Notre Dame Law Review

Volume 51 | Issue 5 Article 1

6-1-1976

Equal Protection, Social Welfare Litigation, the Burger Court

Mark S. Coven

EQUAL PROTECTION, SOCIAL WELFARE LITIGATION, THE BURGER COURT

*Mark S. Coven**
*Robert J. Fersh***

Opinions such as those in Reed *and* James *seemed drawn more as efforts to shield rather than to reveal the true basis of the Court's decisions.*—Justice Marshall dissenting in *San Antonio School District v. Rodriguez,* 411 U.S. 1, 110 (1973).

I. Introduction

In 1905 the Supreme Court held that a New York labor law which prohibited employment in bakeries for more than 60 hours a week or more than 10 hours a day violated the fourteenth amendment of the federal Constitution.[1] Justice Holmes, in dissent, wrote:

> The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[2]

In subsequent years the Court rejected the approach that the fourteenth amendment due process clause contained a separate substantive content. The Court returned to its previous position[3] that states have power to legislate against practices injurious to their internal economic affairs, so long as these laws do not violate a specific federal constitutional prohibition.[4] In regard to the substantive content of the fourteenth amendment, the Court has concluded,

> "Whether wisdom or unwisdom resides in the scheme of benefits . . . is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."[5]

This statement signalled the demise of substantive due process. Recent developments in equal protection cases, however, resurrect the issue of whether the

* Clerk for the Hon. William Grimes, Supreme Court of New Hampshire; J.D., Boston University, 1975; B.A., Union College, 1972.
** Staff Associate, Government Affairs and Social Policy, American Public Welfare Association, Washington, D.C.; J.D., Boston University, 1975; B.S., Cornell University, 1972.
The authors are indebted to Ira C. Lupu, Associate Professor of Law, Boston University School of Law, for his editorial assistance, for his insights in the area of equal protection, and for his encouragement and direction.

1 Lochner v. New York, 198 U.S. 45 (1905).
2 *Id.* at 75 (Holmes, J., dissenting).
3 *See* Williamson v. Lee Optical, 348 U.S. 483 (1955).
4 Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).
5 Halvering v. Lewis, 301 U.S. 619, 644 (1937).

fourteenth amendment contains any substantive content, and whether the equal protection clause has been utilized to achieve the same purposes as the discredited substantive due process approach. This article initially examines the various standards that have been utilized by the Supreme Court in its equal protection analysis and examine others which have been suggested for its use. The article then suggests a new model for equal protection, referred to as the "unitary approach" to equal protection. The "unitary approach" is recommended as a means of employing all relevant considerations in future equal protection analyses.

The "unitary approach" is suggested not only to aid the Supreme Court in articulating a principled equal protection standard, but also to those attorneys and legal scholars who raise equal protection challenges to social welfare legislation. It is the thesis of this article that an equal protection attack is not foreclosed in the area of social welfare legislation, and the article will examine recent Supreme Court social welfare cases as a vehicle to explain the application of this evolving equal protection standard. It will further analyze the use of the "unitary approach" as it may be applied to recent welfare cases, so as to suggest a viable approach which combines all relevant equal protection considerations in social welfare cases.

II. The Standards

A. *The Warren Court*

The Warren Court developed a two-tier approach to the equal protection clause of the fourteenth amendment. The Court used the traditional[6] minimal scrutiny required by the equal protection clause in reviewing most classifications. Under this restrained standard of review, statutes are presumed valid, and as long as the means are reasonably related to a legitimate purpose, the legislation will be upheld.[7] If the challenged classification has some "reasonable basis," it does not violate the Constitution simply because it "is not made with mathematical nicety or because in practice it results in some inequality."[8] The classification will be upheld if any state of facts reasonably may be conceived to justify it.[9]

Minimal rationality review allows the Court to follow the policy set by the legislature and often requires the Court to determine which of several possible legislative purposes is the most probable.[10] The Court, in maintaining the delicate balance between its role and that of the legislature, has often attributed the pur-

6 *See* Williamson v. Lee Optical, 348 U.S. 483 (1955).
7 McGowan v. Maryland, 366 U.S. 420, 425 (1961).
8 Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
9 McGowan v. Maryland, 366 U.S. 420, 426 (1961).
10 In equal protection cases . . . a court is not faced with a problem of applying a statute consistently with the overall policy established by the legislature; instead the concern is to assess the constitutional validity of a statute whose coverage is usually not at issue.
Note, *Developments In The Law—Equal Protection,* 82 HARV. L. REV. 1065, 1077 (1969) [hereinafter cited as *Developments*].

pose thought to be most probable to the challenged classification.[11] The Court has exercised considerable imagination in attributing conceivable purposes to legislative classifications.[12] Unless blatantly arbitrary or capricious, the classification will be upheld, and if any state of facts which would sustain the classification's rationality can be reasonably conceived, the existence of such facts must be assumed. Both overinclusion and underinclusion are tolerated in the classification—the former because "mathematical nicety is not required," the latter because the legislature is free to remedy part of an evil, and to act where it believes the harm is the most acute.[13]

The second tier of the Warren Court approach involves a more active review.

> ". . . [I]n cases involving 'suspect classifications' or touching on 'fundamental interests,' . . . the court has adapted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. . . . Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law, but that the distinctions drawn by the law are *necessary* to further the purpose."[14]

The Warren Court interpreted the Constitution as requiring that certain classifications, such as those based on race,[15] lineage,[16] and alienage,[17] be deemed suspect. These classifications are subjected to the most rigid scrutiny and require that the classifications bear more than a merely rational connection with a legitimate public purpose.[18] A very heavy burden of justification is demanded of the state which draws the distinction, because a suspect classification is valid only if

---

11 *See* Royster Guana Co. v. Virginia, 253 U.S. 412 (1920). In fact, at times the Court has even gone as far as to attribute to the legislation:

> [a]ny reasonable conceivable purpose which would support the constitutionality of the classification. Instead of asking, "what purpose or purposes do this statute and other relevant materials in fact reflect?" the court may ask, "what constitutionally permissible objective might this statute and other relevant materials plausibly be construed to reflect."

Developments, supra note 10, at 1078.

12 *See* Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Pilot Comm'rs., 330 U.S. 552 (1947).

13 *See* Railway Express v. New York, 336 U.S. 106 (1949). Due to the separation of powers inherent in the Constitution, the Court is ordinarily not free to substitute its judgment for that of the legislature. The integrity of the legislature is guarded on the assumption that political decisions should be enacted by the elected representative of the people, and the integrity of the legislature is not to be challenged by the Court. As Justice Harlan noted in his dissent in *Shapiro v. Thompson:*

> Today's decision, it seems to me, reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity; in contriving new constitutional principles to meet each problem as it arises. . . . This resurgence of the expansive view of equal protection carries the seeds of more judicial interference with the state and federal legislative process, much more indeed than does the judicial application of "due process" according to traditional concepts, . . . about which some members of the Court have expressed fears as to its potentialities for setting us judges "at large."

394 U.S. 618, 677 (1969) (Harlan, J., dissenting).

14 Serrano v. Priest, 96 Cal. Rptr. 601, 609, 487 P.2d 1241, 1249, 5 Cal. 3d 584, 597 (1971) (italics in original).

15 Loving v. Virginia, 388 U.S. 1 (1967).

16 Levy v. Louisiana, 391 U.S. 68 (1968).

17 Takahashi v. Fish Comm'n, 334 U.S. 410 (1948).

18 Loving v. Virginia, 388 U.S. 1, 11 (1967).

necessary to achieve some overriding purpose.[19] The state must come forward with a compelling interest to justify a suspect classification, and may have to show that less drastic means do not exist to accomplish the same purpose.

Classifications based on race, alienage, or lineage are held to be immediately suspect, subjected to the most rigid scrutiny, and require an overriding statutory purpose. Exactly what causes a classification to be characterized as suspect has never been fully explained by the Court, although a number of suggestions have been posited. Suspect racial classifications may be explained by reference to the historical basis of the fourteenth amendment.[20] Suspect classifications may also be explained by the characterization of discrete, insular minorities.[21] If certain groups are politically impotent, they have no voice in the political process and no hopes of effecting the desired change through the legislative body. As a result, when politically disadvantaged minorities are affected, the legislation is more critically scrutinized.[22] A further explanation is that race, alienage, and lineage are congenital and unalterable traits over which the person has no control and should not thereby suffer adverse consequences.[23] A final thesis is that classifications based on race, alienage, or lineage have traditionally represented badges of inferiority.[24]

This strict scrutiny approach does not depend solely upon the relative invidiousness of the particular differentiation, but also considers the relative importance of the subject for which equal protection is sought.[25] Certain interests are deemed to be fundamental to the Constitution and, when infringed, require the higher standard of review. In the areas of voting,[26] interstate travel,[27] and criminal procedure,[28] the Court will require that the state show a compelling and overriding interest to justify a dilution or infringement of these fundamental interests. Again, the Court has not explicitly formulated a reason why certain interests are deemed fundamental. Perhaps the Court simply believes that these areas are more important than others or that they are interests which have traditionally been recognized to be of preeminent importance.[29]

It has been stated that when classifications are suspect or dilute fundamental interests, the Court will invalidate the legislation where it perceives a less onerous

19 "A demonstration of possible rationality in the classification, suitable when taxation or economic regulation is the sole question, is deemed insufficient to support a racial distinction." *Developments, supra* note 10, at 1101.

20 "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination." Loving v. Virginia, 388 U.S. 1, 10 (1967).

21 *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

22 *Developments, supra* note 10, at 1125-26.

23 *Id.* at 1126-27.

24 Racial classifications will usually be perceived as a stigma of inferiority and a badge of opprobrium. The same may be said of many national, ethnic, and religious classifications. In this sense, a racial or national minority differs from an economic minority. In this sense, too, race, lineage, and ethnic origin differ from other congenital and unalterable characteristics such as sex or certain physical disabilities.
Developments, supra note 10, at 1127.

25 Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 95 (1966).

26 Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

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

28 Griffin v. Illinois, 351 U.S. 12 (1956).

29 *Developments, supra* note 10, at 1130.

alternative,[30] or where it finds the statute over or underinclusive.[31] There are two approaches to this issue. First, it may be suggested that over or underinclusiveness and less onerous alternatives are means of measuring state interest, and may be regarded as factors to be considered in determining the sufficiency of the state interest. Thereby, if there exist no less drastic alternatives, the state interest may become more compelling. However, if there are less drastic means and overinclusiveness is great, these factors would diminish the state's claim that its interest is compelling. The second approach suggests that any time a classification is suspect or a fundamental interest is diluted, the classification will be invalidated per se regardless of questions of overinclusiveness or less onerous alternatives. Under this view, discussions of less onerous means and over or underinclusiveness are justifications or rationalizations for invalidating suspect classifications or classifications which infringe fundamental interests.[32]

The second tier of the Warren Court's approach toward the equal protection clause rests upon the relative invidiousness of the classification and the relative importance of the interest which is infringed. Either of these factors individually may cause strict scrutiny, and it has been suggested that both in combination may also trigger the more active review.[33] This analysis might explain the direction in which the Warren Court was moving, but fails to explain more recent decisions. The Court has refused to utilize the active standard of review in cases which infringed upon the interests of education[34] or welfare benefits[35] combined with classification of wealth.

Professor Gunther described the Warren Court's rigid two-tier attitude toward equal protection, stating,

> [S]ome situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually more in fact.[36]

Justice Harlan, dissenting in *Shapiro v. Thompson*,[37] stated that use of the compelling interest test in any cases other than racial classification does much toward making the court a super-legislature. The Warren Court has been criticized for

30 *See* Kramer v. Union School Dist., 395 U.S. 621, 627 (1969).
31 *See* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).
32 *See* 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, 10-11 (1972) [hereinafter cited as Gunther].
33 The interaction of these two factors can be visualized by imagining two gradients. Along the first of these gradients is a hierarchy of classifications, with those which are most invidious—suspect classifications based on traits such as race—at the top. Along the second, arranged in ascending order of importance, are interests such as employment, education and voting. When the classification drawn lies at the top of the first gradient, it will be subject to strict review even when the interest it affects ranks below on the second gradient. . . . As the nature of the classification becomes less invidious (descending on the first gradient) the measure will continue to elicit strict review only as it affects interests progressively more important. (ascending on the second gradient).
Developments, supra note 10, at 1120-21.
34 San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).
35 Dandridge v. Williams, 397 U.S. 471 (1970).
36 Gunther, *supra* note 32, at 8.
37 394 U.S. 618, 661 (1969).

usurping legislative functions and preventing a majoritarian choice of values.

> The Court's decisions cannot escape an appearance of subjectivity when interests which are not expressly given protection in the Constitution are denominated "fundamental" and are protected under an approach which goes beyond the requirement of reasonable classification.[38]

For Justice Harlan, the evils of substantive due process and the *Lochner* era[39] were resurrected in the Warren Court's two-tier approach to the constitutional demands of the equal protection clause.

B. *Professor Gunther's "Equal Protection With Bite"*

The Burger Court has expressed discontent with the rigid, two-tier standard of review formulated by the Warren Court. Professor Gunther's study of the Burger Court's 1971-72 term points to a series of discussions which Gunther characterizes as representing "equal protection with bite."[40] The Burger Court has increasingly rejected use of the two-tier approach, but as Gunther indicates: "The Court is prepared to use the clause as an interventionist tool without resorting to the strict scrutiny language of the new equal protection."[41] The requirement of a compelling state interest remains to justify legislation when a fundamental interest or suspect classification is involved, although the court has declined to add to the list of fundamental rights or suspect classifications. The major approach of the Burger Court is seen in cases where the Court purports to apply the traditional minimum rationality test, yet seems to apply a stricter standard in upholding equal protection claims.

In *Reed v. Reed*,[42] petitioner challenged a provision of the Idaho probate code which gave preference to men over women in applying for appointment as administrator of a decedent's estate. Chief Justice Burger stated that the classification must, to be upheld, be found reasonable, not arbitrary, and must rest on a difference that has a fair and substantial relation to the objective of the statute. After voicing the minimal scrutiny standard, the Chief Justice added that the objective of reducing the work load on probate courts by eliminating one class of contestants has some legitimacy, but concluded that the classification was invalid as violating the equal protection clause:

> To give mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.[43]

38 *Developments, supra* note 10, at 1132.
39 See text accompanying notes 1 & 2 *supra*.
40 Gunther, *supra* note 32, at 18.
41 *Id.* at 12.
42 404 U.S. 71 (1971).
43 Reed v. Reed, 404 U.S. 71, 76-77 (1971).

The Chief Justice, in invalidating the classification, feigned the use of the minimal rationality standard. But the decision of the lower court indicates that the classification is not wholly irrelevant to the State's objective, and facts were reasonably conceived to justify it.[44] Nonetheless the Supreme Court rejected the classification.

Professor Gunther has formulated a model which can be used to explain many of the Burger Court equal protection decisions. The model suggests that the Court views

> [E]qual protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends.[45]

Thus in *Bullock v. Carter*,[46] in which a Texas law requiring a candidate to pay a filing fee as a condition to having his name placed on the ballot in a primary election was challenged, the Court stated the standard that different treatment must bear some relevance to the object of the legislation. The Court found that the filing fee requirement did indeed limit the ballot to more serious candidates, but after more careful scrutiny of the statutory means it found that the filing fees excluded legitimate as well as frivolous candidates and thereby concluded, "If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; other means to protect those valid interests are available."[47] And in *Stanley v. Illinois*,[48] an Illinois statutory scheme was challenged. The challenged scheme declared that, upon the death of the mother, children of unmarried fathers were dependents of the state. This was done without a hearing on the father's parental fitness or proof of his neglect. Such a hearing and such proof were required before the state assumed custody of children of married or divorced parents and unmarried mothers. The Court said its role was to determine whether the means used to achieve the ends were constitutionally defensible, and found: "We observe that the state registers no gain towards its declared goals when it separates children from the custody of fit parents.[49] The Court apparently will accept the purposes which are offered by the state, and will scrutinize the means to determine if they are substantially related to those purposes.[50]

The requirement that legislative classifications bear a substantial relationship to legitimate purposes would prevent the Court from exercising its imagination in developing conceivable purposes for the classification or in imagining

44 The state court upheld the regulation as a rational method "to resolve an issue that would otherwise require a hearing as to the relative merits" of the relatives, thereby reducing the workload of the probate courts. *See* Reed v. Reed, 93 Idaho 511, 465 P.2d 635 (1970).

45 Gunther, *supra* note 32, at 20.

46 405 U.S. 134 (1972).

47 Bullock v. Carter, 405 U.S. 134, 146 (1972) (footnotes omitted).

48 405 U.S. 645 (1972).

49 Stanley v. Illinois, 405 U.S. 645, 652 (1972).

50 It is unclear exactly when the Burger Court will employ something more than the Warren Court minimal rationality standard. It is our belief that there is an implicit weighing by the Court of the individual interest involved to determine whether the middle standard should be applied. Thus far, the Burger Court has not applied this middle standard to cases involving business regulations.

facts which would sustain the classification's rationality.[51] As Justice Powell stressed in *San Antonio School District v. Rodriguez*,[52] the Texas statutory scheme for financing public education must be examined to determine whether it rationally furthers some "legitimate, *articulated* state purposes."[53] As a corollary to this notion that the Court will not stretch to conceive purposes or facts justifying the classification, the Gunther model would have the Court accept the purposes offered by the State, unless the purposes are clearly illegitimate. Presumably, if the Court finds the purposes to be illegitimate, the classification will be held invalid.

The final element of Professor Gunther's model is that judicial tolerance of overinclusive and underinclusive classifications is markedly diminished.[54] One of the evils of the Kansas recoupment statute which enabled the state to recover legal defense fees for indigent defendants in subsequent civil proceedings, challenged in *James v. Strange*,[55] was that it deprived an indigent defendant of protective exemptions Kansas provided for other civil judgment debtors. "[O]ther Kansas statutes providing for recoupment of public assistance to indigents do not include the severe provisions imposed on indigent defendants in this case."[56]

Professor Gunther, then, suggests a model whose approach would (1) concern itself with means and not ends, permitting the state to select means that substantially further the legislative purposes, (2) limit judicial consideration to purposes supplied by the state and eliminate imaginative judicial construction of facts justifying the classifications, and (3) reduce judicial tolerance of overinclusive and underinclusive classifications.

C. *The Marshall Model of Equal Protection*

Gunther indicates that while his model may be helpful in analyzing many of the Burger Court equal protection decisions, it does not account for all of the decisions which break from the Warren Court mold, such as *Reed v. Reed*[57]

51 It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of a questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by a perfunctory judicial hypothesizing.
Gunther, *supra* note 32, at 21.

52 411 U.S. 1 (1973).

53 San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (emphasis added).

54 Gunther, *supra* note 32, at 20.

55 407 U.S. 128 (1972).

56 James v. Strange, 407 U.S. 128, 137 (1972). The Warren Court's use of minimal scrutiny would not overturn a classification where not made with mathematical nicety or because it resulted in some inequality. The Burger Court's equal protection with bite requires that the statutes be more narrowly tailored to their legitimate objective, although some imprecision and inequality may be tolerated. This is not to suggest that the Burger Court is more activist than the Warren Court. It is conceivable that in cases where the Burger Court applies this middle standard, the Warren Court may have employed the compelling state interest test so as to invalidate the classification. What is proposed is that there may be more room to challenge a classification under what the Burger Court calls minimal rationality than there was when the Warren Court employed a minimal rationality standard.

57 404 U.S. 71 (1971).

and *Eisenstadt v. Baird*.[58] The model seems to be more of a suggested basis for principled "equal protection with bite" decisions in the future than adequate explanation of such past decisions. In light of more recent decisions, it appears that additional factors must be considered to fully explore the Burger Court's approach to equal protection. Such additional factors may be found in a model suggested by Justice Marshall's dissent in *San Antonio School District v. Rodriguez*.[59]

> A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, 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. I find in fact that many of the Court's recent decisions embody . . . an approach in which the "concentration [is] placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[60]

The Marshall model, then, requires the Court (1) to look at the character of the classifications in question and (2) to balance the benefits accruing to society if the classification is sustained against the importance of the individual interests infringed and the long-term adverse effects on those interests.[61]

It appears that, in considering the character of a classification, the Court is not ready to deem certain classifications suspect, yet it feels that these classifications warrant a tighter scrutiny than other classifications. These classifications might be called "quasi-suspect." The prime example of this is a classification based on sex. It does not appear that a majority of the court has accepted sex as a suspect classification, despite an opinion to that effect by four justices in *Frontiero v. Richardson*.[62] In that case, the Court found it unreasonably discriminating to require a servicewoman to show that her husband was dependent on her for over half his support before she was eligible for increased quarters allowance and medical benefits for her husband, while servicemen were not subject to this requirement. However, it appears from *Reed v. Reed*[63] and a concurring opinion in *Frontiero*[64] (which would base the decision squarely on *Reed*) that members of the Court more closely scrutinized the classification because it was sexual in nature. In both cases, the classifications seemed to be, at the least,

58 405 U.S. 438 (1972); Gunther, *supra* note 32, at 29-30. Gunther indicates that even more than minimum rationality was satisfied in Reed v. Reed, 404 U.S. 71 (1971), and that the reason for the decision may be in the nature of the classification. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court refuses to accept the seemingly legitimate purposes offered by the State.

59 411 U.S. 1 (1973).

60 San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

61 *See*, Note, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103 (1972).

62 Frontiero v. Richardson, 411 U.S. 677 (1973).

63 404 U.S. 71 (1971).

64 Frontiero v. Richardson, 411 U.S. 677, 692 (1973).

minimally rational. In neither case did there appear to be such strong individual interests involved as to outweigh the interest of the government in the classification.[65]

The next component of the Marshall model involves the weighing of the governmental interest in the classification against the individual interest injured by the classification. This balancing test is applied in all cases, regardless of whether the character of the classification is "quasi-suspect." The Court must consider the extent of the benefits to society as well as the degree of risk which would be incurred if the classification is disallowed. Secondly, it must examine the importance of the rights infringed and the extent to which there will be a long-term adverse effect on those interests.[66] Although no precisely calibrated scale is provided by which to weigh these interests, Marshall provides some guidelines by suggesting a sliding scale with which to assess what type of individual interest will demand a strong state interest to justify the classification.[67] Marshall seems to be saying that the more closely related a nonconstitutional interest is to a constitutionally protected right, the closer should be the judicial scrutiny of a classification affecting that interest. For example where education is the interest at stake, the Court may tighten its scrutiny because education bears a close relation to the effective use of the rights of voting and free speech.[68]

The Marshall model, then, involves the two steps of (1) considering the nature of the classification involved, and (2) weighing the competing interests asserted. Within the model, however, these steps may not be fully independent of each other, thereby triggering the use of a second sliding scale. As the character of the classification becomes more suspect, the stricter will be the requirement of an important state interest which outweighs the individual interests at stake.

D. *The Unitary Approach to Equal Protection*

The Gunther and Marshall approaches have been presented as distinct models, yet it is clear that they may be used in the alternative to explain recent

65 It is unclear exactly what types of classifications will trigger a stricter scrutiny from the Court, but still be less than that of suspect classifications. It appears that the Court will give closer scrutiny to classifications based on sex, wealth, age and perhaps in other areas over which the individual has little or no control.

66 San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

67 Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the constitution. . . . As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

Id. at 102-03 (Marshall, J., dissenting).

68 While this example seems clear cut, few other such examples come readily to mind. Marshall has not provided a tool which is very useful. He undoubtedly was trying to provide a method of assessing the importance of individual interest other than leaving it purely to the subjective preferences of individual Justices. However, the task of tying a nonconstitutional interest to a constitutional right seems to be too wide open a process, limited only by the parameters of judicial imagination. Once again, there is no precisely calibrated scale by which to judge how closely an interest relates to a constitutional guarantee. And in addition, the question should be raised whether some constitutional rights are more fundamental than others and if it matters to which of the constitutional rights the interest is being tied.

decisions.[69] Although in many cases the models overlap, in other decisions the only feasible explanation for the outcome is found in a combination of the two models. Such an approach was suggested by Justice Marshall's dissent in *Dandridge v. Williams*.[70] In one part of his opinion, Marshall analyzes the impact of the classification on the individual interests at stake (partial loss of welfare benefits) as compared to the degree to which the interests put forth by Maryland were furthered by a maximum welfare benefit. If Marshall had simply weighed the state interests against the individual interests, he would have concluded that either the state's interests were more important than partial loss of benefits to an AFDC family, or that the partial loss of benefits was more important than the state interests. Yet Marshall did not reach such a conclusion. In order to compare the interests at stake, Marshall first applied a Gunther-like precision test, determining the classification to be vastly over and underinclusive. Marshall's conclusion was not that the state's interests are less important than the individual's right to full welfare payments, but that, given the imprecise manner in which the means accomplish the ends, the state interest must be found less important than the individual interests involved.

The use of the Gunther and Marshall models in combination aids in understanding the unitary approach to equal protection cases. It is unclear whether the Court has consciously employed these two models in its decision-making process, but through the use of both models all relevant considerations may be taken into account. Utilizing both models requires the use of a sliding scale of scrutiny.[71] The stronger the individual interests are, as compared to the state's concerns, the more rigid will be the requirement that the means be substantially related to the articulated purpose. When the result of the interest balancing is that an important individual interest outweighs the state interests involved, the test for precision becomes stricter, thereby requiring that the classification be more precisely drawn. Conversely, as the individual interest becomes less important or the state interests more important, the less strict will be the requirement of precision. There is a point on this sliding scale analysis where the individual interests affected may be of such great importance or so fundamental, that the classification will not be upheld no matter how precisely drawn. At the opposite end of the spectrum where the individual interests affected are of minimal importance, the classification will be given effect regardless of how imprecisely it is

69 A similar type of sliding scale has been suggested in determining reasonableness in scrutinizing fourth amendment violations occurring at border searches. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 275 (1973) (Powell, J., concurring); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967).

70 397 U.S. 471 (1970).

71 The requisite level of precision is uncertain, and may vary according to the invidiousness of the classification or the importance of the personal interests infringed. . . . In effect, then, active review comprehends two levels of balancing. At the first level, the court will inquire whether the importance of the personal interests involved is so great as to outweigh the state's interest in being free to accomplish its objectives through rough accommodations, rather than with scientific precision. But even if the state classifies precisely, the court will inquire further whether the state interests advanced by the classification are sufficient to outweigh the injury done to the individual by the particular unequal treatment to which he is subjected. *Note, The Supreme Court, 1969 Term,* 84 HARV. L. REV. 1, 63-64 (1970).

drawn.[72] It is only when there is a genuine conflict between the importance of the individual interests being deprived and the state interests advanced by the classification, that issues of precision and of reasonable alternative means will be considered. A classification, then, will be upheld provided it is precisely enough drawn to achieve a state objective that outweighs the personal interests involved.[73]

Any use of the unitary approach to invalidate legislation will subject the approach to the attack that it is simply substantive due process in the guise of equal protection. The active use of equal protection to strike down legislation will perhaps always be subject to the type of criticism which Mr. Justice White issued concerning the court's decision in *Roe v. Wade*.[74]

> As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to the Court.[75]

It is indeed dangerous to allow the Court "both to 'define' and to 'balance' interests on the major social and political issues of our time."[76] As the standard of review becomes more rigid, the greater, too, is the likelihood that the Court will institute substantive due process in invalidating legislation. The unitary approach, however, allows such rigid review only where the individual interests at stake outweigh the articulated state needs. As the individual interests become increasingly more important it is easier to justify a stricter scrutiny and a more intense review by the Court to insure that the means are substantially related to the articulated purpose. This approach would prevent the type of substantive due process in the area of economic legislation of which Justices Harlan and Holmes expressed so much fear, while allowing substantial protection for important individual interests. The use of the unitary approach, then, may provide a principled standard for reviewing equal protection challenges, while avoiding the label of substantive due process.

III. The Unitary Approach to Equal Protection as Applied to Welfare Cases

The standard of review traditionally applied to welfare equal protection cases is aptly summarized by this excerpt from the majority opinion in *Dandridge v. Williams*:[77]

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not

72 This approach, then, includes not only a middle standard but also encompasses the Warren Court two-tier approach to equal protection. Hence, it is referred to as the unitary approach.

73 Note, *supra* note 70, at 63-64.

74 410 U.S. 113 (1973).

75 Roe v. Wade, 410 U.S. 113, 222 (1973) (White, J., dissenting).

76 Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, SUPREME COURT REVIEW 159, 185 (1973).

77 397 U.S. 471 (1970).

> offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[78]

Dandridge involved a challenge to Maryland's Aid to Families with Dependent Children program which imposed a maximum grant limit of $250 per month per family, regardless of the size of the family or the computed standard of need. The equal protection attack was based on the claim that such a maximum grant limit caused discrimination among welfare recipients solely on the basis of the size of the family. In its holding, the Court specifically committed itself to the most minimal of rationality standards in its review of welfare cases. In *Dandridge,* the Court virtually apologizes for the standard, saying that it applied to cases which

> . . . have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.[79]

It is this recognition of the "dramatically real factual difference" between welfare cases and those of economic regulation which provides at least a starting point in explaining some apparent movement by the Court away from the old minimum rationality standard in welfare cases.

The Court consistently adhered to the minimum rationality standard in language and effect until the summer of 1973. In cases like *Jefferson v. Hackney,*[80] and more recently in *Ortwein v. Schwab,*[81] the court explicitly reaffirmed the *Dandridge* standard. The claim in equal protection cases that welfare be considered a fundamental right has been consistently rejected. The prospects for those advancing a welfare equal protection claim, other than those who could rely on an accepted fundamental right or suspect classification, were not at all promising until the announcement of two decisions in similar cases on June 25, 1973. In these two decisions, *U.S. Dep't. of Agriculture v. Murry,*[82] and *U.S. Dep't. of Agriculture v. Moreno,*[83] the Court purported to apply the minimum rationality test, yet in result, seemed to apply a stricter standard.

In *Murry,* § 5(b) of the Food Stamp Act[84] was challenged. That section provided that a household was ineligible for food stamps if it included a member who had reached his eighteenth birthday and was claimed as a dependent for federal income tax purposes by a taxpayer who was a member of a different household ineligible for food stamps. The household disqualified by the statute was to be ineligible for the tax period claimed and the year following. Through Justice Douglas, the Court ruled this provision was without a rational basis.

78 Dandridge v. Williams, 397 U.S. 471, 485 (1970).
79 *Id.*
80 Jefferson v. Hackney, 406 U.S. 535 (1972).
81 Ortwein v. Schwab, 410 U.S. 656 (1973).
82 United States Dep't of Agri. v. Murry, 413 U.S. 508 (1973).
83 United States Dept. of Agri. v. Moreno, 413 U.S. 528 (1973).
84 7 U.S.C. § 2014(b) (1970).

Justice Douglas indicated that it was not rational to base the need of an entire household on the fact that only one member was claimed as a dependent by someone outside the household, especially when the penalty fell on the household for a year following the tax claim. The irrationality in this case was heightened by the fact that plaintiffs indicated that they had, in fact, received no support from those claiming them as dependents.[85]

In *Moreno,* § 3(e) of the Food Stamp Act[86] was challenged. It limited food stamp eligibility to households whose members were all related to each other. In an opinion by Justice Brennan, the Court ruled that the distinction between related and nonrelated households not only was irrelevant to the purposes of the Act, but was wholly without rational basis in serving any other legitimate purpose.[87] *Moreno* will be discussed further later.

Both these cases were against the Federal Government and thus decided on fifth amendment due process grounds, but it is clear that the Court is talking in equal protection terms. In both cases the Court invalidates the statutory provisions which classify similarly situated people into different categories. In *Moreno,* Brennan makes it clear that he is applying the "traditional" equal protection test of *Jefferson* and *Dandridge.*[88]

Justice Rehnquist dissented in both *Murry* and *Moreno,* as he said, "for much the same reasons."[89] In both, he found minimum rationality satisfied. In *Murry,* Rehnquist found a correlation between one household's ineligibility for food stamps and the fact that that household has a member claimed as a dependent by a member of another ineligible household. According to the tax laws, he reasoned, the dependent is receiving over half his support from someone whose income is enough to disqualify his own household. This indicates that the dependent is receiving significant support and it is thus rational to assume that he is ineligible for food stamps.[90] In *Moreno,* Rehnquist claims that the requirement that all members of a household be related to each other will as least eliminate the fraud perpetrated by those who form households only to receive food stamps.[91]

It appears that Justice Rehnquist is technically correct. According to the "any set of facts" standard enunciated in *Dandridge* and *Jefferson,* the classifications created in *Murry* and *Moreno* do appear to be minimally rational. Certainly facts can be conceived, as Justice Rehnquist did, which indicate that these regulations could reduce fraud. What, then, is the rationale for the result reached by the Court in *Murry* and *Moreno?*

While *Murry* and *Moreno* may represent an abandonment of the most minimal of rationality standards, they do not necessarily represent an overturning of cases like *Dandridge* and *Jefferson.* It may be that the classifications over-

85 United States Dep't of Agri. v. Murry, 413 U.S. 508, 510 (1973).
86 7 U.S.C. § 2012(e) (1970).
87 United States Dep't of Agri. v. Moreno, 413 U.S. 528, 538 (1973).
88 *Id.* at 533.
89 *Id.* at 545 (Rehnquist, J., dissenting).
90 United States Dep't of Agri. v. Murry, 413 U.S. 508, 525 (1973) (Rehnquist, J., dissenting).
91 United States Dep't of Agri. v. Moreno, 413 U.S. 528, 546 (1973) (Rehnquist, J., dissenting).

turned in *Murry* and *Moreno* are simply less rational than those attacked in previous welfare equal protection cases, even though they are minimally rational. The Court may have decided that although mathematical nicety is not required in classifications, there is a limit somewhere short of complete irrationality to what it will tolerate. However, the important point is not that the statutes in *Murry* and *Moreno* present less rational classifications than the statutes in previous cases, but that these cases indicate that there is room to challenge welfare regulations on a rationality basis that goes somewhat beyond earlier notions of "minimum."

An alternative explanation to *Murry* and *Moreno* is that they involve a factor not present in other cases. In *Moreno,* Brennan indicates that the challenged statute was an attempt to discriminate against a politically unpopular group, hippies and hippie communes. He indicates that this would not be a legitimate government interest.[92] *Murry* and *Moreno,* then, may represent an attempt by the Court to bend over backwards to protect a discrete minority from discrimination, that is, the creation of an additional "quasi-suspect" classification. This would not be the first time the Court has taken a closer look at legislative enactments suspected to be of this character.[93] However, in light of other factors, it does not appear that the *Murry* and *Moreno* decisions can be explained as a protection of politically unpopular groups. The facts in *Murry* really do not indicate an attack on hippies, but rather an attack on children of more affluent families (who may or may not be hippies).[94] And in light of the discussion in the first part of this article, it seems that *Murry* and *Moreno* fit into the pattern of equal protection cases already decided by the Court which have utilized the unitary approach. The following analysis will indicate what factors seem to be important, particularly in light of *Murry* and *Moreno,* to evoke the unitary approach to equal protection from the Supreme Court in welfare cases.

At the outset, it should be emphasized that a welfare equal protection challenge need not be based on a claim of right.[95] The principle is well established that although there may not be, as yet, a right to welfare, just as there is no right to appeal from a criminal conviction,[96] a legislature cannot arbitrarily exclude some people from a benefit it extends to others.

The Court continues to talk in minimum rationality terms. To be overturned a classification must be shown to be arbitrary. But, "it is not arbitrariness in the abstract which can be challenged successfully, but rather constitutional arbitrariness considered against the purpose of the welfare program, and the competing interest asserted."[97] This type of arbitrariness is indicated by *Reed v. Reed.*[98] The Court does not directly declare the regulation to be arbitrary, but

92 *Id.* at 534.
93 *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53, n.4 (1938). South Carolina v. Bornwell Bros., 303 U.S. 177, 184, n.2 (1938).
94 United States Dep't of Agri. v. Murry, 413 U.S. 508, 515-16 (1973) (Stewart, J., concurring).
95 For discussion of this point, see Comment, *Equal Protection As a Measure of Competing Interests in Welfare Litigation,* 21 ME. L. REV. 175 (1969).
96 *See* Griffin v. Illinois, 351 U.S. 12 (1956).
97 Comment, *supra* note 95, at 177.
98 404 U.S. 71 (1971).

finesses the point by saying,

> [T]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.[99]

The classification in *Reed* was not arbitrary in an absolute sense, but arbitrary in light of its purpose and the character of the classification.

In proving a classification to be constitutionally arbitrary, it must be shown that an important individual interest is at stake. A convincing argument can be made that had *Murry* and *Moreno* involved business or economic regulations instead of food stamps, the Court would not have taken as close a look at the statutes and would have upheld them despite their imperfections. It is difficult to believe that the Court could remain oblivious to the individual interests asserted, even though they may not be deemed "fundamental." The importance of the individual interest is built into most welfare cases, since they do concern "the most basic economic needs of impoverished human beings."[100] And, it is not merely the interests of the individual plaintiff which must be considered, but those of the entire class of potential plaintiffs he represents. Thus, though the interest in welfare benefits is not *constitutionally* fundamental, it is sufficiently important to trigger more careful scrutiny of asserted state interests and the means chosen to advance them.[101]

Regarding the state's interest in the regulation, claims that the interest is not legitimate, or that the articulated state purpose is not really a purpose of the state[102] appear to be open. Otherwise, in most cases where there is a legitimate state interest, it must be shown to be less important than the individual interest infringed. *Murry* and *Moreno* indicate one possible avenue to accomplish this. It may be helpful to show that the regulation in question serves a purpose which is either irrelevant or relates only indirectly to the overall policy of the statute involved. In *Murry* and *Moreno,* the regulations were passed to eliminate fraud, a legitimate government purpose, while the overall policy of the Food Stamp Act was to improve nutritional levels in low income households and stimulate the agricultural economy.[103] While elimination of fraud may not be irrelevant to the Food Stamp Program, it certainly is not a central objective. And, in *Murry* and *Moreno,* not only did the regulations serve the *extrinsic* state interest of fighting fraud, but they worked against the overall purpose of the Food Stamp Act by eliminating "innocent," qualified people from eligibility.

Regardless of whether the state interest relates directly or is extrinsic to the overall policy of the statute, the precision with which that state interest is served is a decisive factor. If fraud had been effectively diminished by the statutes in

---

99 Reed v. Reed, 404 U.S. 71, 76 (1971).
100 Dandridge v. Williams, 397 U.S. 471, 485 (1970).
101 To use the Marshall approach, a tenuous argument can be made that the receipt of welfare benefits is closely related to various constitutional rights because welfare provides the means of subsistence on which many people depend in order to exercise any of their constitutional rights.
102 *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).
103 United States Dep't of Agri. v. Moreno, 413 U.S. 528, 533-34 (1973).

Murry and *Moreno,* chances are they would have withstood constitutional challenge. Justice Brennan found in *Moreno* that those people who had formed a household to fraudulently claim food stamps would be able to change their living circumstances in order to qualify, and "*only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements" would be excluded.[104] Brennan's logic can be questioned. Certainly some people with fraudulent claims to food stamps would be eliminated by the regulation requiring all household members to be related. All of the fraudulent claimants would not bother to disrupt their living arrangements in order to receive food stamps. Certain attachments form between people living in the same household which may outweigh the importance of splitting up a household merely to get food stamps. In these cases, the regulation appears to combat fraud and is thus minimally rational. However, the point to be underlined is that the regulation served to eliminate fraud in such an imprecise manner that the Court was able to find it irrational. It is this imprecision, as well as the fact that a regulation may work counter to overall policy, which apparently influenced the court to invalidate these regulations.

A corollary to the claim that the means employed serve the ends imprecisely is a contention that there are alternative means which can be utilized to serve similar ends without the damning imprecision. The fact that the purposes are served with imprecision suggests that other ways of serving these purposes are likely to be available. In *Murry* and *Moreno,* the Court recognized that there were other provisions, such as criminal sanctions, already in effect to minimize fraud. If the state ends can be achieved by means that do not threaten the interests protected by the equal protection clause, the Court should be shown those means.[105]

One final factor, not raised in *Murry* and *Moreno,* to be considered when seeking the unitary approach to equal protection is the character of the classification. Discussion earlier in this article showed that classifications such as those based on sex evoke a stricter scrutiny from the Court. A growing body of case law suggests that if the basis for a classification is something over which the individual has little control, the Court may take cognizance of the *relative* invidiousness of the classification and adjust its standard of review accordingly. In welfare cases, if wealth is the basis for a classification, then the Court's attention should be brought to the quasi-suspect character of the classification. However, most welfare equal protection challenges do not involve wealth as the basis for the classification. Most or all welfare regulations distinguish groups of the poor on some other basis, like family size.[106]

There are various ways to summarize the process by which the unitary approach to equal protection is evoked from the Court. One formulation is that in cases of conflict between individual interest and legitimate state interest, the

104 *Id.* at 538 (emphasis added).

105 The Court should be shown those means merely to suggest that there are ways of accomplishing the state ends with more precision. It is not suggested that plaintiff provide alternatives so that the Court can prescribe what alternatives should be utilized. This would be a usurpation of the legislative function. By showing that alternatives exist, plaintiff diminishes, at least to some degree, the state interest in that particular classification.

106 *See* Dandridge v. Williams, 397 U.S. 471 (1970).

more important the individual interest, the greater the precision the Court will demand in the means-ends relationship. Yet, there are cases where the Court first assesses the importance of the state interest by examining how precisely it is served by the means. Essentially, the process can be summarized by saying that as the individual interest (including the interest in not being stigmatized by an invidious classification) grows more important, and the state interest (including its interest in being free from demands to regulate with precision) diminishes, the Court will apply a stricter scrutiny.

IV. Application of the Unitary Approach *Dandridge v. Williams*

The foregoing analysis of the unitary approach to equal protection will be applied to *Dandridge v. Williams,*[107] a case which illustrates a prototypical application of the "old" minimum rationality standard by the Supreme Court. *Dandridge* will be compared to *Moreno.*

The first basis for comparison is the character of the classifications involved. In *Dandridge,* the basis of the classification was family size; in *Moreno,* whether or not all household members were related to each other. In neither case is the classification close to being suspect, so the natures of these two classifications are not distinguishable in a significant way. If anything, one might claim that the *Dandridge* classification invites stricter scrutiny because it discriminates against a weaker, more powerless minority (welfare families with many children) than the *Moreno* classification (impoverished families with several independent, but unrelated, adults). At any rate, it would be difficult to account for the difference in outcome of these two cases by reference to the character of their classifications.

Likewise, a comparison of the individual interests infringed by the statutes challenged in *Moreno* and *Dandridge* does not explain their difference in outcome. Both cases involve the provision of subsistence resources to impoverished people. One might contend that the welfare benefits lost in *Dandridge* (through the imposition of a maximum grant) are even more important than the food stamp benefits lost in *Moreno.* Food stamps are often supplemental to welfare payments, and people who do not qualify for welfare may qualify for food stamps. Thus welfare payments may be claimed to provide more basic sustenance than food stamps. On the other hand, one could contend that the individual interest in *Moreno* is more important because a total loss of benefit is threatened, while in *Dandridge* there is only a partial loss. Notwithstanding these arguments, the individual interests in these cases are comparable and hardly explain the difference in outcome.

Next, the states' interests served by the regulations in these two cases should be compared. Neither regulation serves the alleged purpose of the statute involved very well. In both cases, the government provides other legitimate purposes which the classifications serve. In *Dandridge,* the purpose of the AFDC program is presumably to aid as many families with needy children as possible in an equitable fashion and to promote family unity. Maryland does not justify its benefit ceiling by claiming it serves these ends, but justifies it because it provides

107 *Id.*

incentive to work, maintains a balance in income between welfare recipients and wage earners, encourages family planning and allows allocation of resources to a greater number of families.[108] In *Moreno,* the requirement that all household members be related does not serve the purpose of raising nutritional levels in low-income households or stimulating the agricultural economy. The state interest claimed is the diminution of fraudulent claims to food stamps. In neither *Dandridge* nor *Moreno* do the interests of the state appear to be compelling or overriding. In *Dandridge,* one could argue that the interests the state presents to the Supreme Court are mere afterthoughts; the main purpose of a maximum grant is to save money for the state and any other purposes served are incidental. The state's interest in preventing fraud claimed in *Moreno* is primarily an interest in administrative efficiency, hardly a compelling state interest. The only real difference, then, between the state interests served is that the state offers four interests in *Dandridge* and only one in *Moreno.* The difference is one of quantity more than quality.

The precision with which the means serve the ends is the next basis on which to compare the two cases. In both cases, the classifications can be found to be vastly over and underinclusive. In *Moreno,* the attempt to disqualify households of unrelated individuals fraudulently claiming benefits also incidentally disqualified other legitimately needy households having unrelated members. Their need is as real as those of "related" households, yet they have no chance to prove that their claim to food stamps is legitimate. The regulation is underinclusive since there are many fraudulent claims which this regulation will not affect at all. (Other provisions of the Food Stamp Act do, however, deal with other types of fraud, thus making the entire scheme somewhat less underinclusive).

In upholding the regulation in *Dandridge,* the majority of the Court actually relied on only two of the four offered state interests.[109] Why the Court did not rely on the other two purposes (encouragement of family planning and aid to the largest possible number of families) is unclear. Perhaps the Court felt that these interests were so remotely (imprecisely) served or hard to measure that they did not warrant discussion.

It is difficult to assess the precision with which the nebulous state purpose of balancing economic status between welfare recipients and wage earners is served. Marshall's dissent indicates that the majority may not have relied on this ground at all since the facts on the record do not clearly indicate that this goal was served.[110] He also indicates that in other states, the benefit ceiling does not bear the desired relation to the minimum wage.[111] It is conceivable, therefore, that this state interest was not served at all by the Maryland maximum grant scheme.

The discussion of the precision with which means serve ends in *Dandridge* thus narrows to one articulated state interest, the benefit ceiling as a work incen-

108 *Id.* at 483-84.
109 *Id.* at 486.
110 *Id.* at 524 (Marshall, J., dissenting).
111 *Id.*

tive. Again, Marshall's dissent indicates how imprecisely this goal is served.[112] The classification is overinclusive because many families affected by the ceiling do not have an employable member. It is grossly underinclusive because the work incentive applies only to the small minority of recipients whose families are large enough to be affected by the maximum, and then only those with an employable member.

The conclusion is that the precision with which means serve ends in both *Moreno* and *Dandridge* is minimal. It is difficult to say whether there is considerably more imprecision in one than the other. It follows that the difference in outcome cannot clearly be attributed to the comparative precision with which the means serve the ends.

There may be a series of factors which cumulatively explain why the equal protection claim was upheld in *Moreno* and rejected in *Dandridge*. Perhaps it was important that in *Dandridge* the Court was dealing with the setting of welfare benefit levels, an area traditionally left to state discretion.[113] Perhaps the four state interests in *Dandridge* were significantly more important than the one offered in *Moreno*. Or perhaps the Court saw the statute in *Moreno* as having a significantly less precise means-end relationship than *Dandridge*. One other explanation previously provided is that *Moreno* involved discrimination against a politically unpopular group. All of these explanations are possible, yet it must be concluded that in the four major areas in the analysis (nature of classification, individual interest, state interest, means-end precision), these two cases are largely comparable.

Some dicta from Justice Douglas in his concurring opinion in *Moreno* provides an interesting conclusion to this analysis. Said Douglas, "But for the First Amendment aspect of the case, *Dandridge* would control here."[114] Douglas was alone in finding the first amendment right of association to be the crucial factor in invalidating the regulation in *Moreno*. One wonders how the remainder of the majority decided that *Dandridge* does not control *Moreno*. Douglas' comment lends force to speculation that if *Dandridge* were decided today, there might indeed be a different result.

V. Recent Supreme Court Decisions

More recent Supreme Court decisions in the area of equal protection and social welfare legislation shed as much light, or produce as much confusion, as do prior cases. The difficulty of discerning an articulated equal protection analysis is compounded by the fact that the most recent cases often involve classifications that have either been held suspect[115] or quasi-suspect,[116] or involve a fundamental right.[117] However, much of the majority or dissenting opinions support the thesis of this article.

112 *Id.*
113 *See* King v. Smith, 392 U.S. 309 (1968).
114 United States Dep't. of Agri. v. Moreno, 413 U.S. 528, 544 (1973) (Douglas, J., concurring).
115 Jiminez v. Weinberger, 417 U.S. 628 (1974) (illegitimacy).
116 Schlesinger v. Ballard, 419 U.S. 498 (1975) (sex); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (sex).
117 Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (right to travel).

Although *Shapiro v. Thompson*[118] was found dispositive of the equal protection attack on Arizona's residence duration requirement for free medical care, the Court in *Memorial Hospital v. Maricopa County*[119] did not simply state that a compelling state interest would be necessary to uphold the classification. Rather the Court cited *Weber v. Aetna Casualty & Surety Co.*[120] and *Dunn v. Blumstein*,[121] for the proposition that the Court must initially look to the nature of the classification and the individual interests affected.[122] This language suggests that equal protection analysis initially involves a balancing process to determine the level of scrutiny.

> The opinion in *Maricopa County* represents a somewhat similar but more limited attack on the two-tier system. Rather than providing several levels of review, it merely prevents the application of strict scrutiny until the deprivation involved reaches a certain level of importance to the individual.[123]

The statutory provision attacked in *Jiminez v. Weinberger*[124] involved a classification based on illegitimacy. Although there was precedental support for simply requiring a compelling state interest to uphold this type of classification,[125] the Court utilized a different equal protection approach. The Court first stated that the statute could not be read to support the *articulated* state purpose.[126] The Court thereby indicated that it would look closely only at such articulated purposes and would no longer accept any conceivable state purpose to justify the classification. The Court did not stop its analysis in its rejection of the articulated purpose, but rather proceeded to closely scrutinize the means-end relationship.

> It does not follow, however, that the blanket and conclusive exclusion of appellant's subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits, and it would discriminate between the two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses.[127]

The statutory classification was held to be unconstitutionally imprecise. It was overinclusive since it benefitted some children who are not dependent on their disabled parent, and underinclusive since it excludes some children who are dependent upon their disabled parent.[128]

---

118 394 U.S. 618 (1969).
119 415 U.S. 250 (1974).
120 406 U.S. 164 (1972).
121 405 U.S. 330 (1972).
122 *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253 (1974); *see also* Sosna v. Iowa, 419 U.S. 393 (1975) which can be explained through the use of this initial balancing approach to determine the level of scrutiny the Court will employ.
123 *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 115 (1974).
124 417 U.S. 628 (1974).
125 Levy v. Louisiana, 391 U.S. 68 (1968); Labine v. Vincent, 401 U.S. 532 (1971).
126 *Jiminez v. Weinberger*, 417 U.S. 628, 634-36 (1974).
127 *Id.* at 636.
128 *Id.* at 637.

It is important to note that the Court invalidated the statutory scheme by using the precision analysis rather than by simply finding that the state had failed to supply a sufficiently compelling interest. Rather than using the language of strict scrutiny, the Court closely analyzed both the statutory means and ends and found the statutory scheme to be unconstitutionally imprecise since the purpose was not effectively served by the means. Seemingly the Court chose to closely scrutinize the statutory scheme after an initial determination that the individual interests affected (insurance benefits) and the invidiousness of the classification (illegitimacy) outweighed the articulated state purpose of preventing spurious claims.

Two cases to be analyzed involve gender-based classifications. In *Schlesinger v. Ballard*[129] the statutory scheme was upheld, while in *Weinberger v. Wiesenfeld*[130] the scheme was found violative of equal protection. In *Schlesinger v. Ballard,* a male naval officer was subject to mandatory discharge under 10 U.S.C. § 6382(a) when he failed for a second time to be promoted to the grade of lieutenant commander. The petitioner raised an equal protection challenge claiming that women officers are subject to 10 U.S.C. § 6401 which entitles them to thirteen years of commissioned service before being mandatorily discharged for want of promotion. The Court first found the legislative purpose to be the maintenance of effective leadership, and then distinguished this purpose from the administrative or fiscal considerations of cases such as *Frontiero v. Richardson.*[131] The Court then indicated it had used a precision test in both *Reed v. Reed*[132] and *Frontiero,* by stating that the gender-based classifications were struck down since based on overbroad generalizations.[133] In *Schlesinger,* however, the Court upheld the classification as based on the "demonstrable fact" that male and female naval officers are not similarly situated with respect to opportunities for professional service.[134] The use of the term "demonstrable" indicates that although the Court is willing to uphold a sex-based classification, it will look at *demonstrable* evidence to find if the legislative purpose is in fact aided by the statutory means.

Justice Brennan, in dissent, first argues that gender-based distinctions must be subject to "close judicial scrutiny," but then he utilizes the strict scrutiny language of the compelling state interest test.[135] After stating that the Government failed to show a compelling interest, Justice Brennan analyzes the classification by closely scrutinizing the articulated purpose[136] and the means-end relationship.[137] The dissent differs from the majority, therefore, in the extent to which

129 419 U.S. 498 (1975).
130 420 U.S. 636 (1975).
131 Schlesinger v. Ballard, 419 U.S. 498, 602-6 (1975).
132 404 U.S. 71 (1971).
133 Schlesinger v. Ballard, 419 U.S. 498, 506-507 (1975).
134 *Id.* at 508.
135 *Id.* at 511 (Brennan, J., dissenting).
136 [W]hile we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications, we have recently declined to manufacture justifications in order to serve an apparently invalid statutory classification. . . . Moreover, we have analyzed asserted governmental interests to determine whether they were in fact the legislative purpose of a statutory classification, . . . and have limited our inquiry to the legislature's stated purposes when these purposes are clearly set out in the statute or its legislative history.
Id. at 520 (Brennan, J., dissenting) (citations omitted).
137 *Id.* at 518, n.9.

it will scrutinize the legislative classification.

This decision reflects the competing balancing tests. Justice Brennan characterizes the classification as a gender-based distinction and finds that the petitioner's interest in avoiding the invidious nature of this quasi-suspect classification outweighs the articulated legislative purpose. He thereby subjects the means-end relationship to close judicial scrutiny. The majority, on the other hand, although stating that the governmental interest to be served is maintaining effective leadership, actually believed that the governmental interest is in compensating women line officers for their inferior position in the Navy (less opportunity for professional service).[138] Characterizing the legislative interest as beneficient in nature, the majority must have found that the governmental interest outweighed the individual interest at stake. With the balance tipping in favor of the governmental interest, the majority was not as willing as the dissent to require strict precision in the statutory scheme. But, significantly, although the majority did not require as strict precision as the dissent, it did closely scrutinize the scheme so as to require "the demonstrable fact" that male and female officers are not similarly situated with respect to opportunities for professional service. Although this scrutiny was not as strict as the dissent would have required, it is more than would be required under the minimum rationality standard.

Weinberger v. Wiesenfeld[139] involved an attack on 42 U.S.C. § 402(g). Under that provision of the Social Security Act, benefits which are based on the earnings of a deceased husband and father are payable, with limitations, both to the widow and the couple's minor children. Benefits based on the earnings of a deceased wife and mother, however, are payable only to the minor children and not to the widower. The classification was found indistinguishable from that invalidated in *Frontiero v. Richardson*[140] and thereby struck down as based on an "archaic and overbroad" generalization.[141] This case added a new term to the confused levels of scrutiny required by the equal protection standard when it stated, "benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex."[142] Although the legislature had articulated the benign compensatory purpose of providing women with benefits because of economic discrimination, the Court was willing to look to the statutory scheme and the legislative history to determine if the purpose articulated by the Government was in reality the genuine purpose of the provision.[143]

It may be assumed that as a result of the gender-based classification and the individual interest in not being stigmatized by an invidious classification, the Court was willing to not only reject the Government's articulated purpose, but also to substitute another purpose to the statutory provision. Even Justice Rehnquist, concurring in the result, was willing to take a hard look at the context and

138 *Id.* at 506; *see id.* at 518 (Brennan, J., dissenting).
139 420 U.S. 636 (1975).
140 411 U.S. 677 (1973).
141 Weinberger v. Wiesenfeld, 420 U.S. 636, 642-43 (1975).
142 *Id.* at 647.
143 Not only did the Court reject the Government's articulated purpose, it went further to attribute to the provision the more general purposes of the Social Security Act of enabling the surviving parent to remain at home to care for the child. *Id.* at 648-51.

history of § 402(g) and reject the Government's proffered legislative purpose.[144] The Court chose not to invalidate this sex-based classification by using the strict scrutiny standard of a compelling state interest. Yet, "this intense examination of legislative objectives and searching for unstated legislative purposes is a salient characteristic of the strict scrutiny approach."[145] In having chosen not to employ the language of strict scrutiny, the Court implicitly recognized a middle-standard of equal protection which caused it to closely scrutinize the governmental purpose, to require a close relationship between means and ends, and to demand a sufficient justification for the differentiation among employees on the sole basis of sex.

Perhaps the recent case which is the most interesting and inconsistent with the thesis of this article is *Weinberger v. Salfi*,[146] said by one commentator to sound the death knell for the irrebuttable presumption doctrine.[147] That case involved an attack on 42 U.S.C. § 416(c)(5) and (e)(2), the duration-of-relationship requirements of the Social Security Act which prohibit a wage earner's widow or stepchild from receiving insurance benefits unless their relationships to the wage earner existed nine months prior to death. In upholding the constitutionality of the provision, the Court simply recited the minimum rationality standard, citing *Dandridge v. Williams*,[148] *Richardson v. Belcher*,[149] and *Flemming v. Nestor*.[150] Both *Jiminez v. Weinberger*[151] and *United States Dep't. of Agriculture v. Murry*[152] were distinguished as involving classifications which bore no rational relation to a legitimate legislative goal.[153] Although the Court tolerated the underinclusive and overinclusive nature of the classification,[154] the majority used language which could have required closer scrutiny than the minimum rationality standard when it stated, "The benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility."[155] If the Court was simply deferring to legislative analysis and determination, the integrity of the minimum rationality standard may be maintained. However, if the Court independently scrutinized the statutory scheme to determine if the legislative means bore a "sufficiently close nexus" to the articulated legislative ends, a standard other than minimum rationality was utilized. This "sufficiently close nexus" test would require a higher level of scrutiny than would minimum rationality.[156] Perhaps the level of scrutiny employed was determined

144 *Id.* at 655 (Rehnquist, J., concurring in the result).
145 Note, Boraas v. Village of Belle Terre, *The New, New Equal Protection,* 72 MICH. L. REV. 508, 531 (1974); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972).
146 422 U.S. 749 (1975).
147 Monaghan, *Foreword: The Supreme Court 1974 Term,* 89 HARV. L. REV. 1, n.2 (1975).
148 397 U.S. 471 (1970).
149 404 U.S. 78 (1971).
150 363 U.S. 603 (1960); Weinberger v. Salfi, 422 U.S. 749 (1975).
151 417 U.S. 628 (1974).
152 413 U.S. 508 (1973).
153 Weinberger v. Salfi, 422 U.S. 479 (1975). In both these cases, however, Mr. Justice Rehnquist dissented, expressing the view that the classifications rested upon a rational basis.
154 *Id.* at 775.
155 *Id.* at 772.
156 Yet it is unclear what level of scrutiny was employed, for Justice Brennan, in dissent, suggests that there was no evidence presented whatsoever that the problem of collusive marriages exists at all. *Id.* at 804.

by an analysis of the individual interest affected as compared to the state interest, thereby allowing the Court to require less precision than would Justice Brennan's dissent, but more precision than that imposed by a minimum rationality standard.[157]

VI. Conclusion

It has been suggested that equal protection claims in the area of social welfare legislation have been foreclosed by *Dandridge v. Williams*.[158] However, *United States Dep't. of Agriculture v. Murry*[159] and *United States Dep't. of Agriculture v. Moreno*[160] indicate that there possibly is room to challenge welfare regulations on a rationality basis that goes somewhat beyond earlier notions of "minimum." When the legislative classification involves important individual interests, including the interest in not being stigmatized by an invidious classification, which outweigh the state interests involved, the level of scrutiny will become more severe. As the individual interest becomes more important or as the state interest becomes less important, the Court will become increasingly rigid in its reliance on the *articulated* governmental purpose and in the requirement that the statute be precisely drawn. It is the thesis of this article that in these situations where an important individual interest is at stake, although not one which will in itself trigger strict scrutiny, the Court will look to *demonstrable* evidence to determine the actual purpose of the statute and to ensure that the selected means will in fact substantially further that purpose without a high degree of over- or under-inclusion.

157 *Compare* Weinberger v. Salfi, 422 U.S. 749 (1975), *with* United States Dep't of Agri. v. Murry, 413 U.S. 508 (1973) (where the interest at stake was sufficient food for an adequate diet); *see The Supreme Court, 1974 Term,* 89 HARV. L. REV. 47, 82-83 n.51 (1975).
158 397 U.S. 471 (1970).
159 413 U.S. 508 (1973).
160 413 U.S. 528 (1973).