Equal Protection in State Courts: The New Economic Equality Rights

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I. Introduction

With the culmination of the legal challenge to officially segregated public schools in *Brown v. Board of Education*[1] in 1954, many recognized the potential for the federal Equal Protection Clause to serve as a guarantor of equality. In subsequent years, some courts have tried to realize this potential by expanding the content of equal protection from civil rights to economic rights.[2] Central to this project is the belief that the principle of equality can and should be respected in fundamental areas of life where the government provides for the basic needs of its citizens. The United States Supreme Court, however, often by the narrowest of margins, generally has refused to expand the content of the Equal Protection Clause in this manner. In major areas of economic equality rights litigation, such as welfare,[3] housing,[4] education financing[5] and abortion funding,[6] the Court has declined to apply heightened

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1. 347 U.S. 483 (1954).

2. *See, e.g.*, cases cited *infra* notes 13-14.

3. *See* Jefferson v. Hackney, 406 U.S. 535 (1972) (5-4 decision); Dandridge v. Williams, 397 U.S. 471 (1970) (6-3 decision).

4. *See* Lindsey v. Normet, 405 U.S. 56 (1972) (5-2 decision).

5. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (5-4 decision).

6. *See* Harris v. McRae, 448 U.S. 297 (1980) (5-4 decision); Maher v. Roe, 432 U.S. 464 (1977) (6-3 decision).

This Article does not distinguish between regulations such as those challenged in *Maher*, which permit the funding of nontherapeutic, medically-necessary abortions, and those challenged in *Harris*, which proscribe even medically-necessary abortions. Both types of regulations restrict abortion funding, and thus fall within

scrutiny to legislation affecting economic rights that has been challenged as violating equal protection.[7] Instead, the Court has upheld the challenged state action, subjecting it to the rational basis test[8] under which courts find almost any legislation constitutional.[9]

With the failure of equal protection economic rights claims in federal courts based on the federal Constitution, focus has turned to challenging inequitable state action in state courts relying on state constitutional law. Justice Brennan, in a widely noted article on the use of state constitutions to protect individual rights, recognized and encouraged state courts to provide more expansive protection in many substantive areas than are provided under federal law.[10] Economic equality rights is one such area where federalism

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the general category of state action that denies funding for abortion services while funding other pregnancy-related medical care. Furthermore, while one could argue that non-medically necessary abortions are not comparable to medically necessary services, since a woman who is pregnant usually must take advantage of either an abortion service or some other pregnancy-related service, some pregnancy-related care is necessary.

7. *See Harris*, 448 U.S. at 322-25; *Maher*, 432 U.S. at 478; *Rodriguez*, 411 U.S. at 40; *Jefferson*, 406 U.S. at 546; *Lindsey*, 405 U.S. at 73; *Dandridge*, 397 U.S. at 485.

8. *See Harris*, 448 U.S. at 324-26; *Maher*, 432 U.S. at 478; *Rodriguez*, 411 U.S. at 55; *Jefferson*, 406 U.S. at 549; *Lindsey*, 405 U.S. at 74; *Dandridge*, 397 U.S. at 486-87.

9. Gerald Gunther, in his seminal analysis of the then emerging two-tier equal protection doctrine, described the "deferential 'old' equal protection" as involving "minimal scrutiny in theory and virtually none in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). As an example of this deferential review, in overruling *Morey v. Doud*, 354 U.S. 457 (1957), which held that the exemption of one named company from a general regulatory scheme violated equal protection, the Supreme Court noted: "*Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous." New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (per curiam). However, despite the general rule that challenged state action survives deferential scrutiny, the Court has occasionally held unconstitutional social welfare legislation scrutinized under the rational basis test. *See infra* note 275.

In contrast, Gunther described strict scrutiny as the "aggressive 'new' equal protection" which is "'strict' in theory and fatal in fact." Gunther, *supra*, at 8. The Supreme Court, however, more recently is reluctant to follow this formula. *See* United States v. Virginia, 518 U.S. 515, 533 n.6 (1996); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact.") (internal quotations omitted).

10. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*]. Specifically, Justice Brennan noted:

> Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly

has permitted greater state protections.[11] Specifically, state courts,[12] which, like the U.S. Supreme Court, have been extremely divided in these cases, have found state constitutional violations in seven out of twenty-two education financing cases decided on equal protection grounds[13] and in six out of ten abortion funding

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significant development for our constitutional jurisprudence and for our concept of federalism.

Id. at 495. *See generally* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *Bill of Rights*] (acknowledging that state courts have interpreted state constitutional provisions as giving more protection than similar provisions in the federal constitution); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976) (concluding that state courts should utilize their states' constitutions to vindicate the rights of individuals); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) (addressing state courts' failure to adjudicate constitutional rights under their state constitutions); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1331-67 (1982) (exploring the differences between state and federal constitutions and proposing a model for state constitutional law to develop separately from federal constitutional law).

11. While Justice Brennan did not specifically discuss state court adjudication of economic equality rights, his analysis applies to these rights. *See* Brennan, *State Constitutions*, *supra* note 10.

12. This Article uses the term "state court" to refer to the highest state court which most recently rendered a decision in a particular case. Any reference to prior or lower court decisions in these cases is specifically noted.

13. The following courts from seven states found that the challenged financing scheme violated equal protection: DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983) (4-1 decision); Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (4-3 decision); Horton v. Meskill, 376 A.2d 359 (Conn. 1977) (4-1 decision); Bismarck Pub. Sch. Dist. No. One v. State, 511 N.W.2d 247 (N.D. 1994); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993) (5-0 decision); Pauley v. Kelley, 255 S.E.2d 859 (W. Va. 1979) (one justice dissenting) (finding a violation on remand); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 (Wyo. 1980) (5-0 decision).

The following courts from 15 states found that the challenged financing scheme did not violate equal protection, and was constitutional: Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (two justices dissenting); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981) (unanimous decision); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975) (3-2 decision); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) (one justice dissenting); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983) (6-1 decision); Milliken v. Green, 212 N.W.2d 711 (Mich. 1973) (unanimous decision); Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (two justices dissenting); Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 655 N.E.2d 647 (N.Y. 1995); Board of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982) (6-1 decision); Board of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979) (6-1 decision); Fair Sch. Fin. Council v. State, 746 P.2d 1135 (Okla. 1987) (5-3 decision); Olsen v. State, 554 P.2d 139 (Or. 1976) (6-0 decision); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995) (unanimous decision); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988) (5-0 decision); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989) (three justices dissenting).

The courts in two states held that the challenged financing scheme did not violate equal protection, but that it violated its respective state's education constitutional provision. In Arizona, see Roosevelt Elementary Sch. Dist. No. 66 v.

cases.[14]

Bishop, 877 P.2d 806, 811, 815-16 (Ariz. 1994); Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973) (5-0 decision). In New Jersey, see Abbott v. Burke, 710 A.2d 450 (N.J. 1998); Abbott v. Burke, 693 A.2d 417 (N.J. 1997); Abbott v. Burke, 643 A.2d 575 (N.J. 1994); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

Five state courts found that their states' public school financing systems violated their state constitutions without addressing the equal protection question. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (5-2 decision) (holding the system violated the constitution's guarantee of an efficient school system); McDuffy v. Secretary of Executive Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993) (4-1 decision) (holding the system violated the constitution's guarantee of an education); Helena Elementary Sch. Dist. No. One v. State, 769 P.2d 684, 690-91 (Mont. 1989) (7-0 decision) (holding the system violated the constitution's guarantee of equality of educational opportunity); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397-98 (Tex. 1989) (unanimous decision) (holding the system violated the constitution's guarantee of an efficient school system); Seattle Sch. Dist. No. One v. State, 585 P.2d 71 (Wash. 1978) (three justices dissenting) (holding that the system violated the state constitution's guarantee of a general and uniform system).

By contrast, one state court found that its state's public school financing system did not violate its state constitution, without addressing the equal protection question. *See* Danson v. Casey, 399 A.2d 360 (Pa. 1979) (5-2 decision).

The court in one state, without analyzing the issue in terms of equal protection, held that while education was a fundamental right, the state constitution did not guarantee equal or substantially equal funding. *See* Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994).

14. The following cases in six states found that the challenged funding restrictions were unconstitutional: Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (4-2 decision) (involving a law that restricted funding of abortions to a few limited circumstances); Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986) (unanimous decision) (involving a law that restricted funding to therapeutic abortions necessary to save the life of the mother); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981) (6-1 decision) (involving a law that restricted funding to abortions necessary to save the life of the mother); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (5-1-1 decision) (involving a law that restricted funding to abortions necessary to save the life of the mother); Planned Parenthood Ass'n v. Department of Human Resources, 663 P.2d 1247 (Or. Ct. App. 1983) (3-0 decision) (involving a law that restricted funding to abortions necessary to save the life of the mother); Women's Health Ctr. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993) (two justices dissenting) (involving a law that restricted funding to those abortions necessary to save the mother's life or prevent serious injury, those that involve a fetus with a severe congenital defect or that is not expected to be delivered, and those where the mother was a victim of incest or a rape reported to a law enforcement agency).

The following cases in four states upheld the challenged funding restrictions as constitutional: Doe v. Department of Soc. Servs., 487 N.W.2d 166 (Mich. 1992) (5-2 decision) (involving a law that restricted funding to abortions necessary to save the life of the mother); Hope v. Perales, 634 N.E.2d 183 (N.Y. 1994) (unanimous decision) (involving a law that did not fund abortions for women with incomes between 100% and 185% of the poverty level); Rosie J. v. North Carolina Dep't of Human Resources, 491 S.E.2d 535 (N.C. 1997) (one justice dissenting) (involving a law that restricted funding to abortions in cases of rape or incest or where pregnancy endangered the life of the mother); Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985) (unanimous decision) (involving a law that restricted abortion funding to situations where the mother's life is endangered or

This Article explores state education financing and abortion funding cases to determine the reasons that some state courts protect economic equality rights, even though the Supreme Court has declined to do so. To accomplish this goal, this Article examines three equal protection approaches for guaranteeing economic equality rights: fundamental rights, suspect classifications and disparate impact. The Article concludes that the fundamental rights approach is the most appropriate approach for supporting economic equality rights. Furthermore, through the exploration of state education financing and abortion funding case law, this Article develops a conception of substantive equal protection that encompasses a broad array of economic equality rights.[15]

Before continuing, a few comments on the scope of this Article are necessary. First, this Article focuses on education financing and abortion funding case law as examples of economic equality rights. Since these issues have been widely litigated in the state courts,[16] they provide a rich source of cases to analyze. Furthermore, in many instances, this litigation has been successful in establishing economic equality rights. In addition, while commentators already have extensively discussed the education finance[17]

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in cases of rape or incest).

15. Recently, the Supreme Court expressed the view that the Equal Protection Clause "creates no substantive rights." Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33, 59 (1973) (Stewart, J., concurring)). This Article, however, argues that the Court has guaranteed a number of "substantive" equal protection rights, and that the rights at issue in the education financing and abortion funding contexts are also such rights. *See infra* Part IV.C.2.c.

16. *See* cases cited *supra* notes 13-14.

17. For articles discussing state education financing cases generally, see Kenneth Fox, *The Suspectness of Wealth: Another Look at State Constitutional Adjudication of School Finance Inequalities*, 26 CONN. L. REV. 1139 (1994); Michael Heise, *State Constitutions, School Funding Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507 (1991); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991); Julius Menacker, *Poverty as a Suspect Class in Public Education Equal Protection Suits*, 54 EDUC. L. REP. 1085 (1989); Alexandra Natapoff, *1993: The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755 (1994); William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993) [hereinafter Thro, *The Role of Language*]; William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989) [hereinafter Thro, *To Render Them Safe*]; Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675 (1992).

For some articles discussing decisions of specific states, see Michael J. Bartlett, Idaho Schools for Educational Opportunity v. Evans*: Education, A Fundamental Element of Liberty*, 31 IDAHO L. REV. 595 (1995); Wayne Buchanan &

and abortion funding cases,[18] this Article attempts to further these discussions by integrating these two areas into a more general substantive equal protection theory.

Second, this Article discusses economic *equality* rights, not economic rights generally. In other words, it focuses on economic rights in the context of equal protection guarantees. For example, in the education financing context, this Article does not explore the challenges to inequitable funding that rely directly on an educa-

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Deborah A. Verstegen, *School Finance Litigation in Montana*, 66 EDUC. L. REP. 19 (1991); Charles W. Burson & Jane W. Young, *School Finance Litigation: The State's Perspective*, 61 TENN. L. REV. 457 (1994) (Tennessee); Lewis R. Donelson, *School Finance Litigation: A Rural Perspective: The Magna Carta of Public Education in Tennessee*, 61 TENN. L. REV. 445 (1994); Douglas McKeige, *Inequality in Louisiana Public School Finance: Should Educational Quality Depend on a Student's School District Residency?*, 60 TUL. L REV. 1269 (1986); John A. Nelson, *Adequacy in Education: An Analysis of the Constitutional Standard in Vermont*, 18 VT. L. REV. 7 (1993); Jennifer M. Palmer, *Education Funding: Equality Versus Quality—Must New York's Children Choose?*, 58 ALB. L. REV. 917 (1995); Kathleen Smith Ruhland, *Equal Opportunity Education for State's School Children: A Missed Opportunity by the Court*, 20 WM. MITCHELL L. REV. 559 (1994); Michael P. Seng & Michael R. Booden, *Judicial Enforcement of the Right to an Equal Education in Illinois*, 12 N. ILL. U. L. REV. 45 (1991); Suzanne M. Steinke, *The Exception to the Rule: Wisconsin's Fundamental Right to Education and Public School Financing*, 1995 WIS. L. REV. 1387; Kate Strickland, *The School Finance Reform Movement, a History and Prognosis: Will Massachusetts Join the Third Wave of Reform?*, 32 B.C. L. REV. 1105 (1991); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994) [hereinafter Thro, *Judicial Analysis*]; William E. Thro, *The Significance of the Tennessee School Finance Decision*, 85 EDUC. L. REP. 11 (1994) [hereinafter Thro, *Tennessee School Finance Decision*]; Margaret Rose Westbrook, *School Finance Litigation Comes to North Carolina*, 73 N.C. L. REV. 2123 (1995).

18. For articles discussing the federal abortion funding cases, see Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

For articles discussing the state abortion funding cases generally, see David Robert Baron, *The Racially Disparate Impact of Restrictions on the Public Funding of Abortions: An Analysis of Current Equal Protection Doctrine*, 13 B.C. THIRD WORLD L.J. 1 (1993); Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 1 (1993); Linda M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433 (1996); Richard Vuernick, *State Constitutions as a Source of Individual Liberties: Expanding Protection for Abortion Funding Under Medicaid*, 19 J. CONTEMP. L. 185, 203-16 (1993).

For articles discussing the specific state's abortion funding decisions, see O'Neill, *supra*, at 30-76 (Ohio); Charles W. Sherman, Committee to Defend Reproductive Rights v. Myers: *Abortion Funding Restrictions as an Unconstitutional Condition*, 70 CAL. L. REV. 978 (1982) (California); Darin E. Tweedt, *The Validity of Legislative Restrictions on Abortion Under the Oregon Constitution*, 65 TEMP. L. REV. 1349 (1992) (Oregon).

tion provision of a state constitution.[19] While some argue that economic rights should be guaranteed in their own right, this issue is, for the most part, outside the scope of the present discussion.

Third, while this Article focuses on state law adjudication, it situates the state cases within a federal law context. This approach is warranted because federal law has importance throughout the fifty states and the state courts themselves analyze the issues within the framework established by federal law.[20] Furthermore, this approach facilitates an understanding of the often disparate state cases by situating them in the more coherent federal framework.

Fourth, it must be noted that the expansion of equal protection to encompass economic equality rights is of particular importance to people of color.[21] Centuries of slavery, racism and discrimination have left many persons of color disproportionately economically disadvantaged. Thus, in contemporary society, guaranteeing economic equality rights disproportionately benefits people of color. Acknowledging this fact, this Article touches on the interaction between race and economic equality rights in several locations.

Fifth and finally, this Article does not explore the question of whether successful economic equality rights litigation translates

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19. Those education financing challenges brought directly under a state education clause rather than under an equal protection clause have been termed part of the "third wave" of education reform litigation. *See* Thro, *Judicial Analysis*, *supra* note 17, at 600-05 (stating that the first wave, during which challenges were based on federal equal protection, lasted from the 1960s to the 1973 decision in *Rodriguez*; the second wave, during which challenges were based on state equal protection, lasted from 1973 until early 1989; and the third wave, during which challenges are based on state education clauses, began in 1989); *see also* Levine, *supra* note 17, at 507-09; Natapoff, *supra* note 17, at 764 (acknowledging that "third wave" states use their state constitutions' education clause to create educational entitlement); Westbrook, *supra* note 17, at 2126-35 (describing William E. Thro's "wave" analysis used to study the history of school finance litigation).

Some argue that third wave challenges hold the most promise for further successful educational reform litigation. One component of this argument is that equal protection challenges to educational systems are no longer viable. *See* McUsic, *supra* note 17, at 312-14. This Article, however, explores the education finance decisions for their significance to equal protection law. Furthermore, equity claims do not preclude standards claims, and for those states in which the courts have already rejected claims based on equal protection, claims based on education clauses are still available.

20. *See infra* notes 193, 304, 310 and accompanying text.

21. For example, toward the end of his life, Martin Luther King, Jr. placed greater importance on the problems of class as a continuation of the civil rights movement. *See, e.g.*, MARTIN LUTHER KING, JR., *Where Do We Go from Here?*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 245 (James M. Washington, ed., 1991).

into concrete benefits for those who are economically disadvantaged. Such an ambitious project is left to others with the skill and knowledge required for such a task. Instead, this Article assumes the desirability of equality in education financing and abortion funding and explores how to best guarantee this equality.

With the boundaries of this Article delineated, the following is its content. Part II of this Article begins by presenting the federal and the various state equal protection doctrines.[22] This Part continues by turning to three equal protection approaches that support applying heightened scrutiny to challenged state action—fundamental rights, suspect classifications and disparate impact—and exploring the role that each approach plays in both federal and state court economic equality rights litigation.[23] Part III analyzes some of the arguments presented in the case law against economic equality rights.[24] This Part first demonstrates how federalism, the separation of powers, a reluctance to impose affirmative obligations and an aversion to *Lochner*[25] fail to provide a sufficient justification for denying economic equality rights. These concepts serve to mask the essential conflict underlying these cases, namely the equitable distribution of economic and social goods.[26] This Part further discusses the role that certain conceptions of personal responsibility and race play in economic equality rights adjudication.[27] Part IV critically examines each of the three equal protection approaches discussed in Part II, concluding that the fundamental rights approach is most suitable for guaranteeing economic equality rights.[28] Furthermore, this Part clarifies the fundamental rights approach and, in the process, develops a conception of substantive equal protection that synthesizes the economic equality rights case law.[29] This Part also explores a fourth, composite equal protection approach that relies on all three previously discussed approaches to guarantee economic equality rights.[30] Part V concludes by briefly considering the prospects for an expansion of the protection of economic equality rights in state courts and the potential for the reemergence of these rights in fed-

22. *See infra* Part II.A.
23. *See infra* Part II.B-D.
24. *See infra* Part III.
25. Lochner v. New York, 198 U.S. 24 (1905).
26. *See infra* Part III.A.
27. *See infra* Part III.B-C.
28. *See infra* Part IV.A-C.
29. *See infra* Part IV.C.1-2.
30. *See infra* Part IV.D.

eral law.[31]

II. The Three Equal Protection Approaches

The strength of an equal protection challenge to inequitable state action derives from its potential to trigger heightened scrutiny of such action.[32] Courts that subject challenged state action to heightened scrutiny usually find that such action fails to survive such scrutiny, and thus is unconstitutional.[33] This Part explores three equal protection approaches—fundamental rights, suspect classifications and disparate impact—that can trigger heightened scrutiny. For each approach, this Part presents its origin and current status in federal law and then discusses its use in the state education financing and abortion funding cases. First, however, a general explanation of the equal protection doctrine under both federal and state law is warranted.

A. General Equal Protection Doctrine

1. Federal Equal Protection Law

Under contemporary federal equal protection doctrine, as developed by the Supreme Court, courts subject state action challenged on equal protection grounds to one of three levels of scrutiny, depending upon the nature of the state action. Under rational basis scrutiny, state action must bear a rational relationship to a legitimate state interest to be constitutional.[34] Under intermediate scrutiny, state action must bear a substantial relationship to an important state interest.[35] Finally, under strict

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31. *See infra* Part V.

32. The potency of subjecting challenged state action to heightened scrutiny is illustrated by the fact that every state court adjudicating an education financing or abortion funding challenge that actually applied some degree of heightened scrutiny held that the challenged state action was unconstitutional. *See infra* notes 163-172 (noting that California, Connecticut, West Virginia, Wyoming and North Dakota courts used a heightened level of scrutiny in finding unconstitutional the respective state's education financing scheme), 230-41 (analyzing state courts that have held state's abortion funding restrictions to a heightened scrutiny) and accompanying text. *But cf.* Fischer v. Department of Pub. Welfare, 502 A.2d 114, 122-23 (Pa. 1985) (subjecting the challenged state action to rational basis scrutiny but arguing that the challenged abortion funding restrictions would survive even intermediate scrutiny).

33. *See* cases discussed *infra* notes 164-168, 227-229 and accompanying text.

34. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

35. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976). The Supreme Court clearly articulated the intermediate scrutiny standard in *Craig* and first used the term "intermediate scrutiny" in *Plyler v. Doe*. *See Craig, id.*; Plyler v. Doe, 457 U.S. 202, 218 n.16 (1982).

scrutiny, state action must further a compelling state interest that cannot be achieved by less intrusive means.[36]

Federal courts generally apply rational basis scrutiny to state action challenged on federal equal protection grounds.[37] However, courts employ "heightened" scrutiny in two situations. First, courts apply strict scrutiny when state action burdens a fundamental right.[38] Under federal law, fundamental rights include those rights explicitly protected by the federal Constitution as well as other rights, such as: the right to privacy;[39] the right to interstate travel;[40] the right of new state residents to receive government benefits on an equal basis as those already residing in the state;[41] the right of access to the courts;[42] the right of equal access

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36. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 156 (1973). The Supreme Court first used the term "strict scrutiny" in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and first articulated the contemporary strict scrutiny standard in *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (holding that the challenged state action must be "necessary to promote a compelling governmental interest").

37. *See, e.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457-58 (1988).

38. *See, e.g.*, *Roe*, 410 U.S. at 155-56. In *Planned Parenthood v. Casey*, the Supreme Court held that the test for determining whether heightened scrutiny should be applied in the abortion context is whether the challenged state action has an "undue burden" on the right to have an abortion. 505 U.S. 833, 874 (1992). *See generally* Ruth Burdick, *The* Casey *Undue Burden Standard: Problems Predicted and Encountered, and the Split over the* Salerno *Test*, 23 HASTINGS CONST. L.Q. 825 (1996); Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025 (1994); Valerie J. Pacer, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295 (1995); Elizabeth A. Schneider, *Workability of the Undue Burden Test*, 66 TEMP. L. REV. 1003 (1993).

39. The right to privacy encompasses a number of rights: (1) the right to have an abortion, *see* Webster v. Reproductive Health Servs., 492 U.S. 490, 521 (1989) (plurality opinion); Planned Parenthood v. Danforth, 428 U.S. 52, 60-61 (1976); *Roe*, 410 U.S. at 153; (2) the right to use contraception, *see* Carey v. Population Servs. Int'l, 431 U.S. 678, 685-86 (1977); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *see also* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); (3) the right to marry, *see* Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967); (4) the right to procreate, *see* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); (5) the right to family relationships, *see* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); (6) the right to control the education of one's children, *see* Meyer v. Nebraska, 262 U.S. 390, 400 (1923); and (7) the right to bodily integrity, *see* Washington v. Harper, 494 U.S. 210, 221-22 (1990); Winston v. Lee, 470 U.S. 753, 767 (1985).

40. *See, e.g.*, United States v. Guest, 383 U.S. 745, 758 (1966), and cases cited therein.

41. *See, e.g.*, Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 911 (1986) (holding unconstitutional a state law granting civil service preference for service in the armed forces only to those veterans who resided in the state when they entered the armed forces); Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (holding unconstitutional a state law that denied the right to vote to those with less than one year of state residency); Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (finding unconstitutional a state law that denied welfare benefits to those with less than one year of

to the courts;[43] and the right to an equal and unburdened vote in state elections.[44] Second, when state action classifies on the basis of a suspect classification, courts apply either intermediate or strict scrutiny, depending upon the classification. Specifically, courts apply strict scrutiny to the classifications of race,[45] ethnicity,[46] national origin,[47] and, when made by a state, legal alienage,[48]

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state residency). See generally *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Zobel v. Williams*, 457 U.S. 55 (1982), which held unconstitutional certain state laws classifying on the basis of residency under a rational basis scrutiny, *see infra* note 275.

Although the Supreme Court described the right of new state residents to receive benefits on an equal basis with older residents as an aspect of the right to interstate travel, this Article argues that the former right actually is a substantive equal protection right distinct from the general right to interstate travel. *See infra* Part IV.C.2.c (discussing substantive equal protection rights).

42. *See, e.g.*, Lewis v. Casey, 518 U.S. 343 (1996); Bounds v. Smith, 430 U.S. 817 (1977).

43. The Supreme Court has grounded the right of equal access to the courts, which has three distinct aspects, in both equal protection and due process. *See* M.L.B. v. S.L.J., 519 U.S. 102 (1996).

The first aspect of the right to equal access to the courts is the right to a waiver of court fees for indigent litigants to pursue actions involving certain fundamental rights. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 383 (1971) (holding that a state must waive the filing fee and costs of service for initiating divorce actions); Burns v. Ohio, 360 U.S. 252, 258 (1959) (holding that a state must waive the fee for a motion for leave to appeal to the state supreme court in a direct criminal appeal).

The second aspect of the right to equal access to the courts is the right of indigent litigants to obtain trial transcripts at state expense in direct and collateral attacks on criminal convictions and in quasi-criminal proceedings. *See, e.g.*, Little v. Streater, 452 U.S. 1, 16-17 (1981) (holding that a state must provide a free blood group test to indigent litigants in paternity actions); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (holding that a state must provide transcripts to indigent criminal appellants on direct criminal appeal).

The third aspect of the right to equal access to the courts is the right to government-provided counsel on direct criminal appeals. *See, e.g.*, Pension v. Ohio, 488 U.S. 75, 79-80 (1988) (holding unconstitutional a state procedure for the withdrawal of appellate counsel); Douglas v. California, 372 U.S. 353, 357 (1963) (holding that a state must supply counsel to indigent criminal defendants for direct criminal appeals as a right).

44. The right to vote in state elections can be burdened in two manners. First, as established in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Baker v. Carr*, 369 U.S. 186 (1962), a state may not exclude or dilute the votes of legitimate voters. *See, e.g.*, Board of Estimate v. Morris, 489 U.S. 688, 692-93 (1989) (extending *Reynolds* to city boards of estimate elections); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (extending *Reynolds* to school district elections). Second, a state may not place financial obstacles in the way of voting. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that a $1.50 poll tax violated equal protection).

45. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

46. *See, e.g.*, *Bakke*, 438 U.S. at 290-91.

47. *See, e.g.*, Oyama v. California, 332 U.S. 633, 646 (1948); Korematsu v.

and apply intermediate scrutiny to the quasi-suspect classifications[49] of gender[50] and legitimacy.[51]

A number of Justices, most notably Justice Marshall, have criticized the Court's "three tiered" equal protection adjudication and have proposed alternatives. Justice Marshall, at times joined by other Justices, consistently advocated a "sliding scale" method of equal protection adjudication in social welfare equal protection cases.[52] Under this alternative, instead of employing fixed levels

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United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

48. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 (1984); Graham v. Richardson, 403 U.S. 365, 371 (1971). The Supreme Court, however, has carved out a public function exception to the general rule that alienage classifications merit strict scrutiny. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 438-39 (1982); Ambach v. Norwick, 441 U.S. 68, 73-74 (1979); Foley v. Connelie, 435 U.S. 291, 296 (1978). Furthermore, since the Constitution grants the federal government the power to regulate naturalization and immigration, *see* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."), the Supreme Court has held that alienage classifications by the federal government merit only deferential scrutiny. *See* Mathews v. Diaz, 426 U.S. 67, 84-85 (1976). Finally, while alienage is a suspect classification for legal aliens, it is not for illegal aliens. *See* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

49. Justice Marshall was the first to use the term "quasi-suspect" in a Supreme Court case, referring to the classes of women and illegitimate children in his dissent in *Massachusetts Board of Regents v. Murgia*, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting). The first majority opinion to use this term was in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442-46 (1985).

50. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996); Craig v. Boren, 429 U.S. 190, 197 (1976).

In *United States v. Virginia*, although invoking the established intermediate scrutiny standard, the Supreme Court further wrote that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." 518 U.S. at 531; *cf. id.* at 2288 (Rehnquist, J., concurring) (stating that the majority "introduce[d] an element of uncertainty respecting the appropriate test" for gender classifications); *id.* at 2294 (Scalia, J., dissenting) (arguing that the majority's invocation of the "exceedingly persuasive justification" test contradicted the traditional intermediate scrutiny test).

51. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988); Mills v. Habluetzel, 456 U.S. 91, 99 (1982).

52. Justice Marshall first advanced his sliding scale method of equal protection adjudication in his dissent in the 1970 case of *Dandridge v. Williams*, 397 U.S. 471, 519-21 (1970) (Marshall, J., joined by Brennan, J., dissenting), which involved a challenge to a state cap on welfare benefits regardless of the recipients' needs. Marshall continued to endorse this method through the rest of his career on the Court. *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 468 (1988) (Marshall, J., joined by Brennan, J., dissenting); *Cleburne*, 473 U.S. at 460 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring and dissenting); *Plyler*, 457 U.S. at 231 (Marshall, J., concurring); Harris v. McRae 448 U.S. 297, 341-42 (1979) (Marshall, J., dissenting); Beal v. Doe, 438 U.S. 454, 457-58 (1976) (Marshall, J., dissenting); Massachusetts Bd. of Regents v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., joined by Douglas, J., dissenting); Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (Marshall, J., for the Court).

Significantly, in *Dunn*, an equal protection right to vote and interstate travel

of scrutiny, the court would employ a balancing test. Specifically, the court would weigh the nature of the classification involved, the importance of the benefits to the recipients and the state interests justifying the classification to determine whether the challenged state action violates equal protection.[53]

2. State Equal Protection Law

State equal protection adjudication, encompassing fifty jurisdictions, is much more diverse than federal law. Our federal system[54] permits this diversity, as states, whether through constitutional provisions or judicial decisions, are free to adopt greater constitutional protections than the federal government provides,[55] so long as such protections are not prohibited by federal law.[56] Under this system, state courts have developed a number of methods of equal protection adjudication.

The courts in forty-eight states have held that their state constitutions guarantee equal protection.[57] These courts ground equal protection in the following state constitutional provisions: provisions guaranteeing equal protection,[58] equality,[59] due proc-

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case, five Justices joined in Justice Marshall's majority opinion, which included an application of his sliding scale approach. In *Dunn*, Justice Marshall cited *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (holding that Ohio's election laws unconstitutionally curtailed access to the ballot), which articulated a substantially similar test. The Court in *Rhodes*, in turn, cited *Carrington v. Rash*, 380 U.S. 89 (1965) (holding unconstitutional a state statute denying the right to vote to bona fide residents who were members of the armed services), and *Skinner v. Oklahoma*, 316 U.S. 535, 535 (1942) (holding unconstitutional a state statute allowing sterilization of "habitual criminals").

53. In *Dandridge*, Justice Marshall presented his sliding scale approach as follows: "[C]oncentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interest in support of the classification." 397 U.S. at 520-21.

54. For a discussion of "Our Federalism," see *Younger v. Harris*, 401 U.S. 37, 44 (1971) (Black, J.) and David Mason, *Slogan or Substance? Understanding "Our Federalism" and Younger Abstention*, 73 CORNELL L. REV. 852 (1988).

55. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967).

56. The Supremacy Clause, U.S. CONST. art. VI, cl. 2, prevents states from enforcing constitutional protections that conflict with federal law. *See, e.g.*, Sims v. Georgia, 385 U.S. 538, 544 (1967).

57. Delaware and Mississippi are the only two states whose courts have not held that their constitutions guarantee equal protection. *See* Hughes v. State, 653 A.2d 241, 243 n.3 (Del. 1994) (declining to decide if Delaware's due process protection encompasses equal protection); Matthew Lansford & Laura S. Howorth, *Legal Impediments to Limited Entry Fishing Regulation in the Gulf States*, 34 NAT. RESOURCES J. 411, 434 (1994) (noting that the Mississippi constitution has no equal protection clause).

58. *See* CAL. CONST. art. I, § 7 (formerly CAL. CONST. art. I, §§ 11, 21); ILL. CONST. art. I, § 2; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 2; MONT. CONST.

ess,[60] or variations on due process;[61] provisions prohibiting the state from granting special privileges or immunities,[62] denying privileges or immunities,[63] or enacting local or special laws;[64] or a combination of provisions.[65] All courts in these forty-eight states

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art. II, § 4; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; R.I. CONST. art. I, § 2; S.C. CONST. art. I, § 3.

59. *See* ALASKA CONST. art. I, § 1 ("all persons are equal and entitled to equal rights, opportunities, and protection under the law"); IDAHO CONST. art. 1, § 2 ("All political power is inherent in the people. Government is instituted for their equal protection and benefit . . . ."); MO. CONST. art. I, § 2 ("[T]hat all persons are created equal and are entitled to equal rights and opportunity under the law . . . ."); N.J. CONST. art. I, ¶ 1 ("All persons are by nature free and independent . . . ."); S.D. CONST. art. VI, § 26 ("All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit . . . ."); WIS. CONST. art. I, § 1 ("All people are born equally free and independent . . . .").

60. *See* COLO. CONST. art. II, § 25; OKLA. CONST. art. II, § 7; W. VA. CONST. art. III, § 10.

61. *See* MD. CONST. Dec. of Rts. art. XXIV ("That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land."); MINN. CONST. art. I, § 2.

62. *See* ARIZ. CONST. art. 2, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."); IND. CONST. art. I, § 23 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."); IOWA CONST. art. I, § 6 ("[T]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."); OR. CONST. art. I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."); VT. CONST. ch. I, art. VII ("That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons who are a part only of that community . . . ."); WASH. CONST. art. I, § 12 ("No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.").

In contrast to the above provisions in state constitutions, the Privileges and Immunities Clause in the Fourteenth Amendment has been relatively irrelevant since the 1873 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74-80 (1873).

63. *See* MINN. CONST. art. I, § 2 ("No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.").

64. *See* NEB. CONST. art. III, § 18 ("The Legislature shall not pass local or special laws in any of the following cases . . . ."); NEV. CONST. art. 4, § 21 ("In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State."); UTAH CONST. art. I, § 24 ("All laws of a general nature shall have uniform operation.").

65. *See* ALA. CONST. art. I, §§ 1 ("equally free and independent"), 6 (due process), 22 (privileges and immunities); ARK. CONST. art. 2, §§ 2 ("All men are created equally free and independent . . . ."), 3 ("The equality of all persons before the law

have interpreted these disparate constitutional provisions as guaranteeing equal protection.[66] Because equal protection is

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is recognized, and shall ever remain inviolate . . . ."), 18 ("The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."); amend. XIV ("The General Assembly shall not pass any local or special act."); CONN. CONST. art. I, §§ 1 (equal rights), 20 (equal protection); FLA. CONST. art I, § 2 ("All natural persons are equal before the law . . . . No person shall be deprived of any right because of race, religion or physical handicap."); GA. CONST. art. I, § 1, ¶ 2 ("Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."); HAW. CONST. art. I, § 5 (equal protection, equal civil rights, anti-discrimination); KAN. CONST. Bill of Rights §§ 1 (equal rights), 2 (equal protection and benefit); KY. CONST. §§ 2 (denial of absolute and arbitrary power), 3 (equality of emoluments and privileges), 59 (no local or special legislation), 60 (general laws); LA. CONST. art. I, § 3 ("No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition or political ideas or affiliation."); MASS. CONST. pt. 1, arts. 1 (born free and equal), 10 (right to protection); N.H. CONST. pt. 1, arts. 1 ("All men are born equally free and independent . . . ."), 2 ("Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."); N.D. CONST. art I, §§ 21 (privileges and immunities), 22 (general laws have uniform operation); OHIO CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly."); PA. CONST. art. I, §§ 1 ("All men are born equally free and independent . . . ."), 26 ("Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."); TENN. CONST. art. 1, § 8 (variation on due process), art. 11, § 8 (only general laws, privileges and immunities); TEX. CONST. art. 1, § 3 ("All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."); VA. CONST art. I, § 11 (due process, anti-discrimination); WYO. CONST. art. 1, §§ 2 (all are equal), 3 (anti-discrimination), 27 (free and equal elections), 34 (general laws have a uniform operation).

66. *See* Moore v. Mobile Infirmary Ass'n, 592 So.2d 156, 165 (Ala. 1991); Isakson v. Rickey, 550 P.2d 359, 361 (Alaska 1976); Valley Nat'l Bank v. Glover, 159 P.2d 292, 299 (Ariz. 1945); Streight v. Ragland, 655 S.W.2d 459, 463 n.10 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241, 1249 n.11 (Cal. 1971); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1014 (Colo. 1982); Horton v. Meskill, 376 A.2d 359, 370 (Conn. 1977); Schreiner v. McKenzie Tank Lines, Inc., 432 So.2d 567, 569 (Fla. 1983); Denton v. Con-Way S. Express, Inc., 402 S.E.2d 269, 271 (Ga. 1991); Baehr v. Lewin, 852 P.2d 44, 59-60 (Haw. 1993); Bon Appetit Gourmet Foods, Inc. v. Idaho Dep't of Employment, 793 P.2d 675, 676 (Idaho 1989); State v. Reed, 591 N.E.2d 455, 457 (Ill. 1992); Reilly v. Robertson, 360 N.E.2d 171, 175 (Ind. 1977); City of Waterloo v. Selden, 251 N.W.2d 506, 509 (Iowa 1977); Manzanares v. Bell, 522 P.2d 1291, 1302-03 (Kan. 1974); State v. Wasson, 842 S.W.2d 487, 491 (Ky. 1992); Burmaster v. Gravity Drainage Dist. No. 2, 366 So.2d 1381, 1386 (La. 1978); Peters v. Saft, 597 A.2d 50, 52 n.1 (Me. 1991); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 780-81 (Md. 1983); State v. Franklin Fruit Co., 446 N.E.2d 63, 64 (Mass. 1983); Doe v. Department of Soc. Servs., 487 N.W.2d 166, 174 (Mich. 1992); Skeen v. State, 505 N.W.2d 299, 312 (Minn. 1993); State v. Stokely, 842 S.W.2d 77, 79 (Mo. 1992) (en banc); Pfost v. State, 713 P.2d 495, 500 (Mont. 1985), *overruled on other grounds by* Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont.

similar throughout these jurisdictions, in discussing state equal protection law, this Article will not differentiate between the equal protection provisions of the various states.

While state courts are free to guarantee more expansive equal protection than that provided by federal law, twenty-one of the forty-eight states that guarantee equal protection in their state constitutions explicitly held that their states' equal protection affords greater protections.[67] The courts in the other twenty-seven

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1989); Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 570 (Neb. 1989); State Farm Fire & Cas. Co. v. All Elec., Inc., 660 P.2d 995, 997 (Nev. 1983); Kerouac v. Town of Hollis, 660 A.2d 1080, 1085 (N.H. 1995); Levine v. Department of Insts. & Agencies, 418 A.2d 229, 241 (N.J. 1980); Richardson v. Carnegie Restaurant Library, Inc., 763 P.2d 1153, 1157 (N.M. 1988); Under 21 v. City of New York, 482 N.E.2d 1, 7 n.6 (N.Y. 1985); Richardson v. North Carolina Dep't of Correction, 478 S.E.2d 501, 505 (N.C. 1996); Bismarck Pub. Sch. Dist. No. One v. State, 511 N.W.2d 247, 255 (N.D. 1994); Beatty v. Akron City Hosp., 424 N.E.2d 586, 591 (Ohio 1981); Fair Sch. Fin. Council, Inc. v. State, 746 P.2d 1135, 1148 & n.48 (Okla. 1987); Olsen v. State, 554 P.2d 139, 142-43 (Or. 1976); Love v. Borough of Stroudsburg, 597 A.2d 1137, 1139 (Pa. 1991); Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 740 (R.I. 1992); South Carolina Pub. Serv. Auth. v. Citizens & S. Nat'l Bank, 386 S.E.2d 775, 786 (S.C. 1989); County of Tripp v. State, 264 N.W.2d 213, 216 (S.D. 1978); Brown v. Campell County Bd. of Educ., 915 S.W.2d 407, 412-13 (Tenn. 1995); Sonnier v. State, 913 S.W.2d 511, 521 (Tex. 1995); Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984); State v. George, 602 A.2d 953, 957 (Vt. 1991); Benderson Dev. Co. v. Sciortino, 372 S.E.2d 751, 757 (Va. 1988); State v. Smith, 814 P.2d 652, 660 (Wash. 1991); Appalachian Power Co. v. State Tax Dep't, 466 S.E.2d 424, 445 (W. Va. 1995); Buse v. Smith, 247 N.W.2d 141, 155 (Wis. 1976); Allhusen v. State, 898 P.2d 878, 884 (Wyo. 1995).

67. *See, e.g., Moore*, 592 So.2d at 170 (Alabama); Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970); *Serrano*, 557 P.2d at 950 (California); *Lujan*, 649 P.2d at 1016 n.11 (Colorado); *Horton*, 376 A.2d at 371 (Connecticut); *Schreiner*, 432 So.2d at 569 (Florida) (stating that federal equal protection case law is not controlling, but provides "persuasive advice"); *Denton*, 402 S.E.2d at 271-72 (Georgia); *cf.* King v. Virginia Birth-Related Neurological Injury Compensation Program, 410 S.E.2d 656, 661 n.4 (Va. 1991) (noting that state equal protection is no broader than under federal law); State v. Bedell, 460 S.E.2d 636, 646 n.6 (W. Va. 1996) (stating that "our state constitution concept of equal protection is coextensive or broader than that of the U.S. Const."); Johnson v. State Hearing Exam'r's Office, 838 P.2d 158, 164-66 (Wyo. 1992). *But see* Grissom v. Gleason, 418 S.E.2d 27, 29 (Ga. 1992) (disapproving of *Denton* "to the extent that it suggests a new equal protection analysis"); *Baehr*, 852 P.2d at 59-60 (Hawaii); Thompson v. Engelking, 537 P.2d 635, 645 (Idaho 1975); *Reilly*, 360 N.E.2d at 175 (Indiana); *Wasson*, 842 S.W.2d at 491 (Kentucky); Crier v. Whitecloud, 496 So.2d 305, 310 (La. 1986); *Hornbeck*, 458 A.2d at 781 (Maryland). *Cf.* Murphy v. Edmonds, 601 A.2d 102, 108 (Md. 1992) (holding that, while state and federal equal protection "are obviously independent and capable of divergent application, we have consistently taken the position that the Maryland equal protection principle applies 'in like manner and to the same extent as'" federal equal protection); *Pfost*, 713 P.2d at 500 (Montana); Harman v. Marsh, 467 N.W.2d 836, 846-47 (Neb. 1991) (holding that Nebraska's special legislation constitutional provision supplements equal protection and is more stringent); Carson v. Maurer, 424 A.2d 825, 831 (N.H. 1980); *Bismarck*, 511 N.W. 2d at 255 (North Dakota); Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970, 974-75 (Or. 1982) (noting that the court need not adopt the federal standard in adjudicating a challenge under art. I, § 20); *Condemarin*, 775

states have specifically held that their states' equal protection guarantees are identical, or essentially identical, to that of federal equal protection (seven states),[68] or that the tests, standards or approaches are the same (nine states)[69] or that the protections are

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P.2d at 352 (Utah); State v. Ludlow Supermarkets, Inc., 448 A.2d 791 (Vt. 1982); *Benderson*, 372 S.E.2d at 757 (Virginia) (holding that classifications challenged under the special legislation provision must bear "a reasonable and substantial relation to the object sought to be accomplished by the legislation") (internal quotations omitted).

68. *See Valley Nat'l Bank*, 159 P.2d at 299 (Arizona) (holding that state and federal equal protection have the same effect "for all practical purposes"); State v. Richardson, 285 A.2d 842, 844 (Me. 1972) (holding that the restrictions placed on the government by state equal protection are no more stringent than the restrictions of federal equal protection); *Under 21*, 482 N.E.2d at 7 n.6 (New York) ("[T]he State constitutional equal protection clause is no broader in coverage than the Federal provision . . . .") (citation omitted); Sedar v. Knowlton Constr. Co., 551 N.E.2d 938, 947 (Ohio 1990) (holding that the limitations of the state and federal equal protection "are essentially identical") (citation omitted); State v. Lopes, 660 A.2d 707, 709 (R.I. 1995) (holding that Rhode Island and federal equal protection are coextensive); Brown v. Campell County Bd. of Educ., 915 S.W.2d 407, 413 (Tenn. 1995) (holding that Tennessee equal protection confers the same protections as federal equal protection); Sonnier v. State, 913 S.W.2d 511, 521 (Tex. 1995) (holding that Texas equal protection affords no broader protections than federal equal protection).

For discussions of how equal protection is treated in some states, see Barbara A. Dillon, *Constitutional Law—He Wore the Skirt but Still Could Not Play the Game*—Kleczek v. Rhode Island Interscholastic League, *612 A.2d 734 (R.I. 1992)*, 27 SUFFOLK U. L. REV. 463, 463 n.2 (1993) (citing *Kleczek* for the proposition that Rhode Island courts apply the same equal protection standard as under federal law); Donelson, *supra* note 17, at 448 (noting that Tennessee cases have held that Tennessee equal protection is essentially the same as federal equal protection); Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 138-40 (1988) (stating that Arizona courts have generally applied the same standard under state equal protection as under federal equal protection, but arguing that courts should guarantee greater protections based on the specific language of Arizona's constitution); Albert H. Kauffman & Carmen Maria Rumbaut, *Applying* Edgewood v. Kirby *to Analysis of Fundamental Rights Under the Texas Constitution*, 22 ST. MARY'S L.J. 69, 88-90 (1990) (discussing Texas's equal protection analysis); Stuart W. Tisdale, Jr., *Reasonable Accommodation and Non-Invidious Discrimination Under the Maine Human Rights Act*, 40 ME. L. REV. 475, 481 (1988) (stating that Maine's court has generally construed Maine's equal protection consistently with federal equal protection); Jeffrey Underweiser, *The Legality of Staten Island's Attempt to Secede from New York City*, 19 FORDHAM URB. L.J. 147, 156-57 (1991) (noting that New York equal protection coverage is no broader than federal protection); Natalie Wright, *State Abortion Law After* Casey*: Finding "Adequate and Independent" Grounds for Choice in Ohio*, 54 OHIO ST. L.J. 891, 925 (1993) (stating that, since Ohio's equal protection clause contains broader language than the federal Constitution, Ohio courts are free to independently interpret state equal protection).

69. *See* State v. Reed, 591 N.E.2d 455, 457 (Ill. 1992) (stating that the court uses the same analysis under state and federal equal protection); Dickerson v. Attorney Gen., 488 N.E.2d 757, 759 (Mass. 1986) (noting that the standard of review is the same under state equal protection as federal equal protection); *Skeen*, 505 N.W.2d at 312 (holding that the same standard is applied to claims under state

similar (seven states),[70] or simply have consistently applied federal

equal protection as under federal equal protection); *State Farm Fire & Cas. Co.*, 660 P.2d at 997 (holding that the standard for judging legislation is the same under Nevada equal protection as under federal equal protection); Chamber of Commerce v. State, 445 A.2d 353, 367 (N.J. 1982) (holding that the state equal protection is a parallel approach to federal equal protection); Richardson v. North Carolina Dep't of Correction, 478 S.E.2d at 505 (holding that North Carolina courts apply the same equal protection test as under federal law); Badlock v. North Dakota Workers Compensation Bureau, 554 N.W.2d 441, 444-45 (N.D. 1996) (noting that the court applies the same standards under state and federal equal protection); Love v. Borough of Stroudsburg, 597 A.2d 1137, 1139 (Pa. 1991) (holding that Pennsylvania equal protection is analyzed under the same standard as federal equal protection); *In re* Petition of N.C.B. Careers, Inc., 298 N.W.2d 526, 528 (S.D. 1980) (holding that the tests are the same under state and federal equal protection).

For discussions of how equal protection is treated in these states, see the following: Illinois: Paul Benjamin Linton & Kevin J. Todd, *The Framers Did Not Incorporate a Right to Abortion*, 81 ILL. B.J. 31, 34 (1993) (noting that the Illinois Supreme Court has recognized that equal protection in Illinois is equivalent to federal equal protection); Massachusetts: John Shaffer, *Just Say No . . . Driving:* Rushworth v. Registrar of Motor Vehicles *and the Massachusetts License Suspension Law*, 28 NEW ENG. L. REV. 1071, 1086 n.125 (1994) (citing a Massachusetts case that quoted *Dickerson*); Minnesota: Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations"?*, 20 WM. MITCHELL L. REV. 337, 348-72 (1994) (discussing Minnesota equal protection and arguing that the Minnesota Supreme Court has vacillated between a deferential and a heightened rational basis review); Ruhland, *supra* note 17, at 575-77 (discussing Minnesota's equal protection); New Jersey: J. Randy Sawyer, *The Last Line of Defense: A Comparative Analysis of United States Supreme Court and New Jersey Supreme Court Approaches to Racial Bias in the Imposition of the Death Penalty*, 7 SETON HALL CONST. L.J. 663, 685-86 (1997) (stating that the New Jersey Supreme Court has not provided more expansive equal protection guarantees than under federal law); North Carolina: Leslie Calkins O'Toole, Wilder v. Amatex Corp.: *A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestations Diseases*, 64 N.C. L. REV. 416, 426-27 (1986) (discussing North Carolina's equal protection analysis); Pennsylvania: Vincent A. Cirillo, Curtis v. Kline: *The Pennsylvania Supreme Court Declares Act 62 Unconstitutional—A Triumph for Equal Protection Law*, 34 DUQ. L. REV. 471, 481 n.66 (1996) (noting that Pennsylvania courts are guided by federal standards and analysis in their equal protection adjudication).

70. *See* Colorado Dep't of Soc. Servs. v. Board of County Comm'rs, 697 P.2d 1, 13 (Colo. 1985) (holding that Colorado equal protection provides "similar guarantees" as federal equal protection); Harden v. State, 434 N.W.2d 881, 885 (Iowa 1989) (noting that the court usually interprets state and federal equal protection guarantees similarly); Bullock v. Whiteman, 865 P.2d 197, 207 (Kan. 1993) (holding that state equal protection "is given much the same effect" as federal equal protection); Doe v. Department of Soc. Servs., 487 N.W.2d 166, 174-75 (Mich. 1992) (holding that the state equal protection clause was intended to duplicate federal equal protection and to offer similar protections); Chapman v. Luna, 701 P.2d 367, 368 (N.M. 1985) (noting that the New Mexico and federal equal protection doctrines have been interpreted similarly, but stating that "they nevertheless constitute independent rights and protections"); State v. Smith, 814 P.2d 652, 660 & n.47 (Wash. 1991) (holding that the protections of Washington equal protection are substantially similar to those of federal equal protection, and modifying earlier decisions, such as *State v. Alfonso*, 702 P.2d 1218, 1221 (Wash. 1985)); State v. McManus, 447 N.W.2d 654, 660 (Wis. 1989) (holding that state equal protection is the substantial equivalent of federal equal protection).

standards in adjudicating state equal protection claims (four states).[71]

State courts that provide more expansive equal protection guarantees employ a number of methods to adjudicate state equal protection challenges. Twelve of these courts have developed their own methods for adjudicating these claims, such as balancing tests,[72] intermediate scrutiny,[73] heightened rational basis scru-

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For discussions of how equal protection is treated in these states, see the following: Iowa: Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 DRAKE L. REV. 593, 633 (1993) (stating that the Iowa Supreme Court has summarily equated state equal protection with federal equal protection); Kansas: Christopher J. Eaton, *The Kansas Legislature's Attempt to Abrogate the Collateral Source Rule: Three Strikes and They're Out?*, 42 U. KAN. L. REV. 913, 924 (1994) (stating that courts, with one exception, find that Kansas's equal protection test is essentially the same as the federal test); Michigan: Michael C. Fayz & Clara G. DeQuick, *Annual Survey of Michigan Law*, 39 WAYNE L. REV. 447, 457-71 (1993) (discussing Doe v. Department of Social Servs., 487 N.W.2d 166 (Mich. 1992)); New Mexico: Jamie McAlister, *The New Mexico Tort Claims Act: The King Can Do "Little" Wrong*, 21 N.M. L. REV. 441, 472 (1991) (stating that the New Mexico Supreme Court has interpreted state equal protection similarly to federal equal protection); Washington: Marco de Sae Silva, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 WASH. L. REV. 653, 664-65 (1988) (stating that Washington courts have held that Washington equal protection may provide greater guarantees than federal equal protection); Wisconsin: Steinke, *supra* note 17, at 1394 (noting that the Wisconsin Supreme Court held that Wisconsin equal protection is substantially equivalent to federal equal protection, and that Wisconsin courts generally adopt federal equal protection analysis).

71. The courts in Arkansas, Missouri, Oklahoma and South Carolina treat state and federal equal protection challenges identically.

For a discussion of how equal protection is treated in Oklahoma, see Harry F. Tepker, Jr., *The Trouble with Pool Halls: Rationality and Equal Protection in Oklahoma Law*, 3 EMERGING ISSUES ST. CONST. L. 151, 157-63 (1990) (arguing that Oklahoma's equal protection analysis is inconsistent by wavering between deferential and heightened rationality scrutiny).

72. *See Moore*, 592 So.2d at 166 ("[W]hether the classifications created under [the statute] represent a reasonable exercise of legislative power depends on whether they are reasonably related to the stated objective, and on whether the benefit sought to be bestowed on society outweighs the detriment to private rights occasioned by the statute."); Herrick's Aero-Auto-Aqua Repair Serv. v. Alaska Dep't of Transp. & Pub. Facilities, 754 P.2d 1111, 1114 (Alaska 1988) (noting that the court "uses a uniform-balancing test which place[s] a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved") (quotations omitted); Butte Community Union v. Lewis, 712 P.2d 1309, 1311, 1314 (Mont. 1986) (holding that when an important interest such as welfare benefits is implicated, the classification must be reasonable and must outweigh the individual interest in obtaining benefits to be constitutional), *superseded by constitutional amendment as stated in* Zempel v. Uninsured Employers' Fund, 938 P.2d 658 (Mont. 1997).

For discussions of these cases, see the following articles: Alabama: Lansford & Howorth, *supra* note 57, at 432 (stating that the Alabama Supreme Court held that state equal protection "essentially mirror[s]" federal equal protection); Alaska: Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1,

tiny[74] or others.[75] The courts in the other nine states, however,

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11-17 (1995) (discussing Alaska's sliding scale equal protection approach); Michael B. Wise, *Northern Lights—Equal Protection Analysis in Alaska*, 3 ALASKA L. REV. 1 (1986) (discussing the development and independence of Alaska's equal protection analysis); Montana: Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1126-28 (1985) (arguing that Montana courts have been less deferential in equal protection challenges to economic regulations than federal equal protection); Robert J. Guite & Lisa A. Rodeghiero, Stratemeyer v. Lincoln County: *Mental Injuries and Workers' Compensation Policy*, 55 MONT. L. REV. 525, 532-39 (1994) (discussing certain inconsistencies in Montana equal protection law); David J. Shannon, *"No Pass, No Play": Equal Protection Analysis Under the Federal and State Constitutions*, 63 IND. L.J. 161, 174-75 (1987/1988) (discussing Montana's middle tier analysis in Bartmes v. Board of Trustees, 726 P.2d 801 (Mont. 1986), for interests that are less than fundamental).

73. *See* Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 733 (Idaho 1993) (holding that classifications that blatantly or facially discriminate are subject to intermediate scrutiny, namely "whether the legislation substantially furthers some specifically identifiable legislative end"); Harman v. Marsh, 467 N.W.2d 836, 847 (Neb. 1991) (holding that, to be constitutional, a classification must bear a "reasonable and substantial relationship to the object sought to be accomplished by the legislation") (quotation omitted); Carson v. Maurer, 424 A.2d 825, 831 (N.H. 1980) (holding that certain classifications involving sufficiently important rights must bear a "fair and substantial relation" to the goals of the legislation to be constitutional) (internal quotations omitted); Benderson Dev. Co. v. Sciortino, 372 S.E.2d 751, 757 (Va. 1988) (holding that classifications challenged under the special legislation provision must bear "a reasonable and substantial relation to the object sought to be accomplished by the legislation") (internal quotations omitted).

For discussions of these states, see the following: Idaho: Bartlett, *supra* note 17, at 612-21 (discussing Idaho's equal protection analysis in Tarbok v. Tax Comm'n, 695 P.2d 342 (Idaho 1984)); Nebraska: Thomas B. Wood, *Special Legislation: The Nebraska Supreme Court Creates New Tests to Confuse an Old Issue:* Harman v. Marsh, *237 Neb. 699, 467 N.W.2d 836 (1991)*, 71 NEB. L. REV. 343 (1992) (discussing the *Harman* case); New Hampshire: Sean C. Doyle, *HIV-Positive, Equal Protection Negative*, 81 GEO. L.J. 375, 400-01 (1992) (noting that the New Hampshire Supreme Court applies intermediate scrutiny when important substantive rights are at stake).

74. *See* Johnson v. State Hearing Exam'r's Office, 838 P.2d 158, 164-66 (Wyo. 1992) (holding that state law provides greater protections against discrimination than federal law, including a "heightened" rational basis scrutiny).

75. *See* Johnson v. Saint Vincent Hosp., Inc., 404 N.E.2d 585, 597 (Ind. 1980) (holding that the standard applied to challenged classifications is "whether the legislative classification is based upon substantial distinctions with reference to the subject-matter, or is manifestly unjust or unreasonable"); Crier v. Whitecloud, 496 So.2d 305, 310 (La. 1986) (holding that, if a statute classifies on the basis of one of the enumerated classifications, then the burden shifts to the state to prove the classification is reasonable; otherwise, the classification will be upheld if it "suitably furthers any appropriate state interest"); Condemarin v. University Hosp., 775 P.2d 348, 352 (Utah 1989) (holding that statutory classifications must have "a reasonable tendency to further the objectives of the statute," and that this is "a higher de facto standard of reasonableness") (internal quotations omitted); State v. Ludlow Supermarkets, Inc., 448 A.2d 791, 795 (Vt. 1982) (holding that legislation may not be based on the goal of favoring part of the community over another).

For discussion of these states, see the following: Indiana: Rosalie Berger Levinson, *State and Federal Constitutional Law Developments*, 27 IND. L. REV.

have not developed a new standard.[76]

887, 891-92 (1994) (stating that Indiana courts have held that state and federal equal protection guarantees are coextensive but that they may have now adopted a modified rational basis test in Indiana High Sch. Athletic Ass'n v. Schafer, 598 N.E.2d 540 (Ind. Ct. App. 1992)); Michael Ray Smith, *Limiting the Discretion of the Administrator of Poor Relief in Indiana*, 26 IND. L. REV. 631, 649-54 (1993) (stating that Indiana equal protection is the same as federal equal protection, but arguing that Indiana courts should provide greater protection); Richard A. Waples, *Recent Developments Under the Indiana Constitution*, 28 IND. L. REV. 1067, 1079-80 (1995) (arguing that under Collins v. Day, 644 N.E.2d 71 (Ind. 1994), Indiana equal protection is less stringent than federal equal protection); Louisiana: Michael Lester Berry, Jr., *Equal Protection—The Louisiana Experience in Departing from Generally Accepted Federal Analysis*, 49 LA. L. REV. 903 (1989) (discussing Louisiana equal protection in light of Sibley v. Board of Supervisors, 477 So.2d 1094 (La. 1985)); Utah: Rob M. Alston, *Utah's Statute of Limitation Barring Minors from Bringing Medical Malpractice Actions: Riding Roughshod over the Rights of Minors?*, 1992 UTAH L. REV. 929, 952-58 (arguing that Utah courts have applied "heightened" scrutiny in some instances not required under federal law); Vermont: Kelli L. Kazmarski, *Protecting the Rights of Parents and Children: The Right to Counsel in Family Court*, 20-FEB VT. B.J. & L. DIG. 37, 38 & n.21 (1994) (citing *Ludlow Supermarkets*).

76. The courts in California, Connecticut, Florida, Georgia, Hawaii, Kentucky, Maryland, Oregon and West Virginia have not developed an alternative equal protection standard.

For discussions of these states see: California: David M. Schoeggl, *New Life for the Doctrine of Unconstitutional Conditions?*—Committee to Defend Reproductive Rights v. Myers, *29 Cal.3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981)*, 58 WASH. L. REV. 679, 688-89 n.58 (1983) (stating that California's unconstitutional conditions doctrine often serves as a substitute for an equal protection analysis, but that California also employs an equal protection analysis interpreted substantially identically as federal equal protection); W. David Slawson, *The Right to Protection from Air Pollution*, 59 S. CAL. L. REV. 672, 766-68 (1986) (stating that California's equal protection analysis has developed further than federal equal protection); Connecticut: M. Kate Curran, *Illegal Aliens, the Social Compact and the Connecticut Constitution*, 13 BRIDGEPORT L. REV. 331, 335-38 (1993) (stating that Connecticut courts have asserted the independence of the Connecticut constitution); Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675 (1992) (arguing that Connecticut's equal protection analysis has been inconsistent, sometimes in lockstep with federal analysis and sometimes independent of federal law); Florida: Lansford & Howorth, *supra* note 57, at 428-29 (arguing that Florida's equal protection seems to be less stringent than federal equal protection); David C. Hawkins, *Florida Constitutional Law: A Ten Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693, 704-11 (1990) (discussing claims brought under art. I, § 2); Georgia: Calvin R. Wright, *The Collateral Source Rule in Georgia: A New Method of Equal Protection Analysis Brings a Return to the Old Common Law Rule*, 8 GA. ST. U. L. REV. 835, 852 (1992) (discussing the equal protection analysis in *Denton*); Hawaii: Nancy Klingeman & Kenneth May, *For Better or for Worse, in Sickness and in Health, Until Death Do Us Part: A Look at Same-Sex Marriage in Hawaii*, 16 U. HAW. L. REV. 447, 465-67 (1994) (discussing the equal protection analysis in *Baehr*); Kentucky: Donald C. Wintersheimer, *State Constitutional Law*, 20 N. KY. L. REV. 591, 594-95 (1993) (discussing Kentucky's equal protection decisions); *State Constitutions—Homosexual Sodomy—Kentucky Supreme Court Finds That Criminalization of Homosexual Sodomy Violates State Constitutional Guarantees of Privacy and Equal Protection*—Commonwealth v. Wasson, *842 S.W.2d 487 (Ky. 1992)*, 106 HARV. L. REV. 1370, 1372-74 (1993) (discussing the equal protection analysis in

In contrast, courts adhering to federal equal protection doctrine are constrained to follow federal precedent on equal protection issues.[77] Thus, unless these courts alter their equal protection approach, they generally cannot provide greater equal protection rights than under federal law.[78] However, if a state protects substantive rights that are not protected by the federal constitution, such as the right to education, then the courts in this state can still provide additional equal protection guarantees based on these additional substantive rights.[79]

B. The Fundamental Rights Approach

1. Federal Fundamental Rights Law

a. What is a Fundamental Right?

The Supreme Court in *Rodriguez* first articulated the test for determining what constitutes a fundamental right as "whether there is a right . . . explicitly or implicitly guaranteed by the Constitution."[80] The first part of this test—rights explicitly guaran-

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Wasson); Maryland: Lynn A. Dymond, *Developments in Maryland Law*, 1991-92, 52 MD. L. REV. 532, 550-53 (1993) (discussing Murphy v. Edmonds, 601 A.2d 102 (Md. 1992)); Mark G. Parenti, Recent Decisions, 54 MD. L. REV. 703, 706-09 (1995) (discussing Verzi v. Baltimore County, 635 A.2d 967 (Md. 1994), and arguing that this case represents a reinvigoration of the state's rational basis review); Oregon: Tweedt, *supra* note 18, at 1366-68 (discussing the development of equal protection in Oregon); Janai M. Powell, *Challenging the Constitutionality of Noneconomic Damage Caps:* Boyd v. Bulala *and the Right to a Trial by Jury*, 24 WILLAMETTE L. REV. 821, 836-37 (1988) (discussing Oregon's equal protection approach).

77. *See infra* note 290 and accompanying text.

78. Specifically, because the suspect classification and substantive equal protection approaches are grounded exclusively in equal protection, those courts that follow federal equal protection law cannot provide further protections under these approaches. *See infra* notes 399-400 and accompanying text.

79. *See* discussion *infra* Part IV.C.2.a.

80. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973); *accord* Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982); City of Mobile v. Bolden, 446 U.S. 55, 75 (1980); Harris v. McRae, 448 U.S. 297, 312 (1980); Maher v. Roe, 432 U.S. 464, 470 (1977); Moore v. City of E. Cleveland, 431 U.S. 494, 503 n.10 (1977); Estelle v. Dorrough, 420 U.S. 534, 538 (1975).

In *Plyler*, while invoking the established test, the Supreme Court suggested that the Constitution guarantees certain rights, such as the right to participate equally in state elections, even though they are not "explicitly or implicitly guaranteed" by the Constitution:

> In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state elections on an equal basis with other citizens in the jurisdiction, even though the right to vote, per se, is not a constitutionally protected right.

teed by the Constitution—is straightforward. Rights mentioned in the text of the Constitution, such as freedom of speech[81] and freedom of religion,[82] are fundamental simply because the Constitution explicitly protects these rights. Determining which rights are "implicitly guaranteed" by the Constitution, however, is problematic.[83] In fact, the Supreme Court has never articulated a standard for determining what rights the Constitution implicitly guarantees,[84] or even designated a right as an implicit right.[85]

Despite the lack of a standard for determining what rights are implicitly guaranteed by the Constitution, the Court has managed to adjudicate claims to fundamental right status for rights which are not explicitly mentioned in the Constitution. In particular, the Court has guaranteed rights to privacy, interstate travel, access to the courts, and an equal, unburdened vote in state

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Plyler, 457 U.S. at 217 n.15 (quotations omitted); *cf. id.* at 232-34 (Blackmun, J., concurring) (stating that the explicit or implicit test resolved most equal protection cases, and further noting that classifications concerning the right to vote in state elections that treat citizens unequally also trigger strict scrutiny).

81. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press."); *see, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

82. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."); *see, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

83. The phrase "implicitly guaranteed by the Constitution" is reminiscent of the phrase "implicit in the concept of ordered liberty," which the Supreme Court used to determine what federal Constitutional rights were incorporated through the Due Process Clause to apply to the states. *See Moore*, 431 U.S. at 503 n.10 (comparing the Court's standard for establishing fundamental rights with the Court's standard for incorporating rights through the Due Process Clause). Furthermore, both concepts have a certain degree of ambiguity. *See* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 393-95 (1994) (discussing *Rodriguez*'s explicitly or implicitly guaranteed test).

The concept of ordered liberty originated in the Supreme Court's due process incorporation jurisprudence. In cases such as *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) (upholding a state law permitting the state to take appeals in criminal cases), and *Adamson v. California*, 332 U.S. 46, 54 (1947) (upholding a state law allowing prosecutors to comment on a defendant's failure to testify), the Court held that only those rights in the Bill of Rights essential to ordered liberty are incorporated into the Due Process Clause of the Fourteenth Amendment and thus applicable to the states. While the Court subsequently abandoned this approach, *see* Duncan v. Louisiana, 391 U.S. 145, 148-50 & 150 n.14 (1968), Justice Harlan relied on this approach to support the right to privacy in *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); *see also* Poe v. Ullman, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting). The majority in *Roe v. Wade* also cited this approach as one basis for the right to privacy. 410 U.S. 113, 152 (1973).

84. Despite its considerable adjudication of fundamental rights cases, the seven cases cited in *supra* note 80 are the only Supreme Court majority opinions to even mention the "explicit or implicit" test.

85. *See* cases cited *supra* note 80.

elections.[86] In contrast, the Court has held that welfare benefits,[87] housing,[88] federal employment,[89] a funded education[90] and pregnancy-related medical care,[91] including medically necessary abortions,[92] are not fundamental rights.

Furthermore, the Court has tied those "non-explicit" rights that it does guarantee to explicit constitutional provisions. While the Court had once avoided grounding substantive rights in the Due Process Clause in reaction to the *Lochner* era,[93] it has more recently held that the right to privacy, which encompasses rights to have an abortion, to use contraception, to marry, to procreate, to have family relationships, to control the education of one's children, and to bodily integrity,[94] is grounded in substantive due process.[95] As to the other "non-explicit" fundamental rights, the Court has grounded the right to interstate travel in a number of textual areas,[96] the right of access to the courts in the First

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86. *See* cases cited *supra* notes 39-44.

87. *See* Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972); Dandridge v. Williams, 397 U.S. 471, 484-86 (1970).

88. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972).

89. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

90. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

91. *See* Maher v. Roe, 432 U.S. 464, 469 (1977).

92. *See* Harris v. McRae, 448 U.S. 297, 318 (1980).

93. *See* Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963) (discussing the Supreme Court's rejection of substantive due process).

94. *See* cases cited *supra* note 39.

95. In *Casey*, a majority of the Supreme Court joined in the portion of Justice O'Connor's opinion locating the right to privacy in the substantive component of the Due Process Clause. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846-53 (1992); *see also* Sandra L. Tholen & Lisa Baird, *Con Law Is as Con Law Does: A Survey Of* Planned Parenthood v. Casey *in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 978-79 (1995).

Prior to *Casey*, the majority of the Court in *Roe* joined Justice Blackmun's opinion that, while not grounding the right to privacy in a particular textual source, noted that the right had been grounded alternatively in the First, Fourth, Fifth and Ninth Amendments, the penumbra of the Bill of Rights, and the concept of ordered liberty. *See* Roe v. Wade, 410 U.S. 113, 152 (1973). Justice Douglas, for the Court in *Griswold*, drew on the First, Third, Fourth, Fifth and Ninth Amendments as support for the right to privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

96. The majority in *Shapiro*, while declining to ground the right to interstate travel in a particular constitutional provision, noted that previous Court decisions grounded this right in the Privileges and Immunities Clause of Article IV, section 2, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Commerce Clause, and grounded the right to travel abroad in the Due Process Clause of the Fifth Amendment. *See* Shapiro v. Thompson, 394 U.S. 618, 630 n.8 (1969); *see also* United States v. Guest, 383 U.S. 745, 758 (1966) (recognizing that the right to interstate travel is not explicitly mentioned in the Constitution); Jonathan Hangartner, *The Constitutionality of Large Scale Police Tactics: Implications for the Right of Intrastate Travel*, 41 PACE L. REV. 473, 482-94 (1994); Karin F. Se-

Amendment's right to petition the government,[97] and the right to an equal and unburdened vote in state elections directly in the Equal Protection Clause.[98]

A number of Justices have criticized and advanced alternatives to the explicit or implicit test for determining what is a fundamental right. Justice Marshall argued that this test failed to account for Court decisions in the privacy, voting rights and criminal appeals cases[99] and maintained that, under his "nexus" approach, in addition to explicit or implicit rights, the Constitution protects certain fundamental interests based on their proximity to explicit constitutional guarantees.[100] Justice Stewart, however, suggested

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gall, *It's Not Black and White:* Spencer v. Casavilla *and the Use of the Right of Intrastate Travel in Section 1985(3),* 57 BROOK. L. REV. 473, 482-94 (1991).

97. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (citing Johnson v. Avery, 393 U.S. 483, 485 (1969) and *Ex parte* Hull, 312 U.S. 546, 549 (1941)); *see also* Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-examination,* 18 HARV. C.R.-C.L. L. REV. 409, 442-44 (1983); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth,* 21 HASTINGS CONST. L.Q. 15, 42-46 (1993).

98. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 629 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

99. Specifically, Justice Marshall stated his criticism of the explicit or implicit test as follows:

> But it will not do to suggest that the "answer" to whether an interest is fundamental for purposes of equal protection analysis is *always* determined by whether that interest "is a right . . . explicitly or implicitly guaranteed by the Constitution."
>
> I would like to know where the Constitution guarantees the right to procreate, or the right to vote in state elections, or the right to an appeal from a criminal conviction.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 100 (1973) (Marshall, J., dissenting) (quoting *id.* at 33-34) (citations omitted); *cf. supra* note 80 (discussing footnote 15 in *Plyler*).

100. Justice Marshall explained his nexus approach as follows:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

Rodriguez, 411 U.S. at 102-03 (Marshall, J., dissenting). Marshall incorporated this "nexus" approach into his general equal protection sliding scale approach. *See supra* notes 52-53 and accompanying text.

The majority of the Supreme Court has never adopted Marshall's "nexus" approach. *See, e.g., Rodriguez,* 411 U.S. at 37. Thus, in *Rodriguez,* the Court majority, while recognizing the importance of the rights to free speech and to vote and not disputing the relationship of education to political participation, argued that the Court has no responsibility to guarantee effective political participation. *See id.* at 36. The Court further argued that such an approach would convert the

that the substantive Fourteenth Amendment rights are limited to those "implicit in the concept of ordered liberty."[101] Justice Harlan advanced an even narrower alternative, disagreeing with the whole equal protection fundamental rights approach.[102]

Turning to the education financing case law, the Supreme Court in *Rodriguez*, while acknowledging the importance of education,[103] held that a funded education is not a fundamental right.[104] First, the Court noted that, while previous cases finding equal protection violations involved the complete deprivation of a right, the challenged education financing scheme did not completely deprive children of an education.[105] Second, the Court stated that the challenged scheme extended and improved, rather than interfered with, public education.[106] Third, the Court invoked the separation

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Court into a "super-legislature." *Id.* at 31. Finally, the Court advanced a slippery slope argument, namely that the adoption of Marshall's nexus approach in the education financing context could lead to unwarranted judicial intrusion into other economic areas in which guaranteeing rights could arguably secure greater political participation. *See id.* at 37.

101. Moore v. City of E. Cleveland, 431 U.S. 494, 537 (1977) (Stewart, J., dissenting). For a discussion of ordered liberty, see *supra* note 83.

102. *See* Shapiro v. Thompson, 394 U.S. 618, 658-63 (1969) (Harlan, J., dissenting) (describing the fundamental rights branch of heightened equal protection scrutiny as "unfortunate and unnecessary").

103. *See Rodriguez*, 411 U.S. at 29-30; *see also* Plyler v. Doe, 457 U.S. 202, 221-23 (1982).

104. *See Rodriguez*, 411 U.S. at 29-39; *see also* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988); *Plyler*, 457 U.S. at 221.

105. *See Rodriguez*, 411 U.S. at 36-37. The Court presented this argument as follows:

> Whatever merit appellees' argument might have had if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id. at 37.

106. *See id.* at 37-39. The Court described Texas's education financing system as follows:

> The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education . . . . [T]he thrust of the Texas system is affirmative and reformatory . . . .

Id.

This reasoning, as well as the Court's first rationale, confuses the issues of whether a right is fundamental and whether state action burdens a fundamental right. Although discussed in the context of whether education is a fundamental

of powers, noting that the judiciary would be usurping the legislature's role if it intervened in education financing.[107] Finally, the Court reasoned that federalism weighed against applying heightened scrutiny because of the substantial impact that such scrutiny would have on the states.[108]

Because the challenged financing scheme did not burden a fundamental right, the Court subjected it to rational basis scrutiny.[109] The Court then held that the scheme survived this deferential level of review, finding that local control of education was a legitimate state interest[110] and that the scheme bore a rational relationship to that interest.[111] In addition, although the Court applied deferential scrutiny in *Rodriguez*, it has left open the possibility that it would apply heightened scrutiny to legislation that denies children a minimally adequate education.[112]

Dissenting in *Rodriguez*, Justice Marshall advanced three arguments in support of subjecting the challenged financing scheme to heightened scrutiny. First, Marshall cited Court precedent recognizing the importance of education.[113] Next, Marshall high-

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right, the Court's argument that Texas's financing system did not completely deprive children of an education, but rather improved public education, actually concerns whether the challenged system would burden a fundamental right to education rather than whether education is a fundamental right in the first instance. *Cf. Plyler*, 457 U.S. at 234 (Blackmun, J., concurring) (stating that when a state provides education to some but denies it to others, it offends equal protection).

107. *See Rodriguez*, 411 U.S. at 40-43. The Court expressed its reluctance to intervene in the legislative process as follows: "Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *Id.* at 41.

108. *See id.* at 44, 58.

109. *See id.* at 44.

110. *See id.* at 49-50.

111. *See id.* at 50-53.

112. In *Papasan v. Allain*, which held that a complaint alleging unequal land benefit distribution to public schools stated a claim), the Court, while restating its holdings in *Rodriguez* and *Plyler* that education is not a fundamental right, also acknowledged that "this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." 478 U.S. 265, 285 (1986); *see also* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 686 (N.Y. 1995) (Smith, J., dissenting in part) (discussing *Papasan*).

113. In particular, Justice Marshall cited *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as two prior Court decisions recognizing the importance of education. *See Rodriguez*, 411 U.S. at 111 (Marshall, J., dissenting). The majority in *Rodriguez* also recognized the relevance of *Brown* to the importance of education, beginning its analysis of whether education is a fundamental right with an extended quotation from the *Brown* decision. *See id.* at 29-30. Nonetheless, the Court held that *Brown* did not support the proposition that education is a fundamental right. *See id.* at 30.

lighted the unique status of education, as evidenced by its inclusion in the constitutions of forty-eight states.[114] Finally, applying his nexus approach, he argued that the close relationship between education and political participation warranted subjecting differences in education spending to a heightened level of scrutiny.[115] Marshall then found that the challenged financing scheme would be unconstitutional under any substantial scrutiny, as it failed to advance the asserted state interest of local control.[116]

In contrast to Justice Marshall's approach, Justices Brennan and White, in their dissents in *Rodriguez*, argued that the challenged school financing scheme failed the rational basis review.[117] Specifically, they argued that, although local control was a legitimate state purpose, the challenged disparate funding was not rationally related to this purpose.[118]

b. When Is a Fundamental Right Burdened?

In addition to the question of what constitutes a fundamental right, before challenged state action is subject to strict scrutiny, the action must be found to burden that right.[119] The Supreme Court generally has held that, to trigger strict scrutiny, challenged state action must directly burden a fundamental right, meaning that the state has placed an obstacle in the way of the exercise of the right.[120] In contrast, Justices Marshall and Brennan took a more contextual approach to determining whether state action burdens a fundamental right. In particular, both Justices argued that financial incentives which have a coercive effect can burden a

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114. *See Rodriguez*, 411 U.S. at 111-12 (Marshall, J., dissenting). Education clauses are now included in the constitutions of all 50 states. *See infra* note 500.

115. Justice Marshall wrote on the importance of education: "Of particular importance is the relationship between education and the political process . . . . Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation." *Rodriguez*, 411 U.S. at 113 (Marshall, J., dissenting). Furthermore, in response to the majority's slippery slope argument, *see supra* note 100, Justice Marshall specifically distinguished education from welfare and housing: "Education, in terms of constitutional values, is much more analogous, in my judgment, to the right to vote in state elections than to public welfare or public housing." *Rodriguez*, 411 U.S. at 115 n.74 (Marshall, J., dissenting).

116. *See Rodriguez*, 411 U.S. at 129 (Marshall, J., dissenting).

117. *See id.* at 62 (Brennan, J., dissenting); *id.* at 68 (White, J., dissenting).

118. *See id.* at 64-68 (White, J., dissenting).

119. *See supra* note 38 and accompanying text.

120. *See* Harris v. McRae, 448 U.S. 297, 315 (1980); Maher v. Doe, 432 U.S. 464, 473-74 (1977); *see also* Appleton, *supra* note 18, at 724-40 (discussing the "impingement" requirement of *Maher* and *Harris*).

fundamental right.[121]

Turning to the abortion funding cases, the Supreme Court has held that the right to have an abortion is not burdened by legislation that denies funding for abortions while providing funding for other pregnancy-related medical expenses.[122] The Court reasoned that, since such legislation does not place any restrictions on, or obstacles in the way of, having an abortion, the legislation does not burden the right to have an abortion.[123] In other words, merely influencing a decision by making one constitutionally protected alternative more accessible than another does not rise to the level of burdening a fundamental right.[124] The Court further relied on its opposition to affirmative economic obligations[125] and alluded to the discredited *Lochner* Era cases[126] to support its deci-

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121. *See Harris*, 448 U.S. at 347 (Marshall, J., dissenting); *id.* at 330 n.4 (Brennan, J., dissenting) ("My focus throughout this opinion is upon the coercive impact of the congressional decision to fund one outcome of pregnancy—childbirth—while not funding the other—abortion."); *Maher*, 432 U.S. at 483 (Brennan, J., dissenting) ("This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have . . . ."); Beal v. Doe, 432 U.S. 454, 456 (1977) (Marshall, J., dissenting) ("The enactments challenged here brutally coerce poor women to bear children . . . .").

This "coercion" argument can be traced to the Supreme Court's First Amendment jurisprudence. *See* Sherbert v. Verner, 374 U.S. 398, 403-04 (1963); American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950) ("[T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.").

122. *See Harris*, 448 U.S. at 316-17; *Maher*, 432 U.S. at 474.

123. *See Harris*, 448 U.S. at 316-17; *Maher*, 432 U.S. at 474.

In response to the argument that the denial of abortion funding was similar to the denial of welfare payments in the interstate travel cases, the Court responded as follows: "[The right to travel cases] did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers." *Maher*, 432 U.S. at 474 n.8.

124. *See Maher*, 432 U.S. at 474.

125. In Justice Powell's view, "Constitutional concerns are greatest when the State attempts to impose its will by force of law." *Id.* at 476. The *Harris* majority noted:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution . . . . Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.

Harris, 448 U.S. at 317-18.

126. In *Maher*, the Court alluded to *Lochner* as follows: "Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wis-

sion.

Conversely, Justice Marshall, applying his sliding scale approach, found that legislation that denies abortion funding while funding other pregnancy-related services violates equal protection based on the importance of the benefit, the class burdened by the legislation and proffered government interests.[127] Furthermore, Justice Brennan found that the challenged schemes impaired the fundamental right to an abortion, as protected in *Roe v. Wade*, since such schemes financially coerce women into childbirth.[128]

2. State Law

When applying the fundamental rights approach, many state courts have specifically declined to follow the federal Supreme Court's "explicitly or implicitly guaranteed" test for determining what constitutes a fundamental right under their respective state constitutions.[129] The primary reason that state courts have not followed federal law stems from the fact that, while the federal Constitution is one of restrictive authority,[130] state constitutions

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dom or social desirability, for this Court does not strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *Maher*, 432 U.S. at 479 (quoting Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955), *quoted in* Dandridge v. Williams, 397 U.S. 471, 484 (1970)). In *Harris*, the Court quoted the same language as it had in *Maher*: "But we cannot, in the name of the Constitution, overturn duly enacted statutes simply 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *Harris*, 448 U.S. at 325 (quoting *Lee Optical Co.*, 348 U.S. at 488, *quoted in Dandridge*, 397 U.S. at 484).

127. *See Harris*, 448 U.S. at 343-44 (Marshall, J., dissenting); *Beal*, 432 U.S. at 458-61 (Marshall, J., dissenting).

128. *See Harris*, 448 U.S. at 333 (Brennan, J., dissenting); *Maher*, 432 U.S. at 484-85 (Brennan, J. dissenting).

129. *See* Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982); Horton v. Meskill, 376 A.2d 359, 372-73 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156, 166 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 646 (Idaho 1975); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1194 (Ill. 1996); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 785-86 (Md. 1983); Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1976); Board of Educ. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979); Fair Sch. Fin. Counsel, Inc. v. State, 746 P.2d 1135, 1148-49 (Okla. 1987); Olsen v. State, 554 P.2d 139, 144-45 (Or. 1976); *see also* Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 n.5 (N.Y. 1982).

Some state courts have not only declined to adopt the "explicitly or implicitly guaranteed" test in their own adjudication, but also criticized the U.S. Supreme Court's use of this test. *See Serrano II*, 557 P.2d at 951 n.44; *Lujan*, 649 P.2d at 1017 n.12; *Robinson*, 303 A.2d at 282; *Walter*, 390 N.E.2d at 819. Other state courts, however, have used the "explicitly or implicitly guaranteed" test to determine whether there is a fundamental right under the state constitution outside of the education financing context. *See, e.g.*, Howell v. Heim, 882 P.2d 541, 546-47 (N.M. 1994).

130. *See* U.S. CONST. amend. X ("The powers not delegated to the United States

touch on many areas of state responsibility.[131] For a state court to hold that every benefit explicitly guaranteed in its state constitution is a fundamental right would result in an unworkable and undesirable array of fundamental rights.[132]

Some state courts have adopted alternative tests for determining what constitutes a fundamental right. These tests include whether a potential right is essential to individual liberty,[133] is central to freedom and representative democracy,[134] or is at the heart of the relationship between an individual and the state.[135] Most state courts rejecting federal law, however, have not articulated an alternative to the federal test.[136] These courts apparently adjudicate claims to fundamental right status on an *ad hoc* basis.

In determining whether challenged state action burdens an established fundamental right, some state courts have applied a more liberal standard than that adhered to by the Supreme Court. These courts reject the federal requirement that the state place a direct obstacle to the exercise of a right. Instead, the courts broaden the concept of "burdening" to include financial coercion, namely using financial incentives to pressure unduly an individual into refraining from exercising a fundamental right.[137] Other state

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by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

131. *See Committee for Educ. Rights*, 672 N.E.2d at 1194.

132. *See Lujan*, 649 P.2d at 1017; *Thompson*, 537 P.2d at 646-47; *Hornbeck*, 458 A.2d at 786; *Nyquist*, 439 N.E.2d at 366 n.5; *Walter*, 390 N.E.2d at 818-19 & n.3; *Fair Sch. Fin. Counsel, Inc.*, 746 P.2d at 1149; *Olsen*, 554 P.2d at 144-45; *see also* Natapoff, *supra* note 17, at 780 n.138.

133. The Colorado court adopted the following test for determining what is a fundamental right: "Fundamental rights are essentially those rights which have been recognized as having a value essential to individual liberty in our society." *Lujan*, 649 P.2d at 1015 n.7. This test is similar to the concept of ordered liberty. *Cf. id.* at 1017 (mentioning ordered liberty).

134. The California court described its test for determining what constitutes a fundamental right as follows:

> In applying our state constitutional provisions guaranteeing equal protection of the laws we shall continue to apply strict and searching judicial scrutiny to legislative classifications which, because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered "fundamental."

Serrano II, 557 P.2d at 952 (footnote omitted).

135. The Illinois court adopted the following test for determining what is a fundamental right: "This court has stated that fundamental rights are only those which lie at the heart of the relationship between the individual and a republican form of nationally integrated government." *Committee for Educ. Rights*, 672 N.E.2d at 1194 (internal quotations omitted).

136. *See, e.g.*, Horton v. Meskill, 376 A.2d 359 (Conn. 1977); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).

137. *See* Doe v. Maher, 515 A.2d 134, 152-53 (Conn. Super. Ct. 1986); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 401-02 (Mass. 1981); Right to Choose

courts, however, have followed federal law, holding that a fundamental right is burdened only if state action places a direct obstacle in the way of exercising the right.[138] With general state fundamental rights law in mind, this Article now discusses how state courts have applied this approach to school financing and abortion funding cases.

a. Education Financing Cases

In contrast to the U.S. Supreme Court, some state courts have held that education is a fundamental right under state law. In particular, the courts in fifteen states—Arizona, California, Connecticut, Illinois, Kentucky, Minnesota, New Hampshire, North Carolina, North Dakota, Tennessee, Virginia, Washington, West Virginia, Wisconsin and Wyoming—have held that a state funded education is a fundamental right or interest[139] under their state constitutions.[140] However, the courts in six states—Colorado,

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v. Byrne, 450 A.2d 925, 934-35 (N.J. 1982); Women's Health Ctr., Inc. v. Panepinto, 446 S.E.2d 658, 665-67 (W. Va. 1993).

138. *See* Doe v. Department of Soc. Servs., 487 N.W.2d 166, 177-79 (Mich. 1992); Hope v. Perales, 634 N.E.2d 183, 187-88 (N.Y. 1994).

139. Although some state courts have used the phrase "fundamental interest" rather than "fundamental rights," this Article does not distinguish between the two. *See, e.g.*, Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980) (using "fundamental interest"); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (describing the fundamental rights analysis alternatively as the fundamental interest analysis).

140. *See* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) ("We hold that the constitution does establish education as a fundamental right of pupils between the ages of six and twenty-one years."); Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1977) ("[E]ducation is a fundamental interest."), *modified*, 569 P.2d 1303 (Cal. 1977); *Horton*, 376 A.2d at 373 ("[I]n the light of the Connecticut constitutional recognition of the right to education (article eighth, § 1) it is, in Connecticut, a 'fundamental' right."); Lewis E. v. Spagnolo, 679 N.E.2d 831, 835 (Ill. App. Ct. 1997) ("We hold that the Illinois Constitution does indeed provide for at least a minimally adequate education . . . ."); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) ("A child's right to an adequate education is a fundamental one under our Constitution."); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993) ("Thus, on balance, we hold that education *is* a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate."); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997) ("We hold that in this State a constitutionally adequate public education is a fundamental right."); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997) ("The right to a free public education is explicitly guaranteed by the North Carolina Constitution . . . ."); Bismarck Pub. Sch. Dist. No. One v. State, 511 N.W.2d 247, 256 (N.D. 1994) ("[T]he right to education is a fundamental right under the North Dakota Constitution."); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 151 (Tenn. 1993) ("The certain conclusion is that . . . the Tennessee Constitution guarantees to the school children of this state the right to a free public education."); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) ("[W]e agree with the trial court that education is a fundamental right under the Constitution."); Seattle Sch. Dist. No. One v.

Georgia, Idaho, Maryland, New Jersey and New York—have held that a state funded education is not a fundamental right under their state constitutions.[141] Furthermore, the courts in six states—Arkansas, Michigan, Ohio, Oklahoma, Oregon and South Carolina—although adjudicating equal protection challenges to education financing schemes, have declined to decide whether education is a fundamental right.[142] The following sections explore these cases.

1. States Holding That Education Is a Fundamental Right

The fifteen state courts that have held that education is a

State, 585 P.2d 71, 92 (Wash. 1978) (en banc) ("[A]ll children residing within the State's borders have a 'right' to be amply provided with an education. That 'right' is constitutionally paramount . . . ."); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) ("Certainly, the mandatory requirement of 'a thorough and efficient system of free schools' found in Article XII, Section 1 of our Constitution, demonstrates that education is a fundamental constitutional right in this State."); Buse v. Smith, 247 N.W.2d 141, 155 (Wis. 1976) ("It has been established that the right to equal opportunity for education is a fundamental right guaranteed by the Wisconsin Constitution . . . . The strict scrutiny standard should here be applied . . . ."); *Herschler*, 606 P.2d at 333 ("In light of the emphasis which the Wyoming Constitution places on education, there is no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest.").

The Wisconsin court, after establishing that education is a fundamental right in the state, subsequently qualified its holding. *See* Kukor v. Grover, 436 N.W.2d 568, 580 (Wis. 1989) ("[N]otwithstanding our recognition that education is, to a certain degree, a fundamental right, we apply . . . a rational basis standard . . . .").

141. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982) ("A heartfelt recognition and endorsement of the importance of an education does not elevate a public education to a fundamental interest warranting strict scrutiny."); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981) ("Consistent with the holding of the U.S. Supreme Court in *Rodriguez*, as well as the decisions of the highest courts in a number of sister states, we hold that education per se is not a 'fundamental right' and that the Georgia public school finance system must stand if it satisfies the 'rational relationship' test."); Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975) ("[W]e refuse to classify the right to education as a fundamental right which compels the State, for the purposes of financing, to wipe out local entities and finance on the basis of revenues raised by some sort of statewide system."); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 786 (Md. 1983) ("[W]e conclude that education is not a fundamental right for purposes of equal protection analysis under Art. 24 of the Declaration of Rights."); Robinson v. Cahill, 303 A.2d 273, 283-87 (N.J. 1973); Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 365-66 (N.Y. 1982).

142. *See* DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983); Milliken v. Green, 212 N.W.2d 711, 717-18 (Mich. 1973); Board of Educ. of Cincinnati v. Walter, 390 N.E.2d 813, 819 (Ohio 1979); Fair Sch. Fin. Council, Inc. v. State, 746 P.2d 1135, 1149 (Okla. 1987) (holding that the Oklahoma constitution only guarantees a basic, adequate education); Olsen v. State, 554 P.2d 139, 144 (Or. 1976) ("We share New Jersey's opinion that this approach of categorizing an interest as a fundamental or nonfundamental interest and deciding this issue upon the basis of whether the interest is explicitly or implicitly guaranteed by the Constitution, is not a helpful method of analysis."); Richland County v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988).

fundamental right relied on a number of sources to reach this conclusion. All fifteen courts relied foremost on the education clauses in their respective state constitutions.[143] The California,[144] Illinois,[145] Kentucky,[146] North Carolina,[147] North Dakota[148] and Ten-

143. *See Shofstall*, 515 P.2d at 591-92; Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1258 (Cal. 1971) (en banc); *Horton*, 376 A.2d at 373; *Lewis E.*, 679 N.E.2d at 835; *Rose*, 790 S.W.2d at 205; *Skeen*, 505 N.W.2d at 313; *Claremont Sch. Dist.*, 703 A.2d at 1358; *Leandro*, 488 S.E.2d at 254; *Bismarck Pub. Sch. Dist. No. One*, 511 N.W.2d at 259; *McWherter*, 851 S.W.2d at 150; *Scott*, 443 S.E.2d at 141-42; *Seattle Sch. Dist. No. One*, 585 P.2d at 93-95; *Pauley*, 255 S.E.2d at 878; *Buse*, 247 N.W.2d at 147-49; *Herschler*, 606 P.2d at 332-33.

144. *See Serrano I*, 487 P.2d at 1257 (citing cases establishing the importance of education under California law); *see also* San Francisco Unified Sch. Dist. v. Johnson, 479 P.2d 669, 676 (Cal. 1971) (en banc) ("Unequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.") (construing a state statute to allow busing of students even without parental consent); Manjares v. Newton, 411 P.2d 901, 908-09 (Cal. 1966) (en banc) ("In light of the public interest in conserving the resource of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education.") (holding that a school board abused its discretion in failing to provide students transportation to and from school, as such action denied children an educational opportunity); Jackson v. Pasadena City Sch. Dist., 382 P.2d 878, 881 (Cal. 1963) (en banc) ("In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis.") (holding that a complaint alleging school segregation stated a cause of action); Piper v. Big Pine Sch. Dist., 226 P. 926, 930 (Cal. 1924) (stating the opportunities made available through education "are rights and privileges that cannot be denied") (holding that a state school system could not exclude a Native American child from attending common public schools because of her race); Ward v. Flood, 48 Cal. 36 (1874) ("Under the laws of California children or persons between the ages of five and twenty-one years are entitled to receive instruction at the public schools . . . .") (holding that San Francisco could maintain separate African-American and White public schools).

145. *See Lewis E.*, 679 N.E.2d at 835 (citing Stasica v. Hannon, 388 N.E.2d 1110 (Ill. 1979), Board of Educ. v. Redding, 207 N.E.2d 427 (Ill. 1965) and People *ex rel.* Leighty v. Young, 139 N.E. 894 (Ill. 1923), to support a finding that education is a fundamental right in Illinois).

146. *See Rose*, 790 S.W.2d at 206-08 (citing cases that support a finding that education is a fundamental right in Kentucky); *see also* Wooley v. Spalding, 293 S.W.2d 563, 565 (1956) ("The fundamental mandate of the Constitution and Statutes of Kentucky is that there shall be equality . . . . [I]t does demand that there shall be a substantially uniform system and equal school facilities without discrimination as between different sections of a district or county."); Commonwealth *ex rel.* Baxter v. Burnett, 35 S.W.2d 857, 858 (Ky. 1931) ("Our Constitution evidences explicit care to promote public education as a duty of the state, making it mandatory upon the General Assembly to provide an efficient system.") (holding that the Commonwealth's attorney could not proceed against the county school superintendent, who was not a county officer); Board of Educ. v. McChesney, 32 S.W.2d 26, 28 (Ky. 1930) ("One of the mandates of the Constitution is that 'the general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state.'") (holding that a board of education could not remove a school superintendent from office); City of Louisville v. Commonwealth, 121 S.W. 411, 412 (Ky. 1909) ("In obedience to th[e] requirement [that the

nessee[149] courts cited state court precedent. The Arizona, Kentucky, Minnesota and Tennessee courts relied on the decisions of the courts of other states.[150] The California, Kentucky, Minnesota and Washington courts further noted the significance of education in the state.[151] The California, Tennessee and Wyoming courts cited the general importance of education as recognized in *Brown*,[152] and the Connecticut court cited Marshall's dissent in

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state provide for public schools] the General Assembly has provided a system of common schools . . . .") (holding constitutional a state law requiring cities to institute a minimum public school tax); Major v. Cayce, 33 S.W. 93, 94 (Ky. 1895) (citing Kentucky's constitutional educational provisions, and assuming "that under the school law the pupils, all within the age and resident in the district, are entitled to attend these common schools . . . .") (holding that a school teacher could charge students for additional lessons not required under state law).

147. *See* Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 432, 436 (N.C. Ct. App. 1987) (citing as support for finding education to be a fundamental right North Carolina Sneed v. Board of Educ., 264 S.E.2d 106 (1980), which held that, although the North Carolina constitution mandates that public funds pay for school buildings and personnel salaries, school districts may charge students certain modest and reasonable fees).

148. *See Bismarck Pub. Sch. Dist. No. One*, 511 N.W.2d at 256 (acknowledging cases that support finding education a fundamental right in North Dakota); *see also* Lapp v. Reeder Pub. Sch. Dist., 491 N.W.2d 65, 67 (N.D. 1992) (holding that a handicapped student's mother was entitled to receive boarding care payments and noting that "[u]nder our state constitution, all children in North Dakota have the right to a public school education"); State v. Rivinius, 328 N.W.2d 220, 228 (N.D. 1982) (upholding a conviction for violating the state's compulsory school attendance law and noting that "Article VIII of the North Dakota Constitution deals with education and contains a constitutional mandate to provide a system of schools and education within the state"); State v. Shaver, 294 N.W.2d 883, 895-96 (N.D. 1980) (upholding a conviction for violating the state's compulsory school attendance law and citing North Dakota constitutional provisions concerning education); *Ex rel* G.H., 218 N.W.2d 441, 446 (N.D. 1974) (stating, while deciding the issue of what agency should pay for a disabled student's education, that "[w]e are satisfied that all children in North Dakota have the right, under the State Constitution, to a public school education").

149. *See* Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 151 (Tenn. 1993) (quoting, as support for finding education to be a fundamental right in Tennessee, Leeper v. State, 53 S.W. 962, 965 (1899) ("[T]he kind and quality of instruction given to the young is as important as the food furnished the people, and the public school is, in the highest sense, a public institution . . . .") (holding as constitutional the state commission's grant to a contractor the sole rights to furnish textbooks to public schools)).

150. *See* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) (citing the California and Michigan decisions); Rose v. Council for Better Educ., 790 S.W.2d 186, 209-10 (Ky. 1989) (citing the West Virginia decision); Skeen v. State, 505 N.W.2d 299, 313-14 (Minn. 1993) (citing the Washington, Wisconsin and Wyoming decisions); *McWherter*, 851 S.W.2d at 151 (citing the Connecticut, West Virginia and Wyoming decisions).

151. *See* Serrano v. Priest *(Serrano I)*, 487 P.2d 1241, 1258-59 (Cal. 1971) (en banc); *Rose*, 790 S.W.2d at 211; *Skeen*, 505 N.W.2d at 313; Seattle Sch. Dist. No. One v. State, 585 P.2d 71, 94 (Wash. 1978) (en banc).

152. *See Serrano I*, 487 P.2d at 1256-57 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)); *McWherter*, 851 S.W.2d at 151 (same); Washakie County

Rodriguez.[153] The California and New Hampshire courts stressed the nexus between education and political participation in a democracy,[154] and the California court analogized the right to education to other established federal rights.[155] The Illinois and Kentucky courts specifically rejected the separation of powers argument.[156] Finally, the West Virginia court cited the importance of education in international human rights documents.[157]

The courts in five states—California, Connecticut, North Dakota, West Virginia and Wyoming—that held that education is a fundamental right further held that inequitable education funding burdens this right.[158] The Connecticut court supported this conclusion with a quote from Justice Marshall's dissent in *Rodriguez*, in which Marshall stated that equal protection concerns equality, not minimal adequacy.[159] The North Dakota court rejected the argument that the challenged education financing scheme did not burden the right to education because there was no absolute deprivation of this right, instead finding that the manner in which education funding is distributed involved important substantive matters.[160] The Wyoming court held that, since the distribution of education funds based on wealth makes a classification on the ba-

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Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333-34 (Wyo. 1980) (same).

153. *See* Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977).

154. *See Serrano I*, 487 P.2d at 1258 ("At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities."); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358-59 (N.H. 1997). The California court's reasoning in *Serrano I* presaged Justice Marshall's nexus argument in *Rodriguez*. *See supra* note 115 and accompanying text.

155. *See Serrano I*, 487 P.2d at 1257-58 (comparing the right to a funded education to the rights of indigent criminal defendants, and stating that "we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer"). The California court also compared the rights at issue to those in *Reynolds v. Sims*, 377 U.S. 533 (1964). *See Serrano I*, 487 P.2d at 1257 n.24. As noted below, the rights to criminal trial transcripts and defense attorneys are both examples of economic equality rights similar to the right to equal education funding. *See infra* Part IV.C.2.c (discussing substantive equal protection rights).

156. *See* Lewis E. v. Spagnolo, 679 N.E.2d 831, 837-38 (Ill. App. Ct. 1997); *Rose*, 790 S.W.2d at 209.

157. *See* Pauley v. Kelly, 255 S.E.2d 859, 863-64 n.5 (W. Va. 1979); *see also infra* Part IV.C.6 (discussing the relationship between economic equality rights and international human rights law).

158. *See* Serrano v. Priest *(Serrano II)*, 557 P.2d 929, 951 (Cal. 1976/1977) (en banc); *Horton*, 376 A.2d at 373; Bismarck Pub. Sch. Dist. No. One v. State, 511 N.W.2d 247, 259 (N.D. 1994); *Pauley*, 255 S.E.2d at 878; Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 334 (Wyo. 1980).

159. *See Horton*, 376 A.2d at 373.

160. *See Bismarck Pub. Sch. Dist. No. One*, 511 N.W.2d at 258-59.

sis of wealth, it is suspect.[161] The California and West Virginia courts concluded without detailed analysis that inequitable education funding burdens the right to a funded education.[162]

After holding that inequitable education financing burdened the fundamental right to education, the courts in four states—California, Connecticut, West Virginia and Wyoming—continued by subjecting their respective state's system of financing public education to strict scrutiny.[163] Three of these courts found their state's system to be constitutionally deficient,[164] while the fourth remanded the case to a lower court, which found a constitutional violation.[165] Specifically, the California court held that the proffered reason for the funding differences—local control over education—was not a compelling state interest.[166] The Connecticut and Wyoming courts held that the state had not demonstrated that the challenged funding system was the least intrusive means to further its stated goals.[167] The West Virginia court, on remand, found that the challenged system was inadequate as it discriminated based on the wealth of the school district.[168]

The Supreme Court of North Dakota, while finding that its state's education financing scheme burdened the fundamental right to education, subjected the challenged scheme to an intermediate level of scrutiny.[169] The court employed this level of scrutiny based on its recognition that separation of powers concerns favored limiting the judicial management of education policy,[170] while at the same time finding that the importance of the right to education

161. *See Herschler*, 606 P.2d at 334.

162. *See Serrano II*, 557 P.2d at 951; Serrano v. Priest *(Serrano I)*, 487 P.2d 1241, 1255 (Cal. 1971) (en banc); *Horton*, 376 A.2d at 373.

163. *See Serrano II*, 557 P.2d at 951; *Horton*, 376 A.2d at 373; *Pauley*, 255 S.E.2d at 878; *Herschler*, 606 P.2d at 333.

164. *See Serrano II*, 557 P.2d at 957-58; *Horton*, 376 A.2d at 374; *Herschler*, 606 P.2d at 335.

165. *See Pauley*, 324 S.E.2d at 130-31.

166. *See Serrano II*, 557 P.2d at 953. The California court also noted that the challenged legislation might fail even rational relationship review. *See id.* at 953 n.49.

167. *See Horton*, 376 A.2d at 370, 374 (endorsing a lower court's finding that the challenged education funding system was not the least drastic means to achieve the goal of local control); *Herschler*, 606 P.2d at 335.

168. *See Pauley*, 324 S.E.2d at 131.

169. *See* Bismarck Pub. Sch. Dist. No. One v. State, 511 N.W.2d 247, 256 (N.D. 1994) (stating that "we analyze these equal protection claims under the intermediate level of scrutiny, and we require the distribution of funding for education to bear a close correspondence to legislative goals").

170. *See id.* at 256-57.

demanded some form of heightened scrutiny.[171] The court then held that its state's financing system failed this intermediate scrutiny because the unequal distribution of educational resources did not bear a close relationship to either of the state's asserted purposes—providing equal educational opportunity and ensuring local control.[172]

The courts in six other states—Arizona, Illinois, Minnesota, North Carolina, Virginia and Wisconsin—held that, while a funded education is a fundamental right, the state need only supply a minimally adequate education, not an equally funded education.[173] In other words, these courts held that inequitable funding did not burden the right to education guaranteed by their state constitutions.[174] The Arizona court relied on the discussion in *Rodriguez* concerning minimally adequate education to reach this result.[175] The Minnesota court reached this conclusion through an examination of its state constitution, finding that the constitution guaranteed a general and uniform system of education but not a particular financing scheme.[176] The North Carolina court also relied on its state constitution, finding that the constitution's education clause explicitly allowed disparate funding.[177] The Virginia court, while not considering the equal protection question, found that its constitution did not mandate equal education funding.[178] Finally, the Wisconsin court relied on the Arizona decision and U.S. Su-

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171. *See id.* at 257-59.

172. *See id.* at 259-61.

173. *See* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) (en banc); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Lewis E. v. Spagnolo, 679 N.E. 2d 831, 835, 837 (Ill. App. Ct. 1997); Skeen v. State, 505 N.W.2d 299, 315-16 (Minn. 1993); Leandro v. State, 488 S.E.2d 249, 256-57 (N.C. 1997); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989).

The courts in other states explicitly disagreed with this conclusion, holding that, once education is a fundamental right, inequitable education financing burdens the right. *See, e.g.*, Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); *see also* Part IV.C.2.a. Furthermore, the Arizona court itself subsequently suggested that its analysis in *Shofstall* was flawed:

> We do not understand how the rational basis test can be used when a fundamental right has been implicated. They seem to us to be mutually exclusive. If education is a fundamental right, the compelling state interest test (strict scrutiny) ought to apply. On the other hand, if the rational basis test properly applies, education is not a fundamental right.

Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 811 (Ariz. 1994) (internal citations omitted) (declining to engage in an equal protection analysis).

174. *See, e.g., Skeen*, 505 N.W.2d at 317-18.

175. *See Shofstall*, 515 P.2d at 592.

176. *See Skeen*, 505 N.W.2d at 315-16.

177. *See Leandro*, 488 S.E.2d at 258.

178. *See Scott*, 443 S.E.2d at 142.

preme Court precedent to conclude that a state need only provide a minimally adequate, but not an equal, education.[179]

Three of these six courts upheld the challenged funding system. The Minnesota court, applying rational basis scrutiny, held that allowing localities to supplement funds received by the state in funding education was rationally related to the goal of encouraging localities to provide additional education funds.[180] The Wisconsin court held that the rational basis of local control justified the disparities.[181] The Virginia court, not engaging in an equal protection analysis, held that the challenged system did not violate its constitution's education clauses.[182] The Arizona court, in contrast, held that, because the state's education financing system caused substantial disparities, the system violated the state's constitutional mandate to provide for education.[183] The North Carolina court remanded the challenge to its state's education financing system to the trial court for further proceeding in light of its holding that the system could be challenged as inadequate.[184]

Three courts declaring education to be a fundamental right—those in Kentucky, New Hampshire and Washington—held that their respective financing schemes violated the education clauses of their respective state constitutions without deciding whether the scheme violated equal protection.[185] While the highest court in Illinois has upheld its system against an equality challenge as local control of education to be a legitimate state interest,[186] and its state's financing system was rationally related to that interest,[187] a lower court remanded a case to the trial court to determine

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179. *See* Kukor v. Garner, 436 N.W.2d 568, 579-80 (Wis. 1989) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), Plyler v. Doe, 457 U.S. 202 (1982), Papasan v. Allain, 478 U.S. 265 (1986), and *Shofstall*, 515 P.2d at 592).

180. *See 'Skeen*, 505 N.W.2d at 316. The Minnesota court also held that its state's school financing system did not directly violate the state's education clause. *See id.* at 312.

181. *See Kukor*, 436 N.W.2d at 582. The Wisconsin court also stated that the challenged system would survive even strict scrutiny. *See id.* at 582 n.13.

182. *See Scott*, 443 S.E.2d at 142.

183. *See* Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 815-16 (Ariz. 1994) (en banc); *see also id.* at 816-18 (Feldman, C.J., specially concurring) (arguing that the state's education financing system violated the state's equal protection guarantee).

184. *See* Leandro v. State, 488 S.E.2d 249, 261 (N.C. 1997).

185. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1360 (N.H. 1997); Seattle Sch. Dist. No. One v. State, 585 P.2d 71, 96-104 (Wash. 1978) (en banc); *see also* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 665 (N.Y. 1995) (recognizing that the state constitution imposes a duty on the state to provide an education).

186. *See* Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1196 (Ill. 1996).

187. *See id.*

whether the challenged system violated the mandate for a minimally adequate education.[188]

Lastly, one state court that found that education is a fundamental right—Tennessee—held that the challenged system failed the equal protection rational relationship review.[189] In particular, this court held that financing schools through local taxes did not bear a rational relationship to the goal of ensuring local control.[190] In doing so, the Tennessee court specifically rejected the separation of powers argument against finding the state's education system unconstitutional on the ground that the court's duty was to determine whether the challenged legislation was in conflict with the state's constitution.[191]

2. Courts Holding That Education Is Not a Fundamental Right

The courts of six states—Colorado, Georgia, Idaho, Maryland, New Jersey and New York—have held that education is not a fundamental right under their respective state constitutions.[192] These courts also relied on a number of sources to reach their conclusions. All but the New Jersey court cited the federal precedent of *Rodriguez*.[193] The Georgia,[194] Maryland[195] and New York[196] courts

188. *See* Lewis E. v. Spagnolo, 679 N.E. 2d 831, 840 (Ill. App. Ct. 1997).

189. *See* Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156 (Tenn. 1993) ("The proof before us fails to show a legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated, and, thus, fails to satisfy even the 'rational basis' test applied in equal protection cases.").

190. *See id.* at 154-55.

191. *See id.* at 147-48.

192. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982) (en banc); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 646-47 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 786 (Md. 1983); Robinson v. Cahill, 303 A.2d 273, 283-86 (N.J. 1973); Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982).

193. *See Lujan*, 649 P.2d at 1018; *McDaniel*, 285 S.E.2d at 167; *Thompson*, 537 P.2d at 646-647; *Hornbeck*, 458 A.2d at 786; *Nyquist*, 439 N.E.2d at 364-65. The New Jersey opinion, issued just a month after the *Rodriguez* decision, did not incorporate that decision into its analysis of the state constitutional issues. *See Robinson*, 303 A.2d at 282.

194. *See McDaniel*, 285 S.E.2d at 167 (citing Ingram v. Payton, 150 S.E.2d 825 (Ga. 1966) (applying rational basis scrutiny in holding that the state could constitutionally distinguish between county school systems and independent school systems for purposes of state funding of education, but not discussing whether education is a fundamental right under state law)).

195. *See Hornbeck*, 458 A.2d at 787 (citing, for the proposition that only a significant interference with a fundamental right triggers strict scrutiny, Attorney Gen. v. Waldron, 426 A.2d 929 (Md. 1981) (holding that a state law that prohibited

further cited their own state court precedent. The Georgia, Idaho and Maryland courts cited education financing decisions from other states.[197] The Georgia court also looked to its constitution's educational provision, finding significant the absence of an equality requirement in an entire article of the state constitution devoted to education.[198] The court further noted its reluctance to place an affirmative duty on the state, absent a specific constitutional requirement.[199] The Colorado, Georgia, Idaho and Maryland courts relied on the separation of powers argument, stating that education financing decisions are properly left to the legislative sphere.[200] Finally, the Maryland court noted that the challenged scheme did not significantly deprive or absolutely deny anyone an education.[201]

As their states' school financing systems did not burden a fundamental right, the courts in five states—Colorado, Georgia, Idaho, Maryland and New York—subjected their states' systems to rational basis scrutiny.[202] All of the courts found local control of

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retired judges from both practicing law for compensation and receiving a pension violated state and federal equal protection)); Attorney Gen. v. Johnson, 385 A.2d 57 (Md. 1978) (upholding a state law mandating that certain medical malpractice claims be submitted before an arbitration panel before proceeding to a court of law)). Neither *Waldron* nor *Johnson*, however, considered the question of whether education is a fundamental right under the Maryland constitution.

196. *See Nyquist*, 439 N.E.2d at 365 (citing *In re* Levy, 345 N.E.2d 556, 558 (N.Y. 1976) (upholding a state law requiring the parents of children who were physically disabled, except for blind or deaf children, to contribute to the cost of education of their children, but which merely cited to the *Rodriguez* decision for the proposition that education is not a fundamental constitutional right)).

197. *See McDaniel*, 285 S.E.2d at 166-67 (citing the Arizona, Idaho and New Jersey cases); *Thompson*, 537 P.2d at 646 (citing the New Jersey case); *Hornbeck*, 458 A.2d at 787 (citing the Colorado and Ohio decisions).

198. *See McDaniel*, 285 S.E.2d at 166.

199. *See id.*

200. *See* Lujan v. State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982) (en banc); *McDaniel*, 285 S.E.2d at 167; *Thompson*, 537 P.2d at 640; *Hornbeck*, 458 A.2d at 786-87.

201. *See Hornbeck*, 458 A.2d at 787. The Maryland court further noted that even if education were a fundamental right, strict scrutiny would not apply because there was no significant deprivation of that right. *See id.* This reasoning is based on that in *Rodriguez*. *See supra* note 105 and accompanying text. *But see* Bismarck Pub. Sch. Dist. No. One v. State, 511 N.W.2d 247, 259 (N.D. 1994).

202. *See Lujan*, 649 P.2d at 1022; *McDaniel*, 285 S.E.2d at 167-68; *Thompson*, 537 P.2d at 644-45; *Hornbeck*, 458 A.2d at 788; Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982).

A subsequent New York State case held that "even a claim of extreme disparity" does not violate the state's education clause. *See* Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 655 N.E.2d 647, 648 (N.Y. 1995).

The Maryland court further stated that the state's financing system would survive even a heightened scrutiny review. *See Hornbeck*, 458 A.2d at 788.

education to be a legitimate state interest,[203] and further found that each state's financing system was rationally related to that interest.[204] The New Jersey court, however, avoided an equal protection analysis and held that its system of education financing violated the thorough and efficient public school provision of its constitution.[205]

3. Other Education Funding Equal Protection Decisions

Of the six courts that did not determine whether education is a fundamental right, one—in Arkansas—held that the challenged system failed equal protection rational relationship review.[206] Specifically, this court held that financing schools based on district tax contributions did not bear a rational relationship to the goal of ensuring local control.[207] The Arkansas court further held that the funding disparities denied equal educational opportunities to students in the poorer school districts.[208] In support of its holding, the Arkansas court relied on the importance of educational opportunity as a prerequisite to allow citizens to appreciate their other established rights.[209]

The other five courts that avoided determining whether education is a fundamental right—those in Michigan, Ohio, Oklahoma, Oregon and South Carolina—found no equal protection violation.[210] The Michigan court held that the state constitution only required adequate educational services, not equality of educa-

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203. *See Lujan*, 649 P.2d at 1023; *McDaniel*, 285 S.E.2d at 167-68; *Thompson*, 537 P.2d at 645; Committee for Educ. Rights v. Edgar, 672 N.E.2d 1196 (Ill. 1996); *Hornbeck*, 458 A.2d at 788-89; *Nyquist*, 439 N.E.2d at 366.

204. *See Lujan*, 649 P.2d at 1023; *McDaniel*, 285 S.E.2d at 168; *Thompson*, 537 P.2d at 645; *Committee for Educ. Rights*, 672 N.E.2d at 1196; *Hornbeck*, 458 A.2d at 789-90; *Nyquist*, 439 N.E.2d at 366-67.

The Maryland court further found that the state constitution's education provision did not mandate equality in spending an equal amount per student education financing. *See Hornbeck*, 458 A.2d at 776.

205. *See* Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) (suggesting that local control rises to the level of a compelling state interest).

206. *See* DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) ("Consequently, even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the districts.").

207. *See id.*

208. *See id.*

209. *See id.*

210. *See* Milliken v. Green, 212 N.W.2d 711, 719-20 (Mich. 1973); Board of Educ. v. Walter, 390 N.E.2d 813, 822 (Ohio 1979); Fair Sch. Fin. Council, Inc. v. State, 746 P.2d 1135, 1150 (Okla. 1987); Olsen v. State, 554 P.2d 139, 147 (Or. 1976); Richland County v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988).

tional opportunities.[211] The Ohio court held that strict scrutiny would not be applicable to issues of taxing and spending, and, applying rational basis scrutiny, found local control to be a rational basis for the financing system.[212] The Oklahoma court held that its state constitution required only an adequate education.[213] The Oregon court, employing a balancing test, held that the interest in local control outweighed any detriment caused by the disparities in funding.[214] Finally, the South Carolina court held that the state's system of providing more funds to school districts with less wealth was a rational means to equalize education.[215]

b. Abortion Funding Cases

In the abortion funding cases, courts have focused not on whether a state-funded abortion is a fundamental right, but on whether the challenged state action burdens the fundamental right to have an abortion that the federal Constitution clearly guarantees. While this Article argues that the actual issue in the abortion funding cases is whether a court should guarantee a distinct substantive equal protection right to a state-funded abortion when other pregnancy-related medical care is funded,[216] this section follows the analyses actually employed in the case law in discussing the abortion funding cases. Furthermore, while the state cases consider challenges to abortion funding restrictions under equal protection, due process, or both, this Article only discusses and considers the case law in terms of equal protection.[217]

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211. *See Milliken*, 212 N.W.2d at 720; *cf.* East Jackson Pub. Schs. v. State, 348 N.W.2d 303, 305 (Mich. Ct. App. 1984) (holding that education is not a fundamental right under the Michigan constitution).

212. *See Walter*, 390 N.E.2d at 819-20. The Ohio court also held that the challenged education financing scheme did not directly violate the education clause of the Ohio constitution. *See id.* at 822-26.

213. *See Fair Sch. Fin. Council, Inc.*, 746 P.2d at 1149-50.

214. *See Olsen*, 554 P.2d at 145-48. The Oregon court also held that the challenged education financing system did not violate the education clause of the Oregon constitution. *See id.* at 148-49.

215. *See Campbell*, 364 S.E.2d at 472. The South Carolina court also held that the challenged "shared funding" education financing system did not violate the South Carolina constitution's education provision. *See id.* at 471-72.

216. *See infra* Part IV.C.1.c.

217. Several of the courts that struck down abortion funding restrictions found that these restrictions violate state due process constitutional protections, in addition to, or rather than, violating state equal protection guarantees. *See* Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 793 n.22 (Cal. 1981) (finding severe impairment or denial of exercise of a woman's fundamental right and acknowledging that the statutes in question are "additionally unconstitutional" under established equal protection principles, but declining to engage in an equal protection analysis due to similarity in applicable principles); Doe v. Maher, 515

The courts of five states—California, Connecticut, Massachusetts, New Jersey and West Virginia—have held that the failure to fund abortions while funding other medical procedures burdens the fundamental right to have an abortion, as established by the Supreme Court in *Roe v. Wade*.[218] Furthermore, the Oregon court held that its state's abortion funding restrictions violated its state's guarantee of equal protection without determining whether the restrictions burdened the right to have an abortion.[219] In contrast, the courts in four states—Michigan, New York, North Carolina and Pennsylvania—have held that challenged abortion funding restrictions did not burden a fundamental right.[220] In

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A.2d 134, 157, 162 (Conn. Super. Ct. 1986) (holding that the challenged statute violated the due process, equal protection and equal rights provisions of the Connecticut constitution); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 397 (Mass. 1981) (declining to engage in an equal protection analysis due to a violation of the due process clause); Women's Health Ctr., Inc. v. Panepinto, 446 S.E.2d 658, 658 (W. Va. 1993) (discussing both equal protection and due process and holding that the challenged statute violated the federally protected right to terminate pregnancy). Furthermore, some of the courts upholding restrictions analyzed the restrictions in terms of due process in addition to equal protection. *See* Doe v. Department of Soc. Servs., 487 N.W.2d 166, 180 n.36 (Mich. 1992) (noting that a due process challenge would have been analyzed under substantially the same standard as the equal protection challenge); Hope v. Perales, 634 N.E.2d 183, 187 & n.6 (N.Y. 1994) (holding that the challenged restrictions violated neither due process nor equal protection).

Because this Article argues that abortion funding restrictions violate substantive equal protection rather than the substantive due process right to have an abortion as established by the *Roe* decision, the abortion funding cases are not specifically discussed in terms of due process. Instead, this Article discusses all of these cases together in terms of equal protection. For discussions on the state abortion funding cases and due process, see Tweedt, *supra* note 18, at 1360-65, and Vuernick, *supra* note 18, at 203-10.

218. *See Myers*, 625 P.2d at 793 ("Thus, the constitutional rights at issue here are clearly among the most intimate and fundamental of all constitutional rights."); Doe v. Maher, 515 A.2d at 159 (stating that the law at issue "at least implicitly impinges on the fundamental right of privacy guaranteed to all pregnant women—rich and poor alike—and that is, the right to choose whether to have an abortion"); *Moe*, 417 N.E.2d at 402 ("Our inquiry does not end with the conclusion that this funding restriction burdens the plaintiffs' fundamental right of choice."); Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982) ("Thus, the statute impinges upon the fundamental right of a woman to control her body and destiny."); *Women's Health Ctr., Inc.*, 446 S.E.2d at 667 ("[W]e cannot but conclude that the [challenged provisions] constitute undue government interference with the exercise of the federally-protected right to terminate a pregnancy.").

219. *See* Planned Parenthood Ass'n v. Department of Human Resources, 663 P.2d 1247, 1260 (Or. Ct. App. 1983). The Oregon court avoided the issue of whether the abortion funding restrictions violated a fundamental right, simply stating "important interests are at stake." *See id.* at 1258.

220. *See* Doe v. Department of Soc. Servs., 487 N.W.2d at 179 ("[T]he state's decision to fund childbirth, but not abortion, does not impinge upon the exercise of a fundamental right provided by the Michigan Constitution."); *Hope*, 634 N.E.2d at 188 ("We thus conclude that [the challenged legislation] does not in any sense burden a fundamental right[.]"); Rosie J. v. North Carolina Dep't of Human Resources,

addition, none of these nine courts held that there is a general right to abortion funding absent funding of pregnancy-related services.[221] The following section discusses these cases.

1. States Holding That Abortion Funding Restrictions Burden a Fundamental Right

The courts in four states—Connecticut, Massachusetts, New Jersey and West Virginia—relied on the neutrality doctrine to support the conclusion that abortion funding restrictions burden the fundamental right to have an abortion.[222] Under the neutrality doctrine, once the government acts in a particular area, it must act in a constitutionally neutral manner.[223] As applied to the abortion funding context, once a state funds health care, or, more specifically, pregnancy-related health care, it cannot refuse to fund the constitutionally protected choice to terminate the pregnancy. The state would not be providing funding in a neutral manner if it provided funding for one pregnancy-related matter and not the other.

The California court relied on the unconstitutional conditions doctrine to find that its state's abortion funding restrictions bur-

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491 S.E.2d 535, 538 (N.C. 1997) ("We have held here that the action of the General Assembly in placing severe restrictions on the funding of medically necessary abortions for indigent women is valid."); Fischer v. Department of Pub. Welfare, 502 A.2d 114, 121 (Pa. 1985) ("Such a right is to be found nowhere in our state Constitution, and therefore . . . such a right cannot be considered fundamental.").

221. *See Right to Choose*, 450 A.2d at 934 ("Nor is there a fundamental right to funding for an abortion."); *Moe*, 417 N.E.2d at 402 ("[T]he Legislature need not subsidize any of the costs associated with child bearing, or with health care generally."); *Hope*, 634 N.E.2d at 187 ("[T]he fundamental right of reproductive choice does not carry with it an entitlement to sufficient public funds to exercise that right . . . ."); *see also Myers*, 625 P.2d at 780-81 (noting that the question of whether a state is required to fund abortion, absent funding the medical costs of child birth, was not at issue in the case); Doe v. Maher, 515 A.2d at 150 n.33 (declining to decide whether the right to medical care is a fundamental right under the Connecticut constitution); *Planned Parenthood Ass'n*, 663 P.2d at 1256 n.14 (noting that the plaintiffs did not argue that the state generally must fund abortions).

222. *See* Doe v. Maher, 515 A.2d at 152; *Moe*, 417 N.E.2d at 402; *Right to Choose*, 450 A.2d at 935; *Women's Health Ctr., Inc.*, 446 S.E.2d at 667. These courts all cited Lawrence Tribe's statement that a state cannot "attempt to achieve with carrots what Government is forbidden to achieve with sticks." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 933 n.77 (1978) (quoted in Doe v. Maher, 515 A.2d at 153; *Moe*, 417 N.E.2d at 402; *Right to Choose*, 450 A.2d at 936; *Women's Health Ctr.*, 446 S.E.2d at 666). The New Jersey court also noted that the challenged New Jersey statute discriminated between those needing abortions because their lives were at stake and those needing abortions because their health was at risk and found that such a distinction failed even rational basis scrutiny. *See Right to Choose*, 450 A.2d at 934-35, 935-36 n.6.

223. *See infra* Part IV.C.1.c. (discussing the neutrality doctrine).

dened the fundamental right to have an abortion.[224] Under this doctrine, the government burdens a fundamental right when it conditions a person's receipt of a benefit on her abstention from exercising that right.[225] The California court found that the restrictions burdened the fundamental right to have an abortion by conditioning the receipt of state medical benefits on a woman's refraining from exercising the right to have an abortion.[226]

The Connecticut court, after finding that its state's abortion funding restrictions burdened a fundamental right, subjected these restrictions to strict scrutiny.[227] Under this scrutiny, the court rejected the first proffered justification for the restrictions, protecting the health of pregnant women, because the challenged legislation prohibited abortions precisely when abortions were in the health interests of women.[228] The court then held that the second justification advanced by the state, protecting potential life, could not outweigh a women's interest in her health at any point during a pregnancy.[229]

The courts in three states—California,[230] Massachusetts[231] and New Jersey[232]—found that their state's abortion funding restrictions burdened a fundamental right when subjecting these re-

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224. *See Myers*, 625 P.2d at 785-86.

225. *See infra* Part IV.C.1.b. (discussing the unconstitutional conditions doctrine). While not using the term "unconstitutional conditions", the U.S. Supreme Court in *Harris* and *Maher* rejected this reasoning. *See* Harris v. McRae, 448 U.S. 297, 317 n.19 (1980); Maher v. Roe, 432 U.S. 464, 474 n.8 (1977).

226. *See Myers*, 625 P.2d at 789.

227. *See* Doe v. Maher, 515 A.2d at 159.

228. *See id.* at 156-57.

229. *See id.* at 157.

230. California's balancing test was "whether the benefits which the state derives from the restrictions 'manifestly outweigh' such significant impairment." *Myers*, 625 P.2d at 793. The California court noted that "[o]ur analysis at this point closely parallels the strict judicial scrutiny used to determine whether an enactment which discriminates against the exercise of a fundamental right denies equal protection of the law." *Id.* at 793 n.22.

231. The Massachusetts court subjected the challenged abortion funding restrictions to a flexible balancing test, balancing the state interests against the individual interests at stake. *See* Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 402-04 (Mass. 1981).

232. The New Jersey court balanced the nature of the restraint against the articulated justification:

> [A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.

Right to Choose v. Byrne, 450 A.2d 925, 936 (N.J. 1982) (quoting Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973)).

strictions to balancing tests. All three courts found that their states' funding restrictions violated their respective state guarantees of equal protection or of an individual's fundamental right to choose.[233] The California court found that the restrictions did not advance the state interest of saving limited resources, as abortions are less costly than continuing a pregnancy to birth.[234] The court further noted that, under *Roe*, the state interest in protecting the life of a fetus is only compelling in the third trimester and when an abortion is not necessary to ensure a woman's life or health.[235] The Massachusetts court, with little analysis, found that a woman's interest in having a medically necessary abortion "far exceeds" the state's interest in preserving potential life.[236] The New Jersey court cited the California and Massachusetts decisions,[237] and, with limited discussion, concluded that a woman's interest in her health and privacy outweighs the state's interest in protecting potential life.[238]

The West Virginia court held that its state's challenged abortion funding restrictions were unconstitutional, without subjecting the restrictions to any scrutiny analysis, because the state was not acting neutrally.[239]

2. States Holding That Abortion Funding Restrictions Violate Equal Protection Without Deciding Whether They Burdened the Right to Have an Abortion

The Oregon court held that, because the right to an abortion is an important right protected by *Roe*, and the challenged state action discriminated against women qualifying for assistance who did not require abortions for medical reasons, the challenged state action was subject to a balancing test.[240] The court balanced the harm to the affected class members against the state justification

233. *See Myers*, 625 P.2d at 781; *Moe*, 417 N.E.2d at 397, 402; *Right to Choose*, 450 A.2d at 941.

234. *See Myers*, 625 P.2d at 794.

235. *See id.* at 795.

236. *Moe*, 417 N.E.2d at 404.

237. *See Right to Choose*, 450 A.2d at 937 n.8.

238. *See id.* at 936-37.

239. *See* Women's Health Ctr., Inc. v. Panepinto, 446 S.E.2d 658, 667 (W. Va. 1993). By not explicitly reviewing the challenged restrictions under some level of review, the West Virginia court arguably misapplied equal protection; under an equal protection analysis, even state action that burdens a fundamental right is constitutional if it survives the relevant degree of scrutiny.

240. *See* Planned Parenthood Ass'n v. Department of Human Resources, 663 P.2d 1247, 1256-58 (Or. Ct. App. 1983).

for the classification.[241] Applying the test, the Oregon court found that the restrictions' adverse effects on women's health outweighed the state's interests in fiscal savings and protecting potential life.[242]

3. States Holding That Abortion Funding Restrictions Do Not Burden a Fundamental Right

Turning to the reasoning of the four courts that found abortion funding restrictions constitutional, the Michigan court cited *Maher*,[243] and argued that refusing to fund abortions while funding childbirth is comparable to not funding either activity, an admittedly constitutional alternative.[244] The New York court argued that the challenged legislation did not even indirectly burden the right to have an abortion and rejected the unconstitutional conditions argument.[245] The North Carolina court simply found that a funded abortion is not a constitutional right in the state, without considering either the unconstitutional conditions or neutrality doctrines.[246] The Pennsylvania court rejected the fundamental rights argument in two sentences, simply stating that there is no right to have the government subsidize one constitutionally protected activity when it subsidizes another.[247]

After finding that the challenged legislation did not burden a fundamental right, the Michigan, New York, North Carolina and Pennsylvania courts upheld the challenged legislation under a rational basis review.[248] They found that the goals of protecting po-

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241. The Oregon court subjected the challenged abortion funding restrictions to the following test: "[T]he detriment to affected members of the class is weighed against the state's ostensible justification for the disparate treatment." *Id.* at 1258.

242. *See id.* at 1259-60.

243. *See* Doe v. Department of Soc. Servs., 487 N.W.2d 166, 178-79 (Mich. 1992).

244. *See id.* at 178.

245. *See* Hope v. Perales, 634 N.E.2d 183, 187-88 (N.Y. 1994). Furthermore, the New York court noted that the U.S. Supreme Court limited the neutrality doctrine to the First Amendment context. *See id.* at 187 n.7.

It also should be noted that the New York court distinguished its holding from those of the courts that struck down abortion funding restrictions on the basis that the challenged legislation affected non-indigent women, who presumably have the resources to obtain abortions absent state funding. *See id.* at 187-88.

246. *See* Rosie J. v. North Carolina Dep't of Human Resources, 491 S.E.2d 535, 537 (N.C. 1997).

247. *See* Fischer v. Department of Pub. Welfare, 502 A.2d 114, 121 (Pa. 1985).

248. *See* Doe v. Department of Soc. Servs., 487 N.W.2d at 179; *Hope*, 634 N.E.2d at 188; *Rosie J.*, 491 S.E.2d at 537-38; *Fischer*, 502 A.2d at 123.

The Pennsylvania court further stated that even if subjected to an intermediate level of scrutiny, the challenged legislation would be constitutional. *See Fischer*, 502 A.2d at 122-23. The court reached this conclusion by finding that pre-

tential life,[249] promoting childbirth[250] and promoting infant health[251] were legitimate and that the challenged restrictions were rationally related to these goals.[252]

C. Suspect Classifications

1. Federal Law

The contemporary method for determining whether a classification is suspect under federal law originated in the now famous footnote four of *United States v. Carolene Products Co.*[253] While subjecting certain economic legislation to a deferential rational basis review, the Supreme Court explicitly left open the possibility that certain legislation directed at "discrete and insular minorities" might be subject to a "more searching judicial inquiry."[254] The footnote ground the application of heightened scrutiny in the reality of prejudice against certain groups which "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities."[255] Subsequently, in the infamous *Korematsu*[256]

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serving potential life is an important interest and that the regulations were closely related to that goal. *See id.*

249. *See* Doe v. Department of Soc. Servs., 487 N.W.2d at 179; *Fischer*, 502 A.2d at 122.

250. *See* Doe v. Department of Soc. Servs., 487 N.W.2d at 179; *Rosie J.*, 491 S.E.2d at 537.

251. *See, e.g., Hope*, 634 N.E.2d at 188 (noting that the purpose of the challenged legislation was to "ameliorat[e] infant mortality and morbidity").

Rather than applying the rational basis test to the exclusion of abortion funding from the program, the New York court applied the test to the challenged program as a whole. *See id.* at 188.

252. *See* Doe v. Department of Soc. Servs., 487 N.W.2d at 179; *Hope*, 634 N.E.2d at 188; *Rosie J.*, 491 S.E.2d at 537-38; *Fischer*, 502 A.2d at 122-23.

253. 304 U.S. 144, 153 n.4 (1938) (holding that the federal government did not violate due process by prohibiting the interstate transportation of "filled" milk).

254. *Id.* at 153. The Supreme Court wrote the following in footnote four of its *Carolene Products* decision:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 153 n.4 (citations omitted).

255. *Id.*

256. Korematsu v. United States, 323 U.S. 214 (1944) (upholding the United States Army's detention of Japanese-Americans on the West Coast during war-

case the Court implicitly adopted the approach articulated in *Carolene Products*, as it drew on the themes from *Carolene Products* to support heightened scrutiny for racial classifications.[257]

Subsequent Supreme Court suspect classification opinions have often evoked the *Carolene Products* footnote when adjudicating whether a classification is suspect.[258] In particular, these opinions rely on three factors derived from the footnote: whether there has been a history of prejudice against the potentially suspect class;[259] whether the class has suffered from a history of powerlessness which has curtailed its strength in the political process;[260] and whether members of the class share certain "immutable" characteristics.[261] In addition to these three factors,

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time).

257. The Supreme Court stated: "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . [C]ourts must subject them to the most rigid scrutiny." *Id.* at 216.

The Court in *Korematsu* did not rely on an equal protection analysis since the Equal Protection Clause does not apply directly to the federal government, but only to the states. *See* U.S. CONST. amend. XIV; *see also, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The Court, however, has since held that equal protection applies with equal force to the federal government under the Due Process Clause of the Fifth Amendment. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 214-18 (1995); *see also* Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

258. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 471, 473 n.24 (1985) (Marshall, J., concurring and dissenting) (citing *Carolene Products* to argue that classifications based on mental retardation should be subject to heightened scrutiny); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (citing, but not relying on, *Carolene Products* to strike down legislation denying public education to children who were illegal aliens); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (citing *Carolene Products* while holding that classifications based on age are not subject to heightened scrutiny); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 104 (1973) (Marshall, J., dissenting) (citing *Carolene Products* and arguing that certain wealth classifications should be subject to heightened scrutiny); Graham v. Richardson, 403 U.S. 365, 372 (1971) (citing *Carolene Products* as support for the holding that classifications based on alien status are subject to heightened scrutiny).

Other Supreme Court opinions have implicitly relied on *Carolene Products* by using the factors derived from that case to determine whether a particular classification is suspect. *See* Lying v. Castillo, 477 U.S. 635, 638 (1986) (using the *Carolene Products* factors to find that classifications based on the degree of a family relationship are not suspect); *Rodriguez*, 411 U.S. at 28 (using the *Carolene Products* factors to find that children residing in poor school districts are not a suspect class).

259. *See Lying*, 477 U.S. at 638; *Cleburne*, 473 U.S. at 472-73 n.24 (Marshall, J., concurring and dissenting); *Plyler*, 457 U.S. at 218 n.14; *Murgia*, 427 U.S. at 313; *Rodriguez*, 411 U.S. at 28; *id.* at 105 (Marshall, J., dissenting).

260. *See Lying*, 477 U.S. at 638; *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring and dissenting); *Plyler*, 457 U.S. at 218 n.14; *Murgia*, 427 U.S. at 313; *Rodriguez*, 411 U.S. at 28; *id.* at 105 (Marshall, J., dissenting).

261. *See Lying*, 477 U.S. at 638; *Cleburne*, 473 U.S. at 473 n.24 (Marshall, J., concurring and dissenting); *Plyler*, 457 U.S. at 218 n.14 ("groups disfavored by cir-

the *Carolene Products* test has been summarized as whether state action disadvantages a "discrete and insular minority."[262] Despite these formulations, however, the process for determining whether a class is suspect is flexible and cannot be tied to any one test.[263]

In its adjudication, the Supreme Court has held that classifications of race, ethnicity, national origin and, when made by a state, legal alienage, merit strict scrutiny, and classifications of gender and legitimacy merit intermediate scrutiny.[264] The Court has further held that classifications of age,[265] illegal alienage,[266] mental disability[267] and degree of a family relationship[268] are not suspect.[269] In addition, although the Court establishes a classification as suspect based in part on whether the adversely affected class has suffered prejudice, once suspect, all classifications merit the same level of scrutiny, even if the classification is beneficial to a class that has suffered prejudice.[270]

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cumstances beyond their control").

262. *See, e.g., Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring and dissenting); *Graham*, 403 U.S. at 372 (describing aliens as "a prime example of a 'discrete and insular' minority"). The discrete and insular minority test, however, is particularly inappropriate for gender classifications, as women are neither "discrete and insular" nor a minority. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting); J.E.B. v. Alabama, 511 U.S. 127, 142 n.13 (1994); Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (plurality).

263. Justice Marshall, in *Cleburne*, wrote that, while political powerlessness and immutability of a trait are relevant to determining whether a classification is suspect, what really matters is "a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs," and that "[n]o single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide." *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring and dissenting).

264. *See supra* notes 45-51 and accompanying text.

265. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991); *Murgia*, 427 U.S. at 313-14.

266. *See Plyler*, 457 U.S. at 223.

267. *See Cleburne*, 473 U.S. at 446.

268. *See* Lying v. Castillo, 477 U.S. 635, 638 (1986).

269. The Supreme Court has declined to rule on whether mental illness and physical disability are suspect classifications. *See* Heller v. Doe, 509 U.S. 312, 318-19 (1993) (finding that the failure to argue for heightened scrutiny in the district court foreclosed the argument) (physical disability); Schweiker v. Wilson, 450 U.S. 221, 231 (1981) (finding that state law did not single out the mentally ill) (mental illness).

270. For example, the Supreme Court subjects race-based affirmative action programs to the same strict scrutiny it applies to all racial classification. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 650-51 (1995) (striking down racial gerrymandering). The Court eliminated even the former exception under which federal affirmative action programs had been subject only to intermediate scrutiny. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995), *overruling in part* Metro Broad., Inc. v. FCC, 497 U.S. 547, 563-66 (1990). Similarly, courts subject gender-based affirmative action programs to the same intermediate level of scrutiny as all

Various Justices have advanced three alternatives to the established suspect classification approach. Justice Rehnquist advanced the alternative that, when strictly adhering to the language of the Fourteenth Amendment, only race and closely related classifications, such as national origin, are suspect.[271] Justice Rehnquist, however, has since joined in opinions applying heightened scrutiny to classifications other than race.[272] Justice Stevens advanced a second alternative to the *Carolene Products* method in his concurrence in *Craig v. Boren*.[273] He rejected heightened scrutiny for any classification and instead argued that state action that makes certain classifications, such as race and gender, fails even the rational relationship test because the classification itself is irrational.[274] While this approach is contrary to established federal equal protection doctrine, it is related to a third alternative that supplements established doctrine: State action that makes certain

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gender classifications. *See, e.g.*, Lamprecht v. FCC, 958 F.2d 382, 392 (D.C. Cir. 1992) (scrutinizing generalizations "regardless of which sex the generalizations purport to favor").

This approach to affirmative action programs is problematic, especially in light of the *Carolene Products* analysis. Under this approach, certain classifications are subject to heightened scrutiny because the classifications have been a basis for discriminating against certain groups. However, declaring a classification to be suspect prevents the government from remedying such discrimination through affirmative action programs. Thus, at least for purposes of remedying discrimination, it is advantageous not to be a member of a suspect class.

271. In *Sugarman v. Dougall*, Justice Rehnquist argued that "there is no language used in the Amendment, or any historical evidence as to the intent of the Framers, which would suggest to the slightest degree . . . that it was designed in any way to protect 'discrete and insular minorities' other than racial minorities." 413 U.S. 634, 649-50 (1973) (Rehnquist, J., dissenting). Justice Harlan advanced a similar argument. *See* Shapiro v. Thompson, 394 U.S. 618, 658-59 (1969) (Harlan, J., dissenting). Justice Rehnquist also criticized the majority's use of the *Carolene Products* footnote to support its holdings for two reasons. First, he argued that the footnote has little persuasive authority because it was only a footnote and only four Justices joined in the opinion. *See Sugarman*, 413 U.S. at 655-56 (Rehnquist, J., dissenting). Second, Rehnquist argued that, given this country's diversity, basing suspect classifications on the existence of discrete and insular minorities has no apparent limit. *See id.* at 657 (Rehnquist, J., dissenting).

272. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 558-66 (1996) (Rehnquist, J., concurring in the judgment) (applying intermediate scrutiny to a gender classification); Clark v. Jeter, 486 U.S. 456 (1988) (applying intermediate scrutiny to a legitimacy classification).

273. 429 U.S. 190, 211-14 (1976).

274. Justice Stevens explained his view as follows:

> I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.

Id. at 212 (Stevens, J., concurring); *see also id.* at 211 (Stevens, J., concurring) ("There is only one Equal Protection Clause.").

non-suspect classifications nonetheless violates equal protection if the state action is motivated by prejudice against a particular class. Under this alternative, courts can strike down state action under the rational relationship test when the action makes a classification that is actually a manifestation of unjustified prejudice.[275] Perhaps one reason for the variety of suspect classification approaches is that this approach is grounded directly in the Equal Protection Clause without relying on any substantive constitutional provisions.[276]

Turning to the application of the Supreme Court's approach to economic equality rights, while the Supreme Court had at times indicated that wealth is a suspect classification meriting height-

275. Although the Supreme Court has not developed a coherent theory justifying this approach, it has on a number of occasions struck down legislation under rational relationship scrutiny when the legislation disadvantages certain disfavored classes. *See* Romer v. Evans, 517 U.S. 620, 634-36 (1996) (holding unconstitutional a state constitutional amendment precluding all state action designed to protect gays and lesbians in part because the purpose of the amendment, to disadvantage gays and lesbians, was not legitimate); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (holding unconstitutional a city's denial of a special use permit for a group home for mentally retarded persons since the ordinance was apparently based on prejudice against the class); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 621-23 (1985) (holding unconstitutional a state law providing a tax exemption to Vietnam veterans who resided in the state before a certain date since the law's purpose of preferring residents was not a legitimate state purpose, and the statute was not rationally related to that purpose); Zobel v. Williams, 457 U.S. 55, 65 (1982) (holding unconstitutional a state statute distributing natural resource income based on the length of residency because the distinction between established residents and new residents served no valid state interest); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973) (holding unconstitutional a federal statute defining a household, for eligibility for food stamps, as only including persons related to each other since the classification was unrelated to any stated purpose of the statute and could not be justified as a method to prevent "hippie communes" because "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest"); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding unconstitutional a state statute that criminalized the distribution of contraceptives to unmarried persons while allowing such distribution to married persons under the rational basis test); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (holding unconstitutional a state statute preferring male over female estate administrators under rational basis scrutiny and using this lower standard of review because the case was decided prior to the establishment of intermediate scrutiny for gender discrimination); *see also* Harris v. McRae, 448 U.S. 297, 344-46 (1980) (Marshall, J., dissenting) (arguing that the challenged funding restrictions should not survive even rational basis scrutiny because, in part, the interest in protecting fetal life is illegitimate when it conflicts with preserving the life and health of a woman).

This approach is closely related to the first two factors of the *Carolene Products* analysis. *See supra* text accompanying notes 259-260.

276. Without reliance on any other substantive provision to guide its application, the suspect classification approach can appear to be somewhat *ad hoc*.

ened scrutiny,[277] it is now relatively well established that such classifications are not suspect.[278] In the education financing case of *Rodriguez*, the Court majority, using residents of districts with relatively less taxable wealth as the potential suspect class, rejected the argument that this class was suspect.[279] The Court argued that this district-based class did not possess either a history of discrimination or political powerlessness, factors indicating suspectness.[280] In the subsequent abortion funding cases of *Maher v. Roe* and *Harris v. McRae*, the Court explicitly adopted the more general proposition that poverty is not a suspect classification.[281] Interestingly, however, the Court in *Rodriguez*, *Maher* and *Harris* qualified its holdings that wealth is not a suspect classification with the word "alone."[282] This qualification might be an acknowl-

277. Prior to the 1970 case of *Dandridge v. Williams*, 397 U.S 471 (1970), a number of Supreme Court decisions indicated that economic distinctions are suspect. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) ("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 and thereby demand a more exacting judicial scrutiny.") (citation omitted) (citing Douglas v. California, 372 U.S. 353 (1963); McLaughlin v. Florida, 379 U.S. 184, 192 (1964)); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."); *Douglas*, 372 U.S. at 355 ("In either case the evil is the same: discrimination against the indigent."); *Griffin*, 351 U.S. at 19 ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); *see also* Goosby v. Osser, 409 U.S. 512, 519-20 (1973) (discussing *McDonald*).

278. *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988); Papasan v. Allain, 478 U.S. 265, 283-84 (1986); Harris v. McRae, 448 U.S. 297, 323 (1980); Maher v. Roe, 432 U.S. 464, 471 (1977); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973); *see also* James v. Valtierra, 402 U.S. 137, 140-41 (1971) (distinguishing claim based on poverty from a claim based on race and upholding state law on rationality review).

279. *See Rodriguez*, 411 U.S. at 28.

280. In defending the conclusion that the class did not satisfy the *Carolene Products* criteria, Justice Powell wrote:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28.

281. *See Harris*, 448 U.S. at 323; *Maher*, 432 U.S. at 471.

282. *Harris*, 448 U.S. at 323 ("[T]his Court has held repeatedly that poverty, *standing alone*, is not a suspect classification.") (emphasis added); *Maher*, 432 U.S. at 471 ("[T]his Court has never held that *financial need alone* identifies a suspect class for purposes of equal protection analysis.") (emphasis added); *Rodriguez*, 411 U.S. at 29 (noting that "this Court has never heretofore held that *wealth discrimination alone* provides an adequate basis for invoking strict scrutiny") (emphasis added). The Court also followed this pattern in *Kadrmas*, stating: "We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should *on that account alone* be subjected to strict equal pro-

edgment that wealth can be suspect in some situations, such as when certain important, but non-fundamental, rights are at stake.[283]

In a number of cases, Justice Marshall, sometimes joined by other Justices, argued that some wealth classifications merit heightened scrutiny.[284] In *Rodriguez*, while acknowledging that wealth classification might not be as suspect as race or alienage classifications,[285] Marshall argued that courts should subject wealth classifications which implicate important interests to a

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tection scrutiny." 487 U.S. at 458 (emphasis added); *see also* Lewis v. Casey, 518 U.S. 343, 373-74 (1996) (Thomas, J., concurring) (quoting *Rodriguez*, 411 U.S. at 29).

In none of these cases did the Court explain the significance of adding the phrase "standing alone." Nor can its significance be found in exploring the cites for this proposition. *See James*, 402 U.S. at 143, *cited in Harris*, 448 U.S. at 323 (upholding law burdening low-rent public housing projects by applying low level scrutiny because it was facially neutral and not aimed at a racial minority); *Rodriguez*, 411 U.S. at 29, *cited in Maher*, 432 U.S. at 471; *Dandridge*, 397 U.S. 471, *cited in Maher*, 432 U.S. at 471; *Harris*, 448 U.S. at 322-23, *cited in Kadrmas*, 487 U.S. at 458; Ortwein v. Schwab, 410 U.S. 656, 660 (1973), *cited in Kadrmas*, 487 U.S. at 458 (upholding $25 filing fee for civil appeal of welfare reduction).

283. The Court's addition of these qualifying phrases is either superfluous or in tension with its other decisions. If these phrases imply that wealth classifications are suspect only when fundamental rights are burdened, then they are superfluous since, once a fundamental right is burdened, strict scrutiny is applied regardless of any other classification. However, if these phrases imply that wealth classifications can be suspect if they implicate interests that fall short of being fundamental, then the Court is modifying its established equal protection analysis, which holds that state action only triggers heightened scrutiny if it burdens a fundamental right or makes a suspect classification. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). In fact, this second interpretation of the Court's language sounds more like Justice Marshall's sliding scale approach, under which wealth classifications are not *per se* suspect, but raise the level of scrutiny when affecting important interests. *See supra* notes 52-53 and accompanying text.

284. *See Kadrmas*, 487 U.S. at 468-69 (Marshall, J., joined by Brennan, J., dissenting); *Harris*, 448 U.S. at 342 (Marshall, J., dissenting); *Maher*, 432 U.S. at 458-59 (Marshall, J., dissenting); *Rodriguez*, 411 U.S. 1, 117-24 (1973) (Marshall, J., joined by Douglas, J., dissenting); *James*, 402 U.S. at 144-45 (Marshall, J., joined by Brennan and Blackmun, J.J., dissenting). Justice Douglas also advanced this view in a number of cases. *See* Hurtado v. United States, 410 U.S. 578, 602-03 (1973) (Douglas, J., dissenting); Hadley v. Alabama, 409 U.S. 937, 939 (1972) (Douglas, J., dissenting); Britt v. North Carolina, 404 U.S. 226, 240-41 (1971) (Douglas, J., joined by Brennan, J., dissenting); Cruz v. Hauk, 404 U.S. 59, 65 (1971) (Douglas, J., concurring); Meltzer v. C. Buck LeCrae & Co., 402 U.S. 954, 961 (1971) (Douglas, J., dissenting); Simmons v. West Haven Hous. Auth., 399 U.S. 510, 514 (1970) (Douglas, J., dissenting).

285. Marshall distinguished poverty from race and ethnicity as follows: "The 'poor' may not be seen as politically powerless as certain discrete and insular minority groups. Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups. But personal poverty is not a permanent disability; its shackles may be escaped." *Rodriguez*, 411 U.S. at 121 (Marshall, J., dissenting) (footnotes omitted).

heightened level of scrutiny,[286] primarily relying on Court precedent to support this position.[287] In *Maher*, Marshall stated that poverty is a relevant factor for an equal protection analysis.[288] In *Harris*, Marshall drew on *Carolene Products* to identify indigent women as a class burdened by the challenged legislation, noting that indigent women have curtailed access to the political process.[289]

2. State Law

Unlike the fundamental rights approach, state courts have not developed suspect classifications law independent from federal law. This may be due, at least in part, to the fact that this approach derives directly from equal protection without interacting with other constitutional provisions, such as education clauses, that might be different in a state constitution. Thus, those state courts that strictly adhere to federal equal protection law prevent themselves from supplementing federal suspect classification law.[290] However, those courts that do acknowledge the potential for greater state equal protection guarantees have the option of developing independent suspect classification analyses.

In this context, the view that wealth classifications, at least in some circumstances, are suspect has received only limited support in the state cases.[291] Furthermore, courts in only ten school financing[292] and three abortion funding cases[293] have discussed

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286. *See id.* at 122 ("Thus, we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests.").

287. *See id.* at 117-20 (discussing Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), Douglas v. California, 372 U.S. 353 (1963), and Griffin v. Illinois, 351 U.S. 12 (1956), and citing McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969)).

288. *See* Beal v. Doe, 432 U.S. 454, 459 (1977) (Marshall, J., dissenting) (dissenting opinion applicable to *Maher*, 432 U.S. 464 and Poelker v. Doe, 432 U.S. 519 (1977)).

289. Marshall wrote in *Harris*:

> The class burdened by the Hyde Amendment consists of indigent women . . . . In my view, the fact that the burden of the Hyde Amendment falls exclusively on financially destitute women suggests "special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

Harris, 448 U.S. 297 at 343-44 (Marshall, J., dissenting) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

290. *Cf. infra* notes 398-400 and accompanying text.

291. *See infra* Part II.C.2.a-b.

292. *See infra* Part II.C.2.a.

293. *See infra* Part II.C.2.b.

suspect classification arguments, and always as supplemental to a fundamental rights analysis.

a. Education Financing Cases

In the education finance cases, the courts of two states—California and Wyoming—have found wealth classification suspect.[294] In reaching this conclusion, the California court in *Serrano I* primarily relied on language from *Harper v. Virginia Board of Elections*,[295] citing other federal cases[296] and a California case[297] as well, without independently analyzing the issue under the *Carolene Products* factors.[298] In *Serrano II*, even though *Rodriguez* substantially undermined the federal authority concerning wealth classifications, the California court adhered to its holding in *Serrano I* on wholly state law grounds.[299] The Wyoming court simply cited *Harper* and the *Serrano I* decision to support its holding that wealth is a suspect classification.[300] Both of these

294. *See* Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) *(Serrano II)* ("[D]iscrimination in educational opportunity on the basis of district wealth involves a suspect classification."), *opinion supplemented by* 569 P.2d 1303 (Cal. 1977); Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 334 (Wyo. 1980) ("A classification on the basis of wealth is considered suspect, especially when applied to fundamental interests.")

This section cites to the reasoning from *Serrano v. Priest*, 487 P.2d 1241 (1971) *(Serrano I)* because the decision in *Serrano II* adhered to the reasons given in *Serrano I* for finding classifications based on wealth to be suspect. *See Serrano II*, 557 P.2d at 951.

295. 383 U.S. 663, 668 (1966), *cited in Serrano I*, 487 P.2d at 1250. For the language from *Harper*, see *supra* note 277.

296. Specifically, the California court cited the following federal cases as support for the proposition that wealth is a suspect classification: Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); McDonald v. Board of Educ., 394 U.S. 802, 807 (1969); Anders v. California, 386 U.S. 738 (1967); Roberts v. LaVallee, 389 U.S. 40 (1967); Douglas v. California, 372 U.S. 353 (1963); Smitt v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956). *See Serrano I*, 487 P.2d at 1250.

297. The California court cited *In re Antazo*, 473 P.2d 999, 1005-06 (Cal. 1970) (holding that a state criminal statute imposing a fine and penalty assessment, or, alternatively, imprisonment until the fine is served out, violated federal equal protection), which interpreted federal precedent as holding that discrimination based on poverty is suspect. *See Serrano I*, 487 P.2d at 1250. The court also cited Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). *See id.*

298. *See id.* Furthermore, the district court in *Rodriguez* cited *Serrano I* in support of the proposition that wealth is a suspect classification. *See* Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 281 n.1 (W.D. Tex. 1971) (per curiam) (citing Van Dusart v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971)), *rev'd*, 411 U.S. 1 (1973).

299. *See Serrano II*, 557 P.2d at 950-51.

300. *See* Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 334 (Wyo. 1980) (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668, 670

courts also held that its state's financing scheme burdened the fundamental right to education,[301] and found the scheme unconstitutional under strict scrutiny.[302]

The courts in eight states—Colorado, Idaho, Maryland, Minnesota, New Jersey, New York, Oregon and Wisconsin—have held that wealth classifications are not suspect.[303] Only two of these courts—Colorado and Minnesota—conducted an analysis using the *Carolene Products* factors in reaching this result.[304] These courts found that the plaintiffs failed to demonstrate that they had been subject to purposeful discrimination,[305] were politically powerless,[306] or possessed immutable characteristics.[307] As to the remaining states, the New York court stated that no authority supported applying heightened scrutiny to state action discriminating between political subdivisions.[308] The New Jersey court noted that admission to public schools was not based on wealth and that po-

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(1966); *Serrano I*, 487 P.2d 1241 (1971)). As in *Serrano II*, the Wyoming court relied on *Harper* even though the United States Supreme Court had found *Harper* to be inapplicable to education financing challenges. *See id.*

301. *See supra* note 158 and accompanying text.

302. *See* cases cited *supra* note 163.

303. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1019-22 (Colo. 1982); Thompson v. Engelking, 537 P.2d 635, 645-46 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 787 (Md. 1983); Skeen v. State, 505 N.W.2d 299, 314 (Minn. 1993); Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973); Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982); Olsen v. State, 554 P.2d 139, 144 (Or. 1976); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989).

Following the majority in *Rodriguez*, the Colorado, Maryland, New York and Oregon courts focused on school districts with less taxable wealth as the potential suspect class. *See Lujan*, 649 P.2d at 1019-20; *Hornbeck*, 458 A.2d at 758 n.17; *Nyquist*, 439 N.E.2d at 366; *Olsen*, 554 P.2d at 144. The Colorado, Maryland and New York courts further held that a political body, such as a school district, cannot be a suspect class under equal protection. *See Lujan*, 649 P.2d at 1020; *Hornbeck*, 458 A.2d at 787 n.17; *Nyquist*, 439 N.E.2d at 366.

The argument that a school district cannot be a suspect class because the equal protection clause applies to people but not districts is untenable. *See Serrano I*, 487 P.2d at 1252; *cf. Rodriguez*, 411 U.S. at 122-23 (Marshall, J., dissenting) (explaining how, because the individual cannot control the group, discrimination based on district wealth may be more invidious than discrimination based on individual wealth). As an analogy, a law completely denying educational funds to school districts with a majority minority population would certainly be suspect and unconstitutional, even though the class directly affected is a school district, because the basis for classifying the school district is the overall racial composition of the district.

304. *See Lujan*, 649 P.2d at 1021-22; *Skeen*, 505 N.W.2d at 314.

305. *See Lujan*, 649 P.2d at 1021-22 (arguing that the state attempted to alleviate school finance disparities, and citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) and San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)); *Skeen*, 505 N.W.2d at 314.

306. *See Lujan*, 649 P.2d at 1022; *Skeen*, 505 N.W.2d at 314.

307. *See Lujan*, 649 P.2d at 1021.

308. *See Nyquist*, 439 N.E.2d at 366.

litical subdivisions are free to raise and spend revenue.[309] The Idaho, Maryland, Oregon and Wisconsin courts simply cited court precedents without independently analyzing the issue; all four courts cited federal precedent,[310] with the Maryland[311] and Wisconsin[312] courts also citing their respective state precedent and the Idaho and Maryland courts citing the other state court decisions.[313]

Four of the seven courts—Colorado, Maryland, New Jersey and New York—that rejected wealth as a suspect classification, also found that their states' education financing schemes did not burden a fundamental right, and upheld the challenged schemes under a rational basis standard.[314] The Minnesota and Wisconsin courts, while finding education to be a fundamental right, held that this right is not burdened by disparate education financing and upheld their states' financing schemes under the rational basis test.[315] The Oregon court found no equal protection violation, while not definitively answering the question of whether education is a fundamental right.[316]

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309. *See* Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973).

310. The Maryland court cited *Harris*, *Maher* and *Rodriguez* as support for holding that wealth is not a suspect classification. *See* Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 787 (Md. 1983). The Idaho, Oregon and Wisconsin courts only cited *Rodriguez* as support for holding that wealth is not a suspect classification. *See* Thompson v. Engelking, 537 P.2d 635, 645-56 (Idaho 1975); Olsen v. State, 554 P.2d 139, 144 (Or. 1976); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989).

311. In *Hornbeck*, the Maryland court "noted that the Supreme Court has never held that financial status alone, especially absent absolute deprivation of a right, creates a suspect class." 458 A.2d at 787. It then cited *Attorney Gen. v. Waldron*, 426 A.2d 929, 942-43 (Md. 1981) (holding that a statute prohibiting retired judges from practicing law for compensation while receiving a pension violated federal and state equal protection guarantees), which, in turn, simply cited the federal cases that established race, national origin and ancestry as suspect classifications. *See id.*

312. In *Kukor*, 436 N.W.2d at 579, the Wisconsin court cited *Rodriguez* and *Will v. State*, 267 N.W.2d 357, 359 (Wis. 1978) (modifying a sentence to allow a criminal defendant to petition for relief from paying a fine so as to avoid incarceration based on inability to pay the fine), which also cited *Rodriguez* in discussing the constitutionality of a criminal fine. *See Will*, *id.*

313. The Idaho court cited the New Jersey decision and the 1974 Washington decision in *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1974), as support for holding that wealth is not a suspect classification. *See Thompson*, 537 P.2d at 646 n.42. The Maryland court cited the Colorado decision in *Lujan*. *See Hornbeck*, 458 A.2d at 787.

314. *See supra* notes 192-197, 204 and accompanying text.

315. *See* cases cited *supra* notes 139, 173.

316. *See* cases cited *supra* notes 142, 214 and accompanying text.

b. Abortion Funding Cases

In the abortion funding case law, three courts held that wealth is not a suspect classification,[317] while one court endorsed this position without stating whether it was dispositive.[318] Specifically, the California court endorsed the proposition that wealth is a suspect classification, arguing that the poor are not fully protected from discrimination by the political process[319] and citing its education financing decisions[320] as well as *Carolene Products* in support of its position.[321] However, rather than rely on the suspect classifications approach, the court held that the state's abortion funding restrictions were unconstitutional under the unconstitutional conditions doctrine.[322]

The North Carolina court rejected finding poor women to constitute a suspect class on the ground that they have not been subject to intentional discrimination, without citing any authority for this proposition.[323] The other two courts rejecting wealth as a suspect classification—New Jersey and Pennsylvania—did not independently analyze this issue.[324] Instead, both courts relied on fed-

317. *See* Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982) ("Neither poverty nor pregnancy gives rise to membership in a suspect class."); Fischer v. Department of Pub. Welfare, 502 A.2d 114, 121-22 (Pa. 1985) ("Like the United States Supreme Court this Court 'has never held that financial need alone identifies a suspect class for purposes of equal protection analysis' . . . ." (quoting Maher v. Roe, 432 U.S. 464, 471 (1971)); Rosie J. v. North Carolina Dep't of Human Resources, 491 S.E.2d 535 (N.C. 1997).

318. *See* Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 796-97 (Cal. 1981).

319. The California court described the relationship between the poor and the political process as follows:

> In the past, this court has been particularly critical of statutory mechanisms that restrict the constitutional rights of the poor more severely than those of the rest of society. Thus, we have implicitly recognized that the indigent poor share many characteristics of other "insular minorities" who may not be adequately protected from discriminatory treatment by the general safeguards of the legislative process.

Id. (citations omitted).

320. *See id.* (citing Serrano v. Priest, 557 P.2d 929, 950-52 (Cal. 1976), *opinion supplemented by* 569 P.2d 1303 (Cal. 1977); Serrano v. Priest, 487 P.2d 1241, 1249-55 (Cal. 1971); *In re Antazo*, 473 P.2d 999, 1003-06 (Cal. 1970)).

321. *See id.* at 796 (citing to United States v. Carolene Prods. Co., 304 U.S. 144 (1938)).

322. *See supra* notes 224-226, 230-235 and accompanying text.

323. *See* Rosie J. v. North Carolina Dep't of Human Resources, 491 S.E.2d 535, 537 (N.C. 1997) ("Indigent women are not a suspect class. They have not been subjected to a history of purposeful unequal treatment so as to command extraordinary protection from the democratic political process.").

324. The Pennsylvania court further stated that "we know of no other jurisdiction which has . . . held" that wealth is a suspect classification. Fischer v. De-

eral precedent,[325] with the New Jersey court further relying on state precedent,[326] to reach their conclusions. The New Jersey court struck down its state's abortion funding restrictions under the neutrality doctrine,[327] while the North Carolina and Pennsylvania courts upheld their states' abortion funding restrictions.[328]

D. The Disparate Impact Approach

Disparate impact is the final approach enabling courts to subject challenged state action to heightened scrutiny in economic equality rights cases. Under this approach, state action that has a disproportionately negative effect on people of color triggers heightened scrutiny.[329] While this approach is derived from suspect classification doctrine, it differs from that doctrine by considering the impact of the state action on different classes instead of simply whether the action itself classifies.[330]

A disparate impact approach could potentially serve to guarantee economic equality rights. People of color are disproportionately economically disadvantaged in the contemporary United States.[331] Thus, legislation that adversely affects the financially disadvantaged often has a disparate adverse impact on people of color. Such legislation therefore would be suspect under this

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partment of Pub. Welfare, 502 A.2d 114, 121-22 (Pa. 1985). In making this statement, the Pennsylvania court ignored the California and Wyoming education cases discussed *supra* notes 296-302, 320-322 and accompanying text.

325. The New Jersey court cited *Maher* and *Rodriguez* as support for holding that wealth is not a suspect classification. *See* Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982). The Pennsylvania court quoted *Maher* as support for holding that wealth is not a suspect classification. *See Fischer*, 502 A.2d at 121-22.

326. As support for holding that wealth is not a suspect classification, the New Jersey court relied on *Taxpayers Ass'n v. Weymouth*, 364 A.2d 1016, 1034 n.15 (N.J. 1976) (upholding a challenged zoning ordinance), which simply noted in a footnote that the U.S. Supreme Court decided in *Rodriguez* that wealth is not a suspect classification. *See Right to Choose*, 450 A.2d at 934.

327. *See supra* notes 220, 237-238 and accompanying text.

328. *See supra* notes 247-248 and accompanying text.

329. *See infra* Part II.D.1. This disparate impact approach can be grounded in discrimination not based on race. While a disparate impact analysis based on gender is an available alternative, especially since women disproportionately rely on cash welfare benefits, this Article only discusses the disparate impact approach in terms of race.

330. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

331. For example, more African-Americans than Whites receive public assistance, even though African-Americans constitute only 13% of America's population. *See* Jason DeParle, *Shrinking Welfare Rolls Leave Record High Share of Minorities*, N.Y. TIMES, July 27, 1998, at A1. In addition, in 1997 the poverty rate for African-Americans was 26.5%, compared with 8.6% for non-Latino Whites (the poverty rate for Latinos was 27.1%). *See* Robert Pear, *Black and Hispanic Poverty Falls, Reducing Overall Rate for Nation*, N.Y. TIMES, Sept. 25, 1998, at A1.

analysis. Furthermore, while potentially beneficial to many people of color, guaranteeing economic equality rights would also benefit large numbers of economically disadvantaged White people.

1. Federal Law

Justice Marshall argued that, in certain situations in which state action has a disparate adverse impact on people of color, the action should be suspect under an equal protection analysis even though the action itself does not make a suspect classification and was not enacted for discriminatory reasons. Marshall first articulated this position in his dissent in *Jefferson v. Hackney*,[332] in which he wrote that "at some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant" to an equal protection analysis.[333] Marshall subsequently reiterated this position in his dissents in both *Maher v. Roe*[334] and *Harris v. McRae*.[335]

In *Washington v. Davis*,[336] however, the majority of the Supreme Court rejected the equal protection disparate impact approach.[337] In upholding a police officer qualifying test that Whites passed at a higher rate than African-Americans,[338] the Court held that facially neutral state action, when lacking a discriminatory

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332. 406 U.S. 535, 558 (1972).

333. *Id.* at 575-76 (Marshall, J., joined by Brennan, J., dissenting).

334. In *Maher*, Marshall wrote the following:

> It is no less disturbing that the effect of the challenged regulations will fall with great disparity upon women of minority races. Nonwhite women now obtain abortions at nearly twice the rate of whites, and it appears that almost 40% of minority women—more than five times the proportion of whites—are dependent upon Medicaid for their health care. Even if this strongly disparate racial impact does not alone violate the Equal Protection Clause, "at some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant."

Maher v. Roe, 432 U.S. 464, 459-60 (1977) (Marshall, J., dissenting) (quoting *Jefferson*, 406 U.S. at 575-76 (Marshall, J., dissenting)) (footnotes and citations omitted).

335. In *Harris*, Marshall wrote:

> The class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races. As I observed in *Maher*, nonwhite women obtain abortions at nearly double the rate of whites . . . . I continue to believe that "a showing that state action has a devastating impact on the lives of minority racial groups must be relevant" for purposes of equal protection analysis.

Harris v. McRae, 448 U.S. 297, 343-44 (1980) (Marshall, J., dissenting) (quoting *Jefferson*, 406 U.S. at 575-76 (Marshall, J., dissenting)) (citations omitted).

336. 426 U.S. 229 (1976).

337. Justice Marshall, joining Justice Brennan in dissent in *Washington v. Davis*, did not have occasion to discuss the equal protection issue, as the opinion decided the case on other grounds. *See id.* at 257 n.1 (Brennan, J., dissenting).

338. *See id.* at 235.

purpose, does not violate the Equal Protection Clause.[339] Thus, a showing of disparate impact alone does not provide the basis for applying heightened scrutiny.[340] Furthermore, the Court specifically rejected the disparate impact argument in a number of economic equality rights cases. For example, in the pre-*Washington v. Davis* case of *Jefferson v. Hackney*, the Court noted that a disparate impact approach would leave a wide array of programs open to attack.[341] The Court has been similarly critical of this approach in post-*Washington v. Davis* cases.[342]

2. State Law

State courts have been just as reluctant as the Supreme Court to recognize the disparate impact equal protection approach. In fact, only one state court[343] has even discussed this approach in either the education financing or abortion funding cases, including those state courts adjudicating abortion funding challenges that have relied on the dissents in *Maher* and *Harris*.[344] Specifically, one of the New York education financing decisions, relying on federal and state authority, rejected the argument that the challenged legislation's disparate impact on African-American and other minority students, absent intentional discrimination, should trigger heightened scrutiny.[345]

339. *See id.* at 242 ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

340. *See id.* The Court noted, however, that a showing of disparate impact can be relevant to determining whether there is intentional discrimination. *See id.*

341. *See Jefferson*, 406 U.S. at 548-49. The Court wrote: "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." *Id.* at 548.

342. *See, e.g.*, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).

343. *See* Doe v. Department of Soc. Servs., 468 N.W.2d 862 (Mich. Ct. App. 1991), *rev'd*, 487 N.W.2d 166 (Mich. 1992). Furthermore, the plaintiffs in the Michigan case explicitly raised this disparate racial impact argument, which was completely ignored in the Michigan Supreme Court opinion. *See* Baron, *supra* note 18, at 2-3.

344. *See* Doe v. Maher, 515 A.2d 134, 152-53 (Conn. Super. Ct. 1986); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 402 (Mass. 1981); Right to Choose v. Byrne, 450 A.2d 925, 935 (N.J. 1982).

345. *See* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 668-69 (N.Y. 1995).

III. An Analysis of the Arguments Against Economic Equality Rights

While an analysis of the legal doctrine supporting economic equality rights is essential to understanding these rights, an analysis of the arguments raised by those opposed to these rights provides a deeper understanding. By demonstrating that certain of these arguments are only superficially persuasive, such an analysis can reveal the more substantial reasons behind the opposition to economic equality rights. Furthermore, this analysis can inform as to how those supporting economic equality rights can frame their arguments to meet less resistance.

The debates surrounding economic equality rights are particularly complex because these rights touch on several concepts embedded deep within American society and politics, namely the ideas of democracy, equality, individual rights, personal responsibility and race. This Part explores the arguments in the federal cases denying economic equality rights, in which courts use federalism, separation of powers, and concern over affirmative government obligations and judicial intervention in economics to reveal the economic motivations behind this position. This Part further explores how these cases rely on the subtexts of personal responsibility and race to support denying economic equality rights.

A. The Underlying Issue: The Equal Distribution of Government Benefits

Those opposing economic equality rights rely on federalism, the separation of powers, opposition to affirmative government obligations, and judicial non-intervention in the economic sphere to support their position. This section, however, demonstrates that these concerns provide an insufficient basis for denying economic equality rights and, in fact, mask the underlying issue in economic equality rights challenges, namely the question of how the government distributes its resources.

Those who oppose economic equality rights often argue that recognition of these rights violates the principles of federalism[346] and the separation of powers.[347] As these are two of the basic, founding principles of the United States government,[348] the argu-

346. *See, e.g.*, *supra* text accompanying note 108.

347. *See, e.g.*, *supra* text accompanying notes 107, 200.

348. For discussions on federalism presented in the Federalist Papers, see THE FEDERALIST NOS. 45, 46, 51 (James Madison), and on the separation of powers, see THE FEDERALIST NOS. 47-48 (James Madison).

ment that the recognition of economic equality rights violates these principles carries substantial weight. Neither federalism nor the separation of powers, however, provides a sufficient ground for opposing economic equality rights because, as will be discussed, they are essentially structural concerns which do not by themselves dictate how authority should be divided.

Initially, only federal economic equality rights raise federal concerns since the state cases concern only state law.[349] Even in the federal context, federalism is not an obstacle to guaranteeing economic equality rights. Under the Supremacy Clause, which guarantees the effectiveness of federal law in the states, federal law, including federal constitutional law, preempts state law.[350] Furthermore, federal economic equality rights are grounded in the Equal Protection Clause;[351] this Clause is part of the Fourteenth Amendment, which was ratified precisely to alter the relationship between the federal government and the states.[352] Thus, under

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349. *See* Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976), *opinion supplemented by* 569 P.2d 1303 (Cal. 1977); Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973); *see also* Sheff v. O'Neill, 678 A.2d 1267, 1279 (1996) ("Principles of federalism, however, do not restrict *our* constitutional authority to enforce the constitutional mandates contained in [the Constitution's education clauses]."); Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 90-91 (1982).

350. *See* U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."); *see, e.g.*, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

Even in the context of statutory enactments, the federal government can regulate almost any activity under the Commerce Clause. *See* U.S. CONST. art. I, § 8. The Supreme Court's decision in *United States v. Lopez*, which struck down a federal statute criminalizing firearm possession near schools, however, appears to mark a break from prior decisions. 514 U.S. 549 (1995). In *Lopez*, the Court held that an activity must "substantially affect" interstate commerce to be within the power of the federal government to regulate it under the Commerce Clause. The dissenters in *Lopez*, however, sharply criticized the majority for departing from the principle supported by the Court since 1942, which allowed Congress to enact legislation under the Commerce Clause so long as it has a rational basis for concluding that an activity sufficiently affects interstate commerce. *See id.* at 617 (Breyer, J., dissenting). Of course, because federal economic equality rights are grounded in the federal Constitution, these Commerce Clause limitations do not affect such rights.

351. *See infra* Part IV.C.2.c.

352. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see, e.g.*, Patsy v. Board of Regents, 457 U.S. 496, 503-05 (1982); Fitzpatrick v. Bitzer, 427 U.S. 445, 453-57 (1976); *Ex parte* Virginia, 100 U.S. 339

our federal system, federal constitutional rights based on equal protection must apply to the states.

Nor does the separation of powers doctrine[353] provide a justification for rejecting economic equality rights. While the principle of the separation of powers—that each branch of government should only act in its own sphere—limits judicial intervention in non-constitutional matters, this principle also mandates that the judiciary intervene in the legislative process when constitutionally guaranteed rights are burdened.[354] This protection extends to all constitutional rights. In the federal context, the judiciary must protect even those rights not explicitly guaranteed by the Constitution.[355] Thus, when state action burdens a fundamental right or makes a suspect classification, courts have the authority and the duty to scrutinize closely and, if required, strike down as unconstitutional the offending legislation.[356]

Even though federalism and separation of powers principles caution against judicial recognition of new substantive constitutional rights, they do not bar this recognition. Every established or proposed federal constitutional right implicates both of these principles,[357] while every state constitutional right implicates the

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(1880); *see also* Morgan, *supra* note 349, at 90-91. The Civil Rights Act of 1871, the precursor of 42 U.S.C. § 1983, was enacted as the statutory basis authorizing persons whose rights are violated by a state to seek legal redress. *See Patsy*, 457 U.S. at 502-03.

353. In the economic equality case law, as well as in other contexts, the Supreme Court sometimes employs the term "super legislature" to describe the fear that the judiciary will usurp the legislative role in violation of the separation of powers. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 231 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973); *id.* at 109 (Marshall, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting). For state courts invoking this term, see McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 640 (Idaho 1975); Kukor v. Grover, 436 N.W.2d 568, 583 (Wis. 1989).

354. *Cf.* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (holding that "the federal judiciary is supreme in the exposition of the law of the Constitution").

355. *See supra* notes 39-51 and accompanying text.

356. Ironically, the *Rodriguez* majority cited a dissent in the right to interstate travel case of *Shapiro v. Thompson* as support for its separation of powers argument. *See Rodriguez*, 411 U.S. at 30-31 (citing *Shapiro*, 394 U.S. at 661 (Harlan, J., dissenting)). The *Shapiro* decision, however, is a leading instance of the judiciary, within the framework of the separation of powers, protecting a fundamental constitutional right. By citing to the *Shapiro* dissent, the *Rodriguez* majority acknowledged that the separation of powers, although a concern, was not a bar to the recognition of the right.

357. The Court in *Rodriguez* noted:

> It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to

separation of powers. Thus, rather than relying on federalism and the separation of powers to deny rights, the essential question is what constitutes a fundamental right, with each candidate for fundamental right status being judged on its own merits.[358]

Opposition to affirmative constitutional obligations also fails to justify the rejection of economic equality claims.[359] The majority of the Supreme Court in such cases as *Rodriguez*,[360] *Maher*[361] and *Harris*[362] has stated

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be subjected instead to rigorous judicial scrutiny.

Rodriguez, 411 U.S. at 44.

358. It bears emphasis that this Article does not reject federalism and separation of powers as constitutional concerns, but rather recognizes that there must be a sound method for determining which rights are protected by the Constitution and thus entitled to judicial protection. Simply invoking federalism and the separation of powers does not answer this question. *See* Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976) (discussing the argument that the judiciary lacks the requisite expertise to make education funding decisions), *opinion supplemented by* 569 P.2d 1303 (Cal. 1977).

359. The opposition to affirmative constitutional obligations also can be framed in terms of an opposition to the recognition of "social and economic rights" in addition to "civil and political rights," or in terms of opposition to "positive rights" in addition to "negative rights." This conflict plays itself out in federalism—the reluctance of the federal judiciary to interfere with state autonomy—and the separation of powers—the reluctance of the judiciary to interfere with the legislative and executive branches of government.

360. The *Rodriguez* Court was particularly impressed with the fact that the state was taking action to provide Texas students with an improved education. *See Rodriguez*, 411 U.S. at 37-39. However, by relying on Texas's "affirmative and reformatory" acts to support its holding, the Court failed to appreciate the essence of *equal* protection. By analogy, in the school desegregation context, the Court in *Brown II* did not simply recognize that a state could take steps toward desegregation, but instead ordered that the cases be remanded for entry of orders desegregating "with all deliberate speed." Brown v. Board of Educ., 349 U.S. 294, 301 (1955). The Court, 13 years later, stated that school boards must "come forward with a plan that promises realistically to work and promises realistically to work *now*." Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

361. *See* Maher v. Roe, 432 U.S. 464, 475-76 (1977):

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

Id. (footnote omitted). This statement reveals a prejudice in favor of more closely scrutinizing government impositions than government distribution of goods. However, equal protection concerns both government force and government benefits. This is clearly demonstrated in the suspect classification doctrine, under which any legislation that classifies along certain lines is suspect. For example, government distribution of construction contracts on the basis of race implicates core equal protection concerns. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1996).

362. *See* Harris v. McRae, 448 U.S. 297, 318 (1980):

> that the constitution does not impose affirmative governmental obligations.[363] Many state courts rejecting education financing and abortion funding challenges also employ this argument to justify their position.[364] However, economic equality rights, including those in both the school financing and abortion funding spheres, can be guaranteed without establishing affirmative constitutional obligations. Specifically, economic equality rights can be guaranteed so that while the government need not fund an activity, once the government provides funding, it must do so on an equal basis. In fact, the claims in these challenges are for equal treatment once the government decides to provide funding, not for affirmative obligations to provide funding in the first instance. Thus, opposition to affirmative constitutional obligations is an insufficient reason to oppose economic equality rights.

The final, and only substantive, argument against guaranteeing economic equality rights is opposition to judicial intervention in the economic sphere. This argument is based in the reaction to the *Lochner* Era Supreme Court's enforcement of substantive due process. During the *Lochner* Era, the Court's decisions engendered substantial criticisms, as it struck down legislation designed to remedy some of the most severe problems of *laissez-faire* capitalism.[365] However, the Court has since disavowed

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> To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result.

Id.

363. Although *DeShaney v. Winnebago City Social Services Department*, 489 U.S. 189 (1989), concerned a due process claim, this case highlights the Court's general concern over the role of the federal judiciary. The *DeShaney* case arose out of an incident in which a boy was severely beaten by his father after county social workers failed to remove the boy from his father's custody, despite repeated reports of physical abuse. On the federal due process claim, the majority wrote:

> [T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

Id. at 196 (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1986)) (citations omitted). This language flows from the model of a constitution that puts limits on state action rather than requiring state action.

364. *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156, 166 (Ga. 1981).

365. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 122-24 (12th ed. 1991). After many years of development, *see, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887) (upholding a law prohibiting the manufacturing of alcohol while laying the groundwork for judicial scrutiny under the due process clause); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (striking down a state law that prohibited contracts with marine insurance companies not in compliance with state laws and stating that the liberty protected by due process includes the right to contract), the Supreme Court fully established its substantive due process approach in *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional a state law that prohibited employees of bakeries from working more than 10 hours a day or 60 hours a week).

The following are further examples of infamous substantive due process *Loch-*

its *Lochner* decisions[366] and has often voiced reluctance to scrutinize democratically-enacted legislation in the absence of explicit constitutional guidance.[367]

Despite its rejection of *Lochner*'s substantive due process, the post-*Lochner* Supreme Court has intervened in democratic processes to guarantee rights not explicitly protected by the Constitution, such as the right to privacy, to an equal, unburdened vote, to equal access to the courts, and to interstate travel, as well as freedom from gender and legitimacy classifications.[368] The Court implicitly distinguished all of these rights, except for the right to privacy,[369] from the substantive due process of the *Lochner* Era by

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ner Era decisions: Adkins v. Children's Hosp., 261 U.S. 525 (1923) (holding unconstitutional a statute setting a minimum wage for female employees); Coppage v. Kansas, 236 U.S. 1 (1915) (holding unconstitutional a statute proscribing employers from only hiring employees who promised to not join a labor organization); Adair v. United States, 208 U.S. 161 (1908) (holding unconstitutional a criminal statute proscribing certain employers from dismissing employees because they were members of a labor organization). In response to these and other decisions, President Roosevelt proposed his "court-packing" plan, which, perhaps owing to Justice Robert's "switch in time," was never enacted. *See* GUNTHER, *supra*, at 122-24.

366. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (per curiam) (upholding a grandfather clause exempting certain vendors from prohibition in the French Quarter); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (upholding a state law regulating opticians); United States v. Carolene Prods. Co., 304 U.S. 144, 147-48 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (upholding a state statute setting a minimum wage for female employees, and overruling *Adkins*).

367. Concern over the excesses of the *Lochner* Era is a theme throughout the Supreme Court's economic equality rights case law. *See* cases cited *supra* note 126 (abortion funding cases); *see also* Dandridge v. Williams, 397 U.S. 471, 484 (1970) ("For this Court to approve the invalidation of state economic or social regulation would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'") (quoting *Williamson*, 348 U.S. at 488); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting); *infra* note 523.

368. *See* Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 26 (1987); *supra* text accompanying notes 39-44.

Ironically, the Court in *Harper* invoked Holmes's dissent in *Lochner*, which stated that the Due Process Clause was not tied to any one particular social science theory, to support the argument that the Equal Protection Clause may change over time. *See Harper*, 383 U.S. at 669.

369. The right to privacy has some of its precedential roots in *Lochner* Era decisions. Numerous post-*Lochner* Era privacy decisions cite both *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as support for the right to privacy. *See* Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992); Thornburg v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986); Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 427 (1983); Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); Whalen v. Roe, 429 U.S. 589, 600 n.26 (1977); Roe v. Wade, 410 U.S. 113, 153 (1973); Griswold v. Connecticut, 381 U.S.

grounding them in constitutional provisions other than the Due Process Clause.[370] Furthermore, with regard to the right to privacy, the Court emphasized its centrality to personal dignity and autonomy, which is clearly different from the *Lochner* property rights and economic concerns.[371] However, when the Court adjudicated economic equality claims, it located the rights at stake in the discredited category of *Lochner* rights, labeling these claims as "social and economic" and involving "social welfare."[372] State courts rejecting economic equality rights claims also make this categorization.[373]

479, 482 (1965). *Meyer* noted the substance of liberty protected by the Due Process Clause:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399. The first right listed in *Meyer* is the freedom to contract, the heart of the *Lochner* Era decisions. *See* Edelman, *supra* note 368, at 27-28 (noting that while the Court overruled *Lochner*'s freedom to contract, it did not overrule other aspects of substantive liberty) (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 435 (1978)).

370. *See supra* text accompanying notes 96-98.

371. *See Planned Parenthood*, 505 U.S. at 851. Justice Rehnquist, dissenting in *Roe*, criticized the majority opinion for being comparable to *Lochner*. *See Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

372. *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 462 (1988) ("*Social and economic legislation* like the statute at issue in this case, moreover, carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.") (emphasis added) (internal quotations omitted); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) ("When *social or economic legislation* is at issue, the Equal Protection Clause allows states wide latitude, and the Constitution assumes that even improvident decisions will eventually be rectified by the democratic process.") (emphasis added) (citations omitted); Ortwein v. Schwab, 410 U.S. 656, 660 (1973) ("As in *Kras*, this litigation, which deals with welfare payments, is in the area of *economics and social welfare*.") (emphasis added) (quotation omitted); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("[T]he undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's *social and economic legislation*.") (emphasis added); United States v. Kras, 409 U.S. 434, 446 (1973) (holding that "bankruptcy is in the area of *economics and social welfare*" in a challenge to prepayment of bankruptcy petition filing fees) (emphasis added); Jefferson v. Hackney, 406 U.S. 535 (1972) ("The Court emphasized only recently, in *Dandridge v. Williams*, 397 U.S. 471, 485 (1971), that in 'the area of *economics and social welfare*, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'") (emphasis added); *Dandridge*, 397 U.S. at 484 ("For here we deal with state regulation in the *social and economic field*, not affecting freedoms guaranteed by the Bill of Rights . . . .") (emphasis added) (contrasting the case, in a footnote and without explanation, to freedom of interstate travel in Shapiro v. Thompson, 394 U.S. 618 (1969)).

373. *See* Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 786 (Md. 1983); Danson v. Casey, 382 A.2d 1238, 1245 (Pa. Commw. Ct. 1978), *aff'd*, 399

The Justices who would recognize economic equality rights have distinguished these rights from *Lochner* rights based on those affected by the challenged legislation. In particular, these Justices noted that the *Lochner* rights protected business from regulation, whereas economic equality rights concern the rights of individuals.[374] Thus, as with the legislation that the Court struck down during the *Lochner* Era,[375] economic equality rights claims benefit those with less economic power. This demonstrates that economic equal rights claims have the opposite substantive goals of the Court majority during the *Lochner* Era.[376]

An additional way to distinguish economic equality rights from *Lochner* rights is based on the type of activity challenged. The *Lochner* Court sustained challenges to government's regulation of private business activity, whereas economic equality claims challenge the economic activity of the government itself.[377] Thus, economic equality rights are much more akin to civil rights claims against government than to the *Lochner* rights of businesses to be

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A.2d 360 (Pa. 1979). *But see* Bismarck Pub. Sch. Dist. No. One v. State, 511 N.W.2d 247, 258-59 (N.D. 1994).

374. *See, e.g., Dandridge*, 397 U.S. at 522 (Marshall, J., dissenting) ("It is the individual interests here at stake that, as the Court concedes, most clearly distinguish this case from the 'business regulation' equal protection cases."); *see also* Sosna v. Iowa, 419 U.S. 393, 420 (1975) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90-91 (1971) (Marshall, J., dissenting); *cf.* Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) ("[S]imply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights.").

The Court majority has also recognized this distinction, although refusing to give it weight:

> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.

Dandridge, 397 U.S. at 485. This passage reveals the Court's refusal to acknowledge on a constitutional level the admittedly very real difference between business regulation and individual economic rights.

375. *See* cases cited *supra* note 365.

376. Contemporary courts that cite *Lochner* in rejecting economic equality claims have lost sight of this substantive point. The problem of the *Lochner* Court was not that it protected rights not explicitly found in the Constitution, but rather the substance of the rights that it did protect were antithetical democratic equality.

377. Justice Marshall wrote in *Dandridge*: "Consequently, the State may not, in the provision of important services or the distribution of governmental payments, supply benefits to some individuals while denying them to others who are similarly situated." 397 U.S. at 519 (Marshall, J., dissenting) (citing Griffin v. County Sch. Bd., 377 U.S. 218 (1964)).

free from government intervention.[378]

The above analysis demonstrates that, although opposition to economic equality rights is often couched in terms of federalism, separation of powers, concern over affirmative obligations, and concern over reestablishing the *Lochner* Era, the real issue is how the government distributes its benefits. The principles of federalism and separation of powers do not weigh against economic equality rights because they are structural, not substantive, principles. Economic equality rights do not demand affirmative state action and are not equivalent to the discredited property rights at issue in *Lochner*. This leaves the opposition to economic equality rights as actually the opposition to equal distribution of state goods. While the heart of the conflict over economic equality rights is the distribution of economic goods, embedded in this conflict are the two subtexts of personal responsibility and of race, which the next two sections explore.

B. A Note on Personal Responsibility

Embedded in the debates over economic equality rights is a subtext concerning the economic relationship between the government and individuals. Specifically, those who oppose economic equality rights often describe the poverty of those seeking equality as their own personal responsibility or even deliberate choice. Many who support economic equality rights, however, recognize that the economic status of individuals is influenced by a variety of factors, including government economic policy, such that poverty is not an individual choice that the government should simply ignore.[379]

Those opposing economic equality rights often support their position by citing to the American myth that anyone can be economically successful simply by working hard enough. This myth underlies the argument that the government is not obliged to guarantee economic equality rights because individuals could sim-

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378. In particular, it is well established that the federal Constitution only applies to government action, not to the action of private individuals. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-51 (1974) (considering whether a privately owned and operated utility company is sufficiently connected to state action to be considered "state action" for Fourteenth Amendment purposes); The Civil Rights Cases, 109 U.S. 3, 10-11 (1883) (stating that the Fourteenth Amendment prohibits "state action of a particular character" and that "[i]ndividual invasion of individual rights is not the subject matter of the amendment"). The federal government only regulates private actors through statute.

379. *See, e.g.*, Edelman, *supra* note 368, at 43 (discussing that government economic policy prevents the poor from participating in the free market).

ply acquire the resources to satisfy these needs if they so desired. It also underlies the view that government action is unconnected to poverty, a view that surfaces in the abortion funding case law,[380] as well as other substantive areas.[381] Under this view, any failure to be economically well-off is a personal failure, not the responsibility of society or the government.

This view of the government's economic relationship to individuals, while partially correct, is ultimately inadequate. While individuals certainly play some role in determining their economic circumstances, this status is also influenced by both micro- and macro-economic trends. These trends are the products of deliberate decisions and unintended consequences of government action at the federal, state, and local levels.[382] Most obvious is the federal fiscal policy to maintain a certain level of unemployment to control inflation,[383] which has the direct effect of forcing a certain percent of those looking for work to remain unemployed.[384] Thus, the government certainly plays a role in creating a class of individuals who are unable to afford certain basic needs.

Furthermore, economic equality rights concern goods and

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380. In *Maher v. Roe*, 432 U.S. 464, 474 (1977), the Supreme Court expressed its belief in personal responsibility as follows: "The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation." In the subsequent case of *Harris v. McRae* the Court wrote:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation . . . . The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.

448 U.S. 297, 316 (1980); *see also* Doe v. Department of Soc. Servs., 487 N.W.2d 166, 178 (Mich. 1992).

381. Justice Harlan articulated the theme of personal responsibility in his dissent in *Griffin v. Illinois*: "Nor is this a case where the State's own action has prevented a defendant from appealing. All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." 351 U.S. 12, 34 (1956) (citations omitted).

382. *See* Edelman, *supra* note 368, at 43 ("[T]he entire economic structure of American society and a series of specific governmental policy decisions over time have contributed to the existence, scope, depth, and perpetuation of poverty.").

383. *See, e.g.*, Richard W. Stevenson, *The Market Turmoil: Policy*, N.Y. TIMES, Sept. 2, 1998, at C1.

384. The notion that those who are not working are to blame for their unemployment is particularly misguided in light of the explicit federal macroeconomic policy to ensure a certain level of unemployment. In fact, if more people work, then the Federal Reserve raises interest rates in an effort to "slow down" the economy to prevent inflation, a policy that aims to maintain and create unemployment. Thus, in essence, the working majority relies on a certain degree of unemployment in order to maintain the economy.

services, the acquisition of which should not depend upon an individual's economic status, regardless of the extent that the status is a deliberate choice or a product of government policy. Thus, in the school financing context, by permitting disparate spending based on the district wealth in which the students reside, the state action disadvantages children who have little or no influence over the wealth of their school district. In the abortion funding context, the choice whether to give birth is so fundamental that it should not depend upon a woman's economic status. Thus, opposing economic equality rights based on notions of personal responsibility is misguided.

C. A Note on Race

Race is a second subtext embedded in the debate over economic equality rights. This subtext provides both a basis to support economic equality rights as well as a ground for opposition to these rights. African-Americans are disproportionately economically disadvantaged in contemporary United States society.[385] Thus, guaranteeing economic equality rights disproportionately benefits African-Americans. Many who support economic equality rights do so with this understanding.[386] This becomes explicit when economic equality rights are justified under the disparate impact theory.

By the same token, at least some of those who oppose economic equality rights may do so under the impression that such rights simply benefit African-Americans and other people of color.[387] For example, the struggles over equitable school financing often involve tensions between center cities whose public schools are predominately African-American, and better financed suburbs whose public schools have fewer people of color.[388] The abortion funding restrictions occur in the context of welfare programs, which are viewed as programs predominantly for people of color.[389]

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385. *See supra* note 331 and accompanying text.

386. *See, e.g.*, WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 146-55 (1987).

387. *See, e.g.*, Greg J. Duncan & Gretchen Caspary, *Welfare Dynamics and the 1996 Welfare Reform*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 605, 606 (1997) (describing that the prevalent negative view on AFDC is based on stereotypes of the recipient's characteristics and attitudes, which are reinforced by the media's accounts such as "three-generation black welfare families" whose members are involved in crime and who never break the cycle.

388. *See, e.g.*, WILSON, *supra* note 386, at 57-58; JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

389. *See* DeParle, *supra* note 331 (noting the stereotypes surrounding welfare and race).

Thus, race is always present in the subtext of economic equality rights adjudication.

IV. Analysis of the Three Approaches

This Part analyzes each of the three approaches for guaranteeing economic equality rights—fundamental rights, suspect classifications and disparate impact—and concludes that the fundamental rights approach can most effectively guarantee economic equality rights. It also defines three versions of the fundamental rights approach—fundamental right without equal protection, straight fundamental right and substantive equal protection—concluding that the substantive equal protection version of the fundamental rights approach is the most sound for guaranteeing economic equality rights. The analysis in this Part is informed by the presentation of the federal and state equal protection case law in Part II and the analysis of the arguments against economic equal rights discussed in Part III.

This Part further explores how international human rights law supports a fundamental rights approach and suggests that some form of intermediate scrutiny might be most appropriate for judging state action that burdens an economic equality right. This Part concludes by exploring an alternative, composite approach for guaranteeing economic equality rights that combines a number of distinct approaches.

A. Wealth as a Suspect Classification

The wealth as a suspect classification approach for guaranteeing economic equality rights, although initially attractive, is problematic for a number of reasons. First, this approach has not fared well in relevant case law.[390] Additionally, the suspect classification approach is unavailable in states whose courts adhere to the federal equal protection analysis. Third, this approach renders suspect a whole range of state action that differentially affects those of different economic classes. Fourth, the suspect classification approach could preclude class-based affirmative action. Fifth, this approach is open to the criticism that it is actually a disparate impact, rather than a disparate treatment, approach. Sixth, this approach could dilute the established heightened scrutiny stan-

390. In addition to not faring well in the case law, a number of commentators argue against finding wealth to be a suspect classification. However, the view that wealth should be a suspect classification has also received support. *See* Edelman, *supra* note 368, at 35 ("[I]t seems clear that the poor, or at least the extremely poor, fit the [suspect class] description precisely.").

dards. Finally, the suspect classification approach is in tension with the American myth of self-reliance discussed in Part III.

Initially, the wealth as a suspect classification approach has not been very successful or even very well-developed in the economic equality rights case law. Under federal law, the Supreme Court has essentially rejected this approach.[391] In the state education financing and abortion funding cases presented in Part II, the courts in only two states have accepted the view that wealth classifications can be suspect,[392] while courts in ten states have rejected this position.[393]

Furthermore, despite the fact that states can adopt greater constitutional protections than provided under federal law, the state cases that have considered whether wealth is a suspect classification have not, for the most part, independently analyzed the issue. Specifically, only three out of ten courts that considered this issue analyzed it under the factors developed from the *Carolene Products* footnote;[394] one of these courts held that wealth is a suspect classification, while the other two courts rejected this proposition.[395] The other seven courts that have considered whether wealth is a suspect classification relied almost completely on federal precedent to reach their decisions. The courts acknowledging that wealth can be a suspect classification ultimately relied primarily on *Harper v. Virginia Board of Elections*,[396] while those cases rejecting wealth as a suspect classification all relied on *Harris*, *Maher* and *Rodriguez*.[397] Thus, in addition to not often relying on this approach, the state courts generally have not independ-

391. *See supra* notes 277-283 and accompanying text.

392. *See* cases cited *supra* notes 294, 318 (California and Wyoming).

393. *See* cases cited *supra* notes 303-317 (Colorado, Idaho, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Pennsylvania and Wisconsin).

394. The courts in the California abortion funding case and the Colorado and Minnesota education financing cases relied on *Carolene Products*. *See supra* text accompanying notes 304, 319-321.

395. The California court held that wealth is a suspect classification, while the Colorado and Minnesota courts held that wealth is not a suspect classification. *See* cases cited *supra* notes 304, 318-321.

396. The Wyoming court in its education funding decision acknowledged that wealth may be suspect. *See* Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 334 (Wyo. 1980).

397. The courts in the Idaho, Maryland, Oregon and Wisconsin education financing cases and the New Jersey and Pennsylvania abortion funding cases cited federal cases as support for finding wealth to not be a suspect classification. *See supra* text accompanying notes 303, 310, 324-325. The courts in the New Jersey and New York education financing cases analyzed the issue of whether wealth is a suspect classification without discussing the *Carolene Products* factors. *See supra* text accompanying notes 303-304, 308-309.

ently developed this approach.

One possible reason for the limited use of the suspect classification approach in the state case law, and the second problem with this approach, is that it generally is not available to state courts that follow federal equal protection law in interpreting their state equal protection provisions. Since suspect classification doctrine is grounded solely in equal protection,[398] those state courts that have opted to interpret their equal protection guarantees as coextensive to or as providing the same or similar guarantees as federal equal protection must follow the Supreme Court's holding that wealth is not a suspect classification.[399] Thus, the wealth as a suspect classification approach is unavailable in at least twenty-seven states whose courts adhere to federal equal protection law.[400]

The third problem with the wealth as a suspect classification approach is that this approach renders suspect most, if not all, government taxing and spending programs. Since these programs generally affect different income groups differently,[401] if wealth classifications were suspect, then every such program would be subject to strict scrutiny if challenged. Furthermore, since state action subject to strict scrutiny is almost always found unconstitutional,[402] this approach would have untenable consequences.

Although the impact of declaring wealth to be a suspect classification could be tempered by holding that wealth is only a quasi-suspect classification, this approach would still likely be too intrusive. State action involving a quasi-suspect classification is subject to intermediate scrutiny, which requires that the challenged action bear a substantial relationship to an important state interest.[403] Applying this standard, which lies between strict and deferential scrutiny, to wealth classifications would be consistent with the

398. *See supra* text accompanying note 276.

399. Although it could be argued that a state court could supplement the federal suspect classes with state suspect classes if the court found that, under the *Carolene Products* analysis, the classification at issue was suspect *within the state*, those states that strictly follow *federal* law effectively preclude this possibility.

400. *See supra* notes 68-71 and accompanying text. The 27 states that adhere to federal equal protection law are in addition to the two states in which equal protection has not yet been recognized. *See supra* note 57.

401. The New Jersey Supreme Court pointed out that "[w]ealth is not at all 'suspect' as a basis for raising revenues." Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973). The court went on to state the following: "It is inevitable that expenditures per resident will vary among municipalities, resulting in differences as to benefits and tax burden. If this is held to constitute classification according to 'wealth' and therefore 'suspect,' our political structure will be fundamentally changed." *Id.*

402. *See supra* note 9.

403. *See supra* notes 35, 49-51 and accompanying text.

views of those who acknowledge that wealth classifications are not as suspect as those classifications that merit strict scrutiny, such as race.[404] However, even under intermediate scrutiny, all state action that makes a wealth classification would still be open to intrusive judicial review.[405] Since the Supreme Court has determined that the state bears the burden of justifying quasi-suspect classifications[406] as they are presumptively unconstitutional,[407] and concerns such as administrative efficiency do not rise to the level of important state interests under an equal protection analysis,[408] any state action challenged under intermediate scrutiny would require a serious defense. Thus, at best, this approach would make governments vulnerable to a substantial expense of time and energy in defense of suits. At worst, this approach could result in courts striking down a wide range of legislation, most of which would have nothing to do with economic equality rights, simply because the government cannot demonstrate that the legislation substantially furthers important state interests.

A fourth problem with the wealth as a suspect classification approach is its potential to undermine affirmative economic action. Under contemporary equal protection doctrine, once a classification is suspect, any use of this classification, even when beneficial

404. Justice Marshall, for example, acknowledged that wealth is not as suspect as race in his dissent in *Rodriguez*. *See* Marc Stuart Gerber, *Equal Protection, Public Choice Theory, and Learnfare: Wealth Classifications Revisited*, 81 GEO. L.J. 2141, 2154 (1993); Grace Jubinsky, *Selecting the Appropriate Standard of Review for Equal Protection Challenges to Legislation Concerning Subsistence Benefits*, 53 U. CIN. L. REV. 587, 604-05 (1984); *Intermediate Equal Protection Scrutiny of Welfare Laws That Deny Subsistence*, 132 U. PA. L. REV. 1547, 1561 (1984) [hereinafter *Intermediate Equal Protection Scrutiny*]; *supra* note 285.

405. While all state action can be challenged in federal court on federal equal protection grounds, under the default rational basis standard, "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961) (citations omitted). Thus, unless a court applies heightened scrutiny, an equal protection challenge almost inevitably fails. *See supra* note 9 and accompanying text. *But cf.* cases cited *supra* note 275.

406. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) ("The burden of justification [for gender classifications] is demanding and it rests entirely on the State.") (citation omitted); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

407. *See* J.E.B. v. Alabama, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (stating that the Supreme Court's gender cases "reveal a strong presumption that gender classifications are invalid") (citations omitted) (cited in *Virginia*, 518 U.S. at 532).

408. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 198 (1976) (holding that administrative ease and convenience are not "as sufficiently important" to justify gender classifications); *cf.* Shapiro v. Thompson, 394 U.S. 618, 633 (1969) ("The saving of welfare costs cannot justify an otherwise invidious classification.").

to the disadvantaged class, triggers the same level of scrutiny.[409] If wealth were suspect, state action benefiting those economically disadvantaged, such as welfare programs and progressive taxation, would merit the same degree of scrutiny as action adverse to those economically disadvantaged.[410] This result could preclude all social welfare programs that aim to redistribute wealth from those better off to those less well-off.[411]

Although this problem could be avoided if courts hold that wealth classifications are suspect only in certain situations,[412] this solution is problematic.[413] In particular, suspect classification analysis could be limited to situations in which certain important or fundamental interests are at stake, thus avoiding implicating the full range of government action. This solution, however, is inconsistent with established equal protection doctrine in two respects. First, as noted above, under contemporary federal law, once a classification is suspect, all state action that makes that classification is suspect.[414] Second, and more importantly, holding wealth classifications suspect only when certain important inter-

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409. *See supra* note 270 and accompanying text.

410. For example, the food stamp and Medicaid programs in general could be struck down if wealth were suspect; as these programs benefit only those less well off, they make a wealth classification and thus trigger strict scrutiny.

411. If courts were to accept the redistribution of wealth through social welfare programs as substantially related to the important goal of sustaining the economy, then these programs could survive intermediate scrutiny.

412. *See supra* notes 282-283 and accompanying text (discussing how the Supreme Court has only held that wealth classifications, "standing alone," are not suspect).

413. Even those supporting economic equality rights acknowledge that a categorical rule would be untenable. For example, the court in the second California education case wrote as follows:

> Because the school financing system . . . involve[s] a suspect classification . . . , and because that classification affects the fundamental interest of the students in this state in education, . . . the school finance system before us must be examined under our state constitutional provisions with that strict and searching scrutiny appropriate to such a case.
>
> In view of this conclusion we need not address the problem, raised in pointed and lucid fashion by one of the amici curiae, whether in applying our *state* equal-protection provisions we should insist upon strict scrutiny review of all governmental classifications based on wealth, thus elevating such classifications to a level of "suspectedness" equivalent to those based on race. The classification here in question, which is based on district wealth, clearly affects the fundamental interest of the children of the state in education, and we hold here, as we held in *Serrano I* . . . that this combination of factors warrants strict judicial scrutiny under our state equal protection provision.

Serrano v. Priest, 557 P.2d 929, 951 & n.45 (Cal. 1976) (citation omitted).

414. *See supra* note 270. Even though states are free to adopt their own method of equal protection adjudication, they might be unlikely to do so given such strongly established traditional equal protection doctrine.

ests are implicated is simply a redescription of either a fundamental rights or a composite approach and not a suspect classification approach at all.

The fifth problem with the suspect classification approach is that it could be argued that challenged education financing programs and abortion funding restrictions only disparately impact those economically disadvantaged. As noted above, the Supreme Court held in *Washington v. Davis* that, absent discriminatory intent, otherwise neutral state action does not violate equal protection simply because it has a disparate impact on members of a suspect classification.[415] Thus, because education financing and abortion funding programs may be neutral on their face, absent discriminatory intent, this action would not trigger heightened scrutiny.[416] While this argument fails to the extent that any state action providing a benefit on the basis of wealth inherently classifies according to wealth,[417] it nonetheless provides another drawback to this approach.

A sixth concern with the wealth as a suspect classification approach is that this approach could "dilute" the intermediate level of scrutiny. Since most wealth classifications are likely constitutional,[418] adjudicating gender and legitimacy classification under the same standard as wealth classifications could potentially lead courts to lower the standard for all three classifications to maintain a consistent level of review. Such adjudication would potentially lead to less scrutiny for gender and legitimacy classifications, even though there are strong arguments that these classifications should be subject to a scrutiny level greater than intermediate scrutiny.

The final problem with the wealth as a suspect classification approach is that this approach is in tension with the view of personal responsibility embedded in American political discourse. The belief that anyone in this country can be economically successful simply by working hard enough deeply resonates in this society. The basis of the suspect classifications approach, however, is the *Carolene Products* analysis, which relies on factors such as

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415. *See supra* text accompanying notes 336-342.

416. Justice Thomas advanced a variation of this argument in his concurrence in *Lewis v. Casey*, 518 U.S. 343, 373-78 (1996) (Thomas, J., concurring), in which he argued that cases such as *Rodriguez* and *Washington v. Davis*, by rejecting disparate impact theory, undermined the whole *Griffin* line of cases involving the right of access to the courts.

417. Analogously, state action that classifies on the basis of skin color, while "race" neutral, would inherently classify.

418. *See supra* text accompanying notes 401-03

immutability of a trait and political powerlessness to support subjecting state action to heightened scrutiny. Given the prevailing view of poverty, the position that poverty is an immutable trait and the poor are politically powerless is unlikely to be well-received.

B. Disparate Impact

The disparate impact approach is also problematic for guaranteeing economic equality rights. Like the wealth as a suspect classification approach, in its general form, this approach renders much state action suspect. Even under more limited, contextual versions of this approach, by explicitly relying on race, this approach faces both pragmatic and doctrinal hurdles.

It should first be noted that the disparate impact approach has at least one advantage over the suspect classification approach—the disparate impact approach does not prevent affirmative economic action. Since affirmative economic action generally has a disparately beneficial impact on people of color, this action would not trigger heightened scrutiny.[419] However, this approach otherwise shares many of the disadvantages of the suspect classification approach.

The general disparate impact approach is untenable because it would render most government actions suspect.[420] Under this approach, legislation that has a disparate impact on people of color would be subject to strict scrutiny without any showing of intent.[421] Applying heightened scrutiny to all state action that has a disparate impact would have essentially the same result as finding wealth to be a suspect classification. This follows from the fact that, since African-Americans currently are economically less well-off than White Americans,[422] any wealth classification that dispar-

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419. An assumption of the disparate impact approach is that a disparately negative impact on people of color is suspect while a disparately negative impact on Whites is not. Otherwise, only government action that affected all races perfectly equally would not be suspect.

420. The Supreme Court noted in *Washington v. Davis* that a disparate impact approach would render much government action suspect:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

426 U.S. 229, 248 (1976).

421. *See supra* Part II.D.1.

422. *See supra* note 331.

ately affects the economically disadvantaged also most likely has a disparate impact on African-Americans.

While the general disparate impact approach is problematic, a number of critical race theorists have advanced more limited alternative equal protection theories that reject the *Washington v. Davis* holding. These theories adopt an anti-subordination view, relying on the perspective of those who have suffered discrimination to inform equal protection adjudication. Furthermore, these theories focus specifically on the intersection of race and poverty, recognizing that racial discrimination and economic disadvantage often combine to create particular forms of disadvantage.[423]

Paul Brest, for example, advanced what he terms the "antidiscrimination principle" for remedying discrimination.[424] Under this principle, state action that disadvantages minorities and is race-dependent would be prohibited.[425] Alan Freeman focused on the victim's perspective, rather than the perpetrator's perspective.[426] This perspective emphasizes the conditions of those who have been discriminated against, rather than specific violations by perpetrators.[427] Furthermore, Charles Lawrence advanced a cultural meaning test that asks whether the state action that has a disparate racial impact is perceived by the general population in racial terms.[428] This approach is designed to chal-

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423. Kimberle Crenshaw, among others, recognized that the intersections between axes of discrimination can create unique and more complicated forms of discrimination. *See* Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

424. Brest noted the potential expansiveness of the antidiscrimination principle: "First, racial discrimination—especially against blacks—is so longstanding and pervasive in our society that most instances of racially-disproportionate impact may seem to be the products of discrimination, and the disproportionate impact doctrine may therefore seem equivalent to the antidiscrimination principle." Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 52 (1976).

425. *See id.* at 2.

426. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

427. *See id.* at 1052-57.

428. Charles Lawrence described the procedure for determining whether to apply heightened scrutiny as follows:

> If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny.

Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987).

lenge state action in which the state actors are not necessarily acting out of conscious discrimination but the action nonetheless discriminates.[429]

These alternative methods for finding equal protection violations where state action has a disparate impact on people of color are particularly appropriate in the school financing and abortion funding contexts.[430] One historical advantage for Whites of segregated schools was that more funds could be spent on White schools than on schools for other students. Continuing unequal funding of schools, which has a disparate impact on people of color, could thus be suspect because of this racial history and meaning. In the abortion funding context, as recognized by Justice Marshall, "'a showing that state action has a devastating impact on the lives of minority racial groups must be relevant' for purposes of equal protection analysis."[431]

While these disparate impact equal protection theories provide contextually sensitive methods for guaranteeing economic equality rights, they have had little effect on the economic equality rights case law. In fact, no court in the school financing or abortion funding cases relied on any version of the disparate impact approach in its adjudication.[432] While such lack of influence on the case law does not preclude its use in future adjudication, it does mean that there is little judicial precedent on which to build.

Furthermore, race-based equal protection theories are likely to meet substantial resistance. As the civil rights movement of the 1950s and 1960s becomes more distant, many Americans will be less willing to accept these race-based equal protection arguments as a method for constitutional adjudication.[433] Thus, as a practical matter it might be difficult to find both judicial and public support for this approach.

C. The Fundamental Rights Approach

The fundamental rights approach is the most sound method for guaranteeing economic equality rights. Since this approach is

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429. *See id.* at 355.

430. *See* Lawrence, *supra* note 428, at 378 (concluding that the abortion funding cases would be a close call under his approach).

431. Harris v. McRae, 448 U.S. 297, 343-44 (1980) (Marshall, J., dissenting) (quoting Jefferson v. Hackney, 406 U.S. 535, 575-76 (1972) (Marshall, J., dissenting)); Maher v. Roe, 432 U.S. 464, 459-60 (1977) (Marshall, J., dissenting) (quoting *Jefferson*, 406 U.S. at 575-76 (Marshall, J., dissenting)).

432. *See* cases cited *supra* notes 12-13 (citing school financing and abortion cases).

433. *See, e.g.*, WILSON, *supra* note 386, at 118-20.

also the most complex and most susceptible to confusion, this section first clarifies the approach as developed in the economic equality rights context. Through this clarification, a certain conception of substantive equal protection that unifies the education financing and abortion funding case law, as well as other established federal substantive rights, will emerge. Specifically, a substantive equal protection right is a right that guarantees that when the government provides a benefit in a particular substantive area, it must do so on an equal basis.[434] While this definition might appear vague, each particular economic equality right, such as those at stake in the education financing and abortion funding cases, only takes on substance when developed in a particular area.

After analyzing the fundamental rights approach in the context of economic equality rights, this section explores the advantages of this approach under contemporary equal protection doctrine. It then examines how the fundamental rights approach is the most defensible in light of the arguments against economic equality rights discussed in Part III. Next, the discussion will address how international human rights law supports this approach. Finally, this section considers what scrutiny is most appropriately applied to state action that burdens an economic equality right.

1. Clarifying Fundamental Rights I

Before exploring the advantages of the fundamental rights approach for guaranteeing economic equality rights, this complex approach must be clarified. This section aims to make sense of this approach by exploring the rationales for striking down abortion funding restrictions advanced in the state case law.

One reason for some confusion surrounding economic equality rights stems from the inconsistent manner in which these rights are described. For example, both of the phrases "right to an abortion" and "right to an education" are ambiguous. The phrase "right to an abortion" can imply either the negative right to not have the government prevent one from having an abortion, or the positive right to have the government provide funding for an abortion.[435] Similarly, the phrase "right to an education" can imply either the negative right to not have the government prevent one

434. *See infra* Part IV.C.2.c.

435. The terms negative right and positive right derive from Isaiah Berlin's definition of negative and positive liberty. *See* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 122-34 (1969); *see also* Appleton, *supra* note 19, at 734-37 (distinguishing positive from negative rights).

from obtaining an education, or the positive right to have the government provide funding for an education. Furthermore, courts, legal commentators and media employ the phrase "right to an abortion" to mean the negative right[436] and the term "right to an education" to mean the positive right.[437] To avoid this confusion, this Article employs the phrases "right to have an education" and the "right to have an abortion" to refer to the negative rights, which the Supreme Court has held are protected by the federal Constitution, and the phrases "right to education funding" and the "right to abortion funding" to refer to the positive rights, which the Supreme Court has held are not guaranteed by the federal Constitution.[438]

Beyond this semantic confusion, the education funding and abortion financing cases finding constitutional violations employ different approaches to reach these results. While the education cases have held that the challenged state action burdens the positive right to education funding,[439] the abortion cases have held that the challenged state action burdens the negative right to have an abortion.[440] To understand this difference, this section will begin with a closer examination of the abortion funding cases.

The abortion funding cases present three theories for finding abortion funding restrictions unconstitutional: such restrictions burden the right to have an abortion established in *Roe*;[441] they violate the unconstitutional conditions doctrine;[442] and they violate the neutrality doctrine.[443] Only the neutrality doctrine, however, properly supports these challenges. Furthermore, this Article argues that the neutrality doctrine is better understood as a way of describing a distinct, substantive equal protection right that supplements the right to have an abortion as established in *Roe*.

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436. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992).

437. *See, e.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988) ("[N]or have we accepted the proposition that education is a 'fundamental right' . . . ."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); *cf.* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (recognizing "the right of parents to engage [a German language instructor] to instruct their children").

438. *Compare Meyer*, 262 U.S. at 400 (mentioning the right to an education), *with Rodriguez*, 411 U.S. at 37 (finding no right to education funding). *Compare* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding the right to have an abortion cannot be infringed), *with* Maher v. Roe, 432 U.S. 464, 469 (1977) (explaining there is no entitlement to medical care for abortion-related medical expenses).

439. *See supra* Part II.B.2.a.1.

440. *See supra* Part II.B.2.b.1.

441. *See infra* Part IV.C.1.a.

442. *See infra* Part IV.C.1.b.

443. *See infra* Part IV.C.1.c.

a. Undue Burden

In each of the state court cases striking down abortion funding restrictions under state law, the court has held that denying abortion funding, while funding other pregnancy related services, burdens the fundamental right to have an abortion as established by the Supreme Court in *Roe v. Wade*.[444] Under the reasoning of these courts, funding the costs associated with childbirth, while not funding abortions, pressures or coerces women who do not have the resources to afford an abortion into childbirth so as to burden the fundamental right to have an abortion.[445] However, without further support, this "financial coercion" argument conflicts with established equal protection doctrine.

While funding childbirth but not abortions can violate equal protection under certain theories,[446] it does not burden the simple right to have an abortion. As noted above, the right to have an abortion, as protected by *Roe*, is the right to not have the government prevent one from obtaining an abortion. Against the background of no state funding of any pregnancy-related services, when the government funds the costs associated with childbirth, it does absolutely nothing to affect a woman's ability to obtain an abortion. In both situations of no funding and selective funding, a pregnant woman without the resources to pay for an abortion is unable to take advantage of her constitutionally guaranteed right to have an abortion.[447] From this perspective, the failure to fund abortions while funding other pregnancy-related services does not prevent, or even burden or interfere with the ability of a woman to have an abortion; it only fails to provide the financial means to do so. Thus, abortion funding restrictions do not burden the fundamental right to have an abortion protected by *Roe*.

This argument can be illustrated with an analogy to the education financing case law.[448] The right to have an education does

444. *See supra* note 221 and accompanying text (reviewing the right to abortion funding cases).

Some of the dissenters in *Maher* and *Harris* also argued that the challenged abortion funding restrictions violated the right to have an abortion as established in *Roe*. *See supra* note 128 and accompanying text.

445. *See supra* note 128 and accompanying text (citing the dissenting opinions in manner *Maher* and *Harris* employing this reasoning).

446. *See infra* Part VI.C.1.c (discussing the doctrine of neutrality).

447. *See supra* notes 126-27, 247 and accompanying text.

448. The majority opinion in *Maher* relied on the analogy to the education financing cases to support its holding that abortion funding restrictions do not burden the right to have an abortion. *See* Maher v. Roe, 432 U.S. 464, 476-77 (1977). This is a particularly appropriate analogy, as the right to have an education and the right to have an abortion are both subsets of the general right to privacy. *See*

not imply the right to have that education funded by the state,[449] but one does have a fundamental constitutional right to attend private schools.[450] However, government funding of public education but not private education does not burden the right to attend private schools by pressuring or coercing one to attend public instead of private school.[451] This is so even for economically disadvantaged children who, because of financial constraints, have essentially no choice but to attend public schools. Analogously, in the abortion funding context, having an abortion, a constitutionally protected choice, is not burdened through funding childbirth, another protected choice.

Furthermore, because this financial coercion argument only applies to those who are economically disadvantaged, it fails to support the general proposition that the government must provide abortion funding when it funds other pregnancy-related procedures. For example, if the government were to institute a universal health care program that excluded abortion funding, women with the means to afford abortions, although potentially influenced by the financial incentives of such a program into carrying pregnancies to term rather than having abortions, would not be

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supra note 374.

The Supreme Court in *Meyer*, which found unconstitutional a state law prohibiting the teaching of foreign languages to young children, wrote that the law interfered "with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." Meyer v. Nebraska, 262 U.S. 390, 401 (1923). The Court in *Pierce*, which held unconstitutional a law that required children to attend public school, rather than private or parochial school, stated that the challenged law interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

449. *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99-101 (1973) (Marshall, J., dissenting) (disagreeing with the majority's view that funding disparities are not burdensome).

450. *See Pierce*, 268 U.S. at 534 (holding that parents had a constitutional right to direct the upbringing of their children).

451. *See* Norwood v. Harrison, 413 U.S. 455, 462 (1973). In *Norwood*, the Supreme Court stated:

> It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

Id. *But compare* Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218 (1964) (holding that a school board violated equal protection when it closed its public schools and then funded private schools to maintain racial segregation), *with* Palmer v. Thompson, 403 U.S. 217 (1971) (holding that a city did not violate equal protection when it closed its public swimming pools to prevent their racial integration).

"financially coerced" into giving birth.[452] While one choice might be more expensive than another, the government action would not carry any coercive force, as these women would be able to afford either choice. Thus, the financial coercion argument does not adequately support finding that abortion funding restrictions generally burden the right to have an abortion.

Implicitly acknowledging the argument that government funding of childbirth, but not abortion, does not directly burden the right to have an abortion, the state courts holding such state action unconstitutional rely on additional doctrines, namely either the unconstitutional conditions[453] or neutrality doctrine,[454] to support their holdings.

b. Unconstitutional Conditions

The unconstitutional conditions doctrine states that the government cannot condition the receipt of a benefit on the requirement that a beneficiary refrain from exercising a constitutional right.[455] Those who apply this doctrine to the abortion funding context argue that the doctrine prohibits the government from conditioning the receipt of health care, or, more specifically, pregnancy-related medical care, on a beneficiary's refraining from exercising her right to have an abortion.[456] While one state court relied on the unconstitutional conditions doctrine in striking down an abor-

452. For example, in *Hope v. Perales*, the New York abortion funding case, the Court of Appeals emphasized that the challenged restrictions only applied to persons with incomes between 100% and 185% of the federal poverty line when it held that the program did not coerce women to bring fetuses to term. *See* 634 N.E.2d 183, 188 (N.Y. 1994) ("[U]nlike an indigent woman, whose option to choose an abortion is arguably foreclosed by her lack of resources, [a woman in the challenged program] has the financial means to exercise her fundamental right of choice."). This case illustrates the danger of relying exclusively on a financial coercion argument for the project of establishing economic equality rights.

453. *See infra* Part IV.C.1.b.

454. *See infra* Part IV.C.1.c.

455. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 405-06 (1963).

For discussions of the unconstitutional conditions doctrine, see Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990); Richard A. Epstein, Foreword, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Gary Feinerman, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 STAN. L. REV. 1369 (1991); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

456. *See supra* note 225 and accompanying text; *see also* Edelman, *supra* note 368, at 41 (disagreeing with the idea that refusing to fund abortions is not an unconstitutional condition).

tion funding restriction,[457] this doctrine fails to support either abortion funding specifically or economic equality rights generally.

As a number of courts[458] and commentators[459] have argued, the unconstitutional conditions doctrine is inapplicable to the abortion funding context. When the government excludes abortions from a health care package, it is not conditioning receipt of the package on whether a woman exercises her right to choose. Instead, the health care package is available to all eligible women regardless of their choices.[460] Abortions are restricted simply by not covering them as part of the package rather than indirectly through placing a condition on receipt of the package.

The inapplicability of the unconstitutional conditions doctrine to abortion funding restrictions can be illustrated by a comparison with the doctrine's established use. *Sherbert v. Verner* presents the classic example of the Supreme Court relying on the unconstitutional conditions doctrine to strike down state action.[461] The *Sherbert* Court held unconstitutional a state law denying unemployment compensation benefits to a person who refused to work on Saturday because of her faith.[462] Thus, in *Sherbert*, a generally available benefit, unemployment insurance, was denied an individual due to her exercise of her religious beliefs. In the abortion funding cases, however, as noted, all recipients are barred from receiving the benefit of abortion funding, regardless of what constitutional rights they do or do not exercise. Conversely, exercising the right to have an abortion does not preclude one from receiving the available benefits package.[463] Thus, the unconstitutional con-

457. *See* Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981). The California court relied on the unconstitutional conditions doctrine in holding unconstitutional its state abortion funding restrictions. *See id.* at 798; *supra* notes 224-26 and accompanying text.

458. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 317 n.19 (1980); Maher v. Roe, 432 U.S. 464, 474-75 n.8 (1977); *Myers*, 625 P.2d at 789 n.19; Planned Parenthood Ass'n v. Department of Human Resources, 663 P.2d 1247, 1256-57 n.14 (Or. Ct. App. 1983).

459. *See, e.g.*, Baker, *supra* note 455, at 1231; Sherman, *supra* note 18, at 989-1013.

460. In other words, those states that do not provide abortion funding do not deny the health care coverage that is available to individuals who exercise their right to have an abortion.

461. 374 U.S. 398 (1963); *see also Harris*, 448 U.S. at 317 n.19 (distinguishing *Sherbert* from the abortion funding issue).

462. *See* Sherbert v. Verner, 374 U.S. 398, 403-10 (1963).

463. The California court specifically addressed the argument that abortion funding restrictions do not involve the denial of a complete medical package, arguing that even the denial of a single benefit, such as a funded abortion, when based on the exercise of a constitutional right, violates the unconstitutional conditions doctrine. *See Myers*, 625 P.2d at 788. This argument, however, is unpersua-

ditions doctrine does not support challenges to abortion funding restrictions.[464]

c. Government Neutrality

The neutrality doctrine states that once the government acts in a particular area, it must act in a constitutionally neutral manner.[465] Applied to abortion funding restrictions, the neutrality doctrine dictates that once the government provides funding for health care, or, more specifically, pregnancy-related medical services, it cannot exclude abortions from such coverage. The majority of state courts that have struck down abortion funding restrictions have invoked this doctrine.[466]

The neutrality doctrine derives from First Amendment jurisprudence.[467] The classic examples of its use are found in the First Amendment Freedom of Speech Clause and Establishment Clause contexts.[468] In the free speech context, the Supreme Court has held that the government may not burden speakers based on the content of their speech,[469] or even in some circumstances, provide funding to speakers in a manner that discriminates on the basis of viewpoint.[470] In the Establishment Clause context, the Supreme

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sive since, as noted, the abortion funding restrictions simply denied rather than conditioned a benefit.

464. The unconstitutional conditions doctrine does have some similarity to the substantive equal protection doctrine developed in this Article. Under both doctrines, the state need not provide a benefit, but once it does, it must do so in a particular manner. However, while under the unconstitutional conditions doctrine a state may not condition the receipt of a benefit upon the exercise of a right, under substantive equal protection a state may not provide a benefit in a discriminatory manner, regardless of whether any rights are exercised.

465. *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Lemon v. Kurtzman, 403 U.S. 602 (1971).

466. The courts in Connecticut, Massachusetts, New Jersey and West Virginia relied on the neutrality doctrine to strike down state abortion funding restrictions. *See supra* notes 225-26 and accompanying text.

467. *See* Sherman, *supra* note 18, at 1006-08.

468. *See id.*

469. *See, e.g., Ragland*, 481 U.S. at 234; Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

470. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995). The Court in *Rosenberger* based its conclusion on the law applicable to state created limited public forums: "Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set." *Id.* at 829. Thus, the Court noted in *Rosenberger* that:

> Although acknowledging that the Government is not required to subsidize the exercise of fundamental rights, . . . we reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits by observing that [t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ai[m] at the suppression of dangerous ideas.

Court has held that the government may only provide benefits to religious groups or individuals on a neutral basis.[471] Thus, in both of these contexts, one does not have a right to a benefit, but once the government decides to provide a benefit it must do so in a content-neutral manner.

The neutrality doctrine is essentially an equal protection doctrine.[472] When invoking this doctrine, an individual does not simply claim that the government has treated him or her unconstitutionally, but rather claims that the government has treated him or her unconstitutionally in relation to its treatment of others.[473] Furthermore, a right protected by the neutrality doctrine is a distinct right supplementing the underlying substantive right that governs otherwise constitutional government action. For example, neutrality in the religious freedom context is protected under a specific constitutional provision, the Establishment Clause, aimed at regulating government funding. This clause supplements the prohibition on the government from directly suppressing religion, guaranteed by the Free Exercise Clause.[474] While there is no such explicit constitutional protection in the free speech context, the Supreme Court has noted similar dangers of discriminatory government funding.[475]

While the term "neutrality doctrine," has a certain currency, this Article employs the term "substantive equal protection right"

Rosenberger, 515 U.S. at 834 (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46, 548 (1983)) (citations omitted).

471. *See, e.g., Rosenberger*, 515 U.S. at 839; Board of Educ. v. Grumet, 512 U.S. 687, 715-16 (1994) (O'Connor, J., concurring). The neutrality requirement is similar to the second prong of the three pronged test established in *Lemon v. Kurtzman* for determining whether state action violates the Establishment Clause. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). While many members of the Court have criticized the *Lemon* test, it remains good law. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7 (1993).

472. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 540 (1993); Mark D. van der Laan, *Up Against the Wall:* Board of Education of Kiryas Joel Village School District v. Grumet, 56 OHIO ST. L.J. 1335, 1362 (1995); *cf.* Miller v. Johnson, 515 U.S. 900, 904 (1995) (noting that "[the Equal Protection Clause's] central mandate is racial neutrality in governmental decisionmaking").

473. *See, e.g., supra* notes 222-223 and accompanying text.

474. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). In recognition of the Constitution's particular concern with the funding of religious organizations, the Supreme Court held that taxpayers, who generally do not have standing to challenge government actions, do have standing to bring suit under the Establishment Clause. *See* Flast v. Cohen, 392 U.S. 83, 105-06 (1968).

475. *See Rosenberger*, 515 U.S. at 835-36 ("[V]ital First Amendment speech principles are at stake here.").

to describe rights protected in this manner.[476] This term recognizes the fact that a substantive equal protection right does not flow from the application of equal protection to a right, but rather concerns an independent right that stands on its own.

While the courts that have adjudicated abortion funding cases have stated that, by violating the neutrality doctrine, abortion funding restrictions burden the fundamental right to have an abortion as protected by *Roe*, this Article argues that a violation of the neutrality doctrine actually burdens a distinct, substantive equal protection right. In the abortion funding context, this is simply the right to have full range of pregnancy-related health care services funded without excluding any constitutionally-protected options. This Article discusses below the justification for these supplemental, equal protection rights.

2. Clarifying Fundamental Rights II

Further confusion over economic equality rights stems from a failure to distinguish between a right simply being fundamental and a right being fundamental only for equal protection purposes—in other words, a substantive equal protection right.[477] While these two rights are related, they are nonetheless distinct, with neither implying the other. This difference is demonstrated by exploring the various categories into which the education financing and abortion funding cases fall.

The courts adjudicating education financing challenges begin by determining whether education funding is a fundamental right and, if it is, then proceed to determine whether equal protection attaches to the right.[478] Thus, court holdings in education financing cases fall into three categories: education funding is not a fundamental right; education funding is a fundamental right, but not for equal protection purposes; and education is a fundamental right for equal protection purposes.[479] In the abortion funding cases, however, the courts begin by determining whether abortion

476. Substantive equal protection rights are similar to substantive due process rights in that both rights are grounded directly in equal protection and due process, respectively. However, in contrast to substantive due process, substantive equal protection is somewhat of a hybrid between the fundamental right and suspect classification approaches.

477. In *Rodriguez*, Justice Marshall used the phrase "fundamental for purposes of equal protection analysis" to describe how he would treat the right to education funding. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 100 (1973) (Marshall, J., dissenting).

478. *See supra* notes 140-72 and accompanying text.

479. *See* cases cited *supra* note 140.

funding restrictions violate equal protection, often in the form of the neutrality doctrine,[480] and, if the court so finds, it then argues that this burdens the fundamental right to have an abortion.[481] Thus, the abortion funding cases fall into two categories: those that hold that abortion funding restrictions violate equal protection by burdening the fundamental right to have an abortion; and those that hold that abortion funding restrictions do not violate equal protection, as they do not burden the fundamental right to have an abortion.[482]

Combining the cases in these two substantive areas, courts adjudicating economic equality claims fall into four categories: not fundamental for any purpose; fundamental right without equal protection; fundamental, including for equal protection purposes (straight fundamental right); and fundamental only for equal protection purposes (substantive equal protection).[483] This section explores all but the first category.

a. The Fundamental Right Without Equal Protection Version

Under the fundamental right without equal protection version of the fundamental rights approach, while a court recognizes a right as fundamental, it does not apply equal protection to the right. Courts use this version exclusively in education funding cases.[484]

Initially, the fundamental right without equal protection version, by definition, fails to guarantee economic equality rights. Since this version focuses on minimal adequacy at the expense of

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480. The neutrality doctrine is actually an equal protection doctrine. *See supra* Part IV.C.2.c.

481. *See supra* Part II.B.2.b.1.

482. *See* cases cited *supra* notes 218-20 and accompanying text.

483. Edelman presents a variation on this categorization of economic rights:

> [O]ne tier where the claims involve interests so unimportant that the state violates no constitutional right when it subsidizes so as to exclude the poor . . . a second where the interests are important enough that the state creates an equal protection problem when it subsidizes so as to deny access to the poor yet has no obligation to get into the business . . . and a third where the state can neither subsidize in a way that excludes the poor nor drop out altogether . . . .

Edelman, *supra* note 368, at 35-36.

484. The courts in four states, namely Arizona, Minnesota, North Carolina and Wisconsin, employed the fundamental right without equal protection version of the fundamental rights approach in their education financing cases. *See supra* notes 176-78 and accompanying text. Furthermore, the courts in a number of states have held that its education financing system violated its state's constitutional guarantees to an adequate education without engaging in an equal protection analysis. *See supra* note 13 and accompanying text.

equality,[485] the government need only adequately supply a particular economic benefit to guarantee the right. Thus, the courts subscribing to this version have upheld legislation challenged on equality grounds.[486]

Furthermore, despite the fact that four state courts have employed this version, it is arguable that, once a court establishes a fundamental right under state law, federal equal protection attaches to the right as a matter of federal law. The general argument is that, although a state court is free to recognize fundamental rights not protected by the federal constitution, once the court recognizes such a right under state law, federal equal protection law, rather than state equal protection law, applies. Thus, if a challenged state action burdens a state-protected fundamental right, then strict scrutiny applies.[487] In the context of education financing, once a state recognizes the right to educational funding, under federal law, differentials in educational funding burden this right, requiring the application of strict scrutiny.[488]

The interaction between state and federal law in the federal procedural due process case law illustrates this approach.[489] The Due Process Clause of the Fourteenth Amendment, found in the same section of the Amendment as the Equal Protection Clause, prevents the government from taking property without due process of law.[490] While states are free to establish protected property rights,[491] the Supreme Court held that once a state establishes

485. In *Rodriguez*, Justice Marshall responded to the argument that a state need only provide an adequate education by stating that: "[T]he Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that 'all persons similarly circumstanced shall be treated alike.'" San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 89 (1973) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)); *see also* DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (quoting *Rodriguez* as stating that "[e]qual protection is not addressed to minimal sufficiency but rather to the unjustifiable inequalities of state action"); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) (quoting Justice Marshall's dissent in *Rodriguez*).

486. *See supra* note 173 and accompanying text.

487. This analysis assumes that the question of whether state action burdens a fundamental right is one of federal law, in addition to the federal law requiring state action that does burden a fundamental right be subject to strict scrutiny. However, these are two independent issues. It could be that states are free to decide whether state action burdens a fundamental right under state law to the same extent that states are free to decide what rights are fundamental.

488. *See* Morgan, *supra* note 349.

489. *See id.* at 94-95.

490. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .").

491. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972).

such a right, federal law, not state law, governs the question of what process is due before someone may be deprived of the right.[492] Thus, while state law defines protected property rights, federal due process law controls how those rights may be abrogated.[493] Analogously, once a state court establishes a fundamental right, federal law controls the standard for protecting that right.

While the argument that federal equal protection attaches to state protected rights certainly has force, it is by no means clear that states should not be able to guarantee economic rights without guaranteeing economic equality rights. Generally, since states are free to supplement federal fundamental rights, the argument can be made that they are also free to apply their own legal analysis to these rights.[494] Furthermore, the Supreme Court has yet to consider whether unequal education funding would burden a fundamental right to education. Thus, there is no direct federal precedent precluding states from giving content to the right to education such that the state must provide certain minimum educational standards, but not equal funding. However, every state court that has held that education is a fundamental right to which equal protection attaches has further held that disparate funding burdens this right.[495]

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492. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). The Supreme Court in *Loudermill* concluded: "In short, once it is determined that the Due Process Clause applies, 'the question remains what process is due.' The answer to that question is not to be found in the [challenged] statute." *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)); *accord* Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982); Bishop v. Wood, 426 U.S. 341, 355-61 (1976); Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part). Justice Rehnquist dissented in *Loudermill*, continuing to insist that when a state creates a property interest, the state can also define what process is due. *See Loudermill*, 470 U.S. at 563 (Rehnquist, J., dissenting).

493. The argument that federal equal protection attaches to state fundamental rights is further supported by the fact that equal protection originally applied only to the states. It was not until the Supreme Court's decision in *Bolling v. Sharpe*—the *Brown* companion case—that the Court first suggested that the Due Process Clause of the Fifth Amendment, which applies to the federal government, incorporated the prohibition against racial discrimination constitutionalized in the Equal Protection Clause of the Fourteenth Amendment. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 215 (1995) (citing Bolling v. Sharp, 347 U.S. 497 (1954)). The Court subsequently held that these protections are coextensive. *See Adarand*, 515 U.S. at 216-18.

494. This is the same argument, made by the dissent, as in the due process context, namely that a state is free to define both the right and the protections that attach to the right. *See supra* note 492 and accompanying text.

495. *See supra* notes 158-72 and accompanying text.

b. The Straight Fundamental Rights Version

Under the straight fundamental right version of the fundamental rights approach, in addition to recognizing a fundamental right, a court holds that the right is fundamental for equal protection purposes. Most of the state cases that have struck down education financing schemes on equal protection grounds have done so by aplying this version.[496] Each of these courts first held that its state constitution guarantees education funding as a fundamental right.[497] These courts continued by holding that disparate education financing burdened this fundamental right and by striking down the challenged financing scheme under heightened scrutiny.[498] While this is the strongest version of the fundamental rights approach, it is inadequate for synthesizing the economic equality rights case law. Specifically, it is incompatible with the approaches by both those state courts striking down abortion funding restrictions and the dissenters in the federal education financing and abortion funding cases.

First, no state court striking down an abortion funding restriction relied on the straight fundamental right version. In fact, no court adjudicating an abortion funding case, including those holding that abortion funding restrictions are unconstitutional, has taken the first step in this version and held that a funded abortion is a fundamental right under state law.[499] Instead, the courts striking down the challenged restrictions all have held that the exclusion of abortion funding from the funding of pregnancy-related care burdens the right to have an abortion rather than the right to abortion funding.

One reason that the courts in the abortion funding context have not relied on the straight fundamental rights version is that, in contrast to the right to education funding, which every state

496. The courts in California, Connecticut, North Dakota, West Virginia and Wyoming employed the straight fundamental rights version of the fundamental rights approach. *See supra* notes 163-72 and accompanying text.

497. *See supra* notes 140, 143-57 and accompanying text.

498. *See supra* notes 158-72 and accompanying text.

499. *See supra note* 221 and accompanying text. *But cf.* Right to Choose v. Byrne, 405 A.2d 427, 431 (N.J. Super. 1979), *aff'd as modified*, 450 A.2d 925 (N.J. 1982) ("That fundamental right is established in the view of this court. Enjoyment of one's health is a fundamental liberty which is shielded by the Fourteenth Amendment to the Federal Constitution and by Article 1, paragraph 1 of the State Constitution against unreasonable and discriminatory restriction."); Right to Choose v. Byrne, 450 A.2d at 944 (Pashman, J., concurring) ("I believe our Constitution affirmatively requires funding for abortions for women who choose them and cannot otherwise afford them.").

constitution explicitly guarantees,[500] there are few sources supporting a right to health care funding. State constitutions generally do not guarantee health care funding as a right,[501] and, in contrast to universal public education, states generally have not adopted universal health care. Thus, there is less support for holding that government-funded health care is a fundamental right.

The straight fundamental rights version also is not relied on by Justice Marshall's dissent in *Rodriguez* supporting equal education funding. In *Rodriguez*, Justice Marshall did not argue that the federal Constitution guarantees a funded education,[502] but rather that education was so important that its disparate funding should trigger heightened scrutiny.[503] Thus, the state courts that employ the straight fundamental rights version in the education funding context cannot even rely on the reasoning provided by the dissenters in the federal cases for support.

Furthermore, a potential drawback to the straight fundamental rights version is that it may have unintended consequences outside of the equality context. Under this version, once a fundamental right is established, in addition to equal protection, it can interact with other constitutional provisions to create additional

500. *See* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. 8, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, pt. 2, § 3; KAN. CONST. art. 6, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, chap. V, § II; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. 7, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 2; OKLA. CONST. art. I, § 5; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. 1, § 23.

501. One exception is the New York State Constitution, which provides as follows: "The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such subdivisions and in such manner, and by such means as the legislature shall from time to time determine." N.Y. CONST. art. XVII, § 3.

502. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting) ("It is true that this Court has never deemed the provision of free public education to be required by the Constitution."); *see also id.* at 62-63 (Brennan, J., dissenting).

503. *See id.* at 111-13 (Marshall, J. dissenting).

rights. For example, a fundamental right could interact with a due process clause to guarantee procedural due process rights as to either public education or funded abortions.[504] While not necessarily problematic, this version does guarantee more than simple economic equality. Thus, for these reasons, the straight fundamental rights version is not ideal for guaranteeing economic equality rights.

c. The Substantive Equal Protection Version

Under the substantive equal protection version of the fundamental rights approach, a court guarantees a right only for a specific equal protection purpose.[505] As applied to economic equality rights, the government need not provide a specific benefit, but once it does, equal protection constrains how the government can dispense the benefit.[506] This version synthesizes into a coherent equal protection theory, the education financing and abortion funding cases, as well as certain established federal equal protection rights in the First Amendment, voting rights, access to the courts, and interstate travel contexts. Before discussing the education funding and abortion financing cases, this section explores the Supreme Court cases in other contexts to demonstrate that all of these rights are properly viewed as substantive equal protection rights.[507]

In the First Amendment context, the Supreme Court employs

504. Thus, if a funded education is established as a fundamental right, a student arguably would have certain due process rights before being expelled for disciplinary reasons. *Cf., e.g.*, Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1095-97 (Mass. 1995) (rejecting a claim that an expulsion from public school violated the expelled student's fundamental right to an education); Lisa H. v. State Bd. of Educ., 447 A.2d 669, 672-74 (Pa. Commw. Ct. 1982) (rejecting a claim that a state's decision to deny students a "gifted" education burdened their property interest in education because the state constitution does not guarantee a particular educational program).

505. As noted above, the substantive equal protection version of the fundamental rights approach is similar to the neutrality doctrine. *See supra* notes 472-76 and accompanying text.

506. *See* Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 300, 334 (1985) ("[I]t is equally clear that government's freedom to leave distribution to the market does not extend, under our Constitution, to *all* things someone might need in order to exercise various constitutional rights—even those not clearly rendered affirmative by the constitutional text itself.").

507. The Supreme Court appears at times to have acknowledged that it has adjudicated substantive equal protection claims. *See* Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982) ("In reality, right to travel analysis refers to little more than a particular application of equal protection analysis."); *see also Rodriguez*, 411 U.S. at 33 ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.").

the neutrality doctrine, which acts like substantive equal protection,[508] to prohibit both the funding of speakers in a manner that discriminates on the basis of viewpoint and the dispensing of benefits to religious groups or individuals on a non-neutral basis.[509] In the voting rights context, the Supreme Court has held that, while a state need not grant the vote as to certain public officials, if the state does so, then the equal protection clause prevents the diminishment or exclusion of the vote.[510] In the access to the courts context, the Supreme Court has held that, while there is no right to a direct criminal appeal, a state collateral attack on a conviction, or certain civil actions, once the government opens the courts to these actions, equal protection prevents discrimination on the basis of wealth in pursuing these actions.[511] Finally, in the interstate travel context, the Supreme Court has held that, while a state need not provide welfare benefits, once a state decides to provide such benefits it may not burden the right to travel by denying such benefits to more recent arrivals.[512] This is actually a substantive equal protection right of new state residents to receive government benefits on an equal basis as those already residing in the state. Thus, in all five of these areas of substantive federal constitutional law, while the constitution does not guarantee a right, once a state acts, equal protection attaches to create a specific substantive right which, when burdened, triggers heightened scrutiny.

Importantly, for each of the above substantive equal protec-

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508. Under the neutrality doctrine, while the government need not fund speech, once it does, equal protection attaches and its funding must be content neutral. *See supra* Part IV.C.1.c.

509. *See supra* notes 467-71 and accompanying text.

510. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628-29 (1969) ("The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment."); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

511. *See* cases cited *supra* note 43. In *Griffin v. Illinois*, for example, the Court 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. 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.

351 U.S. 12, 18 (1956) (internal citation omitted).

512. *See, e.g.*, Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 904 (1986).

Significantly, the *Shapiro* majority cited *Sherbert v. Verner*, 374 U.S. 398 (1963), for the proposition that the "[c]onstitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right.'" Shapiro v. Thompson, 394 U.S. 618, 626 n.6 (1969).

tion rights, the Supreme Court based its protection of the right on the importance of equality when the government provides the benefit underlying the right.[513] Thus, the Court grounded religious neutrality directly in the Establishment Clause, a constitutional mandate of neutrality.[514] The Court based neutrality in the free speech context on the dangers of government encouragement of certain speech at the expense of other speech.[515] The Court based its voting rights holdings on the fundamental importance of the right to vote in a democratic society.[516] The Court based its criminal appeals holdings on the importance of appellate review in adjudicating guilt and innocence regardless of the financial status of the appellant,[517] its transcripts holdings on the importance of a trial record to permit review of claims,[518] and its filing fee cases on the importance of the availability of certain types of actions to all.[519] Finally, the Court based its interstate travel cases on the

513. What the Supreme Court did in practice is similar to Justice Marshall's nexus approach, judging state action under equal protection more strictly when it is close to a fundamental right.

514. *See supra* note 474 and accompanying text.

515. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835-36 (1995). The Court in *Rosenberger* specifically noted: "Vital First Amendment speech principles are at stake here." *Id.* at 835.

516. The Court in *Harper* quoted previous cases describing the right to vote as a "'fundamental political right, because [it is a] preservative of all rights,'" and as a "'[f]undamental matter in a free and democratic society[,] [e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . .'" Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964)).

517. In *Griffin*, the Court wrote: "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discrimination." Griffin v. Illinois, 351 U.S. 12, 18 (1965). The Court further noted that "[a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Id.*

The Court in *Douglas* emphasized the importance of safeguards in criminal law: "'The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.'" *Douglas*, 372 U.S. at 357 n.2 (quoting Coppedge v. United States, 369 U.S. 438, 449 (1962)).

518. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 110-12 (1996).

519. *See* Burns v. Ohio, 360 U.S. 252, 258 (1959); *see also* Boddie v. Connecticut, 401 U.S. 371, 394 (1971) (finding a due process violation where indigent women seeking marriage dissolution were denied access to the courts solely because of their inability to pay court fees); Smith v. Bennett, 365 U.S. 708, 712-13 (1961) (holding that the state's requirement that all prisoners pay filing fees for writ of habeas corpus denied equal protection to indigent prisoners who were unable to pay).

importance of the right to travel within our union of states.[520]

As demonstrated in each of these five substantive areas, the Supreme Court has, at least implicitly, engaged in a contextual analysis of the importance of equality to the particular interests implicated to reach the conclusion that the substantive equal protection right should be established. Furthermore, that two of these rights, the rights of equal access to the courts and to receive benefits on an equal basis after traveling interstate, are economic equality rights demonstrates that the substantive equal protection approach includes economic equality rights.

The substantive equal protection rights protected in all of the above contexts are related to the education financing and abortion funding cases, and the arguments are similar. In particular, the dissenters in the Supreme Court cases that established federal substantive equal protection rights raised the same arguments against these rights as the Justices in the majorities in the federal education financing and abortion funding cases advanced.[521] First, the dissenters argued that, since the government need not provide the particular benefit in the first instance, then the government should be allowed to provide the benefit in a manner in which it sees fit without having this action declared unconstitutional.[522] Second, the dissenters argued that the rights at issue harkened back to the discredited *Lochner* Era.[523] Third, they argued that

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520. *See* Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969).

521. *See, e.g., supra* notes 99-102 and accompanying text.

522. In a passage foreshadowing the *Rodriguez* majority, Justice Harlan posed the following question in *Griffin*: "Can it be that, while it was not unconstitutional for Illinois to afford no appeals, its steady progress in increasing the safeguards against erroneous convictions has resulted in a constitutional decline?" *Griffin*, 351 U.S at 37 (Harlan, J., dissenting). Subsequently, in *Rodriguez*, the Court stated: "Every step leading to the establishment of the system Texas utilizes today . . . was implemented in an effort to *extend* public education and to improve its quality." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S 1, 39 (1973) (emphasis added).

523. In *Harper*, Justice Black wrote:

> Another reason for my dissent from the Court's judgment and opinion is that it seems to be using the old "natural-law-due-process formula" to justify striking down state laws as violations of the Equal Protection Clause. I have heretofore had many occasions to express my strong belief that there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems. Nor is there in my opinion any more constitutional support for this Court to use the Equal Protection Clause, as it has today, to write into the Constitution its notions of what it thinks is good governmental policy.

Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 675-76 (1966) (Black, J., dissenting) (citations omitted). Justice Harlan added:

the Constitution does not require the government to remedy societal inequality.[524] Finally, they argued that the challenged state action should not be subject to heightened scrutiny because it did not implicate a fundamental right or make a suspect classification.[525]

Turning to the education financing and abortion funding contexts, the importance of equality in those areas provides the basis for recognizing substantive equal protection rights. In the educational financing context, in addition to the general importance of education, numerous commentators have argued that educational equity assures fairness and equal opportunity essential to a demo-

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> It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the *laissez-faire* theory of society . . . . The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism.

Id. at 686 (Harlan, J., dissenting) (internal citations omitted).

524. In *Griffin*, Justice Harlan wrote: "Nor is this a case where the State's own action has prevented a defendant from appealing. All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." 351 U.S. at 34 (internal citations omitted) (Harlan, J., dissenting). Justice Harlan elaborated on this point in *Douglas*:

> Laws such as these do not deny equal 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." 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. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.

Douglas, 372 U.S. at 362 (Harlan, J., dissenting) (quoting *Griffin*, 351 U.S. at 34 (Harlan, J., dissenting)).

In *Ross v. Moffitt*, which set a limit on equal protection in the criminal appeals context, the Court wrote: "The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' nor does it require the State to 'equalize economic conditions.'" 417 U.S. 600, 612 (1974) (quoting *Rodriguez*, 411 U.S. at 24; *Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring)). *Cf.* M.L.B. v. S.L.J., 519 U.S. 102, 125 (1996) (rejecting respondents' argument that the Court's holding dishonors the cases recognizing that the Constitution does not confer affirmative rights).

525. Justice Stewart noted in *Kramer*: "This case does not involve racial classifications, which in light of the genesis of the Fourteenth Amendment have traditionally been viewed as inherently 'suspect.' And this statute is not one that impinges upon a constitutionally protected right, and that consequently can be justified only by a 'compelling' state interest." *Kramer*, 395 U.S. at 639 (Stewart, J., dissenting) (citation omitted). In *Shapiro*, Justice Harlan dissented as follows:

> This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation, the right to receive greater or smaller wages or to work more or less hours, and the right to inherit property. Rights such as these are in principle indistinguishable from those involved here . . . .

394 U.S. at 661 (footnotes omitted) (Harlan, J., dissenting).

cratic society.[526] In the abortion funding context, it is well documented that the right to choose whether to give birth or have an abortion is essential for individual autonomy.[527]

Furthermore, the substantive equal protection version supports economic equality rights in both the education and abortion areas. Under this version, regardless of whether a funded education or health care is a fundamental right, a court may guarantee equality in these areas. Additionally, this version provides a basis for those states, and the federal judiciary, which have held that education funding is not a fundamental right, to nonetheless recognize educational equality as a substantive right.

Admittedly, the substantive equal protection version is weaker than the straight fundamental right version. Some argue that either state or federal constitutions should guarantee education and health care, as well as such other basic necessities as housing, welfare and employment, as fundamental rights without being limited to the equal protection context.[528] The more modest proposition, and yet the more tenable one, is that certain equality protections should attach when the government seeks to provide such basic services. Furthermore, by not placing affirmative duties on the government, this version fits in better with contemporary views on the nature of rights.[529]

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526. *See supra* notes 103, 113-15, 152-53 and accompanying text; *Rodriguez*, 411 U.S. at 70-72 (Marshal, J., dissenting); *see also* KOZOL, *supra* note 388 (exploring the inequalities in America's public schools).

Interestingly, the Court in *Plyler* implicitly linked its holding that denying public education to children who are illegal aliens violated equal protection even though education is not a fundamental right, with the Court voting rights decisions, which held that while the right to vote is not constitutionally protected, the equal right to vote is. *See* Plyler v. Doe, 457 U.S. 217 n.15 (1982); *see also Rodriguez*, 411 U.S. at 35.

527. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

528. *See* Edelman, *supra* note 368, at 4 (arguing that the judiciary should recognize "certain affirmative obligations on the part of the state to its citizens"); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659. *See generally* Susan Neilson, *The Right to Shelter Under the Connecticut Constitution*, 67 CONN. B.J. 441, 449-53 (1993). *But cf.* Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Ralph K. Winter, *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U. L.Q. 741.

529. *See infra* Part IV.C.4.

3. Equal Protection Doctrine

The fundamental rights approach is the best method for guaranteeing economic equality rights in light of contemporary equal protection doctrine. Specifically, this approach is limited in scope, permits affirmative economic action, and has received the most support in the state educational financing and abortion funding case law.

The strongest argument in favor of the fundamental rights approach is that this approach does not broadly implicate state action. As discussed above, both the wealth as a suspect classification and disparate impact approaches render suspect all state action that has a disparate economic effect. The fundamental rights approach, however, only implicates certain defined state action, namely action that burdens an established fundamental right. Thus, rather than render suspect a wide range of state action, this approach is limited to areas of fundamental economic equality rights.

Furthermore, the fundamental rights approach does not preclude affirmative economic action. Under the wealth as a suspect classification approach, state action that classifies on the basis of wealth is subject to heightened scrutiny, regardless of whether the action is advantageous or disadvantageous to those less economically well-off.[530] However, under the fundamental rights approach, only that state action which burdens certain defined economic equality rights merits heightened scrutiny, leaving the government free to institute programs beneficial to the economically disadvantaged in other areas. Although under this approach the government may be restrained from providing affirmative economic action where fundamental economic equality rights are established, such rights would only be established where those less well-off have been disadvantaged.

Finally, in both the school financing and abortion funding contexts, state courts have most often relied on the fundamental rights approach.[531] In fact, no state court has relied solely on the wealth as a suspect classification approach to strike down challenged state action.[532] Furthermore, the fundamental rights approach is the most developed approach. In the education financing context, every state court relied on its own independent analysis to

530. *See supra* notes 409-11 and accompanying text.
531. *See* cases cited *supra* notes 140, 218.
532. *See supra* notes 302-22 and accompanying text.

determine whether its state constitution guaranteed the right to an education.[533] In the abortion funding context, the state courts striking down challenged legislation also employed independent analyses to reach that result.[534] Thus, there is strong precedent already embodied in legal decisions supporting the use of this approach.

4. Response to Arguments Against Economic Equality Rights

The fundamental rights approach provides a better response to the arguments against economic equality rights than the alternative approaches. This approach avoids explicit reference to the contested concepts of class and race, while emphasizing a more inclusive rights discourse. Furthermore, the substantive equal protection version of this approach avoids mandating affirmative government obligations.

The fundamental rights approach relies on the concept of rights, which is deeply embedded within the American political landscape. Individual rights have become one of the most cherished aspects of the American political system. By framing economic equality in terms of fundamental rights, those supporting these rights can take advantage of this appreciation. Furthermore, this emphasis avoids explicit reference to the more divisive issues of class and race. While it may be theoretically problematic to obscure the relationships of class and race to economic equality rights, this approach may be a more politically pragmatic way to address issues of class and race.

The substantive equal protection version of the fundamental rights approach has the further advantage of not mandating affirmative government obligations. As noted, concern over reading affirmative duties into the constitution is a major theme of the economic equality rights cases.[535] Under the substantive equal protection version, however, a state is not constitutionally required to provide such services as free public education or health care. Instead, once the state undertakes action in these fundamental areas, equal protection attaches to such action. Thus, this version guarantees economic equality rights without requiring affirmative obligations.

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533. *See supra* notes 143-57 and accompanying text.
534. *See supra* notes 222-24 and accompanying text.
535. *See supra* notes 359-63 and accompanying text.

5. A Further Note on Race

While the fundamental rights approach, unlike the disparate impact approach, does not explicitly refer to race, race is nonetheless an important subtext of this approach. As noted, guaranteeing economic equality can significantly benefit members of groups who are economically disadvantaged.[536] However, because race is implicit in the fundamental rights approach, it has a better chance of success than the alternative approaches, which rely explicitly on a racial analysis. This indirect approach finds support in the arguments of sociologist William Julius Wilson and legal scholar Kimberle Crenshaw.

In his influential book *The Truly Disadvantaged*, William Julius Wilson argues that, rather than rely on race-based remedies, "[t]he hidden agenda for liberal policymakers is to improve the life chances of the truly disadvantaged groups such as the ghetto underclass by emphasizing programs to which the more advantaged groups of all races and class backgrounds can positively relate."[537] Wilson recognizes that racism persists in contemporary society.[538] However, he argues that past discrimination, which has left African-Americans economically disadvantaged, plays a greater role in the continuing economic disadvantages.[539] Thus, while current discrimination certainly needs to be considered, the most effective way to address the disproportionate poverty of African-Americans is through universal economic remedies that can appeal to all races.[540]

From a legal perspective, Kimberle Crenshaw supports a similarly pragmatic approach. According to Crenshaw, this dominant ideology in the United States is expressed in terms of rights, and seeking change using the language of the dominant ideology is more likely to be successful in practice.[541] Crenshaw argues that

536. *See supra* note 21 and accompanying text.

537. WILSON, *supra* note 386, at 155 (italics omitted).

538. *See id.* at 30 ("There is no doubt that contemporary discrimination has contributed to or aggravated the social and economic problems of the ghetto underclass.").

539. *See id.* at 32 ("My own view is that historic discrimination is far more important than contemporary discrimination in explaining the plight of the ghetto underclass . . . .").

540. *See id.* at 112-20.

541. Crenshaw writes: "Consequently, the challenge in such societies is to create a counter-hegemony by maneuvering within and expanding the dominant ideology to embrace the potential for change." Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1386 (1988) (citing J. FEMIA, GRAMSCI'S POLITICAL THOUGHT: HEGEMONY, CONSCIOUSNESS, AND THE REVOLUTIONARY PROCESS

this strategy of emphasizing rights improved the situation of African-Americans in the past, and has the best potential for future success.[542]

The views of both Wilson and Crenshaw support the fundamental rights approach. By employing a universal rights discourse that encompasses all segments of society, this approach avoids the dangers of the potentially more divisive disparate racial impact and suspect wealth classifications approaches, which explicitly focus on race and class. Thus, the fundamental rights approach is more likely to engender broader support and to work successfully in practice.

6. International Human Rights

International human rights law provides further support for the fundamental rights approach for guaranteeing economic equality rights.[543] In particular, both the Universal Declaration of Human Rights ("Declaration")[544] and the International Covenant

51 (1981), and borrowing the concept and term "war of position" from the work of social critic Antonio Gramsci).

542. Crenshaw notes: "Casting racial issues in the moral and legal rights rhetoric of the prevailing ideology helped create the political controversy without which the state's coercive function would not have been enlisted to aid Blacks." *Id.* at 1381. In this respect, Crenshaw explicitly rejects the tendency of critical legal studies scholars to "trash" rights. *Id.*

543. For discussions on the use of international human rights documents in domestic adjudication, see, for example, Marc-Olivier Herman, *Fighting Homelessness: Can International Human Rights Law Make a Difference?*, 2 GEO. J. ON FIGHTING POVERTY 59 (1994); Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851 (1989) [hereinafter Lillich, *International Human Rights*]; Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y 1 (1993) [hereinafter Lillich, *International Human Rights Law*]; Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 CINCINNATI L. REV. 367 (1985) [hereinafter Lillich, *Invoking International Human Rights Law*]; Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946, 1955*, 69 IOWA L. REV. 901 (1984); Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: An "Entirely New Strategy"*, 44 HASTINGS L.J. 79 (1992); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990); James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33 (1995).

544. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/777, at 71 (1948), *reprinted in* United Nations, Human Rights: A Compilation of International Instruments 1, U.N. Doc. ST/HR/1/Rev. 2 (1983) [hereinafter Declaration].

Edelman argues that the Declaration represents, in part, "an extension of tra-

on Economic, Social and Cultural Rights ("ICESCR")[545] guarantee the right to education funding,[546] the ICESCR further guarantees the right to health care funding,[547] and the Declaration, the ICESCR, and the International Covenant on Civil and Political Rights ("ICCPR") all guarantee equality generally.[548] These guarantees can influence domestic economic equality rights adjudication in three ways: entering domestic law directly, if the documents are self-executing; entering domestic law through customary international law; or acting as interpretative guides.[549] Under traditional domestic jurisprudence, these human rights documents are not self-executing, and economic equality rights generally are not recognized as part of customary international human rights law. But, with continuing trends toward internationalism, courts may increasingly recognize the interpretative value of these important documents.

Preliminarily, if existing international human rights were incorporated into domestic law and recognized as fundamental rights, then economic equality rights could be guaranteed. For example, if the international rights to education funding and health care funding were incorporated into domestic law, then state action burdening these rights, such as disparate education financing

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ditional liberalism beyond *laissez-faire* into the realm of positive welfare rights." Edelman, *supra* note 368, at 20.

545. International Covenant on Economic, Social and Cultural Rights, *adopted and opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

546. *See* Declaration, *supra* note 544, art. 26, § 1 ("Everyone has the right to education."); ICESCR, *supra* note 545, art. 13, § 1 ("The State Parties to the present Covenant recognize the right of everyone to education.").

547. *See* ICESCR, *supra* note 545, art. 12 ("The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").

The interpretation that these documents support rights to have funded education and health care is not universally accepted. *Compare* Herman, *supra* note 543, at 63, *and* Park, *supra* note 543, at 1216-22, *with* Frank Newman & David Weissbrodt, *International Human Rights*, 385-90 (1990) (cited in Herman, *supra* note 543, at 63 n.41).

548. Declaration, *supra* note 544, art. 1; ICESCR, *supra* note 545, art. 3; International Covenant on Civil and Political Rights, *adopted and opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), art. 2, § 1.

While the Declaration includes social and economic as well as civil and political rights, some have criticized the inclusion of economic, social and cultural rights in international human rights documents. This resistance contributed to the split of the rights guaranteed in the Declaration into two separate documents: the ICESCR and ICCPR. *See* Park, *supra* note 543, at 1220 n.84. Despite this split, many international human rights scholars maintain that these two sets of rights are interdependent, with neither having priority over the other.

549. These are the three recognized methods for international human rights law to influence domestic adjudication. *See, e.g.*, Herman, *supra* note 543, at 69.

or the denial of abortion funding, would be subject to heightened scrutiny. Once a court applied heightened scrutiny, it would almost certainly find that the challenged inequitable state action violates equal protection.[550]

The most direct way for international human rights to enter domestic law would be through self-executing documents. Self-executing treaties enter domestic law by their own force, without requiring the enactment of domestic implementing legislation.[551] Moreover, under Article VI of the Constitution, treaty law has the same force as federal statutory law.[552] Thus, rights embodied in self-executing treaties have the force of statutory law.

Domestic courts, however, have held that the United Nations Charter is not self-executing.[553] Thus, domestic implementing legislation is necessary for the Charter's provisions to acquire the force of law. Furthermore, the United States is not a party to the

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550. *See supra* note 9.

551. *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Frovola v. U.S.S.R., 761 F.2d 370, 373 (7th Cir. 1985); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring); Dreyfus v. Von Fink, 534 F.2d 24 (2d Cir. 1976).

552. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI; *see also* Restatement (Third) on the Foreign Relations Law of the United States § 111(1) (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States.").

553. *See* Fujii v. State, 242 P.2d 617 (Cal. 1952) (declaring the nondiscrimination human rights provisions of the United Nations Charter to be non-self-executing; *Fujii* is the leading case adjudicating the status of a human rights treaty); *see also, e.g., Frovola*, 761 F.2d at 374 & n.5 (holding that articles 55 & 56 of the United Nations Charter are not self-executing); Manybeads v. United States, 730 F. Supp. 1515, 1521 (D. Ariz. 1989) (holding that the United Nations Charter is not self-executing); Hitai v. I.N.S., 343 F.2d 466, 468 (2d Cir. 1965) (holding that article 55 of the United Nations Charter is not self-executing); Camacho v. Rogers, 199 F. Supp. 155, 158 (S.D.N.Y. 1961) (holding that article 55 of the United Nations Charter is not self-executing); Pauling v. McElory, 164 F. Supp. 390, 393 (D.D.C. 1958) (holding that the United Nations Charter is not self-executing). *But see* Oyama v. California:

> [W]e have recently pledged ourselves to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?

332 U.S. 633, 649-50 (Black, J., concurring) (quoting United Nations Charter, Articles 55c & 56).

For discussions of whether the nondiscrimination provisions of the United Nations Charter are self-executing, see Herman, *supra* note 543, at 71; Paust, *supra* note 543; Strossen, *supra* note 543, at 812-15.

ICESCR, and, when it ratified the ICCPR, it specifically included a provision that the ICCPR was not self-executing.[554] Thus, arguing that international human rights documents are self-executing is not a promising method for supporting economic equality rights.

Customary international law, which is grounded in the practice of nations,[555] is an alternative means by which international human rights can enter domestic law.[556] The 1900 *The Paquete Habana*[557] case established customary international law as having the same force as treaty law.[558] Therefore, customary international law, like self-executing treaties, supersedes federal law without legislative enactment, with the same potential to provide a basis for guaranteeing economic equality rights.[559]

It is unlikely, however, that economic rights have entered customary international law. According to the Restatement (Third) of the Foreign Relations Law of the United States, a state arguably only violates international human rights law when the state, by policy, "practices, encourages, or condones" genocide, slavery, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross human rights violations.[560]

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554. *See* 138 CONG. REC. S4781-01, S4784 (Apr. 2, 1992) (cited in White v. Paulsen, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998)). For discussions on whether the declaration that the ICCPR is not self-executing is binding on the judiciary, see Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); Herman, *supra* note 543, at 71-72; Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993).

555. Restatement, *supra* note 552, § 102(2) ("Customary international law results from a general and consistent practice of states followed by them for a sense of legal obligation."); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 882-85 (2d Cir. 1980); Lillich, *Invoking Int'l Human Rights Law*, *supra* note 543, at 13-14.

556. *See* Herman, *supra* note 543, at 72; Strossen, *supra* note 543, at 815-23.

557. 175 U.S. 677 (1900).

558. *See id.* at 700; Restatement, *supra* note 552, § 102(1).

559. *See* Restatement, *supra* note 552, § 115 cmt. e.

560. Restatement, *supra* note 552, § 702:

> A state violates international law, if, as a matter of state policy, it practices, encourages, or condones
> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or
> (g) a consistent pattern or gross violations of internationally recognized human rights.

Id.

Other authority supports this limited view of customary international human rights.[561] Thus, according to these sources, the social and economic provisions of the international human rights documents have not yet entered customary international human rights law.[562] Furthermore, to the extent that these rights do enter customary international law, it is unlikely that domestic courts would be willing to recognize them.[563]

As an alternative to recognizing the incorporation of international economic rights into domestic law, international human rights documents can be used as authority by courts adjudicating economic equality rights cases.[564] In fact, one state court cited the education provision of the Declaration when holding that education was a fundamental right in the state.[565] Even this modest approach, however, faces the reluctance of domestic courts to recognize international human rights generally and international economic rights specifically.[566] But, with the growing importance of internationalism, courts may become more receptive to arguments incorporating international human rights discourse to support findings of fundamental rights.

7. The Degree of Scrutiny to Be Applied

Under the fundamental rights approach for guaranteeing economic equality rights, once a court holds that state action burdens an economic equality right, the court must next determine

561. *See* Wilets, *supra* note 543, at 52-53. *But see id.* at 48 n.56 (citing commentators).

562. *See* Herman, *supra* note 543, at 72 ("[N]o case [considering customary human right law] so far has dealt with social, economic, and cultural rights."); Lillich, *International Human Rights Law*, *supra* note 543, at 16 (noting that "[h]uman rights not found in Section 702 uniformly have been denied such status").

563. *See* Herman, *supra* note 543, at 70; Park, *supra* note 543, at 1242. In particular, the court in *In re Alien Children Education Litigation* found "that the right to education, while it represents an important international goal, has not acquired the status of customary international law." 501 F. Supp. 544, 596 (S.D. Tex. 1980), *aff'd*, 457 U.S. 202 (1982).

564. *See* Herman, *supra* note 543, at 72-73; Lillich, *International Human Rights*, *supra* note 543, at 859-60; Lillich, *International Human Rights Law*, *supra* note 543, at 19-21; Strossen, *supra* note 543, at 824-41; Wilets, *supra* note 543, at 51-52.

565. *See* Pauley v. Kelly, 255 S.E.2d 859, 864 n.5 (W. Va. 1979) ("[The Universal Declaration of Human Rights, approved December 10, 1948, by the General Assembly of the United Nations, which] appears to proclaim education to be a fundamental right of everyone, at least on this planet."); *see also* Boehm v. Superior Court, 223 Cal. Rptr. 716, 720-21 (Cal. Ct. App. 1986) (citing the Declaration to support a more expansive definition of minimum subsistence).

566. *See* Cees Flinterman, A *Tribute to Richard B. Lillich*, 38 VA. J. INT'L L. 51, 60 (1997).

how closely to scrutinize the action. Federal Justices and state courts adjudicating educational financing and abortion funding cases have subjected state action to several standards of scrutiny: "heightened" rational basis scrutiny;[567] intermediate scrutiny;[568] the established federal strict scrutiny;[569] and various balancing tests.[570] This section explores the advantages and disadvantages of each standard in the economic equality rights context, concluding that some form of intermediate scrutiny might be the most appropriate.[571]

A heightened rational basis scrutiny is the least desirable standard for adjudicating economic equality rights claims. First, this scrutiny is generally inapplicable once a court determines that a fundamental right has been burdened.[572] In addition, because state action generally survives rational basis scrutiny,[573] in practice this is a tenuous method for guaranteeing rights. More importantly, holding legislation unconstitutional under a rational basis scrutiny generally misapplies the deferential standard of review.[574]

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567. The Supreme Court has, on occasion, applied a heightened rational basis test. *See* cases cited *supra* note 275. The Arkansas and Tennessee courts applied this scrutiny in their decisions finding unconstitutional their states' education financing systems. *See supra* notes 189-90, 206-07 and accompanying text.

568. Under federal law, courts subject state action that makes a quasi-suspect classification to intermediate scrutiny. *See supra* note 35 and accompanying text. The North Dakota court used this standard in its decision finding unconstitutional North Dakota's education financing system. *See supra* note 169 and accompanying text.

569. Under federal law, courts subject state action that makes a suspect classification or burdens a fundamental right to strict scrutiny. *See supra* note 38 and accompanying text. The California, Connecticut, West Virginia and Wyoming courts used this standard in their decisions finding unconstitutional their states' education financing systems and the Connecticut court used this standard in its decision finding unconstitutional Connecticut's abortion funding restrictions. *See supra* notes 163, 227 and accompanying text.

570. The California, Massachusetts and New Jersey courts used balancing tests in their decisions striking down their states' abortion funding restrictions. *See supra* note 230 and accompanying text.

571. The conclusion that state action burdening an economic equality right should be subject to intermediate scrutiny is by no means unique. *See Intermediate Equal Protection Scrutiny, supra* note 404; *cf.* Harris v. McRae, 448 U.S. 343 n.6 (1980) (Marshall, J., dissenting) (noting that his sliding scale approach was "not in this context dissimilar" to the intermediate scrutiny standard).

572. Specifically, no court in an education financing or abortion funding case has employed a heightened rational basis scrutiny standard after determining that state action burdens a fundamental right.

573. *See, e.g.*, cases cited *supra* notes 8, 202-204, 248 and accompanying text.

574. For example, Justice Marshall, in his concurrence in *Cleburne*, noted:

> The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regula-

Under rational basis scrutiny, rather than judging the reasonableness of legislation, legislation "will not be set aside if any state of facts reasonably may be conceived to justify it."[575] Heightened rational basis scrutiny, however, scrutinizes the actual motivation for legislation rather than considering whether any hypothetical reason may justify it. Thus, this approach is in tension with generally established federal law.

Furthermore, even if a court were to strike down legislation under a rational basis review to guarantee economic equality rights, a state could likely reenact the legislation, providing a judicially acceptable "legitimate" reason for the legislation and a rational relationship between the legislation and a legitimate purpose. Thus, heightened rational basis review does not provide a sound basis for guaranteeing economic equality rights.

Because of its potency, strict scrutiny also may not be desirable.[576] Under strict scrutiny, challenged state action must be the least restrictive means to achieve a compelling state interest.[577] This is an extremely difficult standard to meet. In the education finance context, however, the equal protection concern is often the large disparity in funding, not simply some difference in funding.[578] Furthermore, intermediate scrutiny might be more desirable than strict scrutiny in light of the need for some flexibility in how education is financed. Nonetheless, since many state courts have managed to subject challenged education financing schemes to strict scrutiny,[579] this is certainly a viable standard.

In contrast to either heightened rational basis or strict scru-

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tion. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation.

Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 456 (1985) (Marshall, J., concurring); *see also* Harry F. Tepker, Jr., *Separating Prejudice from Rationality in Equal Protection Cases: A Legacy of Thurgood Marshall*, 47 OKLA. L. REV. 93, 97-106 (1994) (discussing Justice Marshall's criticisms); John D. Wilson, Cleburne: *An Evolutionary Step in Equal Protection Analysis*, 46 MD. L. REV. 163, 189-90, 193 (1986).

575. McGowan v. Maryland, 366 U.S. 420, 426 (1961) (upholding a state law exempting certain business from a Sunday closing law).

576. *See supra* note 9. In this respect, all of the courts that applied strict scrutiny in the education funding and abortion financing cases found the challenged legislation unconstitutional. *See supra* notes 163-66, 227-29 and accompanying text. While all of those courts that applied an intermediate level of scrutiny also found the challenged legislation unconstitutional, there is, at least in theory, a significant difference between strict and lesser degrees of scrutiny. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 & n.6 (1996).

577. *See supra* text accompanying note 36.

578. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

579. *See supra* note 569.

tiny, an intermediate standard of review provides the judiciary sufficient scrutiny to ensure substantial equality while still allowing some judicial flexibility. Intermediate review encompasses both the federal intermediate scrutiny—requiring challenged state action to bear a substantial relationship to an important government purpose—and balancing tests—weighing the state interest against the individual interests at stake.[580] Under intermediate scrutiny, the judiciary can intervene to guarantee basic equality without becoming too intrusive beyond its capacity. To some extent, an intermediate review takes into account the argument that recognizing economic equality rights violates the separation of powers by converting the judiciary into a super-legislature. Furthermore, while the intermediate scrutiny standard has been criticized as being too subjective,[581] it allows for flexible judicial oversight.

Although intermediate scrutiny may be preferable, contemporary federal equal protection law does not provide for intermediate scrutiny when state action burdens a fundamental right. Instead, under federal law and those states which follow its equal protection analysis, once state action burdens a fundamental right, strict scrutiny must be applied.[582] In contrast, intermediate scrutiny is limited to the suspect classification approach when state action makes a quasi-suspect classification.[583] Even those states that

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580. *See supra* note 35 and accompanying text.

581. Justice Rehnquist attacked the intermediate level of scrutiny:

> The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air . . . . How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives, or whether the relationship to those objectives, is "substantial" enough.

Craig v. Boren, 429 U.S. 190, 220-21 (1976) (Rehnquist, J., dissenting) (quoting *id.* at 197); *see also* William R. Engels, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149 (1985) (discussing intermediate scrutiny). Despite Justice Rehnquist's protests, the Court firmly established this level of scrutiny, and Justice Rehnquist himself later joined opinions employing intermediate scrutiny, *see supra* note 271, and even criticized a recent reformulation of intermediate scrutiny, *see Virginia*, 518 U.S. at 559 ("While terms like 'important governmental objective' and 'substantially related' are hardly models of precision, they have more content and specificity than does the phrase 'exceedingly persuasive justification.'").

582. *See supra* note 38 and accompanying text.

583. *See supra* notes 49-51 and accompanying text.

do not strictly follow federal law may be precluded from applying intermediate scrutiny in the fundamental rights context. As discussed above, when a state recognizes a fundamental right under state law, federal equal protection may attach to the right.[584] If this argument is correct, then state courts are constrained under federal equal protection law to apply strict scrutiny to state action that burdens even those rights that are only fundamental under state law.

One possible way to avoid this difficulty is the development of a new category of quasi-fundamental rights meriting intermediate scrutiny.[585] Just as the Supreme Court established the quasi-suspect classification category to fill the gap between strict scrutiny and rational basis scrutiny, courts could establish a quasi-fundamental classification. Furthermore, because a quasi-fundamental right would not be a fundamental right, federal equal protection would not attach. Economic equality rights, such as the right to equal education financing and to funded abortions when other reproductive choices are funded, could be included in such a category.[586]

D. The Composite Approach

The composite approach for guaranteeing economic equality rights, which combines all three of the above approaches, is a compelling alternative to the fundamental rights approach. However, this approach may ultimately be problematic. While this approach gains its strength by relying on a number of sources, this is also its weakness.

The Supreme Court has employed the composite approach in

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584. *See supra* notes 487-88 and accompanying text.

585. *See* Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992); John F. Casey, Plyler v. Doe*: The Quasi Fundamental Right Emerges in Equal Protection Analysis*, 19 NEW ENG. L. REV. 151 (1983-84); Mitchell Kurfis, *The Constitutionality of California's Proposition 187: An Equal Protection Analysis*, 32 CAL. W. L. REV. 129 (1995); Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by any Other Name*, 62 IND. L.J. 779 (1987); *cf.* Board of Educ. v. Nyquist, 443 N.Y.S.2d 843, 859 (App. Div. 1981) (applying intermediate scrutiny to state action that burdened an important interest, education), *modified*, 439 N.E.2d 359 (1982). It should also be noted that the dissenters in *Plyler* contended that the majority used a quasi-fundamental rights approach. *See* Plyler v. Doe, 457 U.S. 202, 244 (1982) (Burger, J., dissenting).

586. Not all economic equality rights need to be quasi-fundamental rights. As with the suspect classification approach, whether an economic equality right is fundamental or only quasi-fundamental could depend on the particular nature of the right at stake.

at least three substantive areas.[587] Most notably, the Court in cases such as *Griswold v. Connecticut*[588] and *Roe v. Wade*[589] grounded the right to privacy in a variety of sources.[590] The Court has also recognized the right to interstate travel based on several sources, and has yet to tie it in a specific constitutional provision.[591] In addition, the Court implicitly relied on a composite approach in the economic equality rights case *Plyler v. Doe*.[592] In *Plyler*, the Court invoked both the general importance of education to society and the fact that the challenged state action adversely affected a disfavored class—children who are illegal aliens—to justify subjecting to heightened scrutiny a law denying public education to those children.[593] *Plyler* is important because the Court simultaneously declared that, while education is not a fundamental right[594] and classifications based on illegal alienage are not suspect,[595] state action that implicated both of these concerns merited heightened scrutiny. Thus, while avoiding either a fundamental rights or suspect classification approach, the Court relied on both of these approaches to guarantee a substantive equal protection right.

Economic equality rights have the potential to be based on the composite approach because they are supported by several doctrines. For example, the right to equal education is supported by the importance of education in contemporary society, recognized in

587. Justice Marshall, at least implicitly, employed a composite approach in a number of his dissents in economic equality rights cases. In *Rodriguez*, Justice Marshall invoked fundamental rights and wealth classifications approaches to justify applying heightened scrutiny to Texas's public school financing scheme. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 110-24 (1973). In *Maher*, Justice Marshall invoked the wealth classifications, disparate impact and fundamental rights approaches to justify applying heightened scrutiny to abortion funding restrictions. *See* Maher v. Roe, 432 U.S. 464 (1977); *see also* Beal v. Doe, 432 U.S. 454, 458-60 (1977).

588. 381 U.S. 479 (1965).

589. 410 U.S. 113 (1973).

590. *See supra* note 95.

591. *See supra* note 96.

592. 457 U.S. 202 (1982).

593. The Court held that the challenged legislation could only be upheld if it furthered a substantial state goal. *See id.* at 223-24.

Chief Justice Burger, writing for a four Justice dissent, claimed that the majority was "patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis." *Id.* at 244 (Burger, J., dissenting). Burger argued that since illegal alienage is not a suspect class and education is not a fundamental right, rational basis scrutiny should be applied. *See id.* at 249 (Burger, J., dissenting).

594. *See id.* at 221.

595. *See id.* at 219 n.19.

Brown[596] and in state constitutions;[597] the disparate impact of unequal funding on those economically disadvantaged; the disparate impact of unequal funding on people of color; the importance of education to political participation; the recognition of the right to education in international human rights documents; and, in the federal context, the Ninth Amendment.[598] Similarly, the right to abortion funding when other pregnancy-related choices are funded is supported by the importance of procreative choice, the disparate impact of such restrictions on those economically disadvantaged, the disparate impact of funding restriction on people of color, the right to health care in international human rights documents, and, in the federal context, the Ninth Amendment. At both levels of government, all of the cited sources can combine to create a guarantee of the right for the purpose of equal protection.

The most problematic aspect of using the composite approach to guarantee economic equality rights is its lack of solid grounding in one specific constitutional doctrine. This leaves these rights open to criticism. By analogy, the right of privacy, which includes the right to an abortion, had been subject to wide-ranging criticism for its basis in a number of constitutional provisions, and eventually the Court abandoned the composite approach. Similarly, the *Plyler* decision has been widely criticized.[599] Thus, the composite approach may not be the ideal basis for grounding economic equality rights.

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596. *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

597. *See supra* notes 139-40 and accompanying text.

598. Justice Douglas, dissenting in *Palmer v. Thompson*, 403 U.S. 217 (1971), provocatively stated:

> There is, of course, not a word in the Constitution, unlike many modern constitutions, concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights "retained by the people" under the Ninth Amendment.

Id. at 233-34; *see also id.* at 238 (citing articles on the Ninth Amendment). Furthermore, in *Casey*, Justice O'Connor specifically cited the Ninth Amendment for the following proposition: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992).

599. *See* Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond,* Plyler v. Doe, 44 U. PITT. L. REV. 329 (1983); *see also* Tom Geraty, *Children in the Labyrinth: The Complexities of* Plyler v. Doe, 44 U. PITT. L. REV. 379 (1983); Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of* Plyler v. Doe, 44 U. PITT. L. REV. 409 (1983). *But see* Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995).

V. Conclusion

While this Article focused on cases already adjudicated, both school financing and abortion funding cases continue to be litigated in state courts.[600] In addition to other factors, how courts will decide these cases depends on how the issues are framed. This Article argued that the fundamental rights approach is the most promising method for framing economic equality rights based on the success of this approach in practice, its doctrinal consistency, and its ability to win broader support.

Given the mixed results of challenges to inequitable state action in the education financing and abortion funding cases, it is difficult to predict how state courts will decide such challenges in the future. However, the availability of state constitutions provides a basis for such challenges even though the federal Constitution currently provides no such basis. Furthermore, recognition by state courts of economic equality rights in school financing and abortion funding cases can potentially expand into other substantive areas of economic equality rights. Such areas include those in which the federal Supreme Court has declined to guarantee equality, including welfare, housing, and employment.

The trend that state courts provide greater guarantees of rights than the federal courts that Justice Brennan observed in 1977 may eventually be reversed. The federal Supreme Court may someday be in a position to follow the lead of those states that have recognized economic equality rights. Continuing successful state court equal protection actions, combined with further doctrinal articulation and coherence, can put pressure on the Supreme Court to change its approach.[601]

State court adjudication of economic equality rights can go far in resolving the separation of powers arguments. As discussed above, the Supreme Court has been reluctant to apply heightened scrutiny because of its unwillingness to interfere in the economic sphere. The fact that many states have subjected public school financing systems to heightened or strict scrutiny shows that the

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600. *See* Steven A. Holmes, *Right to Abortion Quietly Advances in State Courts*, N.Y. TIMES, Dec. 6, 1998, § 1, at 1 (listing states in which challenges to abortion funding restrictions have been filed).

601. *See* Edelman, *supra* note 368, at 8, 55.

In this context, it is interesting to note that apparently most constitutional law classes at top law schools use federal constitutional law casebooks that make few references to state court decisions recognizing fundamental economic rights. While these casebooks provide dissents from the U.S. Supreme Court cases, the inclusion of state decisions would show that some jurisdictions actually have recognized these rights.

judiciary can successfully execute the important task of ensuring equal protection in public education financing. Furthermore, many of these courts specifically have addressed the questions of local autonomy, finding equal protection a priority.

Unfortunately, any expansion of economic equality rights into the federal law is not likely to occur soon. The precedent against such rights, although sharply divided, has been laid out by the Supreme Court. Furthermore, the Court's liberal wing has been diminished, especially with its loss of Justices Marshall and Brennan, who consistently voted to uphold economic equality rights.[602] Until the Supreme Court reconsiders and modifies its approach to economic equality rights, the legal struggles to secure equality in fundamental areas of life will continue to be litigated on a state-by-state basis.

Recognizing economic equality rights in areas such as school finance and abortion funding can have a profound impact on those who are economically disadvantaged, including people of color. Of the three equal protection approaches that support these rights—fundamental rights, suspect classifications and disparate impact—the fundamental rights approach has gained the most support in court cases, and is both theoretically and pragmatically the most sound approach to pursue in future litigation. Furthermore, the substantive equal protection version of the fundamental rights approach provides the best method for synthesizing economic equality rights. State courts, and eventually the federal courts, should continue to expand their reliance on this approach to guarantee economic equality rights.

602. The most recent Supreme Court especially witnessed an assertion of conservative decisions. *See, e.g.*, Lewis v. Casey, 518 U.S. 343 (1996); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); United States v. Lopez, 514 U.S. 549 (1995). However, the Court also has come out with some liberal decisions. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102 (1996); Romer v. Evans, 517 U.S. 620 (1996); United States v. Virginia, 518 U.S. 515 (1996).