THE CONSTITUTION AND FUNDAMENTAL RIGHTS

Gary S. Goodpaster*

THE QUEST FOR AN UNDERLYING PRINCIPLE

Trying to make sense of the United States Supreme Court's handling of "fundamental" rights—seeking an underlying principle, a clearer articulation, a limiting logic—is difficult work. Why, in cases where certain rights are involved, the expression of legislative will receives "strict scrutiny," whereas in cases involving other rights, a much looser standard of review is invoked, has defied rational analysis. The difficulty arises because the Court has inadequately justified its treating certain rights as fundamental and has been unable to articulate an underlying principle by which to determine whether other rights are fundamental. In moments of despair, the mind seeks an image to describe its distress. Recall the croquet match in *Alice in Wonderland* in which the King and Queen of Hearts and Alice participate. The mallets are flamingos stood on their heads; the balls, rolled-up hedgehogs; and the wickets, playing card soldiers doubled over. The game, however, has curious features. The mallets will not be rigid; they turn and peer up at the players and fall limp. The hedgehog balls disconcertingly unroll and run away when about to be hit. Equally unnerving, the wickets have the habit of changing their positions on the field in the midst of play. Yet the royalty play the game with great gusto; and perhaps only Alice, born to another world, is not having much fun. Working with due process and equal protection opinions dealing with fundamental rights is like playing that croquet game, using concepts that bend or fall limp to chase words that move with a mind of their own into categories which just are not there any more. We quickly learn: this is not the game we thought we were playing.

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* Professor of Law, University of California, Davis. J.D. 1965, Indiana University.

Of course, it may be argued that the Court has simply been operating very much in the common law tradition, slowly defining a general principle of fundamentalness on a case-by-case basis. For example, in trying to reconcile the Court's fluctuating valuations of constitutional rights, commentators have recently proffered sliding scale standards of judicial review under the equal protection clause. Under such standards, the degree of judicial review called forth in any particular case depends directly upon variables filled from a hierarchy of constitutional values determined, as best one can, from the Court's previous decisions.[1] Such articulations carefully attempt to tidy up and arrange the Court's work in areas where no discernible or coherent principle appears to operate. Because a guiding principle is lacking, the formulations are merely classificatory. At most, they generally describe more or less what has happened in past cases, giving a result somewhat like that obtained in classifying cumulus clouds by their shapes.

Yet the quest for an underlying principle is tantalizing. And the analytic terms used suggest there may be one: "fundamental rights," "rights preservative of all rights," "compelling state interests," "legitimate state interests," "suspect classifications," "forbidden classifica-

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1. *See* Cox, *The Supreme Court, 1965 Term—Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95-99 (1966); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969); Michelman, *The Supreme Court, 1968 Term—Forword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

Note, for example, the complex yet somewhat mystifying effort of Professor Michelman to describe the work of judicial review in equal protection cases:

> 'Equal protection' radar is sensitive to governmental implication in systematic inequality. It blips whenever a government seems (a) to be 'classifying' persons so as to extend to them unequal treatments, or (b) otherwise to be acting in a way which results in systematic inequality in treatments received by definable groups of persons. Here we are primarily concerned with cases in category (b). When a blip—a warning signal—occurs, the ensuing inspection focuses first upon the criteria which, explicitly or implicitly, are used to classify the affected population. If those criteria are free of invidiousness, the case is to be treated, in effect, as one of 'substantive due process.' If, however, they are in noticeable degree suggestive of oppression or stigmatization, that fact is to be borne in mind as attention shifts to the actual clash of interests involved in the case: the personal interests which are adversely affected by unequal treatment and the interest of the government in continuing the 'unequal' practice. We are concerned about the degree of special importance (in some sense) which attaches to the unequally served personal interest; we factor this with the degree of invidiousness of the classifying trait. The resultant is a kind of 'prejudice' variable which, if it exceeds a certain critical magnitude, we are to balance against the governmental interest—a procedure crudely described by the statement that in such cases the governmental interest can prevail only if it is 'compelling.' (There are special or limiting cases in which the invidiousness factor is 'I'—i.e., neutrality of classifying trait—but in which the unaugmented personal interest factor is itself a prejudice variable weighty enough to call for balancing. Voting rights cases seem to be an example.

Michelman, *supra*, at 33-34 (citations omitted).

tions," "fundamental principles of liberty which lie at the base of all our civil and political institutions," "the immutable principles of justice which inhere in the very idea of free government." These phrases seem to be so many variations on an unstated theme, the working out of a foundation "more subtle than any articulate major premise,"[2] a structuralism inherent in the American legal mind. Furthermore, what is to be made of the similarity between fundamental rights analyses under the equal protection clause and fundamental rights analyses in other contexts, such as the first amendment cases; between the due process incorporation cases and the fundamental rights equal protection cases? There certainly is something in common in the character of the debate in first amendment cases, in the due process criminal cases and in equal protection fundamental rights cases. If there is a principle involved, it seemingly operates like the smile of the Cheshire Cat, which is there when the cat is not. Perhaps the cat can be made to appear, bit by bit. For the sake of later recognition in a detailed landscape, however, it would help now to outline the shape of things unseen.

The reason the Court has had such difficulty with the doctrine of fundamental rights arises out of the unresolved and perhaps unresolvable issue of the scope and extent of judicial review. That is, while judicial review of legislation was early established as an outstanding feature of American constitutionalism, its full scope has never adequately been defined, and its use raises major and continuing issues of political power. Except in cases of relatively clear constitutional directive, judicial constitutional construction has often run head-on into an assumed majority will as expressed in legislation. Immediately, the issue of the imposition of subjective judicial preference upon the majority, what may be called the "judicial legislation" problem, is drummed up. The Court's major experience with this issue, the rise and fall of substantive economic due process, was one of Pavlovian proportions, and since that time the Court goes to great lengths to avoid giving the appearance of second-guessing a legislature, even when it is doing so. Whenever the cry of judicial legislation is heard on the legal battlements, the spectre of economic due process appears from the grave, like the ghost of Hamlet's father, demanding vengeance. For example, that spirit was recently invoked by Justice Rehnquist in dissent in *Weber v. Aetna Casualty & Surety Co.*[3] in which he claimed that fundamental rights analysis under the equal protection clause was

2. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
3. 406 U.S. 164, 188 (1972) (Rehnquist, J., dissenting).

the equivalent of freedom of contract analysis under the due process clause and remarked that "[i]t is an invitation for judicial exegesis over and above the commands of the Constitution, in which values that cannot possibly have their source in that instrument are invoked to either validate or condemn the countless laws enacted by the various States."[4] It is the confusion caused by the haunting memory of economic due process which contributes to the invention of ritual formulae by which the Court adjudicates while exorcising the appearance of judgments. All this has made the Court's due process and equal protection standards and its treatment of "fundamental rights" issues a rendezvous of questions and question marks. It is essential to examine due process and equal protection standards and the concept of fundamental rights and to clarify their meaning and interrelationship.

Notwithstanding the jurisprudential insecurities in the Court's due process or equal protection formulations in the ordinary cases and in fundamental rights cases, it has been able, without significant critical dissent, to establish strict judicial review as the acceptable standard in first amendment cases. While this has been justified on the basis that the first amendment is in a "preferred position,"[5] it is my general contention that it is not uniquely so. The right of freedom of speech, and its judicial treatment, is just the paradigm case of all "fundamental" rights. Other rights are fundamental for the same reasons that free speech is a fundamental right. Indeed, those reasons may be used to clarify which rights are fundamental and to explain how fundamental rights differ from rights that were protected under traditional doctrines of substantive economic due process. Essentially, and this will be developed at greater length later, those reasons are that such rights are primarily structural rather than substantive—that is, they define processes of government relating to the acquisition and use of governmental power; and, value neutral—that is, they advantage no particular social or economic view. Finally, because such rights define basic rules of governmental process, very close judicial scrutiny of legislation affecting them is the appropriate standard of judicial review. Fundamental rights are the rules of procedure regulating political power, and only the gravest of threats to the state, found to exist only after the most intensive and serious examination, can justify even a temporary suspension of these rules.

Anticipating my conclusions, I find only four classes of constitutional rights which qualify as fundamental: first amendment rights, political participation rights, and the rights to due process and equal

4. *Id.* at 182.
5. Kovacs v. Cooper, 336 U.S. 77, 88 (1949) (Frankfurter, J., concurring).

protection. This list, while partly agreeing with that of the Supreme Court, does not include some rights the Court has already determined to be fundamental, such as the right to travel[6] or the right of privacy.[7] It also omits "rights" that have been serious contenders for designation as "fundamental" such as the "right" to an education[8] or the right of access to the courts.[9] Weighty reasons are required to oppose such authority and deny the body of established doctrine, but this article shall attempt to show that a rather serious conceptual error, an indiscriminate mixing of personal rights of different logical and functional orders, underlies current fundamental rights doctrine. This error generates the confusion surrounding that doctrine and renders it irresolvable and unsatisfactory, at least insofar as solutions require a principled basis.

A further consequence of the views presented will be a clarification of the role equal protection should play in cases where legislative classifications affect important, as distinguished from fundamental, rights or interests. The essential conclusion is that there is only one equal protection standard applicable to all such cases. That standard is a reasonable basis standard. But it is a reasonable basis standard radically different from the current rational basis standard, for it requires in each case a careful balancing of the effects, rationale and intent of legislation in view of the rights and interests affected.

This article will first sketch the history and current status of the double standard of judicial review in due process and equal protection cases. Much of this will be familiar, but it is important to demonstrate just what our present impasse is and what problems and reasoning brought and keep us there. Special emphasis will be placed on *Dandridge v. Williams*,[10] which, when contrasted with *Shapiro v. Thompson*[11] and *San Antonio Independent School District v. Rodriguez*,[12] illustrates the need for a principled approach to judicial review of unfair legislation. I shall then attempt to articulate a theory of fundamental rights which resolves this impasse and to explore some ramifications of the position.

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6. Shapiro v. Thompson, 394 U.S. 618 (1969).
7. Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).
8. *Compare* San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973), *with* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
9. *Compare* Boddie v. Connecticut, 401 U.S. 371 (1971), *with* Ortwein v. Schwab, 93 S. Ct. 1172 (1973); *cf.* Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970).
10. 397 U.S. 471 (1970).
11. 394 U.S. 618 (1969).
12. 93 S. Ct. 1278 (1973).

HISTORY AND CRITIQUE OF THE DOUBLE STANDARD OF JUDICIAL REVIEW

Traditional Due Process and Equal Protection Standards for Judicial Review

Current equal protection problems derive ultimately from the overturning of what has been called the *Allgeyer-Lochner-Adair-Coppage* substantive due process doctrine.[13] It was at heart a liberty of contract doctrine, but it was a specious liberty, for under the guise of freedom of contract all parties to a contract, and in particular employment contracts, were deemed equally free, whereas in fact, they were clearly not equal. Legislation which the Court struck down was often intended to mitigate that inequality of bargaining power. Thus, the Court's interpretation of liberty of contract served principally to protect the market advantage of the strongest party to a contract. The economic theory implicit in this interpretation of liberty of contract was, of course, that of *laissez-faire* capitalism, the social Darwinism of Herbert Spencer's *Social Statics*, so famously noted by Justice Holmes in dissent in *Lochner*.[14] In essence, the Court was saying that the Constitution required the legislators of the United States to ignore what they reasonably determined to be substantive social and economic evils and to forego imposing remedies restricting the social and economic power of *laissez-faire* capitalism. As Holmes pointed out, however, the Constitution was made to accomodate fundamentally differing social and economic views and to permit those views receiving majority support to carry the day, unless "it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[15] Rejecting this view, at the time, the Court was preventing the normal political processes of the country from working in major and important areas of social life.

13. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535-37 (1949), *discussing* Coppage v. Kansas, 236 U.S. 1 (1915) (Kansas statute making it a misdemeanor for employer to require employee to agree not to join labor union while employed declared repugnant to fourteenth amendment); Adair v. U.S., 208 U.S. 161 (1908) (Act of Congress which made it criminal to discriminate against or threaten dismissal of any employee in interstate commerce because of his membership in labor union declared unconstitutional because such prohibition is an invasion of personal liberty and right of property guaranteed by fifth amendment); Lochner v. New York, 198 U.S. 45 (1905) (New York statute controlling bakers' hours and working conditions declared unconstitutional because general right to contract, including right to buy and sell labors, is part of liberty protected by fourteenth amendment); Allegeyer v. Louisiana 165 U.S. 578 (1897) (Louisiana statute prohibiting sale of marine insurance to firm not complying with other Louisiana laws cannot constitutionally reach and invalidate a contract made in New York). *See also* Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

14. 198 U.S. 45, 75 (1905).

15. *Id.* at 76.

Holmes' views prevailed, however, and the substantive economic due process doctrine was finally rejected by the Court, following years of intense controversy, in *Nebbia v. New York*[16] and *West Coast Hotel Co. v. Parrish.*[17] "[L]aws passed [which] are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory . . ."[18] were held to satisfy the requirements of due process. A "reasonable relation" test suggests the retention of modest, but meaningful, judicial review over legislation. But in *United States v. Carolene Products,*[19] Justice Stone went a step further, stating that regulatory legislation was to be upheld even if it had only some "rational" basis. The rejection of substantive economic due process quickly became overwhelming, and the Court moved from one extreme to the other—from strict judicial review of economic regulation to virtually no review at all.[20] Thus, while there had been a time when the Court used the due process clause to strike down laws thought "unwise or incompatible with some particular economic or social philosophy," now, "under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation,"[21] or "[w]hether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other. . . ."[22] Judicial review of economic regulation has thus been virtually abandoned. While the Court does continue to invoke a "rational basis" standard of review,[23] its application is perfunctory—quite a step removed even from the reasonableness standard established in the critical turning cases, *Nebbia* and *West Coast Hotel Co.*—and the presumption of constitutionality of economic regulation is well-nigh irrebuttable.

Traditional equal protection analysis utilized virtually the same tests as articulated in *Nebbia* and *West Coast Hotel,* with necessary changes made for equal protection's concern with classification. Said the Court in *Lindsley v. Natural Carbonic Gas Co.*, summarizing equal protection law:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption

16. 291 U.S. 502 (1934).
17. 300 U.S. 379 (1937).
18. 291 U.S. at 537.
19. 304 U.S. 144 (1938).
20. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial,* 1962 SUP. CT. REV. 34.
21. Ferguson v. Skrupa, 372 U.S. 726, 729 (1963).
22. *Id.* at 732.
23. *See, e.g.,* Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical, 348 U.S. 483 (1955).

> of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[24]

But these standards have suffered an attenuation similar to that undergone by due process standards, a subtle shift from a reasonable relationship test to a rational relationship or minimum rationality test—from a modest measure of judicial review to no review at all. The Court's application of the equal protection clause to state utility, tax and economic regulation "can only be described as an abandonment of it."[25]

There are features of this legal history, explored in great detail by others,[26] which are important to note. First, the position that the Constitution embodies no particular social or econmic view, but was meant to accommodate any view which a legislature enacted into law has been firmly established in cases involving economic regulation. Second, the Court ultimately went quite far in its acceptance of this position, really further than it had to, and adopted under both due process and equal protection a rational basis standard of review amounting to an abdication of judicial review. Under this standard, legislation was given an extremely strong presumption of constitutionality. This very lenient standard of review, however, posed a possible danger to the exercise of first amendment rights and promised little protection for minorities. First amendment rights and minority protection called for greater judicial solicitude regarding the effect and intent of legislation than economic interests received, as was noted in the famous footnote in *United States v. Carolene Products Co.*[27] The Court pro-

24. 220 U.S. 61, 78-79 (1911).

25. Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 368 (1949).

26. *See generally* Hamilton, *The Path of Due Process of Law*, in AMERICAN CONSTITUTIONAL LAW HISTORICAL ESSAYS, 131 (L. Levy ed. 1966); Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 13, 226 (1958); Rodes, *Due Process and Social Legislation in the Supreme Court—A Postmortem*, 33 NOTRE DAME LAW. 5 (1957).

27. There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments,

vided such protections through various forms of close judicial examination of legislation in first amendment and racial discrimination cases.[28]

The Court's abdication of review in cases involving economic and social legislation regulating property rights while actively and closely reviewing legislation affecting first amendment rights and minorities caused some commentators to claim that the Court was using an inadequately justified double standard of judicial review.[29] Since economic or property rights are recognized and protected under the fifth amendment, and since they are important rights, it was claimed they were entitled to as much judicial consideration as other constitutional rights. Other scholars, however, approved the double standard. For example, Tussman and ten Broek, in their famous article on equal protection,[30] suggested that because of "the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of experts, and the number of times the judges have been overruled by events,"[31] there should be great judicial self-restraint in review of state economic regulation. On the other hand, they did not find these reasons persuasive for an equivalent judicial deference in review of legislation affecting political and civil rights, where the issues are not so localized nor the data so technical as to be beyond the grasp of the

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which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .

304 U.S. 144, 152-53 n.4 (1937) (citations omitted).

28. *See generally* McCloskey, *supra* note 20.

29. *See generally id.*; Karst, *supra* note 1; Michelman, *supra* note 1.

30. Tussman & ten Broek, *supra* note 25. The Court's recent due process decisions, Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), evidence a very changed attitude toward review of state regulation of property rights. The following dictum of Justice Stewart perhaps best reflects the new attitude, although its full ramifications for judicial review have yet to be worked out:

> the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speech or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

31. Tussman & ten Broek, *supra* note 25, at 812.

Court. This is not really a very satisfactory ground of distinction, and given the legal ground traveled since they made that claim, the complexity and intractability of racial issues, the bewildering conflict of social science experts, one doubts they could now even make a case on this basis.

Whatever its justification, which was never very clear, the economic-civil rights double standard of review satisfied an evident and deeply felt need, placed the Court in the position as protector from oppression and was not offensive when applied to legislation intended to ameliorate social and economic conditions. It became ensconced in constitutional law. This was fine, and until the present, aside from a few scholars, only regulated property owners were unhappy.

Strict Judicial Review of Legislation

As contrasted with traditional standards of judicial review, exacting judicial examination of the effect, rationale and intent of legislation, where legislation is given no presumption of constitutionality and where the state must give compelling justification if the legislation is to be upheld, is called strict review. It has been utilized by the Court to review legislation affecting some personal rights other than property rights. As a principle, it has had many applications and has received many variant formulations. When the cases are examined, they fall into rough categories, not mutually exclusive and not fully comprehensive, but at least quite suggestive. The first category is composed of decisions dealing with participation in the political process, broadly defined, and includes the first amendment and voting rights cases. The second category deals with the fairness of legislation and includes the due process "fundamental fairness" and equal protection decisions addressed to the fairness of legislative classifications, primarily the suspect classification cases. The final category comprises the remaining cases and includes the ill-defined, amorphous category of implied fundamental rights.

CATEGORY I: PARTICIPATION IN THE POLITICAL PROCESS

Strict Review in First Amendment Cases

Strict review has been a doctrine long recognized in first amendment cases. As stated in *NAACP v. Button*,[32] in which the Court struck down, as violating the right of freedom of association, a Virginia attorney malpractice statute which effectively prohibited the NAACP

32. 371 U.S. 415 (1963).

from soliciting and handling racial discrimination cases for others, "[t]he decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[33] But this is only a recent formulation of an old principle. For example, Justice Holmes' famous dissent in *Abrams v. United States*,[34] the theory of which later became the major foundation of the Court's treatment of first amendment matters, is a clear ancestor of the fundamental rights-compelling state interest doctrine, with "present danger" occupying the role analogous to the current "compelling state interest" test.

> It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. . . .
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> . . . .
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> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[35]

There is, of course, an extraordinary literature on the meaning of the first amendment. Undeniably central in the importance of its freedoms is some idea of self-government, of participation by the populace through the expression of opinion, in the political life of the polity.

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33. *Id.* at 438 (1963). Other cases demonstrate the strength of the principle. In NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), the state sought to compel the NAACP to disclose its Alabama membership lists. The Court found that the production order entailed a likely restraint upon NAACP's members freedom of association rights, and in reviewing the state interests in obtaining the information at this risk to first amendment rights, applied, in terms, the compelling state interest test to overturn the state action. In Bates v. City of Little Rock, 361 U.S. 516, 524 (1960), with a similar fact situation, the Court said "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling". The draft-card burning case, United States v. O'Brien, however, contains perhaps the most convenient summary (if somewhat askew because it deals with "incidental" limitation on first amendment freedoms) of the various first amendment review formulations of the compelling state interest principle:

> This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong.

United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

34. 250 U.S. 616, 624 (1919).

35. *Id.* at 628, 630 (Holmes, J., dissenting).

> Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of freedom of speech springs from the necessities of the program of self-government.[36]

But first amendment rights other than freedom of speech have been held to be fundamental. In *Sherbert v. Verner*[37] South Carolina sought to deny unemployment compensation benefits to a Seventh-day Adventist who refused, from religious scruples, jobs involving Saturday work. The Court concluded this denial burdened the appellant's free exercise of religion and applied a compelling state interest test to overthrow the state law.

Religious freedom, of course, is an analogue of freedom of opinion. Speech assumes a variety of human purposes and opinions and would be severely threatened were there no freedom of religion. Indeed, it is impossible to say which freedom is primary, for both appear to stem from a basic principle that no man should be allowed to proscribe ultimate truths or ultimate conceptions of the good for other men. Both affirmatively recognize the individual pursuit of ultimate goals, and both protect minority interests against the power of political majorities: freedom of speech by requiring majorities to be at least formally open to reasoned appeals and to be aware of the effects of their decisions; freedom of religion by prohibiting action which could destroy at least certain important minorities at their root. The first amendment freedoms are all practical expressions of these vital principles and equally merit fundamental protection.

Strict Review and Voting Rights

The equal protection voting cases deal with a variety of political participation rights ranging from equal voting rights,[38] through placing parties on the ballot,[39] candidacy[40] and participation in elections.[41]

36. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).
37. 374 U.S. 398 (1963).
38. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).
39. Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23 (1968).
40. Bullock v. Carter, 405 U.S. 134 (1972).
41. Dunn v. Blumstein, 405 U.S. 330 (1972) (residency qualifications); Evans v. Cornman, 398 U.S. 419 (1970) (residency qualifications); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969);

In these cases, the right to vote, when statutes call for voting, has been recognized as being as important as the right of free speech. The right to vote "is a fundamental political right . . . preservative of all rights."[42] It is "the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[43] Consequently, in *Reynolds v. Sims*,[44] *Wesberry v. Sanders*[45] and other reapportionment cases, the Court used strict scrutiny to strike down laws infringing equality of voting rights. The principle was used by Justice Black to protect voting and association rights in *Williams v. Rhodes*[46] where Ohio election laws imposing greater ballot access burdens on minority political parties than on majority parties were invalidated. Such laws favored the two majority parties while effectively stifling the growth of others. In *Kramer v. Union Free School District*[47] strict scrutiny was applied to overturn a state law which excluded certain voters from voting in special purpose elections. At issue were voting requirements excluding school district residents from voting in school district elections unless they were parents of enrolled school children or possessed taxable real estate. These restrictions were invalidated as excluding voters having an interest in such election while also including those who did not. There it was said that "[a]ny unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government."[48] Similarly, in *Carrington v. Rash*,[49] *Evans v. Cornman*[50] and *Dunn v. Blumstein*,[51] strict scrutiny was used to render unconstitutional various voting residency qualification requirements which operated to disenfranchise state residents. Finally, it was used in *Bullock v. Carter*[52] to invalidate the Texas filing fee system for political candidates in primary elections. The filing fees were so unreasonably high that many qualified candidates were precluded from filing. This indirectly bur-

Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Carrington v. Rash, 380 U.S. 89 (1965) (residency qualifications, for voting in state elections). *See* James v. Valtierra, 402 U.S. 137 (1971) (mandatory referendum for low-income housing).

42. Reynolds v. Sims, 377 U.S. 533, 562 (1964), *quoting* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

43. 377 U.S. at 555. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

44. 377 U.S. 533 (1964).

45. 376 U.S. 1 (1964).

46. 393 U.S. 23 (1968).

47. 395 U.S. 621 (1969); *cf.* Cipriano v. City of Houma, 395 U.S. 701 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

48. 395 U.S. at 626.

49. 380 U.S. 89 (1965).

50. 398 U.S. 419 (1970).

51. 405 U.S. 330 (1972).

52. 405 U.S. 134 (1972).

dened the right of impecunious voters to vote for a candidate of their choice since they might not be able to accumulate contributions sufficient for their candidate to meet the exorbitant filing fee. The holding harkens back somewhat to the important earlier case of *Harper v. Virginia Board of Elections*[53] where the court struck down the poll tax as violating equal protection.

The foregoing series of cases disclose strict scrutiny to be a powerful principle in reviewing state regulation of participation in the political process, as significant a mode of review here as in first amendment cases. There is close analogy between first amendment rights and political participation rights. The latter usually involve association, are a form of expression and, in any event, have one major function in common with first amendment rights. That is, both are basic means of citizen participation in and reaction to government; both are means to insure the responsiveness of government, to obtain its adjustment to the desires of the people. This is a profound underlying principle, and it forms one foundation for a theory of fundamental rights and the application of strict judicial review to regulation of those rights.

But strict scrutiny has been applied in other areas, and these must be examined as well. The second rough category of strict scrutiny cases is the due process and equal protection cases relating to the fairness of legislation.

CATEGORY II: STRICT REVIEW OF UNFAIR LEGISLATION

Fairness and Due Process

The due process variant of strict review found its seminal expression in *Palko v. Connecticut*.[54] There, in determining that due process did not require the states to abide by the double jeopardy clause, Justice Cardozo stated the test for determining whether state action offended due process to be whether it subjected individuals to "hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?' "[55] Justice Frankfurter also found an "independent potency" in the principle of due process and found that it demanded, in criminal cases, an examination of "the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which expressed the notions of justice of English-speaking peoples even toward those charged with the

53. 383 U.S. 663 (1966).
54. 302 U.S. 319 (1937).
55. *Id.* at 328.

most heinous offenses."[56] Finally, Justice Harlan took essentially the same view of the character of judicial review under due process: "It entails a 'gradual process of judicial inclusion and exclusion,' seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those 'immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard.' "[57]

While this "fundamental fairness" principle controlled in the early criminal procedure cases, it seemingly dropped from view, except in dissent or concurrence, as the Court proceeded to ad hoc incorporation of specifics of the Bill of Rights into the fourteenth amendment's due process clause. Notwithstanding, it can be seen to be operating in *Gideon v. Wainwright*[58] in which the Court held that accused indigent felons must be provided with free counsel. But even if hidden, the independent due process principle of fundamental fairness was not by any means defunct. It resurfaced in the civil case of *Boddie v. Connecticut*,[59] which involved the in forma pauperis rights of divorce petitioners. Because of the importance of marital status in our society and because the state had monopolized the mechanisms for dissolving marriages, the Court, in an opinion by Justice Harlan, held that the state was fundamentally unfair in refusing to allow indigent divorce petitioners, unable to pay court filing and production fees, to proceed without payment of costs.

Fairness and Equal Protection

A number of cases decided under the equal protection clause can also be characterized, in substance if not decisional terms, as strict scrutiny fairness cases. The most obvious of these are the criminal cases, *Griffin v. Illinois*,[60] in which the Court held that the state must provide indigent convicted persons with free trial transcripts, and *Douglas v. California*,[61] in which it held that the state must provide free counsel to indigents on appeal. In these cases, the court emphasized that there could be no equal justice in criminal cases where the affluent could purchase essential services which the indigent could not. But the Court has never required that an indigent receive the same

56. Adamson v. California, 332 U.S. 46, 67-68 (1947) (Frankfurter, J., concurring).
57. Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting) (footnotes omitted).
58. 372 U.S. 335 (1963). *See also* Clark, *Gideon Revisited*, 15 ARIZ. L. REV. — 1973.
59. 401 U.S. 371 (1971).
60. 351 U.S. 12 (1956).
61. 372 U.S. 353 (1963).

quality of services that an affluent party could purchase. Consequently, both decisions can be read for the general proposition, applicable also in *Gideon v. Wainwright*,[62] that the state is unfair to indigents in criminal cases when it does not treat them on the basis of at least rough equality with the affluent.

The foregoing equal protection decisions are instances of the application of a form of strict scrutiny, although not so denominated, in cases involving suspect classifications, for the state sought to classify in accordance with wealth. The Court has also applied equal protection strict scrutiny forms of analysis in cases in which the suspect classifications were race,[63] nationality[64] and alienage.[65] There are two primary reasons for the suspect classification doctrine. First, distinct minorities may not be able to protect themselves in the political process. Thus, the suspect classification cases, as part of their constitutional basis, recognize the necessity of correcting discriminations caused by inadequacies in the political process—a realization that legislatures are quite likely to be unfair to particular, indentifiable interests. Second, with the exception of wealth, the suspect classifications are considered generally irrelevant to legitimate state purposes.[66] But a general determination that a classificatory basis is irrelevant to proper purposes is really a judgment that classification on that basis is unfair.[67] It is for this reason that the equal protection-suspect classification decisions are at heart fairness cases, falling together with similar due process cases.

Upon analysis, other significant strict scrutiny equal protection cases appear to be operating under the same underlying principle of questioning the basic fairness of legislation. Indeed, the first of this line, *Skinner v. Oklahoma*,[68] is an example. There, the Court struck down an Oklahoma statute requiring the sterilization of persons convicted of felonies involving moral turpitude. But the law did not apply to all who committed equally serious offenses and was therefore unfairly discriminatory, given the importance of the human interest involved: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one

62. 372 U.S. 335 (1963).
63. Cf. Loving v. Virginia, 388 U.S. 1 (1967), McLaughlin v. Florida, 379 U.S. 184 (1964); Yick Wo v. Hopkins, 118 U.S. 356 (1963).
64. Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944).
65. Graham v. Richardson, 403 U.S. 365 (1971).
66. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964).
67. *Cf.* Goodpaster, *supra* note 9, at 242-44.
68. 316 U.S. 535 (1942).

and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[69]

The *Skinner* view that legislative classifications relating to intimate matters in procreation, marriage and family relationships required strict scrutiny was later used in *Levy v. Louisiana*[70] and *Weber v. Aetna Casualty & Surety Co.*[71] to strike down state legislation relating to children's rights, but adversely affecting illegitimate children. While equal protection cases, these can be read for the proposition that classification on the basis of illegitimacy is presumptively unfair, because illegitimacy has been determined to be irrelevant to state purposes.

Strict Scrutiny in Fundamental Rights Cases

There is a final group of equal protection strict scrutiny cases which do not readily fit into the rough categories I have been using. These might be called the miscellaneous fundamental rights cases. In this group, the application of strict review is more controversial than in the preceding two groups. There is far less agreement that the rights involved are fundamental, the use of strict review under the equal protection clause is severely questioned and a search for new equal protection principles begins. While there are a number of cases in this category, the issues are best characterized by *Shapiro v. Thompson*,[72] *Dandridge v. Williams*[73] and *San Antonio Independent School District v. Rodriguez*.[74]

Shapiro v. Thompson: The Right to Travel

Shapiro contains the most fully developed of the equal protection strict scrutiny analyses. There, Justice Brennan, speaking for the Court, articulated the standard to be applied when classifications in state legislation deterred or penalized interstate travel of welfare recipients by imposing long residency period qualifications for the receipt of welfare assistance. When they moved, "appellees were exercising a constitutional right [the right to travel], and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[75] Under this standard, the Court's analysis of the many prof-

69. *Id.* at 541.
70. 391 U.S. 68 (1968).
71. 406 U.S. 164 (1972).
72. 394 U.S. 618 (1969).
73. 397 U.S. 471 (1970).
74. 93 S. Ct. 1278 (1973).
75. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

fered state interests in and reasons for the regulation was very much the strict kind of analysis made familiar in first amendment cases, and the Court used such familiar first amendment tools as overbreadth and less-restrictive alternative analyses to strike it down.

Justice Harlan, preferring, as he consistently did, to use due process to analyze the propriety of state regulation of important interests, dissented sharply in *Shapiro* from the use of the compelling state interest doctrine, finding it a highly subjective application of the equal protection clause without a limiting principle:

> This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation, the right to receive greater or smaller wages or to work more or less hours and the right to inherit property. Rights such as these are in principle indistinguishable from those involved here [the right to travel], and to extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'super-legislature'. . . . When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental' and give them added protection under an unusually stringent equal protection test.[76]

Thus, Justice Harlan powerfully resurfaced the issue of judicial subjectivism which had been at the heart of some of the Court's great constitutional debates. Seemingly resolved in the overthrow of substantive economic due process, central to the due process incorporation debate,[77] and never intelligibly handled there, it arose again more sharply than ever in equal protection. The *Shapiro* fundamental rights-compelling state interest doctrine was an open invitation to constitutional litigants to press their claims as fundamental rights.

Shapiro, in addition to failing to make clear what the catalog of fundamental rights was, had many deep ambiguities, for the most part resolved by later cases. But hindsight reveals that the full blown double standard of equal protection review locked legal analysis of state regulation into a rigid either-or framework unresponsive to the real nature of the issues being reviewed. Because of the judicial legis-

76. *Id.* at 661-62 (Harlan, J., dissenting).
77. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Adamson v. California, 332 U.S. 46 (1947).

lation problem inherent in the absence of a definite list of fundamental rights, the Court would in future cases either have to find an infringement of a "fundamental" right in order to utilize strict scrutiny or would have to use the minimum rationality test. This meant that the Court, and lawyers developing cases, would be forced to take a procrustean view of equal protection; that is, either to raise the interests involved and allegedly infringed by the state to the dignity of constitutional and fundamental rights, or simply to allow the state to regulate them at will, no matter what their nature. The later did occur in *Dandridge v. Williams*[78] and in much of the subsequent welfare litigation.

Dandridge v. Williams: The Necessities of Life

The reach of *Shapiro*, given its respectful consideration of the needs of poor people, was uncertain. *Dandridge*, the next major welfare case before the Court, resolved some of the ambiguities. In *Dandridge* a state statute imposed an upper limit on the amount of money paid to families on welfare. Under this maximum grant limitation, once the maximum benefit amount was reached it could not be increased, no matter what the family size. Thus, larger families received a lesser amount of welfare benefit, proportional to the number of persons in the family. This scheme was attacked under equal protection as drawing an arbitrary classification based on family size. Further, it was contended that because the state's classification injuriously treated welfare recipients' statutory entitlement to the necessities of life, a strict scrutiny equal protection analysis applied. Certainly, it was argued, the very necessities of life are as important as the interests protected by fundamental rights.[79] After all, to state the obvious, without the necessities of life, rights are worthless. Under a strict scrutiny analysis, therefore, because of the importance of the personal interests involved, the state would not be permitted to make the usual rough overinclusive or underinclusive classifications. Instead, as under first amendment analysis, precision of regulation, not admitting of overbreadth, would be required. Under that analysis, the states' proffered interests, essentially to provide a work incentive and to maintain an equitable income balance between welfare families and the families of the working poor, would have been too roughly served by the classification, and it would have fallen. In effect, the Court was asked to find either that there was some kind of fundamental right to the necessities of life or that the strict scrutiny test was to be applied in cases involv-

78. 397 U.S. 471 (1970).
79. *Id.*

ing important personal interests, not readily cognizable as constitutional rights, as well as cases involving fundamental rights.

Justice Stewart, speaking for the majority, found that such holdings would be unmanageable, and "far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought,' "[80] that is, the *Lochner* era. While recognizing "the dramatically real factual difference" between economic regulation cases and cases involving "the most basic economic needs of impoverished human beings," the Court declined to apply a different equal protection test to the latter.

> [H]ere we deal with state regulation in the social and economic field, not affecting freedom guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. . . .
>
> In the areas of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'[81]

Thus, the reach of *Shapiro* was limited by restricting its fundamental right analysis to the right to travel and freedoms guaranteed by the Bill of Rights.

While it may be that the majority in *Dandridge* cannot be analytically faulted for failing to find a right to the necessities of life implicit in the Constitution, one cannot help feeling that the Court's already well-established abdication of review in economic regulation cases had been harshly extended to the social problems presented in *Dandridge*, and that something was wrong with the decision. The alternatives facing the Court, Scylla for the poor if the rational relationship test was applied, Charybdis for the Court if the substantive review of strict scrutiny was used, dictated an unsatisfactory result. This points up the major problem with the double standard equal protection test. There is, after all, a very large chasm between classifications not made with mathematical nicety and classifications made without any nicety at all; between classifications which are genuinely reasonable and those merely having a conceivably rational justification. In that chasm lay

80. 397 U.S. at 484.
81. *Id.* at 484-85 (citations omitted).

the plaintiff's claim in *Dandridge*, but there was no equal protection bridge to cross it.

The all-or-nothing character of equal protection review standards, under which a case is won or lost by the characterization of the personal interests involved, was immediately perceived to be unsatisfactory. Justice Marshall, first in dissent in *Dandridge* and then again in dissent in *Richardson v. Belcher*,[82] argued for a balancing form of review in equal protection cases in which the Court reviewed legislation "providing fundamental services or distributing government funds to provide for basic human needs":[83]

> [E]qual protection analysis of this case is not appreciably advanced by the *a priori* definition of a 'right,' fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[84]

Thus Justice Marshall has proffered a third form of equal protection review in cases involving governmental benefits or services.

The trend of decisions—*Griffin*,[85] *Douglas*,[86] *Harper*[87] and *Shapiro*[88]—in which the Court showed solicitude for the poor as a social class, had suggested that the states had special legal obligations to avoid burdening the poor's exercise of certain constitutional rights, but had left open the extent of the general obligation of states to alleviate poverty. *Dandridge* firmly settled what had not been given definitive legal treatment and what the cited decisions had cast in doubt. In most cases, except those involving issues on which the Court had already clearly stated, or implied a fundamental right was involved, the states were given the same latitude of power to deal with the social problem of poverty as they had to regulate business or industry. The peculiarly difficult status of the poor, with little money or resources

82. 404 U.S. 78 (1971). In *Richardson* the Court sustained a provision of the Social Security Act requiring a reduction in awarded disability benefits equal to workmen's compensation receipts, although individuals who received insurance or tort damages disability compensation did not have their payments reduced. The Court inferred that Congress could have had a rational purpose of not creating a disincentive, through duplication of benefits, for states to continue in full effect their workmen's compensation programs. Given the lack of legislative history and the slim likelihood of this result in fact, this assigned rational purpose seems truly conjured from a judicial hat.

83. *Id.* at 90 (Marshall, Brennan, Douglas, J.J., dissenting).

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

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

86. Douglas v. California, 372 U.S. 353 (1963).

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

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

in a society which premises the provision of necessities, goods and essential services on money and resources, deserved no special constitutional consideration. To the degree that the earlier cases suggested otherwise, such problems were handled simply by noting that the state maximum grant law did not affect freedoms guaranteed by the Bill of Rights. This view was upheld in *Lindsey v. Normet*,[89] in which the Court rejected the proposition that the need for decent shelter or the right to retain peaceful possession of one's home were fundamental interests entitled to strict scrutiny review. It was further reconfirmed in *Ortwein v. Schwab*,[90] in which the Court held that appellate court filing fee requirements do not deny due process or equal protection to appellants unable to pay them.

San Antonio Independent School District v. Rodriguez: The Right to an Education

If there was any remaining doubt as to the expansibility of the list of fundamental rights, the Court has lately attempted to remove it. The most recent major case in which the Court was asked to declare an important interest to be a fundamental right under the Constitution is *San Antonio Independent School District v. Rodriguez*.[91] Plaintiffs in that case, poor Mexican-American parents whose children attended public schools in Texas, sought to have the Texas system of public school financing, which relied on local property taxes, declared unconstitutional. Because public education was supported by local property taxes, school districts with a low property tax base, allegedly those where minority group members and poor persons resided, could not spend as much per pupil for education as wealthier districts. The district court had held that the system classified students in accordance with wealth, found wealth to be a suspect classification and found education to be a "fundamental" interest. Consequently, it found the appropriate standard for equal protection review to be the strict scrutiny standard, and that the Texas system could be sustained only if the state could show a compelling interest. The district court saw neither a compelling interest nor even a reasonable basis for the classification. It therefore held the system to be unconstitutional. The United States Supreme Court reversed, however, finding neither a suspect classification nor a fundamental right to be involved. While continuing to recognize that "education is perhaps the most important function

89. 405 U.S. 56 (1972).
90. 93 S. Ct. 1172 (1973).
91. 93 S. Ct. 1278 (1973).

of state and local governments,"[92] the Court was unwilling to find that it was a fundamental right. Reviewing prior case law to explain the application of the strict scrutiny standard, Justice Powell, writing for the majority, stated:

> The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing [referring to *Dandridge* and *Lindsey v. Normet*]. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[93]

Since the majority could not find education a right so guaranteed, it refused to apply the strict scrutiny test.

Justice Marshall in his dissent expanded on his equal protection review position, giving a remarkably full and firm statement to the general proposition that in a system premised on judicial review it is incumbent on the Justices to scrutinize state legislation to a degree commensurate with the importance of the interests burdened:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.
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> . . .
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> . . . .
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> The majority suggests, however, that a variable standard of review would give this Court the appearance of a 'superlegislature.' . . . I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that Document. . . . Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process.[94]

92. *Id.* at 1295, *quoting* Brown v. Board of Educ., 347 U.S. 483 (1954).
93. 93 S. Ct. at 1297.
94. *Id.* at 1332, 1336 (Marshall, J., dissenting).

Marshall's framework is the correct solution to the problems created by the double standard of judicial review under the Constitution. And in his fine analysis in *Rodriguez*[95] of the Court's prior work, he correctly shows that the Court has often adjusted the degree of review to accord with the importance of the interests adversely affected by legislation. He does not, however, with equal facility, fully show how such a standard flows from a system of judicial review and from the equal protection clause.

It is not my purpose, however, to critique the majority decision in *Rodriguez* generally, but only to glean from it the status of the equal protection strict scrutiny test. As to that, it was made clear by the majority that the line of demarcation between fundamental and non-fundamental rights is drawn by the words of the Constitution and by past decisions of the Court where the right in question is found in terms in the Constitution.

This explanation of equal protection strict scrutiny is inconsistent with the past and question-begging. Had the same rationale been applied when the rights of privacy, procreation or travel were being pressed as fundamental constitutional rights, they probably would not have qualified. The point is that the Constitution is a very broad instrument and, at least with respect to very important rights or interests, it would be highly surprising if a creditable argument could not be made that the Constitution did not implicitly guarantee them. Furthermore, the question whether the Constitution "implicitly" guarantees the right rests with the decision of the Court. Even when the Constitution explicitly guarantees a right, however, it does not tell the content of the right, declare in what respects it is fundamental nor, finally, even that it is fundamental. For example, indictment by grand jury for capital or infamous crimes is a right guaranteed by the fifth amendment; and jury trials at law, where the value in controversy exceeds 20 dollars, is guaranteed by the seventh amendment. Yet even though explicitly found in the Constitution, it is unlikely that anyone would contend that these rights are fundamental. Thus, while explicit or implicit constitutional connection may be a necessary condition for fundamentalness, it is not also a sufficient condition. No, the riddle of fundamentalness may be boxed, but it is not yet wrapped and delivered: the Court must still decide the issue, and we are still without a guiding principle for decision.

95. *Id.* at 1329-37 (Marshall, J., dissenting).

The Application of Strict Review

The application of strict review in fundamental rights cases but not in others creates a further problem, which is evidenced by the recent work of the Court. In some cases involving rights falling on either side of the line, the *actual* degree of scrutiny given by the Court has tended to drift towards the middle ground between strict review and rational basis review. Holding a right to be a fundamental right has very serious consequences. Since the meaning of most rights is not unequivocal and "right" is a general term encompassing a broad range of protected interests, there is a danger that holding a right to be fundamental will overvalue some interests. If this happens, legislatures may be proscribed from acting where they would ordinarily be found justified to act. To avoid this result, the Court may be forced to refine the "fundamental" in a given fundamental right or to move from a compelling state interest to a balancing test. On the other hand, with respect to the rational basis test, when a sympathetic Court reviews legislation affecting an important right or interest not deemed fundamental, it may redefine its notions of rationality to fit the case. The meaning of "rational basis" may then become fluid and unreliable. This will be a more subtle and insidious form of judicial legislation. Both of these eventualities appear to have happened.

In its recent work, the Court has purported to apply the extremely lenient "rational" basis test, but has in fact imposed a stricter standard of judicial review, although not as strict as a compelling state interest scrutiny. In *Reed v. Reed*[96] a provision of the Idaho Probate Code giving preference to men over women for appointment as administrators of decedents' estates was attacked under equal protection. Rejecting the opportunity to declare sex a suspect classification and to subject sexually discriminatory laws to strict scrutiny, the Court, claiming to apply a rational basis standard, sustained the discrimination claim. As a rational justification, the state offered a legislative judgment that men would be more likely to have business experience relevant to the administration of an estate. Had the Court given the issue the cursory treatment usually given under the rational basis standard, the state's position would likely have been upheld.

In *Eisenstadt v. Baird*[97] the Court struck down as violating the rational basis equal protection standard a state statute denying unmarried persons the same access to contraceptive devices as married persons. The state offered reasons, arguably rational under the tradi-

96. 404 U.S. 71 (1971).
97. 405 U.S. 438 (1972).

tional standard—deterring pre-marital sexual activity and regulating the dissemination of possibly dangerous articles—but these were rejected. Clearly, the state's encroachment on privacy affected the Court's view of what was rational under the circumstances. The Court similarly purported to apply a rational basis standard in *James v. Strange*,[98] in which the Court held unconstitutional a state statute calling for recoupment of legal defense fees paid by the state for indigent convicts. The state interests, to recover the fees and to discourage fraud, were given short shrift. To achieve the results in the foregoing cases, while continuing to apply the traditional rational basis standard, the Court had, in effect, subtly, and in an ad hoc manner, changed the meaning formerly assigned to rationality under that standard.

While the foregoing cases suggest a process of unadmitted but opportune inflation of the rational basis standard, there are other cases which suggest a threatened deflation of the strict scrutiny standard. In *Bullock v. Carter*[99] in determining that strict review of Texas' costly primary filing fee requirement was required in a challenge by parties unable to pay the fee, Justice Burger stated for the Court:

> Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in *Harper*, that the laws must be closely scrutinized and found *reasonably necessary to the accomplishment of legitimate state objectives* in order to pass constitutional muster.[100]

While this articulation may be a fair rendition of the *Harper* holding, it is not an accurate restatement of the *Shapiro* formulation. Chief Justice Burger does read precedent quite narrowly, but there is the further suggestion in his formulation that each right heretofore found to be fundamental, and thus generally calling into play "strict review," has its own particular review standard dependent upon the treatment of the right given by the Court in the initial case in which it was determined to be fundamental. Thus, for example, regarding the right to vote, state laws must be found "reasonably necessary to the accomplishment of legitimate state objectives," while with respect to the right to travel, they must be strictly necessary to promote a compelling state interest. On the other hand, Burger's formulation may represent an attempted retreat in general from the rigorous heights of overall strict

98. 407 U.S. 128 (1972).
99. 405 U.S. 134 (1972).
100. *Id.* at 144 (emphasis added).

review established in *Shapiro*. In either case, we are in something of a quandary, and there is no certainty in the application of either of the equal protection review standards.

Summary of Difficulties in the Current Doctrine of Fundamental Rights

There are many problems in the constitutional doctrine of fundamental rights. Some of these have been discussed as they arose in the course of presenting an overview of the development of the doctrine, while others have been hinted at. It is useful at this juncture, however, to state them all explicitly.

The fundamental rights doctrine, as it has been developed by the Court, lacks coherent and objective underlying principles. It therefore seems impossible to determine, other than by judicial fiat, just what rights should be treated as fundamental and as justifying strict review. The threat of judicial legislation is thus raised and, without a showing of principles, cannot be satisfactorily allayed.

There is also what might be called the canonization problem. Declaring a right to be a fundamental appears to give the right an infrangible sanctity, for state authority cannot regulate or burden its exercise without showing a compelling interest to do so. Most "rights" are just categorical names for recognized legal protection of a variety of similar or related human interests. The interests subsumable under any given right may range from the trivial to the extremely important. If the right is declared fundamental, the state may be precluded from regulating even the trivial instances of its exercise. On the other hand, strained analysis may be required to show that the claimed right is not really in issue, or that the state actually has a compelling interest, or that the exercise of the right is not really burdened in the particular case.[101] Declaration of a right as fundamental, therefore, without an attendant statement as to wherein it is fundamental, generates severe analytic problems and precludes judgments responsive to the real nature of the rights and interests involved.

The fundamental rights doctrine also does not solve the problems of a double standard of judicial review, a standard felt to be correct when first amendment or minority rights are involved, but never even then satisfactorily justified on a sound jurisprudential basis. The win-

101. "We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969).

ner-take-all result of the double standard encourages the upgrading or downgrading of interests so that they may fit into the proper category, but in doing so does not do justice to the interests under review. On the other hand, if justice is to be done, there may be a watering down of both the rational basis and the strict scrutiny standards of review. When this happens, it screens a more subtle form of judicial legislation and, more importantly, fails to give principled guidance to the lower levels of our vast legal system.

Finally, the current fundamental rights doctrine creates an anomaly in our constitutional life under which interests which may be of little importance to many, such as travel, are given extreme protection, while interests of extreme importance to virtually all, such as opportunities to work, do not receive special protection. Under the most recent interpretation of the fundamental rights doctrine in *Rodriguez*,[102] we are told we are firmly locked into the past grading and valuation of constitutional rights. But contemporaneous pressures are generated to distill constitutional protection for highly valued human interests from out of the oftentimes vague generalities of the Constitution. The fundamental right of privacy, for example, was found in that way.[103] But the creation of constitutional rights by implication may be the very substance of judicial legislation. Thus, the fundamental rights doctrine generates constitutional action and reaction, expansion and retrenchment—all without ever having resolved the basic intellectual and jurisprudential issues.

And yet, for all these problems, there seems to be an essential truth in the doctrine of fundamental rights. It is a teaching of great merit which has been misapplied. Its proper articulation and application form the bases of a general theory of fundamental rights.

A GENERAL THEORY OF FUNDAMENTAL RIGHTS

It is due time to move from detail to pattern, from the specific to the general. Central in all fundamental rights cases is the same issue that generated the substantive economic due process cases: who shall have the last effective say as to what may be law, the legislature or the judiciary, who is to be the final authority and why. A rational basis standard gives the largest possible scope to legislative authority, while the strict scrutiny standard gives virtually none.

But let us for a moment look at these matters from the point of view of a legislature, in good faith attempting to provide solutions to

102. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973).
103. Griswold v. Connecticut, 381 U.S. 479 (1965).

public problems while respecting all interests its decisions may affect. This body would try to find and assert as much legitimate power as was needed to deal with the problems, but would not seek to exercise power to injure any interest beyond the injury necessarily required to solve the problem. This would mean that the legislature would impartially and fairly consider all the interests affected by its intended action, and after careful study select the legislation most likely to achieve the desired result, but least likely to do unnecessary injury.

But legislatures, deeply affected by political interests and subject to intensive interest group pressures, are rarely able to consider matters with close attention to the niceties of zealous impartiality, fairness to interests and studious consideration of the effects of proposed legislation. On the contrary, there is danger that, unless checked in some manner, the legislature might be captured by special interests or that its actions, as an expression of majority will, might always override minority rights or interests. This natural danger and tendency in legislatures might be limited, however, were there restrictions, as there are in the American system, on their legitimate power. An essential constitutional problem, therefore, is this: to give legislatures or, more generally, governments, sufficient power to deal with social problems, but in some way to check, or at least in the long run to mitigate, possible abuses of governmental power. This is a major problem in constitutional design.

It is not the only problem, however. A constitution is a set of rules organizing the political governance of a society. If it creates a law-making body, it does so because of the contingency and change of human life and affairs. Legislative power must by nature, therefore, be open-ended and relatively undefined—who knows what sort of authority will be needed to deal with problems? This, then, suggests that there should be few, if any, substantive limits on governmental power. This is also one of the lessons of the overthrow of substantive economic due process; that is, the Constitution should not be construed to lock in any view of what is an ultimate good for humankind, should not unchangeably embody any social or economic view. As Justice Holmes stated in his *Lochner* dissent:

> But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

> . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[104]

Just so; and any doctrines of rights which recognize as fundamental substantive ends which are good for all men—some natural rights positions—violate this principle of constitutional neutrality. Substantive doctrines embodied in the Constitution would hamstring governmental power to act in matters in which it is essential or highly desirable for a government to act.

The basic constitutional problem accordingly is to give governments adequate authority to deal with all new problems, whatever they may be, but to restrain abuses of that vast power, while at the same time embodying no set doctrines concerning the ultimate values for men. How can this be done?

The simplest way to approach this problem is to ask whether there are any rights which embody no substantive social or economic views, which do not posit ultimate goods for men, but which nontheless operate, at least theoretically, to place limits on the possible abuses of governmental power. I believe there are such rights. Generally stated, they are rights which, in the broadest sense, direct how governmental decisions shall be made, but do not direct what the results of those decisions shall be. That is to say, they are rights which determine first what shall be taken into account in governmental decision-making, and second, what accountability there shall be for decisions made. They are rights which regulate the political process (broadly defined), while not directing its outcome except through indirect means of holding the decision-makers responsible for their decisions. Thus, the logical character of such rights is that they are non-substantive, power regulating. This is not to say they are simply procedural, for they do have substantive effects. Nonetheless, they posit no substantive ends.

In the United States Constitution there are two categories of rights having this character: political participation rights and fairness rights. In the former category are included at least first amendment rights and voting rights. In the latter are due process and equal protection. These rights are fundamental because they create a societal process for the regulation of political power without express substantive restrictions

104. Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

on that power. They are fundamental because their exercise cannot be curtailed without destroying the self-governing character of our polity.

Political Participation as a Fundamental Right

The basic theory of constitutional government is that certain ground rules for collective choice have been established for a society in which there are fundamentally differing social and economic views. This means that the Constitution and the structure of the government it organizes must first and foremost be interpreted as decision-process directives for a polity designed to benefit all its members while giving its government sufficient power to deal with common problems—but not enough to abuse it. Because they are agreed-upon rules regulating group power, which may shift as political alignments and issues change, the ground rules themselves must not inherently favor the acquisition of power by any individuals, groups or interests. Nor can the ground rules be such as to enhance the accretion or retention of power by any interests competing for power. Otherwise the Constitution would be a stacked deck, for it would then embody some particular views among all the possible fundamentally differing social and economic views. The willingness to make a particular economic theory a required and irrevocable ground rule for the operation of political power was the defect in the substantive economic due process doctrine.

But the requirement that the Constitution itself not inherently advantage any particular social or economic view does not mean that the Constitution cannot, or should not, proscribe some limits on the exercise of governmental power following legitimate political acquisition of the instruments of government. On the contrary, if the polity is to remain open to contests between fundamentally differing social and economic views, open to the possibility of the consequences of shifting political forces, the Constitution must embody positive mechanisms to insure this. That is, the ground rules must operate to prevent the use of the powers of government to alter the structures which insure fairness and openness in the competition for and exercise of governmental power. Ground rules or constitutional mechanisms which do this can take a variety of forms, foremost of which are constitutionally articulated governmental structures, relationships and personal rights. From this point of view, a system of constitutional rights is as much an institution or structure of our government as the executive, legislative or judicial branches. The fact that the rights are not embodied in offices or official bodies does not detract from their theo-

retical regulatory function, although it may, of course, weaken their practical regulatory effectiveness. And, just as all of the governmental structures and relationships established by the Constitution do not have the fundamental function of regulating political competition and its results, so all personal constitutional rights do not.

Certain constitutional rights, such as first amendment and voting rights, when freely exercised, act in combination as additional ground rules or regulatory mechanisms for collective choice. This occurs as a matter of course, regardless of the specific intentions of the exerciser in the particular case of exercise. Such constitutional rights may be called fundamental because of the structural role they play in the regulation of the uses of governmental power. Even further, it is this special feature of process regulation that makes it possible to identify these fundamental rights and which makes them distinguishable from substantive rights like liberty of contract, as interpreted by the *Lochner* Court. One may say certain rights are fundamental because they do not embody a particular social or economic theory, but rather provide general directions on how to go about the proceedings,[105] through mechanisms premised on the expression of differing views.

Fundamental rights are political or civil rights which when exercised by individuals for personal goals function as well to benefit the polity by maintaining its integrity against changes in either the basic operating rules relating to the exercise of power in the polity or in the effectiveness of those rules. It is in this sense that certain rights are, in the famous statement, fundamental "because preservative of all rights."[106] The conclusion, therefore, is that fundamental constitutional rights are those rights which keep open the possibility that there effectively will be fundamentally differing social and economic views; that holders of governmental office will be affected by those differences and, while enabled to act with respect to them, will meaningfully be held politically liable for what they do.

It is possible, of course, that circumstances will arise which require the suspension of some of the basic rules of the game for the political governance of a society. For example, when Rome was a republic, temporary dictators could be appointed in times of great external threat. When this occurs, there are very grave risks of permanent increases of governmental power at the expense of the people. Consequently, only dangers which are, reasonably viewed, at least as

105. This position leads to the further conceptual possibility that some constitutional rights have a highly complex character and may operate fundamentally, in the sense established, in some, but not all, of the instances of their exercise.

106. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

threatening to the polity as the suspension of its life-giving rules can justify the suspension of some of those rules. It is not because individuals are endangered due to the loss of important personal rights that great justifications are required. It is, rather, because of the possible irrevocable loss of an important power regulating and restraining mechanism. In such cases it is as though the rulers of the state were saying to the people: "If you do not give up this particular power now, for the duration of the threat to the state, you run a serious risk of losing altogether what you cherish even more." In this sense, personal freedoms which function in the system to limit power are traded, at least temporarily, for other values which may be more important at that time, for example, security or health. Freedom as a limitation on the exercise of power is given up temporarily to enhance the ability of power to deal with an unusual and critical situation. This in essence is the meaning of the constitutional permission given to burden fundamental rights when there is a compelling state interest.

Due Process and Equal Protection as Fundamental Rights

Under this view of the meaning of fundamental rights, I have claimed that the fundamental rights are the first amendment rights, voting rights, due process and equal protection. That first amendment and voting rights fall under the general theory of fundamental rights is, I think, reasonably clear. That due process and equal protection are also fundamental rights of the same character because they are practical expressions of the same underlying principle is not as apparent and needs further explanation.

Notwithstanding the existence of first amendment and voting rights, majorities, however they are ultimately composed, may abuse their power, and the exercise of these rights may never effectively change the composition of the majority or affect its use of power. "Certain racial or ethnic groups have frequently been recognized as 'discrete and insular minorities' who are relatively powerless to protect their interests in the political process."[107] If first amendment and voting rights are inadequate to protect minorities, there must therefore be other guarantees or insurances of neutrality and generality in the application of governmental power.[108] Minorities may be defined as groups having a set of beliefs and patterns of conduct distinctively

107. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1333 (1973) (Marshall, J., dissenting).

108. "[G]eneral commitments to fairness, generality, and neutrality are built into the idea of legality and constitute its meaning." Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 305 (1964).

different from others. In other words, minorities represent distinct visions of the meaning and ends of humanity. To insure that the government itself does not suppress differing visions of life, differing social and economic views, and that it remains politically open to them, the government must be required to give them impartial respect. In other words, there must be guarantees to insure that whoever the holders of governmental power are, they will act fairly with respect to the interests they will regulate. Due process and equal protection are such guarantees.

Although equal protection, unlike due process, is not often related to its grounding in fairness considerations, its connection to them has occasionally been expressed very clearly:

> I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. . . . [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[109]

With respect to fairness concerns underlying the principles of due process and equal protection, there is, I think, little difference between the guarantees of equal protection and due process except that the latter deals with individual fairness while the former deals with fairness as between groups.[110]

While due process and equal protection require fairness, they do

109. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

110. A claim for equality of treatment presupposes individuals similarly situated with respect to all significant characteristics which form the basis for the questioned action. A claim for fair treatment, however, presupposes the lack of a one-for-one comparability between the situations of different individuals, and asks that the claimant receive whatever his own situation entitles him to. It is an element of fairness, however, that if two or more individuals are similarly situated for legislative purposes, they be treated equally. Anything less than equal treatment would be unfair because it could not be justified and would therefore be arbitrary and irrational. Consequently, general notions of fairness incorporate the idea of equality, equal protection can be viewed as a specific case of the application of fairness principles to prima facie members of designated classes, while due process is the application of the principle to individual cases. Thus, any equal protection analysis could as well be a due process analysis where classes are treated as individual group claimants, but not every due process analysis could be an equal protection analysis. Why equal protection rather than due process is called into play in any particular case is in the first instance a question of whether the law in issue attempts either to classify ostensibly different cases as similar or to make apparently similar cases different. Cases not involving some asserted form of one-for-one comparability with other cases, but raising solely questions of fair treatment, invoke due process rather than equal protection.

not define it, but leave the resolution to particular cases. They do not therefore embody settled substantive views as to what is fair, although they may, of course, incorporate the lessons of history. Consequently, they satisfy the criteria for fundamental rights; that is, they are general injunctions to the government to act with openness to differing views. They therefore do not preclude governmental power from acting, but at the same time they do place limits upon the operation of governmental power. Generally speaking, the clauses impose a standard of fairness on governmental actions. But what is that standard of fairness?

There can be only one answer here: the government must be fair, and the only way to determine whether it has been fair is to weigh and balance its purposes and method of regulation against the interests regulated and to examine, in view of the government's ends, the consequences of the regulation on the regulated. That is to say, using the current terminology of judicial review, the scrutiny given legislation needs to be as strict as the case warrants: there are no automatic formulae. In effect, both due process and equal protection apply the standards of review expressed by Justice Black: "In determining whether or not a . . . law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."[111]

Placed in this context, it can be seen that the chief issue is not what the fundamental rights are, but whether there shall be judicial review and how much judicial review there shall be. Our current system is to have no judicial review of so-called economic and social legislation and absolute judicial review over the burdening of a mixed group of rights. Assuming that we accept judicial review, my position is that only a few critical, structural rights, all of the same logical order, call for strict review. All other rights and interests call for a balancing mode of review, which may be called "reasonableness" review, to connect it with its constitutional tradition and to indicate the nature of the conclusion which must be drawn to validate legislation. Thus, both the "rational" basis standard and the strict scrutiny standard of due process and equal protection review are wrong as general standards. They describe instead specific instances of application of a gen-

111. Williams v. Rhodes, 393 U.S. 23, 30 (1968) (Black, J.). In Dunn v. Blumstein, 405 U.S. 330, 335 (1972), Justice Marshall stated the criteria for equal protection inquiry to be "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification."

eral standard, reasonableness review. They are the respective end points of the continua of due process and equal protection review.

A genuine reasonable basis standard or review is difficult to apply because it is so frankly judgmental and because it would apply in most cases. Undoubtedly its inherent difficulty of application forms part of the reason for the failure to admit its use or to utilize it more readily and broadly. Yet if it is a requirement of general fairness that the legislature deal fairly with the persons and human interests under its jurisdiction, and reasonable dealing is to be a meaningful requirement, the Court cannot escape giving significant review of legislation. The Court could, of course, determine that in certain classes of cases, for example cases involving economic regulation, there are good general reasons, based on experience and the nature of the cases, for indulging in a strong presumption of prima facie reasonableness. Yet in all cases, such presumptions should be recognized only as presumptions: the nature of the facts may require abandonment of the presumption and a genuine inquiry into the reasonableness of application of the legislation to a particular party or into the reasonableness of the legislation itself.

The Court's failure to accept this jurisprudentially sound standard results in a more subtle and iniquitous form of judicial legislation than that which ostensibly troubles legislators, critics and judges. Under current standards, the Court in effect can either constitutionally authorize legislatures to act unfairly or it can itself vacillate opportunistically in the applied content of its supposedly well-established standards. As stated previously, failure to review legislation under a reasonableness standard simply creates a virtually irrebuttable presumption that the legislature did act fairly—a perhaps politic, but necessarily naive and often unjust conclusion. On the other hand, giving significant review to legislation under the rational basis standard while claiming not to do so by declaring arbitrary and irrational what is plainly rational but unreasonable, or by declaring rational what is plainly unreasonable or unfair, is at best deceptive and confusing. It permits the members of the Court to disguise what they are doing, to hide behind words rather than to engage in an open analysis of values.

A reasonableness standard, however, openly adopted and applied, faces issues for what they are and requires substantial and realistic analysis of legislation in view of constitutional and juridical values. Unlike current practice, this standard does not pretend to engage in judicial review while not exercising it, nor to no review while exercising it, but rather is a frank acceptance of a legitimate review function. If

the Constitution promises impartiality, neutrality and the general and considered application of laws, it does so to ensure fairness; to realize that promise, some authority must review exercises of governmental power to see if they are fair. In a system of judicial review the courts have this role. Judicial review inherently involves a certain amount of judicial legislation, if one means by that the substitution of judicial judgment for legislative judgment.

This should not be overly objectionable if there is a limit on the substitution of judicial for legislative judgment. A requirement that legislative judgment be accepted if reasonable is such a limit. But as a guiding standard, it is a limit on judicial power which at the same time must operate as authority for judicial protection against legislative abuse. As a limit, it can function properly only if judges undertake their review function with an extraordinary understanding of their role, of the necessity to expose, not hide, value preferences while discounting their weight in judgment. On the other hand, to hide behind a facade of semi-automatic decision formulae, to pretend to ineluctable results essentially out of fear of judging, is to indulge in a kind of fraud. To claim that judging is inherently subjective is to say that matters of fairness are matters of taste, that no one can be fair except fortuitously. If we are willing to conclude that, we should give up the whole enterprise and forsake reasoned judgment by anyone.

Application of the General Theory of Fundamental Rights

A number of problems have been noted in the Court's application of the fundamental rights doctrine. These were the absence of a definite list of fundamental rights or criteria to determine which rights were fundamental; the "canonization" problem (the overvaluing or undervaluing of interests caused by the either-or character of equal protection analysis); the persistent lack of justification for the double standard of review exemplified by the disparity of treatment between two rights protected by the Constitution, property rights and free speech rights; and finally, the failure of the double standard to give any protection to highly important interests not considered to be fundamental rights.

The theory of fundamental rights which has been presented solves these problems. It offers a definite list of fundamental rights together with a logical explanation of why they are fundamental. When these are burdened by legislation, the theory calls for the strictest of judicial review. When other rights or interests are burdened—the vast majority of the cases—it requires judicial treatment of the rights and inter-

ests at their real worth by calling for a form of genuine balancing review under both due process and equal protection. It explains and justifies the existence of a double standard of review by showing that the differing standards apply to the infringement of rights of different logical and functional orders. Finally, it admits the necessity of an intensity of judicial review commensurate with the importance of the interests regulated and the purpose of the legislation.

Under the foregoing general theory of fundamental rights, the Court has been correct in requiring the demonstration of a compelling state interest before permitting the burdening of first amendment rights or voting rights. It has been correct as well in the racial classification decisions and in the *Skinner v. Oklahoma*[112]-*Weber v. Aetna Casualty & Surety Co.*[113] line of cases. For in these cases what the Court actually did was to balance the avowed legislative purposes and interests against affected interests and found the former wanting in fairness. On the other hand, the Court has been frequently wrong in the cases involving regulation of property, because it failed to give sufficient consideration to the property interest. Under this approach the Court also erred in the three major cases, *Shapiro v. Thompson*,[114] *Dandridge v. Williams*[115] and *San Antonio Independent School District v. Rodriguez*.[116] The Court was wrong in applying a fundamental right analysis to these cases and in each case delivered its result simply because of its determination that a fundamental right was or was not involved. In each case, as I shall now attempt to show, the application of a meaningful balancing standard of equal protection review would have been more sensitive to the matter in issue.

In *Shapiro v. Thompson* plaintiff welfare applicants claimed that the Connecticut residency requirements for receipt of welfare infringed their right to travel freely from state to state. To this the state interposed its primary interests of saving money, administrative convenience, reduction of fraud through receipt of payments from more than one jurisdiction and encouraging employment seeking by new residents.

Under the structural view of fundamental rights presented, the right to travel is not considered to be a fundamental right. It is, of course, implicit in the idea of the Union, and could be said to be fundamental in that sense. But the question must be whether it is so fundamental that the states must show a *compelling* interest to regulate it.

112. 316 U.S. 535 (1942).
113. 406 U.S. 164 (1972).
114. 394 U.S. 618 (1969).
115. 397 U.S. 471 (1970).
116. 93 S. Ct. 1278 (1973).

That is to say, is it generally so important that it cannot be regulated except for a public emergency creating a danger greater to the polity than the danger posited in regulation of the right? The answer is "no"; reasonable regulation of travel has often been upheld.[117] But even if the right to travel is not so fundamental as to require a compelling state interest justification for state regulation, it is nonetheless an extremely important right, and this as well must be recognized. Consequently, if the state appreciably burdens the exercise of that right, it must show some very strong, if not compelling, reasons. In *Shapiro* it is difficult to see how the state burdened that right: there was apparently no showing that welfare recipients were actually deterred from traveling by the residency requirements, and if there was a burden it was not on travel, but simply on the recipient's decision to change residence. But a state might, by many of its policies or laws, burden the right to travel in that sense. A state without a system of welfare grants would presumably place an extreme burden on a welfare recipient's decision to travel there, but surely the right to travel would not require the state to create such a system. Similarly, the fact that California has a higher state income tax than Iowa may adversely affect my decision to move from Iowa to California, but I do not consider California's higher tax to burden my right to travel. The point simply is that all state created disincentives to move into the state cannot be considered to burden the right to travel.

In *Shapiro* the state had no intention to keep out welfare recipients. Instead, its purposes were to save money and aid welfare administration. Under a balancing test, since the impact of the residency requirements on the right to travel are quite indirect and possibly insignificant, and the state interests important and reasonable, residency rules would be upheld. Because welfare benefits are statutory rights and critical sources of income for the recipients, however, the length of the residency requirement, one year in *Shapiro*, should be questioned independently of its effect on the right to travel. In *Shapiro* it seems unreasonably long in view of its purposes and the possible harsh effects on recipients, and the state perhaps should have been required to satisfy its purposes more narrowly.

Under a balancing test, a similar kind of result would have been reached in *Dandridge v. Williams*. Granted, there is no right to the fundamental necessities of life, but that does not mean the state can give less than fair and most careful consideration to the need for such necessities. The state in *Dandridge* imposed a maximum limit on the

117. *See* Zemel v. Rusk, 381 U.S. 1 (1965).

welfare benefit any family beyond a certain size could receive. This operated to reduce proportionally, vis-à-vis smaller families, the amount of welfare benefit received by members of larger families. The proffered state reasons for this monetary discrimination were to provide a work incentive and to maintain an equitable balance between welfare families and families of the working poor. While these are legitimate purposes, the classifications very poorly served those purposes and did so discriminatorily. The record indicated that there were few employable parents in the larger families. The work incentive therefore was irrelevant to most of the larger families—there was nothing they could do about it. Additionally, a like work incentive was not imposed on smaller families. Finally, while it may be desirable to maintain an equitable balance between the income of welfare recipients and families of the working poor, the Maryland law really did not do so except by insuring that large welfare families would receive less than working poor families regardless of size. It thus presumed that income equity had nothing to do with family size. In any case, such a purpose argues for a more equal distribution of available welfare funds among all recipients, not proportionate reduction of the amount of grant to the largest families. Consequently, I believe that an equal protection balancing test would have found Maryland legislation unfair or unreasonable in light of its purposes and that, given the importance of even small amounts of money to welfare recipients, a more equitable effort would have been required of the state.

Rodriguez is a far too recent and complex case for summary simplification. Yet it is possible to focus on one critical issue of state purpose and to demonstrate how a genuine reasonableness equal protection approach would treat it. The central issue in *Rodriguez* was whether the state's reliance on property taxes to finance public education denied equal protection to impecunious students in school districts with relatively low assessed property valuations. In such districts, an amount of tax effort equal to that of a richer district would produce less funds per school child than would be produced in the richer district. The Court refused to apply strict scrutiny, but did proceed to analyze the state purpose behind this financing scheme, which was to ensure local control over education. Although this ostensible purpose produced significantly unequal expenditures between children residing in different districts, the Court accepted the proffered state purpose at face value. Applying a rational basis test, it held "that the Texas plan abundantly satisfies this standard."[118]

118. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278, 1308 (1973).

As pointed out by Justices White and Marshall in dissent,[119] even a brief examination of the state purpose in the context of the actual facts reveals that the principle of local control was ill-served in many districts. Those districts with a low per-pupil real estate tax base had little capacity significantly to raise education expenditures. While the financing plan did provide a meaningful choice to richer districts, it gave little choice to the poorer districts.

In designing an educational financing scheme which effectively traded off the important educational interests of parents and children in poor districts for the right of richer districts to exercise local control over education, the state was manifestly unfair. What was at issue was not the state's legitimate desire to establish the principle of local control, but whether its less than universal establishment was bought at too high a cost. On balance, it does not appear that the legislature dealt fairly with the interests of the poorer districts, and the financing plan should have fallen.

CONCLUSION

In the course of this article, I have tried to review the constitutional law of fundamental rights and to discern the fundamental principles underlying it. The basic conclusions have been that there is a definite set of fundamental rights; that they are fundamental essentially because they have important structural implications for the regulation of governmental power which other rights do not have; and that these rights may not be burdened except to protect against real and serious threats to the polity itself. These fundamental rights have been broadly categorized as political participation rights and fairness rights. The former require the strictest judicial review. The latter imply judicial review commensurate with the importance of the interests affected by legislation, at least as long as we genuinely have a system of judicial review. Such review requires consummate impartiality, extraordinary sensitivity to justice, comprehensive, fully open analysis of both governmental and personal interests and, in general, a high order of judicial statesmanship. Under this standard, many cases now quickly and summarily resolved will become difficult, but the constitutional promise of fairness, and therefore justice, will be more closely fulfilled.

119. *Id.* at 1278, 1312, 1315 (1973) (Marshall, White, J., dissenting).