Vanderbilt Law Review

Volume 25
Issue 1 *Issue 1 - January 1972*

Article 21

1-1972

Equal Protection--DeFacto Racio-Economic Classifications Not Constitutionally Suspect

Law Review Staff

Equal Protectiou—De Facto Racio-Economic Classifications Not Constitutionally Snspect

I. INTRODUCTION

The fourteenth amendment's prohibition that "no state shall deny to any person within its jurisdiction the equal protection of the laws[1] has long been held to require not only that each person be afforded a "fair" administration of state statutory commands, but also that the laws themselves be "equal."[2] This requirement of equal laws, however, has not been interpreted to mean that statutes must apply uniformly to all persons;[3] rather the courts have held that legislatures may fashion laws that affect separate classes of persons unequally,[4] as long as the classifications involved are reasonable.[5] While this judicial standard of reasonableness recognizes that differences in fact may properly be reflected by differences in law, it requires similar treatment for those who are similarly situated with respect to the purpose of the legislative enactment.[6] Since classifications calculated to advance only constitutionally unacceptable objectives are not "reasonable,"[7] the traditional judicial test for

1. U.S. CONST. amend. XIV, § 1.

2. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 342 (1949); *see, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

3. "The fourteenth amendment . . . does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate." Hayes v. Missouri, 120 U.S. 68, 71 (1887).

4. "It is of the essence of classification, that upon the class are cast duties and burdens different from those resting on the general public. . . . [T]he very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899).

5. *Id.* at 104-05; *see* Tussman & tenBroek, *supra* note 2, at 344.

6. Since equal treatment of subjects different in fact is no more reasonable than different treatment of subjects equal in fact, it follows that laws may not impose sanctions without regard to the factual situations of those they reach. Moreover, it is not enough that the statutory sanctions fall equally upon all in the class defined by the enactment. This point was emphatically made in McLaughlin v. Florida, 379 U.S. 184, 191 (1964), when the Court rejected as unconstitutional a statute outlawing cohabitation between two persons of different sex and race despite the State's contention that since punishment was meted out to both parties regardless of race there was no improper classification. *See* Huang-Thio, *Equal Protection and Rational Classification*, 1963 J. PUB. L. 412, 418-22; Tussman & tenBroek, *supra* note 2, at 345; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969).

7. When the purpose reasonably advanced by a legislative classification violates a constitutional provision, it would seem that the classification should be held constitutionally infirm as violating that provision. For an article suggesting that some leading equal protection decisions might have been better decided on other grounds see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33-34 (1959). The result, however, is the same under traditional equal protection analysis; when the purpose reasonably advanced is disregarded as impermissible, the classification is by definition no longer reasonable, hence constitutionally infirm. *See Developments in the Law—Equal Protection, supra* note 6, at 1081.

determining whether state legislative action[8] violates the equal protection clause is whether the action that treats some persons differently from others bears a reasonable relation to a permissible state purpose.[9] Under this test, the party challenging the state action carries the burden of showing that the classification in question is not reasonably related to the advancement of a legitimate state interest,[10] and the state is aided by a presumption of constitutionality.[11] Under some circumstances, courts have applied a much less permissive standard of review to challenged classifications, subjecting them to "strict scrutiny,"[12] under which the normal presumption of constitutionality loses its efficacy.[13] In cases involving classifications that the court has found to be inherently "suspect,"[14] or when the state's purpose in making some classification has affected "fundamental interests,"[15] or when elements of both "suspi-

8. The fourteenth amendment's prohibition is directed against the states. This Comment will not explore the law as it relates to the requirement of "state action" in equal protection cases, except to note that the area is not free from controversy. *See generally* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

9. *See* Southern Ry. v. Greene, 216 U.S. 400 (1909). "[A classification] must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed . . . ." *Id.* at 417. Another common formulation is that a classification is reasonable, hence valid, when it "includes all persons who are similarly situated with respect to the purpose of the law." Tussman & tenBroek, *supra* note 2, at 346.

10. *See, e.g.*, Morey v. Doud, 354 U.S. 457 (1957) (plaintiffs sustained burden of demonstrating that exemption of only the American Express Company from statutory requirement of licensing was unreasonable classification); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) (one assailing classification must show that it is essentially arbitrary).

11. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (exemptions in Sunday closing law held reasonable; despite fact of some inequality in practice, state legislature was presumed to have acted within constitutional power in passing measure).

12. *E.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny").

13. *Developments in the Law—Equal Protection*, *supra* note 6, at 1101; *see* Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) (California court viewed cases as negating the normal presumption of constitutionality when strict scrutiny was applied in holding California alien land law violative of equal protection); *cf.* Loving v. Virginia, 388 U.S. 1, 11 (1967) (Virginia antimiscegenation statute held to violate equal protection).

14. *E.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (exclusion of Japanese-Americans from West Coast military area during World War II).

15. *E.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (statute providing for sterilization of habitual criminals held unconstitutional; procreation viewed as one of the "basic civil rights of man").

cion" and infringement of "fundamental interests" have been found,[16] the "strict scrutiny" test has been applied to charge the state with the burden of establishing that the unequal treatment is necessary[17] to achieve an "overriding"[18] state goal. Although the Court has not established any clear standard for the identification of suspect classifications, those based on race have long been viewed with disfavor,[19] and those based on nationality[20] and lineage[21] have received similar treatment. Classifications made explicitly on the basis of wealth may be suspect,[22] but no Supreme Court decision has held that a wealth classification alone will trigger a strict standard of review.[23] When classifications have infringed individual interests of franchise,[24] criminal process,[25] procrea-

16. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Virginia poll tax viewed as a suspect wealth classification infringing upon the fundamental interest of exercising the franchise).

17. Loving v. Virginia, 388 U.S. 1, 11 (1967) (suspect classifications must be shown to be "necessary to the accomplishment of some permissible state objective").

18. McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose . . . .").

19. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Some commentators have suggested that race is "constitutionally irrelevant," and that any classification based on race is therefore a per se violation of equal protection. *See Developments in the Law—Equal Protection, supra* note 6, at 1088.

20. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (California law prohibiting issuance of commercial fishing licenses to aliens held violative of equal protection).

21. *See* Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) (California alien land law held to violate equal protection).

22. "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws." Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting) (emphasis in original).

23. In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), and Douglas v. California, 372 U.S. 353 (1963), the Court struck down de facto wealth classifications that infringed upon "fundamental interests" in voting and the criminal process. While the Court's language in both cases indicates that the wealth classifications involved would have been independently sufficient to trigger strict scrutiny, the infringement of fundamental interests provides an alternate ground. Furthermore, in view of the multitude of heretofore unquestioned de facto wealth classifications—for example, conditioning the right to ride a municipal bus on the payment of a 35¢ fare—and their importance in the functioning of modern government—presumably, progressive income taxes are de facto wealth classifications—it is perhaps premature to take the Court's language literally. *Cf.* Dandridge v. Williams, 397 U.S. 471 (1970) (applying traditional test to a denial of AFDC payments for "excess" dependent children of otherwise qualified indigent mothers); Turner v. Fouche, 396 U.S. 346 (1970) (applying traditional test to invalidate requirement that school board members be property owners).

24. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (equal protection clause requires state legislative seats to be apportioned on the basis of population). *But cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) (state action denying incarcerated persons absentee ballots does not trigger strict scrutiny).

25. *E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (indigent criminal defendants entitled to free trial transcripts).

tion,[26] interstate travel,[27] and, perhaps, education,[28] the Court has considered these "fundamental" and has applied strict judicial scrutiny;[29] when defacto, or nonexplicit,[30] wealth classifications have been found to infringe any of these interests,[31] the same result has followed.

This discussion will focus on the criteria used by the Court in deciding whether to impose the strict scrutiny standard of review in the area of interrelated de facto wealth and racial classifications. In applying its criteria, the Court has looked beyond the superficially innocuous provisions of apparently universal[32] or neutral[33] statutes to determine whether the law would result in unequal effects on the basis of wealth or race sufficient to "trigger"[34] strict scrutiny. Although case law thus far has not disclosed how direct or significant the racial or economic impact of such a statute must be to merit strict scrutiny, the Court must apply some limiting standard, since almost any legislative measure contains the probability of unequal racial or economic effects.[35] The diffi-

26. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (Oklahoma statute providing for sterilization of habitual offenders stricken).

27. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (residency requirement for public welfare held impermissible).

28. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

29. Although the Court has spoken of the franchise as "preservative of other basic civil and political rights," Reynolds v. Sims, 377 U.S. 533, 562 (1964), and of procreation as a "right which is basic to the perpetuation of a race," Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536 (1942), there has been no delineation of more specific criteria to distinguish those interests that have been deemed "fundamental" from those interests of apparently similar nature that have not.

30. In the remainder of this discussion, legislative acts which "classify," that is, impose burdens and/or benefits without explicitly describing those persons who are to be affected, will be said to impose de facto classifications, as distinguished from explicit classifications. There is no intention to inject any content as to the legitimacy of the classification.

31. A case can be made that all the decisions involving "fundamental interests" also involved wealth classifications. *See* Note, *Low-Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343, 346 (1971).

32. *E.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (California constitutional amendment providing that property owners were free to sell or refuse to sell to anyone held to involve the State in impermissible authorization and encouragement of private discrimination).

33. *E.g.*, Griffin v. County School Bd., 377 U.S. 218 (1964) (state action in closing public schools ostensibly affected children of both races equally but effect was to deny black children the opportunity to attend integrated schools).

34. *See* cases cited notes 32 & 33 *supra*. The term "trigger" is taken from Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

35. As long as individuals are not in fact precisely equal in their economic and/or racial characteristics, any legislative measure can be found to have unequal racial or economic effects. For example, a law that requires all persons to pay a 35¢ bus fare imposes a heavier burden on the poor than on the rich because the poor depend heavily on public systems for transportation, and because fare payment is much less of a relative hardship on the affluent than on the needy. Since "the poor" consist in disproportionate part of racial minorities, *see* U.S. BUREAU OF CENSUS, CURRENT POPULATION REPORTS, CONSUMER INCOME, SERIES P-60, NO. 54: THE EXTENT OF POV-

culty of isolating the relevant factors used in ascertaining the applicability of "strict scrutiny" is compounded by the Court's failure to disclose whether legislative motive is relevant as an independent criterion in assessing the "suspect" nature of de facto classifications.[36]

Two recent cases presented the Supreme Court with factual situations involving these questions of classification. In *James v. Valtierra*,[37] the Court, speaking through Mr. Justice Black, failed to find a suspect classification of an either racial or economic nature in the California constitution's requirement that local housing authority decisions to initiate federally financed low-income housing projects be subjected to voter approval. In *Palmer v. Thompson*,[38] the Court, again speaking through Mr. Justice Black, refused to find any classification at all when the mayor and city council of Jackson, Mississippi, decided to close all municipal swimming pools in the wake of a federal court judgment that the pools' segregated operation was unconstitutional. In both cases, the Court's failure to find suspect classifications and thereby impose strict scrutiny seems to indicate a significant abatement of its recent active concern in the areas of civil rights and poverty.

ERTY IN THE UNITED STATES: 1959-1966, at 3-4 (1968), such a requirement also would impose heavier burdens on the basis of race. It is hardly conceivable that this example presents a proper situation for the imposition of strict scrutiny, yet some degree of economic and racial classification is present. The question that this Comment seeks to examine is "how much" and "what sort" of racio-economic effect state action must generate before the state will have created a "suspect classification."

36. The Court traditionally has been reluctant to inquire into legislative motive. *See* United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (refusal to void draft-card burning statute on basis that the congressional motive for enactment was suppression of freedom of speech); Fletcher v. Peck, 10 U.S. (6 Cranch) 48, 73 (1810) (refusal to void Georgia legislature's sale of land on theory that legislators were corruptly motivated). Yet some equal protection cases indicate that legislative motive provided a basis for the resulting determination of unconstitutionality. *See, e.g.*, Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962) (superficially innocuous statute with impermissible "sub-surface purpose"); Bush v. Orleans Parish School Bd., 187 F. Supp. 42 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569 (1961) (acts with "sole purpose" of continuing segregation); *cf. Developments in the Law—Equal Protection, supra* note 6, at 1092-1101. For a discussion of the distinction between the legislative "purpose" used in both traditional and "strict scrutiny" equal protection analysis, and legislative "motive," not used in the traditional analysis and of controversial applicability under the strict standard see Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970).

37. 402 U.S. 137 (1971). Mr. Justice Black spoke for a majority of 5. Mr. Justice Marshall, joined by Justices Brennan and Blackmun, dissented. Mr. Justice Douglas took no part in the consideration or decision of the case.

38. 403 U.S. 217 (1971). Justice Black again wrote the majority opinion and was joined by 4 other justices. The Chief Justice and Mr. Justice Blackmun joined in the opinion of the Court, but filed brief concurring opinions. Mr. Justice White dissented, joined by Justices Brennan and Marshall, who also filed brief separate dissents. Mr. Justice Douglas filed a separate dissenting opinion.

II. PALMER V. THOMPSON

In *Palmer*, petitioners, black residents of Jackson, urged that respondent's action in closing the municipal pools was unconstitutional because it was racially motivated and resulted in constitutionally suspect racial classification under at least four theories:[39] (1) that the closings in fact affected Negroes more harshly than whites because whites still had access to private segregated pools while Negroes did not, just as the whites in *Griffin v. County School Board*[40] had access to private segregated schools while Negroes did not; (2) that the city was authorizing and encouraging private discrimination, as condemned in *Reitman v. Mulkey*;[41] (3) that the city's response of closing the pools after petitioners had attempted to secure equal access to public facilities marked an unconstitutional "chilling"[42] of the black community's right to challenge segregation under the civil rights statutes[43] by establishing an impermissible inference that future protests against segregation in public facilities would be met by closing those facilities; and (4) that under *Hunter v. Erickson*[44] the "impact" of the city's superficially neutral act fell on the racial minority as the enunciation of an official view that Negroes are not fit to share with whites this particular type of public facility.[45] The Court rejected petitioners' reliance on any cases other than *Reitman* or *Griffin* as implausible, and then distinguished those two as

39. Petitioners also maintained that the pool closings were a denial of the right of Negroes to swim in public pools with whites, and as such, constituted a "badge or incident of slavery" in violation of the thirteenth amendment under Jones v. Alfred Mayer Co., 392 U.S. 409 (1968).

40. 377 U.S. 218 (1964). In *Griffin*, the public schools of Prince Edward County, Virginia, were closed, but public aid was extended to private academies, which were in fact all white.

41. 387 U.S. 369 (1967); *see* note 32 *supra*.

42. The "chilling effect" theory relied upon is expressed in United States v. Jackson, 390 U.S. 570, 581 (1968), and Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965). *See* Note, *supra* note 36, at 1901-02.

43. The Civil Rights Act of 1870, 42 U.S.C. § 1981 (1964), provides: "All persons . . . shall have the same right . . . to sue . . . as is enjoyed by white citizens . . . ." The Civil Rights Act of 1964 further provides that the Attorney General may bring a civil suit in the name of the United States upon receipt of a signed complaint from a private person that he is being denied equal use of any public facilities. 42 U.S.C. §§ 2000a-b (1964).

44. 393 U.S. 385 (1969). In addition to finding an explicit racial classification in Akron's city charter amendment to prevent the implementation of open housing ordinances unless approved by referendum, the Court stated: "[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority." *Id.* at 391.

45. This expression of the fourth theory is taken from Mr. Justice White's dissent, 403 U.S. at 266-68. The "impact" referred to is the psychological impact of officially sanctioned views of racial inferiority as recognized and condemned in Brown v. Board of Educ., 347 U.S. 483, 491-94 (1954).

resting on findings that the state had participated actively in the perpetuation of segregated school facilities[46] or had officially encouraged private discrimination,[47] while the *Palmer* record disclosed no evidence in support of any similar state involvement. Pointing out elements of difficulty, futility, and impropriety inherent in judicial attempts to divine legislative motive,[48] the Court ruled out motivation analysis as an independent equal protection test, explaining that, although some previous decisions[49] contain language indicating that legislative motive might be relevant to constitutionality, the "focus" in those cases was on the actual effect of the challenged enactments. Turning to the actual effect of the pool closings, the Court found that the record disclosed only that Jackson once operated segregated swimming pools and now operates no pools at all. Then, by reasoning that all residents are equally barred from using the closed facilities, the Court concluded that no equal protection violation had occurred. In holding that no unequal treatment could be found from the record, the Court necessarily foreclosed petitioners' attempts to demonstrate de facto racial classification, since a finding of such a classification would require unequal treatment. Although some degree of unequal treatment must clearly have resulted from the city's action,[51] the Court did not consider taking judicial notice of external

46. *See* note 40 *supra*.

47. In *Reitman*, the Court relied heavily on the California Supreme Court's finding of significant state involvement in the discriminatory acts of private parties. *See* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39.

48. The Court noted that "[i]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." 403 U.S. at 225. The Court also pointed out that a law struck down because of the bad motives of its supporters presumably would be valid when passed again for "different reasons." *Id.* The Court cited Fletcher v. Peck, 10 U.S. (6 Cranch) 48, 73 (1810) (refusal to void legislative land sale on theory that legislators were corruptly motivated), as expressing the "pitfalls" of motivation analysis.

49. The Court specifically referred to the opinions in Griffin v. County School Bd., 377 U.S. 218 (1964), and Gomillion v. Lightfoot, 364 U.S. 339 (1960), both of which previously had been thought to stand for the proposition that motivation analysis could be determinative of constitutionality. *See* note 36 *supra* and accompanying text.

50. Given the Court's premise, that the only effect of the pool closings was to bar blacks and whites equally, the conclusion—no equal protection violation—is inescapable. Equal protection analysis, under either the traditional test or the strict scrutiny standard, is framed in terms of classification. Since, in *Palmer*, there is no explicit classification and no unequal effects are found, there is no classification, and therefore no equal protection issue. Put another way, equal protection can hardly be violated when equal treatment is given.

51. The fact that poor people do not have the same access to personal or private swimming pools as do rich people, together with the fact that a disproportionate number of the poor are members of racial minorities, demonstrates that unequal racial effects stemmed from respondent's action.

facts to remedy any deficiency in the formal proof,[52] but confined its analysis to the record before it.

III. JAMES V. VALTIERRA

In *James v. Valtierra*,[53] plaintiffs, who were qualified applicants for public housing, secured a federal district court judgment[54] that article 34 of the California constitution, requiring referendum approval of low-income housing projects,[55] violated the equal protection clause by making it more difficult for federal agencies to provide housing assistance than other forms of statutorily authorized assistance, thereby imposing a "special burden" on the poor and on racial minorities.[56] On appeal, the Supreme Court reversed, finding the challenged referendum provision constitutionally permissible. The authority supporting plaintiffs' argument that article 34 classified on the basis of race was distinguished as applying only to explicit classifications;[57] the wording of the impugned referendum provision, however, disclosed no racial content and the record was viewed as providing no support for any claim that the overtly

52. Judicial notice would have been proper to find these effects under either the traditional practice of courts to take notice of commonly known facts, or, under the broad latitude afforded the judiciary in determining the constitutionality of legislative action, to take notice of any "legislative" facts which bear upon the issue. *See* notes 70 & 72 *infra* and accompanying text. For an example of the use of legislative judicial notice to furnish data for use in the decision of a constitutional issue see Brown v. Board of Education, 347 U.S. 483 (1954).

53. 402 U.S. 137 (1971).

54. Valtierra v. Housing Authority, 313 F. Supp. 1 (N.D. Cal. 1970). The case is a consolidation of 2 actions and was so tried by the 3-judge district court.

55. CAL. CONST. art. XXXIV, § 1 provides: "No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body, until a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

. . . .

"For the purposes of this article only, 'persons of low income' shall mean persons or families who lack the amount of income necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding. . . ." The provision was adopted in 1950 in response to a California Supreme Court decision, Housing Authority v. Superior Court, 35 Cal. 2d 550, 219 P.2d 457 (1950), which held that local housing authority decisions to seek federal aid for housing projects were "administrative" rather than "legislative" in nature and therefore outside California's general referendum provision, CAL. CONST. art. IV, § 1, which reserves to the people the power to adopt or reject any act passed by the legislature.

56. The decision was held to be controlled by Hunter v. Erickson, 393 U.S. 385 (1969). The opinion of the 3-judge court stated: "Here, as in the *Hunter* case, the 'special burden' of a referendum is not ordinarily required; here as in the *Hunter* case, the impact of the law falls upon minorities." 313 F. Supp. at 5.

57. 402 U.S. at 141. The Court said that the *Hunter* rationale would apply only if the referendum requirement contained an explicit classification.

neutral provision was "in fact aimed at a racial minority."[58] The Court apparently conceded that article 34 resulted in unequal treatment by disadvantaging persons seeking affirmative public housing decisions with respect to persons seeking to influence other public decisions, but did not discuss plaintiffs' position that this effect amounted to a suspect wealth classification.[59] It would seem, however, that for a court to find a de facto wealth classification should require no more than drawing the clearly available inference that those who seek low-income housing projects are probably "poor."[60] The Court's silence on this point appears to support its previous refusal to find a racial classification, since plaintiffs' argument that racial minorities were disadvantaged appears to depend on an inference that the poor consist largely of these minorities, which in turn depends on the inference that those who seek low-income housing are poor.[61] The Court also was silent on the possibility that article 34's referendum requirement infringed a fundamental interest in "housing,"[62] foreclosing the imposition of strict scrutiny on that ground. Reasoning that every referendum requirement disadvantages a group that favors the subject of the referendum, and that the California constitution contains several examples of mandatory referenda[63] on issues of public importance, the Court refused to declare that referenda automatically result in equal protection violations. The Court considered that since low-income housing projects impose long-term fiscal liabilities on the communities in which they are situated,[64] the challenged

58. *Id.*

59. On this point, Mr. Justice Marshall, dissenting, stated: "The article explicitly singles out low-income persons to bear its burden," and therefore found a "[s]uspect classification, which demands exacting judicial scrutiny." 402 U.S. at 144, 145.

60. Had the Court found a de facto wealth classification, it would then have been confronted with the question of whether that classification was constitutionally suspect. Since the Court did not draw the inference necessary to find a de facto classification, it avoided the necessity of considering whether such a classification should trigger the strict scrutiny test.

61. *See* note 35 *supra.*

62. Although the Supreme Court has emphasized the importance of housing in previous decisions, it has not taken the occasion to denominate housing a fundamental interest. *See* Hunter v. Erickson, 393 U.S. 385 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917). For an argument that housing is a fundamental interest for the purposes of equal protection analysis see Note, *supra* note 31, at 347-48.

63. The Court referred to provisions requiring mandatory referenda for approval of constitutional amendments, CAL. CONST. art. XVIII, for the issuance of long-term local bonds, CAL. CONST. art. XIII, and for certain municipal territorial annexations, CAL. CONST. art. XI. Additionally, the Court observed that much of California's statutory law was first enacted by referendum and therefore can be repealed or amended only by referendum. CAL. CONST. art. IV.

64. Althougb the bousing projects in question are financed through the federal government, local communities must waive all taxes on the property while furnishing all municipal services. The

referendum requirement has the purpose of placing decisions that so affect the community in the hands of the people who ultimately must bear the costs that they entail. In concluding that this allocation of decision-making power did not violate the equal protection clause, the Court's opinion appears to follow traditional equal protection analysis. Finding a classification consisting of those desiring low-income public housing, and a permissible state purpose of placing long-term community liability decisions in the hands of the community, the Court concluded that the classification was reasonably related to the purpose of the state action.[65]

IV. INTERACTION OF JAMES AND PALMER

Since it is based on traditional equal protection analysis, the *James* decision leaves open several questions. It is not clear whether the Court rejected de facto wealth classifications as constitutionally suspect or whether the Court's action was meant to hold that de facto racial classifications found by inference from unequal economic treatment are constitutionally irrelevant; further, it is also not certain that housing was rejected as a "fundamental interest," since the Court's silence on these points is susceptible to a variety of interpretations.[66] Similarly, the *Palmer* opinion, by disposing of the case on "no-classification" grounds, avoided the questions whether economic effects alone may trigger strict scrutiny and whether economic effects may support an inference of suspect racial classification.

These decisions leave the precise nature of the constitutional standards applicable to de facto legislative classifications in doubt. Although the majority in *Palmer* was apparently sound in its rejection of motivation analysis as an independent equal protection test,[67] an application of

---

cost to the community, however, is offset by the municipality's right to 10% of the rentals; but by definition these rentals are artificially low. *See* 42 U.S.C. §§ 1401-30 (1964), *as amended*, 42 U.S.C. §§ 1401-30 (Supp. V, 1970).

65. This rationale, however, seems vulnerable to the attack that the classification is "under-inclusive" in that all long-term liability decisions are not subject to the mandatory referendum requirement. *See* Tussman & tenBroek, *supra* note 2, at 348-51. In identifying other decisions subject to mandatory referenda the Court does not answer this contention, although it does lessen the appearance of arbitrary selection. One possible answer to the charge of under-inclusion is the rationale that legislatures are not compelled to reach all persons similarly situated or else not legislate at all; the Court has often held that legislatures are free to attack one part of a problem at a time. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

66. *See* note 73 *infra* and accompanying text.

67. Since, in *Palmer*, the Court found that the state action did not classify at all on the basis of race, the motive behind its action could not have been logically relevant to the equal protection question. The equal protection clause can hardly operate to condemn as discriminatory action

the test ostensibly adopted in that case as the proper standard—the "actual effect"[68] of the challenged action—to the factual situations presented by both *Palmer* and *James* seems to lead to results inconsistent with the conclusions reached by the Court. Unequal economic effects caused by state action are directly traceable in both cases. In *James*, the constitutional provision in question concededly "disadvantaged" those seeking low-income housing, hence those with low incomes. In *Palmer*, the closing of public swimming pools necessarily had a greater effect upon those with low incomes who have no access to personal or private pools.[69] Although by taking judicial notice of indisputable matter of common knowledge,[70] the Court could have found each of these effects from the overtly neutral state action at issue, in neither case did the Court expressly find a wealth classification. This apparent inconsistency between the Court's language and the results it reached suggests three interpretations: First, it is possible that the Court's failure to impose strict scrutiny on the *James* and *Palmer* facts constitutes an implied

---

which does not in fact single out any individual person or group to bear special burdens—to find a denial of equal protection when equal treatment has been given involves a contradiction in terms. *Cf.* note 50 *supra*. To say that motivation analysis is unacceptable as an independent test of equal protection violation, however, is not to say that legislative motive should not play a part in equal protection analysis. Since almost any conceivable legislative action ultimately may be shown to result in unequal effects on the basis of race or wealth, *see* note 35 *supra*, it is clear that some cut-off point is needed, if only to avoid the conclusion that the majority of our statutes violate the fourteenth amendment. For an argument that motivation analysis should be used to fill that need see Ely, *supra* note 34.

68. In rejecting motivation analysis as an equal protection test in *Palmer*, Mr. Justice Black pointed out that the "focus" in those cases which had been relied upon as precedent for the relevance of legislative motive was on the actual effect of the challenged enactments. Justice Black then proceeded to examine the actual effect of the state action in *Palmer* itself. The opinion therefore supports the conclusion that the Court adopted an actual effect test for the presence of suspect classifications.

69. Although the majority in *Palmer* did not discuss the economic classification issue at all, the Fifth Circuit Court of Appeals, in its decision upholding the pool closings, noted the plaintiffs' argument that the greater access of the more affluent white community to swimming pools resulted in racial classification, but disposed of it as follows: "The equal protection clause does not promise or guarantee economic or financial equality. . . . [T]his Court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially less fortunate citizens of recreational facilities available on a completely private basis to the more affluent." Palmer v. Thompson, 419 F.2d 1222, 1227-28 (5th Cir. 1969) (en banc).

70. "The oldest and plainest ground for judicial notice is that the fact is so commonly known in the community as to make it unprofitable to require proof, and so certainly known as to make it indisputable among reasonable men." C. MCCORMICK, EVIDENCE § 324, at 689 (1954). The fact that those who desire low-income housing are likely to be poor, or that access to personal or private swimming pools is likely to be a function of wealth is undoubtedly both commonly and certainly known in Mississippi and California.

rejection of wealth as an independently suspect trait.[71] Secondly, in both cases the emphasis the Court placed on the actual content of the record indicates that the decisions may be explicable in terms of the combination of a failure of the respective records to include sufficient direct proof of unequal economic effects and of the Court's reluctance to utilize judicial notice to remedy the omission. Thirdly, the apparent inconsistency is perhaps best explained by the possibility that the Court simply felt that the unequal economic effects stemming from the questioned state action were not "sufficient" to be termed suspect classifications, thereby reserving the question whether economic effects alone could ever trigger strict scrutiny. These three interpretations are relevant in considering the Court's failure to find a racial classification in either case, despite the fact that as a practical matter unequal economic treatment seems to be the equivalent of unequal treatment on the basis of race.[72] If the records themselves were thought insufficient to establish unequal treatment on the basis of wealth, then the inference of unequal racial effect could not have arisen. If the unequal economic effects were recognized, but considered insufficient to create a suspect wealth classification, then the inference of racial classification would remain. This would be, however, a "second order" inference, in the sense that an inference of unequal economic effect must first be drawn from the superficially neutral state action before the "racial" inference is available. From this viewpoint, *James* and *Palmer* may be read as announcing a rule that unequal racial effects found by second order inferences are not sufficient to create suspect classifications.[73]

---

71. *Cf.* note 69 *supra.*

72. The conclusion that wealth classifications are the equivalent of race classifications depends upon acceptance of the premise that the poor consist in disproportionate part of racial minorities. *See* note 35 *supra.* This proposition would seem to be amenable to judicial notice under the traditional head of common knowledge. *See* C. MCCORMICK, *supra* note 70, at 689. If not, there is precedent to sustain the use of judicial notice to recognize statistical and scientific matter when it is relevant to the constitutionality of impugned legislative acts. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (use of "legislative" judicial notice of psychological effects of segregated schooling); PROPOSED RULES OF EVIDENCE FOR THE U.S. DISTRICT COURTS AND MAGISTRATES rule 201(a), Advisory Committee's note (a); C. MCCORMICK, *supra* note 70, § 323, at 687-88.

73. Given that there are unequal economic and racial effects in *Palmer* and *James*, there are 4 possible explanations for the Court's failure to find suspect classifications: (1) rejection of wealth as an independently suspect trait, coupled with rejection of "second-order" racial classifications; (2) rejection of wealth as a suspect classification, together with refusal to supplement an inadequate record with judicial notice; (3) a finding of "insufficient" economic effect, with a rejection of "second order" racial effects; and (4) a finding of insufficient economic effect, coupled with refusal to judicially notice the concommitant racial effect. The remaining mathematical possibilities have been rejected as highly unlikely.

V. CONCLUSION

Whatever explanation accounts for the failure of the actual results in *James* and *Palmer* to trigger strict scrutiny, the cases indicate a desire on the part of the Court to avoid following an objectively identifiable test for recognizing situations that call for the strict standard of review. This approach is open to criticism on at least three grounds. First, the Court's failure to indicate the precise standards by which it rejected the presence of suspect classifications at best leaves the law in a condition of uncertainty. This may be productive of future litigation over the same ground and it may further erode public confidence in the Court as an institution for the application of neutral and objectively identifiable principles in the resolution of controversies, thereby weakening a real source of its power.[74] Secondly, if moral leadership is viewed as a legitimate judicial function, then the *Palmer* and *James* decisions can be said to reflect an unfortunate departure from the Court's previous protective concern for minorities and the poor.[75] These two cases can be read to allow the very sort of "ingenious" discrimination that the Court frequently has condemned.[76] If racial classification is not constitutionally suspect when it springs from the economic effects of superficially neutral state action, then subtly contrived legislation may be used to advance discriminatory goals, as long as a legitimate purpose is also reasonably served by the economic classifications. Thirdly, regardless of the substantive result of these decisions, the Court may be criticized for failing to deal with the real issues presented. It seems clear that the Court strained to avoid imposing a strict standard of review in the two cases.[77]

---

74. *See, e.g.*, H. ABRAHAM, THE JUDICIARY 115-17 (2d ed. 1969); C. BLACK, *The Supreme Court and Democracy, in* THE OCCASIONS OF JUSTICE 61 (1963); A. COX, THE WARREN COURT 21-23 (1968). Professor Cox has stated: "[A]bility to rationalize a constitutional judgment in terms of principles referable to accepted sources of law is an essential, major element of constitutional adjudication. It is one of the ultimate sources of power for the Court. . . ." Cox, *The Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

75. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (1 year residency requirement for welfare benefits deprives newly arrived indigents of equal protection); Hunter v. Erickson, 393 U.S. 385 (1969) (city charter amendment requiring general or special election to approve fair-housing ordinances discriminates against racial minorities). *But see* Dandridge v. Williams, 397 U.S. 471 (1970) (ceiling on aid to dependent children regardless of need held a matter of social and economic policy not subject to strict scrutiny).

76. *E.g.*, Smith v. Texas, 311 U.S. 128, 132 (1940) (systematic exclusion of Negroes from grand juries violates equal protection).

77. The distinctions relied on by the Court to reject plaintiffs' arguments do not appear compelling. Although it is true that *Palmer* did not involve the state participation in the operation of segregated facilities as found in *Griffin*, it is difficult not to credit Mr. Justice White's observa-

Yet only by imposing this standard could the Court reach the real question that the plaintiffs in both cases sought to have answered: whether, in view of the effects it produced, the state action in each case was *justifiable*. Under the traditional equal protection test, the constitutionality of challenged action is measured by reasonableness rather than by justification—the relative importance of the state's goal and the means of achieving it versus the undesirability of imposing particular unequal burdens on the basis of wealth and/or race. By avoiding the imposition of strict scrutiny through its failure to find suspect classifications, the Court evaded the balancing of interests question that constituted the real issue in each case.[78]

Nevertheless, the Court's reluctance to engage in this balancing of the state interest on the one hand, and the "relative invidiousness"[79] of the impugned classification on the other, is not without substantial support in considerations of policy. First, a Court decision applying strict scrutiny would have been necessarily subjective in nature. Although any legislative state action is necessarily the product of subjective value assignments by the legislature about the relative importance of the conflicting interests involved in the original decision to enact or kill the measure, judicial review of such acts under the equal protection clause is normally determined objectively—by the reasonable classification test, or by a finding that the purpose reasonably advanced by the act contravenes an express or implied constitutional prohibition.[80] Under the standard of strict scrutiny, the Court is required to evaluate the importance of the objective sought to be achieved by the legislation. This, however, is presumably what the legislature has already done; indeed, this evaluation might be said to be the legislature's primary function. Therefore, the balancing process required by strict judicial scrutiny has undesirable aspects because of potential erosion of judicial authority inherent in

---

tion that *Griffin* "is perhaps distinguishable, but only if one ignores its basic rationale and the purpose and direction of this Court's decisions since Brown." 402 U.S. at 263-64 (White, J., dissenting). Similarly, although the majority in *Hunter* found an explicit racial classification in the city charter amendment, it also emphasized the amendment's impact in creating a roadblock in the path of minorities seeking favorable legislation. Hunter v. Erickson, 393 U.S. 385 (1969).

78. This criticism of the Court's approach is not answered by reference to the Court's traditional avoidance of constitutional questions when other grounds are available, since the Court's disposition of both *James* and *Palmer* was on constitutional, albeit more restrained, grounds.

79. Professor Cox views the process of strict scrutiny as follows: "The decisions appear to rest upon two largely subjective judgments, perhaps coupled with a sense of how fast a change the community desires. One element is the relative invidiousness of the particular differentation. . . ." Cox, *supra* note 74, at 95.

80. *See* note 7 *supra*.

invalidating legislative action on the basis of subjective value judgments[81] and because of possible encroachment on the legislative function in violation of the principle of separation of powers. The legislative actions reviewed in *James* and *Palmer* appear particularly susceptible to these undesirable consequences. A decision adverse to the state in *James* would have put the Court in a position of deciding that an allocation of local decision-making power to the local citizenry was subject to judicial revision; a similar decision in *Palmer* would have been in effect a judicial statement that the decision whether a municipality will provide its citizens with a given recreational service is to be made by the courts. Viewed from this perspective, it seems clear that these decisions are in large measure political, and therefore of a kind ordinarily reserved to the political branches. When, as in these cases, the subjective judgments called for by the imposition of strict scrutiny are to be applied to questions normally associated with the functions of other branches of government, this imposition appears to be particularly vulnerable to a charge that the Court is abandoning the traditional judicial role to indulge in what numerous opinions have condemned as a substitution of the Court's judgment for that of the legislature.[82] There are indications in both *Palmer*[83] and *James*[84] that considerations of the proper role of the judiciary influenced the decisions. These considerations provide a plausible explanation for the otherwise anomalous failure of the Court to find suspect classifications from the racio-economic effects of the state action in the instant decisions and at least suggest the possible emergence of a significant doctrinal alteration in the area of equal protection. The decisions may indicate that rather than relying on criteria extracted from the actual effects of challenged state action to determine the presence of de facto suspect classifications, the Court is in fact looking to considera-

81. "[P]olitical perceptions without roots in objective standards are an inadequate basis for law, and to accept them would give judges unacceptably dangerous power." Cox, *supra* note 74, at 98-99; *see* materials cited note 74 *supra* and accompanying text.

82. *See, e.g.*, Morey v. Doud, 354 U.S. 457, 475 (1957) (Frankfurter, J., dissenting) ("In applying the Equal Protection Clause, we must be fastidiously careful to observe the admonition of Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo that we do not 'sit as a super-legislature' ").

83. In the closing words of his *Palmer* opinion, Mr. Justice Black observed: "Probably few persons, prior to this case, would have imagined that cities could be forced by five lifetime judges to construct or refurbish swimming pools which they choose not to operate for any reason, sound or unsound." 403 U.S. at 227.

84. In *James*, the Court's emphasis on provisions for referenda as provisions for democratic decision-making suggests that court decisions striking referendum provisions as unconstitutional would be, in the view of the Court, an interference with the democratic process.

tions of policy for the critical determinants. The Court, in these two cases, has taken a step toward the articulation of a position that allegedly suspect de facto classifications will not receive strict judicial scrutiny unless the Court makes an initial determination that the considerations which militate against engaging in subjective value assignment are outweighed by the desirability of judicial action, in view of the relative political content of the ultimate questions involved. This position would appear to provide a theoretical potential for maximizing the effectiveness of the Court's moral leadership role, while maintaining the Court's ability to avoid the risk of controversy over its role in government. If the Court avoids subjective judgments in politically sensitive areas only when the net effect of these decisions seems likely to diminish the Court's prestige and authority, thereby inhibiting its capacity to make future decisions that involve subjective balancing, two results would seem to follow. First, over the long run, the Court's function of moral leadership will have been exercised to the fullest possible extent, since by avoiding strict scrutiny in one case, the capability to impose that scrutiny effectively in all future cases is preserved. Conversely, by avoiding controversial subjective judgments, the Court will receive those benefits of increased stature and prestige thought to flow from adherence to a philosophy of judicial restraint. The realization of this potential, however, is dependent upon an accurate determination at each case's inception of the reaction of the other branches of government and the public to the imposition of strict judicial scrutiny. This forecast, if not conjectural, surely calls for the application of uncommon wisdom. Even if the Court is in fact able to apply such wisdom in the majority of cases before it, the likelihood of its being able to communicate the "correct" decision-making process to lower courts in terms of objectively identifiable standards seems remote. The theoretical benefits of this "threshold balancing" approach, therefore, appear to be significantly offset by practical difficulties. In view of these difficulties, it seems certain that the doctrinal addition to the law of equal protection herein described will not finally solve the problems surrounding delineation of the Court's role vis-à-vis the other branches of government in the eradication of discrimination on the basis of wealth or race.