STANDARDS OF JUDICIAL REVIEW UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES*

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This Article reviews some of the Supreme Court's recent decisions concerning individual constitutional rights.[1] It focuses specifically on the "standards of review" which the Court has used in applying the due process and equal protection clauses.[2] Before reviewing the various standards which the

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The paper was designed to give the German participants a basic understanding of constitutional adjudication under the due process and equal protection clauses in the United States. Although portions of the paper will be common knowledge to American readers, the paper is being published in the United States with the hope that an overview will be of interest here, perhaps especially to law students struggling with their first course in constitutional law.

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1. Throughout this Article, "constitution" refers only to the Federal Constitution. It is important to note, however, that each state also has a constitution and that most of these state constitutions also guarantee important individual rights. The state constitutions are subject to interpretation by state courts. Even though the state constitutional provisions are cast in language very similar to that of the Federal Constitution, state courts may interpret state constitutional provisions differently than the United States Supreme Court interprets the provisions of the Federal Constitution. The result is that the citizens of a particular state may have more but not fewer "constitutional" rights than those guaranteed by the Federal Constitution. In recent years, state courts whose decisions reflect the tradition of the Warren Court rather than the tradition of the Burger Court have turned to the state constitutions as the sources of their decisions invalidating government action. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

2. In applying other constitutional provisions, the Court has developed standards similar to those it has developed in due process and equal protection litigation. For example, the Court has often used a "balancing" standard to determine whether legislation or other government action that restricts speech or association violates the first amendment. *See, e.g.*, Barenblatt v. United States, 360 U.S.109 (1959).

Court has developed, the Article identifies the nature and source of the restraints which courts have said that the Federal Constitution imposes.

I. RESTRAINTS IMPOSED BY THE FEDERAL CONSTITUTION

The Federal Constitution imposes restraints on government or "state" action, as opposed to purely private activity.[3] First, the Constitution is said to prohibit government (or particular governmental units) from pursuing certain goals, commonly called "illegitimate" goals.[4] Second, the Constitution prohibits government from pursuing or achieving legitimate goals by imposing certain costs.[5] Government action may therefore be unconstitutional on one of at least three grounds: first, it may advance only illegitimate goals; second, it may advance both legitimate and illegitimate goals; and third, it may advance legitimate goals but impose unacceptable costs on individual interests.

To illustrate, the first amendment probably makes clear that government may not seek to prohibit honest, good-faith criticism of government policy during peacetime.[6] In other words, that prohibition is a goal or objective which government may not pursue. If such an objective were the *only* one which the government advanced in support of a particular regulation or which a court could determine was served by a particular regulation, the regulation would be unconstitutional. But a regulation which furthers illegitimate goals could also further legitimate goals. For example, a regulation banning the distribution of handbills on public streets could serve to reduce honest, good-faith criticism of government, but it could also promote clean public streets, an admittedly legitimate governmental objective. A court might nevertheless find the ban on handbills unconstitutional, holding that the government must pursue legitimate goals in ways which do not

3. Review of the state action doctrine, which holds that the requirements of the due process and equal protection clauses apply only to actions of the "state" and not to those of "private" individuals or associations, is beyond the scope of this Article. For a collection of relevant cases and citations to scholarly commentary about the state action concept, consult G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 906-61 (9th ed. 1975).

4. In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall explained that "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land." *Id.* at 423.

5. These are typically costs imposed on individual interests which the Constitution is said to protect, such as speech, association, travel, and, of late, privacy. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (burdens on pregnant woman's "privacy" interest in terminating her pregnancy are excessive unless necessary to promote a compelling state interest); West Virginia School Bd. v. Barnette, 319 U.S. 624 (1943) (burdens on speech, press, assembly, and worship are excessive unless they prevent grave and immediate danger to state interests).

6. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

allow government to pursue illegitimate goals simultaneously.[7] On the other hand, if a court were for some reason unwilling to say that the ban on handbills advanced illegitimate goals, it might rule that the costs to individual interests in self-expression and communication imposed by the ban on handbills were inappropriate—either because such costs may never be imposed or because they are "excessive" in light of the gains to the government's legitimate goals.[8]

Goal characterization obviously plays an important part in constitutional adjudication. A court would no doubt be more inclined to invalidate the handbill legislation if it found that reducing speech opportunities was an objective of the legislation than if it found that the sole objective was maintaining clean streets. Although characterizing the goals of government action is an essential element of constitutional adjudication, the process of goal characterization is poorly understood. The courts seem to look to two kinds of evidence in characterizing goals. First, courts infer goals or objectives from the impacts or effects of the government action.[9] In other words, they deduce goals from the necessary results of the government's activity. Second, courts look to the terms of the legislation and the history of its enactment for evidence of the legislative objectives.[10]

Often these two sources will provide complementary and consistent evidence. For example, both the legislative history and the impact of the handbill legislation may provide evidence that maintaining clean streets was an objective of the enactment. On the other hand, the sources may provide different or even inconsistent evidence of objectives. For example, the legislative history may contain explicit denials that curtailment of speech was an objective of the handbill legislation while the impact of the legislation—a substantial reduction in an effective means of communication by

7. In discussing a regulation prohibiting persons from knocking on the door or ringing the bell of a residence to deliver a handbill, the Supreme Court has noted that because the legitimate goals of protecting householders from annoyance, invasion of privacy, and crime "can so easily be controlled by traditional legal methods . . . stringent prohibition [of handbill distribution] can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." Martin v. Struthers, 319 U.S. 141, 147 (1943).

8. The Supreme Court took the "excessive cost" approach in Schneider v. Town of Irvington, 308 U.S. 147 (1939), a decision invalidating a ban on leaflet distribution. The Court noted that the valid objectives of preventing fraud, littering, or disorder could be achieved in a way less restrictive of communication: fraud, littering, and disorderly conduct could be punished directly. *Id.* at 162.

9. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (enactment of statute changing city boundaries from a square to a 28-sided figure and removing almost all of the city's Negro voters would lead to the irresistible conclusion that the legislation was solely concerned with segregating white and black voters so as to deprive Negro citizens of the municipal vote).

10. *See, e.g.*, Village of Arlington Heights v.Metropolitan Housing Dev. Corp., 97 S.Ct. 555 (1977); Epperson v. Arkansas, 393 U.S. 97 (1968).

or to an identifiable segment of the community—produces evidence to the contrary.

These conflicts present some of the most difficult issues in constitutional adjudication. One of the most perplexing is whether legislation which is invalidated because it furthers an illegitimate objective can be reenacted. For example, if the handbill legislation were invalidated because a court found it had the objective of diminishing speech, could the very same statute be reenacted if that objective were "eliminated"? Although the issue is quite complex, the answer would seem to be that the possibility of reenactment depends in part on the source of the court's determination that an illicit objective was being furthered. If the court has inferred the objective from the impact of the legislation (essentially doing what courts do in holding that an actor "intends" those consequences of his acts which are "substantially certain" to occur), the legislation could not be reenacted. Since the necessary consequences of the legislative action were the basis for the court's determination that an illegitimate goal was being pursued, legislative reenactment accompanied by denials that the illegitimate goal was in fact an objective of the legislation would be ineffective.

On the other hand, if the objective were determined from legislative history, reenactment might be possible. Assume, for example, that a test used to determine eligibility for employment as a policeman is attacked on the ground that an objective of the test is to preclude members of racial minorities from gaining jobs as policemen. Assume the test does in fact have a disproportionate impact on a racial minority: the percentage of black applicants who pass the test is far less than the percentage of white applicants who pass. The disproportionate impact of the test alone is not sufficient to warrant the court to characterize racial exclusion as a goal of the test.[11] But suppose the legislative history shows additional evidence of the test's objective—evidence such as indiscreet statements of members of the police commission that adopted the test—which shows a discriminatory motivation, and this additional evidence is sufficient to support the court in characterizing racial exclusion as an objective of the test. The test is therefore invalidated. A police commission composed of new members who were not involved in the first decision to use the test might well be able to reimpose the test.[12]

11. Washington v. Davis, 426 U.S. 229 (1976).

12. If the membership on the police commission had *not* changed, a court would probably be quite reluctant to find credible denials of racial motivation upon reenactment.

Some of these problems are explored in detail in Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation In Constitutional Law*, 79 YALE L.J. 1205 (1970).

Controversy has long existed whether the judiciary can look to "principles of natural justice," "notions implicit in the concept of ordered liberty," or some similar conception of natural law as a source for determining which goals are illegitimate and which costs are excessive or otherwise forbidden.[13] While the controversy continues today, the Supreme Court has generally preferred *to start* with the text of the Constitution and the history of its adoption. When these sources are adequate to sustain a constitutional challenge, they will usually be the only sources which the Court discusses. It is accurate to say, however, that the justices have consulted notions of "democracy," a "free society," and "fundamental liberty"—notions which the constitutional text and history do not mandate as restraints on government action—in invalidating government action under both the due process and equal protection clauses.[14]

II. STANDARDS OF REVIEW UNDER THE EQUAL PROTECTION CLAUSE

The fourteenth amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[15] The Supreme Court has held that the requirements of "equal treatment" imposed on the states by the fourteenth amendment are also imposed on the federal government by the due process clause of the fifth amendment.[16] Thus, all units of government are bound by the constitutional command not to deprive persons within their jurisdictions of the "equal protection" of the laws.

A. SUSPECT CLASSIFICATIONS

The legislative and social history of the fourteenth amendment led the Supreme Court to conclude that the equal protection clause makes certain objectives illegitimate. Basically, the Court interpreted the clause as prohibiting government from disadvantaging persons who belong to racial minorities because of their racial status. Thus, in *Strauder v. West Virginia*,[17] the Court said that government could no longer seek to subjugate one race to another, a goal that southern states had been pursuing.[18] The

13. The debate dates at least from Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). *See also* Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1-2), 42 HARV. L. REV. 149, 365 (1928-1929).

14. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Lochner v. New York, 198 U.S. 45 (1905); *see* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

15. U.S. CONST. amend. XIV, § 1.

16. Bolling v. Sharp, 347 U.S. 497 (1954).

17. 100 U.S. 303 (1880).

18. The Court noted that the equal protection clause meant that "no discrimination shall be made against [members of the colored race] because of their color," *id.* at 307, and that the

Civil War had been fought in part over the power of government to accomplish such a goal, and through the equal protection clause the victors prohibited state governments from continuing to pursue this goal.

If this were all that the equal protection clause had accomplished, courts would still have had much to do in applying its guarantee. Cases like *Strauder* involved laws which by their terms disadvantaged blacks. But governments intent on circumventing the new prohibition could pursue the illegitimate goal in more subtle ways, such as by drafting legislation which in its terms is race-neutral, but which nevertheless has a disproportionately negative impact on racial minorities, and by administering otherwise race-neutral laws so as to disadvantage racial minorities. In fact, both problems have confronted the Court,[19] and it has struggled to formulate a coherent approach to them. In essence, the Court seems to have held that proof of the disproportionate impact of a race-neutral law must be considered evidence that the law makes a racial classification, but that disproportionate impact alone is not—except in the most extreme cases—conclusive evidence that the law makes such a classification. Other evidence of the legislature's intent or purpose to effect a racial classification must be considered.[20]

Racial classifications are not, according to the Court's doctrine, per se illegal. Instead, such laws must be subjected to the most rigorous judicial scrutiny. Laws which classify on the basis of race (whether in their terms or by inference from their disproportionate impact) are said to make "suspect classifications" which can stand only if they are "necessary to promote a compelling state interest."[21] This "compelling state interest" test is commonly considered the most difficult standard of review for a law to satisfy, and with few exceptions laws usually are invalidated under it.[22] Although

amendment created the right to an "exemption from legal discriminations implying inferiority in civil society, lessening the security of [Negroes'] enjoyment of their rights which others enjoy and discrimination which are steps towards reducing them to the condition of a subject race," *id.* at 308.

19. Jefferson v. Hackney, 406 U.S. 535 (1972) (differential impact); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discriminatory administration).

20. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S. Ct. 555 (1977); Washington v. Davis, 426 U.S. 229 (1976).

21. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944).

22. In the racial context, application of the test has resulted in validation of the government's action only twice. Korematsu v. United States, 323 U.S. 214 (1944) (exclusion of all persons of Japanese ancestry from West Coast "military areas" during World War II); Hirabayashi v. United States, 320 U.S. 81 (1943)(curfew for American citizens of Japanese ancestry). Whether the compelling state interest test should be applied to classifications based on race which seek to benefit racial minorities and, if so, whether application of the test should result in a similar pattern of invalidation is far from clear. *See* G. GUNTHER, *supra* note 3, at 744-53.

the Court has not fully elaborated the test, it seems to have two elements: first, the classification must be necessary (*i.e.*, other classifications will not "reasonably" accomplish the same legitimate goals); and second, the goals must be not merely legitimate but "compelling" (*i.e.*, very important).

When a suspect classification is identified, the Court has, as the phrase indicates, become "suspicious" that the government is attempting to achieve the illegitimate goal proscribed by the fourteenth amendment. To overcome this suspicion, the Court requires what is in effect a showing that racial disadvantage is not a significant goal of the legislation, but is, at most, an unfortunately inescapable side effect of crucially important government activity.

Over the years the Court has found a few other classifications to be "suspect" and has thereby added to the list of goals which the equal protection clause makes illegitimate. Two of these classifications, those based on national ancestry and ethnic origin,[23] seem closely tied to racial classifications. But the other, alienage,[24] must fairly be said to rest on a judicially created notion that aliens may not be disadvantaged because of their status as noncitizens. In light of the constitutional provisions which specify citizenship as a requirement for eligibility,[25] it is difficult to say that the text and history of the Constitution require that classifications based on citizenship be treated as suspect.

B. FUNDAMENTAL INTERESTS

Primarily during the Warren Court years, the Supreme Court developed another reason for employing "strict scrutiny" under the equal protection clause: strict scrutiny was necessary, the Court said, when the legislative classification affected a "fundamental interest." For example, in *Harper v. Virginia Board of Elections*,[26] the Court invalidated a statute imposing a poll tax as a condition to voting in a state election, noting that although the right to vote in state elections was not guaranteed by the Constitution, the "right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights,"[27] and "that where fundamental

23. As early as in Strauder v. West Virginia, 100 U.S. 303, 308 (1880), the Supreme Court noted that a clear violation of the equal protection clause would occur "if a law should be passed excluding all naturalized Celtic Irishmen" from jury service.

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

25. *E.g.*, U.S. CONST. art. II, § 1 ("No person except a natural born Citizen or a Citizen of the United States, . . . shall be eligible to the Office of President."); *id.* art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *id.* amend. XV ("The right of citizens of the United States to vote . . . .").

26. 383 U.S. 663 (1966).

27. *Id.* at 667.

rights and liberties are asserted under the equal protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."[28] Similarly, the Court has said that although there may be no constitutional right to appeal a criminal conviction, classifications which affect access to appellate review in criminal cases will also receive strict scrutiny.[29]

The development of a "fundamental interest" branch of strict scrutiny drew heavy criticism. In *Shapiro v. Thompson*,[30] for example, the Court held unconstitutional a one-year durational residency requirement for eligibility for welfare payments. Strict scrutiny of the classification was necessary, the Court said, because the classification penalized those who had exercised their constitutional right of interstate travel. Justice Harlan, however, presented a comprehensive statement of his objections to the doctrine in his dissent. Justice Harlan argued that development of the fundamental interest branch of equal protection analysis was either superfluous or, worse, judicial overreaching.[31] It was superfluous because to the extent that it provided strict scrutiny for imposition of burdens on interests—like the right of travel—which are protected by the Constitution, the test simply duplicated the strict scrutiny which the protection of those interests already required. If the first amendment requires that limitations on speech can stand only if they are "necessary to promote a compelling state interest," then nothing is added by saying that a classification which affects an individual's interest in speech must receive special scrutiny under the equal protection clause. The test constituted judicial overreaching to the extent that it provided for strict scrutiny even though the classification burdened no individual interests specifically protected by the Constitution. In Harlan's view, the equal protection clause mandated strict scrutiny only when racial classifications were involved; the Court had no justification "to pick out particular human activities, characterize them as 'fundamental' and give them added protection under an unusually stringent equal protection test."[32]

Those who approved of an activist judiciary applauded the development of the fundamental interest branch and urged that other interests, such as the satisfaction of "minimum physical wants" and access to education, should also be deemed "fundamental."[33] Those who, like Justice Harlan,

28. *Id.* at 670.
29. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).
30. 394 U.S. 618 (1969).
31. *Id.* at 655-77 (Harlan, J., dissenting).
32. *Id.* at 662.
33. *See, e.g.*, Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"*

thought that the Court should remain more faithful to constitutional text and history naturally disapproved of the doctrine, and some feared that the Court had embarked on a path toward "constitutionalizing" large areas of public policy.[34]

In fact, the Warren Court's list of "fundamental interests" which are not otherwise protected by the Constitution was quite short: voting in state and local elections[35] and access to appeals in criminal cases.[36] The ultimate result of "strict scrutiny" in these areas has been significant, however. For example, the Court has ruled that the equal protection clause requires states to pursue one policy in distributing the franchise in general elections: one man, one vote.[37]

The Burger Court has neither deleted interests from nor added interests to this short list. The Court has in fact indicated that the creation of new fundamental interests under the equal protection clause may have ended. In *San Antonio Independent School District v. Rodriguez*,[38] the Court refused to treat access to education as a fundamental interest. Fundamental interests, the Court said, are only those interests which some provision of the Constitution gives special protection.[39] Although the Court's opinion in *Rodriguez* is not satisfying in its attempt to demonstrate that the Court has never recognized interests which did not receive protection from another constitutional provision as "fundamental interests,"[40] it indicates that the present Court does not intend to expand strict scrutiny under the equal protection clause to provide special protection to interests not otherwise protected by constitutional provision. This is not to say, however, that the Burger Court will not grant special judicial protection to interests not formerly entitled to

16 U.C.L.A. L. REV. 716 (1969); Michelman, *The Supreme Court—1968 Term, Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

34. *E.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 51.

35. *E.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

36. *E.g.*, Douglas v. California, 372 U.S. 353 (1963).

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

38. 411 U.S. 1 (1973).

39. *Id.* at 33.

40. In attempting to distinguish the cases requiring strict scrutiny for regulations affecting access to the franchise, the Court stated that "a citizen has a *constitutionally protected right* to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.* at 34 n.74 (quoting Dunn v. Blumstein, 405 U.S. 330, 335 (1972)(emphasis in *Rodriguez*)). Even though the right to vote in state elections is not expressly mentioned in the Constitution, the Court explained that the "constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted." *Id.* The Court failed to discuss the source of the "constitutional underpinnings."

such protection, for it has done so under due process analysis, most notably in its famous abortion decision, *Roe v. Wade*.[41]

C. THE RATIONAL BASIS STANDARD

The Supreme Court has made one other significant use of the equal protection clause. According to the Court, the clause requires that legislative classifications must bear a "rational relation" to a legitimate government goal.[42] In other words, the equal protection clause protects persons from being burdened by classifications which are "arbitrary" because they fail to advance any legitimate goal. All legislative classifications, regardless of the distinctions which they employ and the interests which they affect, must pass this "minimum rationality" test to withstand constitutional challenge.

The Warren Court had thus constructed what has become known as a "two-tiered" analysis under the equal protection clause. If one of the factors triggering strict scrutiny was present, the compelling state interest test was applied; if not, the rational basis test was applied. But the Warren Court's announcement of which test was to be applied was tantamount to an announcement of the constitutionality of the legislation. Application of the rational basis test almost invariably led to approval of the legislation, while application of the strict scrutiny analysis as often led to its invalidation. Commentators complained that the two standards were not "tests" at all, but rather were cumbersome ways of stating that classifications based on race or other suspect classifications and those burdening certain interests were invalid, while all other classifications were valid.[43] This may indeed have been an accurate criticism of the Warren Court's use of the two standards, but the Burger Court's cases cannot be so easily understood. First, the Court has purported to use the rational basis test to *invalidate* legislation[44] and, second, it has recently announced what seems to be a third test to apply under the equal protection clause: whether the challenged classification is "substantially related" to the achievement of "important governmental objectives."[45]

Both these developments probably stem from dissatisfaction with the two-tiered approach that the Warren Court developed. But the new analyses are also subject to question. First, the Court's use of the rational basis test to

41. *See* notes 100-06 and accompanying text *infra*.

42. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

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

44. *E.g.*, Reed v. Reed, 404 U.S. 71 (1971).

45. Craig v. Boren, 97 S. Ct. 451 (1976). *See* text accompanying notes 57-68 *infra*.

invalidate legislation has raised substantial doubts whether the test, if honestly applied as the Court has phrased it, can result in the invalidation of a legislative classification.[46] Second, the new "substantially related to an important governmental objective" standard seems to involve the judiciary in giving special protection to new interests just as the expansion of fundamental interests and suspect classifications did. These two developments will be considered in turn.

The rational basis standard requires that legislative classifications make distinctions which serve legitimate legislative goals or interests. For example, suppose that a legislature requires owners of some trucks to install a new braking system but exempts owners of other trucks.[47] Can those who have been requested to install the brakes complain that they have been "arbitrarily" singled out for regulation? Their success in doing so will depend on two factors: first, the differences between those regulated and those exempted; and second, the goals of the regulation which the court recognizes. Assume that installation of the braking system ensures that trucks traveling at a particular speed will be able to stop within a certain distance. Assume further that the goal of requiring the installation is to promote traffic safety. The distinction would be rational if the trucks excluded could already stop in the desired distance and those included could not. Indeed, owners of trucks which could already stop in that distance could probably claim successfully that their inclusion would be irrational under the due process clause. The distinction would also be rational if installation on the excluded trucks costs more than on those included, or if those excluded were smaller and lighter and thus might cause less damage if they were unable to stop in the desired distance. All these distinctions would be rationally related to furthering the goal of traffic safety: the excluded trucks either pose less of a risk to traffic safety or the cost of achieving their contribution to traffic safety is higher than that of achieving the contribution of those included.

But what if all blue trucks were excluded, or more likely, if all trucks owned by farmers and used in transporting agricultural goods were excluded?[48] If there were no showing that the color of the truck or its ownership and use by a farmer had some relationship to the risk which the

46. *See, e.g.*, Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

47. The illustration is drawn from Ely, *supra* note 12, at 1237-39. For further discussion and elaboration, see P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 558-65 (1975).

48. The Supreme Court was once confronted with a similar case. Smith v. Cahoon, 283 U.S. 553 (1931) (no rational basis for distinction between common carriers and carriers of agricultural products in state statute requiring certification, posting of security, and payment of mileage tax).

truck poses or to the relative cost of making the vehicles safer, can the classification be declared rational? If traffic safety were the only goal of the legislation, it could not. But legislation often—if not usually—serves multiple goals. Thus, legislation requiring brakes on all but blue trucks is rationally related to the twin goals of increasing traffic safety and encouraging the use of a color found aesthetically pleasing, and legislation exempting trucks owned by farmers is rationally related to increasing both traffic safety and agricultural output.[49] Some have argued that the rational basis test can never result in the invalidation of legislation because the very classification itself will always suggest a mix of goals to which the classification is rationally related.[50]

Critics of the rational basis test have been bolstered by the Supreme Court's decisions invalidating legislation on rational basis grounds. Many of these cases either ignore goals which are readily inferable from the legislative classification or treat the goals separately, asking whether the classification is rationally related to each goal separately rather than whether it is rationally related to a mix of inferable goals.[51] The Court's application of the rational basis test has led some to conclude that when it "uses" the test to invalidate legislation, the Court is invariably deciding sub silentio that some of the goals inferable from the classification itself are constitutionally illegitimate or determining that the costs imposed are excessive. They urge that the Court should candidly explicate which goals are illegitimate or explicitly recognize that it is engaged in a balancing analysis, rather than pretending that it is "merely" testing the rationality of the classification without passing on the legitimacy of the legislature's goals or assessing the appropriateness of the costs imposed.[52]

But others have suggested that an analytically distinct test can be used to invalidate legislation if the legislature's goals are characterized in some fashion other than by inference from the classification itself. First, it has been suggested that some goals simply cannot be advanced in certain contexts. For example, although subsidy to particular industries is a legitimate government action, it cannot be achieved through traffic regulations.[53]

49. In order for the Court to reach the result it did in *Smith v. Cahoon*, it "completely ignored a plausible objective of the . . . regulation." P. BREST, *supra* note 47, at 561.

50. *See* materials cited in note 46 *supra*.

51. The classic example is Eisenstadt v. Baird, 405 U.S. 438 (1972).

52. *See, e.g.*, Linde, *supra* note 46.

53. In commenting on the Supreme Court's refusal to recognize an obvious goal of the legislation struck down in *Smith v. Cahoon*, Professor Ely explains:

> [T]he Court apparently is applying a sort of "consensus" theory, asking not what motivation underlay the specific distinction in question, but rather what such laws are generally concerned with, what most legislators intend to accomplish by most such laws considered in their entirety. Where a law has generally to do with traffic safety,

Thus, an increase in agricultural output could not be a goal of a traffic statute exempting the trucks of farmers. Unless there were some showing that farmers' trucks contributed less traffic risk or that reduction of their risk was relatively more costly, their exemption would be irrational.

Second, it has been suggested that rather than gleaning legislative goals simply from the classifications made, courts could seek to determine the actual goals of the legislature through study of legislative history and other evidence surrounding the enactment of the legislation or from some other "official" statement of purpose.[54] While the goals inferable from the classifications would be candidates for characterization as the actual goals of the legislation, courts might conclude that these were not the goals the legislature in fact sought to further. For example, the legislative history might disclose that the legislature believed that farmers' vehicles were not usually operated on the public roadways and therefore that they created far less risk of harm. If so, the Court would not consider subsidy of farmers or increased agricultural output as goals of the legislation. If through time the farmers increased the use of their trucks on public roadways to substantially the same level as that of other trucks, their exemption could become irrational.

Both these ways of limiting the range of objectives which are considered the goals of the legislation are subject to criticism. First, the constitutional justification for a limitation on the range of objectives that can be pursued in a given regulatory context is difficult to discern.[55] Indeed, there is a very long history of legislatures' using regulatory legislation as well as revenue laws to accomplish multiple objectives. And the political compromises which are inherent in the legislative process seem to ensure that legislation will continue to serve multiple objectives. Moreover, the political "horse trading" which characterizes the legislative process is generally thought to be a positive feature of that process—a process in which pragmatic *compromise* is encouraged.[56]

> the Court is saying, classifications must—regardless of the motivation underlying the specific classification in issue—be justifiable in terms of traffic safety . . . . A subsidy program or a tax code may constitute an appropriate vehicle for legislative promotion of whatever activity is deemed to advance the general welfare, but a motor vehicle code does not.

Ely, *supra* note 12, at 1226.

54. According to Professor Gunther, a workable test requires that:

> the Court assess the rationality of the means in terms of the *state's* purposes . . . . It does not, however, call for a delving into actual legislative motivation . . . . Nor, at the other extreme, would the only judicially cognizable purpose be one explicitly set forth in a statutory preamble or the legislative history. A state court's or attorney general office's description of purpose should be acceptable.

Gunther, *supra* note 43, at 46-47 (emphasis in original).

55. *See* P. BREST, *supra* note 47, at 562-63.

56. Some have suggested, however, that the equal protection clause should be understood to protect against classifications which can be justified only in terms of political expe-

Second, the determination of the "actual" goals of the classification seems most difficult. Much legislation is passed without the recordation of any legislative history. Even when legislative history is recorded, it is often ambiguous. There probably will be few instances in which the legislative history will show that none of the goals which are inferable from the legislation and which are furthered by its enforcement are among the actual goals. This seems especially true if the attorney general's characterization of goals in the course of the lawsuit must be accepted by the court.

All this is not to say, however, that a rational basis test is always logically indistinguishable from analyses which either invalidate government goals or determine that the goals served are not "important" enough to justify the costs imposed. An analytically distinguishable rational basis test is possible if the legislative goals are not simply inferred from the legislative classification, as the example of the exemption of farmers' trucks in a traffic ordinance illustrates.[57] But the problems of goal characterization in rationality analysis are formidable, and if the rational basis test is to be considered a meaningful, independent standard of review, the Court will have to give far more attention to the process of goal characterization than it has in the past.

D. THE *CRAIG* CASE: EVOLUTION OF A NEW STANDARD OF REVIEW?

The Court may have recognized some of the difficulties of using the rational basis test to invalidate legislation, for it has apparently decided to articulate a third equal protection standard of review—one which is clearly capable of supporting a judgment of unconstitutionality. The new standard appears to impose less judicial supervision of legislative choices than does the compelling state interest test. First, rather than asking whether the classification is "necessary" to promote a governmental interest, the new standard inquires whether it is "substantially related" to promoting that interest. Thus, the Court may not inquire into reasonable alternatives under the new standard to

diency. It is constitutionally inadequate, in other words, to justify an exemption of farmers on the ground that if they had not been exempted they would have blocked the legislation and no safety legislation whatsoever would have been enacted. *See, e.g.*, Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

57. As the number of goals which the decisionmaker can lawfully pursue decreases, the utility of rationality analysis increases. Rationality analysis is therefore clearly useful when the decisionmaker's goals are limited by statute, as is often the case with administrative agencies. For a recent example of the use of rationality analysis to invalidate the decision of a federal agency, see Hampton v. Mow Sun Wong, 426 U.S. 89 (1976). In that case, the Civil Service Commission had excluded most aliens from federal government employment. The Court found that the only goal which the Civil Service Commission could pursue is the efficiency of the Civil Service, and it thus refused to determine whether the ban was rationally related to encouraging aliens to become citizens.

the same degree that it does in applying strict scrutiny. Second, the new standard asks whether the government's goals are "important objectives" rather than "compelling interests." Although the Court has not elaborated the differences between these two standards, it may be saying that governmental goals may be important without being so important as to be "compelling." The new standard seems to call for a balancing analysis, one which weighs the importance of governmental goals and the extent to which they are advanced against the burdens engendered by the classification.

The case which announced the new standard, *Craig v. Boren*,[58] involved a gender classification. The challenged Oklahoma statute prohibited sale of beer containing 3.2% alcohol to males less than 21 years old but allowed sales to females 18 years of age and older. The state sought to show that the classification was rational and hence constitutional because it promoted traffic safety. Males, the state argued, pose a greater risk to traffic safety than do females because males between 18 and 20 are more prone to be arrested for driving under the influence of alcohol and for drunkenness. The data the state produced for people in the 18-20 age group seemed impressive: in 1973, the state arrested 427 males for driving under the influence and 966 for drunkenness; during the same year, however, the state arrested only 24 females for driving under the influence and 102 for drunkenness.[59] The Court found the statistical evidence a "weak answer"[60] to the constitutional challenge, however. It noted that the statistics presented by the state meant that 2% of the males in the 18-20 age group had been arrested for driving under the influence, while only 0.18% of the females had been arrested.[61] While the Court found that these differences were not statistically "trivial," it also determined that a "correlation of 2% must be considered an unduly tenuous 'fit'"[62] for gender-based classifications. In short, the statistics did not show that treating males and females of this age group differently was "substantially related" to improving traffic safety.[63] Moreover, said the Court, proving broad sociological propositions (like "young males are more likely to be drunken drivers than are young women") is a dubious business, and one that inevitably is in tension with the *normative philosophy* that underlies the equal protection clause.[64]

58. 97 S. Ct. 451 (1976).
59. *Id.* at 458 n.8.
60. *Id.* at 459.
61. *Id.*
62. *Id.*
63. *Id.* at 460. The Court also noted that the data showed that males were even more involved in such arrests at later ages. *Id.* at 458 n.8.
64. *Id.* at 460.

The examples of the normative philosophy of the equal protection clause which the Court cited in a footnote are those which ban classifications based on race and ethnic origin.[65] The Court, therefore, implied that if these statistics could support legislative distinctions between male and female, they could also support racial classifications, such as would prohibit the sale of liquor to white youths because they have a somewhat higher incidence of heavy drinking than do black youths of the same age.

The addition of a normative philosophy concerning gender to equal protection analysis is not surprising. The author of the Court's opinion in *Craig*, Justice Brennan, had in an earlier case expressed the view that gender classifications were "suspect" and hence should trigger the compelling state interest test.[66] Although a majority of the Court did not agree with this position, cases involving gender classifications have nevertheless seemed to receive special scrutiny, though the Court has professed to be applying the rational basis test.[67] Prior to *Craig*, these cases seemed to stand for the proposition that classifications which *disadvantaged women* would be invalidated,[68] but *Craig* suggests a broader proposition.[69]

Whether the Court will apply this new standard to other classifications remains to be seen. Indeed, whether a new standard has been firmly established is difficult to assess from a single case, especially since the Court disposed of the case on the "substantial relation" ground and therefore did not have to address the "importance" of the government's goals. Justice Stewart, for example, concurred in the result and opined that the classification amounted to "total irrationality" and thus was presumably

65. *Id.* at 463 n.22.

66. Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion).

67. *E.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971)("whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statute]").

68. *See* Craig v. Boren, 97 S. Ct. 451, 457 (1976); *id.* at 467-69 (Rehnquist, J., dissenting). *See also* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (statute which allowed benefits to mothers but not fathers of minor children invalidated because it diminishes the financial security of female wage earners); Kahn v. Shevin, 416 U.S. 351 (1974)(property tax exemption for widows but not for widowers upheld).

69. Justice Rehnquist complained that there was no justification for specially scrutinizing classifications which disadvantaged young males: "There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts." Craig v. Boren, 97 S. Ct. 451, 468 (Rehnquist, J., dissenting). The pending Equal Rights Amendment to the Constitution is some evidence that a broad segment of American society believes that all gender classifications are morally suspect.

The Court's special treatment of all gender classifications, not just those which disadvantage women, may have some significance for the racial classification problem. If classifications which advantage women *vis-à-vis* men are subject to heightened review, perhaps classifications which advantage blacks *vis-à-vis* whites will receive the same treatment.

invalid under the rational basis test.[70] Justice Powell, while joining in the Court's opinion, stated that he did not welcome a new test, although he conceded that "our decision today will be viewed by some as a 'middle-tier' approach" and that "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address gender-based classification."[71]

The Court's articulation and application of this "middle-tier" approach should be contrasted with the standards proposed by two influential advocates of the abandonment of the two-tier approach. In a number of opinions, most notably in his dissent in *Rodriguez*,[72] Justice Marshall has argued for the application of a "spectrum of standards" involving variations in the degree of care with which the Court will scrutinize particular classifications. He has urged that the degree of scrutiny should depend on the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[73] Although Justice Marshall had agreed with the earlier view of Justice Brennan that gender was a suspect classification, he also joined in the *Craig* opinion without comment, perhaps indicating his view that the new standard is the appropriate one for gender classification. Marshall would no doubt support expansion of this flexible middle-tier to other situations, as his dissent in *Rodriguez* makes clear.

In a much-cited 1972 article,[74] Professor Gerald Gunther urged the Court to provide a middle approach in its use of the rational basis test—one which would ask whether the classification has a "substantial relationship to legislative purposes."[75] His proposed standard differs in two important respects from the traditional rational basis test. Like the Court's new standard, the classification would have to be "substantially related" to legislative purposes, thus imposing a stricter test than the "some relationship" standard of the deferential rational basis test. Second, it would "have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture."[76] But Professor Gunther argued that "a state court's or attorney general office's description of purpose should be acceptable" in determining the purposes of the legislation.[77] This has led some to question whether Gunther's limitation is very

70. *Id.* at 466 (Stewart, J., concurring).
71. *Id.* at 464, n.* (Powell, J., concurring).
72. 411 U.S. 1, 70 (1972)(Marshall, J., dissenting).
73. *Id.* at 99.
74. Gunther, *supra* note 43.
75. *Id.* at 20.
76. *Id.* at 21.
77. *Id.* at 47.

meaningful, since a competent attorney general can be expected to advance all plausible goals in seeking to sustain legislation.[78] Interestingly, in *Craig* the Court accepted the state's assertion that the purpose of the law was to promote traffic safety, even though it expressed doubt that this was the "true purpose."[79] Finding that the law was not substantially related to traffic safety, the Court in *Craig* left "for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, *post-hoc* rationalization."[80]

Professor Gunther emphasized that his standard would not inquire into the relative importance of the legislative goals. He sought to provide a test which did not involve comparing the *importance* of goals with the costs they impose, and he argued that his heightened scrutiny should be available in every case. In both these respects the newly articulated standard appears to reject his advice.

The Supreme Court may well have established, or be on its way to establishing, a three-tiered standard of review under the equal protection clause. Because of the difficulty of applying a rational basis analysis to invalidate legislation, the rational basis test may be largely reserved for instances in which the legislation is upheld. Of course, any "test" which always results in the same outcome cannot be considered a meaningful standard of review. The compelling state interest test may be maintained for those suspect classifications and fundamental interests which have already been said to trigger the strict scrutiny, with few, if any, new applications. The Court has already limited new applications; it has not only refused to extend "suspect" status to gender, but last Term, after several cases had seemed to indicate that classifications based on the legitimacy of a person's birth would be "suspect,"[81] it held that such classifications are not suspect.[82] Instead, the Court applied an unclear standard of review—but one which it explicitly said was "less than the strictest scrutiny"[83]—to legislation that distinguished between legitimate and illegitimate children.

78. "Why wouldn't counsel usually proffer all plausible legitimate objectives that might sustain a challenged law? (And if they would, what interests are served by shifting the locus of requisite imagination from the judge's chambers to the attorney general's office?)" P. BREST, *supra* note 47, at 1016.

79. 97 S. Ct. 451, 458 n.7 (1976).

80. *Id.*

81. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

82. Mathews v. Lucas, 427 U.S. 495 (1976).

83. *Id.* at 510.

Thus, the key to future adjudication may be whether the new intermediate test or the rational basis test will be applied. The situation would differ from the two-tiered formulation of the Warren Court because application of the new middle-tier standard of review might not always result in invalidation of the classification. The use of the new standard, like the expansion of the strict scrutiny test beyond racial classifications during the Warren Court years and the analytically indefensible use of the rational basis test during the early years of the Burger Court, will probably depend upon the Court's decision to recognize certain goals as no longer legitimate ends of government or to protect certain interests not otherwise granted special protection by the Constitution.

III. STANDARDS OF REVIEW UNDER THE DUE PROCESS CLAUSE

The Constitution contains two due process clauses—one in the fifth amendment and another in the fourteenth. The language of both clauses is virtually the same: persons may not be deprived "of life, liberty, or property without due process of law."[84] The fourteenth amendment clause was necessary for the guarantee of due process to bind the state governments, however, because the Supreme Court had held that the fifth amendment clause limited only the federal government.[85]

The clauses might be understood only as guarantees of fair procedures. While the Supreme Court has held that the clauses do guarantee that government must follow fair procedures in applying laws which deprive persons of life, liberty, or property, it has also given "substantive" content to the clauses. The Court has said, in effect, that the due process clauses guarantee that a person may be deprived of life, liberty, or property only if there is an "adequate justification" for doing so.

A. SUBSTANTIVE DUE PROCESS STANDARDS OF REVIEW

The first focus of concern will be the second meaning of the due process clause, commonly called "substantive due process." The central issue in substantive due process is determining what counts as an "adequate justification." The minimum protection view is that a deprivation is justified so long as it is accomplished pursuant to a validly enacted law. In other words, the clause is interpreted to mean that life, liberty, or property may not be taken other than according to a properly enacted law.[86] For example, a

84. *Compare* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law") *with id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law").

85. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

86. This interpretation adds little if any substantive content to the due process clauses. Rather than focusing on the procedures followed in applying the law to a particular case, the

person could not be deprived of property at the whim of a local policeman in disregard of his statutory authority because such action would not be pursuant to a regularly enacted law, but rather would be accomplished at the caprice of the policeman.

The Supreme Court has gone beyond this minimum protection in two respects. First, it has used the due process clause of the fourteenth amendment to "incorporate" substantive restraints on the federal government as restraints on the state governments.[87] The Court has said that it is not enough that a deprivation of liberty be accomplished pursuant to a properly enacted state law. The state law itself must not offend "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[88] Through the years, the Court has found the vast majority of the first eight amendments binding on the states.[89] Although there is controversy about whether "selective incorporation" of the provisions of the Bill of Rights as restraints on state governments was intended by the framers of the fourteenth amendment, the doctrine is well established.[90]

A further departure from the minimum protection position occurred when the Court used both due process clauses to impose restraints on *both state and federal* government action which could not be fairly inferred from the specific limitations of the Constitution. The Court's action was analogous to the expansions it later made in equal protection analysis, declaring goals to be illegitimate by creating new "suspect" classifications and decreeing that certain individual interests not fairly inferred from the constitutional text and history were entitled to special protection. The most famous example of the Court's use of the due process clause in this manner

interpretation seeks to ensure that the deprivation is made pursuant to a rule of law *which has been properly generated* by a lawmaking authority. In this respect it is quite like the interpretation given to the "law of the land" clauses in state constitutions. *See generally* E. CORWIN, LIBERTY AGAINST GOVERNMENT 90-95 (1948). Some who believe that the due process clauses should impose no substantive restraints on government accept this minimum role for the clauses. *See, e.g.*, Linde, *supra* note 46.

87. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 364 (1937)(first amendment rights).

88. Powell v. Alabama, 287 U.S. 45, 67 (1932). This requirement has been phrased differently, but its meaning has remained constant. *See* Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968). *See also* Benton v. Maryland, 395 U.S. 784, 794-95 (1969).

89. The Court's use of the due process clause to impose the guarantees of the first eight amendments on the states is in part a doctrinal accident. Soon after the enactment of the fourteenth amendment, the Court rejected the argument that the privileges and immunities clause of the fourteenth amendment ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .") accomplished the incorporation function. Slaughter House Cases, 8 U.S. (16 Wall.) 36 (1873). When pressure to impose federally defined guarantees of individual liberty on the states increased, the due process clause became the doctrinal vehicle for incorporation.

90. *See* Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

is *Lochner v. New York*,[91] which invalidated a New York statute that set a maximum number of hours which a baker could work. The Court held that the right to contract is part of the "liberty" protected by the fourteenth amendment.[92] While that liberty was subject to reasonable limitations, the restriction on the hours bakers might work was not justifiable. The Court applied what was essentially a form of strict scrutiny, finding an insufficient connection between the regulation of bakers' hours and the promotion of their health and finding further that regulation of hours could not be sustained as an alteration of the respective bargaining power of employers and employees. The Court intimated that an alteration in bargaining power would be an illegitimate goal of the statute: "the real object and purpose were simply to regulate the hours of labor between the master and his employés . . . . [T]he freedom of master and employés to contract with each other in relation to their employment . . . cannot be prohibited or interfered with, without violating the Federal Constitution."[93]

During the period that the Court openly engaged in substantive due process analysis, from approximately 1890 to 1935, it used the due process clause rather consistently to insist that legislative enactments "conform to the basic principles of a competitive market economy."[94] The decisions did what Justice Holmes in his dissent in *Lochner*[95] accused the Court of doing: they constitutionalized an economic creed which was "a blend of Herbert Spencer's social Darwinism and Adam Smith's free market economy."[96]

Under various well-known pressures,[97] the Court abandoned the constitutionalization of this creed in the mid-1930's, thus recognizing decisions of the legislatures to depart from free market economics as legitimate.[98] In doing so, the Court did not purport to say that the due process clause had no force when government sought to deprive persons of their liberty to contract. Instead, it announced the same test which came to be one of the "tiers" in the two-tiered equal protection analysis: interference with the liberty of contract or any other aspect of liberty not specifically protected by the Constitution must be rationally related to a legitimate goal of government.[99] The application of the rational basis test invariably resulted in

91. 198 U.S. 45 (1905).

92. *Id.* at 53, 64.

93. *Id.* at 64.

94. Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 N.C.L. REV. 1, 50 (1976).

95. 198 U.S. at 74-76.

96. Strong, *supra* note 94, at 51.

97. Among the pressures were an increasing divergence between the Court's view of economic liberty and the legislatures' view of regulation necessary to deal with the Depression, and President Roosevelt's plan to expand the membership of the Supreme Court.

98. *E.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

99. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).

validation of the legislation, just as it did until recently in equal protection analysis. Moreover, application of rationality analysis in due process litigation is subject to the same criticisms of rationality analysis in the equal protection context. Nevertheless, the Court has continued to assert that the due process clause guarantees that deprivation of life, liberty, or property can be accomplished only if the deprivation is rationally related to the service of a legitimate goal.

For 30 years following the demise of the *Lochner* line of cases, the Court refused to use the due process clause to invalidate goals or to give special protection to individual interests not protected by some other provision of the Constitution. During part of this period the expansion of fundamental interests and suspect classifications under the equal protection clause served to impart new restraints on government.

In recent years, however, the Court has returned to the due process clause as a source of new restraints, this time not to invalidate legislation that departs from free market economics, but rather to invalidate legislation that impinges on personal choice in matters relating to sex and family relationships. The trend began most clearly with *Griswold v. Connecticut*, a case invalidating a state statute banning the use of contraceptives by married persons.[100] The Court strived to show that an interest in marital privacy "emanated from the penumbras" of the specific limitations of the Bill of Rights and that this marital privacy could therefore receive special protection consistent with the Court's abandonment of active substantive due process review. Whatever the success of this "emanations" approach, the Court seemed to abandon it in *Roe v. Wade*.[101] The Court indicated that a pregnant woman has a specially protected "privacy" interest in determining whether she will bring her fetus to full term. Applying strict scrutiny to statutes affecting this interest, the Court held that the interest is immune from government regulation to a significant degree.

It has been said with some accuracy that these modern substantive due process cases incline toward constitutionalizing the philosophy of Mill,[102] just as the earlier decisions served to constitutionalize the philosophy and economics of Spencer and Smith. But the modern cases do not apply Mill's philosophy across the board. Thus, regulations that affect so-called "economic" interests have invariably been upheld, so long as they do not run afoul of specific constitutional limitations.[103]

100. 381 U.S. 479 (1965). The statute banned the use by "any person." *Id.* at 480.

101. 410 U.S. 113 (1973).

102. Strong, *supra* note 94, at 99-100.

103. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976), *overruling* Morey v. Doud, 354 U.S. 457 (1957).

It is far from clear just how far the Court is prepared to go in giving special protection to interests related to sexual activity. There has been substantial adverse reaction to *Roe v. Wade* from groups, such as the Roman Catholic Church, which favor laws prohibiting abortions, and from scholars who believe the Court was unjustified in constitutionalizing the issue.[104] The storm of criticism which *Roe* generated can be expected to have an impact on the Court's willingness to give special protection to additional interests in sexual privacy. Recently, for example, it summarily affirmed a lower court's refusal to declare unconstitutional a prohibition on sodomy in private between consenting adult males.[105]

B. Procedural Due Process Standards of Review

As mentioned above, the Court has interpreted the due process clauses to mean that a person is entitled to "fair procedures" whenever a "deprivation" of "liberty" or "property" occurs. The doctrine involves two major issues: first, whether the government's action constitutes a "deprivation" of "liberty" or "property";[106] and second, if so, whether under the circumstances the person has been afforded "fair opportunity to be heard" to challenge the legality of the deprivation. Although the second issue is not free of complexities, it is easier to explain.

The Court has applied a balancing test to determine the scope and timing of the hearing to which the person is entitled. For example, in *Goldberg v. Kelly*,[107] the Court held that welfare recipients are entitled to an evidentiary hearing before termination of their benefits. It weighed the welfare recipient's interest in receiving uninterrupted payments and the state's interest in assuring that eligible persons receive benefits against the state's interest in preventing an increase in its fiscal and administrative burdens. The government had urged that an administrative hearing after termination was sufficient, but the Court struck a different balance.[108] And, in *Goss v. Lopez*,[109] the Court held that public school students were entitled to a rather informal hearing prior to suspension from school.[110]

104. *See, e.g.*, Ely, *supra* note 14.

105. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975).

106. This "threshold" determination is theoretically also necessary in what remains of substantive due process. Nonetheless, the Court has given attention to the threshold inquiry primarily in cases involving asserted procedural due process rights.

107. 397 U.S. 254 (1970).

108. *Id.* at 260-66.

109. 419 U.S. 565 (1975).

110. Other cases require prior hearings in different contexts. Perry v. Sindermann, 408 U.S. 593 (1972) (termination of employment); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (garnishment of wages).

These cases arise when administrators and other enforcement officials apply otherwise valid rules. For example, in *Goldberg*, there was no question that welfare benefits could be terminated if the recipient no longer met the eligibility requirements; the issue was whether the welfare department could decide that a particular recipient was in fact no longer eligible without affording the recipient an opportunity to challenge the welfare department's determination prior to the termination. Similarly, while it is constitutional for a school principal to suspend a student for infractions of school rules, due process requires that the student have notice of the charges against him and an opportunity to respond to them prior to suspension.[111] These cases should be distinguished from deprivations of liberty or property that are accomplished overtly by legislative enactment. Such deprivations are deemed to comport with the requirements of procedural due process.[112] For example, someone who loses welfare benefits because the legislature changes the eligibility requirements will not be able to challenge the termination on procedural due process grounds by showing that neither he nor anyone else was given an opportunity to present evidence on the factual premises that may have affected the legislative decision. Procedural due process thus provides judicial control of enforcement and administration but does not tell legislators how they must behave in formulating that policy.

The requirement for "fair procedures" comes into play only when a "deprivation" of "property" or "liberty" takes place.[113] For many years the termination of government largess did not constitute a deprivation of either "property" or "liberty." Since government had discretion to institute programs of largess, recipients did not acquire any enforceable "property" interests in them, and hence due process did not apply. In 1970, however, the Court held that the termination of such benefits was subject to due process constraints,[114] thus bringing about the "demise of the right-privilege distinction."[115] In succeeding cases,[116] the Court constructed an "entitlements" theory, stating that when government grants various benefits to persons, the grantee's entitlement to those benefits is protected by the due process clause. The fact that the government was not constitutionally required to grant the benefits does not mean that they can be terminated or reduced without fair procedures. Therefore, although the government need

111. Goss v. Lopez, 419 U.S. 565 (1975).

112. They may of course offend the guarantees of substantive due process, equal protection, or other specific constitutional provisions.

113. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

114. Goldberg v. Kelly, 397 U.S. 254 (1970).

115. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

116. *E.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Bell v. Burson, 402 U.S. 535 (1971).

not provide welfare benefits nor government employment that may be terminated only for "cause," once it provides such benefits, their termination is subject to the "fair procedures" requirement.

The Court has also expanded its interpretation of the concept of "liberty." Freedom from physical restraint was of course included, but "liberty," the Court said, also includes "the right of the individual to contract, to engage in any of the common occupations of life . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[117] Legislation affecting these interests therefore had to be rationally related to a legitimate goal, and enforcement of the legislation was subject to the "fair procedures" requirement. For example, in *Wisconsin v. Constantineau*,[118] the Court held that state officials could not post in liquor stores the names of persons who, because of their excessive drinking, were "dangerous to the peace" without first providing those persons with notice and an opportunity to challenge the validity of their classification.

The expansion of the concepts of property and liberty could of course lead to requiring "fair procedures" in the enforcement of all legislation. But the Supreme Court seems to have made plain that it will not adopt such a course. There are probably at least two reasons for this. First, the expansion would place substantial demands on already overburdened courts to determine what procedures are "fair" in thousands of different enforcement contexts. Second, because extremely minimal procedures would on balance probably be found to be "fair" in many contexts, the utility of the courts' undertaking this task, even if they had substantial free time, would be doubtful.

In fact, recent decisions of the Supreme Court seem to indicate that the Court is prepared to retreat somewhat from the expansions of "liberty" and "property" already made. For example, in *Paul v. Davis*[119] the Court held that the government's placement of a person's name on a list of "active shoplifters" which was distributed to shopkeepers deprived him neither of "liberty" nor of "property." He thus had no right to fair procedures before his name was circulated. The Court distinguished *Paul* from *Constantineau* on the ground that the person whose reputation was injured in *Constantineau* was *also* precluded from purchasing liquor.[120] Damage to reputation plus a restriction on purchasing ability involved "liberty," but damage to

117. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
118. 400 U.S. 433 (1971).
119. 424 U.S. 693 (1976).
120. *Id.* at 708-09.

reputation alone was not enough.[121] The distinction is tenuous, however, for two reasons: first, the Court in *Constantineau* failed to mention purchasing liquor as a significant factor in its analysis;[122] and second, the aggrieved party in *Paul* alleged that his employment opportunities were impaired and that he was inhibited from entering business establishments and purchasing goods[123]—infringements seemingly as important as purchasing liquor.

Paul and other recent cases[124] also indicate that there may be some restriction in the entitlement theory. Some have argued that since "entitlements" depend on government action for their creation, the government can define the scope of procedural due process that their termination will require. For example, in *Arnett v. Kennedy*,[125] a case that involved the termination of government employment without a prior hearing, Justice Rehnquist stated that no entitlement was created that required a prior hearing because the statute providing that government employees could be terminated only "for . . . cause" specifically stated that a pretermination hearing was not required.[126] Although six justices disagreed with his theory that one must in effect "take the bitter with the sweet,"[127] more recent cases may indicate that the Court is moving toward this view.[128] If so, the entitlement doctrine would be drastically reduced in importance,[129] the Court essentially reinstituting the "right—privilege" distinction so that largess can be terminated by whatever procedures the government specifically establishes. The Court will probably not go this far, but it may well be more inclined to find that the procedures specifically established meet the requirements for "fair procedures."[130]

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121. *Id.* at 709.

122. 400 U.S. at 436; *see* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 325 (1976).

123. 424 U.S. at 697.

124. Meachum v. Fano, 427 U.S. 215 (1976); Bishop v. Wood, 426 U.S. 341 (1976).

125. 416 U.S. 134 (1974).

126. *Id.* at 154.

127. Chief Justice Burger and Justice Stewart joined in Justice Rehnquist's opinion. Justice Powell concurred. *Id.* at 164-71. Justice White wrote an opinion concurring in part and dissenting in part. *Id.* at 171-203. Justice Douglas wrote a dissenting opinion, *id.* at 203-06, as did Justice Marshall, *id.* at 206-31. Justice Blackmun joined in Justice Powell's opinion; Justice Brennan joined in Justice Marshall's dissent.

128. *See* cases cited in note 124 *supra*.

129. *See* Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L.L. REV. 269, 277 (1975).

130. In Mathews v. Eldridge, 424 U.S. 319 (1976), the Court ruled that a hearing is not required before Social Security disability benefits can be terminated on the ground that the recipient is no longer disabled. The Court noted that in assessing what process was due, "substantial weight must be given to the good-faith judgments of individuals charged by Congress with the administration of the social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." *Id.* at 349.

These possible limitations on the meaning of "liberty" and "property" also raise a question about the continuing relevance of the "rationality" requirement of substantive due process. If the person listed as an "active shoplifter" in *Paul* could prove to a court that there was no basis for concluding that he was an active shoplifter, would the Constitution require that his name be removed from the list? If placing his name on the list does not implicate a property or liberty interest, what would be the basis of his constitutional claim? The Supreme Court has indicated that he probably would be entitled to relief if he could show that his name was placed on the list in retaliation for the exercise of his first amendment rights, for then it would not be his general interest in liberty but rather his specifically protected first amendment interests which were infringed.[131] But if no such protected interest is involved—the officials simply made a mistake or listed him out of personal spite related to some business transactions—how can the Constitution require that the wrongly listed person be entitled to relief, consistent with the determination in *Paul*?

C. IRREBUTTABLE PRESUMPTION ANALYSIS

Brief mention should also be made of the Court's recent use of "irrebuttable presumption" analysis under the due process clause. The modern use of this doctrine emerged in 1973,[132] and after almost uniformly disapproving review by commentators[133] and heavy criticism from some members of the Court,[134] was probably interred in 1975.[135] The doctrine is closely related to the procedural due process cases discussed above, but is nevertheless distinguishable from them.

To illustrate the irrebuttable presumption analysis, suppose that a legislature wishes to ensure that elementary school teachers will be able-bodied so that they can handle various physical tasks, such as leading playground recreation. To further this goal, the legislature provides that women who have reached the fourth month of pregnancy may not serve as elementary school teachers. Pursuant to that rule the school board suspends an elementary school teacher upon hearing a rumor that she is pregnant.

131. Perry v. Sindermann, 408 U.S. 593 (1972); *cf.* Elrod v. Burns, 427 U.S. 347 (1976) (first and fourteenth amendment rights infringed if respondents lost government jobs for nonsupport of political party).

132. Vlandis v. Kline, 412 U.S. 441 (1973).

133. *E.g.*, Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975). *But see* Tribe, *supra* note 129.

134. *E.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 660 (1974) (Rehnquist, J., dissenting); Vlandis v. Kline, 412 U.S. 441, 462 (1973) (Burger, C.J., dissenting).

135. Weinberger. v. Salfi, 422 U.S. 749 (1975); *see* Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 U. COLO. L. REV. 653 (1976).

Assume that the teacher has a "property" interest in her job because the statutes governing her employment provide that she can be terminated only "for cause." She could successfully claim that she was entitled to a hearing either before or soon after her discharge to allow her to show that she was not in fact four months pregnant. Like the welfare recipient in *Goldberg*, she would be entitled to "fair procedures" in the enforcement of the statutory rule. The conclusive presumption analysis required that a hearing be held on an additional issue: whether application of the rule to a particular teacher *admittedly more than four months pregnant* would further the goals of the legislation. In other words, the teacher was entitled to a hearing not only on the issue of whether she was four months pregnant but also on the issue of whether she would herself be physically unable to carry out her duties. This is what the Court required in *Cleveland Board of Education v. LaFleur*.[136]

The Court in *LaFleur* was willing to assume, arguendo, "that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy."[137] But it also found that some teachers would not be so disabled: "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter."[138] Hence the rule requiring the discharge of all teachers contained a conclusive presumption of disability which was not "necessarily universally true."[139] Because the law did not provide an opportunity for the teacher to rebut the presumption of disability, it violated the due process clause.

Critics of this approach were quick to point out that all legislative classifications which draw lines based on the compromise between precision in the attainment of the legislative goal and the costs of administration could be classed as "irrebuttable presumptions." It did not seem reasonable to believe that the Court was saying that such compromises could not be made; since the Court articulated no rationale for identifying those situations in which a rule would be deemed a conclusive presumption, most of the critics concluded that the analysis could best be understood as a disguised protection of certain substantive interests, such as procreation and travel.[140] Little was gained by calling the analysis "procedural due process," the critics claimed, when the touchstone of the analysis was special protection of some interests not protected by specific constitutional provisions. In effect, the

136. 414 U.S. 632 (1974).
137. *Id.* at 643-44.
138. *Id.* at 645.
139. *Id.* at 646.
140. *See* materials cited in note 133 *supra*.

Court seemed to be saying that infringement of certain interests could not be justified solely by appeals to administrative convenience. It would be better, or at least more honest, to protect those interests explicitly as a part of a substantive due process analysis.

The criticisms may well have had effect. The Court has recently declined to apply the conclusive presumption analysis in situations that seem indistinguishable from *LaFleur*, except to the extent that they do not involve personal interests in sex or marital intimacy.[141] It seems quite probable that the Court will not use the irrebuttable presumption analysis as a general requirement for legislation and may also refrain from expanding its use as a backhanded way of protecting certain individual interests.

CONCLUSION

There is a clear similarity in the standards of review which the Court has applied under the equal protection and due process clauses. In dealing with equal protection and the substantive aspects of due process, the Court had, until very recently, settled into a rather tidy pattern of two-tiered analysis. All legislation was tested to determine whether the classification made or the deprivations imposed were "rationally related" to legitimate government goals. Some legislation, either because it was "suspected" of furthering an illicit goal or because it intruded on specially protected individual interests, was allowed to stand only if it was "necessary to promote a compelling state interest." At the same time, the Court has applied a balancing standard to determine whether the procedural aspects of the due process clause were met.

Three standards of review have thus been used: the rational basis test, which usually resulted in validation of the legislation; strict scrutiny (or the compelling state interest test), which almost uniformly resulted in its invalidation; and an intermediate "balancing" standard in which the result was far more indeterminate. Interestingly, the two-tiered approach has been under attack for several years, with Justice Marshall and others calling for application instead of a "spectrum of standards," an approach analytically like the balancing employed in procedural due process. The possible emergence of a middle-tier "balancing" approach in recent Supreme Court opinions may indicate some convergence in the standards used in equal protection and substantive due process, on the one hand, and procedural due

141. *See* materials cited in note 135 *supra*. The Court has continued, however, to give *LaFleur* some effect. Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam) (statute unconstitutional which makes pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of childbirth until 6 weeks after childbirth).

process, on the other. Nevertheless, the general use of different standards in "substantive" and "procedural" contexts seems well-established. Why should this be so?

The answer may be that balancing is perceived as a more "activist" standard of review, and that there is an understandable reluctance to expand activist judicial review generally to substantive due process and equal protection. Balancing exposes the Court's process of evaluating competing values and ranking their importance. It is commonly viewed as a rather open-ended standard in which judicial attitudes and preferences heavily influence the outcome. But, one might assert, the compelling state interest aspect of the two-tiered approach seems even more activist, since it is more likely to lead to judicial invalidation of legislative choice. While "strict scrutiny" is a tougher standard than balancing—it is in fact a kind of "balancing" in which the scales are heavily weighted against the government—the test is applied in relatively few cases. In other words, the vast amount of legislation will be tested by the deferential rational basis test under equal protection and substantive due process, while it will be tested by a balancing standard under procedural due process. The "trigger" for application of meaningful judicial scrutiny under substantive due process and equal protection is the effect on a "fundamental interest" or use of a "suspect classification." There are comparatively few of either. On the other hand, the "trigger" for meaningful judicial scrutiny under procedural due process is deprivation of "liberty" or "property," which includes a vast number of statutes. Whether the judiciary is constitutionally justified in providing more active review under procedural due process than under equal protection and substantive due process is an interesting and somewhat perplexing question, but beyond the scope of this Article.