EQUAL PROTECTION, "GENERAL EQUALITY" AND ECONOMIC DISCRIMINATION FROM A U.S. PERSPECTIVE

Gerald L. Neuman

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INTRODUCTION

The evolution of a country's constitutional law reflects both the particular historical experiences of the country and general trends of intellectual history shared among countries. The United States inherited its human rights tradition from Europe. Although much of its development has been self-referential, implicit reliance on broader intellectual trends and even explicit invocation of European thinkers and European legal developments have also contributed. Meanwhile, U.S. constitutionalism has been influential in other countries, and received special attention-which does not mean unquestioning imitation-in Germany. [FN1]

In the field of constitutional equality, the U.S. practice of regarding equality before the law as a norm that prohibits arbitrary legislation, and not just as a guarantee of the equal application of laws by judges and administrators, influenced debates on the interpretation of the Weimar Constitution, [FN2] and has become important constitutional doctrine under the post-war German constitution, or Grundgesetz (GG) of 1949. [FN3] U.S. case law was closely studied in the 1920's by Professor Gerhard Leibholz, later a Justice of the Federal Constitutional Court, who approved its focus on "objective arbitrariness"-the objective absence of any reasonable justification for unequal treatment. [FN4]

U.S. equality law has evolved considerably since the 1920's, partly by rejecting some of the cases that influenced German constitutional thinking. That evolution has not yet produced a consistent and stable doctrine, however, and methodological disagreements persist. German equality law (which has not ignored later developments in the United States) has also evolved, and has supplemented the inquiry into objective arbitrariness with other concepts. One might therefore ask whether U.S. and German equality law might reconverge; whether the modern German constitutional experience offers solutions to the dilemmas of U.S. equality law; and whether U.S. experience offers insights into German practice. Or are conditions in the United States and Germany insufficiently comparable for convergence to be likely or desirable? Or, even if conditions are comparable, has the path of constitutional development in each country led their conceptions of equality away from a common basis, so that convergence is not feasible? It is with these questions in mind that I will discuss "general equality" law from the United States perspective, with specific attention to economic discrimination.

I. A QUICK HISTORY OF EQUAL PROTECTION LAW

It would be useful to begin with a quick summary of the development of equal protection law

in the United States.

The original U.S. Constitution of 1787, and the Bill of Rights of 1791, did not include a general guarantee of equality. There were a number of narrowly directed provisions addressing particular aspects of equality, such as the prohibition on titles of nobility, [FN5] and guarantees of equal treatment of the several states [FN6] and their respective citizens. [FN7] The absence of a general equality guarantee is hardly surprising, given that a majority of the states permitted slavery, and that slavery in the United States took a racialized form that also entailed the imposition of legal disabilities on free blacks.

Contention over slavery led to the Civil War of 1861-65, and the victory of the North resulted in the abolition of slavery by the Thirteenth Amendment in 1866. It soon became clear that formal abolition of slavery was not sufficient to prevent the reestablishment of the Southern states' system of racial domination. The Fourteenth Amendment was then adopted in 1868 to ensure a degree of federal control over the rights of individuals in the states. (The Bill of Rights of 1791 had been understood as limiting exercises of federal power, not exercises of state power.) [FN8] The first section of the Fourteenth Amendment guaranteed both federal and state citizenship to persons born in the United States, [FN9] prohibited the states from abridging any of the "privileges or immunities" of U.S. citizens, prohibited the states from depriving any person of life, liberty or property without due process of law, and finally forbade a state to "deny any person within its jurisdiction the equal protection of the laws." [FN10]

Although one obvious purpose of this Equal Protection Clause was to address the Southern states' pervasive discriminations against their African-American citizens, it was phrased in great generality, and disputes about its proper interpretation soon arose. In its first adjudication under the Fourteenth Amendment, a five-to-four majority of the Supreme Court expressed a narrow expectation concerning the effect of the Clause:

> We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. [FN11]

Some of the dissenters, however, viewed the grant of a monopoly on the performance of a common occupation (slaughtering livestock) as not only within the purview of the clause, but a discrimination forbidden by it. [FN12]

Over the following two decades, the Court frequently rejected equal protection challenges to regulatory legislation, observing that the states were entitled to make reasonable distinctions between different categories of persons or activities. Increasingly, the opinions appeared to assume that the Equal Protection Clause condemned legislation that imposed un reasonable distinctions, in areas wholly unrelated to racial discrimination.

The Court's sense of reasonableness was informed by the anti-regulatory and anti-redistributive philosophy that also guided its interpretation of other constitutional provisions in the years between 1890 and 1937. In this period, known now in retrospect as the Lochner era (after the 1905 decision

in *Lochner v. New York* [FN13]), the Court aggressively protected implied rights of property and contractual liberty against new regulatory approaches. The Court often invoked the guarantee of due process of law under the Fifth and Fourteenth Amendments as the vehicle for these interventions, a doctrine that later received the pejorative label of "substantive due process."

The first actual beneficiaries of the reasonableness approach to equal protection were railroad companies. In 1897, the Court invalidated a Texas statute providing that in suits for debt against railroad companies, a prevailing plaintiff would receive attorneys' fees from the losing party, but a prevailing defendant would not. [FN14] The majority explained that a legislative classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." [FN15] It saw no reason to believe that the railroad business involved a peculiar danger of nonpayment of debts, or any other reasonable basis for the distinction. It rejected the dissent's hypothesis that railroad companies in Texas might have been accustomed to resist payment of small claims, and insisted that to uphold the statute on such speculative grounds would "subjec t certain individuals or corporations to hostile and discriminating legislation." [FN16]

The adoption of reasonableness as a standard for judging equal protection claims also extended to the evaluation of race discrimination claims. In the notorious case of *Plessy v. Ferguson*, the Supreme Court upheld legislation mandating the racial segregation of railway cars. [FN17] The majority concluded that, given existing social attitudes, the legislation reasonably promoted the comfort of passengers and the preservation of the public peace and good order. [FN18]

Equal protection methodology was eventually caught up in the repudiation of Lochner era jurisprudence in the midst of the Great Depression. The Supreme Court's enforcement of laissez-faire economic ideology and narrow conceptions of federal regulatory power led to confrontation with New Deal efforts to relieve unemployment and revive the economy. In one of the central developments of twentieth-century U.S. constitutional law, the Court backed down in the mid-1930's, dramatically modifying its interpretation of a variety of constitutional doctrines. The Court renounced the enforcement of unwritten constitutional rights to autonomy within the market, accepted the legitimacy of redistributive goals, and adopted a stance of extreme deference to legislative determinations of the utility of regulation. In the equal protection context, rather than deciding for itself whether the distinctions drawn in economic regulation bore a just and reasonable relationship to some proper public goal, the Court would uphold legislation if any rational basis supporting it could be conceived.

Even while articulating its refusal to exercise independent judgment on economic policy, however, the Court identified some exceptional circumstances in which a more active judicial role could be justified. In the famous *Carolene Products* footnote, Justice Stone suggested that more searching judicial inquiry might be required under the Fourteenth Amendment where the legislation "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation," or where "prejudice against discrete and insular minorities . . . curtail [s] the operation of those political processes ordinarily to be relied upon to protect minorities." [FN19] These categories in fact provided some of the bases of later Warren Court and Burger Court activism.

The modern era of equal protection law began with *Brown v. Board of Education*, [FN20] the Warren Court's overruling of the "separate but equal" approach to racially segregated public schools. On the same day that it decided *Brown*, the Court struck down the federal government's system of segregated schools in the District of Columbia, confirming that the Due Process Clause of the Fifth Amendment imposed obligations on the federal government substantially equivalent to those imposed on the states by the Equal Protection Clause of the Fourteenth Amendment. [FN21] Ironically, this recognition of an equal protection component in the Fifth Amendment revalidated the idea that due process includes substantive as well as procedural aspects.

By the time of Chief Justice Warren's retirement in 1969, the Supreme Court had articulated a "two-tier" approach to the Equal Protection Clause. In the higher tier, legislation and other government measures drawing distinctions on the basis of a "suspect classification" like race were subject to "strict scrutiny," and would be upheld only in the rare case where the Court could be persuaded that the employment of the classification was necessary to the achievement of a compelling government interest. Strict scrutiny would also apply to the distinctions employed by government in allocating certain "fundamental" rights or interests, such as the right to vote. [FN22] Cases involving neither a suspect classification nor a fundamental right were presumably in the lower tier, where the rational basis test applied; a difference in treatment would be upheld if a state of facts could be rationally conceived under which that difference would serve any legitimate governmental interest. That test was virtually always satisfied.

Although the two-tier structure was never fully accurate in descriptive terms, it summarized major trends of equal protection law in the Warren Court years: the condemnation of racial segregation; the reapportionment of state election districts on the basis of the one-person, one-vote principle; the elimination of most eligibility criteria for voting; and the continued extreme deference to government regulation of business. A central problem of equal protection jurisprudence was identifying the criteria that would put a classification or an interest in the higher tier, where greater judicial protection would be provided. Since the 1970's, the nominal tier structure became more complicated as additional classifications, like illegitimacy, alienage and gender were recognized as suspect or quasi-suspect, but the problem of justifying extraordinary judicial solicitude under some form of "heightened scrutiny" remained. [FN23] Similarly, disputes over the identification of rights or interests as "fundamental" for equal protection purposes has continued.

Meanwhile, the methodology of review in the lowest, rational basis tier has also sparked disagreement. One can confidently say that a randomly chosen statute has a very high probability of surviving rational basis review, but it is extremely difficult to predict which statutes will be struck down.

Commentators and several of the Justices themselves have expressed dissatisfaction with the tier formulation, both from descriptive and from normative perspectives. A viable doctrinal substitute, however, has not yet been found.

II. THE PROBLEMATIC CONTENT OF GENERAL EQUALITY

Thus, although the Fourteenth Amendment contains only one broadly worded equal protection

clause, in contrast to the multiple equality clauses of GG Article 3, [FN24] judicial interpretation has subdivided equal protection analysis into different inquiries for different kinds of discrimination. The paradigm of racial subordination that motivated the adoption of the clause in the United States receives the strictest judicial inquiry. One might then ask whether the lower tier of rational basis review represents a different aspect of the same underlying norm, and whether the doctrinal structure offers an appropriate method for implementing that norm.

Justice Stevens, for example, has argued that " [t]here is only one Equal Protection Clause," and that its basic requirement is impartiality in governance. [FN25] He has argued against the tier structure, and in favor of a more direct examination of whether the law under challenge is one that an impartial legislature could have adopted. Others have seen the norm as a requirement to "treat each individual with equal regard as a person," [FN26] or a prohibition on differences in treatment that merely implement a "naked preference" for favoring one group over another, rather than serving a public value. [FN27]

Whether these generally phrased principles can account for all of equal protection law depends upon the concrete consequences that can be drawn from them. For example, how would an impartial legislator respond to the diverse desires and conflicting conceptions of the public good expressed by different constituents? Moreover, how would impartial legislators resolve disagreements among themselves? Results produced by group decisional processes may involve more compromise among distinct visions of public policy than the work of a single law-giver. As economic analysis can inform us, mediation of group conflict is itself a valuable activity, and legislatures may rationally limit the costs of their own processes by seeking closure. These considerations may suggest that every statute is tautologically rational. It serves the purpose of producing its effects, including the secondary effects of resolving conflict. If this analysis is accepted, then rational basis review has no function to serve.

Rational basis review has also been criticized by process theorists like Dean John Hart Ely, who argue in the style of *Carolene Products* that judicial intervention is justified only to correct systemic defects in the democratic process. Lower tier cases involve no identified democratic defect, but simply an outcome that appears unacceptable to the judges. Such evaluations tend to rest on implicit disagreements on issues of value between the legislature and the judges, and process theorists consider these disagreements an improper basis for judicial intervention. [FN28]

While process theory attempts to minimize the opportunity for judicial value imposition in constitutional adjudication, critics of process theory emphasize that reference to values outside the constitutional text is inevitably necessary for deciding equal protection claims (among others). Some scholars contend that equality is an "empty idea" depending entirely on other principles for its content, [FN29] while others regard it as having some content but still requiring supplementation. [FN30] The question then is where judges should seek the values that make equal protection a concept robust enough to apply. To some extent, other values for deciding equal protection cases can be provided by other elements of the constitutional order, like freedom of speech or the nature of the federal union. [FN31] The more general suggestion to define equality as the requirement of "justice" would threaten to convert the equal protection clause into a vehicle for comprehensive enforcement of the judges' own conceptions of justice. At least since 1937,

equal protection doctrine has sought a more limited role.

The civic republican defense of rationality review rejects on normative grounds the pluralist bargaining account of democracy on which the economic and process-based critiques rely. It insists that the legislative process must, at least aspirationally, be carried out as an effort to shape and enforce public values. Explaining a statute as a response to the "naked preference" of an interest group, or as a compromise among the "naked preferences" of several interest groups, is constitutionally insufficient. In this interpretation, equal protection condemns laws that are "arbitrary" in the sense of resting wholly on the will of a group powerful enough to get its way. One challenge for this interpretation, of course, is how to distinguish a naked preference from a public value; for example, does a statute exempting a forest region from the endangered species act reflect the power of the timber lobby or a public desire to preserve lumberjacking as a way of life?

In actual operation, rational basis review usually does not attempt to determine whether a particular statute was the product of a legislative process in which public values were discussed, or one in which naked power was exercised. Under the classic rational basis test of the post-1937 period, a statute may be upheld with reference to a purpose that was never mentioned in the legislature, and never even proffered by the attorneys defending the statute. [FN32] Similarly, the relationship between the statutory discrimination and its alleged purpose is evaluated not in light of the facts believed by the legislators, but in light of any facts that they could reasonably have believed that would support the statute. Thus the judicial test as articulated exercises severe restraint in policing adherence to the supposed underlying norm.

One should also ask whether these proposed unifying norms are strong enough to entail the strict judicial demands made in the higher tier cases. The rigidly enforced limits on the use of racial classifications-including, in recent years, affirmative action-evidently reflect something more than a ban on implementing naked preferences. Equal protection law affords special judicial attention to discrimination along lines that have historically been the vehicle for pervasive disadvantaging of groups. This attention has been attributed to a nonsubordination principle, [FN33] which does not appear to be implicated in most cases overturning nonrecurrent irrational discriminations.

In the 1970's, Justice Thurgood Marshall proposed a different kind of unification of equal protection methodology. His "sliding scale" approach subsumed the dichotomous tiers in a two-dimensional continuum, in which the strength of justification demanded for an unequal treatment would vary with both the perceived "invidiousness" of the classificatory criterion and the importance of the right or interest impaired by the discrimination. The inclusion of both rights and interests in the sliding scale reflected the effort in the late 1960's and early 1970's to reduce inequalities in the provision of affirmative government services and benefits that were not independently required by the federal Constitution, like welfare payments and public education. One might phrase this sliding scale approach in terms of equal respect by suggesting that there are certain interests so pressing or so highly valued within the society that one would be unlikely to tolerate their denial to persons whom one regarded as equals, so that both suspicious classifications and nonfulfillment of fundamental interests serve as interrelated indicators of a violation of the norm of equal respect.

The Burger Court majority rejected both the sliding scale articulation and heightened scrutiny for "fundamental interests." However, Marshall's formulation appears to account better than the orthodox description for a few important precedents in which the combination of a reputedly nonsuspect classification with a reputedly nonfundamental right nonetheless produces heightened scrutiny and invalidation of the statute. One such line of cases involves the effect of payment requirements in the criminal and civil justice systems; although neither discriminations against the poor nor the prerequisites to initiating a lawsuit or an appeal usually triggers heightened scrutiny, on several occasions the Court has held unconstitutional the exclusionary effect of payment requirements on the poor. [FN34] Another example is *Plyler v. Doe*, invalidating Texas's refusal to provide free public education to alien children unlawfully residing in the state. [FN35] A prominent recent example is *Romer v. Evans*, invalidating the result of a state referendum that prohibited the state and local governments in Colorado from adopting laws or policies protecting any person against discrimination on grounds of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." [FN36]

The hypothesis of the sliding scale appears particularly intriguing in the German comparative context because of its similarity to the Federal Constitutional Court's "new" framework for applying the general equality clause developed since the 1980's. [FN37] Stated briefly, the German Court now explains that the degree of justification required for an inequality of treatment varies. At a minimum, general equality always requires nonarbitrary government action, in the sense that some objective reason is required for legal distinctions. More strongly, however, when legislation treats different groups of persons differently, or has negative effects on the exercise of constitutionally protected rights, the absence of arbitrariness does not suffice. Instead, reasons must exist whose kind and weight justify the unequal treatment. In other words, distinctions turning on personal characteristics and distinctions affecting constitutional rights are subject to a proportionality requirement. [FN38] Both Senates of the Court employ this framework, to which they have each added their own further refinements.

The juxtaposition of U.S. doctrine-and the cases it cannot explain-with German doctrine immediately suggests the question whether the modern German constitutional experience offers solutions to the dilemmas of U.S. equal protection law. Could a version of the German framework bring greater predictability to general equality analysis in the United States, and would the results it produced be acceptable there?

III. GENERAL EQUALITY AND ECONOMIC REGULATION

As mentioned above, since the 1940's the equal protection norm has placed very little constraint on government regulation of business activity in the United States. Essentially, the courts have treated business entities as able to safeguard their own interests in the lawmaking process, [FN39] and have not perceived typical forms of economic regulation as threatening values entitled to special constitutional protection.

That modern approach contrasts with the application of the equal protection principle at the turn of the century. After the Fourteenth Amendment had been adopted, influential writers and judges expounded the Equal Protection Clause as embodying a general condemnation of "class

legislation," laws that single out a particular class of persons for unequal treatment. The danger that they saw as especially threatened by class legislation was redistribution of property from the wealthy few to the less wealthy majority. This concern about the redistributive potential of democracy was not new in the U.S. constitutional tradition. The original federal Constitution contained a provision intended to prevent the states from enacting laws for the relief of debtors, and the Bill of Rights prohibited the federal government from expropriating private property. Madison's famous analysis of politics in The Federalist No. 10 had identified the combination of the less-propertied against the more-propertied as a prime example of faction. [FN40] Moreover, the Republican Party's opposition to slavery had been articulated in the framework of a free labor ideology that emphasized equality of opportunity within a competitive marketplace.

Thus, although the legislative history of the Equal Protection Clause addressed entirely different problems, elements existed to support the appropriation of the clause by corporate interests in the late nineteenth century. So fundamental a step as the extension of the guarantee from natural persons to juristic persons was taken without dissent and even without the felt need for explanation. [FN41] At times, the Supreme Court of the Lochner era treated the Due Process, Equal Protection and Takings Clauses as fluid general bases for shielding property and its profitable employment. As part of this protection, the Court treated property holders as constitutionally entitled to enjoy the disparities in bargaining power that their property conferred. It tended to view legislation compensating for these disparities as the vindication of a factional private interest, rather than a legitimate public one.

The New Deal Court repudiated this understanding of the Fourteenth Amendment in the 1930's. The Court recognized the inevitable creative role of the positive legal order in creating the framework for economic interactions, and no longer assumed that the existing form of the market was either natural or constitutionally privileged. The Court ceased enforcing an unwritten constitutional right to "liberty of contract" against direct government regulation or government protection of labor union activity.

The New Deal Court also ceased using the equal protection norm as a surrogate for implied property rights. Doctrinally, one element of this reversal was the articulation of the rational basis test: rather than reaching its own empirical conclusions on whether a legislative distinction was reasonable, the Court would uphold legislation if any factual basis could rationally be conceived as existing to support it. The rationale need not demonstrate a close relationship between the distinction and its underlying purpose; in the economic sphere, the Court is very tolerant of overbroad generalizations that may be instrumentally useful, and does not require employment of less restrictive alternatives or a proportionality test. Moreover, the Court will hypothesize purposes as well as facts, rather than limiting its attention to demonstrable purposes of the statute, or even to those proffered by counsel. Conversely, the Court also tolerates underinclusiveness, especially on the ground that legislative reform may proceed "one step at a time." That is, legislatures need not pursue a reform to the limits of its logic immediately, but are entitled to experiment or to address the aspects of the problem that seem to demand the most urgent attention-and courts will presume that they have done so, without explicit confirmation, and without requiring that further steps actually be taken later.

At the same time, it should be emphasized, the New Deal Court did not replace the laissez-faire constitutionalism of the Lochner era with its opposite, a constitutional demand for regulatory intervention. The Court took a posture of judicial restraint, and invoked the incompleteness of the Constitution. In the terms of Justice Holmes's celebrated dissent in the Lochner case, the Fourteenth Amendment did not adopt an economic theory, neither Herbert Spencer's nor John Maynard Keynes's.

The modern Supreme Court has proved remarkably committed to the practice of not using the Equal Protection Clause as a brake on economic regulation. Conservative Justices have been among the most insistent on minimizing the role of equal protection in this area. [FN42] One well-known example involves the problem of statutes that single out identified businesses for special treatment. In 1957 the Supreme Court invalidated a statute that expressly exempted the American Express Company by name from a regulatory structure for currency exchanges, insisting that even if the exemption were currently justified, one could not rationally presume that it would remain justified in the future; in 1976, in a unanimous opinion by Chief Justice Burger, the Court went out of its way to overrule that holding, characterizing it as an overly intrusive decision that departed from the uniform course of deference to economic regulation. [FN43]

Observing that equal protection principles place little constraint on economic regulation does not imply that race discrimination or sex discrimination that would otherwise be condemned will be tolerated in a business regulation context. Rather, it is the "general" equality principle that has minimal effect.

Furthermore, it should be noted that the Supreme Court has not included the express economic rights contained in the Constitution, like the Contracts Clause and the Takings Clause, within the doctrine of "fundamental rights equal protection." With regard to certain other rights explicitly or implicitly protected by the Constitution, like freedom of speech or the right to marry, discriminatory government action that does not necessarily violate the right may nonetheless trigger heightened requirements of justification under the Equal Protection Clause. This doctrine has similarities to established doctrine in Germany, under which the negative effect of unequal treatment on the exercise of constitutionally protected rights results in heightened proportionality requirements. In the United States, this doctrine has been subjected to various criticisms, two of which are mutually contradictory: [FN44] some have considered the doctrine redundant, because it merely duplicates the constitutional protection that would be afforded by direct application of the right, and some have considered the doctrine improper because the rigidity of equal protection analysis extends more protection than application of the right would.

The doctrine of fundamental rights equal protection might have contributed to solving the problem of identifying the sources of values to be used in fleshing out the equal protection norm-the values would be sought in other constitutional provisions. However, the Supreme Court's case law has been selective and underarticulated. The Court has employed this doctrine on an ad hoc basis, recognizing certain constitutional rights as fundamental for equal protection purposes without any self-conscious explanation of which rights receive this treatment and why; and even when it has been established that a right is fundamental for these purposes, it is not easy to predict when the Court will decide a case by equal protection analysis rather than by direct application of

the right. The Court does not reserve fundamental equal protection status for rights that are peculiarly susceptible to competitive harms, and it does not reserve equal protection analysis for cases that turn uniquely on problems of classification. But the important point to be made here is that the clear commitment to not using equal protection to expand contract and property rights means that the Supreme Court cannot rely upon the express list of constitutional rights as the source of the values to be employed in enforcing the equal protection norm.

The minimal role played by equal protection in business regulation in the United States contrasts strongly with the approach taken in Germany. The Grundgesetz contains a much fuller bill of rights than the U.S. Constitution does, and these include rights in the labor law field and freedom of occupation, which has been interpreted as including freedom in the exercise, as well as the choice, of an occupation. [FN45] Moreover, the Grundgesetz contains a clause guaranteeing everyone the "right to the free development of his personality," which has been interpreted as a general liberty provision and has produced a doctrine comparable to the U.S. doctrine of substantive due process, in fields both of personal liberty and economic liberty. [FN46] The Federal Constitutional Court has been willing to enforce requirements of proportionality against economic regulation restricting both the enumerated economic rights and the general liberty provision. [FN47] As Susanne Baer's discussion of the tailor's case illustrates, the Court also enforces the general equality clause against economic regulation when laws draw vulnerable distinctions. [FN48]

IV. GENERAL EQUALITY AND THE POOR

As mentioned, the late nineteenth century concern about economic class legislation focused on discrimination against the rich, not discrimination against the poor. In that period, however, the poor were the objects of explicit statutory discriminations. It was not until the second half of the twentieth century that equal protection doctrine paid serious attention to discrimination against the poor, and even then the results of that attention have been unpredictable and controversial.

The history of qualifications for voting illustrates the slow process of affording citizenship rights to all economic classes in the United States. The 1787 Constitution, by prohibiting both the federal government and the states from conferring titles of nobility, secured the first stage of the bourgeois revolution. The Constitution did not, however, define the set of qualified voters. Rather than choosing among the conflicting rules of the different states (which would be asked to ratify the Constitution), the Constitution referred federal voter qualifications to state law. [FN49] Most of the states limited voting rights not only by race and gender but by ownership of property, often land. [FN50] The abolition of property-owning requirements for voting, in order to enfranchise independent wage-earners, was achieved under the slogan of "universal male suffrage" (for whites). But in most states this universality was accompanied by requirements of tax-paying or by express exclusion of "paupers" who received public poor relief. Although attitudes towards recipients of public relief were significantly changed by the Great Depression, remnants of these exclusions survived until the 1960's, when they were invalidated by the Warren Court as invidious restrictions on the fundamental right to vote that violated equal protection. [FN51]

The dependent poor were long subject to the traditions of the English poor laws, which

required local communities to support their own and denied the indigent rights of geographical mobility. The Articles of Confederation had expressly excluded "paupers," as well as "vagabonds and fugitives from justice" from its guarantee of interstate equality, and although that exception was not carried over into the text of the 1787 Constitution, the nineteenth century Supreme Court approved of the states' power "to provide precautionary measures against the moral pestilence of paupers [and] vagabonds" entering the state. [FN52] That understanding was repudiated in 1941, when the Supreme Court struck down the traditional criminal prohibition against knowingly transporting an indigent nonresident from one state to another. [FN53] The majority, however, rested its holding on the overriding federal power to regulate interstate commerce. [FN54] Concurring opinions invoked a right to travel protected by the privileges and immunities clause of the Fourteenth Amendment. [FN55] Although both concurrences contained language redolent of equality, [FN56] none of the opinions accepted counsel's invitation to base the decision on the Equal Protection Clause.

Poverty and equal protection finally met in a series of cases involving wealth discriminations-or, more accurately, payment requirements-in the criminal process. The paradigm case was *Griffin v. Illinois*, [FN57] involving criminal defendants whose ability to appeal from their convictions was blocked by their inability to pay for a transcript of the trial. It was well-established that due process of law did not require that criminal trials be subject to appeal. But the majority held that making the availability of an optional appeal turn on a defendant's ability to pay for the costs violated (some combination of) due process and equal protection. Justice Black's plurality opinion characterized the discrimination as "invidious," and emphasized that the country was "dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law." [FN58] When first written, that characterization was substantially debatable, given that poor defendants were not automatically entitled to free legal counsel in criminal trials, but several years later the Supreme Court-relying on the Sixth Amendment right to assistance of counsel rather than the Equal Protection Clause-held that indigent defendants were entitled to appointed counsel. [FN59] Even so, the Constitution has not been interpreted as entitling the poor, or the middle class, to the quality of counsel that rich defendants can afford.

As the *Griffin* doctrine was extended to other aspects of the criminal process, and selected aspects of civil procedure, [FN60] dissenters have articulated vulnerable spots in its equal protection methodology. [FN61] The doctrine fit uncomfortably within the two-tier methodology that the Court was elaborating in the 1960's. Charging a price for a service is not, without more, irrational. If inability to pay is an invidious criterion for government action, then it would appear that all government services must be provided without charge to those who cannot afford them, and other laws sustaining the market economy may also be of dubious constitutionality. The suggestion in some of the opinions that poverty is a suspect classification that inherently triggers heightened judicial scrutiny could not be consistently implemented. On the other hand, if appealing a criminal conviction is a fundamental right whose unequal allocation triggers heightened scrutiny, then other rules limiting the opportunity to appeal should also be strictly scrutinized. The *Griffin* case and its progeny thus violate the supposed rule that either a suspect classification or a fundamental right, and not some combination of a nonsuspect classification and a nonfundamental interest, is what triggers heightened requirements of justification. Moreover, this line of cases does not involve express discrimination against the poor as such, but rather uniform payment

requirements whose adverse effects are imperfectly correlated with wealth. These cases may appear to conflict with the Supreme Court's insistence in the 1970's that "neutral" classifications that are statistically correlated with race or gender do not trigger heightened scrutiny. [FN62]

In the 1960's, as the civil rights movement was joined by the Johnson administration's "War on Poverty," arguments were increasingly articulated for the invalidation of discriminations against the poor and for the enforcement of rights to affirmative government services under the rubric of equal protection. Among the targets were legal service costs and litigation fees, inequalities in educational quality caused by local financing of public education, limitations on eligibility and levels of welfare benefits, and "exclusionary zoning" policies enabling wealthier communities to prevent the construction of housing that persons of lower income could afford.

Despite some modest successes, [FN63] the effort to make poverty a central focus of equal protection doctrine failed. The Supreme Court ultimately refused to treat poverty as a suspect classification triggering heightened scrutiny. [FN64] It insisted that heightened requirements of justification applied only where legislation employed a suspect classification or affected a fundamental right. [FN65] It rejected the proposal that "fundamental interests" that were not already constitutionally protected rights should also be recognized in equal protection doctrine, and it declined to recognize fundamental rights to welfare benefits, education, or housing. [FN66]

Several factors may account for the failure of the poverty program in equal protection law. Historically, of course, the 1968 election of Richard Nixon and his appointment of the more conservative Justices who joined the Burger Court played a role. But it is not clear how far the egalitarian reforms would have gone without this change. First, as already mentioned, it would have been difficult to reconcile the Warren Court two-tier structure for equal protection law with the treatment of inability to pay as a suspect classification. Following the paradigm of racial discrimination, that structure requires heightened justification for the employment of suspect classifications wherever they occur. Since the Court could not have invalidated payment requirements throughout the economy, it would have had to modify the structure, and Justice Marshall articulated his sliding-scale approach to equal protection largely for this purpose. [FN67] One of the most sophisticated analyses of the constitutional response to poverty, Professor Frank Michelman's 1969 article "On Protecting the Poor Through the Fourteenth Amendment," had maintained that equal treatment was not the proper goal for constitutional reform, but rather the assurance of a level of "minimum protection" that satisfied everyone's "just wants." [FN68] Supreme Court majorities, however, have balked at the degree of judicial discretion that the sliding-scale approach or the "minimum protection" inquiry would involve.

The Court's hesitancy about enforcing unenumerated rights to affirmative government services and requirements of state intervention to redress market failures may also be seen as reflecting the agedness of the U.S. Constitution. The original text is an eighteenth century document and the Fourteenth Amendment is a nineteenth century addition. Even as to the federal government, the constitutional text does little to establish affirmative duties of government action, as opposed to granting the government useful powers, [FN69] and it does even less with regard to the states, which have constitutions of their own. The judicial interpretation of the Fourteenth Amendment has included a "state action" doctrine that gives the amendment much less effect on interactions

among private parties than the German Grundgesetz has. The Court does not even see the Fourteenth Amendment as requiring a state to protect one citizen against violence by another. [FN70]

The New Deal revolution did not necessarily change this. The Court's doctrinal shift in 1937 withdrew federalism and due process obstacles to the federal government's creation of the modern welfare state. But affirming broader federal powers need not imply a constitutional obligation to employ those powers at all, or to employ them in a particular way. Supreme Court opinions have repeatedly emphasized the view that social welfare policy is a proper field for experimentation and change. And the Court based its abandonment of due process objections to redistributive government action on the recognition of a broader spectrum of public interests, not on the discovery of a constitutional mandate for redistribution. In German constitutional terms, the New Deal revolution has enabled the United States to become a social state, but it does not commit the United States to being one.

The fact that the New Deal Court's reversal was based on the assertion of judicial restraint in the economic sphere also influences the refusal of later Courts to derive from general equality strong constraints on social welfare programs. The Court has referred to economic and social welfare legislation in a unified phrase that suggests an inseparable unit of government activity. Presumably the configuration of government benefit programs affects work incentives, and labor law is interrelated with economic production. But beyond this, in terms of judicial politics, extreme deference to social welfare legislation may be the price of extreme deference to economic regulation in the United States. The German constitutional experience of active judicial involvement in both the economic and social welfare spheres might be viewed as indirectly confirming this explanation.

The Supreme Court majority's analysis in the school finance case also brings to the foreground the difficult problems of definition in evaluating discrimination against "the poor." The classification issues involved in school finance litigation were particularly complex because the disadvantaged children were residents of school districts with lesser amounts of taxable property, a characteristic that correlates unevenly with the economic status of the children's own families. [FN71] But even where economic discrimination occurs on an individual rather than an aggregate basis, deprivations resulting from poverty may be relative rather than absolute because the poor receive fewer or lower quality goods or services rather than none at all. [FN72] Poverty is not a discrete criterion, definable in clear opposition to non-poverty, but rather there is a range of lower incomes which may result in inability to pay charges at particular levels for particularly pressing needs. Unlike other classifications treated as suspect, the class of "the poor" must be functionally defined in a manner that shifts from context to context.

Furthermore, for any definition of a poverty line by income or net worth, many of the poor are likely to slip in and out of that category repeatedly over their lifetimes. On both an individual and an intergenerational level, the United States has considered itself a society in which considerable social mobility-upward and downward-exists. Moreover, it may have become glaring by now to European readers that the discussion has been phrased in terms of poverty, income and wealth, not in terms of social class. Modern U.S. constitutional law has focused heavily on racial stratification,

but has assumed that class distinctions are less entrenched and less politically salient. Against this background, the *Carolene Products* approach to equal protection analysis, which justifies judicial intervention by the need to protect "discrete and insular minorities" from prejudice in the political process, fails to facilitate the pursuit of economic equality. [FN73]

Despite all this, the *Griffin* line of cases survives, and received its most recent extension in 1996. In *M.L.B. v. S.L.J.*, the majority relied on both the Due Process and Equal Protection Clauses to invalidate a requirement that the petitioner pay the costs of preparing the record as a condition for appealing from a civil proceeding that resulted in termination of her parental rights. [FN74] The decision renews *Griffin*'s challenge to the conventional statement of equal protection methodology. For that reason, two dissenting Justices would have overruled the entire line of cases. [FN75]

V. GENERAL EQUALITY AND TAXATION

Taxation deserves separate mention in a comparative discussion of German and U.S. equality law, because of the contrasting attitudes toward the field: German jurisprudence treats tax law as an area in which the requirements of general equality take on additional force, while U.S. precedents treat tax law as an area of economic policy in which the legislature has even more discretion than usual.

[omitted]

PARTIAL CONCLUSION

In contrast to modern German equality law, modern U.S. equality law is fundamentally negative. U.S. equality law responds to instances of extreme inequality, while German equality law challenges injustice throughout the legal system. [FN129] That project is too ambitious for the post-New Deal Court. Moreover, for historical reasons, as explained, the Supreme Court cannot use the full list of express constitutional rights as indicia of the denial of equal respect for persons.

The doctrine of suspect classifications attempts to identify those groups that are peculiarly vulnerable to recurrent oppressive treatment, to denial of the equal protection of the laws in the plural, and not merely to an isolated unmerited disadvantage on one occasion that may well be counterbalanced by an unmerited advantage on another. Similarly, some aspects of fundamental rights equal protection, concerning voting rights and freedom of speech, for example, address systematic defects that may deprive individuals or groups of influence on the lawmaking process and so expose them to recurrent disadvantage. The doctrine of "tiers of review" has sought to list single factors that indicate the likelihood that an unequal treatment has the purpose or effect of subordinating a group.

U.S. constitutional law has much greater difficulty responding to the situation of a group defined by characteristics that are considered relevant bases for distinction in some legal contexts, but that could otherwise be abused for ostracism or exploitation. A few decisions have invalidated

isolated discriminations against such a group, without generating broader protection of the group in other contexts. [FN130] Sometimes, but not always, the harm inflicted by the discrimination has been particularly intense. [FN131] The case law gives individual explanations for the decisions in these cases, but not criteria unifying them and distinguishing them from other discriminations that the Court easily upholds. The ad hoc character of these interventions has sometimes provoked vehement dissents. [FN132]

While the foregoing cases involve denials of equal treatment that may be based on active hostility against a group, the poverty cases appear to indicate that passive disregard of sufficiently important interests-attributable to frugality rather than hostility-can also violate the equality norm. The range of judicial discretion potentially opened by that inquiry continues to trouble most of the Justices, even as they cautiously extend precedent in this area.

In closing, it may be worth asking whether the more limited mission of equal protection law in the United States is a strength, even from the perspective of equality. As mentioned earlier, the development of the reasonableness standard in the late nineteenth century resulted in its application in race discrimination cases as well, thereby undermining the Equal Protection Clause in the area of its original concern. One lesson to be drawn from juxtaposing the U.S. experience and Susanne Baer's account of equality doctrine in German constitutional law may be that a conception of equality as proportionality gives judges a breadth of discretion that can be employed in opposition to hierarchy, but does not guarantee that the discretion will indeed be employed to that end.

NOTES

[FN1] See, e.g, Helmut Steinberger, Historic Influences of American Constitutionalism Upon German Constitutional Development: Federalism and Judicial Review, 36 Colum. J. Transnat'l L. 189 (1997).

[FN2] See, e.g., Steinberger, supra, at 205-06 (noting contributions of Heinrich Triepel and Gerhard Leibholz); Willibalt Apelt, Die Gleichheit vor dem Gesetz nach Art. 3 Abs. 1 des Grundgesetzes, 6 Juristenzeitung 353, 355- 56 (1951) (describing Weimar debates).

[FN3] For a general overview as of the late 1980's, see David P. Currie, Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany, 1989 Sup. Ct. Rev. 333, 363-71 (1990).

[FN4] See Gerhard Leibholz, Die Gleichheit vor dem Gesetz (2d ed. 1959) (including reprint of 1st ed. 1925); Gerhard Leibholz, Equality as a Principle in German and Swiss Constitutional Law, in Gerhard Leibholz, Politics and Law 302 (1965).

[FN5] See U.S. Const. art. I, § 9, cl. 8 (ban on federal conferral of titles of nobility); id. § 10, cl. 1 (ban on state conferral of titles of nobility).

[FN6] See, e.g., U.S. Const. art. I, § 3 (guaranteeing two Senators to every state); id. § 8, cl. 1

(requiring duties, imposts and excises to be uniform throughout the United States); id. § 9, cl. 6 (prohibiting preference to be given to ports of one state over another in regulation and taxation).

[FN7] U.S. Const. art. IV, § 2, cl. 1 (entitling citizens of each state to privileges and immunities of citizens in other states). The 1791 Bill of Rights also included the Due Process Clause of the Fifth Amendment, which was construed much later as containing an "equal protection component" imposing on the federal government obligations similar to those imposed on the state governments by the Equal Protection Clause of the Fourteenth Amendment.

[FN8] See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). The 1787 Constitution did contain a small number of individual rights provisions binding on the states. See U.S. Const. art. I, § 10; art. IV, § 2, cl. 1.

[FN9] Subject to the requirement that they were "subject to the jurisdiction" of the United States at the time of birth.

[FN10] U.S. Const. amend. XIV.

[FN11] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

[FN12] See id. at 122 (Bradley, J., dissenting); id. at 128 (Swayne, J., dissenting).

[FN13] 198 U.S. 45 (1905) (invalidating state regulation of the maximum hours of work of bakers as unreasonable interference with liberty of contract under the due process clause). The choice of Lochner as eponym reflects the celebrated dissent of Justice Holmes in that case, denying the Court's authority to enforce the economic theory of laissez faire.

[FN14] Gulf, C. & S.F. Ry. Co. v. Ellis, 165 U.S. 150 (1897). The Court had earlier mixed equal protection language with references to due process and takings in decisions striking down administrative determinations of railroad rates. See Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 399 (1894); Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U.S. 418, 458 (1890).

[FN15] Gulf, 165 U.S. at 155.

[FN16] Id., at 154.

[FN17] 163 U.S. 537 (1896).

[FN18] Id., at 550.

[FN19] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The case was more important for its adumbration of future themes than for its particular holding or its precedential significance. The Court rejected a substantive due process challenge to a statute prohibiting the interstate shipment of "filled" milk, a substance in which animal fat had been replaced by vegetable oil. Arguably the statute reflected the political power of the dairy industry and destroyed

the market for a healthy food. See Geoffrey P. Miller, The True Story of Carolene Products, 1987 Sup. Ct. Rev. 397 (1988).

[FN20] 347 U.S. 483 (1954).

[FN21] Bolling v. Sharpe, 347 U.S. 497 (1954). Some later cases recognize particular areas where the effect of equality requirements on the state and federal governments diverge. See, e.g., Mathews v. Diaz, 426 U.S. 67 (1976) (discrimination against aliens). "Congruence" between state and federal equal protection doctrine received new emphasis in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), which overruled prior cases giving greater deference to race-based affirmative action programs when they were adopted by the federal government than when they were adopted by the states.

[FN22] The right or interest in voting is somewhat peculiar in the U.S. constitutional system, because the Constitution does not expressly confer the right to vote in state elections. Instead, the right to equality in voting is triggered by the state's establishment of an elective office or referendum procedure. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973) (describing implied right to equal treatment in voting). In Germany, by contrast, the Grundgesetz expressly guarantees the right to equal suffrage at the federal, state, and local levels. GG arts. 28(1), 38.

[FN23] "Heightened scrutiny" refers to any form of equal protection analysis stricter than the rational basis test, the major examples being the "strict scrutiny" of the race discrimination cases and the "intermediate scrutiny" developed in gender discrimination cases.

[FN24] Article 3 currently provides:

1. All persons shall be equal before the law.
2. Men and women shall have equal rights. The state shall promote the factual realization of the equal rights of women and men and shall work toward the elimination of existing disadvantages.
3. No one may be disadvantaged or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. No one may be disadvantaged because of his disability.

The second sentence of paragraph 2 and the second sentence of paragraph 3 were added in 1994.

[FN25] Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring); see also City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 451-52 (1985) (Stevens, J., concurring); Note, Justice Stevens' Equal Protection Jurisprudence, 100 Harv. L. Rev. 1146 (1987).

[FN26] Laurence H. Tribe, American Constitutional Law 1438 (2d ed. 1988); see also C. Edwin Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U. Pa. L. Rev. 933 (1983) (elaborating the "equality of respect" approach to the equal protection doctrine).

[FN27] See Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689

(1984).

[FN28] See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 251-52 n.69 (1980); John Hart Ely, On Constitutional Ground 399-400 n.255 (1996).

[FN29] See Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982); see also Joseph Raz, The Morality of Freedom 239-44 (1986) (arguing that the validity of egalitarian principles always rests on nonegalitarian principles that make the appeal to equality unnecessary).

[FN30] See, e.g., Erwin Chermerinsky, In Defense of Equality: A Reply to Professor Westen, 81 Mich. L. Rev. 575 (1983) (arguing that the concept of equality is incomplete but necessary); Kent Greenawalt, How Empty is the Idea of Equality?, 83 Colum. L. Rev. 1167 (1983) (distinguishing between formal equality and particular substantive principles of equality like treating one's children equally and treating racial differences as irrelevant); Jeremy Waldron, Book Review, The Substance of Equality, 89 Mich. L. Rev. 1350 (1991) (arguing that the equality principle rebuts claims based on unequal human worth).

[FN31] See, e.g., Carey v. Brown, 447 U.S. 455 (1980) (freedom of speech); see Part III, infra (discussing interstate equality cases).

[FN32] See, e.g., FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993); Flemming v. Nestor, 363 U.S. 603, 612 (1960). But see Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 46-47 (1972) (proposing a more demanding form of rational basis review that would focus on officially articulated purposes of the legislation).

[FN33] See, e.g., Baker, supra note 26 at 963-69; Tribe, supra note 26 at 1514-21 ("antisubjugation principle").

[FN34] I will return to this example in Part IV infra.

[FN35] 457 U.S. 202 (1982).

[FN36] 116 S. Ct. 1620, 1623 (1996) (quoting the text of the Amendment). One interpretation of Romer is that it represents the first step toward a recognition of sexual orientation as a suspect basis for classification, comparable to the Supreme Court's initial invalidation of a gender-discriminatory statute as irrational before the further development of gender discrimination doctrine in the 1970's. See, e.g., Andrew Koppelman, Romer v. Evans and Invidious Intent, 6 Wm. & Mary Bill of Rights J. 89 (1997). Another, perhaps more likely interpretation of Romer is that the majority found (as it said) the scope of the discrimination imposed by the referendum so vast that the ordinary framework of equal protection could not be applied, and the Court felt compelled to intervene against the open official subordination of the group. See, e.g., Daniel Farber & Suzanna Sherry, The Pariah Principle, 13 Const. Comment. 257 (1996); Roderick M. Hills, Jr., Is Amendment 2 Really a Bill of Attainder?, 95 Mich. L. Rev. 236 (1996).

[FN37] See, e.g., Susanne Baer, Equality, The Jurisprudence of the German Constitutional Court. 6 Colum. J. Eur. L. 249, nn. 59-65 (1999); Lerke Osterloh, Art. 3, in Grundgesetz Kommentar 188-90 (Michael Sachs ed. 1996).

[FN38] The operative concept of "groups of persons" is extremely broad. It does not depend on immutable characteristics or social disadvantage. In some decisions, however, the Federal Constitutional Court has stated that the degree of resemblance between the group characteristic and the designated characteristics listed in Article 3(3) (sex, parentage, race, homeland and origin, faith, religious or political opinions, and handicap) will affect the strength of justification required to uphold a law. See BVerfGE 92, 26 (51-52) (foreign sailors on German ships who reside abroad); BVerfGE 88, 87 (96) (transsexuals under 25); Baer, supra note 37 at 278.

[FN39] As will be mentioned later, discrimination by one of the states against out-of-state business does provoke judicial intervention, usually under the rubric of protection of interstate commerce, but occasionally under the rubric of equal protection. This exception could be explained either by emphasizing that the state political process is responsive to in-state business interests, or by identifying the unification of the national market as a special constitutional value in the federal system.

[FN40] The Federalist No. 10 (Madison).

[FN41] See Santa Clara County v. Southern P. R.R. Co., 118 U.S. 394 (1886).

[FN42] See, e.g., FCC v. Beach Communications, Inc., 508 U.S. 307, 313- 16 (1993) (Thomas, J.).

[FN43] City of New Orleans v. Dukes, 427 U.S. 297 (1976), overruling Morey v. Doud, 354 U.S. 457 (1957). The Dukes decision upheld a "grandfather clause" exempting two existing pushcart vendors from a city ordinance prohibiting such vendors in the French Quarter of New Orleans.

[FN44] Evidently, the choice between these criticisms depends on whether (or when) the equal protection doctrine is in fact applied so as to provide stricter limits on government action than would result from direct application of the right.

[FN45] GG Art. 9, 12.

[FN46] GG Art. 2(1); see Currie, supra note 3 at 358-63.

[FN47] See, e.g., BVerfGE 53, 135 (invalidating a disproportionate consumer protection measure that prohibited sale of chocolate mixed with puffed rice); BVerfGE 7, 377 (invalidating disproportionate barriers to opening of additional pharmacies); cf. BVerfGE 89, 214 (invalidating enforcement of loan guarantee against borrower's daughter) (discussed in Baer, supra note 37 at 272).

[FN48] See Baer, supra note 37 at 254, 264; BVerfGE 82, 126 (invalidating difference in statutory notice period for termination of white-collar and blue-collar employees). For other recent examples, see, e.g., BVerfGE 93, 386 (invalidating differential in overseas pay increments between officials and soldiers assigned to NATO); BVerfGE 85, 191 (invalidating distinction between white-collar and blue-collar employees in prohibition of nightwork).

[FN49] See U.S. Const. art. I, § 2, cl. 1 ("the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"). The members of the House of Representatives were the only officers of the federal government directly elected by the people under the original Constitution.

[FN50] See Robert J. Steinfeld, Property and Suffrage in the Early American Republic, 41 Stan. L. Rev. 335 (1989).

[FN51] See Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); cf. Turner v. Fouche, 396 U.S. 346 (1970) (invalidating property ownership qualification for membership on elected school board). The Twenty-Fourth Amendment, adopted in 1964, prohibits denial of the right to vote in federal elections because of failure to pay a poll tax or other tax.

[FN52] See Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 142-43 (1837); compare Arts. of Confederation art. IV with U.S. Const. art. IV, § 2, cl. 1.

[FN53] Edwards v. California, 314 U.S. 160 (1941).

[FN54] 314 U.S. at 174.

[FN55] 314 U.S. at 178 (Douglas, J., joined by Black and Murphy, JJ., concurring); 314 U.S. at 182 (Jackson, J., concurring).

[FN56] See 314 U.S. at 181 (Douglas, J.) (denying the poor interstate mobility would "introduce a caste system," an "inferior class of citizenship" and a "serious impairment of the principles of equality"); 314 U.S. at 184- 85 (Jackson, J.) ("The mere state of being without funds is a neutral fact-constitutionally an irrelevance, like race, creed, or color.").

[FN57] 351 U.S. 12 (1956).

[FN58] 351 U.S. at 17-19.

[FN59] Gideon v. Wainwright, 372 U.S. 335 (1963). The original purpose of the Assistance of Counsel clause had been to reverse British practices denying defendants the aid of counsel even at their own expense.

[FN60] This line of cases has been characterized by variations in the degrees of reliance on the Equal Protection Clause and on the Due Process Clause as the bases of decision. In the most recent case, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996), to be discussed infra, the majority invoked

both clauses.

[FN61] See, e.g., M.L.B. v. S.L.J., 117 S. Ct. 555, 570 (1996) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting); Williams v. Illinois, 399 U.S. 235, 259 (1970) (Harlan, J., concurring in the result); Douglas v. California, 372 U.S. 353, 360 (1963) (Harlan, J., dissenting); Griffin, 351 U.S. at 29 (Harlan, J., dissenting).

[FN62] See Washington v. Davis, 426 U.S. 229 (1976) (statistically disparate impact upon racial minority, without more, does not trigger strict scrutiny); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (gross statistically disparate impact upon women, without more, does not trigger heightened scrutiny). General equality doctrine in Germany does take notice of conduct-based distinctions that indirectly discriminate against (i.e., have disparate impact upon) groups of persons, but I am not aware of case law imposing strict review when legislation indirectly discriminates against women or against other groups protected by Article 3(3).

[FN63] See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating durational residency requirement for eligibility for welfare benefits). The school finance litigation that failed altogether at the federal constitutional level, see San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), has enjoyed greater success under a number of state constitutions, a fact attributable in part to the explicit focus on education in state constitutions.

[FN64] See James v. Valtierra, 402 U.S. 137 (1971) (upholding state requirement of specific local referendum approval before construction of any public housing project for low-income persons); William H. Clune III, The Supreme Court's Treatment of Wealth Discriminations under the Fourteenth Amendment, 1975 Sup. Ct. Rev. 289, 327-34; Ralph K. Winter, Jr., Poverty, Economic Equality, and the Equal Protection Clause, 1972 Sup. Ct. Rev. 41, 57-58, 97-99.

[FN65] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[FN66] See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare).

[FN67] See Rodriguez, 411 U.S. at 98-110 (Marshall, J., dissenting); Dandridge, 397 U.S. at 518-23 (Marshall, J., dissenting).

[FN68] Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969). Michelman suggests that John Rawls' ongoing work on the theory of justice would be useful in identifying those just wants. Id. at 14-16.

[FN69] But see, e.g., U.S. Const. art. IV, § 4 (requiring the United States to guarantee to each state a republican form of government, and to protect each of them against invasion and domestic violence (such as insurrections)). The duty to guarantee a republican form of government has, however, been construed as nonjusticiable.

[FN70] See DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989); Gerald L. Neuman, Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany, 43 Am. J. Comp. L. 273 (1995).

[FN71] See Rodriguez, 411 U.S. at 22-23. For example, some poor families are fortunate enough to be included in districts with a high proportion of wealthier families, and some poor families-even as a result of their poverty-reside near industrial properties that provide a higher tax base for their school districts.

[FN72] Id. at 23-24.

[FN73] Cf. Bruce Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 742 (1985) (identifying the inability of the Carolene Products approach to provide protection to the poor as one of the reasons for further development beyond that approach).

[FN74] 117 S. Ct. 555 (1996). The atypical use of initials to designate the parties apparently reflects the privacy protections of the domestic relations proceeding in which the case originated. One additional Justice concurred in the result, but would have based the decision solely on due process. Id. at 570 (Kennedy, J., concurring in the judgment). The narrow holding in M.L.B. may be compared with the much broader right to legal aid in civil litigation in Germany, discussed in Baer, supra note 37, at 270.

[FN75] Id. at 575 (Thomas, J., joined by Scalia, J., dissenting).

. . . .

[FN129] I do not mean to imply that the members of the Federal Constitutional Court fully achieve their visions of justice through equality law, or that their visions are uncontested, either within the Court or in the larger society. Nonetheless the Court regards itself as far freer to enforce its understanding of justice in general equality cases than a U.S. court would.

[FN130] See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (the "mentally retarded"); Plyler v. Doe, 457 U.S. 202 (1982) (undocumented alien children); As discussed in note 36 supra, Romer (sexual orientation) may also turn out to be such a case.

[FN131] In Plyler, the majority emphasized that the state's denial of education to a class of children threatened to reduce them to an exploitable caste of illiterates; in Romer, the majority emphasized the extraordinary breadth of the discrimination sanctioned by the referendum. Cleburne, however, involved a single zoning decision in a single municipality.

[FN132] See, e.g., Plyler (Burger, C.J., dissenting); Romer (Scalia, J., dissenting vituperatively).