The Revival of Interest in Justice Harlan's Flexible Due Process Balancing Approach

Gary C. Leedes
The Revival of Interest in Justice Harlan's Flexible Due Process Balancing Approach

GARY C. LEEDES

Although the Supreme Court often "tangles" equal protection and due process analyses in its opinions, it is preferable not to conflate concepts that are most useful if kept separate. Indeed, it is objectionable to twist together the due process and equal protection clauses, because the "new" equal protection approach, developed during the Warren era, places too heavy a burden on the government to justify classifications. A flexible balancing approach is appropriate for resolution of the due process clause issue, and a less intrusive, means-focused equal protection methodology is appropriate for resolution of the equality issue. Justice Harlan believed that the ends-oriented equal protection doctrine shifted the Court's focus of inquiry away from its proper concern, which was to inquire whether classifications were clearly and unjustifiably unrelated to legitimate governmental objectives. A revival of interest in Justice Harlan's approach is indicated by several recent United States Supreme Court decisions.

PRELIMINARY REMARKS

The guarantees of the equal protection clause and the due process of law clauses, although not mutually exclusive, are, and

* Professor of Law, University of Richmond. B.S.E., Pennsylvania, 1960; LL.B., Temple, 1962; L.L.M., Harvard, 1973. The author wishes to thank Neil Kuchinsky, who prepared the chart at the end of this article.

2. Id. amend. V & XIV.
3. In Loving v. Virginia, 388 U.S. 1 (1967), the Court invalidated the state's ban on interracial marriages. The Court held that the racial classification violated
should be kept, conceptually distinct. The function of the equal protection clause is to protect all individuals and classes from comparatively disadvantageous distinctions, but laws that burden all persons equally may nevertheless violate the due process clause. It follows that the equal protection clause is triggered when the government treats individuals disparately; the due process clause may be triggered even though the government treats all individuals the same. Adequate, not equal, protection is guaranteed by due process of law.

Substantive due process doctrine also differs from procedural due process. When an individual is isolated owing to some alleged (but deniable) misconduct, characteristic, or tendency, the constitutional question pertains to the type of individualized hearing, if any, which is due. The adequacy of procedural safeguards is usually irrelevant when a challenger attacks the validity of applicable substantive law. Under such circumstances, the is-

the equal protection clause and that the burden on liberty violated due process of law. One commentator has noted: “Thus, equal protection and due process, as independent constitutional guarantees, may both be violated in some circumstances.” Note, Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine, 14 HARv. C.R.-C.L L. Rev. 529, 531 (1979) (succinct analysis of the differences between equal protection and due process of law doctrines).

4. “Although due process and equal protection arguments often may be transformed into each other, . . . there is value in maintaining the conceptual distinction.” Plante v. Gonzalez, 575 F.2d 1119, 1128 n.15 (5th Cir. 1978). The distinction is this: The equal protection clause argument focuses on the challenged classification; the due process clause focuses on the burdened constitutionally protected right or liberty. See Note, supra note 3, at 531-33.

5. Due process review is triggered by the deprivation of protected personal interests regardless of whether a classification is involved. Thus, a statute may, without imposing any classifications, deprive all persons of an interest protected under due process; clearly the absence of a classification should not save the statute from invalidation. Note, supra note 3, at 533. Justice Rehnquist writes, “Due process” emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated.” Ross v. Moffitt, 417 U.S. 600, 609 (1974).

Since due process concepts are invoked to prevent unfairness and injustice, which, like due process itself, are concepts that resist specific definition, the difficulty of articulating a completely informative standard of due process is not surprising. It is a concept that is designed “for an undefined and expanding future.” Hurtado v. California, 100 U.S. 516, 530-31 (1884).

6. See generally Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). Professor Grey writes, “Procedural fairness does not include those fundamental substantive rights which in our constitutional law are enforced in the name of due process—rights such as the freedom of speech and religion . . . or the rights of liberty and privacy usually characterized as aspects of substantive due process.” Grey, Procedural Fairness and Substantive Rights, in DUE PROCESS: NOMOS XVIII 182 (1977). The primary function of procedural due process, Grey observes, is “designed to promote the correct decision of disputes.” Id. at 184.

7. But see Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982) (statute as interpreted and applied violated procedural due process). The Court has held that procedural due process violations occur “if indigents are singled out by the State.
Due Process Balancing Approach
SANDIEGO LAW REVIEW

sue is whether the Constitution imposes restrictions upon the scope, reach and character of the challenged exercise of legislative power.8

Equal protection principles protect members of classes from unreasonable or invidious classifications.9 A disadvantageous classification is usually invidious when deemed hostile or stigmatizing.10 A classification is intolerably imprecise (designates for a benefit or burden more persons than is necessary) or underinclusive (excludes from a benefit or burden more

and denied meaningful access to the appellate system because of their poverty.” Ross v. Moffitt, 417 U.S. 600, 611 (1974). Justice Rehnquist concedes that this exception is not an “entirely satisfactory” explanation for the Court’s solicitude towards indigents compelled by the state to defend themselves against criminal charges. Id. at 609. It is not a satisfactory explanation because the Court’s rationale in the “access to court” cases (see infra text accompanying notes 27-29) is a hybrid of equal protection and substantive and procedural due process: in other words, a conceptual disaster. See also Vlandis v. Kline, 412 U.S. 441 (1973) (purporting to irrebuttable presumption analysis, the Court invalidated state residency test used by the state to determine eligibility for tuition preferences for in-state students at state universities). For a brief discussion of the requirement of an individualized determination which is the judicial remedy for an irrebuttable presumption, see infra note 111.

8. The doctrine of “void for vagueness” is also a due process doctrine. The vices of statutes and rules which are void for vagueness consist in their lack of fair warning and the excessive latitude given to administrators, prosecutors, judges and juries for erratic, discriminatory or overreaching exercises of authority. See A. BICKEL, THE LEAST DANGEROUS BRANCH 151 (1962). See generally Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67 (1960). It does not seem particularly important to categorize this doctrine as either procedural or substantive due process, and it could be argued that it is a hybrid.

9. “The Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way.” Jones v. Helms, 452 U.S. 412, 423-24 (1981). In their seminal article, Joseph Tussman and Jacobus tenBroek pointed out that:

Due process is . . . a weapon blunted out and scarred in the defense of property. The present Court, conscious of its destiny as the special guardian of human or civil rights, may well wish to develop some alternative to due process as a sanctuary for these rights. The equal protection clause has much to recommend it for this purpose.


10. See generally Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107 (1976); Tussman & tenBroek, supra note 9; Note, supra note 3.
persons than is necessary). If a court holds a classification to be invalid, this does not mean that the government lacks power to regulate the subject matter; the government simply must use a more precise classification. One can, but should not, exaggerate the virtue of equal protection analysis as a value-neutral means-oriented approach. When a statute is invalidated by a federal court, representative government is still stymied by unelected officials whether their warrant is the equal protection or the due process clause. But a means-focused intervention is not based on a subjective evaluation of the importance of governmental ends when the court's decision plausibly rests on the unjustifiable imprecision of a challenged classification. Hence equal protection analysis is a less intrusive tool of judicial intervention.

The equality requirement of the equal protection clause protects all persons and classes from every unjust comparison disadvantaging certain politically powerless or traditionally stigmatized groups. Since the equal protection clause is primarily concerned with classification, the courts decide whether a challenged classification is disfavored or suspect. If neither, the court determines whether the classification is substantially related to the governmental goal which made the legislative line-drawing advisable in the first place. There should not be an emphasis on balancing competing interests in an equal protection case.

If the challenged classification is suspect, the Court requires the government to justify the classification by demonstrating that a "compelling interest" is substantially furthered in the least discriminatory way. The compelling interest test in this context ideally does not involve weighing the harm to the group disadvantaged against the benefit accruing to society from the classification. The compelling interest test is a method used to flush out unconstitutional motivation. Although the Court requires the government's goal to be important, not trivial, the importance of the goal is simply an indicator of the government's neutrality. In this respect, as Professor Clark has written, "[O]ne can acknowledge a kind of balancing in this context." But the methodology "of looking for evidence of probable legislative prejudice is differ-

11. Fiss, supra note 10, at 111 (citing Tussman & tenBroek, supra note 9).
12. See also Note, supra note 3.
13. Id. at 529-33.
ent from balancing the good and the bad effects of the law." Unfortunately, since many courts confound equal protection doctrine with substantive due process balancing, this distinction becomes blurred.

This article discusses how the Supreme Court, over a period of years, ignored important distinctions between the concepts of due process and equal protection. This was invariably accomplished over the objection of Mr. Justice Harlan. The article further suggests that in the 1980's, the prospects are good for the adoption of Justice Harlan's approach. More than an aesthetic notion of doctrinal purity is at stake. In the Constitution, liberty and equality are in tension with each other. At times, liberty may be limited by the government to achieve equality. Conversely, equality at times may be subordinated to liberty. The tangling of due process and equal protection methodologies distorts the concepts of liberty and equality.

18. Id.; see also J. ELY, supra note 16, at 145-47, 247 n.46. The compelling interest test invoked in the "new" equal protection cases is a formulation that is derived from Justice Frankfurter's concurrence in a first amendment case, Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957), an opinion which Justice Harlan joined. The test obviously was designed to be strict. Although Justice Harlan continued to apply the compelling interest test in first amendment cases without minimizing the state's heavy burden of justification, "his balancing typically entailed a fair and careful evaluation of the asserted state justifications for impinging on first amendment interests." Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Powell, 24 STAN. L. REV. 1001, 1006 (1972). The compelling interest test, however, as applied by the Warren Court in the "new" equal protection cases—withstanding Justice Harlan's objections—was less sensitive to the competing interests, less flexible and always fatal.


20. One could invoke a general bridging concept, which subsumes liberty and equality, for example—equal concern and respect for each person's autonomy. But such a bridging concept, given the absence of an all-encompassing supreme moral principle implicit in the Constitution would not be deduced from the Constitution, but induced from the cases and commentary. Although it removes some of the tension between the concepts subsumed, an abstract concept like equal concern and respect, or justice, for that matter, is too general to help judges decide concrete cases. In a particular case, judges should employ standards that channel their discretion. It is, therefore, more prudent to maintain the traditional distinction between liberty, which pertains to substantive justice, and equality, which so far as the fourteenth amendment is concerned, pertains to formal justice. Both concepts are in the Constitution; so, nothing is lost but clarity and candor by intermixing the two.

Formal justice is the concept implicit in the equal protection clause; in other words, persons similarly situated should be similarly treated with respect to the purpose of a law. If the purpose of a law is legitimate, its importance should not
The entanglement began in *Skinner v. Oklahoma ex rel. Williamson*.\(^{21}\) The challenged statute provided for the sterilization of habitual criminals, as defined by the act, but made exceptions for crimes of embezzlement, political offenses, and for violations of prohibitory laws or revenue acts.\(^{22}\) The exemptions, although grossly over- and underinclusive, might have been upheld, owing to the deference usually accorded the legislature in equal protection cases. Justice Douglas's opinion, however, referred to procreation as "one of the basic civil rights of man."\(^{23}\) His identification of procreation as a fundamental right enabled him to apply strict scrutiny.

Ordinarily the equal protection clause is not a source of fundamental rights.\(^{24}\) Justice Douglas's opinion did suggest that a state sterilization statute could be used against "races or types which are inimical to the dominant group."\(^{25}\) There was no showing, however, that the state was motivated by any such impermissible

---

22. *Id.* at 537.
23. *Id.* at 541.
24. *See*, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.").
The real issue raised by cases like *Skinner* is whether procreation is a constitutionally protected liberty; the rhetoric of equality simply sidesteps the issue. Yet, the Court held the Oklahoma statute violative of equal protection. To the extent that Justice Douglas was implying that the legislature lacks power to prevent transmission of hereditary criminal traits by sterilization (and this seems to be the essence of his message), he was applying the doctrine of substantive due process.

It was the egalitarianism of *Skinner* that the Warren Court adopted as its model for the protection of fundamental interests. The form of strict scrutiny which evolved during the Warren Court era, however, placed too heavy a burden of persuasion on the government. The government usually is unable to persuade the Court that its classification is the least discriminatory alternative available.

In cases involving alleged undue burdens on liberty the courts should focus on the extent of the burden. Due process standards require the Court to accommodate, with sensitivity, the competing interests of both the government and the individual whose interests are burdened by governmental action. Justice Harlan believed in this flexible approach. Slowly but surely, the Supreme Court is adopting his preference for a flexible balancing of interests under the rubric of due process.

Courts should not rigidly insist upon precise classifications, or upon extraordinarily important governmental ends, when legislative line-drawing excludes individuals from a privilege that would enhance their ability to exercise and enjoy fundamental rights. A recent first amendment case, *Metromedia, Inc. v. City of San Diego*, 27 suggests that a flexible balancing approach is preferable to strict scrutiny, because the rigidity of strict scrutiny hinders a

---

26. Chief Justice Stone perceived the conceptual error. “And so I think the real question . . . is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty . . . satisfies the demands of due process.” *Id.* at 544 (Stone, C.J., concurring). Chief Justice Stone probably was referring to procedural due process; the flaw in the statute which he perceived was the inability of the individual to have “a hearing and opportunity to challenge the existence as to him of the only facts which could justify so drastic a measure.” *Id.* From another viewpoint, perhaps Chief Justice Stone was trying to say that the Oklahoma statute violated substantive due process because it did not accord individuals their rights to procedural due process.

more careful, particularized, case-by-case inquiry into the competing concerns of the government and the individual whose liberties are protected by the Constitution. A San Diego ordinance was held unconstitutional on its face because it reached too far into the realm of protected noncommercial speech. The ordinance imposed substantial prohibitions on the erection of outdoor advertising signs in order to eliminate distracting hazards to pedestrians and motorists and "to preserve and improve the appearance of the City." Some exceptions to the general prohibition on outdoor advertising made the ban underinclusive to the extent that it permitted signs that could be both ugly and distracting. The ban on noncommercial advertising was also overinclusive, owing to prohibitions on communication at places where unsightly and distracting commercial signs could be erected. None of the Justices applied the least discriminatory alternative test, which is pro forma when classifications are subjected to strict scrutiny. Instead of demanding more precise classifications, the Justices analyzed the extent of the burden imposed on protected speech, and the strength of the government's interests.

Responsible balancing, which is an approach with "a capacity to identify and evaluate separately each analytically distinct ingredient of the contending interests," was a technique mastered by Justice Harlan. It compares favorably with the "new" equal protection technique of the Warren era, which connotes "scrutiny . . . 'strict' in theory and fatal in fact." We turn now to the development of the Court's "new" equal protection doctrine, which, as applied, was more of a weapon than a tool of analysis.

28. Id. at 493.
29. See Gunther, supra note 18, at 1035.
30. G. Gunther, Constitutional Law: Cases and Materials 671 (10th ed. 1980), quoted in The Supreme Court; 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 66 Harv. L. Rev. 1, 8 (1972). There is a temptation, which has developed into a tendency, to use equal protection principles in first amendment litigation. On the relationship between the first amendment and the anti-discrimination thrust of the equal protection clause, see Chicago Police Dept. v. Mosely, 408 U.S. 92 (1972); Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1976). Justice Stewart, however, joined the majority opinion in Carey v. Brown, 447 U.S. 455 (1980), on the understanding that the Court rested not ultimately on equal protection doctrine but on the first amendment: "[W]hat was actually at stake in Mosley, and is at stake here, is the basic meaning of the constitutional protection of free speech." Id. at 471 (concurring opinion). On the theme of the arguable inadequacies of the equal access principle in first amendment public forum cases, see G. Gunther, supra, at 1196. For other commentary dealing with discrete problems created by the apparent relationship between the equal protection clauses and the content neutral requirements of the first amendment, see Alexander, supra note 20, at 54-55.
THE WARREN COURT'S "NEW" EQUAL PROTECTION

In Griffin v. Illinois,31 an indigent defendant convicted of a crime could not afford to take full advantage of the one appeal to which he was entitled because he was financially unable to purchase a transcript of his trial. The state charged the same transcript fee to every person who desired to appeal, but indigents could not afford to pay the price. The Court held that Griffin had been denied equal protection and due process when the state refused to furnish him a free transcript in order to perfect his appeal. Justice Black's opinion stated:

It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e.g., McKane v. Durston, 153 U.S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.32

Equal protection of the laws calls for "procedures in criminal trials which allow no invidious discriminations,"33 and in Justice Black's view the state's system of charging a fee that indigents could not afford was invidious. As he put it, "A State can no more discriminate on account of poverty than on account of religion, race or color because the ability to pay costs in advance bears no rational relationship to a defendant's guilt."34

To the extent Justice Black was relying on procedural due process principles35 to support the Court's decision, he perhaps went too far. No one was singled out and denied an appeal owing to some alleged but disputed fact and for that reason deprived of an opportunity to be heard. The state was treating all convicted defendants who wanted to appeal in the same way. Moreover, "the transcript could be waived as a convenient but not necessary predicate to court access."36

Substantive due process principles were not violated because

32. Id. at 18.
33. Id. at 17.
34. Id. at 17-18.
35. A trial transcript is obviously helpful to appeal errors made during the course of a trial. But Griffin was not denied a transcript because of any trait peculiar to him or because of any alleged characteristics, action or tendency on his part which was disputed. Since there were no facts in dispute which, if resolved, would count against the state in the controversy over the transcript, the Court's reliance on procedural due process principles is questionable.
the state's practice of charging a uniform fee per page to cover its costs, as Justice Harlan's dissent stated, is not "arbitrary or capricious."\textsuperscript{37} A fee charged to all who wish to obtain the stenographic minutes of a trial is hardly an irrational way for the state to obtain reimbursement for its expenses. Nor is the "failure to furnish free transcripts to indigents in all criminal cases . . . 'shocking to the universal sense of justice.'"\textsuperscript{38} Since the failure of a state to provide for any appeal is not deemed shocking,\textsuperscript{39} Justice Harlan was on firm ground when he said that the state did not violate the basic values of our society which give meaning to the concept of due process of law.

Perhaps because the Court's procedural due process rationale was tenuous, it also relied upon the equal protection clause.\textsuperscript{40} The Court's reliance on a theory of equal protection was radical because the state had not discriminated against anyone. It simply charged a uniform fee. Justice Harlan argued that the Court was in fact requiring the state to treat people unequally.\textsuperscript{41} Although not intended malevolently, the state's uniform fee had a harsher impact on those, who, owing to economic circumstances, could not afford to pay the price. Justice Harlan, nevertheless, invoked the Court's traditional concept of formal equality which "requires merely that similar cases be treated similarly, 'according to one and the same rule.'"\textsuperscript{42} The Griffin Court balked at such formal equality.

The Court relied on a conception of proportional equality, taking account of each person's differing economic circumstances, and requiring disparate treatment of individuals because of those differences. This distinction between formal or numerical equality on the one hand, and proportional or substantive equality on the other, was not discussed by the Court. Nor did the Court concede that it was ordering a modest redistribution of wealth. Justice Harlan submitted that the basis for the Court's holding was simply its conclusion that the financial barrier confronting the indigent was fundamentally unfair.\textsuperscript{44} But this fundamental fairness

\textsuperscript{37} 351 U.S. 12, 37 (1956) (Harlan, J., dissenting).
\textsuperscript{38} Id. at 39.
\textsuperscript{39} Id. at 18 (main opinion).
\textsuperscript{40} Id. at 16-19.
\textsuperscript{41} Id. at 34. "It may . . . be said that the real issue in this case is not whether Illinois has discriminated but whether it has a duty to discriminate." Id. at 35 (Harlan, J., dissenting).
\textsuperscript{42} Developments, supra note 15, at 1163 (quoting Flathman, Equality and Generalization, A Formal Analysis, in EQUALITY: NOMOS IX 38, 49 (1967)).
\textsuperscript{43} Developments, supra note 15, at 1166.
\textsuperscript{44} Griffin v. Illinois, 351 U.S. 12, 38 (1956) (Harlan, J., dissenting). Justice Harlan argued that "the issue here is not the typical equal protection question of the reasonableness of a 'classification' on the basis of which the State has imposed
rationale, as Harlan later made clear, is simply substantive due process doctrine masquerading in an equal protection costume.\textsuperscript{45} Undaunted, Justice Black stressed the state's discrimination against the poor.\textsuperscript{46} But the state was not motivated by antipathy toward the poor, nor had it intended to classify on the basis of economic status. The state treated rich and poor alike.

The indigent is always at a comparative disadvantage because he is unable to afford the best criminal lawyer available. Stripped of all the rhetoric about equality and discrimination, the crucial question presented, therefore, was whether the state had an obligation to provide some minimal level of protection to help indigents who could not take meaningful advantage of the system of appellate review.\textsuperscript{47} But the Court did not see (or did not want to see) that this question pertains to substantive due process notions of fundamental fairness.

The effort to avoid a substantive due process rationale in \textit{Griffin v. Illinois} is explicable in light of the Court's post-1937 attempts to avoid acting as a super-legislature.\textsuperscript{48} The Court had often overturned state legislation that violated principles of fundamental fairness emanating, it was said, from the due process clause.\textsuperscript{49} But substantive due process doctrine was anathema to most of the Warren Court Justices,\textsuperscript{50} particularly Justice Black.\textsuperscript{51} But where the Warren Court had a will, it had a way. Justice Black's way was to rely upon the equal protection clause. The fusing of the equal protection and due process methodologies had begun. The importance of \textit{Griffin} lies in this curious development: The Court recognized that an indigent's right to appeal is fundamental only in connection with the equal protection clause, which is it-

\begin{footnotesize}
\begin{enumerate}
\item See also Michelman, \textit{The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment}, 83 Harv. L. Rev. 7 passim (1969).
\item See, e.g., Lochner v. New York, 198 U.S. 45 (1905).
\item See Gunther, supra note 30, at 42-43; see also McCloskey, \textit{Economic Due Process and the Supreme Court: An Exhumation and Reburial}, 1962 Sup. Ct. Rev. 34.
\end{enumerate}
\end{footnotesize}
self not a source of fundamental rights, while expressly recognizing that the due process clause does not guarantee anyone, rich or poor, the right to appeal a criminal conviction.\(^5\)

Griffin\(^53\) spawned a number of other cases guaranteeing the "equal protection" rights of indigents accused of crime.\(^54\) One important sequel was Douglas v. California.\(^55\) An indigent defendant had unsuccessfully sought appointed counsel to represent him on appeal (granted to all persons convicted of felonies in the California courts). The Supreme Court held that California's refusal to provide attorneys at state expense denied equal protection of the law. The Court's rhetoric was powerful: "There can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"\(^56\) The state provided appointed counsel on occasion, but only when the appellate court found after an investigation that "it would be helpful to the defendant or the court."\(^57\) This "gantlet of a preliminary showing of merit"\(^58\) did not satisfy the Supreme Court. Justice Douglas held that, "Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."\(^59\) The state drew no lines. It was the Court that was involved in line-drawing.

In his dissenting opinion, Justice Harlan contended that he could find no violation of due process, procedural or substantive, since the state may prevent the "needless expenditure of public

---


53. In Griffin, the state granted convicted persons the right to appeal. Is the policy of charging indigents for a transcript an undue burden on the right to appeal, which is a property right protected by the due process clause? The answer to this question requires weighing the state's interest in covering its costs, against the indigent's interests which are burdened. How the balance is struck requires judgment. But the balancing of interests methodology is what distinguishes substantive due process doctrine from the rationality requirement of the equal protection clause which, properly understood, requires a tolerable relationship between the challenged classification and the state's goal, but no balancing. In Griffin, there is no doubt that the state's fee requirement was closely related to its goal to obtain reimbursement for the court stenographer's minutes.


56. Id. at 355 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).


59. Id.
funds by summarily disposing of frivolous appeals."$^{60}$ That kind of screening comports with the Supreme Court's own practice.$^{61}$ Justice Harlan again emphasized that the state is not required to provide any appeal whatsoever.$^{62}$ The Court's rationale in Douglas was merely an extension of Griffin v. Illinois.$^{63}$ But Justice Harlan steadfastly opposed—on constitutional grounds—the leveling philosophy that was beginning to imbue the Warren Court opinions.$^{64}$

It was Justice Harlan's apprehension that Griffin could be extended far beyond the area of access to courts that induced him to write:

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation. . . .

> Laws such as these do not deny protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances."$^{65}$ To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society.$^{66}$

Justice Harlan and the other Warren Court Justices, obviously at loggerheads on the theoretical question raised by Douglas and Griffin. That question was whether the rationale underlying the holdings should have rested on due process or on equal protection principles or both. Justice Douglas relied primarily on equal protection,$^{67}$ striving to label as suspect$^{68}$ classifications having a harsher impact on the poor.$^{69}$ His goal was never realized.$^{70}$ What remains peculiar, however, is that the interest in a

---

$^{60}$ Id. at 366 (Harlan, J., dissenting).
$^{63}$ 351 U.S. 12 (1956).
$^{65}$ Id. (Harlan, J., dissenting) (quoting his dissent in Griffin v. Illinois, 351 U.S. 12, 34 (1956)).
$^{66}$ Id. at 361-62.
$^{67}$ Id. at 355-58 (main opinion).
$^{68}$ See also McDonald v. Board of Election Comm'r's, 394 U.S. 802 (1969).
$^{69}$ "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect . . . ." Id. at 807 (Warren, C.J.) (citation omitted).
meaningful criminal appeal\textsuperscript{71} is still deemed fundamental for equal protection purposes,\textsuperscript{72} even though there is no due process right to appeal a conviction.\textsuperscript{73}

With the exception of Mr. Justice Douglas’s opinion in \textit{Skinner v. Oklahoma ex rel. Williamson},\textsuperscript{74} prior to the Warren era, the equal protection clause was \textit{never} deemed to be a source of fundamental rights. But lack of precedent did not inhibit the Warren Court. The Justices recognized as fundamental not only the interest in a meaningful appeal in a criminal case (at least when the state guarantees an appeal as of right) but also the right to vote,\textsuperscript{75} the interest in meaningful access to the ballot,\textsuperscript{76} and the interest in migrating with intent to settle in another state.\textsuperscript{77}

What was unsettling was the Court’s selection of fundamental interests, regardless of constitutional text, legislative history, tradition, or any other source of values that is authentically rooted in the Constitution. Moreover, the Court was almost smug\textsuperscript{78} in its refusal to provide explanations, beyond misleading rhetoric about equality,\textsuperscript{79} to justify its selections of certain liberties as fundamental. It manufactured the right to vote and the “one person, one vote” standard out of whole cloth.\textsuperscript{80} The original Constitution for the most part “appears to have treated voting rights as a matter solely of state concern and permitted the states wide tolerance in deciding who could—and who could not—vote.”\textsuperscript{81} It had never been contemplated by the framers or suggested by any Justice prior to the Warren era that durational residency requirements which indirectly burden the right of interstate travel (arguably protected by the commerce clause\textsuperscript{82} and privileges and immuni-

\textsuperscript{72} The question of what constitutes a meaningful appeal is a question of degree; it is not a question of fit between a state’s classification and its goal. Therefore, in Ross v. Moffitt, id., the Court really analyzed the issue in a substantive due process mode, although it retained the equal protection analysis applied to these cases by Douglas v. California, 372 U.S. 353 (1963).
\textsuperscript{73} Griffin v. Illinois, 351 U.S. 12, 18 (1956).
\textsuperscript{74} 316 U.S. 535 (1942).
\textsuperscript{76} Williams v. Rhodes, 393 U.S. 23 (1968).
\textsuperscript{77} Shapiro v. Thompson, 394 U.S. 618 (1969).
\textsuperscript{78} J. ELY, supra note 16, at 177.
\textsuperscript{80} See Reynolds v. Sims, 377 U.S. 533, 589-625 (1964) (Harlan, J., dissenting).
\textsuperscript{82} U.S. CONST. art. I, § 8, cl. 3.
ties clauses)\textsuperscript{83} violated the equal protection clause.\textsuperscript{84} As Professor Gunther wrote:

\begin{quote}
[I]t was the "fundamental interests" ingredient of the new equal protection that proved particularly dynamic, open-ended and amorphous. "It was the element that bore the closest resemblance to the freewheeling substantive due process, for it circumscribed legislative choices in the name of newly articulated values that lacked clear support in constitutional text and history."\textsuperscript{85}
\end{quote}

But the mischief goes beyond freewheeling jurisprudence. The modest virtue of the equal protection clause, deferentially applied, is that it need not disable any governmental body from dealing with the problems that are of concern.\textsuperscript{86} When the rationality requirement of the equal protection clause is violated, the government merely has to broaden or narrow the scope of the invalidated classifications. The "new" equal protection of the Warren Court, because it really focused on fundamental interests,\textsuperscript{87} had a greater tendency to prevent the government from regulating activities that, according to the legislature, required regulation.\textsuperscript{88}

It was this "new" fundamental rights ingredient of the equal protection clause that caused Justice Harlan to elaborate his views in \textit{Shapiro v. Thompson}.\textsuperscript{89} The Court struck down a one-year residency requirement for welfare benefits on the ground that the waiting period impinged on the constitutional right of interstate travel. Justice Brennan, writing the opinion for the Court, did not bother "to ascribe the source of this right . . . to a particular constitutional provision."\textsuperscript{90} Nevertheless, he cited

\begin{itemize}
\item \textsuperscript{83} \textit{Id.} amend. XIV, § 1; art. IV, § 2.
\item \textsuperscript{84} \textit{Cf.} \textit{Shapiro v. Thompson}, 394 U.S. 618, 666-71 (1969) (Harlan, J., dissenting).
\item \textsuperscript{85} G. \textsc{GuNTHER}, supra note 30, at 671-72, quoted in \textit{The Supreme Court, 1971 Term}, supra note 30, at 8.
\item \textsuperscript{87} As Professor Perry described the oddity:
\begin{quote}
Under the so-called "fundamental interests" strand of equal protection doctrine, . . . [w]hat is disfavored is not the \textit{basis} of the classification (i.e., the trait or other factor in terms of which the class is defined) but its \textit{effect} (preventing or impeding satisfaction of a fundamental interest). If the problem is the effect of the classification, however, does it make sense to conceptualize the problem in terms of equal protection?
\end{quote}
\begin{quote}
Perry, supra note 19, at 1077.
\item \textsuperscript{88} \textit{See} Lupu, supra note 19, at 994.
\item \textsuperscript{89} 394 U.S. 618, 665-77 (1969) (Harlan, J., dissenting).
\item \textsuperscript{90} \textit{Id.} at 630 (main opinion) (footnote omitted).
\end{itemize}
United States v. Guest,\textsuperscript{91} decided three years earlier, to hold that the right to travel "occupies a position fundamental to the concept of our Federal Union."\textsuperscript{92} Accordingly, he rejected the state’s "argument that a mere showing of a rational relationship between the waiting period and . . . four admittedly permissible state objectives will suffice to justify the classification."\textsuperscript{93} Instead, he wrote:

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. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.\textsuperscript{94}

The waiting period requirement, of course, had the effect of classifying needy people on the basis of the time they had resided in the state.\textsuperscript{95} But durational residency requirements are not directed at "discrete and insular minorities"\textsuperscript{96} against which there is a "special animus."\textsuperscript{97} Thus, it seems anomalous to scrutinize strictly the burdening of the "right to travel" under equal protection principles.\textsuperscript{98} Justice Harlan suggested that it was unsound to enlarge the list of cases that trigger the compelling interest standard "to include classifications based upon recent interstate movement, and perhaps those based upon the exercise of any constitutional right."\textsuperscript{99}

When a state's classification impinges on a right guaranteed by the Constitution, Justice Harlan pointed out, "there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause."\textsuperscript{100} But the Court's recent pattern, Harlan

\begin{itemize}
\item \textsuperscript{91} 383 U.S. 745 (1966).
\item \textsuperscript{92} Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (quoting United States v. Guest, 383 U.S. 745, 757 (1966)).
\item \textsuperscript{93} Id. at 634.
\item \textsuperscript{94} Id. at 638 (emphasis on word "touches" added). The Court's use of the compelling interest standard can be viewed in either of two ways: (1) The Court did not accept the state's articulated objectives at face value, and assumed that they were pretexts designed to conceal impermissible aims (i.e., deterring needy persons from entering the state); or (2) the articulated goals were not of such overriding importance to outweigh the disadvantaged class members' interest in welfare benefits. If alternative (1) is applicable, placing the burden on the state to show that its articulated aims are not pretexts is too heavy-handed, absent the existence of a suspect classification. If alternative (2) is applicable, the Court was balancing pursuant to a substantive due process balancing approach; therefore, it was unnecessary, as well as misleading, to describe its analysis in equal protection terms.
\item \textsuperscript{95} Id. at 627.
\item \textsuperscript{96} United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).
\item \textsuperscript{97} New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 n.40 (1979).
\item \textsuperscript{98} Note, supra note 3, at 538.
\item \textsuperscript{99} Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting).
\item \textsuperscript{100} Id. at 659.
\end{itemize}
complained, was to apply the "compelling interest" test of strict scrutiny in order to protect fundamental interests not guaranteed by the Federal Constitution and regardless of the rational basis for the state's classification. Justice Harlan believed that the Court lacked authority to proceed deceptively in this mode.\textsuperscript{101}

Justice Harlan accurately traced the genesis of the Court's "new" equal protection back to\textit{ Skinner v. Oklahoma}.\textsuperscript{102} The decisional method had surfaced, he noted, "[a]fter a long hiatus . . . in\textit{ Reynolds v. Sims},\textsuperscript{103} . . . in which state apportionment statutes were subjected to an unusually stringent test [of numerical equality—one person, one vote] because 'any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.'\textsuperscript{104} The "new" equal protection had emerged again in\textit{ Harper v. Virginia Board of Elections}\textsuperscript{105} and in other voting rights cases. The trend continued in\textit{ Shapiro v. Thompson}. Justice Harlan thought this open-ended branch of equal protection doctrine was "particularly unfortunate . . . because it creates an exception which threatens to swallow the standard equal protection rule,"\textsuperscript{106} and he knew "of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental' and give them added protection under an unusually stringent equal protection test."\textsuperscript{107}

\textsuperscript{101.} \textit{Id.} at 658-63.
\textsuperscript{102.} \textit{316 U.S.} 535 (1942).
\textsuperscript{103.} \textit{377 U.S.} 533 (1964).
\textsuperscript{105.} \textit{383 U.S.} 663 (1966); see also\textit{ Carrington v. Rash}, 380 U.S. 89 (1965) (Texas statute denying certain servicemen in the armed forces the vote invalidated under strict scrutiny).
\textsuperscript{107.} \textit{Id.} at 662. The privileges and immunities clause, U.S.\textit{ Const.} art. IV, § 2, cl. 1, protects a resident of state A who travels into state B. But the applicant for welfare is a resident of state B, not a sojourner; he or she is simply ineligible for welfare. The privileges and immunities clause of the fourteenth amendment has been virtually a dead letter since the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), and it is really something of a cheat to rely on the negative implications of the commerce clause, U.S.\textit{ Const.} art. I, § 8, cl. 3, as a source of fundamental rights. The Court in\textit{ United States v. Guest}, 383 U.S. 745, 758 (1966), however, did hold that the "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution," and, therefore, the right of interstate travel is arguably protected by the fifth amendment of the Federal Constitution. But, if it is protected by the due process clause of the fifth amendment and is burdened by a state statute, the proper mode of analysis must be substantive due process, not equal protection.

One problem with the "compelling interest" test of the equal protection clause is
The proper approach, Justice Harlan submitted, was to weigh the competing interests pursuant to the due process clause. Justice Harlan, after balancing, could not conclude "that the burden imposed by residence requirements upon ability to travel outweighs the governmental interests." Justice Harlan’s position was partially vindicated last Term in *Jones v. Helms* when the Court intimated that cases like *Shapiro* should be decided directly on right to travel grounds without triggering the kind of strict scrutiny that is typical of the "new" equal protection analysis.

Justice Stewart concurred in *Shapiro v. Thompson*, and to him it did not seem to matter much whether the challenged statute was tested "against the Equal Protection Clause . . . or . . . tested against the Due Process Clause." Justice Stewart later changed its rigidity. It is too strict if it is triggered each time a durational residency requirement touches upon the fundamental interest in interstate travel. Accordingly, the Court clarified the nature of this fundamental interest as the right to migrate "with intent to settle and abide." Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974) (footnote omitted).

109. *Id.* at 677.
111. *Shapiro v. Thompson*, 394 U.S. 618, 644 (1969) (Stewart, J., concurring). In 1973, Justice Stewart was the moving force behind the renewal of interest in irrebuttable presumption analysis. For example, in *Vlandis v. Kline*, 412 U.S. 441 (1973), the Court invalidated a state’s tuition preference for bona fide residents, which turned, in part, on a durational residency requirement for unmarried students. Justice Stewart concluded that where a state “purport[s] to be concerned with residency,” *id.* at 452, the due process clause is violated if an individual is denied “the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact.” *Id.* Justice Stewart wrote that due process requires “the State [to] allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.” *Id.* This was means scrutiny with a vengeance, for it required an absolutely perfect nexus between the challenged classification and the state’s purpose.

The applicability of the irrebuttable presumption doctrine was limited drastically by the Court in *Weinberger v. Salfi*, 422 U.S. 749 (1975). The Court upheld a statutory classification that pertained to certain Social Security Act eligibility requirements for surviving wives and stepchildren of deceased wage earners. The challenged statutory classification (which is usually the case) was not universally true. Justice Rehnquist, however, wrote that there is “no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.” *Id.* at 785. Justice Stewart joined the opinion without comment.

The irrebuttable presumption approach has not yet been rejected in cases where fundamental interests are substantially burdened. See *Elkins v. Moreno*, 435 U.S. 647, 660 (1978). This approach is obviously just as strict as the “new” equal protection, and it will be necessary for the Court to adopt a more careful balancing test if it is to avoid going from the frying pan of the “new” equal protection into the fire of the irrebuttable presumption doctrine. The challenger of an ir-
Due Process Balancing Approach
SAN DIEGO LAW REVIEW

his mind. But the Warren Court continued to rely upon the equal protection clause, despite disclaimers, to conceal its zeal for displacing the legislative judgment with its own views of wise social and economic policy.

THE BURGER COURT

In 1970, Chief Justice Warren Burger assigned himself the opinion writing duty in Williams v. Illinois. Williams had been convicted of petty theft and received the maximum sentence provided by state law: one year imprisonment and a $500 fine. The state court judgment directed, as permitted by statute, that if Williams had not paid his fine and court costs by the date set for his release, he would have to remain in jail “to ‘work off’ the monetary obligations at the rate of $5 per day.” Williams argued that “every instance of default imprisonment violates either the Equal Protection and/or Due Process Clause(s) of the Fourteenth Amendment.” The Illinois Supreme Court held that “there is no denial of equal protection of the law when an indigent defend-

rebuttable presumption should have the burden of persuasion to show that a fundamental interest of constitutional significance has been substantially burdened by a statutory presumption. If such a showing is made, then the Court should balance the competing concerns to determine what kind of individualized hearing, if any, is required by the due process clause. In this situation it is difficult to make a conceptual distinction between substantive and procedural due process issues, which, if resolved in favor of the challenger, requires a procedural due process remedy.

112. See Harris v. McRae, 448 U.S. 297, 322 (1980); Zablocki v. Redhail, 434 U.S. 374, 391 (1978) (Stewart, J., concurring). In Redhail, Justice Stewart stated, “To hold, as the Court does, that the Wisconsin statute violates the Equal Protection Clause seems to me to misconceive the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications.” Id. Stewart added:

The Court is understandably reluctant to rely on substantive due process. But to embrace the essence of that doctrine under the guise of equal protection serves no purpose but obfuscation. “[C]ouched in slogans and ringing phrases,” the Court's equal protection doctrine shifts the focus of the judicial inquiry away from its proper concerns. . .

Id. at 395-96 (citations omitted).

113. Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting) (“'compelling interest' rule . . . [goes] far toward making this Court a 'super-legislature'”).

115. Id. at 236.
116. Id. (footnote omitted).
117. Id. at 238 n.7.
ant is imprisoned to satisfy payment of a fine."\textsuperscript{118} The United States Supreme Court reversed.

Previous Supreme Court decisions had tacitly approved of incarceration as a means to "work off" unpaid fines.\textsuperscript{119} But Chief Justice Burger relied on \textit{Griffin v. Illinois} and quoted Justice Black's language that "a law nondiscriminatory on its face may be grossly discriminatory in its operation."\textsuperscript{120} The Court held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."\textsuperscript{121}

Justice Harlan concurred in the result. Viewing the case as a "due process matter,"\textsuperscript{122} he determined that legislation which deprives an individual of his liberty, "his right to remain free,"\textsuperscript{123} outweighs the state's penological interests, given the existence of less burdensome alternatives.\textsuperscript{124} Justice Harlan, however, continued to adhere to his previously stated views criticizing the "new" equal protection.\textsuperscript{125} Except for Justice Harlan, all the Warren Court holdovers joined in the Chief Justice's equal protection opinion. By 1970, equal protection had become the preferred technique to review alleged invidious discrimination against indigents. Chief Justice Burger was either not ready or not able to disturb the established precedent.

Fortunately, Justice Harlan had the opportunity to write the Court's opinion in \textit{Boddie v. Connecticut}.\textsuperscript{126} This was a class action brought by indigent welfare recipients who unsuccessfully tried to file divorce actions in state courts but could not "pay either the court fees required by statute or the cost incurred for the service of process."\textsuperscript{127} Simply by reason of their indigency, many individuals were denied access to the state's divorce courts.\textsuperscript{128} Justice Harlan relied on the procedural due process cases which require "at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle

\begin{thebibliography}{99}
\bibitem{118} Id. at 238 (quoting People v. Williams, 41 Ill. 2d 511, 517, 244 N.E.2d 197, 200 (1969) (footnote omitted)).
\bibitem{121} Id. at 262 (Harlan, J., concurring).
\bibitem{122} Id. at 263.
\bibitem{123} Id. at 264-66.
\bibitem{124} Id. at 259.
\bibitem{125} 401 U.S. 371 (1971).
\bibitem{126} Id. at 372.
\bibitem{127} Id. at 374.
\end{thebibliography}
their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”129 But Justice Harlan was careful to limit the scope of his decision. Aside from the fact that payment of the fees was a necessary predicate to court access130 and that access to the divorce courts is the only way to adjust “a fundamental human relationship,” Harlan emphasized that in more than one due process case “this Court ... recognized [that] marriage involves interests of basic importance in our society.”131 Justice Harlan did not imply that marriage is a fundamental right which always triggers strict scrutiny and the compelling interest test. His enduring message is that the Court must squint hard when a state, absent “a sufficient countervailing justification,”132 denies indigents “their claimed right to a dissolution of their marriages.”133 In short, Justice Harlan was advocating a flexible, careful balancing of interests approach instead of the rigid and usually fatal compelling interest test which is typical of the “new” equal protection. Justice Harlan’s due process approach was recently emulated by the Court in *Little v. Streater*134 which held, after balancing, that an indigent defendant in a paternity action was entitled to blood grouping tests at state expense.

During the early 1970’s, the Burger Court travelled on the same equal protection road mapped out by its predecessor—sometimes backwards. There had been widespread speculation that welfare, housing, and education would be recognized as fundamental “new” equal protection interests that trigger strict scrutiny.135 These possibilities never materialized. The Court in *San Antonio Independent School Dist. v. Rodriguez*136 made it plain that it is no longer “the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection.”137 In *Rodriguez*, the Court vowed to confine its discoveries of fundamental rights to those “explicitly or implicitly guaranteed by the Constitution.”138

---

129. *Id.* at 377.
130. *Id.* at 382-83.
131. *Id.*
132. *Id.* at 376.
133. *Id.* at 380-81.
134. *Id.* at 380.
138. *Id.* at 33.
139. *Id.* at 33-34.
For the most part, the Burger Court's discoveries of fundamental interests have been based on the due process clause. The one notable exception is *Zablocki v. Redhail*,\(^{140}\) where the Burger Court apparently confirmed as "fundamental" the freedom to decide whether or not to marry. The Court invalidated a state statute which required a resident to obtain court permission to marry, if he were subject to a court order to support minor children not in his custody. After a "critical examination,"\(^{141}\) because the right to marry was "fundamental," the Court held that the statute violated the equal protection clause. The problem in holding that "all regulation touching upon marriage implicates a 'fundamental right' triggering the most exacting judicial scrutiny"\(^{142}\) was the topic of the separate concurrences of Justices Powell\(^ {143}\) and Stevens.\(^ {144}\) Justice Powell explained that the Court's approach "would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce."\(^ {145}\) If the Court were to apply *its most exacting equal protection scrutiny*, hardly any restrictions pertaining to the right to marry would survive. This lethal scrutiny would not be triggered if the more flexible due process balancing approach of Justice Harlan were used to review state restrictions on marriage.

Only Justice Stewart took the trouble to point out that the Court's decision in *Redhail*, which was based solely on equal protection principles, "is no more than substantive due process by another name."\(^ {146}\) He explained that the effect of the Court's holding was *not* to require the state "to draw its legislative classifications with greater precision or to afford similar treatment to similarly situated persons"\(^ {147}\) which is the function of equal protection. What the Court actually accomplished, Stewart pointed out, was to restrict the "basic governmental power"\(^ {148}\) to regulate marriage as it pleases, which is the "heart of substantive due process"\(^ {149}\) doctrine. Justice Stewart justly complained that the Court's embrace of substantive due process "under the guise of equal protection serves no purpose but obfuscation."\(^ {150}\)

The Court's obfuscation has not gone unnoticed by law review
commentators. Professor Lupu has observed that the Court’s frequent but inconsistent use of the equal protection clause as its authority to protect fundamental rights entangles liberty and equality as constitutional ideals.151 This tangle, Lupu notes, raises several questions: “Which new rights properly derive from the liberty strand, and which from the equality strand? Sometimes the Court tells us; other times it does not.”152 Lupu, like Justice Harlan and later Justice Stewart, argues that “the equality strand cannot and should not bear a substantive content—that equal protection, whether viewed in moral terms or process terms, should remain substantively rooted in the pure antidiscrimination concerns that . . . inspired the framers.”153

The tangling of the strands was quite evident in Maher v. Roe.154 At issue was the constitutionality of a state’s policy which permitted the use of Medicaid funds to reimburse a woman for the costs of childbirth and “medically necessary” abortions. The state, however, did not reimburse women for nontherapeutic abortions. The due process question presented was “whether the Constitution, after Roe v. Wade, affirmatively requires state subsidy of abortions for women too poor to bear the cost privately.”155 The Court’s analysis, however, “followed an equal protection mode,”156 although Justice Powell, in his effort to avoid requiring the state to “show a compelling interest for its policy choice to favor normal childbirth,”157 did examine the nature of the fundamental right identified in Roe v. Wade.158 The awkwardness of this approach suggests that the strands which the Court has used to weave equal protection and due process principles into a blurred pattern ought to be untangled.

Maher v. Roe is an important milestone back down the road mapped out by the Warren Court, because the Court rejected quite clearly the proportional equality concept that inspired Grif-fin v. Illinois.159 There were, to be sure, many other cases de-

151. Lupu, supra note 19, at 983; see also Note, supra note 3, at 529.
152. Lupu, supra note 19, at 984 (footnote omitted).
153. Id. at 985.
155. Lupu, supra note 19, at 1003 (footnote omitted).
156. G. Gunther, supra note 30, at 618.
158. 410 U.S. 113 (1973).
159. 351 U.S. 12 (1956). Justice Powell distinguished Griffin on the grounds that the case is grounded “in the criminal justice system, a governmental monopoly in
cided before the *Maher* decision which refused to build on the tantalizing Warren Court dicta suggesting the prospect of strict scrutiny for all classifications affecting the basic necessities of life. In *Dandridge v. Williams* and *Lindsey v. Normet,* for example, the Court applied its most deferential rational basis test when statutes, which had the effect of denying indigents welfare and housing, were challenged. The Court made it clear that welfare and housing, however important, were not fundamental rights; neither was education. Moreover, in *United States v. Kras* and *Ortwein v. Schwab,* indigents who respectively were too poor to file for voluntary bankruptcy and without funds to appeal a denial of welfare benefits were without constitutional remedies. The Court explained that the right to bankruptcy is not fundamental and the interest in welfare payments has far less constitutional significance than the fundamental rights recognized in the “privacy” cases.

which participation is compelled.” *Maher v. Roe,* 432 U.S. 464, 471 n.6 (1977). Moreover, he stated that “[b]ecause Connecticut has made no attempt to monopolize the means for terminating pregnancies through abortion the present case is easily distinguishable from *Boddie v. Connecticut,* 401 U.S. 371 (1971).” Id. at 469-70 n.5.

160. *See Gunther,* supra note 30, at 9, and sources cited.


162. 405 U.S. 56 (1972).


165. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973). There are at least two ways of looking at these cases. Through the equal protection prism, one could say that the legislature did not intend to burden the poor, and that any burdens imposed were in spite of, not because of, government policy. *Cf.* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). Another prism, more typical of the “new” equal protection, is to inquire whether the burdened interest is fundamental. Housing, education and welfare, however important, are not deemed related to the enduring basic values of our society. Had the nexus theory of Justice Marshall, articulated in his dissent in *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 102-03 (1973), been adopted, the Court could have continued using the equal protection clause as a source of substantive rights not explicitly or implicitly guaranteed by the Constitution. The Court rejected the nexus theory, id. at 35-37, and is now beginning to analyze the issues presented by social legislation in the mode of substantive due process doctrine which is the traditional source for identifying basic values. *See Moore v. City of East Cleveland,* 401 U.S. 494 (1977).


169. What distinguishes *Boddie v. Connecticut,* 401 U.S. 371 (1971), from *United States v. Kras,* 409 U.S. 434 (1973), and *Ortwein v. Schwab,* 410 U.S. 656 (1973), is that welfare and bankruptcy, however important, are privileges which the government is free to grant or withhold as it pleases. *Boddie,* however, involved the interests in dissolving a marriage which is an institution that relates to the basic values that underlie our society. The government has less leeway to be arbitrary when its policy runs counter to basic values. But the discovery of basic values in-
In *Maher v. Roe* the question presented was whether a state's financial pressure, albeit in the form of a carrot rather than a stick, forces a female to forego her fundamental right to an abortion. The state's selective funding made the indigent's right to have a medically supervised nontherapeutic abortion meaningless as a practical matter. But the Court held that the financial pressure which encourages childbirth is not a state-created obstacle which blocks the "pregnant woman's path to an abortion." Thus, unlike *Griffin v. Illinois* and *Douglas v. California*, the Court imposed no affirmative duty upon the state to "lift the handicaps flowing from differences in economic circumstances."

Although the issue in *Maher v. Roe* primarily involved clarification of the liberty identified in *Roe v. Wade*, the Court analyzed it as an equal protection question, and since the Court already had held in *Wade* that the interest in preserving the potential of human life is not necessarily compelling, the government's case seemed weak. But although the Court appeared to proceed in an equal protection mode, it held that constitutionally protected interests were not invaded, since the failure of the state to subsidize all abortions was not an "unduly burdensome interference with [the] freedom to decide whether to terminate . . . pregnancy." The Court's "undue burden" terminology relates not to classifications but to liberty. From this terminology, I discern a signal for retreat from the rigidity of the "new" equal protection technique.
Even before *Maher v. Roe*, the Burger Court has been retreating in somewhat disorganized fashion from the path the Warren Court had cleared. In *Ross v. Moffitt*,181 for example, the Court refused to extend the principles enunciated in *Douglas v. California*182 to discretionary appeals. Although conceding that lawyers can be helpful to indigents pursuing discretionary appeals, the Court held that the need of an indigent for a lawyer to brief and argue a discretionary appeal (after losing the first appeal as of right) is not a handicap great enough to impose upon the state any further obligation to subsidize the litigation.183 Although *Douglas v. California* required the state to provide indigents with a "meaningful appeal,"184 Justice Rehnquist found that the question is "one of degrees."185 This flexible approach captures the essence of due process balancing.186

In *Sosna v. Iowa*,187 the Court held that a state's durational residency requirement did not violate the rights of persons seeking quick divorces. Such persons were not "irretrievably foreclosed"188 from obtaining the divorces they sought. The question was whether the challenged durational residence requirement was reasonable under the circumstances.189 The Court explained that the burden on liberty created by the requisite temporary waiting period was not substantial enough to outweigh the state's interests in minimizing the susceptibility of its own divorce decrees to collateral attack.190 This kind of flexible balancing is not possible under the rigid and lethal standard applied in *Shapiro v. Thompson*.191

Thus, in the name of the equal protection clause, the Burger Court has been balancing. But during the early seventies the meld of due process and equal protection principles remained basically intact, creating the misleading impression that they were not conceptually distinct.

In a substantive due process case, even when the challengers' constitutionally protected interest is "of basic importance in our

---

184. *Id.* at 612 (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)).
185. *Id.*
186. See also *Marston v. Lewis*, 410 U.S. 679 (1973). The Court upheld a 50-day durational residency requirement in a right-to-vote case and adopted a level of scrutiny which was a far cry from *Shapiro v. Thompson*, 394 U.S. 618 (1969), though similar to a flexible due process balancing approach.
188. *Id.* at 405.
Due Process Balancing Approach
SAN DIEGO LAW REVIEW

society," the Court should not impose a virtually impossible burden of persuasion on the state. There was another indication in Moore v. City of East Cleveland that Justice Harlan's technique of sensitively balancing the relevant competing interests has appeal for some of the Justices. The Court invalidated a city's zoning ordinance which limited the occupancy of a dwelling unit to members of a single family and defined "family" in such a way that a grandmother could not share her home with her grandson without violating the ordinance. Justice Powell's plurality opinion carefully examined "the importance of the governmental interests advanced to justify the ordinance and the extent to which they were served by the challenged regulation." He did not apply the compelling interest test and did not place any extraordinarily heavy burden of persuasion on the city; nor did he insist upon the least restrictive alternative test, although he held that the city's restriction "has but a tenuous relation" to its legitimate goals. Eschewing rigid and insensitively strict formulas of scrutiny, he quoted Justice Harlan's eloquent dissent in Poe v. Ullman:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . No formula could serve as a substitute . . . for judgment and restraint.

Justice Powell's approach in Moore is preferable to the "new" equal protection in this respect. Rather than utilizing the equal protection clause as a source of fundamental interests, he relied on precedent and tradition to identify the basic enduring values in our society which were deemed to encompass the "constitutional right to live together as a family." The plurality opinion adopted a flexible balancing approach, which was sensitive both to the interests of the government and the individual whose lib-

194. See id. at 496 n.1.
195. Id. at 496 n.2, 497.
196. Id. at 499.
197. Id. at 500.
200. 431 U.S. at 500.
erty was burdened. The Court, however, gave no clear signal that the "new" equal protection was no longer a viable technique; instead, Justice Powell merely indicated in a footnote that there was no need to reach the equal protection question presented by the case.201

In *Harris v. McRae*,202 the Court stressed the point that the threshold and crucial question in an abortion funding case pertains to the liberty203 identified in *Roe v. Wade*.204 After Justice Stewart noted that the guarantees of equal protection are not a source of substantive rights205 (save for the exception identified in *Reynolds v. Sims*206), he applied the minimum rationality level of review,207 because no challenged classification discriminated against discrete and insular minorities208 and because the state's financial pressure on pregnant females did not violate the due process clause.209 Thus, a majority of the Justices in *Harris v. McRae*210 focused on the difference between equal protection principles and substantive due process doctrine. Assuming the Burger Court continues to adhere to its approach in *McRae*, the rigid compelling interest test of the "new" equal protection will be inapplicable if the challenged government action does not violate due process of law.211

*H.L. v. Matheson*212 strengthens the thesis that the Court is abandoning the "new" equal protection concept for a more flexible due process balancing approach. The plaintiff, a fifteen year old girl, was pregnant. She did not wish to inform her parents, with whom she lived, of her condition. Her physician advised her that an abortion would be in her best medical interest,213 but "he could not and would not perform the abortion, without first notifying her parents."214 The Utah criminal code215 requires a physi-

201. *Id.* at 496 n.3.
203. *Id.* at 312.
204. 410 U.S. 113 (1973).
206. 377 U.S. 533 (1964). Justice Stewart noted, "Reynolds held that if a State adopts an electoral system, the Equal Protection Clause of the Fourteenth Amendment confers upon a qualified voter a substantive right to participate in the electoral process equally with other qualified voters." *Harris v. McRae*, 448 U.S. 297, 322 n.25 (1980).
207. *Id.* at 322.
208. *Id.* at 317.
211. *See id.* at 322. ("The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties . . . .")
213. *Id.* at 400.
215. UTAH CODE ANN. § 76-7-304(2) (1974).
cian "if it is physically possible" to notify the "parents or guardian of the woman upon whom the abortion is to be performed if she is a minor."

Plaintiff proceeded to assert her rights in a class action seeking to represent "a class consisting of unmarried 'minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies but may not do so' because of their physicians' insistence on complying with 76-7-304(2)." After a hearing, the trial judge dismissed the complaint seeking injunctive and declaratory relief. The issue, as framed by the Utah Supreme Court, was "whether the statute serves 'any significant state interest' that is not present in the case of an adult, which would justify as a condition precedent to the obtaining of an abortion by a minor, the notification of her parents."

The Utah Supreme Court resolved the issue in favor of the state. The court focused its scrutiny—which was hardly strict—on the state's special interest in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision as to whether or not to bear a child. It held "[t]here is no basis to conclude this provision unduly burdens the constitutional right of the minor woman. . . ." The state court did not discuss the equal protection clause.

The Supreme Court affirmed in a six to three decision. Although the Utah courts did not narrowly construe the challenged statute to avoid a facial overbreadth challenge, the Court held that the plaintiff lacked standing to assert the rights of all unmarried mature or emancipated minors. In what has to be characterized as a flexible ad hoc balancing approach, the Chief Justice wrote that the challenged statute "gives neither parents nor judges a veto power over the minor's abortion decision . . . [and] [a]s applied to immature and dependent minors . . . plainly serves the important considerations of family integrity and pro-

217. Id. at 400 (citing Utah Code Ann. § 76-7-304(2) (1974)).
220. 604 P.2d at 912.
221. Id.
tecting adolescents." He added that "the Utah statute is reason-
ably calculated to protect minors in appellant's class by
enhancing the potential for parental consultation concerning a de-
cision that has potentially traumatic and permanent conse-
quences." The Court did not deny that the statute burdens
fundamental rights but noted:

That the requirement of notice to parents may inhibit some minors from
seeking abortions is not a valid basis to void the statute as applied to ap-
pellant. . . . The Constitution does not compel a State to fine-tune its
statutes so as to encourage or facilitate abortions. To the contrary, state
action "encouraging childbirth except in the most urgent circumstances"
is "rationally related to the legitimate governmental objective of protect-
ing potential life."

The Court rejected the contention that abortions were being
singled out for special treatment in contrast to other medical pro-
cedures, like childbirth, that do not require parental notice. The Court held, the equal protection clause notwithstanding, that
"a State's interest in full-term pregnancies is sufficiently different
to justify the line drawn by the statutes." The Court imposed
no heavy burden of persuasion upon the state to show that the
medical decision to carry an unwanted fetus to term carries less
risk of harm to the pregnant female than an abortion. Indeed, the
state presented no evidence that the Court cited to justify the ab-


sence of a provision requiring the treating physician to inform
parents that their child (his patient) is pregnant and has elected
to carry the fetus to term. The Court, nevertheless, assumed that
"[i]f the pregnant girl elects to carry her [unwanted] child to
term [rather than notify her parents of an election to abort], the
medical decisions to be made entail few—perhaps none—of the
potentially grave emotional and psychological consequences of
the decision to abort." In short, at least with respect to the mi-
nor's fundamental right to decide whether to terminate a preg-
nancy, if the due process clause is not violated, there is
apparently no longer a rigid, strict scrutiny of the state's classifi-
cations. Thus, the "new" equal protection concept of the Warren
Court seems to have lost its appeal for the Burger Court.

Chief Justice Burger did not mention, even in passing, the
"compelling interest" standard. Nor did Justice Powell, who
stressed the flexibility of his due process analysis. "Numerous
and significant interests compete when a minor decides whether

223. Id. at 411 (footnotes omitted).
224. Id. at 412 (footnotes omitted).
225. Id. (quoting Harris v. McRae, 448 U.S. 297, 325 (1980)).
226. Id.
227. Id.
228. Id. at 412-13.
or not to abort her pregnancy. . . . None of these interests is absolute. Even an adult woman’s right to an abortion is not unqualified.”

For further emphasis, Justice Powell wrote:

The circumstances relevant to the abortion decision by a minor can and do vary so substantially that absolute rules—requiring parental notice in all cases or in none—would create an inflexibility that often would allow for no consideration of the rights and interests [of the parents and state].

Justice Stevens also counselled flexibility:

The fact that a state statute may have some impact upon a minor’s exercise of his or her rights begins, rather than ends, the constitutional inquiry. Once the statute’s impact is identified, it must be evaluated in light of the state interest underlying the statute.

As Justice Marshall noted in his dissent, “The decision of the Court is narrow.” The decision might be explicable on the ground that a minor was involved—which traditionally dilutes the Court’s level of scrutiny. Furthermore, the Court did not unambiguously concede that the fundamental right of the plaintiff was substantially burdened; thus, the Court has not yet explicitly disavowed the Warren Court’s doctrinal legacy. The Court, nevertheless, is obviously heeding Justice Harlan’s admonition not to use strict scrutiny mechanically each time human activities characterized as fundamental are affected in order to “give them added protection under an unusually stringent equal protection test.” Thus, from the perspective of constitutional theory, the tangled strands of equal protection and due process are in the process of being separated. The movement in this direction is gaining momentum. It would be a welcome development if never

229. Id. at 418-19 (Powell, J., concurring) (citing Roe v. Wade, 410 U.S. 113, 154 (1973)).
230. Id. at 420 (footnote omitted).
231. Id. at 421 (Stevens, J., concurring).
232. Id. at 425. Justice Powell, joined by Justice Stewart, stressed in his concurring opinion that the decision leaves open the question of whether the statute “unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification.” Id. at 414.
233. In Bellotti v. Baird, 443 U.S. 622, 633 (1979), Justice Powell wrote, “The Court long has recognized that the status of minors under the law is unique in many respects.” He also explained that, “The unique role in our society of the family, the institution by which ‘we inculcate and pass down many of our most cherished values, moral and cultural,’ requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children.” Id. at 634 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion)).
the twain shall meet again.\footnote{235} More than sterile preferences for verbal nuances or symmetry are at stake. The confusion generated by the Warren Court's odd marriage of equal protection and due process principles places too heavy a burden of persuasion on the state in the "new" equal protection cases. This is a perversion of the equal protection clause. Absent a suspect or disfavored classification, the rationality requirement is the essence of equal protection doctrine. It is the test in the great majority of cases which do not involve suspicious classifications that trigger either the strict or the intermediate level of scrutiny. Although enforcing the requirement of a reasonable classification involves judgment, it does not involve an evaluation of the importance of legislative ends.\footnote{236} A classification is either overinclusive or underinclusive, or it is not. The only burden on the state, at most, is the plausible articulation of its ends and the reasons that justify its classification.\footnote{237}

Justice Marshall opposes across the board application of the rationality requirement. His concept of the sliding scale permits the Court to balance in a wide variety of equal protection cases depending on its view of the importance of the individual's interest which is burdened and the relative suspiciousness of the classification which is challenged. In Justice Marshall's words,

\begin{quote}
We must consider the substantiality of the state interests to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests. Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake and the invidiousness of the particular classifications.\footnote{238}
\end{quote}

The Court has not adopted this approach in the equal protection cases, probably because Marshall's sliding scale is not limited to interests that would, if burdened, justify heightened scrutiny.

Justice Marshall's sliding scale appears to be an interest balancing approach that blurs the differences "between the equal...

\footnote{235} "Oh, East is East, and West is West, and never the twain shall meet..." Rudyard Kipling, the Ballad of East and West.

The affinity is understandable.

\begin{quote}
[A] mastiff dog
May love a puppy cur for no more reason
Than the twain have been tied up together. . . . .
\end{quote}

Alfred, Lord Tennyson
Queen Mary, act I, scene IV.

\footnote{236} See G. Gunther, supra note 30, at 42-43.
\footnote{237} See id. at 46-47.
Due Process Balancing Approach

SAN DIEGO LAW REVIEW

protection and the due process methods of review.” An ends-oriented sliding scale, to the extent it is limited to interests with constitutional significance, is an unnecessary addition to the equal protection clause if the Court adheres to the substantive due process methodology of Justice Harlan. In the words of Justice Harlan (reiterated in Zablocki v. Redhai by Justice Stewart) the Court’s focus is on:

the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen.

Justice Harlan believed that a frank recognition of the Court’s power under the interests balancing approach pursuant to substantive due process principles would lead to more self-discipline, which is often absent if the Court is preoccupied with “equalizing” rather than with analyzing the rationality of the legislative enactment in relation to legislative purpose. The Court in Harris v. McRae was clearly not preoccupied with “equalizing.”

CONCLUSION

A Supreme Court that is preoccupied with equalizing, or with providing some minimum level of protection for individuals, will intensify its level of scrutiny whenever fundamental rights are substantially burdened because of classifications such as those based on age, residence, intelligence, educational background, health or ability to pay. But if the displeasing classification in question is not suspect or suspicious in the same way that classifications based on race, religion, sex, alienage and illegitimacy are, the Court should not insist on the least discriminatory alter-

239. Note, supra note 3, at 547. Justice Marshall’s sliding scale approach would be less objectionable if it focused solely on a tighter fit between the challenged classification and a legitimate end. When fundamental interests are at stake, the Court certainly should not rubber stamp classifications, but introduction of an ends scrutiny component invites excessive judicial activism.


242. Harlan wrote: “An analysis under due process standards, correctly understood, is, in my view, more conducive to judicial restraint than an approach couched in slogans. . . that blur analysis by shifting the focus away [from the balancing of interests].” Id.

243. Id.
native. Strict scrutiny should be reserved for classifications which historically reflect popular but misleading stereotypical assumptions about the inferiority of a group because of a trait that is not indicative of its members' worth.

This is not to say that the Court should not continue to inquire whether a burden on rights of constitutional significance is justified by the state's interests. Indeed, the balancing of competing interests may be necessary. But if the Court determines that there is no substantive due process violation, there is no need to apply a stricter test than the deferential requirement, which inquires whether the challenged classification is rationally related to a legitimate purpose. As the Court intimated, and Justice White, concurring, made plain in Jones v. Helms,\textsuperscript{244} the reason for insisting upon a test stricter than rational basis disappears when the burden on constitutional rights is justified, and the state's classification is not suspect or suspicious.

When the Court combines its equal protection and due process clause doctrines, as the Warren Court did, the combination often has a synergistic effect that enables the Court to act more like a superlegislature. Justice Marshall's sliding scale test in equal protection clause cases does the same, although it is less rigid than the "compelling interest" test. But Justice Harlan always preferred a more restrained approach to equal protection cases, and it is his flexible due process balancing approach that is being revitalized by the Court.

\textsuperscript{244} 452 U.S. 412, 427 (1981) (White, J., concurring).
Due Process Balancing Approach

San Diego Law Review

[Vol. 19: 737, 1982]