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Federalism and a New Equal Protection

Henry Siedzikowski

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Comment

FEDERALISM AND A NEW EQUAL PROTECTION

We hold these truths to be self-evident; that all men are created equal . . . .

Declaration of Independence

I. INTRODUCTION

It is indeed ironic that our nation, founded on the basic premise of human equality, had no constitutional requirement of equal treatment under the law until the post-Civil War amendments.\(^1\) nearly a century after its birth. Following the passage of these amendments, the Supreme Court gradually developed a body of equal protection law that restricted discriminatory actions by state governments in a variety of contexts.\(^2\)

In contrast, there was no equivalent restriction on the federal government until 1954. In that year, the Supreme Court, in *Bolling v. Sharpe*,\(^3\) held that the due process clause of the fifth amendment included concepts of equal protection.\(^4\) The question of the degree of incorporation of equal pro-

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1. The thirteenth, fourteenth, and fifteenth amendments to the United States Constitution were passed in response to social conditions existing during the period of the Civil War. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67-72 (1873). The thirteenth amendment, adopted in 1865, prohibits slavery and involuntary servitude. U.S. Const. amend. XIII. The fourteenth amendment, adopted in 1868, prohibits the denial of the right to vote on the basis of race, color, or previous condition of servitude. U.S. Const. amend. XV. And the fifteenth amendment, adopted in 1870, provides that the states provide equal protection under the laws to all people within their jurisdiction. U.S. Const. amend. XIV, § 1. That amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

2. For a review of the development of equal protection law, see notes 10-26 and accompanying text infra.


4. *Id.* at 499. *Bolling* involved a challenge to segregation in the public schools of the District of Columbia. *Id.* at 498. It was decided on the same day as *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the pioneer school desegregation case. *Bolling* was not controlled by *Brown* since the District of Columbia is governed by the federal government and, consequently, the prohibitions of the fourteenth amendment are not applicable. 347 U.S. at 499.

However, the *Bolling* Court held that racial segregation in the District of Columbia public schools violated the due process clause of the fifth amendment, which operates as a restriction on federal action. *Id.* at 500. That amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Court based its holding on the intolerability of invidious racial discrimination. 347 U.S. at 499-500. The Court stated:

Classification based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. . . . This Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race."

*Id.* (footnotes omitted), *quoting* *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896).
tection principles into the fifth amendment due process clause, however, was left for future determination.5

This comment will examine the effect of the equal protection requirement on the federal government, particularly in the context of recent Supreme Court decisions concerning classifications of aliens6 and illegitimates.7 Consideration will also be given to the degree to which equal protection law is influenced by the federal system8 in which it operates.9

II. OVERVIEW OF EQUAL PROTECTION LAW

It is appropriate to begin with a brief examination of the development of equal protection law and of the standards of judicial review which the Supreme Court currently applies. More specifically, it is essential to focus upon the different levels of scrutiny invoked in the Court’s analysis of various legislative classifications.

Early equal protection law focused solely upon the means which had been chosen to accomplish a state legislature’s objectives.10 A statute generally withstood judicial review if the classification made by the law was reasonably related to a legislative purpose.11 This type of equal protection review was commonly called the “rational basis test.”12 Classifications based on race were the one major exception to this rule, and received far

5. The Court maintained that although concepts of equal protection were incorporated, to some extent, in the fifth amendment due process clause, the two were not equivalent. 347 U.S. at 499-500. Chief Justice Warren, writing for a unanimous Court, stated:

[The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.]

Id. at 499. For a discussion of the degree of incorporation of equal protection principles into the due process clause, see notes 159-70 and accompanying text infra.

6. See notes 94-154 and accompanying text infra.

7. See notes 33-93 and accompanying text infra.

8. A system of federalism is one in which several states are organized under the control of a central government, distinct from the individual governments of the separate states. BLACK'S LAW DICTIONARY 740 (4th ed. 1968).

9. This issue revolves around the question of whether constitutional restrictions on the powers of government are equally applicable to all levels of government operating in the federalist system. For a discussion of the role of federalism in equal protection law, see notes 159-97 and accompanying text infra.


12. See, e.g., Labine v. Vincent, 401 U.S. 352 (1971); Levy v. Louisiana, 391 U.S. 68 (1968). More recently, this type of review has also been labelled the “minimum” or “mere” rationality test. See Reed v. Reed, 404 U.S. 71 (1971).
less deferential treatment by the courts. The "strict scrutiny" of racial classifications had its origin in the fact that racial prejudice in state laws was the obvious target of the post-Civil War amendments.

In the 1960's, under the Warren Court, a two-tiered approach to equal protection analysis evolved which requires the identification of the class discriminated against or the interest affected by the classification. Under this approach, characterization of a class as "suspect" or an interest as "fundamental" would invoke "strict scrutiny" by the Court, which would trigger an intensive review of the objectives sought to be achieved by the legisla-


16. Race remained the major suspect class. For the latest reaffirmation of this position, see Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978). In addition, classifications based on alienage were eventually determined to be suspect, although this pronouncement came from the Burger Court rather than from the Warren Court. See Graham v. Richardson, 403 U.S. 365 (1971). Justice Blackmun, writing for the Graham Court, stated:

"[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority...for whom such heightened judicial solicitude is appropriate. Accordingly,..."the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."

Id. at 371-72 (citations and footnotes omitted), quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). For a discussion of Graham, see notes 94-104 and accompanying text infra. It should be noted that the Supreme Court may have retreated from this position. See Foley v. Connelie, 98 S. Ct. 1067 (1978). For discussion of Foley, see notes 138-54 and accompanying text infra.

There was also dicta in several Warren Court opinions to the effect that classifications based on wealth were suspect. See, e.g., McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) ("a careful examination...is especially warranted where lines are drawn on the basis of wealth or race"); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.") Subsequent decisions of the Burger Court, however, rejected this dicta and refused to designate wealth a suspect classification. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971).


ture, the means selected to achieve these ends, and the congruence between the two.\textsuperscript{18} In contrast, any other classification would invoke the traditional deferential review.\textsuperscript{19}

The Burger Court, however, has initiated a withdrawal from the extremes of the Warren Court’s two-tiered approach.\textsuperscript{20} The Court has steadfastly refused to augment the list of suspect classes or fundamental interests.\textsuperscript{21} In addition, the Court has created a new middle standard, commonly labelled “minimum scrutiny with bite.”\textsuperscript{22} Moreover, the Burger Court has often been less deferential in applying the “rational basis” test.\textsuperscript{23}

In summary, current equal protection law encompasses a number of different standards, with each type of classification theoretically triggering a corresponding standard of review.\textsuperscript{24} Within a specific type of classification, however, the enunciated standard is not always uniformly applied.\textsuperscript{25} In-

\begin{itemize}
  \item \textsuperscript{18} See, e.g., Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Strauder v. West Virginia, 100 U.S. 303 (1880). See Gunther, supra note 15, at 8-10. The invocation of strict scrutiny had a substantial effect on the Court’s equal protection analysis. The usual presumption of constitutionality was reversed, and the state, rather than the challenger, had to sustain the burden of proof. Id. Moreover, the Court would not accept a hypothetical basis for the state action, but rather required the demonstration of a “compelling” state interest and means absolutely necessary to accomplish the legislative ends. Id. Once strict scrutiny was invoked, the result was almost always fatal to the challenged statute or other government action. See id. But see Korematsu v. United States, 323 U.S. 214 (1944) (sustaining the exclusion of persons of Japanese origin from the west coast of the United States during World War II for compelling military reasons).
  \item \textsuperscript{19} See Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Gunther, supra note 15, at 8-10; Developments, supra note 15, at 1076-133. See generally Bice, supra note 16, at 698-702.
  \item \textsuperscript{20} See Gunther, supra note 15, at 17-40; Note, Equal Protection: Modes of Analysis in the Burger Court, 53 DEN. L.J. 687, 697-702 (1976).
  \item \textsuperscript{21} See Gunther, supra note 15, at 12-16; Note, supra note 20, at 689-97.
  \item \textsuperscript{22} See Trimble v. Gordon, 430 U.S. 762 (1977); Gunther, supra note 15, at 18-40; Note, supra note 20, at 712-29. For a discussion of Trimble, see notes 70-83 and accompanying text infra.
  \item \textsuperscript{23} See G. Gunther, supra note 10, at 661-62. Compare McDonald v. Board of Election Comm’rs, 394 U.S. 802 (1969) (Warren Court decision sustaining a denial of absentee ballots to qualified voters imprisoned in the county jail while awaiting trial, while other classes of voters were provided with absentee ballots) and McGowan v. Maryland, 366 U.S. 420 (1961) (Warren Court rejection of equal protection challenge to state’s Sunday closing laws which exempted certain products from the ban) with Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (Burger Court, while applying the minimum rationality test, invalidated a Social Security Act provision which paid benefits to widows but not to widowers) and Reed v. Reed, 404 U.S. 71 (1971) (Burger Court decision invalidating state preference for men over women as administrators of estates while purporting to apply the traditional minimum rationality standard).
  \item \textsuperscript{24} For example, race is still a suspect classification invoking strict scrutiny. See Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978). Illegitimacy classifications are not suspect, but do trigger minimum scrutiny with bite. See Trimble v. Gordon, 430 U.S. 762 (1977). Gender based classifications are apparently subject to the “mere rationality” standard, but the test is far less deferential than the traditional rationality standard. See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971). But see Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion of four Justices would make gender based classifications suspect).
  \item \textsuperscript{25} For a discussion of the lack of uniformity in applying the tests involving illegitimacy and alienage classifications, see notes 33-93 (illegitimacy) & 94-154 (alienage) and accompanying text infra. For an example of this lack of consistency in the context of gender based classifications, compare Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating statute requiring service-women to prove the dependence of their husbands before they were entitled to increased benefits, but which contained no similar requirement for servicemen) with Schlesinger v. Ballard,
deed, Justice Marshall has gone so far as to suggest that the Court currently utilizes a "sliding scale" approach, applying a spectrum of standards depending on the nature of the classification and the importance of the interests infringed upon. 26

III. RECENT TRENDS

Equal protection challenges arise in a variety of situations. Classifications based on race are frequently the subject of litigation and are often challenged successfully. 27 Moreover, the constitutional doctrines with respect to race based classifications are fairly explicit and consistent. 28 In contrast, classifications based on sex are currently generating a number of challenges, and have resulted in a plethora of varying and sometimes inconsistent responses from the Court. 29

419 U.S. 498 (1975) (upholding military promotion system which granted women in Navy a tenure of thirteen years before being subject to discharge for lack of promotion, but which provided no such tenure for men).

26. Justice Marshall has urged that the Court's equal protection decisions reveal the application of a variety of standards, including strict scrutiny and the rational basis test. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting). He has contended that the Court should explicitly adopt this flexible approach. Id. at 98-99, 108-110 (Marshall, J., dissenting). In his dissent in Rodriguez, Justice Marshall stated:

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. 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 the very sort of reasoned approach to equal protection analysis for which I previously argued. . . . Id. at 98-99 (Marshall, J., dissenting). See also Dandridge v. Williams, 397 U.S. 471 (1970) (Marshall, J., dissenting).

Justice White also appears to have endorsed this "sliding scale" theory. See Vandis v. Kline, 412 U.S. 441, 438 (1973) (White, J., concurring). For a further discussion of the "sliding scale" approach, see Note, supra note 20, at 716-17.


28. This is probably due to the fact that the post-Civil War amendments were aimed specifically at racial discrimination, and therefore race has traditionally been considered a suspect class. See Cooper v. Aaron, 358 U.S. 1 (1958); Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ., 347 U.S. 483 (1954). See also notes 13 & 14 and accompanying text supra. One controversial area involving race based classifications is affirmative action. See notes 195-97 and accompanying text infra.

There are two lines of cases, however, of fairly recent origin, which clearly illustrate a federal-state distinction in the Court's equal protection analysis. The first class of cases involves challenges to discriminatory treatment of illegitimates. The second line of cases concerns the application of the equal protection principles to classifications involving aliens. Both of these classes of cases contain indications that the Supreme Court is willing to be more deferential to federal mandates than to those of the states.

A. Classifications Involving Illegitimates

This area of equal protection law originated with the companion cases of Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co. Levy and Glona involved separate challenges to the Louisiana wrongful death statute which barred unacknowledged illegitimate children from recovering for the death of their mother, and prohibited a mother from recovering for the death of her unacknowledged illegitimate children. Having concluded that the equal protection clause applied to classifications involving illegitimates, the Court determined that the rational basis test was the appropriate standard to be applied.

In applying the rational basis test to the challenged statute, the Levy majority recognized the usual deference given to state legislatures in the social and economic area, but also reiterated the Court's sensitivity to classifications involving basic civil rights. The Court concluded that since an intimate, familial relationship was involved, and since the question of legitimacy bore no relationship to the wrong allegedly inflicted upon the

30. See notes 33-93 and accompanying text infra.
31. See notes 94-154 and accompanying text infra.
32. See notes 155-97 and accompanying text infra.
34. 391 U.S. 73 (1968).
35. LA. CIV. CODE ANN. art. 2315 (West 1972).
36. Under Louisiana law, acknowledgment occurs when the parent publicly and formally admits responsibility for the child. LA. CIV. CODE ANN. art. 203 (West 1972). It can occur voluntarily or through court proceedings. LA. CIV. CODE ANN. arts. 203, 208 (West 1972). See also Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 74-75 & n.7 (1968). In order to effectively acknowledge a child, the natural parents must be legally capable of marrying at the time of the acknowledgment, or have actually married subsequent to the acknowledgment. LA. CIV. CODE ANN. art. 204 (West 1972).
37. Levy concerned the right of the child to recover for the death of the mother. 391 U.S. at 69-70. The companion case, Glona, involved the right of a mother to recover for the death of her illegitimate child. 391 U.S. at 73-74.
38. 391 U.S. at 70. The Court stated: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." Id. (citations and footnotes omitted).
39. Id. at 71.
40. Id.
41. Id.
42. Id.
mother, the statute was unconstitutional. Similarly, in *Glona*, the majority held that the statute was not rationally related to the asserted purpose of discouraging illegitimacy.

Three years later, in *Labine v. Vincent*, the Court apparently retreated from its position in *Levy*. *Labine* involved a challenge to a Louisiana interstate succession provision which subordinated the rights of acknowledged illegitimate children to those of legitimates and other relatives of the deceased parent. The *Labine* majority questioned the appropriateness of any equal protection review, but nevertheless concluded that the statute clearly met the rationality standard.

43. *Id.* The Court explained:

These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.

We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother. *Id.* at 72 (footnotes omitted).

44. *Id.* at 72.

45. *Id.* at 75-76. The *Glona* Court applied the rational basis test. *Id.* The majority opinion, written by Justice Douglas, concluded:

[We] see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death.

*Id.* at 75 (citations omitted).

In a dissent to *Levy* and *Glona*, Justice Harlan, in an opinion joined by Justices Black and Stewart, labelled the Court's decisions "constitutional curiosities." *Id.* at 76 (Harlan, J., dissenting). Disagreeing with the conclusions of the majority and the degree of rigor with which the rationality test was applied, Justice Harlan stated:

The question in these cases is whether the way in which Louisiana has defined the classes of persons who may recover is constitutionally permissible. The Court has reached a negative answer to this question by a process that can only be described as brute force.

*Id.* at 76, 79-80 (Harlan, J., dissenting).

46. 401 U.S. 532 (1971).

47. The Court distinguished *Labine* from *Levy* and *Glona* on two bases. First, the Court noted the traditional state interest in intestate succession laws. *Id.* at 535-38. Secondly, the Court reasoned that the provision challenged in *Labine* did not provide an "insurmountable barrier" to the illegitimate child, since the parent could have provided for the child by will. *Id.* at 539.


49. Recall that acknowledged illegitimate children were not excluded under the wrongful death statute involved in *Levy* and *Glona*. See note 36 and accompanying text supra.

50. 401 U.S. at 534.

51. The *Labine* majority consisted of the dissenters in *Levy* plus the two most recent appointees to the Court at that time, Chief Justice Burger and Justice Blackmun.

52. 401 U.S. at 535-39. The majority asserted:

[T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed
In Weber v. Aetna Casualty & Surety Co., the Court invalidated a state workman's compensation statute which discriminated against illegitimates. The Court distinguished Labine, relying on the fact that the provision challenged in Weber provided an "insurmountable barrier" to the illegitimate child which was absent in Labine. The majority opinion in Weber did not clearly enunciate the appropriate standard of review, but concluded that no justification existed for the statutory classification regardless of which test was applied. The dissent argued that the rational

[to] the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws.

Id. at 538-39 (footnote omitted).

53. The Court stated: "Even if we were to apply the 'rational basis' test, [the] statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State." Id. at 535 n.6.


55. Id. at 165. The challenged statute was Louisiana's Workman's Compensation Act, LA. REV. STAT. ANN. § 23:1232 (West 1964), which gave priority of recovery to legitimate children and acknowledged illegitimates over unacknowledged illegitimate children. Id.

56. 406 U.S. at 170. An "insurmountable barrier" was considered to be present because under Louisiana law the father could not have acknowledged the illegitimate children even if he had desired to do so. As the Court explained:

[Louisiana law] prohibits acknowledgment of children whose parents were incapable of contracting marriage at the time of conception. Acknowledgment may only be made if the parents could contract a legal marriage with each other. Decedent in the instant case remained married to his first wife—the mother of his four legitimate children—until his death. Thus, at all times he was legally barred from marrying . . . the mother of the two illegitimate children. It therefore was impossible for him to acknowledge legally his illegitimate children and thereby qualify them for protection under the Louisiana Workmen's Compensation Act.

406 U.S. at 171 n.9, construing LA. CIV. CODE ANN. art. 204 (West 1972). The children in Weber were therefore barred from recovery even if they were, in fact, dependent on their father. This situation can be contrasted to that presented in Labine, where the parent could have provided for the illegitimate child by will in order to avoid the harsh result under the intestacy law. For a discussion of Labine, see notes 46-53 and accompanying text supra. For a discussion of acknowledgment of illegitimate children under Louisiana law, see note 36, supra.

The Weber Court further distinguished Labine as resting on the "traditional deference to a State's prerogative to regulate the disposition at death of property within its borders." 406 U.S. at 170 (citation omitted).

57. The majority opinion was written by Justice Powell.

58. Justice Powell stated:

The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. . . . Though the latitude given state economic and social regulation is necessarily broad, when statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. . . . The essential inquiry . . . is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

406 U.S. at 172-73 (citations omitted).

59. Id. at 175-76. Justice Powell reasoned: "Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." Id. (footnote omitted).

In his discussion, Justice Powell apparently analogized illegitimacy to other suspect classes, such as race and alienage. See id.
tionship test was appropriate, and that the statute satisfied that standard of review.60

Four years later, the trend established by the Court changed direction. In *Mathews v. Lucas*,61 the Court sustained a Social Security Act provision62 which operated to the disadvantage of some illegitimates.63 The majority in *Lucas* rejected strict scrutiny as the appropriate standard64 and distinguished prior decisions invalidating illegitimacy classifications.65 Applying the minimum rationality test, the Court found the provision justified by administrative convenience.66 The dissenters67 would have required more than minimum rationality,68 although they did not assert that strict scrutiny was appropriate.69

60. *Id.* at 177-85 (Rehnquist, J., dissenting). Justice Rehnquist was the sole dissenter. He maintained that the statutory provision at issue in *Weber*, as well as the provision in *Levy*, satisfied the rational relationship test. *Id.* at 184-85 (Rehnquist, J., dissenting).


63. 427 U.S. at 516. The provision governed a surviving child's insurance benefits. *Id.* at 497-99. The benefits were provided to children who were dependents at the time of their parent's death. *Id.* at 498. Legitimate children, and illegitimates who met certain criteria, such as entitlement to inherit under state law or written acknowledgment of paternity, were not required to prove dependence. *Id.* at 498-99. All other illegitimates were subjected to individualized proof of dependency as a condition to entitlement to benefits. *Id.*

64. *Id.* at 504-05. Justice Blackmun, writing for the majority, stated:

> It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society. ... [S]uch irrationality in some classifications does not in itself demonstrate that other, possibly rational, distinctions made in part on the basis of legitimacy are inherently untenable ...

> We therefore adhere to our earlier view ... that the Act's discrimination between individuals on the basis of their legitimacy does not "command extraordinary protection from the majoritarian political process."

*Id.* at 505-06 (citations omitted).

65. *Id.* at 511. In distinguishing *Levy* and *Weber*, Justice Blackmun noted that the statutes challenged in those cases provided an "insurmountable barrier" to the illegitimates, causing them to be totally shut out from benefits. *Id.* For a discussion of *Levy*, see notes 33-45 and accompanying text supra. For a discussion of *Weber*, see notes 54-60 and accompanying text supra. In contrast, under the provision at issue in *Lucas*, the question of legitimacy was simply regarded as an indication of dependency, which was considered a valid ground of qualification. 427 U.S. at 511.

66. 427 U.S. at 509. In describing this asserted interest, the Court stated:

>Congress' purpose in adopting the statutory presumptions of dependency was obviously to serve administrative convenience. While Congress was unwilling to assume that every child of a deceased insured was dependent at the time of death, by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency, Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable.

*Id.* The administrative convenience justification, however, has not generally been favored by the Court. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974).

67. Justice Stevens wrote a dissenting opinion in which Justices Brennan and Marshall joined.

68. 427 U.S. at 520-21 (Stevens, J., dissenting). Justice Stevens argued:

> [A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem
Finally, in 1977, in two cases decided on the same day, the Court sustained a challenge to a state intestacy statute and rejected an attack on a classification under federal immigration law. In *Trimble v. Gordon*, the plaintiffs challenged a provision of the Illinois Probate Code which allowed all children to inherit by intestate succession from their mothers, but only permitted legitimate children to inherit by intestate succession from their natural fathers. A sharply divided Court found the provision unconstitutional.

While recognizing that illegitimates as a class share many characteristics with other suspect classes, the Court declined to find that illegitimacy was a suspect class. While rejecting strict scrutiny, however, the Court asserted that the appropriate level of review “is not a toothless one.”

Whether the classification is expressed in terms of eligible classes or in terms of presumptions of dependency, the fact remains that illegitimacy, written acknowledgments, or state law make eligible many children who are no more likely to be “dependent” than are the children in appellees’ situation. Yet in the name of “administrative convenience” the Court allows these survivors’ benefits to be allocated on grounds which have only the most tenuous connection to the supposedly controlling factor—the child’s dependency on his father.

I am persuaded that the classification which is sustained today in the name of “administrative convenience” is more probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates. The sovereign should firmly reject that tradition. The fact that illegitimacy is not as apparent to the observer as sex or race does not make this governmental classification any less odious. It cannot be denied that it is a source of social opprobrium, even if wholly unmerited, or that it is a circumstance for which the individual has no responsibility whatsoever.

Id. at 520-23 (Stevens, J., dissenting) (footnote omitted).

The dissenters also rejected the majority’s administrative convenience argument. Id. at 516-20 (Stevens, J., dissenting). They found *Lucas* to be indistinguishable from cases in which that justification had been rejected. Id. (citations omitted). The dissenters also believed that the majority had “unfairly evaluate[d] the competing interests at stake.” Id. at 517 (Stevens, J., dissenting).


72. 430 U.S. at 764-65.
74. 430 U.S. at 765-66.
75. Id. at 767.
76. Id.
The *Trimble* majority determined that the purpose of the statutory provision was to ameliorate the harsh common law regarding illegitimates, and concluded that the remaining discrimination must be considered in light of this purpose. After reviewing the justifications which the Supreme Court of Illinois had accepted in upholding the statute, and considering an additional justification offered by the state, the majority concluded that the provision violated the equal protection clause. The dissenters maintained that *Trimble* was indistinguishable from *Labine*, and hence considered the statute to be constitutional.

Decided on the same day as *Trimble* was *Fiallo v. Bell*. The statute challenged in *Fiallo* was a federal immigration law which had the effect of excluding the relationship between an illegitimate child and his natural father from the special preference immigration status accorded a child or

78. 430 U.S. at 768. The Supreme Court accepted the determination of the Supreme Court of Illinois that this was in fact the purpose of the statute. Id. at 767-68. At common law, an illegitimate child was incapable of inheriting from either parent. Id. at 768.

79. Id. at 768.

80. Id. at 768-74. The Supreme Court of Illinois had found three major justifications for the law. Id. The first was the purported state interest in promoting legitimate family relationships. Id. at 768. The Supreme Court rejected this justification because it found that the provision bore "only the most attenuated relationship to the asserted goal." Id. The Court elaborated by stating: 

81. Id. at 774. The state urged that the provision reflected the presumed intention of the citizens of the state as to the disposition of their property at death. Id. The Court also rejected this justification, reasoning that the failure of the Supreme Court of Illinois to address this argument in its opinion indicated "that the statutory provisions were shaped by forces other than the desire of the legislature to mirror the intentions of the citizens of the state with respect to their illegitimate children." Id. at 775-76.

82. Id. at 776.

83. Id. at 776-77 (Burger, C.J., dissenting). Justice Rehnquist in a separate dissent, argued that the equal protection clause was intended to have a much narrower meaning than that given it by the majority and that the scope of the clause was being unnecessarily broadened by the Court. Id. at 777-86 (Rehnquist, J., dissenting).

The majority initially noted the limited scope of judicial review in immigration cases and rejected arguments that this traditional standard should be expanded.

Apparently applying a highly deferential rationality test, the majority found the statute constitutional. The dissenters asserted that the statute discriminated among United States citizens and that a less deferential standard of review was therefore appropriate notwithstanding the fact that the

85. Id. at 788-90. See 8 U.S.C. §§ 1101(b)(1)(D), 1101(b)(2) (1976). The relationship between an illegitimate child and his natural mother was included within the special preference status. 80 U.S. at 788.

86. Justice Powell, author of the majority opinion in Trimble, also wrote for the majority in Fiallo. He was joined by Chief Justice Burger and Justices Stewart, Blackmun, Rehnquist, and Stevens.

87. 430 U.S. at 792. The Court noted that “in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.” Id., quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976).

88. 430 U.S. at 793-96. The plaintiffs offered several arguments in support of the imposition of a higher level of judicial scrutiny than is usually applied in immigration cases. Id. First, they argued that since the purpose of the statute was to reunite families whenever possible, the statute afforded rights to United States citizens and legal permanent residents rather than to aliens. Id. at 793. Consequently, the plaintiffs urged that the Court closely scrutinize the enactment in order “to protect against violations of the rights of citizens.” Id. at 793-94. This argument was adopted by the dissenters. See note 92 and accompanying text infra. The majority, however, summarily rejected the plaintiffs' contention. 430 U.S. at 794.

Secondly, the plaintiffs urged that the statute involved “double-barreled” discrimination based on sex and illegitimacy, and that it infringed upon “the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship.” Id. In response to these arguments, the Court noted that it had declined a more searching review in Kleindienst v. Mandel, 408 U.S. 753 (1972). 430 U.S. at 794-95. Kleindienst involved the refusal of a visa to a communist sympathizer, challenged on first amendment grounds by the applicant and citizens of the United States who supported him. Kleindienst v. Mandel, 408 U.S. at 754-59. The Kleindienst Court stated:

When the Executive exercises this power [the right to refuse a visa to a communist sympathizer] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Id. at 770. The Fiallo majority found this language dispositive, stating: “We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in Kleindienst v. Mandel, a First Amendment case.” 430 U.S. at 795.

Finally, the plaintiffs urged that the deferential standard should only apply where the exclusionary policy was aimed at protecting a threat to national security. Id. at 796. The majority summarily dismissed this contention, stating: “We find no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue.” Id.

89. The Fiallo Court never actually expressed the standard of review being employed. The majority, however, frequently described the scope of review as being very narrow. See 430 U.S. at 799-99. The Court further stated that “it is not the judicial role in cases of this sort to probe and test the justification for the legislative decisions.” Id. at 799 (footnote omitted). It would thus appear that the Court applied the deferential rationality test commonly employed by the Warren Court. See notes 11 & 19 and accompanying text supra.

90. 430 U.S. at 799-800.

91. Justice Marshall wrote a dissenting opinion in which Justice Brennan joined. Justice White wrote a separate, one sentence dissenting opinion in which he dissented for “substantially the same reasons” as Justice Marshall.
classification appeared in the immigration laws. Moreover, the dissenters also would have found the statute unconstitutional under the test applied in Trimble.

B. Classifications Involving Aliens

The modern line of cases in this area of equal protection law began with Graham v. Richardson. Graham involved challenges to several state statutes which denied welfare benefits to resident aliens who had not resided in the United States for a specified period of years. The states argued that the statutes did not contain invidious classifications because the legislatures were not classifying with respect to race or nationality.

The Court first found that aliens were entitled to the protection of the fourteenth amendment. After noting the deference traditionally accorded the states in the area of economics and social welfare, the Court indicated that aliens were a suspect class entitled to "heightened judicial solicitude." While conceding that various statutory provisions which imposed disabilities upon aliens had been upheld in the past, the Court in Graham rejected all of the proffered justifications for the statutes before them.

92. 430 U.S. at 800-09 (Marshall, J., dissenting). Justice Marshall argued:

93. Id. at 809-16 (Marshall, J., dissenting). For an explanation of the standard of review applied in Trimble, see text accompanying notes 75-77 supra. Justice Marshall summarized: "Once it is established that this discrimination among citizens cannot escape traditional constitutional scrutiny simply because it occurs in the context of immigration legislation, the result is virtually foreordained. One can hardly imagine a more vulnerable statute." 430 U.S. at 809 (Marshall, J., dissenting).


95. Id. at 367. Two cases were consolidated for this decision. The first originated in Arizona, and involved that state's program for assistance to persons who were permanently and totally disabled. Id. See Ariz. Rev. Stat. Ann. § 46-233 (1972) (amended 1972). The program was supported in part by federal grants and was administered by the states under federal guidelines. 403 U.S. at 367. Assistance was conditioned on United States citizenship or residency in the United States for a period of 15 years. Id.

The second case involved Pennsylvania's general assistance program, which was not federally supported. Id. at 368. See Pa. Cons. Stat. Ann. § 62-432 (Purdon 1974). The statute denied benefits to noncitizens. 403 U.S. at 368.

96. 403 U.S. at 370.

97. Justice Blackmun wrote the opinion of the Court. Justice Harlan joined in the unanimous judgment of the Court, but did not agree with its use of strict scrutiny. Id. at 383 (Harlan, J., concurring). See note 100 and accompanying text infra.

98. 430 U.S. at 371.

99. Id.

100. Id. at 371-72. The Court stated that "[a]liens as a class are a prime example of a 'discrete and insular' minority." Id. at 372, quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). The Court also analogized to race and nationality, two other suspect classes. 403 U.S. at 372.

101. 403 U.S. at 372-73 & n.9, citing Clark v. Deckebach, 274 U.S. 392 (1927) (upholding city ordinance which prohibited issuance of licenses for billiard rooms to aliens); Terrace v.
The Court then proceeded to discuss federal-state relations in this area of the law, observing that the federal government has broad powers over naturalization and immigration and, therefore, over aliens. The question of congressional authority to make classifications similar to those in *Graham* was expressly reserved.

Two years later, the Supreme Court reaffirmed the *Graham* holding in two separate decisions. The first of these cases was *Sugarman v. Dougall*. *Sugarman* involved a challenge to a provision of the New York Civil Service Law which excluded aliens from competitive positions except in rare instances. The Court initially noted that it was only addressing New York’s indiscriminate exclusion of aliens from all public employment. The Court determined that “classifications based on alienage are ‘subject to close judicial scrutiny.’” Noting the broad discriminatory im-

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102. 403 U.S. at 372-76. Arizona and Pennsylvania argued that the states had a special interest, in favoring citizens over aliens. *Id.* at 372. The Court rejected this argument, reasoning that it was inconsistent with the fourteenth amendment. *Id.* at 374. The Court also rejected the argument that welfare benefits were simply a “privilege” rather than a “right” and that their denial was therefore not to be accorded constitutional protection. *Id.* Finally, the Court rejected the states’ contention that because of limited welfare resources, it was necessary to exclude aliens in order to maintain the “fiscal integrity” of its programs. *Id.* at 374-75.

103. *Id.* at 376-80.
104. *Id.* at 382 n.14. The Court stated: “We have no occasion to decide whether Congress, in the exercise of the immigration and naturalization power, could enact a statute imposing on aliens a uniform nationwide residency requirement as a condition of federally funded welfare benefits.” *Id.*

105. 413 U.S. 634 (1973).
107. 413 U.S. at 635. The only exception to the prohibition allowed temporary employment of aliens if the department head or appointing authority determined that there was an “acute shortage of employees . . . in any particular class or classes of positions by reason of a lack of a sufficient number of qualified personnel available for recruitment.” *Id.* at 635 n.1, quoting N.Y. Civ. Serv. Law § 53(2) (McKinney 1973). The alien, however, could only continue his employment until it was determined that a shortage no longer existed. 413 U.S. at 635.
108. 413 U.S. at 638-39. The Court indicated that it was not asked to address the question of a particular individual’s right to public employment. *Id.* The Court also noted that the state did have an interest in defining its political community, and in limiting participation in governing positions to those within that community. *Id.* at 642-43. The Court held, however, that “in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose.” *Id.* at 643. Therefore, the Court indicated that it was not addressing a classification which barred aliens from “closely defined and limited classes of public employment.” *Id.* at 639.

109. *Id.* at 642, quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971). The Court also quoted *Graham* when it observed that aliens as a class “are a prime example of a ‘discrete and insular’ minority.” *Id.* It was never explicitly stated in *Sugarman*, however, that the Court was designating aliens as a suspect class entitled to strict scrutiny. But cf. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (where Court explicitly categorized classifications based on alienage with those based on race and nationality, two traditional suspect classifications). See note 100 and accompanying text supra. The *Sugarman* Court never used the terms “strict scrutiny” or “suspect class,” nor did it cite to cases involving other suspect classes as it had in *Graham*. Instead, it required that the classification be subject to “close judicial scrutiny.” 413 U.S. at 642.
pact of the statute,\textsuperscript{110} as well as the lack of any substantial justification for the classification,\textsuperscript{111} the Court found the statute unconstitutional.\textsuperscript{112}

The second case was \textit{In re Griffiths}.\textsuperscript{113} Griffiths involved a challenge to a Connecticut state court regulation\textsuperscript{114} which excluded aliens from the practice of law. The majority stated that "classifications based on alienage, like those based on nationality or race, are inherently suspect."\textsuperscript{115} Requiring a "substantial"\textsuperscript{116} justification, the Court found that Connecticut had not sustained its burden,\textsuperscript{117} and held that the exclusion of aliens from the bar violated the equal protection clause.\textsuperscript{118}

In 1976, the Supreme Court was confronted with challenges to a federal statute and a federal regulation which were directly analogous to the state provisions at issue in \textit{Graham} and \textit{Sugarman}. The results, however, were quite different.

It may also be significant that in testing the statute, the Court made reference to the "substantiality of the State's interest." \textit{Id}. Traditionally, when strict scrutiny has been applied, a "compelling interest" has been required. \textit{See} note 18 and accompanying text \textit{supra}. Since the statute at issue in \textit{Sugarman} was found unconstitutional, it is not clear whether this choice of language by the Court indicated that it was applying a more deferential test than strict scrutiny. This question may have been answered in \textit{Foley} v. \textit{Connell}, 98 S. Ct. 1067 (1978). For a discussion of \textit{Foley}, \textit{see} notes 138-54 and accompanying text \textit{infra}. In \textit{Foley}, the Supreme Court, applying a rational basis test, upheld the exclusion of resident aliens from the New York state police force. 98 S. Ct. at 1073. Although \textit{Sugarman} was distinguished, \textit{Foley} clearly demonstrated that classifications based on alienage are not always suspect and, therefore, do not always trigger strict scrutiny. \textit{Id}. at 1070. Moreover, the Court has also expressly indicated that it does not consider the use of the term "substantial interest" rather than "compelling interest" to be significant. \textit{See} note 116 \textit{infra}.

\textit{Id}. at 643. The Court found the statute "neither narrowly confined nor precise in its application" as the provision applied indiscriminately to sanitation workers and typists as well as to top level policymakers. \textit{Id}. at 643-46. The Court again rejected the assertion of a state's special interest in favoring its citizens. \textit{Id}. \textit{see} note 102 \textit{supra}.

\textit{Id}. at 646. The Court did not discuss possible conflicts between the state law and congressional regulation of immigration and naturalization as it had in \textit{Graham}. \textit{Id}. \textit{see} notes 103 & 104 and accompanying text \textit{supra}.

Justice Rehnquist wrote a dissent to \textit{Sugarman} and \textit{In re Griffiths}, 413 U.S. 717 (1973). For a discussion of Griffiths, \textit{see} notes 113-18 and accompanying text \textit{infra}. Justice Rehnquist interpreted the majority opinion as designating aliens as a suspect class. 413 U.S. at 649 (Rehnquist, J., dissenting). The dissent argued that the only suspect class should be race. \textit{Id}. at 651-52 (Rehnquist, J., dissenting). Justice Rehnquist also noted that the Constitution itself recognizes differences between aliens and citizens. \textit{Id}. at 651-52 (Rehnquist, J., dissenting), citing U.S. CONST. art. I, § 2, cl. 2 (Representatives must be citizens); U.S. CONST. art. I, § 3, cl. 3 (Senators must be citizens); U.S. CONST. art. IV, § 2, cl. 1 ("citizens" entitled to all "Privileges and Immunities"). Asserting that the rational basis test should apply, Justice Rehnquist would have found the statutes constitutional. 413 U.S. at 653-54 (Rehnquist, J., dissenting).

\textit{Id}. at 671 (1973).

\textit{Id}. at 721, \textit{quoting} Graham v. Richardson, 403 U.S. 365, 372 (1971). It is interesting to note this explicit statement made by the Griffiths Court in light of the absence of a similar statement in Sugarman. \textit{See} note 109 and accompanying text \textit{supra}.

\textit{Id}. at 722. As in Sugarman, the Court characterized the requisite state interest as "substantial." \textit{Id}. \textit{see} note 109 \textit{supra}. In Griffiths, however, the Court noted that the magnitude of the state's interest has also been characterized as "overriding," "compelling," "important," or "substantial," 413 U.S. at 722 n.9 (citations omitted). The Court stated: "We attribute no particular significance to these variations in diction." \textit{Id}.
In Mathews v. Diaz,119 the Court reviewed a federal medical insurance program which excluded aliens unless they satisfied a residency requirement and had been admitted for permanent residence in the United States.120 The statutory conditions were substantially similar to those found unconstitutional in Graham.121 Justice Stevens, writing for a unanimous Court, concluded that while the fifth amendment due process clause was applicable, it did not prohibit all classifications of aliens.122 Noting the broad power of Congress over naturalization and immigration,123 the Court determined that not all disparate treatment of aliens is unconstitutional.124 Finding that the case did not present a question of discrimination between citizens and aliens, but rather between classes of aliens,125 the Court applied the rationality test,126 and upheld the constitutionality of the statute.127 Graham was distinguished solely on the grounds that it involved a state statute.128

The second case, Hampton v. Mow Sun Wong,129 involved a Civil Service Commission regulation which barred all noncitizens from competitive federal civil service positions.130 The provision challenged in Hampton was directly analogous to the state statute invalidated in Sugarman.131 A sharply divided Court132 found the regulation unconstitutional on due process grounds.133 It is noteworthy, however, that the Court assumed, without deciding, that Congress or the President could have excluded aliens from the federal service.134

The Hampton Court based its decision on two major factors. First, the majority found that the Civil Service Commission was not responsible for promoting the interests which it asserted in justification of the regula-

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120. Id. at 70. The statute attacked was 42 U.S.C. § 1395o(2) (1976). 426 U.S. at 67. This provision is part of the Social Security Act of 1935, 42 U.S.C. § 1395 (1976). The durational residency requirement was five years. Id. § 1395o(2)(B) (1976).
121. See note 95 and accompanying text supra.
122. 426 U.S. at 77-80. It is interesting to note that while the Court found that the due process clause of the fifth amendment was applicable, it did not specifically mention equal protection, although it did refer generally to the fourteenth amendment. Id. at 77.
123. Id. at 79-80.
124. Id. at 77-80.
125. Id. at 80. For an explanation of the classification, see text accompanying note 120 supra.
126. 426 U.S. at 81-84.
127. Id. at 87.
128. Id. at 84-85. The Court, in finding the equal protection argument which had been successful in Graham inapplicable, stated: "The equal protection analysis . . . involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government." Id.
130. Id. at 90. See 5 C.F.R. § 338.101 (1978).
131. See note 107 and accompanying text supra.
132. Hampton was a 5-4 decision. Justice Stevens wrote the majority opinion in which Justices Brennan, Marshall, Stewart, and Powell joined. Justice Rehnquist dissented, joined by Chief Justice Burger, and Justices White and Blackmun.
133. 426 U.S. at 116-17.
134. Id. at 105. The Court also noted that its holding did not preclude the use of citizenship as a qualification for certain policymaking positions. Id. at 101 & n.20.
tion. Second, since Congress and the President were responsible for the admission of aliens to the country, the Court concluded that due process required that decisions which deprive aliens of an important liberty interest be made at a comparable level of government. The dissent criticized the majority for enunciating "a novel conception" of due process and for disregarding the narrow standard of review appropriate in the area of federal policy with regard to aliens.

Finally, in 1978 the Court decided *Foley v. Connellie.* *Foley* involved a challenge to a state statute which barred aliens from becoming New York state troopers. The majority initially determined that although the Court will closely scrutinize restraints by the states on aliens, not all such restrictions are suspect. The *Foley* majority attempted to distinguish all of the Court's prior decisions in which state discrimination against aliens had been invalidated. The Court recognized the "State's historical power to exclude aliens from participation in its democratic political institutions in order to preserve the basic conception of a political community." This exclusionary power was interpreted as allowing the restriction of access to positions involving "discretionary decisionmaking or execution of..."
policy, which substantially affects members of the political community.”  

Applying these principles to the challenged provision, the Court concluded that the rational relationship test was appropriate and that it had been satisfied. Justice Stewart wrote a concurring opinion in which he questioned the validity of prior decisions concerning aliens. Justice Blackmun, concurring in the result, maintained that the rational basis test was applicable solely because New York had “vested its state troopers with powers and duties that are basic to the function of state government.” He agreed with the majority that the statute was constitutional under this level of scrutiny.

The dissenters disagreed with the majority on several grounds. They considered the result to be inconsistent with prior decisions of the Court, and disagreed with the majority’s conclusion that state troopers were involved in the execution of policy to a degree sufficient to justify such discrimination.

IV. AN ANALYSIS

An examination of the foregoing decisions reveals that, at the least, congressional legislation is more frequently sustained in the face of equal protection challenges than state legislation. Several theories may help to explain this trend. First, the due process requirements of the fifth amendment may not be as stringent as the equal protection requirements of the fourteenth amendment, indicating that there is not total incorporation of equal protection principles. Secondly, there may be a special deference shown by the

145. 98 S. Ct. at 1071.
146. Id. at 1070-71. The Court stated:

The practical consequence of this theory is that “our scrutiny will not be so demand-
ing where we deal with matters firmly within a States’ constitutional prerogatives . . . .”

The State need only justify its classification by a showing of some rational relationship
between the interest sought to be protected and the limiting classification.

Id. at 1070, quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1973).
147. 98 S. Ct. at 1073.
148. Id. at 1073 (Stewart, J., concurring). Justice Stewart maintained that it was difficult to reconcile the Foley holding with the reasoning of prior decisions. Id.
149. Id. (Blackmun, J., concurring).
150. Id. at 1074 (Blackmun, J., concurring). Justice Blackmun was careful to reiterate that under other circumstances, classifications of aliens would be suspect. Id. at 1073 (Blackmun, J., concurring). He maintained that the lesser scrutiny was appropriate only because Foley involved a state’s constitutional power to establish its government and to define eligibility for participation therein. Id. at 1073-74 (Blackmun, J., concurring).
151. Id. at 1073-74 (Blackmun, J., concurring).
152. Justice Marshall wrote a dissenting opinion, joined by Justices Stevens and Brennan. Justice Stevens also wrote a separate dissenting opinion in which Justice Brennan joined.
153. 98 S. Ct. at 1074-76 (Marshall, J., dissenting); id. at 1077-79 (Stevens, J., dissenting). Justice Stevens had particular difficulty reconciling Foley with Griffiths since he was unable to understand why police should receive greater protection from the state than lawyers. Id. at 1077 (Stevens, J., dissenting).
154. Id. at 1075-76 (Marshall, J., dissenting); id. at 1077-78 (Stevens, J., dissenting).
155. For a discussion of this theory, see notes 159-70 and accompanying text infra.
Supreme Court to a coequal branch of government. 156 Thirdly, the federal government may have different, more compelling interests to offer in justification of its statutes than do the states. 157 Finally, it is possible that the cases are distinguishable on the basis of factors other than the federal-state distinction. 158 Of course, consideration must be given to the possibility that a combination of these theories is necessary to adequately explain the recent trend.

A. Total Incorporation?

The fifth amendment contains no explicit equal protection clause. 159 It is clear, however, that the federal government is now subject to some equal protection restrictions since the fifth amendment guarantee of due process incorporates at least some degree of equal protection. 160 The question, prompted by some cryptic language in Bolling, 161 is whether due process encompasses the entire spectrum of equal protection restrictions.

It should be noted that Bolling involved a racial classification. 162 The decision in that case was grounded upon the premise that some forms of discrimination, such as discrimination based on race, could be so invidious as to violate both due process and equal protection. 163 Since classifications other than race have since been held to constitute invidious discrimination, 164 it is now clear that the Bolling incorporation principle was not limited to racial classifications.

Subsequent discussion of the incorporation question by the Court has not served to clarify the issue. Various Justices have suggested that the due

156. For a discussion of this theory, see notes 171-81 and accompanying text infra.
157. For a discussion of this theory, see notes 182-97 and accompanying text infra.
158. For a discussion of this theory, see notes 198-206 and accompanying text infra.
159. See U.S. Const. amend. V.
160. See notes 3-5 and accompanying text supra.
161. For the relevant language in Bolling, see note 5 supra.
162. See note 5 and accompanying text supra. In fact, Bolling has often been cited in support of the proposition that race is a suspect class or that racial classifications constitute invidious discrimination. See, e.g., Hunter v. Erickson, 393 U.S. 385, 392 (1969); McLaughlin v. Florida, 379 U.S. 184, 192 (1964). The first time Bolling was cited by the Supreme Court was with respect to this aspect of its holding. See Cooper v. Aaron, 358 U.S. 1, 19 (1958). The Cooper Court stated: "The right of a student not to be segregated on racial grounds in schools so maintained [publicly] is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." Id. at 19, citing Bolling v. Sharpe, 347 U.S. 497 (1954). Bolling has since been cited in support of this proposition on numerous occasions. See, e.g., Hunter v. Erickson, 393 U.S. 385, 392 (1969); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 721 & n.7 (1963).
163. See notes 3-5 and accompanying text supra.
164. In some circumstances, sex discrimination has been found to be invidious. See Frontiero v. Richardson, 411 U.S. 677 (1973). Also, discrimination between native born citizens and naturalized citizens has been considered invidious. See Schneider v. Rusk, 377 U.S. 163 (1964). Some discrimination against illegitimates has been held to be invidious. See notes 33-45, 54-60 & 70-83 and accompanying text supra. Moreover, some discrimination against aliens has been held to be invidious. See notes 94-118 & 129-37 and accompanying text supra. In these last two categories, the question at the federal level is whether the discrimination is sufficiently invidious to violate due process.
process guarantees are not equivalent to those of equal protection. On the other hand, there has been some language suggesting total incorporation. There also seems to be some disagreement in the lower federal courts concerning this issue. A number of the lower courts have maintained that there has been total incorporation. Other courts, however, have noted that due process and equal protection restrictions against discrimination are not necessarily equivalent.

Despite this ambiguity, however, this factor does not appear to have had controlling significance. Apparently, the Court has not yet refused to consider an equal protection challenge to federal action based on this argu-

165. This position has been expressed in a variety of ways. In Schneider v. Rusk, 377 U.S. 163 (1964), the Court stated that "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" Id. at 168, quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954). More recent expressions include that of Chief Justice Warren in his dissenting opinion in Shapiro v. Thompson, 394 U.S. 618 (1969). Chief Justice Warren noted that there was no requirement of uniformity of treatment of different groups when Congress acted under the commerce power. Id. at 652 (Warren, C.J., dissenting), citing Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 401 (1940); Currin v. Wallace, 306 U.S. 1, 13-14 (1939). The Chief Justice concluded that the incorporation principle of Bolling did not apply in the area of social or economic welfare legislation or, at most, that it dictated the application of a loose rationality test. 394 U.S. at 652-53 (Warren, C.J., dissenting). Justice Douglas has also perceived some difference between the two constitutional provisions. In his dissent in Richardson v. Belcher, 404 U.S. 78 (1971), Justice Douglas asserted that he would employ the same analysis under either amendment, but cited Bolling as supporting a different proposition. Id. at 90 & n.4 (Douglas, J., dissenting). In his dissenting opinion in Picard v. Connor, 404 U.S. 270 (1971), Justice Douglas stated: "The overlap is, of course, not total." Id. at 279 n.2 (Douglas, J., dissenting), citing Bolling v. Sharpe, 347 U.S. 497 (1954).

166. In Buckley v. Valeo, 424 U.S. 1 (1976), in which the Court found strict scrutiny appropriate where there was an infringement of voting rights, the Court stated: "Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Id. at 93, citing Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

Justice Brennan expressed a similar view in dictum in Johnson v. Robison, 415 U.S. 361 (1974). Writing for the majority in a decision upholding the exclusion of conscientious objectors from a veterans' educational benefits program, he stated: "If a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Id. at 364 n.4.

167. See, e.g., Francis v. Immigration & Naturalization Serv., 532 F.2d 268, 272 n.5 (2d Cir. 1976) (classification of aliens invalid under the fourteenth amendment is also invalid under the fifth amendment); United States v. Gordon–Nikkar, 518 F.2d 972, 976 (5th Cir. 1975) (due process equivalent to equal protection in the context of classification of aliens); NAACP v. Allen, 493 F.2d 614, 619 n.6 (5th Cir. 1974) (if a classification is invalid under the equal protection clause of the fourteenth amendment, it is also inconsistent with the due process requirements of the fifth amendment); Davis v. Richardson, 342 F. Supp. 588, 594 (D. Conn.), aff'd, 409 U.S. 1069 (1970) (three-judge court relied on Bolling in applying Weber to the federal government).

168. See, e.g., United States v. Ramirez, 404 F. Supp. 273, 275 (W.D. Tex. 1974), aff'd, 523 F.2d 1054 (5th Cir. 1975) (federal statutes do not have to be nationally uniform in their application to the states); United States v. An Yun, 371 F. Supp. 668 (D. Hawaii 1974) (not every discrimination rises to the level of denial of due process under the fifth amendment).
ment, and such challenges have been upheld in a variety of contexts. This may, however, be one factor explaining the greater deference accorded federal action.

B. Deference to a Coequal Branch

Under the federalist system as established by the United States Constitution, the federal government is superior to that of the states. Furthermore, the Supreme Court, the President, and Congress comprise the three coequal branches of the federal government. This distribution of power cannot be ignored in considering a pattern of decisions in constitutional law.

Due to the nature of our tripartite system, the Supreme Court has traditionally exercised a degree of deference towards the other branches of the federal government. This same degree of deference may not be accorded the states, as exemplified by a remark of Justice Holmes, who stated: “I do not think the United States would come to an end if we [the Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”

The Court’s deferential approach in reviewing the activity of a coequal branch has been exhibited in numerous contexts. An early example was the broad interpretation given the “necessary and proper clause” in

\[169. \text{Indeed, an examination of the illegitimacy and the alien decisions reveals that the only time the Court questioned the appropriateness of engaging in an equal protection analysis was in } \text{Labine,} \text{ which involved a challenge to state action. See note 52 and accompanying text supra.} \]


When the federal government has exercised its constitutional authority over the District of Columbia, the Court has treated the due process clause as the equivalent of the equal protection clause. See Shapiro v. Thompson, 394 U.S. 618 (1969). For the D.C. Circuit’s treatment of this issue, see Davis v. Washington, 512 F.2d 956, 957-58 & n.2 (D.C. Cir. 1975), rev’d on other grounds, 426 U.S. 229 (1976).

\[171. \text{See U.S. CONST. art. VI, cl. 2. This article provides in pertinent part:} \]

\[\text{This Constitution and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.} \]

\[\text{Id. It should be noted, however, that although the federal government is supreme, its powers are limited to those enumerated in the Constitution. See U.S. CONST. amend. X. All other powers are reserved to the states. Id.} \]

\[172. \text{See U.S. CONST. arts. I, II, III. See also G. Gunther, supra note 10, at 81.} \]

\[173. \text{See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (discussing traditional deference of Court to President despite enforcing a subpoena issued to the President); Coleman v. Miller, 307 U.S. 433 (1939) (Supreme Court would defer to Congress on questions of the timing of ratification of constitutional amendments); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (deference to Congress and the President in the area of foreign affairs). See also notes 175-80 and accompanying text infra.} \]

\[174. \text{O.W. HOLMES, COLLECTED LEGAL PAPERS 295 (1920).} \]

\[175. \text{U.S. CONST. art. I, § 8, cl. 18. This clause provides in pertinent part: “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into} \]
McCulloch v. Maryland. 176 Supreme Court decisions interpreting the scope of Congress’ power under the “commerce clause” 177 also reveal a deferential approach by the Court.178 The same deference has also been demonstrated in areas ranging from eminent domain 179 to the fundamental right of access to the courts.180 While this factor obviously does not explain all of the Court’s equal protection decisions, it must nevertheless be considered.181

C. A Difference in Justifying Interests

This theory, on its face, appears to have substantial merit. Congress must confront larger national problems and deal with a more heterogeneous population than state legislatures. At the same time, the federal government, as the supreme sovereign, has been constitutionally granted numerous powers, such as authority to determine foreign policy and jurisdiction over matters involving immigration and naturalization, which have been denied to the states.182 The latter factor makes this theory especially attractive in explaining the cases dealing with aliens.

Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States ...” Id. 176. 17 U.S. (4 Wheat.) 316 (1819). McCulloch involved a challenge by the state of Maryland to the chartering of the Second Bank of the United States. Id. at 316-18. In concluding that the “necessary and proper” clause authorized Congress to charter the bank, Justice Marshall stated:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or 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, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

Id. at 423.

177. U.S. CONST. art. I, § 8, cl. 3. This clause provides in pertinent part: “The Congress shall have Power ... To regulate Commerce with the foreign Nations, and among the several States ....” Id.

178. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. Darby, 312 U.S. 100 (1941); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). In his concurring opinion in Youngstown, Justice Jackson described the scope of judicial review when Congress and the President act in conjunction: “A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.” 343 U.S. at 637 (Jackson, J., concurring).

179. See Berman v. Parker, 348 U.S. 26 (1954) (holding that congressional declaration of public purpose is virtually conclusive in eminent domain cases).


181. For example, consider the deference shown in the illegitimacy context. Compare Trimble v. Gordon, 430 U.S. 762 (1977) (state statute found unconstitutional) with Fiallo v. Bell, 430 U.S. 787 (1977) (federal statute found constitutional). For a discussion of Trimble and Fiallo, see notes 70-93 and accompanying text supra.

182. See U.S. CONST. art. I, § 8, cl. 4. Congress is also given plenary power over bankruptcies. Id. Furthermore, only the federal government may enter into a treaty with a foreign nation. See U.S. CONST. art. I, § 10, cl. 1.
A close examination of the decisions, however, does not support this simple analysis. For example, the cases involving aliens appear to have been decided on the basis of different levels of judicial scrutiny, rather than on a consideration of the various governmental interests in the application of the tests. Since the Court could have reached the same results if it had employed a uniform test to review each classification but had considered the differing governmental interests in applying that particular test, its use of the various tests must be considered significant. It is submitted that this clearly indicates a departure from traditional equal protection analysis. While governmental interests remain as viable considerations, they are no longer considered as mere justifications in the application of the test, but rather as determinative factors in the choice of the test itself.

A further problem is the isolation of the different federal or state interests involved. The most obvious of these interests is the national power over immigration and naturalization. One commentator has suggested that this federal interest may provide an explanation for the decisions involving classifications of aliens. Foley, however, apparently precludes such a

183. In Graham, Sugarman, and Griffiths, the Court engaged in an intense scrutiny of the statutes and found the provisions unconstitutional. See notes 94-118 and accompanying text supra. In Diaz and Foley, the Court applied a rational basis test and found the statutes constitutional. See notes 119-28 & 138-54 and accompanying text supra. See generally Comment, Aliens' Right to Work: State and Federal Discrimination, 45 FORDHAM L. REV. 835, 838-57 (1977).

184. Under the early decisions involving challenges to state action, classifications based on alienage were considered to be inherently suspect. See notes 100 & 115 and accompanying text supra. See also note 109 and accompanying text supra. It is thus assumed that strict scrutiny may have been employed as the uniform standard of review. Under strict scrutiny, a statute will withstand judicial review only if it is supported by a compelling governmental interest. See note 18 and accompanying text supra. Applying this analysis, the statutes challenged in Graham, Sugarman, and Griffiths were found to be unconstitutional. See notes 94-118 and accompanying text supra.

In Diaz, where the Court upheld the constitutionality of the challenged provision, the federal interest in encouraging aliens to become citizens could have been found to be compelling, considering the plenary power of Congress in this area. For a discussion of Diaz, see notes 119-28 and accompanying text supra. Such a compelling interest would have enabled the statute to withstand even strict scrutiny.

In Hampton, the civil service regulations were invalidated. For a discussion of Hampton, see notes 129-37 and accompanying text supra. Although it is unclear whether or not Hampton rested on equal protection grounds, the Court did employ some equal protection analysis. See notes 134 & 135 and accompanying text supra. In so doing, the Court rejected the assertion of any interest which may have been considered to be compelling. See note 135 and accompanying text supra. Hampton would therefore not have withstood strict scrutiny, and the regulations at issue would still have been found unconstitutional under this hypothetical analysis.

Even the provision challenged in Foley would probably have withstood strict scrutiny. The Court in Sugarman noted that a state has a compelling interest in insuring that citizens control the key policymaking positions in the state government. See note 106 and accompanying text supra. The Foley Court could have found that the state government delegated a portion of its policymaking role to the state police. Indeed, this was Justice Blackmun's position in his concurring opinion. See note 130 and accompanying text supra. The Court may thus have found that the state had a compelling interest supporting its exclusion of aliens from the state police force.

185. The Court explicitly discussed this federal power in a number of decisions. See notes 103-04, 123 & 134 and accompanying text supra.

186. See Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 SUP. CT. REV. 275. This commentator summarized the Court's position as
simple analysis. Foley rested on the state’s interest in reserving “policymaking and executing” positions for citizens.\textsuperscript{187} While the parameters of this interest are currently unclear,\textsuperscript{188} it is apparently one shared both by the states and the federal government.\textsuperscript{189}

The illegitimacy classification decisions do not provide any greater support for this theory. In Fiallo, the classification had been made in an immigration context,\textsuperscript{190} and thus the decision could be explained by Congress’ plenary power in this area.\textsuperscript{191} The statute in Lucas, however, was justified by “administrative convenience,”\textsuperscript{192} an interest no more important to Congress than to the state governments.\textsuperscript{193} Furthermore, in comparing Fiallo with Trimble, one again finds the utilization of different tests on the federal and state levels.\textsuperscript{194}

It is possible, of course, that the relative magnitude of the problems confronting the federal and state governments may make a significant difference to the Court in its determination of the strengths of the interests asserted. In Regents of the University of California v. Bakke,\textsuperscript{195} a recent affirmative action case arising in the racial context,\textsuperscript{196} the Court noted in dictum that Congress would have greater latitude in its efforts to remedy past discrimination than would some smaller governmental bodies.\textsuperscript{197}

“preferring the proposition that the federal government has plenary power to the proposition that alienage classifications are suspect. The apparent result is that all or nearly all challenged state statutes must fall, but all federal statutes will apparently survive.” \textit{Id.} at 276-77.

\textsuperscript{187} See text accompanying note 145 \textit{supra}.

\textsuperscript{188} State police apparently fall within the scope of this interest, while lawyers do not. Compare Foley v. Connelle, 98 S. Ct. 1067 (1978) with \textit{In re Griffiths}, 413 U.S. 717 (1973). For a discussion of Foley and Griffiths, see notes 113-18 & 138-54 and accompanying text \textit{supra}. Justice Stevens noted this anomaly in his dissent in Foley. See note 153 and accompanying text \textit{supra}.

\textsuperscript{189} Foley involved state action. See note 139 and accompanying text \textit{supra}. In Hampton, which involved the federal civil service, the Court also noted that aliens could be excluded from top level policymaking positions. See note 134 and accompanying text \textit{supra}.

\textsuperscript{190} See note 85 and accompanying text \textit{supra}.

\textsuperscript{191} Indeed, this was the way in which the Fiallo dissenters perceived the Court’s holding. See note 92 and accompanying text \textit{supra}.

\textsuperscript{192} See note 66 and accompanying text \textit{supra}.

\textsuperscript{193} It may be argued that since the national government is much larger than the government of any individual state, it has a greater interest in administrative convenience. This subtle argument has yet to be recognized by the Court.

\textsuperscript{194} In Fiallo, the Court applied a very deferential minimum scrutiny test. See note 89 and accompanying text \textit{supra}. In contrast, the Court in Trimble employed “minimum scrutiny with bite.” See note 77 and accompanying text \textit{supra}.

\textsuperscript{195} 98 S. Ct. 2733 (1978).

\textsuperscript{196} \textit{Id.} at 2733-48. The Medical School at the University of California at Davis had instituted an affirmative action program by reserving a specific number of positions in each class for minority students. \textit{Id.} at 2740-42.

\textsuperscript{197} \textit{Id.} at 2755 n.41. The Court stated:

\begin{quote}
[\textit{W}e are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination \ldots. We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.]
\end{quote}

\textit{Id.}
D. Other Distinguishing Factors

It is highly unlikely that any one factor, such as the federal-state distinction, provides an adequate explanation for all of the Court's decisions in the equal protection area. Indeed, a review of the cases concerning aliens and illegitimates dispels any hope of such a simple explanation. Additional factors are obviously being considered by the Court.

The most readily apparent factor is the nature of the group against whom the discrimination has occurred. Racial classifications are suspect. Classifications of aliens may be suspect. Illegitimacy classifications invoke minimum scrutiny with bite. Sex classifications generally invoke minimum scrutiny.

Another factor may be the presence or absence of an "insurmountable barrier" or a "total shutout." This factor has been explicitly relied on by the Court but has also been expressly rejected in one instance. The importance of the right or interest infringed may also be a consideration.

V. Ramifications—What Will the Future Hold?

It is submitted that the foregoing discussion leads to two conclusions. First, the due process clause of the fifth amendment does impose some equal protection restraints on the federal government. Secondly, the level of governmental action under review, whether federal or state, while not dispositive, does influence the Court's equal protection analysis.

It is suggested that this difference indicates a significant departure from traditional equal protection doctrine. Traditional equal protection analysis

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198. For example, in Hampton, a federal regulation was found to be unconstitutional. See notes 129-37 and accompanying text supra. On the other hand, in Foley, a state classification was found to be constitutional. See notes 138-54 and accompanying text supra.

199. This was one of the factors noted by Justice Marshall in his "sliding scale" approach. See note 26 and accompanying text supra.

200. See notes 13-14 & 16 and accompanying text supra.

201. This was the Court's position in Graham and Griffiths. See notes 100 & 115 and accompanying text supra. This is not true, however, at the federal level, see notes 119-37 and accompanying text supra, and is not always true on the state level. See notes 138-54 and accompanying text supra. For a discussion of the erosion of suspect status for classification of aliens, see generally Comment, supra note 183, at 835-48.

202. This was the Court's position in Trimble. See notes 76 & 77 and accompanying text supra. In Fiallo, however, the Court did not add much "bite" to its minimum scrutiny. See note 89 and accompanying text supra. For one commentator's analysis of the level of scrutiny employed in Fiallo, see Rosberg, supra note 186, at 318-27.


204. See note 47 supra; note 56 and accompanying text supra.

205. See note 80 supra.

206. This is clear in the "fundamental rights" line of decisions. See note 17 and accompanying text supra. It also appears in other contexts, however. The Foley Court distinguished prior decisions concerning classifications of aliens on the ground that those classifications affected the aliens' ability to exist in the community, whereas exclusion from the state police force was determined to fall outside that line of cases. See note 143 and accompanying text supra.

207. See notes 4 & 160 and accompanying text supra.

208. See notes 27-197 and accompanying text supra.
was basically a two-step approach. First, the appropriate test was determined. This was a fairly mechanical process, with the level of scrutiny being determined by the nature of the class discriminated against or the nature of the right or interest infringed. Certain specified classes and fundamental rights or interests invoked strict scrutiny, while all other classifications were subject to some form of a rationality test. The government's asserted interests, as well as other factors, were then considered in applying the tests. Except for some differences over additions to the list of suspect classes or fundamental rights, the major divisions on the Court occurred in the application of the test once the appropriate level of scrutiny had been determined.

It is submitted that the decisions regarding alienage and illegitimacy demonstrate a marked change from this approach. The federal-state distinction appears to be a factor not in applying the appropriate test, but rather in choosing the test itself.

Perhaps this is most clearly demonstrated by an examination of the various opinions of the Justices. The dissenting opinions frequently expressed disagreement not with the application of the test, but rather with the choice of the appropriate standard. Consideration should also be given to the

209. See notes 15-19 and accompanying text supra. See generally G. Gunther, supra note 10, at 657-65; Equal Protection, supra note 10; Gunther, supra note 15; Developments, supra note 15.


211. See notes 16-19 and accompanying text supra. See generally Bice, supra note 16, at 698-702.

212. See note 11 and accompanying text supra. See generally Bice, supra note 16, at 689-702.

213. See notes 16 & 17 and accompanying text supra.


215. In the early illegitimacy cases such as Levy, the dissenting opinions frequently disagreed with the majority's application of a particular test. See note 45 supra. Labine also reflected a disagreement over the application of a commonly accepted test. For a discussion of Labine, see notes 46-53 and accompanying text supra. Labine, however, may be perceived as marking the beginning of a new trend by the dissenting Justices—a trend in which they became increasingly critical of the selection of the standard rather than the application of a particular test by the majority—in light of the Court's implication that equal protection review may not have been appropriate. See note 52 and accompanying text supra.

If not Labine, then Weber marked the beginning of a change, since although the majority did not enunciate a standard of review, the dissent argued that the rational relationship test had been satisfied. See notes 57-60 and accompanying text supra. The dissent in Lucas clearly urged more than the minimum rationality treatment accorded by the majority. See notes 64-69 and accompanying text supra. In Trimble, the majority applied minimum rationality with bite, while the dissenters urged that the traditional deferential rationality test was the appropriate standard to be applied. See notes 75-83 and accompanying text supra. In Fiallo, the roles were reversed, with the majority applying a very deferential rationality test, and the dissenters arguing for closer scrutiny. See notes 89-93 and accompanying text supra.

The line of decisions on classifications of aliens reflects this same trend. In Graham, Justice Harlan, while concurring in the judgment, did not agree with the Court's use of strict scrutiny. See note 97 supra. In his dissent in Sugarman and Griffiths, Justice Rehnquist argued for the application of a mere rationality standard. See note 112 supra. In Hampton, the dissenters again argued for a more deferential test. See note 137 and accompanying text supra. In Foley, the
opinions of Justice Powell in Trimble and Fiallo.\textsuperscript{216} Despite his obvious sympathy in Trimble for the plight of illegitimates,\textsuperscript{217} Justice Powell was willing to apply a very deferential rationality test in Fiallo.\textsuperscript{218} Such an approach would be an anomaly in traditional equal protection analysis, where the level of scrutiny would be determined by the nature of the class against which the discrimination occurred.

The cases concerning aliens provide another striking example of a trend in which a multitude of factors influence the determination of the appropriate test to be applied by the Court. The early cases utilized strict scrutiny in reviewing state legislation, but applied a deferential minimum rationality test for challenges to federal classifications.\textsuperscript{219} The Foley decision merely carried this trend to its logical conclusion. Since Graham had established that aliens were a suspect class on the state level,\textsuperscript{220} traditional equal protection analysis would have called for the application of strict scrutiny in Foley. If the Court had wanted to uphold the exclusion of aliens from the New York state police force, it could have found that the reservation of policy executing positions to citizens was a compelling interest. The majority, however, simply applied a more deferential test.\textsuperscript{221}

It is suggested that while Justice Marshall’s “sliding scale” approach\textsuperscript{222} was a recognition of this new trend in equal protection doctrine, it does not provide a complete explanation for the Court’s decisions. First, under his approach, the appropriate test is still solely determined by the nature of the class discriminated against and/or the importance of the interest involved.\textsuperscript{223} It is submitted that the federal-state distinction provides at least a third factor to be considered. Secondly, his approach suffers from the same ambiguity for which he criticized the Court.\textsuperscript{224} Under Justice Marshall’s theory, there are a number of variables, explicit and implicit, which, in a way not fully explained, affect the level of scrutiny chosen.\textsuperscript{225} Moreover, Justice Marshall has not clearly indicated the number of different tests that
the Court should utilize.226 It is submitted that the three identifiable tests currently employed by the Court are sufficient. A pure "sliding scale" approach would make any meaningful understanding of the Court's level of scrutiny impossible. It is further suggested that the Court should more fully explain how other factors affect its level of scrutiny, thereby producing a more consistent equal protection doctrine, understandable to the entire political community.

VI. CONCLUSION

The most obvious conclusion of any study of equal protection law is that a state of confusion exists. Several more specific conclusions can nevertheless be drawn from an examination of the Court's decisions.

On the narrowest level, after Trimble, it seems likely that state classifications affecting illegitimates will be judicially scrutinized with some degree of care.227 Federal classifications of illegitimates do not appear to be in danger of easy invalidation.228 Classifications of aliens by the federal government appear to be virtually beyond challenge.229 State classifications of aliens are subject to attack unless they can be justified by the state's interest in protecting policymaking or policy executing positions in state government.230

On a broader level, it seems clear that the level of government being challenged is a relevant factor in current equal protection analysis. It is suggested that the Court should expressly recognize this factor and define the scope of its influence.

On the broadest level, it appears that a new equal protection doctrine is in a state of formation. It is hoped that the Court will recognize this development and begin to explain and standardize its various components. Such an explanation would be extremely helpful to the nation's lawmakers, federal and state, and to the general political community. It may also indirectly benefit the Court itself, by providing greater public understanding of the Court's processes and hopefully, as a result, greater public support for the Court.

Henry Siedzikowski

226. See id.
227. See notes 70-82 and accompanying text supra.
228. See notes 61-66 & 84-90 and accompanying text supra.
229. See notes 119-37 and accompanying text supra.
230. See notes 94-118 & 138-54 and accompanying text supra.