is in fact using the concept of impact in conjunction with a sliding scale balance to evaluate the reasonableness of a statute's classification in light of its purpose. The "desirability" of the end, and the effectiveness of the statute in accomplishing it are being balanced against the impact or burden which the classification imposes upon the members of the named class. As the desirability of attaining the end rises, and the burden decreases, the more willing the Court has been to accept patently under and over inclusive classifications. On the other hand, the greater the impact and the less desirable and capable of accomplishment the end, the less over and under inclusion the Court will tolerate.

Use of the impact test involves the Court in four interconnected inquiries: (1) What is the classificatory trait? (2) What is the statutory purpose? (3) What is the nature and extent of the burden or impact of the statute upon the members of the class? and (4) What is the relationship of the classification to the purpose? Under the traditional test, the state was under no obligation to answer any of the above-mentioned questions, and the Court itself usually dealt with the first and second, while the challenger had the burden of establishing the irrationality of the classification under the fourth. While the statute's impact was never explicitly discussed by the Court, it began in the 1960's to serve as the unstated basis of the decision.[162]

It is suggested that the four decisions[163] of the Warren Court which invalidated state social legislation on equal protection grounds without relying explicitly upon either the traditional or active review standard, can be explained as examples of the Court's unacknowledged but very real use of reasonableness of impact as an equal protection test, and thus were forerunners of the new approach. In *Baxstrom v. Herold*,[164] the Court invalidated a New York "statutory procedure under which a person [could] be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York."[165] The Court found that in terms of deciding "whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."[166] The key to this decision was that the heavy burden that civil commitment placed upon the members of the class led the Court to require that the state come forward and justify the statutory classification. When it failed to do so, the Court refused to undertake the task on its own, and invalidated the statute.

162. See text accompanying notes 163-76 infra.

163. See note 33 supra.

164. 383 U.S. 107 (1966).

165. Id. at 110.

166. Id. at 111-12.

Rinaldi v. Yeager[167] presented an even clearer example of the Court's use of the impact criteria. In *Rinaldi* the Court invalidated a New Jersey statute which required that indigent defendants confined to penal institutions repay the state for the cost of their transcript on appeal. The statute did not provide, however, that those defendants who received suspended sentences, were placed on probation or were sentenced to pay a fine be similarly obligated to repay the state. Thus, among all defendants whose convictions were affirmed on appeal, only those who were sent to prison had to repay the state for the cost of their transcripts.[168] In overturning this statute, the Court recognized that "legislation may impose special *burdens* upon defined classes in order to achieve permissible ends."[169] But, the Court, quoting *Baxstrom v. Herold*, also recognized that in defining a class, the distinctions drawn must have " 'some relevance to the purpose for which the classification is made.' "[170] On the question of why the state chose to burden only those defendants who were incarcerated, the Court noted that it had "been referred to no record of legislative history"[171] which would explain the classifications justification and that it could think of none itself.

The final two examples of the pre-1971 use of the impact test are found in the companion cases of *Levy v. Louisiana*[172] and *Glona v. American Guarantee & Liability Insurance Co.*[173] In these decisions, the Court invalidated Louisiana statutes which respectively barred an illegitimate child from recovering for the wrongful death of his or her mother, and barred the mother from recovering for the wrongful death of an illegitimate child. In *Levy*, Justice Douglas noted the existence of the two-tiered equal protection approach and then stated: "The rights asserted here involve the intimate, familial relationship between a child and his own mother."[174] This indicates that the impact of the statute was viewed as impinging upon a right which derived from an important relationship, but one which was not fundamental. With this background, and without further discussion of the appropriate standard to be applied, the Court held that illegitimacy was an irrational classificatory trait in regards to compensating children for damages suffered due to the wrongful death of their mother.[175] This decision can be viewed as an inarticulate use of the impact test by a Court which, in 1968, was already feeling constrained by the rigidity of the two-tiered approach.[176]

---

167. 384 U.S. 305 (1966).

168. Id. at 307-08.

169. Id. at 309 (emphasis added).

170. Id. quoting Baxstrom v. Herold, 383 U.S. 107, 111. The Court also cited Guano as authority for the statement.

171. 384 U.S. at 309.

172. 391 U.S. 68 (1968).

173. 391 U.S. 73 (1968). For a critical analysis of the Court's rationale in these cases see Krause, Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity, 36 U. Chi. L. Rev. 338 (1969).

174. 391 U.S. at 71.

175. Id. at 72.

176. See text accompanying notes 63-76 supra. In Labine v. Vincent, 401 U.S. 532 (1971),

Analysis of the decisions of the 1971 term sheds further light on the Court's use of a new test.

In *James v. Strange*,[177] the Court found that the purpose of the statute was to recoup funds expended for the legal defense of indigent defendants in criminal actions, and that the classification was all indigent criminal defendants, as opposed to other judgment debtors.[178] The burden on the members of the class was that the criminal defendants owing money to the state were not comparably protected against garnishment, nor were the usual exemptions provided other judgment debtors available to them.[179] The Court made much of the " 'tremendous hardships' " which the statute worked upon the debtor.[180]

As to the purpose-classification relationship, the Court noted the "legitimate state interests" in recoupment, but found no justification for the imposition of "unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor."[181] It is difficult to conclude whether the state failed to show that there was a relationship between purpose and classification, or if the challenger had proven that the relationship was irrational or unreasonable in light of the burden. The Court had recognized that "enforcement procedures with respect to judgments need not be identical,"[182] but found the burden in this scheme to be too heavy and the differences between the classes and the effectiveness of the statute not commensurately great. *Strange* relied in part upon *Rinaldi v. Yeager*,[183] one of the rare Warren Court equal protection invalidations which failed to explain which test it was employing. Like *Rinaldi*, *Strange* approaches the indigent defendant cases such as *Griffin v. Illinois*[184] and the area of fundamental rights, for as the Court said in *Strange*, "to impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice, no less than in *Rinaldi*, a discrimination which the Equal Protection Clause proscribes."[185] Thus the Court found that the burden of the statute upon indigent defendants was unreasonable in light of the obvious and unexplained underinclusion of the statutory classification. Had the burden been less, or fallen upon a class in a better position to bear it, then the Court would probably have been more willing to permit the legislature to deal with the problem as it saw fit.

The decision in *Jackson v. Indiana*[186] invalidated a statute which, in effect,

---

the Court retreated from Levy and Glona and upheld a Louisiana statute which barred illegitimate children from sharing in the estate of an intestate parent. But see text accompanying notes 192-96, 235-38 infra.

177. 407 U.S. 128 (1972).

178. Id. at 129-31.

179. Id. at 135-37.

180. Id. at 136, quoting Snaidich v. Family Fin. Corp., 395 U.S. 337, 340 (1969).

181. 407 U.S. at 138.

182. Id. (footnote omitted).

183. See text accompanying notes 167-71 supra.

184. 351 U.S. 12 (1956).

185. 407 U.S. at 140-41.

186. 406 U.S. 715 (1972).

often resulted in the lifetime commitment of a criminal defendant upon a showing that he was incompetent to stand trial.[187] The standards for such commitment, and the procedural safeguards afforded the defendant prior to commitment were substantially lower than those which applied to civil commitment proceedings, while the standards for release were higher.[188] Relying on its decision in *Baxstrom v. Herold*,[189] the Court said that "the mere filing of criminal charges surely cannot suffice" to "justify less procedural and substantive protection against indefinite commitment than that generally available to all others . . . ."[190] The Court thus determined that the problem of dealing with criminal defendants who are incompetent to stand trial could not be solved by committing them indefinitely under standards and procedures inferior to those offered civil committees. The Court did say, however, that were the commitment "only temporary" it might be permissible to use standards different from those required in civil commitment proceedings.[191] This decision can be read as an example of the Court balancing the impact of the statute against its purposes. It is apparent that something must be done with incompetent defendants, and if what is done does not impose too heavy a burden on the defendant, the Court might allow procedures different from those followed in civil commitment proceedings. When, however, the burden is indefinite commitment with a substantial possibility of its being permanent, the Court will not permit different treatment without a greater showing by the state that criminal defendants are dissimilarly situated than all others facing long term commitment. Another way of stating this rationale is to say that while criminal defendants alleged to be incompetent to stand trial are in fact dissimilar to individuals who are the subjects of civil commitment proceedings, they are not dissimilar enough to justify the imposition of so heavy a burden.

Whereas *Reed* and *Eisenstadt* seemed to revitalize the traditional test, *Weber v. Aetna Casualty & Surety Co.*[192] totally ignored the two-tiered approach. As Professor Gunther noted, Justice Powell's opinion "tried to blur the distinctions between strict and minimal scrutiny precedents by formulating an overarching inquiry applicable to 'all' equal protection cases."[193] In fact, the Court's statement of the "essential inquiry" contains elements of the impact test discussed above. As Justice Powell stated it, the Court must always ask "[w]hat legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[194] In *Weber*, the challenged statute put unacknowledged illegitimate children in the position of receiving workmen's compensation benefits only if their parents' legitimate children did not first exhaust

187. Id. at 720-23.
188. Id. at 728-30.
189. 383 U.S. 107 (1966). See text accompanying notes 164-66 supra.
190. 406 U.S. at 724.
191. Id. at 725.
192. 406 U.S. 164 (1972).
193. Gunther 17.
194. 406 U.S. at 173.

the available funds.[195] In striking down the statute, the Court explicitly acknowledged that there is an equal protection middle ground between the traditional and strict standards. "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications *approach* sensitive and fundamental personal rights, this Court exercises a *stricter* scrutiny."[196] Thus, Justice Powell was saying that there are certain non-fundamental rights which deserve stricter scrutiny than that available under the traditional standard. That is, of course, the essence of the burden test, in that it recognizes that as the impact of the statute becomes more detrimental to the members of the class, the scrutiny required becomes more intense.

As has been noted, there were four equal protection cases decided during the 1971 term in which the Court upheld the statute in question.[197] Two of these decisions contain elements of the new approach, while the other two offer a clue as to those areas in which the Court will continue to use the traditional test rather than the impact balancing test. Another valuable aspect of these four cases is that they were not unanimous decisions. While the unanimity of the invalidations is evidence that the "trend had remarkably widespread support on the Court,"[198] the study of a non-unanimous decision can, as Herman Pritchett demonstrated, "supply information about [the Justices'] attitudes and their values which is available in no other way. . . . [D]isagreement demonstrates that the members of the Court are operating on different assumptions, that their inarticulate major premises are dissimilar, that their value systems are differently constructed and weighted . . . ."[199]

The most revealing of the non-unanimous decisions, which found the majority voting to uphold the challenged statute, was *Schilb v. Kuebel*.[200] Contrary to Professor Gunther's assertion, in *Schilb*, as well as in *Lindsey v. Normet*,[201] the Court's decisional process was far more than a finding of "minimal rationality after merely a perfunctory, deferential judicial examination."[202] *Schilb*, a 4 to 3[203] decision, upheld a statute which required a defendant to put up 10 per cent of his bail as security, and had the clerk retain 10 per cent of the security as bail costs. Defendants released in their own recognizance were, of course, not subject to the loss of 10 per cent of the deposit, and neither were those who put up the full amount in cash.[204] The purpose of the statute was

195. Id. at 167-68.

196. Id. at 172 (emphasis added) (citations omitted).

197. See note 88 supra.

198. Gunther 19.

199. C.H. Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947 XII (1948).

200. 404 U.S. 357 (1971).

201. 405 U.S. 56 (1972).

202. Gunther 25.

203. Mr. Justice Blackmun wrote the opinion of the Court in which Chief Justice Burger and Justices White and Marshall joined. Justice Douglas dissented alone, and Justice Stewart wrote a dissent in which Justice Brennan joined.

204. 404 U.S. at 367.

found by the majority to be the reform of the bail system and an attempt to "rectify [the] offensive situation" concerning bail bondsmen.[205] To illustrate the purpose and operation of the statute, the Court quoted extensively from the legislative committee report.[206] While there was never any actual discussion of the issue of reasonable relationship, the Court concluded by saying: "[w]e refrain from nullifying this Illinois statute that . . . has brought reform and needed relief to the State's bail system."[207] Thus, the Court saw a valid and important state purpose; it had been convinced of its successful accomplishment, and in light of the small burden produced by the under-inclusion, the statute was upheld. Justice Marshall's concurring opinion voiced a similar rationale: "In the evolving struggle for meaningful bail reform I cannot find the present Illinois move toward that objective to be unconstitutional."[208] Thus, all the members of the Court who voted to uphold the statute saw its purpose to be bail reform, and, in light of this laudable end which the statute appeared to be accomplishing, they were willing to tolerate a certain degree of unjustified inequality. The dissenters, on the other hand, did not see the purpose as broadly. Rather, they argued that it was merely an attempt to cover administrative costs and that this purpose did not justify "selective imposition" of cost upon one class of defendants.[209] The case, then, turned upon the identification of the statutory purpose. Both factions of the Court agreed that there was a burden, and that it was not really oppressive. In light of this, the purpose posited by the majority outweighed the burden imposed; that purpose upon which the dissenters relied, did not.

A second case in which the Court upheld the statute was *Lindsey v. Normet*.[210] There, an Oregon law provided for a trial within six days of the service of the complaint in real property possessory actions.[211] The Court found the purpose of the statute to be the "prompt as well as peaceful resolution of disputes over the right to possession of real property"[212] and it found the provision for an early trial to be "closely related to that purpose."[213] The imposition of the burden of a quick court appearance was held to be permissible due to the "unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants."[214] Here, then, the state came forward with convincing evidence that there was a reasonable relationship between the purpose and the classification by showing that possessory disputes between landlords and tenants were, in

205. 404 U.S. at 360.
206. Id. at 363 n.8.
207. Id. at 372.
208. Id. at 373.
209. Id. at 384 (Stewart, J., dissenting).
210. 405 U.S. 56 (1972).
211. Ore. Rev. Stat. §§ 105.135-.140 (1971).
212. 405 U.S. at 70.
213. Id.
214. Id. at 72.

fact, dissimilar to other legal disputes. Thus, the Court found that although the statute did burden defendants, such a burden was entirely justifiable.

The final two cases in which the Court upheld statutes against equal protection challenges involved payments of benefits under the Social Security and Aid to Families with Dependent Children ("AFDC") programs. In *Jefferson v. Hackney*,[215] the Court held that the State of Texas could use a percentage reduction factor in determining the amount of funds to be allocated to its various aid programs, notwithstanding the fact that it resulted in lower payments to AFDC recipients than to recipients of Aid for the Permanently and Totally Disabled, Old Age Assistance, or Aid to the Blind.[216] After quickly disposing of allegations of racial motivation,[217] the Court used the traditional approach. It did not require the state to come forward with evidence of its actual purpose or purposes as it had in *Eisenstadt*, but rather accepted "suggestions"[218] as to possible purposes, and then added a number of alternative purposes which the state "may" have had in mind.[219]

The decision in *Richardson v. Belcher*[220] took much the same approach. There, the Court upheld an "offset" provision of the Social Security Act which reduced federal benefits for those disabled workers who were also covered by state workmen's compensation programs.[221] The statute limited the maximum combined state and federal payments to eighty per cent of the employee's average earnings. The asserted purpose of this provision was to eliminate those situations in which an employee would be receiving benefits totaling more than his usual salary, thereby reducing his incentive to return to work.[222] This Congressional enactment was alleged to be a violation of the due process clause of the fifth amendment in that it did not provide for reducing payments to those individuals who were receiving private insurance benefits in addition to those coming from the federal government.[223] The Court upheld the statute without meeting the dissenters' argument[224] that there was no distinction in terms of legislative purpose between individuals receiving state workmen's compensation and those receiving private insurance benefits. Notwithstanding this failure of the government[225] and the Court to justify the statute's under-inclusion, the statute was not struck down. The Court relied upon *Dandridge v. Williams*,[226] and stated that "[a] statutory classification in the area of social welfare is con-

215. 406 U.S. 535 (1972).
216. Id. at 549.
217. Id. at 548-49.
218. See Brief for Appellee at 17, Jefferson v. Hackney, 406 U.S. 535 (1972).
219. 406 U.S. at 549.
220. 404 U.S. 78 (1971).
221. 42 U.S.C. § 424a(a) (1970).
222. 404 U.S. at 83; see Brief for Appellant at 9-11, Richardson v. Belcher, 404 U.S. 78 (1971).
223. 404 U.S. at 81.
224. Id. at 92-96 (Marshall, J., dissenting).
225. See Brief for Appellant at 9-11, 15, Richardson v. Belcher, 404 U.S. 78 (1971).
226. 397 U.S. 471 (1970).

sistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrimination.' "[227] The reiteration of the *Dandridge* language indicates that the Court will be reluctant to apply the new equal protection test in cases involving welfare and social security. The reason for this might derive from the recognition that this is a technical and complex area and the conclusion that the Court lacks the institutional competence to deal with it effectively and should, therefore, defer to the judgment of the legislature.[228] If, in fact, a majority of the Justices do agree with those who, like Len Fuller, caution against the overjudicialization of "every function of government" in the belief that "adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources,"[229] then until those challenging distributive social legislation can demonstrate otherwise, these statutes will be tested under the traditional standard regardless of either the burden or the extent of under and over-inclusion.

Having analyzed the equal protection decisions of the 1971 term, it seems clear that the Court no longer feels bound by the two-tiered equal protection test. It is also apparent, however, that the contours of the new approach are far from settled. In fact, as the initial decisions of the 1972 term demonstrate, equal protection adjudication is undergoing a reformulation, the exact nature of which may not emerge for a number of years.

The first equal protection decision of the 1972 term quite clearly follows the traditional test. In *United States v. Kras*,[230] the Court held that the mandatory payment of a filing fee for those seeking a discharge in bankruptcy did not violate either the due process or equal protection clause. The majority opinion distinguished *Boddie v. Connecticut*[231] on the ground that requiring a filing fee to obtain a divorce resulted in a denial of access to the courts in regard to a fundamental relationship, while a discharge in bankruptcy "although important . . . does not rise to the same constitutional level."[232] The Court stated: "If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense."[233] Thus, no fundamental interests were found to be at stake, and bankruptcy legislation, being "in the area of economics and social welfare," the traditional test with its requirement of a "rational justification" was applied.[234] While use of the *Reed-Guano*-impact test might not

227. 404 U.S. at 81, quoting Dandridge v. Williams, 397 U.S. at 487. As one commentator said of the Dandridge decision: "[T]his looks like an unmistakable message to welfare groups and their lawyers to look elsewhere for legal relief." Reinstein, supra note 100, at 50.

228. See Gunther 23-24.

229. L. Fuller, The Morality of Law 176 (rev. ed. 1969); see A. Miller, The Supreme Court and American Capitalism 198-202 (1968); cf. A. Bickel, The Supreme Court and the Idea of Progress 175-81 (1970).

230. 41 U.S.L.W. 4117 (U.S. Jan. 10, 1973).

231. 401 U.S. 371 (1971).

232. 41 U.S.L.W. at 4121.

233. Id.

234. Id.

have changed the outcome in *Kras*, the Court's reference to a "constitutional" level is antithetical to the thesis herein presented in that it fails to recognize the very harsh negative impact that deprivation of some non-constitutional rights and interests can have. While the decision in *Kras* could be interpreted as a sign that the Court is returning to the strictures of the two-tiered approach, the recent per curiam opinion in *Gomez v. Perez*[235] suggests otherwise. In *Gomez*, the Court, relying on its decisions in *Levy v. Louisiana* and *Weber v. Aetna Casualty & Surety Co.*, held that Texas could not "grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children."[236] The Court, without stating which equal protection test was appropriate, gave *Levy* and *Weber* an expansive interpretation.

> Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefor hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother.[237]

Although *Gomez* comes close to declaring illegitimacy to be a suspect classification, the Court, as in *Reed*,[238] did not find it necessary to take this step. Thus, it appears that if a state wishes to treat illegitimate children differently from legitimate children, it will have to convince the Court that they are dissimilar in a way which justifies the disparate treatment.

In terms of the reasonableness of impact test, the *Gomez* decision is significant in that the Court described support as an "essential right." In contrast to the approach taken in *Kras*, the Court did not feel constrained to speak of a "constitutional level" but recognized that even though support is not a fundamental right protected by the Constitution, depriving a young child of parental support is a harsh burden requiring substantial justification.

In light of *Gomez*, and the trend evident from the Court's decisions in the 1971 term, it may be prudent to withhold judgment on the ultimate doctrinal significance of *Kras*. Whether in retrospect *Kras* will be seen as a return to the two-tiered approach, an attempt to insure that the *Boddie* rationale will not be extended, or the final appearance of the old approach, only future decisions of the Court will reveal.

VI. A Preliminary Justification of the Use of the New Test

The three key elements which run through the cases discussed above are the shifting burden of coming forward with the statutory purpose, the shifting burden of proof on the reasonableness of the classification, and the use of impact or burden as a criterion for determining permissible degrees of unequal treat-

235. 41 U.S.L.W. 4174 (U.S. Jan. 17, 1973).

236. 41 U.S.L.W. at 4174; see text accompanying notes 172-76, 192-96 supra.

237. 41 U.S.L.W. at 4175.

238. See text accompanying notes 102-06 supra.

ment. This last element will, in all probability, cause the most debate and generate the greatest criticism. This is so because it involves the Court in the weighing or ranking of values which have no specific constitutional content or textual origin. In anticipation, the following tentative justification for the use of the impact test is offered.

Professor Goodpaster has persuasively argued that in applying the equal protection clause, courts have always concerned themselves with "due process kinds of considerations" such as "improper" governmental action and "unfairness."[239] The intersection of the two clauses is apparent in cases of indigent defendants in the appellate process such as *Griffin v. Illinois*[240] and *Douglas v. California*,[241] where the Court found denials of equal protection due to the unfairness of conditioning ability to file an appeal and the right to be represented by counsel in that appeal upon considerations of wealth. As one analysis of *Douglas'* equal protection rationale put it, "[t]hat this is not logically equal protection does not detract from the fact that it is practically due process."[242] More recently in *Boddie v. Connecticut*,[243] Justice Harlan's plurality opinion described the interaction of the two clauses from the opposite point of view and found that requiring indigents to pay a filing fee in a divorce action violated the due process right to "be afforded an opportunity to go into court to obtain a divorce . . . ."[244]

Thus, as Professor Goodpaster noted, the two concepts have a "symbolic relationship" and "overlap like propositions in Venn diagrams in Aristotelian logic . . . ."[245] This being the case, it seems fair to analogize the equal protection question of which test the Court should use in evaluating a challenged statute to the due process determination of which procedural safeguards are proper in a given situation.[246] As Chief Justice Burger said in *Morrissey v. Brewer*,[247] where the Court held that there must be "an effective but informal hearing"[248] prior to revocation of parole, "[o]nce it is determined that due process applies, the question remains what process is due."[249] To paraphrase, once it is determined that equal protection applies, the question remains what protection is equal. That is, how equal must the protection be to satisfy the constitutional mandate? This of course depends upon which test is utilized and how; this in turn depends, for the most part, upon the "nature of the interest" that the classification affects. If the interest is one previously recognized as fundamental, then active review is triggered and the state must demonstrate a compelling interest. If on the other hand, the interest is not one denominated fundamental, the issue is

239. Goodpaster 243. Much of the discussion which follows borrows from and builds upon Goodpaster's analysis.

240. 351 U.S. 12 (1956).

241. 372 U.S. 353 (1963).

242. Gerard, The Right to Counsel on Appeal in Missouri, 1965 Wash. U.L.Q. 463, 481.

243. 401 U.S. 371 (1971).

244. Id. at 382.

245. Goodpaster 243.

246. A similar suggestion was made by Reinstein, supra note 100, at 46-49.

247. 408 U.S. 471 (1972).

248. Id. at 485.

249. Id. at 481.

whether to use the traditional or the *Reed-Guano* test. It is suggested that this determination is somewhat analogous to the determination made under the due process clause regarding the formality of the required hearing. In both *Morrissey v. Brewer* and *Fuentes v. Shevin*,[250] where it was held that due process requires some form of hearing prior to pre-judgment repossession of personal property, the Court faced the problem of determining the nature of the hearing to be held. In *Morrissey*, the Court, acting as it had in *Goldberg v. Kelly*,[251] set very specific guidelines by which to conduct "an effective but informal" parole revocation hearing.[252] In *Fuentes*, however, the Court declined the invitation to set forth a code of procedure, stating that the nature and form of the hearing "are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication."[253] In essence, as the Court said in *Boddie v. Connecticut*, "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."[254]

The point is that if the Court acknowledges that different interests require different degrees of protection under the due process clause, why can it not do the same under the equal protection clause? It is thus submitted that the Court's consideration and grading of non-constitutional interests in equal protection cases should not be viewed as either aberrant or unusual, but rather as the logical and beneficial application of principles recently enunciated in procedural due process cases. Such an approach provides the Court with a much needed tool for protecting a variety of non-constitutional interests without requiring the expansion of the list of fundamental interests to the point that there are more inclusions than exclusions. More importantly, the reasonableness of impact test discussed above is not a proposal for a new approach, rather, it is a description of the reality of Supreme Court decision making in equal protection cases. As such, its use should greatly facilitate the open consideration of factors which have always been implicit in those decisions, and as Charles Black has said, "clarity about what we are doing, about the true or the truly acceptable grounds of judgment, is both a good in itself, and a means to a sounder decision."[255]

VII. A Critical Analysis of Professor Gunther's "New" Equal Protection Test

In the *Foreword* to the Harvard Law Review's annual analysis of the Supreme Court, Professor Gerald Gunther has presented his view of the causes for, and

250. 407 U.S. 67 (1972).

251. 397 U.S. 254 (1970) (requiring a hearing prior to termination of welfare benefits).

252. 408 U.S. at 484-89, accord, Miranda v. Arizona, 384 U.S. 436 (1966).

253. 407 U.S. at 96-97 (footnote omitted).

254. 401 U.S. at 378 (footnote omitted). In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court said, "a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process." Id. at 570 (emphasis omitted) (footnote omitted).

255. C. Black, Structure and Relationship in Constitutional Law 32 (1969).

contours of, the new equal protection test. Gunther's essay, entitled "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,"[256] rests upon three premises with which this Comment is in full accord: (1) the Burger Court will be slow to create new suspect classifications or fundamental interests; (2) there is growing displeasure with the rigidity of the two-tiered approach; (3) the Court is ready to use a test somewhere in between strict scrutiny and the traditional approach.[257] It is with Gunther's formulation of the outlines and application of the test that issue is here taken. In his essay, the new test is described as "a means-focused, relatively narrow, preferred ground of decision in a broad range of cases."[258] The model is said to require "that legislative means must substantially further legislative ends."[259] "It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture." Thus, "[i]t would concern itself solely with means, not with ends. . . . The yardstick for the acceptability of the means would be the purposes chosen by the legislatures, not 'constitutional' interests drawn from the value perceptions of the Justices.

". . . [The new test] would permit the state to select any means that substantially furthered the legislative purpose."[260] As must be evident, the key word in the test is "means," and yet nowhere is it defined. It seems, in light of the uses of "means" in the above, to be capable of two alternative definitions. One is that "[a] legislative, or administrative, *means* is a *classification of persons* upon whom the law will operate."[261] Ends, on the other hand, are the legislative purposes or goals. However, if this definition is accepted, how can the observation that the state may "select any means that substantially further[s] the legislative purpose"[262] be understood? It seems doubtful that Gunther would suggest that a statute which automatically preferred tall people to short ones as estate administrators would be valid, notwithstanding the fact that it furthered the legislative end of reducing administrative disputes. Yet, in analyzing *Reed v. Reed*, Gunther states that the decision does not conform to his model in that "[c]lear priority classifications are plainly relevant to the State's interest in reducing administrative disputes. Even if the requirement be that the means bear a 'significant relationship' to the state's purpose, or contribute substantially to its achievement, the test would seem to have been met in *Reed*."[263] The confusion appears to derive from using "priority classification" rather than "men instead of women" as the statement of the legislative classification. To say that priority classifications bear a rational relationship to the diminution of court

256. Gunther, supra note 37.

257. Id. at 12-20.

258. Id. at 20.

259. Id.

260. Id. at 21.

261. Coons, Clune & Sugarman 321 (emphasis added).

262. Gunther 21.

263. Id. at 34 (footnotes omitted). A similar appraisal of Reed was offered in Note, Legislative Purpose 150-51. The critique of Gunther's formulation which follows is equally applicable to the Note.

disputes over who should be the administrator is all well and good. To say, however, that automatically favoring men over equally qualified women is a rational priority classification, is exactly what the Court refused to do in that such discrimination makes "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ."[264]

This leads to the second, and it is suggested more probable, definition that Gunther had in mind. Means are not synonymous with classification, rather the term stands for the *method* by which the classification will lead to the effectuation of the end chosen by the legislature. If this is in fact a proper definition of "means," then Gunther is opting for an equal protection test in which "the rationality of a distinction is to be measured against what the legislature or other decision maker was trying to accomplish. But were this in fact the Court's approach, the equal protection clause—save in cases of out and out lunacy—would, again, outlaw only legislation enacted in pursuit of some universally unacceptable goal . . ."[265] or when the goal is unarticulated and the Court refuses to supply it. Gunther is thus not calling for a rational relationship between the purpose and the classification, but only for an efficacious one between the purpose and the "means" that the legislature has chosen to accomplish that purpose.

The basic failure of Gunther's analysis is that it ignores the equal protection command of similar treatment for those similarly situated and concentrates instead upon the reasonableness of the legislature's choice of method. Such an approach would be more appropriately applied in an attempt to revitalize due process as a limited substantive check on state legislation. As regards equal protection, however, it is unacceptable. While the equal protection and due process clauses are in many respects overlapping and practically identical, they do have significant differences. Foremost among these is that equal protection quite aptly deals with equality, while due process deals with fairness. The fact that strands of each exist within the other does not indicate that one or the other is superfluous. Gunther, however, has redefined equal protection in due process terms, and by so doing has neglected the equal protection stricture of similar treatment for those similarly situated.

Analysis of the seven cases which Gunther declares to be "the best evidence" of the "reality" of his model raises further doubts as to its viability. Of the seven, Gunther himself puts aside *Stanley v. Illinois*[266] "at the outset" as resting on due process rather than equal protection grounds.[267] *Reed v. Reed* and *Eisenstadt v. Baird* respectively throw the model "into doubt"[268] and "undercut [it] in a fundamental way."[269] *Weber v. Aetna Casualty & Surety Co.*[270] is never

264. Reed v. Reed, 404 U.S. 71, 76 (1971).
265. Ely, supra note 139, at 1225 (footnote omitted).
266. 405 U.S. 645 (1972).
267. Gunther 25.
268. Id. at 34 (footnotes omitted).
269. See id. at 35.
270. 406 U.S. 164 (1972).

evaluated in terms of the model,[271] and *Humphrey v. Cady*[272] is given minimal scrutiny at best.[273] Thus it is only *Jackson v. Indiana*[274] and *James v. Strange*[275] which remain. As to *Jackson*, Gunther again fails to explain the method by which the Court is to analyze the means-end relationship. It is said that "legislative methods" are to be measured "against the ends defined by the legislature" and not constitutional principles,[276] but there is no clue as to how the measuring should be done. Finally, *Strange* is said to be "illustrative of the cases in which the intensity of scrutiny most clearly conformed to the model."[277] In *Strange*, however, wherein the Court invalidated a recoupment statute which stripped indigent criminal defendants who had been represented by state compensated attorneys of much of the protection against excessive garnishment afforded other judgment debtors, the decision was said to rest upon the lack of an "articulated state ground for the difference . . . ."[278] The Court's refusal in this case to supply one on its own is surely an example of the shift in the burden of coming forward and explaining the basis for treating the members of the class differently from all others.[279] At the same time, however, the decision does not enlighten us as to the use of "intensified means scrutiny" when there is, as there will be in most cases, some articulated reason for the difference in the treatment. If one takes the approach Gunther used in his analysis of *Reed* and applies it to *Strange*, the reasoning would be as follows: if the statutory purpose was to assure that the state was reimbursed by criminal defendants who were capable of making such repayment, then there was definitely a rational relationship between the burdensome repayment requirements (the means) and the legislative end. If, however, one concentrates on the classification rather than the method, the issue becomes why criminal defendants are to be treated differently from other judgment debtors, and the reasonableness of the classification in light of the burden becomes difficult to demonstrate.

Gunther's emphasis on legislative "means," rather than on similar treatment for those similarly situated, apparently derives from a desire to see the Court use the equal protection clause as an effective check on legislation without at the same time having to render an overabundance of decisions based upon " 'constitutional' interests drawn from the value perceptions of the Justices."[280] Understandably, both the Court and Gunther would like to formulate the new equal protection test so as to avoid the appearance of having resurrected substantive due process. As a result, both seem to have overstated the judicial restraint elements of the new approach. Gunther, for example, in describing

271. Gunther 27-28.
272. 405 U.S. 504 (1972).
273. Gunther 30-32.
274. 406 U.S. 715 (1972).
275. 407 U.S. 128 (1972).
276. Gunther 28.
277. Id. at 33.
278. Id. at 28, 33.
279. See text accompanying notes 177-85 supra.
280. Gunther 21.

the decisional process of *Jackson v. Indiana*[281] as one in which the Court measured "the legislative methods against the ends defined by the legislature, not in terms of constitutionally compelled limits on legislative purposes,"[282] sounds surprisingly reminiscent of Justice Roberts' 1935 pronouncement in *United States v. Butler*[283] that the Court "has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[284]

As for the Court, while the equal protection decisions of the 1971 term did successfully avoid resting upon "ultimate" constitutional interests,[285] they did not and could not avoid the sometimes less than ultimate but never less than real value perceptions of the Justices themselves. Whether the issue was the importance of bail reform,[286] the burden of indefinite commitment in a mental institution,[287] or the role of the Court in reviewing distributive social welfare programs,[288] the decisions rested, in Professor Frankfurter's phrase, upon the "controlling conceptions" of the Justices.[289] To describe the new equal protection approach in a manner which suggests that its application is neutral and valueless is to ignore its reality in an attempt to objectify the work of the Court.

At the same time, it is true that "reasonableness" was the basic criterion of substantive due process, and it cannot be denied that there is more than a surface similarity between the reasonableness of impact test and substantive due process.[290] To admit this, however, neither negates the reality of its existence nor voids its utility. In contrast to the manner in which substantive due process was used to strike down economic regulations in the late nineteenth and early twentieth centuries, the equal protection approach described above should not lead to decisions based upon "inarticulate major premises."[291] Reasonableness of impact as a method for determining permissible degrees of under and over-inclusion, as well as which party must bear the burden of proof, is a tentative operational description of the manner in which equal protection decisions are in fact reached. As such, its use will require the Justices to admit that they

281. 406 U.S. 715 (1972); see text accompanying notes 186-91 supra.

282. Gunther 28.

283. 297 U.S. 1 (1936).

284. Id. at 62.

285. Gunther 28.

286. Schilb v. Kuebel, 404 U.S. 357 (1971); see text accompanying notes 200-09 supra.

287. Jackson v. Indiana, 406 U.S. 715 (1972); see text accompanying notes 186-91 supra.

288. Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); see text accompanying notes 215-29 supra.

289. Frankfurter, supra note 1, at 914.

290. In Lawton v. Steele, 152 U.S. 133 (1894), the Court said that due process required that the legislative means be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Id. at 137. See also Chicago, B. & Q.R.R. v. McGuire, 219 U.S. 549 (1911).

291. See Kales, "Due Process," The Inarticulate Major Premise and the Adamson Act, 26 Yale L.J. 519 (1917). In his dissent in Lochner v. New York, 198 U.S. 45 (1905), Mr. Justice Holmes said that due process decisions "depend on a judgment or intuition more subtle than any articulate major premise." Id. at 76.

are considering the importance of legislative ends and to justify their opinions in these terms. As Thomas Reed Powell has said:

> Man is a rhetorical animal. But his rhetoric he uses to market his notions, not to make them. So it is the factory and not the salesroom that I invite you to explore. It is to the logic behind the rhetoric of constitutional law that I wish to direct your attention.[292]

292. Powell, The Logic and Rhetoric of Constitutional Law, 15 J. of Philosophy, Psychology & Scientific Method 654 (1918), in Essays in Constitutional Law 85, 87 (R. McCloskey ed. 1957).