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BASIC EQUAL PROTECTION ANALYSIS

Russell W. Galloway, Jr.*

INTRODUCTION

The equal protection clause¹ has been called “the single most important concept in the Constitution for the protection of individual rights.”² It protects racial minorities, women, resident aliens, and illegitimate children from discriminatory treatment. It places strict limits on the government’s ability to infringe fundamental constitutional rights of all classes of persons. And it requires that all government classifications be rationally related to legitimate purposes.

But how does the equal protection clause work? This article describes the basic structure of equal protection analysis. Its purpose is to help law students, lawyers, and judges understand and apply the diverse strands of Supreme Court law in this complex and controversial field.

The legal analysis developed by the Supreme Court in its effort to enforce the equal protection clause is summarized in the following outline:

Equal Protection: Basic Analysis

I. Preliminary questions

- A. Does the court have jurisdiction?
- B. Is the claim justiciable?
- C. Was the harm caused by government action?

II. On the merits: Did the government action violate the equal protection clause?

- A. Applicability: Did the government use a classification?
 1. Facial or
 2. In effect

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* Professor of Law, Santa Clara University School of Law; J.D., 1965, Columbia University School of Law; Ph.D., 1970, Graduate Theological Union; Director, Supreme Court History Project; member of the California Bar.

1. U.S. CONST. amend. XIV, § 1. The clause provides, “[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws.”

2. J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 524 (3d ed. 1986).

- B. Compliance: Does a sufficient justification exist to support the classification?
1. Classifications subject to intensified scrutiny (presumption of unconstitutionality)
 - a. Suspect classifications
 - 1) Is the classification suspect or semi-suspect, i.e., based on race, national origin, ethnicity, resident alienage, gender, or illegitimacy?
 - a) Facial or
 - b) Effect and purpose
 - 2) Is the applicable level of intensified (strict, intermediate) scrutiny satisfied?
 - a) Sufficiently strong (compelling, important) interest?
 - b) Substantially effective means?
 - c) Necessary means (least onerous alternative)?
 - b. Fundamental rights
 - 1) Did the government infringe a fundamental right of the class?
 - a) Fundamental right?
 - b) Infringement?
 - 2) Is strict scrutiny satisfied?
 - a) Does the government classification further a compelling interest?
 - 1) Compelling interest?
 - 2) Substantially effective means?
 - b) Is the use of the classification necessary?
 - c. Other grounds for intensified scrutiny
 - 1) Is there any other basis for intensified scrutiny, e.g., somewhat suspect class and somewhat fundamental right?
 - 2) Is the use of the classification substantially related to a substantial government interest?
 - a) Substantial interest?
 - b) Means substantially related to end?
 - 1) Substantially effective means?
 - 2) Narrowly tailored means?
 2. Classifications subject to rationality review (presumption of constitutionality)
 - a. Valid government interest?
 - b. Rational means?

III. Remedies

Let us translate this outline into prose. A claimant seeking redress for an alleged violation of the equal protection clause must initially meet three preliminary requirements.³ First, the court must have jurisdiction over the claim. Second, the claim must be justiciable. And third, the conduct giving rise to the claim must be government action. Failure to satisfy any of these requirements normally results in dismissal without reaching the merits of the equal protection claim.

If the claimant satisfies the preliminary requirements, the court will proceed to the merits of the claim. On the merits, the analysis has two components.⁴ First, one must determine whether the equal protection clause is applicable. The equal protection clause applies only to government classifications (i.e., government action imposing a burden or conferring a benefit on one class of persons to the exclusion of others).⁵ Government classifications may be “facial”⁶ or “in effect.”⁷ If the classification appears on the face of a statute, court decision, or other government action, the equal protection clause applies. Similarly, if the government action is neutral on its face but has the effect of distributing burdens or benefits unequally, equal protection requirements must be satisfied. If no government classification is present, the equal protection clause is not applicable, and the analysis ends.

If, on the other hand, the government has used a classification, the equal protection clause is applicable, and one must determine whether the government complied with the requirements of the clause. Here the analysis is more complex. In general, the equal protection clause requires that government classifications be supported by a sufficient justification. Courts rely on a set of tests collectively labelled “means-end scrutiny” to measure the sufficiency of the justification. Some classifications are subject to intensified means-end

3. These are standard preliminary requirements that apply throughout constitutional law.

4. The two-part structure of the analysis is the same for all constitutional limits. In applying any constitutional restriction on government action, one should ask first, whether the limit is applicable—i.e., is this the kind of government action that is subject to this limit?—and second, whether the government complied with the Supreme Court’s rules for enforcing the limit. In short, the analysis on the merits of any constitutional limit focuses on two issues: (1) applicability and (2) compliance. See Galloway, *Basic Constitutional Analysis*, 28 SANTA CLARA L. REV. 775 (1988).

5. E.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) (“The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.”).

6. See *infra* notes 28-29 and accompanying text.

7. See *infra* notes 30-31 and accompanying text.

scrutiny, an activist form of judicial review demanding substantial justification; others are subject to rationality review, a more deferential form of means-end scrutiny requiring only a rational justification.⁸

Thus, in determining whether a government classification is supported by sufficient justification to satisfy the equal protection clause, one must determine first what kind of means-end scrutiny is applicable and second whether that test is met. Intensified scrutiny is applicable where the classification is suspect (or semi-suspect), or the government has infringed a fundamental right, or the classification is somewhat suspect and the interest is somewhat fundamental. Otherwise rationality review applies.⁹

If the classification is suspect or semi-suspect, intensified scrutiny is applicable, and the government must overcome a presumption of unconstitutionality by showing that its justification is sufficient to satisfy the appropriate level of intensified scrutiny. The Court currently recognizes four kinds of classifications as suspect or semi-suspect: (1) classifications based on race, ethnicity, or national origin; (2) state classifications based on resident alienage; (3) classifications based on gender; and (4) classifications based on illegitimacy.¹⁰

The test for determining whether one of these suspect or semi-suspect classifications is present is somewhat different from the test for determining whether any government classification is present. If a facially suspect or semi-suspect classification is present, intensified scrutiny applies. On the other hand, if the government action classifies only by virtue of an adverse impact on one of these groups, the

8. See Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 *LOY. L.A.L. REV.* 449 (1988). Means-end scrutiny is an analytical process used to evaluate the government's justification for conduct that harms individuals. In applying means-end scrutiny, courts examine the purposes (ends) which government conduct is designed to serve and the methods (means) chosen to further those purposes. Such scrutiny may focus on three different topics: (1) the importance of the government's interests; (2) the effectiveness of the government's means; and (3) the availability of less onerous alternatives. The least stringent forms of means-end scrutiny require only that the government's conduct be a rational means to further some valid interest. The more intensified forms require that the government's conduct be a substantially effective and necessary means to further some significant, important, or compelling interest.

9. We must decide, first, whether the . . . [government classification] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the . . . [classification] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose

Rodriguez, 411 U.S. at 17.

10. See *infra* notes 42-122 and accompanying text.

action is not a suspect or semi-suspect classification unless it was undertaken for the purpose of harming members of the protected class.¹¹ Government action having an adverse impact on a protected class but no evil purpose is subject only to rationality review.

Classifications based on race, ethnicity, and national origin are suspect.¹² Such classifications violate the equal protection clause unless the government can satisfy "strict scrutiny" by showing that the classification is "necessary to further a compelling interest."¹³

State government classifications disfavoring resident aliens are suspect and violate the equal protection clause unless the government can satisfy the same strict scrutiny test applicable to racial classifications.¹⁴ However, when States exclude resident aliens from government jobs that go to the heart of the democratic process, strict scrutiny is not applicable, and the classification is subject only to rationality review.¹⁵

Gender- and illegitimacy-based classifications are semi-suspect and violate the equal protection clause unless the government can satisfy intermediate scrutiny by showing that the classification is "substantially related to an important interest."¹⁶

Intensified scrutiny also applies if the government action infringes a fundamental right of the members of a class. To determine whether this fundamental rights strand of equal protection law is applicable, one must determine, first, whether the challenged government action affects any fundamental constitutional right.¹⁷ If the government action affects such a fundamental right, one must determine whether the government action substantially infringes that right. If so, strict scrutiny applies, and the classification violates the equal protection clause unless the government shows that its conduct is necessary to further a compelling interest.¹⁸

Occasionally, the Supreme Court uses a mildly intensified form of means-end scrutiny in cases not involving either a suspect or semi-

11. *E.g.*, *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

12. *See infra* notes 46-75 and accompanying text.

13. *See infra* notes 50-56 and accompanying text.

14. The federal government has broad power over resident aliens and may impose restrictions on them without being subject to strict scrutiny. *E.g.*, *Mathews v. Diaz*, 426 U.S. 67 (1976).

15. *See infra* notes 80-86.

16. *See infra* notes 94-120 and accompanying text.

17. Fundamental rights include those rights expressly protected by specific constitutional provisions (such as free speech) and other rights recognized as fundamental by the Supreme Court (such as the right to have one's vote counted equally and the right to migrate from one state to another).

18. *See infra* notes 123-33 and accompanying text.

suspect classification or an infringement of a fundamental right. This occurs, apparently, when the government (1) uses a classification that is not technically suspect or semi-suspect but shares some of the characteristics of those classes and (2) infringes an interest which is important even though not technically fundamental. In such cases, the government must show that its classification is substantially related to a substantial government purpose.¹⁹

If intensified scrutiny does not apply, the classification is subject to rationality review, a relatively mild kind of means-end scrutiny requiring only that the classification be a rational means for furthering a valid government purpose. Occasionally, the Court uses a nondeferential rational relation test, which requires that the classification be a demonstrably effective means for furthering some actual valid government interest.²⁰ Usually, however, the Court uses the deferential rational basis test, which requires only that the classification arguably be a rational means for furthering some conceivable government interest.²¹ When rationality review applies, the claimant normally has the burden of proving that the government's classification is not a rational means for furthering any valid government interest.

If the equal protection clause is inapplicable or the applicable level of means-end scrutiny is satisfied, the analysis ends. If, however, the equal protection clause is applicable and its requirements are not met, one must proceed to questions about remedies. Here the questions concern what kinds of damages are recoverable and what kinds of injunctions may be issued to prevent further violations of the clause.

The next section discusses each step of basic equal protection analysis in more detail.

DISCUSSION

I. PRELIMINARY QUESTIONS

Before reaching the merits, equal protection claimants must satisfy the three standard preliminary requirements that apply throughout constitutional law (i.e., they must show that the government harmed them enough to create a justiciable claim that is within the jurisdiction of the court).

19. See *infra* notes 191-96 and accompanying text.

20. See *infra* notes 203-09 and accompanying text.

21. See *infra* notes 199-202 and accompanying text.

A. *Does the Court Have Jurisdiction?*

First, the claimant must show that the court has jurisdiction over the claim. This requirement sometimes raises issues in the equal protection context, as when Congress tries to repeal the Supreme Court's jurisdiction over busing cases. This article will assume that jurisdiction is present.

B. *Is the Claim Justiciable?*

Second, to qualify for a decision on the merits, the claim must involve a justiciable controversy between adverse parties. Justiciability problems surface repeatedly in equal protection cases. Standing barriers, for example, have resulted in dismissal of equal protection claims without reaching the merits.²² Similarly, mootness has resulted in dismissal of some famous cases.²³ This article will not provide a detailed analysis of justiciability issues.

C. *Was the Harm Caused By Government Action?*

Third, the equal protection clause, like most other constitutional limits, applies only to the government.²⁴ Unequal distribution of benefits and burdens by private parties need not satisfy equal protection requirements. If a government official imposes the challenged classification, the government action requirement is met unless the classification was completely unrelated to the official's government duties. If a private party imposes the classification, such as a private owner refusing to sell a house to a minority purchaser, the government action requirement is not met unless the government either compelled the discrimination²⁵ or encouraged it so substantially that the decision must be attributed to the government.²⁶ A symbiotic relationship between the government and the private party, in which

22. *E.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975) (suit challenging discriminatory zoning law dismissed because plaintiffs lacked standing).

23. *E.g.*, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (suit challenging law school's affirmative action program dismissed as moot because claimant was about to graduate).

24. Indeed, many of the most famous government action cases have involved equal protection claims. *E.g.*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (refusal to serve black guest at bar in private club is not government action); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (private sales and rentals of real estate considered government action because encouraged by state initiative); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (segregation of private restaurant in public parking facility is government action); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of restrictive covenant is government action).

25. *E.g.*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (segregation of private restaurant required by ordinance is government action).

26. *E.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Reitman*, 387 U.S. 369 (1967).

the government profits from the private discrimination, may also satisfy the government action requirement,²⁷ but the status of this rule is in doubt.

If the claimant does not satisfy the three preliminary requirements, the claim should be dismissed without reaching the merits of the equal protection issues. If the claimant satisfies the preliminary requirements, one may proceed to evaluate the equal protection claim on the merits.

II. ON THE MERITS: WAS THE EQUAL PROTECTION CLAUSE VIOLATED?

Analysis of equal protection claims on the merits involves the same two-step inquiry that applies to all constitutional limits. The threshold question is whether the equal protection clause is applicable (i.e., whether the government action that harmed claimant was the kind of government action that is subject to the equal protection clause). If so, the second step is to determine whether the government has complied with equal protection requirements.

A. *Applicability: Did the Government Use a Classification?*

The equal protection clause applies only to government classifications. This occurs when government action imposes a burden or confers a benefit on one class of persons to the exclusion of others. Government classifications may be "facial" or "in effect."

1. *Facial Classification: Did the Government Conduct Classify "On Its Face"?*

Facial classifications are subject to the equal protection clause. For example, if the classification appears on the face of a statute (i.e., in the express words of the statute), it is subject to equal protection scrutiny.²⁸ Similarly, a court order based explicitly on racial grounds involves a facial government classification.²⁹

27. See *Burton*, 365 U.S. 715 (1961).

28. E.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (statutes explicitly requiring racial segregation in public schools); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (statute limiting jury service to "white male persons").

29. E.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (child custody order explicitly based on race of mother's spouse is suspect); cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (court order enforcing restrictive covenant is government action).

2. *De Facto Classification: Did the Government Conduct Classify "In Effect"?*

Even if the government action is facially neutral, it is subject to equal protection scrutiny if it has the effect of distributing burdens and benefits unequally.³⁰ At this initial stage in the analysis, when one is determining whether the equal protection clause is applicable or not, one need not consider whether the government intended to harm claimant's class.³¹ It is enough that the government action produced an unequal effect.

If the government action that harmed claimant is not a classification, the equal protection clause does not apply and the equal protection analysis ends. If, on the other hand, the challenged government action is a classification, the analysis proceeds to the question of compliance.

B. *Compliance: Is the Government's Justification for Using the Classification Sufficient To Satisfy the Applicable Level of Means-End Scrutiny?*

If claimant was harmed by a government classification, the equal protection clause is applicable, and the analysis reaches a crucial turning point. All government classifications are subject to means-end scrutiny, so it is clear that the classification must satisfy some version of means-end scrutiny. But different kinds of classifications are subject to different levels of means-end scrutiny, varying from strict scrutiny all the way down to rationality review. The lawyer's task, at this point in the analysis, is to examine the classification, characterize it, and then scan the various strands of equal protection law to determine which test is controlling.³²

30. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational residency requirement has the effect of dividing applicants into two classes); *Harper v. Virginia Bd. of Elecs.*, 383 U.S. 663 (1966) (poll tax has the effect of dividing potential voters into two classes).

31. Later, when determining whether a nonfacial classification is suspect, effect is not enough. Instead, to trigger intensified scrutiny, claimant must show discriminatory effect and purpose. *See infra* notes 38-41 and accompanying text.

32. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986) ("The logical first question to ask when presented with an equal protection claim, and the one we usually ask first, is what level of review is appropriate."); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980) ("The initial issue . . . is the appropriate standard of judicial review . . ."). This step of the analysis is akin to the characterization step in conflict of law analysis. There, the lawyer examines the facts, determines whether the claim is based on tort, contract, or the like, and then applies the choice-of-law rules for the appropriate body of law. Similarly, in equal protection cases, the lawyer examines the facts, determines what kind of classification is present, and then applies the legal test specified by the Supreme Court

Is this a suspect classification? Does the classification infringe a fundamental right? Or is this a run-of-the-mill classification subject only to rationality review? If any arguable bases for intensified scrutiny are present, these theories should be analyzed in more detail. If no basis for intensified scrutiny is present, rationality review should be applied.

The following sections describe the different kinds of government classifications recognized in Supreme Court cases and the means-end scrutiny test applicable to each.

1. *Is Intensified Scrutiny Applicable, and, If So, Is It Met?*

The cases in which the Court uses intensified scrutiny in appraising the justification for government classifications fall into three categories. First, if the classification is suspect or semi-suspect, intensified scrutiny applies.³³ Second, if the classification results in the infringement of a fundamental right of class members, intensified scrutiny applies.³⁴ Third, even if the classification is not suspect and does not infringe any fundamental right, the Court may adopt intensified scrutiny if the classification is somewhat suspect and the interest is somewhat fundamental.³⁵ If the classification falls into any of these three categories, the Court will set aside the usual presumption of constitutionality and require the government to show that its conduct has a strong justification.

a. *Suspect Classification Strand*

If the challenged classification is suspect or semi-suspect, intensified scrutiny is applicable, and the classification violates the equal protection clause unless it is supported by a sufficiently weighty justification to satisfy the appropriate version of intensified scrutiny. To date, the Court has recognized four kinds of classifications as suspect or semi-suspect: (1) race, ethnicity, and national origin, (2) resident alienage, (3) gender, and (4) illegitimacy.³⁶ These four classifications will be discussed separately in the following four sections.

First, however, one legal requirement applicable to all four categories needs to be discussed. In each case, the threshold question that must be answered before applying intensified scrutiny is

for that particular kind of classification.

33. See *infra* notes 36-122 and accompanying text.

34. See *infra* notes 123-90 and accompanying text.

35. See *infra* notes 191-96 and accompanying text.

36. See *infra* notes 42-122 and accompanying text.

whether the government action, in fact, involves a suspect or semi-suspect classification. Obviously, this question is closely related to the previously discussed question of whether the government action involves a classification that is subject to the equal protection clause.³⁷ But it is not identical, and the difference is critically important.

In order to be deemed a suspect or semi-suspect classification, the government action must classify on the basis of race, alienage, gender or illegitimacy on its face or in effect and purpose. To determine whether a facially suspect classification exists, one looks at the language used by the government to see whether an explicit classification based on race, alienage, gender or illegitimacy is present. If so, intensified scrutiny is applicable.

Assume, on the other hand, that no facially suspect classification exists but that the government action discriminates in effect against racial minorities, resident aliens, women, or illegitimates. Under the Supreme Court's cases, such de facto discrimination is not a suspect or semi-suspect classification unless the government had a purpose to harm members of such groups.³⁸ In short, non-facial classifications against these groups do not trigger intensified scrutiny unless they discriminate in effect and purpose.

This discriminatory-purpose requirement received its classic statement in *Personnel Administrator v. Feeney*,³⁹ where the Court stated, " 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁴⁰

37. See *supra* notes 28-31 and accompanying text.

38. E.g., *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

39. 442 U.S. at 279.

40. The *Arlington Heights* case explains the evidentiary requirements for proving discriminatory purpose. The court should analyze the totality of the circumstances to discern whether a purpose to harm a protected group was present. Proof of adverse impact is a good starting point, but only if the discriminatory effect is substantial and not readily explainable on other grounds. The court should then examine the general history of the government entity to determine whether it has engaged in any other illegal discrimination. Next, the court should evaluate the historical background of the specific decision, looking for direct or circumstantial evidence of discriminatory purpose. Direct evidence includes prior statements in public meetings, reports, or minutes, and, if appropriate, trial testimony by the responsible officials, although the Court has cautioned that putting officials on the stand is "usually to be avoided." *Arlington Heights*, 429 U.S. at 268 n.18. Circumstantial evidence includes evidence that the challenged decision was a sudden change of policy, involved a departure from the normal

Thus, before invoking the suspect classification strand of equal protection law as a basis for intensified scrutiny, one must be sure that the challenged government action classified on the basis of race, alienage, gender, or illegitimacy, either on its face or in effect and purpose. This is a standard ingredient in each of the four lines of suspect classification law.⁴¹

1) *Classifications Based on Race, National Origin, or Ethnicity*

The core purpose of the equal protection clause was to protect recently emancipated blacks from government discrimination. Thus, the Court has long held that racial classifications disfavoring blacks are normally not allowed.⁴² The Court has extended this core restriction to classifications disfavoring other racial minorities, ethnic minorities, and minorities based on national origin.⁴³ Such classifications are subject to strict scrutiny.⁴⁴ They violate the equal protection clause unless they are necessary to further a compelling government interest.⁴⁵

policy used in similar areas, or resulted from a departure from normal procedures. Indeed, anything about the sequence of events that suggests a purpose to harm the members of a protected group would be relevant.

Claimant has the initial burden of proving that the desire to burden the protected class was "a motivating factor." *Id.* at 266. If claimant fails to carry this burden, the classification is not suspect, and rationality review applies. However, if claimant proves that a discriminatory purpose was present, the burden shifts to the government to prove that the discriminatory effect was entirely the result of factors other than invidious intent (i.e., that the same result would have occurred even without the discriminatory purpose). If the government fails to carry this burden, strict scrutiny is applicable. If, on the other hand, the government proves that the discriminatory effect was the result of other legitimate, racially neutral purposes, rationality review is applicable unless the claimant can prove that the proffered neutral purposes are mere pretexts and that the actual purpose was discriminatory.

41. There is one exception. Claimants in school desegregation cases may prevail by showing recent actions having a discriminatory impact but no discriminatory purpose if the school district engaged in intentional discrimination before the limitations period. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979). If, for example, a predicate of pre-*Brown* de jure segregation is established, recent de facto discrimination is enough to trigger strict scrutiny.

42. The first case using the equal protection clause to strike down a classification disfavoring blacks was *Strauder v. West Virginia*, 100 U.S. 303 (1879), which held unconstitutional a statute restricting eligibility for jury service to whites.

43. *E.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that discrimination against persons of Japanese origin is presumptively unconstitutional).

44. *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Korematsu*, 323 U.S. 214 (1944).

45. A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. . . . Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to

a) *Did the Government Use a Classification Based on Race, National Origin, or Ethnicity?*

In applying the rule that racial classifications are subject to strict scrutiny, the first question is whether the government used a racial classification.⁴⁶ If the government action discriminates on its face, on the basis of race, intensified scrutiny is applicable. If, on the other hand, the government action does not involve facial discrimination, then the *Feeney* evil purpose test is applicable, and in order to trigger strict scrutiny, claimant must show that the government action discriminates in effect and purpose on the basis of race.⁴⁷

b) *Did the Government Satisfy Strict Scrutiny?*

Strict scrutiny applies to all racial classifications,⁴⁸ but the treatment of “disadvantaging” classifications that harm minorities and “benign” classifications that benefit minorities are sufficiently different to merit separate discussion.

(1) *Classifications Disfavoring Minorities*

Racial classifications harming minorities—so-called disadvantaging racial classifications—are subject to the strictest scrutiny.⁴⁹ Such classifications are subject to a strong presumption of unconstitutionality. They violate the equal protection clause unless they are necessary to further a compelling government interest. To justify such a classification, the government must prove the following: (1) it has an actual compelling interest, (2) the classification is substantially and demonstrably effective in advancing that interest, and (3) use of the racial classification is necessary to further that interest (i.e., the classification is the least onerous alternative available for furthering the interest).⁵⁰

the accomplishment' of their legitimate purpose
Palmore, 466 U.S. at 432-33.

46. The term “racial classifications” will be used in this article to denote classifications based on race, national origin, or ethnicity.

47. See *supra* notes 38-40 and accompanying text. Government action that discriminates against a racial group in effect but not in purpose is subject only to rationality review unless some other basis for intensified scrutiny is applicable.

48. *City of Richmond v. H.A. Croson Co.*, 109 S. Ct. 706 (1989).

49. See cases cited *supra* note 44.

50. See cases cited *supra* note 44.

(a) *Does the Racial Classification Further a Compelling Government Interest?*

To satisfy the first prong of strict scrutiny, the government must prove that its disadvantaging racial classification furthers a compelling interest. This prong has two components: (a) the government must have actually intended that its classification further a compelling (very strong) interest, and (b) the classification must be a substantially effective method for furthering that interest.⁵¹

(1) *Compelling Interest*

The government must prove that the racial classification was adopted to further a compelling government interest. Such an interest must, of course, be constitutionally permissible.⁵² It must also have been the government's actual purpose for adopting the classification; courts will not accept speculations of counsel about conceivable purposes when strict scrutiny is applicable. Finally, the interest must be very strong. Avoiding a major military catastrophe is a compelling interest,⁵³ but most government interests are not strong enough to meet this stringent test.

(2) *Substantially Effective Means*

Even if the government has a compelling purpose, the racial classification violates the equal protection clause unless the government can prove that the classification is a substantially effective method for furthering that interest. If the classification is not demonstrably effective in achieving the government's purpose, there is no compelling justification for using the racial classification, and the government cannot satisfy strict scrutiny.

(b) *Is the Racial Classification Necessary to Further the Compelling Interest?*

The final prong of strict scrutiny requires the government to prove that the racial classification is a necessary means for furthering the compelling interest.⁵⁴ In other words, the racial classification

51. This test is often not clearly articulated in the Court's opinions, but it is an important component of strict scrutiny. Cf. *infra* notes 180-81 and accompanying text.

52. For example, a purpose to keep the races separate to maintain racial purity would be constitutionally impermissible and therefore would not qualify as a compelling interest.

53. *Korematsu v. United States*, 323 U.S. 214, 223 (1944).

54. The Court usually labels this the "second" prong of strict scrutiny, but it is really the third component, since the first prong has two components. See Galloway, *supra* note 8, at

must be the least onerous alternative available to achieve the government's purpose. If any less onerous method is available, the racial classification is not necessary, and the government must use the less onerous alternative rather than the racial classification.⁵⁵ The government has the burden of proof regarding necessity and must prove that no less onerous alternative exists.⁵⁶

Strict scrutiny is always a difficult test to meet, but the Court applies it with special strictness in dealing with disadvantaging racial classifications. Even if the government has a rather powerful justification that might be sufficient to justify other kinds of government action that are subject to strict scrutiny,⁵⁷ the Court is very unlikely to approve a disadvantaging racial classification.⁵⁸ Even here, however, the rule is not tantamount to an absolute ban. In *Korematsu v. United States*,⁵⁹ for example, the Court held that excluding Japanese persons from the West Coast during World War II did not violate the equal protection clause because it was justified by overwhelming military need.

(2) *Benign Racial Classifications Disfavoring the White Majority*

Racial classifications disfavoring whites are also subject to strict scrutiny.⁶⁰ Protecting whites was certainly not the core purpose of the equal protection clause. Nor are whites in need of special judicial protection because they are unable to use the normal political process to advance their interests.⁶¹ Therefore, three Justices—Brennan, Marshall, and Blackmun—have concluded that benign racial classifications should be subject to intermediate rather than strict scrutiny.⁶² However, five other Justices—Rehnquist, Scalia, O'Connor, Kennedy, and White—believe that strict scrutiny is the controlling test for benign racial classifications.⁶³ Justice Stevens does not accept the

450, 454.

55. Another synonym for "necessary" is "narrowly tailored."

56. Confusion exists regarding whether the government must use less onerous alternatives that are not as effective as the challenged classification.

57. For example, content-based infringements of free speech, or interference with free exercise of religion.

58. This particularly intense version of strict equal protection scrutiny is justified precisely because the original core purpose of the equal protection clause was to ban government discrimination against racial minorities.

59. 323 U.S. 214, 223 (1944).

60. *City of Richmond v. H.A. Croson Co.*, 109 S. Ct. 706 (1989).

61. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

62. *E.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Board of Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

63. *City of Richmond*, 109 S. Ct. at 712.

strict scrutiny test and would apply a sliding scale version of rationality review.⁶⁴

Since a majority of the current Justices are apparently committed to strict scrutiny of benign racial classifications,⁶⁵ defenders of racially specific affirmative action programs will have to overcome a strong presumption of unconstitutionality. They will have to prove that the benign classification furthers a compelling interest⁶⁶ and is narrowly tailored.⁶⁷

The Justices agree that the interest in remedying the effects of past discrimination is sufficiently compelling to support a benign racial classification.⁶⁸ The Court has also suggested that achieving an ethnically diverse student body is sufficient to support a racially specific special admission program at a graduate school.⁶⁹ On the other hand, remedying past societal discrimination and providing minority role models are not sufficiently important.⁷⁰

The Justices also agree that the benign racial classification must be a substantially effective and necessary (narrowly tailored) means for advancing the government's compelling interest.⁷¹ Moreover, there is substantial agreement regarding the factors that should be considered in scrutinizing the means. "In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity of the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights

64. *E.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting). The classic statement of Stevens' sliding scale rationality review approach is in the gender classification case *Craig v. Boren*, 429 U.S. 190, 211-14 (1976) (Stevens, J., concurring).

65. *City of Richmond* does not necessarily require the application of strict scrutiny to all benign racial classifications. Both the City of Richmond and its city council have black majorities. Thus, narrowly construed, the case only held that strict scrutiny applies when the majority advantages itself. Perhaps Justice White will return to his original view that affirmative action on behalf of minorities is subject to intermediate scrutiny. *See Bakke*, 438 U.S. at 369 (Brennan, White, Marshall, and Blackmun, dissenting in part). But that seems unlikely.

66. *City of Richmond*, 109 S. Ct. at 723-24.

67. *Id.* at 727-28.

68. *E.g.*, *United States v. Paradise*, 480 U.S. 149, 166-67 (1987); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 451 (1986); *Wygant*, 476 U.S. 267 (1986).

69. *Bakke*, 438 U.S. at 314.

70. *Wygant*, 476 U.S. 267 (1986).

71. Note, however, that a strict least-onerous-alternative requirement is *not* applicable to court orders designed to remedy past discrimination. *Paradise*, 480 U.S. at 187-88.

of third parties."⁷²

Thus, for example, the Court upheld the use of race as one factor in making admissions decisions at University of California Davis Medical School but rejected a racial quota system as unnecessary.⁷³ And the Court upheld a racial quota for promotions in the Alabama Highway Patrol because it was necessary to overcome defendants' extreme recalcitrance.⁷⁴ But the Court struck down a collective bargaining agreement provision requiring out-of-order layoffs of public school teachers, mainly because it inflicted too much harm on a narrow group of innocent white teachers.⁷⁵

2) *Classifications Based on Resident Alienage*

Certain classifications that disfavor resident aliens are suspect and, like racial classifications, are unconstitutional unless the government can satisfy strict scrutiny. The strong presumption that alienage-based classifications are unconstitutional does not apply, however, to the federal government or to state classifications excluding aliens from important political functions involving the exercise of discretion.

As in the case of racial classifications, the analysis of alienage-based classifications proceeds in two steps. One must determine first whether the government has classified on the basis of alienage. If so, one must next determine what level of means-end scrutiny is applicable and whether that test is satisfied.

a) *Did the Government Use a Classification Based on Resident Alienage?*

The first question is whether the government classified on the basis of resident alienage. Intensified scrutiny of alienage classifications applies only when the aliens who are harmed have been admitted to resident status by the federal government.⁷⁶ If the government action that harmed claimant discriminated on its face against aliens, intensified scrutiny may be applicable. If, on the other hand, the gov-

72. *Id.* at 171.

73. *Bakke*, 438 U.S. at 318.

74. *Paradise*, 480 U.S. at 186.

75. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). However, the Court has approved a one-black-for-each-white promotional quota, holding that the impact on white employees was not as severe as the impact involved in a layoff. *Paradise*, 480 U.S. at 182.

76. Classifications disfavoring illegal (nonresident) aliens are subject to rationality review. Henceforth, all references to aliens will be limited to resident aliens unless otherwise specified.

ernment action did not involve a facial alienage-based classification, the *Feeney* evil purpose test is applicable,⁷⁷ and, in order to trigger intensified scrutiny, claimant must show that the government action discriminated in effect and purpose on the basis of alienage.⁷⁸

b) *Did the Government Satisfy the Applicable Level of Means-End Scrutiny?*

Unlike other suspect and semi-suspect classifications, alienage-based classifications are subject to different intensities of means-end scrutiny. The particular level of scrutiny depends on whether the classification was imposed by the federal or state government and whether the classification concerns a political function. The ensuing discussion focuses first on state alienage classifications. The rules concerning the federal government are discussed later.

(1) *State Alienage Classifications*

As a general rule, state classifications disfavoring resident aliens are suspect and unconstitutional, unless the government can satisfy strict scrutiny.⁷⁹ A major exception, however, is that such classifications are subject only to rationality review if they exclude aliens from important political functions. In analyzing state alienage classifications, the Court normally asks first whether the political function exception is applicable.

(a) *If the Dougall "Political Function" Exception Is Applicable, the Alienage Classification Satisfies Equal Protection If It Is Rational*

(1) *Is the Political Function Exception Applicable?*

Beginning in *Sugarman v. Dougall*,⁸⁰ the Supreme Court has repeatedly held that state alienage classifications are not suspect if they merely impose citizenship requirements for voting or holding important government offices involving formulation, execution, or review of broad public policy. This exception is based on the notion that, while aliens should normally not be disfavored in the distribution of economic benefits, it is appropriate for States to reserve im-

77. See *supra* notes 38-40 and accompanying text.

78. Government action that discriminates in effect but not purpose against aliens is subject only to rationality review unless some other basis for intensified scrutiny is applicable.

79. See cases cited *infra* note 87.

80. 413 U.S. 634 (1973).

portant government positions for citizens.

The Court uses a two-prong test for determining whether the political function exception applies. "First, the specificity of the classification will be examined: a classification that is substantially over-inclusive or underinclusive tends to undercut the government claim that the classification serves legitimate political ends. . . . Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to . . . those officers who . . . 'perform functions that go to the heart of representative government.'"⁸¹

Thus, if confronted with a state classification based on alienage, the first step is to analyze whether the classification is narrowly tailored to exclude aliens from important government positions. If the state haphazardly excludes aliens from some unimportant government positions while allowing aliens to hold some important positions, this belies the claim that the state's purpose is to reserve important government functions for citizens. In such a case, the political function exception is inapplicable, and the classification is subject to strict scrutiny.

If, on the other hand, the government action is narrowly tailored, the next question is whether, in the case at hand, the claimant is excluded from "functions that go to the heart of representative government,"⁸² i.e., "elective or important non-elective executive, legislative, and judicial positions" involving "formulation, execution, or review of broad public policy."⁸³ A two-step test is used to answer this question. First, the exception applies only if the function involves discretionary as opposed to ministerial (clearly defined and mandatory) conduct.⁸⁴ Second, the exception applies only to elective or important nonelective government positions.⁸⁵

If the state's alienage classification is not a narrowly tailored means for excluding aliens from important government positions involving the exercise of discretion over public policy, then the *Dougall* exception is inapplicable, and strict scrutiny must be satisfied. If, on the other hand, the *Dougall* exception is applicable, the classification is subject only to rationality review.⁸⁶

81. *Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982).

82. *Sugarman*, 413 U.S. at 647.

83. *Bernal v. Fainter*, 467 U.S. 216, 222 (1984).

84. *E.g.*, *id.* at 225, which holds that notaries public perform only "clerical and ministerial" functions and are therefore not subject to the *Dougall* exception.

85. *E.g.*, *Cabell*, 454 U.S. 432 (1982) (deputy probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (state troopers).

86. *Ambach*, 441 U.S. at 80 ("rational relationship"); *Foley*, 435 U.S. at 300 ("rational

(2) *Is Rationality Review Satisfied?*

State classifications that exclude resident aliens from political functions violate the equal protection clause only if claimant proves that the classifications do not rationally further any valid government interest. The Court normally adopts a strong presumption of constitutionality and applies the deferential rational basis test, holding such classifications constitutional unless the claimant proves that they do not even arguably further any conceivable government interest.

(b) *If the Dougall "Political Function" Exception Is Not Applicable, the Alienage Classification Violates Equal Protection Unless Strict Scrutiny Is Satisfied*

The general rule is that state classifications disfavoring resident aliens are subject to strict scrutiny.⁸⁷ Thus, if such a classification is present and the *Dougall* exception is not applicable, the classification is unconstitutional unless the government shows that the classification is necessary to further a compelling interest.⁸⁸ In other words, the government must show that the classification was adopted to further some compelling interest, is a substantially effective means to further that interest, and is necessary (i.e., the least onerous alternative available to further that interest). In most cases, the government cannot meet this stringent test, and the alienage classification violates equal protection.⁸⁹

(2) *Federal Alienage Classifications*

The federal government, in contrast to the states, has broad

relationship").

87. The landmark case on this point is *Graham v. Richardson*, 403 U.S. 365 (1971). *Accord Bernal*, 467 U.S. 216 (1984); *In re Griffiths*, 413 U.S. 717 (1973). As the Court put it in *Bernal*, "As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal*, 467 U.S. at 219.

88. See *supra* notes 50-56 and accompanying text for a more detailed discussion of the components of strict scrutiny as applied to racial classifications. The structure of the analysis is essentially identical when applied to alienage classifications, although the Court's scrutiny may not be quite as strict as in race cases.

89. See, e.g., *Bernal*, 467 U.S. 216 (1984) (ban on aliens' serving as notaries public); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (denial of state scholarships to aliens); *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976) (ban on aliens' serving as civil engineers); *Griffiths*, 413 U.S. 717 (1973) (ban on aliens' serving as lawyers); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (ban on aliens' holding civil service jobs); *Graham*, 403 U.S. 365 (1971) (denial of welfare benefits to aliens).

power to impose restrictions on resident aliens. Therefore, federal classifications disfavoring resident aliens are not suspect; they are subject to rationality review rather than strict scrutiny.⁹⁰

Instead of using the normal deferential rational basis test, however, the Court applies a hybrid, sliding-scale version of rationality review for evaluating such classifications. This test focuses first on the government's ends or interests and, second, on the government's means.

(a) *End Scrutiny*

Federal classifications disfavoring resident aliens, like other classifications subject to rationality review, are unconstitutional unless they are related to some legitimate government interest. But the Court has held that the end scrutiny regarding alienage classifications must go a step further and focus on whether the government's interest is one that relates to national immigration policy. In making this determination, the Court scrutinizes the government's interest in a nondeferential manner, asking for the government's actual purpose in adopting the classification, rather than speculating about hypothetical purposes that might have motivated the classification.⁹¹

(b) *Means Scrutiny*

The Court appears to use a two-tier test for evaluating whether federal alienage classifications are sufficiently effective to withstand rationality review. If the Court determines that the classification was intended to serve some national interest relating to immigration policy, then it applies a deferential version of rationality review regarding the means. In other words, the Court upholds such classifications if they are arguably effective methods for furthering national interests.⁹² If, on the other hand, the Court determines that the classification was not intended to serve a purpose related to national immigration policy, then it applies a nondeferential version of rationality review regarding the means. In other words, it insists on an actual demonstration that the classification is effective in achieving its purpose.⁹³

90. *E.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (exclusion of aliens from civil service jobs); *Mathews v. Diaz*, 426 U.S. 67 (1976) (restriction on eligibility of aliens for Medicare benefits).

91. *E.g.*, *Hampton*, 426 U.S. 88 (1976); *Mathews*, 426 U.S. 67 (1976)

92. *E.g.*, *Hampton*, 426 U.S. 88 (1976); *Mathews*, 426 U.S. 67 (1976)

93. *E.g.*, *Hampton*, 426 U.S. at 115-16.

3) *Classifications Based on Gender*

Since the 1970's, the Supreme Court has held that classifications based on gender are semi-suspect and violate the equal protection clause unless they satisfy intermediate means-end scrutiny (i.e., unless they are substantially related to an important government interest).⁹⁴ As in the case of racial and alienage classifications, the analysis of gender-based classifications proceeds in two steps. First, there must be a determination of whether the government has classified on the basis of gender. If so, the next step is to ascertain whether intermediate scrutiny is met.

a) *Did the Government Use a Classification Based on Gender?*

In applying the rule that gender-based classifications are subject to intensified scrutiny, the first question is whether the government used a gender-based classification. If the government action discriminates, on its face, on the basis of gender, intensified scrutiny is applicable. If, on the other hand, the government action does not involve facial gender-based discrimination, then the *Feeney* evil purpose test applies, and in order to trigger intensified scrutiny, the claimant must show that the government action discriminates in effect and purpose on the basis of gender.⁹⁵

b) *Did the Government Satisfy Intermediate Scrutiny?*

Classifications based on gender are subject to intermediate scrutiny.⁹⁶ Such classifications are subject to an intermediate presumption of unconstitutionality. They violate the equal protection clause unless they are substantially related to an important government interest.⁹⁷ "Substantially related" means both substantially effective and necessary.

In short, to justify a gender-based classification, the government

94. *Craig v. Boren*, 429 U.S. 190 (1976); *cf. Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

95. See *supra* notes 38-40 and accompanying text. Government action that discriminates against males or females in effect but not in purpose is subject only to rationality review unless some other basis for intensified scrutiny is present.

96. This is true whether the classification disfavors women or men.

97. *E.g., Mississippi Univ. for Women*, 458 U.S. 718 (1982); *Craig*, 429 U.S. 190 (1976). The initial and classic formulation of the test was in *Craig*, where the Court said, "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197.

must prove both that it has acted to further an actual important interest and the classification is substantially related to that interest (i.e., substantially effective and necessary for furthering that interest). This test is not as stringent as strict scrutiny, but it does require the government to show an "exceedingly persuasive justification."⁹⁸

(1) *Important Government Interest*

To satisfy the equal protection clause, the government must prove that its gender-based classification was adopted to further an important interest (i.e., a weightier interest than the merely valid interest required by rationality review, but not necessarily as overwhelming an interest as needed to satisfy the compelling interest requirement of strict scrutiny). Such an important interest must, of course, be constitutionally permissible, and it must be the government's actual purpose rather than merely a conceivable purpose suggested by a government lawyer or dreamed up by a judge.⁹⁹ Administrative convenience is usually not sufficient to satisfy this requirement.¹⁰⁰ Moreover, purposes that reflect archaic stereotypes or perpetuate archaic gender-based roles are insufficient.¹⁰¹ Yet the Court has recognized numerous interests as sufficiently important to satisfy intermediate scrutiny.¹⁰²

(2) *Substantial Relation*

To satisfy the equal protection clause, the government must also prove that its gender-based classification is "substantially related to achievement of those [important] objectives."¹⁰³ The substantial relation test has been called "opaque"¹⁰⁴ and has caused confusion and dispute, but it now appears to be settled that it requires that the

98. *Mississippi Univ. for Women*, 458 U.S. at 724; *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Administrator v. Feeney*, 442 U.S. 256, 273 (1979).

99. *E.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

100. *E.g.*, *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980); *Craig*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

101. *E.g.*, *Mississippi Univ. for Women*, 458 U.S. at 724-25; *Califano v. Webster*, 430 U.S. 313 (1977). For example, a government purpose to keep women in homes to raise healthier children would be insufficient.

102. Such important interests include: remedying past discrimination, *Mississippi Univ. for Women*, 458 U.S. at 718 and *Califano*, 430 U.S. 313 (1977); traffic safety, *Craig*, 429 U.S. 190 (1976); helping the needy, *Frontiero v. Richardson*, 411 U.S. 677 (1973); preparing a draft of combat troops, *Rostker v. Goldberg*, 453 U.S. 57 (1981); preventing illegitimate teenage pregnancies, *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981); and protecting reasonable expectations in retirement funds, *Heckler v. Mathews*, 465 U.S. 728 (1984).

103. *Craig*, 429 U.S. at 197.

104. *Michael M.*, 450 U.S. at 474 n.10.

classification be substantially effective and necessary.

(a) *Substantially Effective Means*

First, the government must prove that its gender-based classification is a substantially effective method for achieving its important interest.¹⁰⁵ For example, if gender is merely a loosely fitting proxy for some other relevant trait, the gender-based classification may not be sufficiently effective to withstand intermediate scrutiny.¹⁰⁶ Similarly, if the effect of the classification is actually perverse, the classification violates equal protection.¹⁰⁷ Thus, the Court will carefully scrutinize supposedly remedial classifications to ensure they do not harm the group they were intended to protect.

(b) *Narrowly Tailored Means*

After some initial confusion and a few contrary statements,¹⁰⁸ the Court has apparently decided that the substantial relation test has a necessity component. For example, the Court struck down the exclusion of men from a nursing school in part because the "record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals."¹⁰⁹ Thus, if a less onerous alternative is available for furthering the government's important purpose, the gender-based classification violates equal protection. If, for example, a gender-neutral method, such as holding individual hearings, would accomplish the task, the government may not use a gender-based classification.¹¹⁰

105. *E.g.*, *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980); *Craig*, 429 U.S. 190 (1976); *Frontiero*, 411 U.S. 677 (1973). The government has the burden of proof. Several Justices have suggested that courts should defer to the legislative and executive branches on this issue, but it is doubtful that this is the majority rule. *See, e.g.*, *Rostker*, 453 U.S. 57 (1981); *Michael M.*, 450 U.S. 464 (1981).

106. *Craig*, 429 U.S. 190 (1976).

107. In *Wengler*, 446 U.S. 142 (1980), for example, the classification seemed, at first glance, to favor women by making them automatically eligible for survivors' benefits. On closer inspection, however, the classification actually harmed women by making it harder for them to provide financial security for their survivors, so the Court struck down the classification.

108. *E.g.*, *Michael M.*, 450 U.S. at 473 ("It is argued that this statute is not *necessary*. . . . The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been . . .").

109. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982).

110. *E.g.*, *Orr v. Orr*, 440 U.S. 268, 281-82 (1979). Some uncertainty remains whether the less onerous alternative must be "equally effective" in order to invalidate the classification. *E.g.*, *Michael M.*, 450 U.S. at 473 ("we cannot say that a gender-neutral statute would be as effective . . .").

4) *Classifications Based on Illegitimacy*

Similar to classifications based on gender, classifications based on illegitimacy are semi-suspect and violate the equal protection clause unless they satisfy intermediate scrutiny,¹¹¹ or unless they are "substantially related to an important government objective."¹¹² As in the case of racial and gender-based classifications, the analysis of classifications based on illegitimacy proceeds in two steps. The first step is to determine whether the government has classified on the basis of illegitimacy. If so, there must be a determination of whether intermediate scrutiny is satisfied.

a) *Did the Government Use a Classification Based on Illegitimacy?*

In applying the rule that classifications disfavoring illegitimates are subject to intensified scrutiny, the first question is whether the government used an illegitimacy-based classification. If the government action that harmed claimant discriminated, on its face, against illegitimates, intermediate scrutiny applies. If, however, the government action did not involve facial discrimination against illegitimates, then the *Feeney* evil purpose test is applicable,¹¹³ and in order to trigger intensified scrutiny, the claimant must show that the government action discriminates in effect and purpose on the basis of illegitimacy.¹¹⁴

111. *Clark v. Jeter*, 108 S. Ct. 1910, 1914 (1988). The first case suggesting that classifications disfavoring illegitimates are subject to intensified scrutiny was *Levy v. Louisiana*, 391 U.S. 68 (1968). Intensified scrutiny is appropriate because, historically, illegitimates have been the victims of discrimination. In addition, illegitimacy is a characteristic for which the individual is not responsible and which is not relevant to individual fitness. Moreover, discrimination against illegitimates interferes with fundamental rights concerning family structure and child rearing.

112. *Clark*, 108 S. Ct. at 1914. Before *Clark*, the test for illegitimacy classifications was "somewhat heightened review" rather than intermediate scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). Under this test, the classification was unconstitutional unless it was "substantially related to a *legitimate* state interest." *Mills v. Hableutzell*, 456 U.S. 91, 99 (1982) (emphasis added); cf. *Picket v. Brown*, 462 U.S. 1, 8 (1983). In *Clark*, the Court raised the level of scrutiny from somewhat heightened scrutiny to intermediate scrutiny without even mentioning the change. In view of the Court's "zigzag course" in illegitimacy cases, the new test may not stick. G. GUNTHER, *CONSTITUTIONAL LAW* 678 (11th ed. 1985).

113. See *supra* notes 38-40 and accompanying text.

114. Government action that discriminates against illegitimates in effect but not in purpose is subject only to rationality review unless some other basis for intensified scrutiny is applicable.

b) *Did the Government Satisfy Intermediate Scrutiny?*

Classifications based on illegitimacy are subject to intermediate scrutiny.¹¹⁵ Such classifications are subject to a presumption of unconstitutionality. They violate the equal protection clause unless the government can prove that they are substantially related to an important government interest. As in the case of gender-based classifications, "substantially related" means both substantially effective and necessary.

In short, to justify a classification based on illegitimacy, the government must prove that the classification is both supported by an actual important interest and substantially related to that interest (i.e., substantially effective and necessary for furthering that interest). This test is not as stringent as strict scrutiny, but it is more stringent than the rational relation basis test used when intensified scrutiny is not applicable.

(1) *Important Government Interest*

To satisfy the equal protection clause, the government must prove that its illegitimacy-based classification was adopted to further an important government interest. Such an interest must have been the government's actual purpose rather than merely a conceivable purpose hypothesized after the fact by an attorney or judge.¹¹⁶ The interest in promoting legitimate family relationships is insufficient to justify imposing sanctions on illegitimate children.¹¹⁷ On the other hand, the interest in preventing stale and fraudulent child support claims is sufficient to satisfy intermediate scrutiny.¹¹⁸

(2) *Substantial Relation*

To satisfy the equal protection clause, the government must also prove that its illegitimacy-based classification is substantially related to its important interest. This requirement has two components.

(a) *Substantially Effective Means*

First, the government must prove that its illegitimacy-based classification is a substantially effective method for achieving its im-

115. *Clark*, 108 S. Ct. 1910 (1988).

116. *E.g.*, *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) ("[W]e will not hypothesize an additional state purpose . . .").

117. *Id.* at 762.

118. *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982).

portant interest. For example, a statute eliminating illegitimates' child support rights unless paternity suits are filed within one year of birth violates equal protection, because it is not "evident that the passage of twelve months will appreciably increase the likelihood of fraudulent claims."¹¹⁹

(b) *Narrowly Tailored Means*

Second, the government must prove that its illegitimacy-based classification is necessary. Thus, a one-year statute of limitations on paternity suits by illegitimates violates equal protection, because as the Court concluded, "[w]e can conceive of no evidence essential to paternity claims that invariably will be lost in only one year"¹²⁰

In short, government action that discriminates on its face or in effect and purpose against illegitimates violates equal protection unless the government proves that the classification is a substantially effective and necessary means for furthering an important government interest.

To summarize, if the government's classification that harmed the claimant discriminates on its face or in effect and purpose on the basis of race, ethnicity, national origin, resident alienage, gender, or illegitimacy, it violates the equal protection clause unless the appropriate level of intensified scrutiny is met.¹²¹ To date, the Court has refused to extend the list of suspect and semi-suspect classifications beyond these four types.¹²²

If no suspect or semi-suspect classification is present, the next question is whether intensified scrutiny is applicable because the government's classification infringed a fundamental constitutional right.

119. *Mills*, 456 U.S. at 101.

120. *Id.* The State had no statute of limitations for child support claims by legitimate children.

121. In a few cases, rationality review is applicable. *E.g.*, federal alienage classifications and state alienage classifications subject to the political function exception. *See supra* notes 80-86, 90-93 and accompanying text.

122. *E.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (classifications disfavoring mentally retarded persons are not suspect); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (classifications disfavoring the elderly are not suspect); *James v. Valtierra*, 402 U.S. 137 (1971) (classifications disfavoring the poor are not suspect).

b. *Fundamental Rights Strand*

1) *In General*

Government classifications that infringe fundamental rights of the members of a class are subject to strict scrutiny. The basic structure of fundamental rights analysis may be summarized as follows:

Equal Protection/Fundamental Rights; Basic Analysis

1. Applicability: Does the classification infringe a fundamental right?
 - a. Fundamental right?
 - b. Infringement?
2. Compliance: Is strict scrutiny satisfied?
 - a. Does the classification further a compelling interest?
 - 1) Compelling interest?
 - 2) Substantially effective means?
 - b. Is the classification necessary?

a) *Does the Government Classification Infringe a Fundamental Right?*

(1) *Fundamental Right?*

If a claimant has been harmed by a government classification and the lawyer wishes to determine whether the fundamental rights doctrine is applicable, the lawyer should ask first whether the challenged government action adversely affects any of the claimant's fundamental rights? The test for determining whether a particular right is fundamental is whether the right is "explicitly or implicitly guaranteed by the Constitution."¹²³ Freedom of speech, for example, is a fundamental right, because the first amendment explicitly protects it.¹²⁴ Similarly, the noninterpretive right of privacy is a fundamental right, because the Court has held that it is protected by the due pro-

123. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

[T]he 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. 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.

Id.

124. Thus, government classifications infringing the free speech of class members are subject to strict scrutiny. *E.g.*, *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

cess clauses.¹²⁵ And the rights of equal voting weight¹²⁶ and interstate migration¹²⁷ are also fundamental because they are implicitly protected by the Constitution.

(2) *Infringement?*

If the government action burdens a fundamental right of members of the claimant's class, the next question is whether the burden is sufficiently substantial to be recognized as an infringement. In general, the totality of the circumstances must be examined from a common sense point of view and there must be a determination whether the government's action substantially interferes with the claimant's exercise of the right. Obviously, a ban on the exercise of the right backed by threat of legal sanctions is an infringement.¹²⁸ But a lesser interference also qualifies as an infringement if it substantially deters the exercise of the right or makes the exercise of the right materially more difficult.¹²⁹

If the government's classification does not infringe a fundamental right, then one must look to the suspect classification strand or rationality review for the proper equal protection analysis. If, on the other hand, the government's action does infringe a fundamental right of class members, strict scrutiny usually applies.

b) *Is Strict Scrutiny Satisfied?*

The strict scrutiny test used here is structurally the same as that used in dealing with racial classifications.¹³⁰ The government action is subject to a strong presumption of unconstitutionality, and the burden is on the government to prove that the classification is necessary to further a compelling interest.¹³¹ In other words, the government must prove that the classification was designed to serve an actual legitimate and compelling (very strong) interest, that the classification is a substantially effective means for furthering that

125. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to choose a marriage partner); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right not to be sterilized).

126. *E.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

127. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

128. *E.g.*, *Kramer*, 395 U.S. 621 (1969).

129. *E.g.*, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986).

130. *See supra* notes 50-56 and accompanying text.

131. *E.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) ("necessary to promote a compelling governmental interest"); *Kramer*, 395 U.S. at 627 ("necessary to promote a compelling state interest").

purpose, and that no less onerous alternative is available.

In recent years, the Court has suggested that the fundamental rights strand of equal protection theory may be redundant and slated for cancellation. If government action infringes the claimant's fundamental right, strict scrutiny should be applicable on that basis alone without reference to the equal protection clause.¹³² For example, a content-based infringement of free speech rights of labor unions triggers strict scrutiny under the first amendment itself, so the equal protection clause is not needed.¹³³ Similarly, selective interference with the right of privacy can be curtailed under the due process clauses without help from equal protection theory.

However, there are at least four lines of fundamental rights cases that are uniquely associated with the equal protection clause and which deserve more detailed discussion here: (1) the right of voters to participate on an equal basis in elections, (2) the right of political candidates and parties to ballot access, (3) the right of interstate migration, and (4) the right of meaningful access to certain judicial proceedings. The next four sections discuss these topics.

2) *The Right to Equal Voting Weight*

In a long series of cases beginning with *Reynolds v. Sims*,¹³⁴ the Supreme Court has held that there is a fundamental right to have one's vote counted equally when the government adopts elections as the method for choosing officials.¹³⁵ This fundamental right appears to be grounded on the equal protection clause itself, on the policy that the right to an equal vote is "preservative of all rights,"¹³⁶ and on the judgment that legislators cannot be trusted to correct abuses

132. *E.g.*, *Soto-Lopez*, 476 U.S. at 904-05 n.4 ("Of course, regardless of the label we place on our analysis—right to migrate or equal protection—once we find a burden on the right to migrate the standard is the same.").

133. *E.g.*, *Carey v. Brown*, 447 U.S. 455, 471 (1980) (Stewart, J., concurring); *cf.* *Shapiro v. Thompson*, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting).

134. 377 U.S. 533 (1964).

135. *Dunn*, 405 U.S. at 336 ("this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis . . ."); *Reynolds*, 377 U.S. 533 (1964). The fundamental right here is not a right to vote; it is a right to equal participation if the government chooses to use elections as the method for selecting officials. *E.g.*, *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973) ("the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population").

136. *Harper v. Virginia Bd. of Elecs.*, 383 U.S. 663, 667 (1966) ("the political franchise of voting' . . . [is] a 'fundamental political right, because preservative of all rights'").

in the very voting process that brought them into office.¹³⁷

In short, infringements of the fundamental right to have one's vote counted equally are, as a general rule, subject to strict scrutiny. But there are also several exceptions to this general rule involving infringements that are subject only to rationality review. The following sections discuss the general rule and then the exceptions.

a) *General Rule: Strict Scrutiny*

If none of the exceptions listed in the next section applies, an infringement of the right to equal voting weight is unconstitutional unless strict scrutiny is satisfied.¹³⁸

The first question is whether the claimant's right to participate in an election on an equal basis has been infringed. Of course, an outright denial of the right to vote is an infringement.¹³⁹ Similarly, postponing the right until one has resided in the area for an extended period is an infringement.¹⁴⁰ Conditioning the right on payment of a poll tax is also an infringement.¹⁴¹ And diluting the value of the claimant's vote by means of election districts having unequal population is an infringement.¹⁴²

Such infringements violate the equal protection clause unless they are "necessary to promote a *compelling* government interest."¹⁴³ In the vast majority of cases, this test has been strict in theory and fatal in fact, but some infringements have survived strict scrutiny. For example, the Court has upheld a 50-day durational residency requirement as necessary to serve the compelling interest in accurate voter lists.¹⁴⁴ And the Court has approved a restriction on voting in primaries designed to inhibit raiding by voters from other parties.¹⁴⁵

137. See, e.g., *Kramer v. Union Free School Dist.*, 395 U.S. 621, 628 (1969) ("The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all of the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.").

138. E.g., *Dunn*, 405 U.S. 330 (1972); *Kramer*, 305 U.S. 621 (1969); *Reynolds*, 377 U.S. 533 (1964).

139. E.g., *Kramer*, 305 U.S. 621 (1969).

140. E.g., *Dunn*, 405 U.S. 330 (1972).

141. E.g., *Harper v. Virginia Bd. of Elecs.*, 383 U.S. 663 (1963).

142. E.g., *Reynolds*, 377 U.S. 533 (1964).

143. *Dunn*, 405 U.S. at 342 (emphasis in original).

144. *Marston v. Lewis*, 410 U.S. 679 (1973); *Burns v. Fortson*, 410 U.S. 686 (1973).

145. *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

b) *Exceptions: Rationality Review*

Not all restrictions on the right to participate equally in elections are subject to strict scrutiny. The Court has recognized five exceptions involving restrictions that are subject only to rationality review. Four of these—restrictions based on citizenship, age, residence, and criminal conviction—are derived from the language of the fourteenth amendment.¹⁴⁶ The fifth exception involves restrictions on voting rights in elections concerning special districts that do not exercise “general government power” (i.e., districts that do not make laws binding on the public or administer traditional government functions).¹⁴⁷

If one of these exceptions is involved, the restriction on voting rights is presumed to be constitutional and will be upheld unless the claimant proves it is not rationally related to any legitimate government interest.

3) *The Right of Ballot Access*

The fundamental rights strand of equal protection law also requires intensified scrutiny of government classifications that substantially infringe the fundamental right of candidates and political parties to be listed on election ballots among the voters' choices.¹⁴⁸ This hybrid right is based in part on the same reasoning as the right to equal voting weight¹⁴⁹ and in part on the implied first amendment freedom of association.¹⁵⁰ Infringements of the right of ballot access are subject to strict scrutiny¹⁵¹ or perhaps a balancing test with the thumb on claimant's side of the scales.¹⁵²

146. U.S. CONST. amend. XIV, § 2 provides that sanctions may be imposed against States that deny the right to vote to any “inhabitants of such State, being twenty-one years of age, and citizens of the United States . . . , except for participation in . . . crime” This implies that restrictions based on residence, age, citizenship, and criminal conviction are permitted.

147. *Ball v. James*, 451 U.S. 355 (1981); *cf. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

148. The seminal ballot-access case is *Williams v. Rhodes*, 393 U.S. 23 (1968).

149. *Id.*

150. *E.g.*, *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). In *Anderson*, for example, the Court relied entirely on the first amendment and expressly stated that the equal protection clause was not a basis for the opinion. *Id.* This appears to be the current trend.

151. *See* cases cited *infra* note 167. Dicta in the plurality opinion in *Clements v. Fashing*, 457 U.S. 957 (1982), purported to limit strict scrutiny to financial burdens, burdens on new or small political parties, and burdens on independent candidates, but this restriction has not received majority support.

152. *Anderson*, 460 U.S. 780 (1983). If *Anderson* is taken seriously, strict scrutiny may

On the merits, one must first determine whether the challenged classification infringed the claimant's right of ballot access.¹⁵³ Typical infringements include filing fees,¹⁵⁴ voter petition requirements,¹⁵⁵ filing deadlines,¹⁵⁶ and exclusion from absentee ballots.¹⁵⁷ If the government classification imposes only a "de minimis burden" on ballot access, no infringement is present and rationality review applies.¹⁵⁸

If the government substantially infringed the claimant's right of ballot access, the classification violates the equal protection clause, according to numerous cases decided in the 1960's and 1970's, unless the government satisfies strict scrutiny by proving that its conduct is necessary to further a compelling interest.¹⁵⁹ Strict scrutiny is not as strict in this context as in some others, however, and many infringements have survived the Court's review.¹⁶⁰ For example, the Court has accepted as "compelling" the following interests: avoiding voter confusion and deception,¹⁶¹ maintaining the stability of the political system,¹⁶² maintaining the integrity of elections,¹⁶³ and requiring a preliminary showing of substantial support.¹⁶⁴

Cases in the 1980's suggest that strict scrutiny is being replaced by a balancing test that requires weighing the harm against the need. The leading case in this development is *Anderson v. Celebrezze*.¹⁶⁵ More recently, *Tashjian v. Republican Party*¹⁶⁶ applied a mode of analysis that seemed to be a composite of strict scrutiny and

be obsolete in this field. Even before *Anderson*, there were signs that the Court was not deeply committed to strict scrutiny in ballot-access cases. In *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974), the Court referred alternatively to strict scrutiny and rationality review.

153. As usual, one should make a common sense judgment whether the challenged government action made claimant's exercise of the right substantially more difficult.

154. *Lubin*, 415 U.S. 709 (1974); *Bullock*, 405 U.S. 134 (1972).

155. *Illinois Bd. of Elecs. v. Socialist Workers Party*, 440 U.S. 173 (1979).

156. *Anderson*, 460 U.S. 780 (1983).

157. *American Party of Texas v. White*, 415 U.S. 767 (1974).

158. *Clements v. Fashing*, 457 U.S. 957 (1982); *cf. Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In *Clements*, the plurality upheld restrictions on ballot access for current office holders, stating, "This sort of insignificant interference with access to the ballot need only rest on a rational predicate . . ." *Clements*, 457 U.S. at 967.

159. *E.g., Illinois Bd. of Elecs.*, 440 U.S. 173 (1979); *Storer v. Brown*, 415 U.S. 724 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968).

160. *See cases cited infra* notes 161-64.

161. *Jenness v. Fortson*, 403 U.S. 431 (1971).

162. *Storer*, 415 U.S. 724 (1974).

163. *Lubin v. Panish*, 415 U.S. 709 (1974).

164. *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

165. 460 U.S. 780 (1983).

166. 479 U.S. 208 (1986).

balancing. At present, the correct analysis is uncertain, and one must watch future developments to be sure what test to use.

4) *The Right of Interstate Migration*

The right to move from one state and take up residence in another is also a fundamental right that triggers strict equal protection scrutiny when infringed.¹⁶⁷ Although the precise constitutional source of the right remains unclear,¹⁶⁸ the Court has held that this right of interstate migration is constitutionally grounded and therefore fundamental for purposes of equal protection analysis.¹⁶⁹ As with the rights of equal voting weight and ballot access, the analysis has two steps. One must determine whether the right has been infringed and, if so, whether strict scrutiny has been satisfied.

a) *Infringement of the Right of Interstate Migration*

The first question is whether the claimant's right of interstate migration has been infringed.¹⁷⁰ Although earlier cases suggest that the right in question is the "right to travel,"¹⁷¹ later cases explicitly hold that the right involved in this line of cases is the right to migrate from one state to another (i.e., the right to leave one state and take up residence in another).¹⁷²

The Court has developed a specialized test for determining whether an infringement of the right of interstate migration has occurred, a test in part similar to and in part different from those used for other fundamental rights.¹⁷³ Under this test, an infringement

167. *E.g.*, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904-05 n.4 (1986) ("Laws which burden that right [to migrate] must be necessary to further a compelling state interest."); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 262 (1974) ("necessary to promote a *compelling* governmental interest"); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) ("Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest.").

168. "The textual source of the constitutional right . . . of free interstate migration, though, has proven elusive." *Soto-Lopez*, 476 U.S. at 902. "We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." *Shapiro*, 394 U.S. at 630.

169. *Id.* at 634 ("in moving from State to State . . . appellees were exercising a constitutional right").

170. *Soto-Lopez*, 476 U.S. at 906 n.6.

171. *E.g.*, *Shapiro*, 394 U.S. 618 (1969).

172. *E.g.*, *Soto-Lopez*, 476 U.S. at 902 ("the constitutional right to travel, or, more precisely, the right of free interstate migration"); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255 (1974) ("right to migrate, 'with intent to settle and abide'").

173. *Soto-Lopez*, 476 U.S. at 903-04.

may occur in one of three ways. First, if the government action actually deters interstate migration, it is an infringement sufficient to trigger strict scrutiny.¹⁷⁴ Second, if the primary purpose of the government's action is to deter interstate migration, the action is an infringement.¹⁷⁵ Third, if the action "penalizes" the exercise of the right of interstate migration¹⁷⁶ by either temporarily depriving new residents of a "necessity"¹⁷⁷ or permanently depriving new residents of a significant benefit,¹⁷⁸ that too is an infringement.¹⁷⁹

b) *Strict Scrutiny*

If the government's classification infringed the claimant's right of interstate migration, strict scrutiny is applicable, and the government must prove that the classification is a necessary and substantially effective means to further a compelling interest. Indeed, the interstate migration cases provide classic examples of strict scrutiny in action.

In *Shapiro v. Thompson*,¹⁸⁰ for example, the Court rejected a series of justifications offered by the government, holding that deterring an influx of new residents and rewarding past contributions by old residents were not permissible purposes; that preserving fiscal integrity of the state's welfare system was a valid but not a compelling purpose; that improved budget planning was not the government's actual purpose, and, in any case, that denial of welfare benefits to newcomers was not a demonstrably effective means to further that purpose; and that denial of welfare benefits was not necessary to prevent welfare fraud.¹⁸¹

174. *Id.*

175. *Id.*

176. The concept of a "penalty" for interstate migration was suggested in dictum in *Shapiro v. Thompson*, 394 U.S. 618, 638 n.21 (1969). It was raised to the status of a requirement in *Memorial Hosp.*, 415 U.S. 250 (1974). It was then demoted to an alternative test for infringement in *Soto-Lopez*, 476 U.S. 898 (1986).

177. *Memorial Hosp.*, 415 U.S. at 258-61. Such necessities include vital government benefits such as welfare benefits, housing, and medical care. *Id.* at 261; *Shapiro v. Thompson*, 394 U.S. 618 (1969).

178. *Soto-Lopez*, 476 U.S. at 909.

179. If the government classification did not infringe the right of interstate migration, strict scrutiny does not apply. *E.g.*, *Jones v. Helms*, 452 U.S. 412 (1981).

180. 394 U.S. 618 (1969).

181. *Soto-Lopez*, 476 U.S. 898 (1986), is another good example of strict scrutiny in action. There the Court rejected four government purposes on the ground that they were not the government's actual purposes and the means were not sufficiently effective and necessary.

5) *Meaningful Access to Judicial Proceedings*

Perhaps the most obscure line of fundamental rights law involves the right of indigents to have meaningful access to courts to protect certain legal interests. This right derives from the *Griffin-Douglas* line of cases,¹⁸² which originally suggested that the government must provide indigent criminal defendants with "equal access" to transcripts, assistance of counsel, and other aids needed to put on a defense. This right of access was based on both the due process and equal protection clauses.

In *Ross v. Moffitt*,¹⁸³ the Burger Court cut back on the *Griffin-Douglas* rule by holding that the government need not provide equal access but only meaningful access (i.e., the opportunity for meaningful consideration of indigents' claims). In 1985, the Court suggested that the constitutional foundation of this right of access is not equal protection but rather the due process requirement of fundamental fairness.¹⁸⁴ The government, the Court held, may not have to provide the procedural protection in the first place, but if it chooses to adopt the procedure, fundamental fairness requires that indigents be allowed meaningful access. This reinterpretation may eliminate this strand of equal protection law, but it is perhaps appropriate to explain briefly how the equal protection analysis worked.

a) *Infringement of the Right of Meaningful Access*

The basic concept was that the Constitution confers a fundamental right of meaningful access to (1) criminal procedures designed to permit criminal defendants to challenge criminal prosecutions¹⁸⁵ and (2) civil proceedings that affect fundamental rights.¹⁸⁶ The specific constitutional source of this right was never clearly explained, and as a result it was often labelled a "noninterpretive" constitutional right,¹⁸⁷ like the right of marital privacy. The right was defined as providing that "indigents have an adequate opportu-

182. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963).

183. 417 U.S. 600 (1974).

184. *Ake v. Oklahoma*, 470 U.S. 68 (1985); cf. *Little v. Streater*, 452 U.S. 1 (1981) (due process requires free blood-grouping test for indigent defendant in paternity suit).

185. E.g., *Douglas*, 372 U.S. 353 (1963); *Griffin*, 351 U.S. 12 (1956).

186. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce proceedings). This right does not include access to civil proceedings not involving fundamental rights. *Ortwein v. Schwab*, 410 U.S. 656 (1973) (appeals from denials of welfare benefits); *United States v. Kras*, 409 U.S. 434 (1973) (bankruptcy proceedings).

187. "Noninterpretive" means that the right is not traceable to the text, history, or structure of the United States Constitution.

nity to present their claims fairly within the adversary system."¹⁸⁸

To determine whether the right of meaningful access was infringed, it was necessary to evaluate all of the materials available to the court, and analyze whether a meaningful opportunity for consideration of the claim was possible without additional public assistance. Thus, in *Ross*, the Court concluded that an indigent's petition for discretionary Supreme Court review could be meaningfully considered without providing free assistance of counsel, because the documents already available—for example, lower court transcripts, briefs, and opinions—gave the Supreme Court enough information to make a meaningful decision regarding whether to grant review.¹⁸⁹ In contrast, denial of counsel in a criminal defendant's first appeal as of right infringes the right of meaningful access, because no prior appellate briefs and court opinions are available to guide the court, and assistance of counsel is therefore needed to ensure fair consideration of the appeal.¹⁹⁰

b) *Strict Scrutiny*

If failure to provide assistance infringed the indigent's right of meaningful access, the government has the burden to prove that the denial was necessary to further a compelling interest. Normally the government could not meet this test, because the only legitimate purpose—saving money—was not compelling. Thus, if assistance was needed for meaningful access, the government had to provide it in most cases.

c. *Other Bases for Intensified Scrutiny*

The Supreme Court has usually taken the position that the equal protection clause requires only rationality review unless a suspect or semi-suspect classification is present or the classification infringes a fundamental right.¹⁹¹ In one important case,¹⁹² however, the Court used intensified scrutiny while explicitly holding that the classification was not suspect and the right was not fundamental. The case suggests that there is a third category of equal protection claims triggering intensified scrutiny.

188. *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

189. *Id.*

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

191. *E.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

192. *Plyler v. Doe*, 457 U.S. 202 (1982).

*Plyler v. Doe*¹⁹³ involved a requirement that children of illegal aliens pay tuition for attending public schools. By a 5-4 vote, the Supreme Court held that the requirement violated equal protection. The Court admitted that undocumented aliens do not comprise a suspect class.¹⁹⁴ The Court also admitted that the right to public education is not a fundamental right.¹⁹⁵ Nevertheless, the Court held that the tuition requirement violated equal protection, because the government failed to prove that the classification "furthers some substantial state interest."¹⁹⁶ Citing cases involving classifications based on gender and illegitimacy, the Court applied a presumption of unconstitutionality and struck the requirement down because the government failed to prove that its classification was a demonstrably and substantially effective means to further its goals.

Plyler appears to stand for the proposition that intensified scrutiny applies when the government classification harms a somewhat suspect class and infringes a somewhat fundamental right. To trigger this rule, the claimant must show that the class affected has some similarities to suspect or semi-suspect classes, that the right affected is very important, and the disability imposed is very severe. Thus, in *Plyler*, the Court was impressed by the fact that exclusion from public schools creates drastic disabilities affecting all aspects of the child's future.

It is unclear how far this rule extends. To date, *Plyler* has no progeny. Perhaps it is a constitutional sport that will not produce offspring. Assuming, however, that *Plyler* is a valid precedent, the analysis may be summarized as follows:

Plyler; Basic Analysis

1. Applicability
 - a. Somewhat suspect class and
 - b. Infringement of somewhat fundamental right
2. Compliance
 - a. Substantial government interest and
 - b. Substantial relation, i.e.,
 - 1) Substantially effective means and
 - 2) Narrowly tailored means

193. *Id.*

194. *Id.* at 223.

195. *Id.* at 221.

196. *Id.* at 230.

2. *Is Rationality Review Applicable, and, If So, Is It Met?*

Government classifications which are not subject to intensified scrutiny are constitutional under the equal protection clause if they satisfy rationality review.¹⁹⁷ Rationality review is the least intense form of means-end scrutiny, requiring only that the government classification be a rational method for furthering some legitimate government interest.¹⁹⁸ As in other forms of equal protection analysis, one must determine, first, whether rationality review is applicable, and, if so, second, whether the rationality requirement is met.

a. *Is Rationality Review Applicable?*

As stated above, rationality review is applicable whenever the claimant has been harmed by a government classification that is not subject to intensified scrutiny, because it is not suspect or semi-suspect and does not infringe any fundamental or semi-fundamental right. Thus, if the preliminary requirements are met, because the government has used a classification, and intensified scrutiny is not applicable, rationality review is the controlling test.

b. *Is Rationality Review Satisfied?*

Rationality review is a two-prong means-end scrutiny test requiring that the government's action be a rational means for furthering a valid government interest. In most cases, if rationality review applies, the government action is presumed to be constitutional, and the claimant has the burden of proving that the classification is not even an arguably rational method for furthering any conceivable valid government interest. Occasionally, however, the Court applies rationality review in a more aggressive manner, striking down the

197. *E.g.*, *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). The Court's decisions establish that rationality review is to be applied only *after* it is determined that the classification is not subject to intensified scrutiny. *E.g.*, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986). Therefore, rationality review comes last in the logical structure of equal protection analysis. The reader should note, however, that rationality review is, in one sense, the general rule in equal protection analysis, since it applies to all classifications that are not subject to intensified scrutiny. In other words, rationality review is the "residuary clause" of equal protection law, applicable to the great majority of government classifications occurring in the run-of-the-mill socio-economic contexts that comprise the vast majority of government/individual interactions. As such, it is more important than its position at the end of the equal protection analysis might suggest, and it is important for the student of equal protection analysis to understand its central role in most equal protection cases.

198. *E.g.*, *Rodriguez*, 411 U.S. at 40 ("the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes").

government action unless the record contains evidence showing that the classification is a demonstrably effective method for furthering some actual valid interest. The following sections describe these deferential and nondeferential versions of rationality review in more detail.

1) *Is the Deferential Rational Basis Test Applicable, and, If So, Is It Met?*

The form of rationality review applicable in most cases is the deferential rational basis test. This is a two-prong test involving analysis of the government's ends and means.

a) *Any Conceivable Valid Interest?*

The component involving end scrutiny requires only that the government's classification be supported by some conceivable valid government purpose. If, after analyzing the challenged classification, the court can hypothesize any legitimate interest that the government might have been attempting to further, that is sufficient. Proof is not required that the government officials responsible for the classification actually had this purpose in mind when they undertook the challenged action. It is enough if a rational government official might have acted for this purpose.

b) *Arguably Rational Means?*

The component involving means scrutiny requires only that the government classification be arguably an appropriate method for furthering a valid interest. Proof is not required that the classification is actually effective. It is enough if a reasonable government official might have believed that the classification would further the goal.

If the deferential rational basis test is applicable, the government action is strongly presumed to be constitutional, and claimant has the burden to prove that the classification is not even arguably an effective method for furthering any conceivable government interest. This is the least demanding form of means-end scrutiny. Often called "minimum rationality review," it is so minimal that it has been dubbed the "hands off" test.¹⁹⁹ All that is required is any conceivable rational basis for concluding that the classification might be an effective means for pursuing a legitimate goal.²⁰⁰ Although there

199. See G. GUNTHER, *supra* note 112, at 472.

200. The classic formulation of the test was in *Lindsley v. Natural Carbonic Gas Co.*,

have been a few exceptions, the outcome of deferential rationality review is virtually a foregone conclusion: government action subject to this test is almost certainly constitutional. In the words of Professor Gunther, the test involves "minimal scrutiny in theory and virtually none in fact."²⁰¹

Despite the fact that the deferential rational basis is usually a mere formality leading to the foregone conclusion that the government action is constitutional, it is nevertheless appropriate for the lawyer analyzing such an issue to spell out the analysis explicitly. To do so, one must use a two-step analytical structure. First, one must identify the government interests that might conceivably support the challenged classification. Second, for each such interest, one must articulate why the classification arguably furthers that interest, or, in the alternative, why no rational legislator could have considered the classification to be an effective method for implementing that interest.²⁰²

2) *Is the Nondeferential Rational Relation Test Applicable, and, If So, Is It Met?*

Occasionally, the Court applies rationality review in a somewhat more demanding manner, insisting that, even though intensified scrutiny is not applicable, a government classification is unconstitutional unless it is a demonstrably effective method for furthering

220 U.S. 61 (1911), in which the Court stated:

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. . . . 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.

Id. at 78-79. *Cf.* *McGowan v. Maryland*, 366 U.S. 420 (1961), where Chief Justice Warren's majority opinion stated,

[T]he Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26.

201. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

202. "When faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (Brennan, J., dissenting).

some actual valid interest.²⁰³ In such cases, the Court refuses to speculate about conceivable valid interests and arguably rational means. Instead, it requires proof that the government officials responsible for the conduct actually had some legitimate interest in mind and that the classification actually furthers that interest.²⁰⁴

The formal structure of nondeferential rationality review is identical to that of deferential rationality review. Step one involves identification of government interests served by the classification. Step two involves analysis of each such interest in order to determine whether the classification is an effective, non-arbitrary method for furthering such purpose. The only difference is the intensity of the Court's scrutiny.

The burden of proof under the nondeferential rational relation test is unclear. The *Cleburne* case,²⁰⁵ however, suggests that the burden may be on the government.

The Court has used the nondeferential rational relation test to strike down government action in a variety of cases.²⁰⁶ Nevertheless, it remains unclear why the Court chooses to apply the nondeferential rather than the deferential version of rationality review from time to time. Justice Marshall has suggested three factors that should be considered in deciding whether to intensify rationality review in a given case: (1) the invidiousness of the classification (i.e., the identity of the class of persons adversely affected),²⁰⁷ (2) the importance of

203. The classic recent example of this type of rationality review is *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in which the Court struck down a classification disfavoring developmentally disabled (mentally retarded) persons. Justice Marshall's opinion in the *Cleburne* case labelled the test "'second order' rational-basis review." *Id.* at 458 (Marshall, J., dissenting in part).

204. Professor Gunther labels this type of rationality review "newer equal protection" and "rationality review with a bite," and he summarizes it as follows:

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

Gunther, *supra* note 201, at 21.

205. 473 U.S. 432 (1985).

206. *E.g., id.*; *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (imposition of a tax on out-of-state insurance companies heavier than on domestic insurance companies does not satisfy rationality review); *United States Dept. Agric. v. Moreno*, 413 U.S. 528 (1973) (denial of food stamps to households composed of unrelated persons does not satisfy rationality review).

207. For example, in *Cleburne*, the Court may have intensified its rationality review in part because the class affected was developmentally disabled persons, a politically powerless class victimized by a history of discrimination much like that faced by racial minorities. *Cleburne*, 473 U.S. 432 (1985).

the interest adversely affected,²⁰⁸ and (3) the nature of the government's purpose.²⁰⁹ This appears to be as good a starting point as any for analyzing when the Court might depart from the usual rule and use nondeferential rather than deferential rationality review.

If the claimant fails to meet the preliminary requirements, or the equal protection clause is inapplicable because the government has not used a classification, or a sufficient justification is present to satisfy the applicable level of means-end scrutiny, claimant loses, and there is no need to discuss remedies. If, on the other hand, the preliminary requirements are met, a government classification is present, and the applicable means-end test is not met, claimant wins, and the analysis turns to questions concerning remedies.

III. REMEDIES²¹⁰

A. *In General*

Courts have the duty to enter orders compensating the victims of illegal discrimination for their damages, preventing future recurrence of the conduct, and eliminating the continuing effects of past discrimination. To carry out this duty, courts have broad discretion to impose equitable remedies.²¹¹ The main limitation is that the remedies must be tailored to the constitutional violation: courts are not free to impose remedies unrelated to counteracting the discriminatory conduct found to violate the equal protection clause.²¹²

B. *School Desegregation Cases*

Some of the most heated disputes concerning equal protection remedies have occurred in school desegregation cases. In general, the Court has confirmed the broad power of the district courts to impose orders that will not only halt the illegal segregation but also eradi-

208. For example, in *Moreno*, the Court used rationality review to strike down a government classification cutting off subsistence food supplies (food stamps). *Moreno*, 413 U.S. 528 (1973).

209. In *Moreno*, the Court held that the restriction on food stamps was not rational, in part because it was based on hostility toward "hippies," a government interest that the Court found improper. *Id.* at 534.

210. This article will not undertake a full analysis of remedies for equal protection violations, but a few comments are in order.

211. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad . . ." *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

212. *E.g.*, *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("The controlling principle . . . is that the scope of the remedy is determined by the nature and extent of the constitutional violation.").

cate the continuing effects of past segregation root and branch.²¹³ Thus, for example, courts may alter attendance zones,²¹⁴ order busing of students,²¹⁵ throw out freedom of choice plans,²¹⁶ and impose such other orders as are necessary to achieve desegregation "now."²¹⁷ Indeed, courts may impose district-wide remedies based on a finding of illegal segregation within any substantial part of the school district.²¹⁸

On the other hand, the Court has imposed important restrictions on the remedial powers of district courts in school desegregation cases. For example, courts may not impose inter-district remedies involving school districts which have not been found guilty of de jure segregation.²¹⁹ Similarly, courts may not adjust their desegregation decrees to counteract the effects of white flight and other developments not "caused by segregative actions" of school officials.²²⁰

CONCLUSION

Equal protection analysis proceeds in three steps. First, the preliminary requirements (jurisdiction, justiciability, and government action) must be met. Second, the merits of the equal protection claim must be considered. The equal protection clause is applicable if the government action that harmed the claimant is a classification on its face or in effect.

If a classification is present, the next step is to determine the appropriate level of scrutiny. If the classification is suspect or semi-suspect, because it discriminates facially or in effect and purpose on the basis of race, national origin, ethnicity, resident alienage, gender, or illegitimacy, intensified scrutiny is applicable, and the government must satisfy the applicable version of intensified scrutiny. If the classification infringes a fundamental right, intensified scrutiny is also applicable, and the government must ordinarily satisfy strict scru-

213. *E.g.*, *Swann*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).

214. *Id.* This includes the power to pair non-contiguous school zones and to create gerrymandered zones that are not compact.

215. *Id.*

216. *Green*, 391 U.S. 430 (1968).

217. *Id.* The Court has long since discarded the "all deliberate speed" formula set forth in *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

218. *Keyes v. School Dist.*, 413 U.S. 189 (1973).

219. *Milliken v. Bradley*, 418 U.S. 717 (1974). This is an application of the general principle that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Id.* at 744.

220. *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 435 (1976).

tiny. If the government action involves a somewhat suspect classification and infringes a somewhat fundamental right, intensified scrutiny is also applicable. All other classifications are subject to rationality review and are normally constitutional unless the claimant proves that they do not arguably serve any legitimate government interest.

If the preliminary requirements are satisfied, the claimant has been harmed by a government classification, and the applicable level of means-end scrutiny is not satisfied, then an equal protection violation has occurred, and questions concerning remedies should be considered.

If this analytical structure is kept clearly in mind, the chances for an accurate equal protection analysis may be increased.

APPENDIX

On the basis of the foregoing discussion, it is possible to set forth the following, more detailed outline of basic equal protection analysis.

Equal Protection: Basic Analysis

- I. Have the preliminary requirements been met?
 - A. Does the court have jurisdiction?
 - B. Is the claim justiciable?
 - C. Was the harm caused by government action?
- II. On the merits: Did the government action violate the equal protection clause?
 - A. Applicability: Did the government use a classification?
 1. Facial or
 2. In effect
 - B. Compliance: Does a sufficient justification exist to support the classification?
 1. Classifications subject to intensified scrutiny (presumption of unconstitutionality)
 - a. Suspect and semi-suspect classifications
 - 1) Race (or national origin or ethnicity)
 - a) Racial classification?
 - (1) Facial or
 - (2) Effect and purpose
 - b) Justification: strict scrutiny
 - (1) Does the classification further a compelling government interest?
 - (a) Compelling interest?
 - (b) Substantially effective means?
 - (2) Is the classification necessary?
 - 2) Resident alienage

- a) Classification that burdens resident aliens?
 - (1) Facial or
 - (2) Effect and purpose
 - b) Justification
 - (1) Classification by state government
 - (a) Political function exception
 - (1) Is the exception applicable?
 - (a) Specifically tailored?
 - (b) Function that goes to the heart of representative government?
 - (1) Discretionary, not ministerial?
 - (2) Elective or important non-elective office?
 - (2) If yes, rationality review
 - (a) Valid government interest?
 - (b) Rational means?
 - (b) General rule: strict scrutiny
 - (1) Does the classification further a compelling government interest?
 - (a) Compelling interest?
 - (b) Substantially effective means?
 - (2) Is the classification necessary?
 - (2) Classification by federal government; specialized rationality review.
 - (a) End scrutiny: valid government interest
(Note: In evaluating the government's interest, the Court asks whether the interest is related to national immigration or foreign relations policy).
 - (b) Means scrutiny
 - (1) If the interest is related to national immigration or foreign relations policy, deferential means scrutiny (arguably rational means).
 - (2) If the interest is not related to national immigration or foreign relations policy, nondeferential means scrutiny (demonstrably effective means).
- 3) Gender
 - a) Gender-based classification?
 - (1) Facial or
 - (2) In effect
 - b) Justification: intermediate scrutiny
 - (1) Important interest?

- (2) Substantial relation?
 - (a) Substantially effective means?
 - (b) Narrowly tailored means?
- 4) Illegitimacy
 - a) Illegitimacy-based classification?
 - (1) Facial or
 - (2) In effect
 - b) Justification: intermediate scrutiny
 - (1) Important government interest?
 - (2) Substantial relation?
 - (a) Substantially effective means?
 - (b) Narrowly tailored means?
- b. Classifications affecting fundamental rights
 - 1) In general
 - a) Infringement of fundamental right?
 - (1) Fundamental right?
 - (2) Infringement?
 - b) Strict scrutiny
 - (1) Does the classification further a compelling government interest?
 - (a) Compelling interest?
 - (b) Substantially effective means?
 - (2) Is the classification necessary?
 - 2) Equal voting weight
 - a) Infringement of right of equal voting weight?
 - (1) Right of equal voting weight?
 - (2) Infringement?
 - b) Justification
 - (1) General rule: strict scrutiny
 - (a) Does the classification further a compelling government interest?
 - (1) Compelling government interest?
 - (2) Substantially effective means?
 - (b) Is the classification necessary?
 - (2) Exceptions: rationality review
 - (a) Is an exception applicable?
 - (1) Citizenship?
 - (2) Age?
 - (3) Residence?
 - (4) Criminal conviction?
 - (5) Special district (not making rules binding on public or administering traditional government function)?
 - (b) If so, rationality review
 - (1) Valid government interest?
 - (2) Rational means?

- 3) Ballot access
 - a) Infringement of right of ballot access?
 - (1) Right of ballot access?
 - (2) Infringement?
 - b) Justification
 - (1) Strict scrutiny
 - (a) Does the classification further a compelling government interest?
 - (1) Compelling government interest?
 - (2) Substantially effective means?
 - (b) Is the classification necessary?
 - (2) Balancing test; weigh:
 - (a) Harm vs.
 - (b) Need
- 4) Interstate migration
 - a) Infringement of right of interstate migration?
 - (1) Right of interstate migration?
 - (2) Infringement?
 - (a) Actual deterrence?
 - (b) Primary purpose to deter? or
 - (c) Penalty for interstate migration?
 - (1) Temporary denial of necessity? or
 - (2) Permanent denial of significant benefit?
 - b) Justification: strict scrutiny
 - (1) Does the classification further a compelling government interest?
 - (a) Compelling government interest?
 - (b) Substantially effective means?
 - (2) Is the classification necessary?
- 5) Access to judicial proceedings
 - a) Criminal proceedings
 - (1) Infringement of right of meaningful access?
 - (a) Right of meaningful access?
 - (b) Infringement (denial of opportunity for meaningful hearing of claim)?
 - (2) Strict scrutiny
 - (a) Does the classification further a compelling government interest?
 - (1) Compelling government interest?
 - (2) Substantially effective means?
 - (b) Is the classification necessary?
 - b) Civil proceedings
 - (1) Infringement of fundamental right?

- (a) Does the procedure affect a fundamental right?
 - (b) Infringement (denial of opportunity for meaningful hearing of a claim)?
 - (2) Strict scrutiny
 - (a) Does the classification further a compelling government interest?
 - (1) Compelling government interest?
 - (2) Substantially effective means?
 - (b) Is the classification necessary?
 - c. Somewhat suspect classifications and somewhat fundamental rights
 - 1) Applicability?
 - a) Is the classification somewhat suspect? and
 - b) Does the government action infringe a somewhat fundamental right?
 - 2) Justification: heightened review
 - a) Substantial government interest?
 - b) Substantial relation
 - (1) Substantially effective means?
 - (2) Narrowly tailored means?
 - 2. Classifications subject to rationality review
 - a. Nondeferential rational relation test
 - 1) End scrutiny: actual valid interest?
 - 2) Means scrutiny: demonstrably rational means?
 - b. Deferential rational basis test
 - 1) End scrutiny: any conceivable valid interest?
 - 2) Means scrutiny: arguably rational means?
- III. Remedies
- A. In general
 - B. School desegregation

