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Justice Rehnquist's Equal Protection Clause: An Interim Analysis

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I. INTRODUCTION

More than a decade has passed since William H. Rehnquist became an Associate Justice of the United States Supreme Court. The Court's most conservative member, with a propensity toward dissenting alone, Rehnquist has often been perceived by Supreme Court observers as somewhat isolated—a Justice whose views are not likely to be accepted by a majority of the Court.[1] Belying such an image, however, is the fact that Rehnquist has written the opinion in many important cases, that he and Chief Justice Burger often vote together, and that when he and the Chief Justice are in

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1. Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 HASTINGS L.J. 875, 876 (1975).

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the majority, the Chief Justice is quite likely to assign the opinion to Rehnquist. Moreover, with five Justices over the age of seventy currently serving on the Court, it is likely that there will be one or more new Supreme Court Justices within the next few years who will share Rehnquist's ideological persuasion. Indeed, it is possible that Rehnquist may emerge in the near future as the leader of a dominant conservative bloc of the Supreme Court.

The purpose of this article is twofold: first, it seeks to clarify Rehnquist's judicial philosophy by analyzing his equal protection opinions, and second, it attempts to determine whether his influence among the other members of the Court is expanding. Justice Rehnquist has offered explanations of his judicial philosophy in public addresses as well as in his judicial opinions. The article entitled, *The Notion of a Living Constitution*[2] (hereinafter referred to as *The Living Constitution*), is Rehnquist's most explicit statement of a judicial philosophy based on a belief in the democratic nature of the United States' Constitution. In Rehnquist's view, the Constitution gives the popularly elected branches of government, not the judiciary, the responsibility of balancing rights and interests, and of determining the goals of the political system. Such a perception of the American constitutional system provides the theoretical basis for Rehnquist's approach to constitutional interpretation.

This article compares the views expressed in Rehnquist's article, *The Living Constitution*, with Rehnquist's equal protection opinions in order to demonstrate that Rehnquist has a coherent judicial philosophy that is reflected in his judicial opinions. In order to test the hypothesis that Rehnquist's influence among the other justices is increasing, this article analyzes the Supreme Court's voting in the equal protection cases in which Rehnquist has participated. Also, an analysis of Rehnquist's judicial philosophy requires that a brief overview of the Supreme Court's equal protection jurisprudence be given.[3]

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2. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).
3. Section II of this article provides a brief overview of the Supreme Court's equal protection jurisprudence as a background for Rehnquist's approach to equal protection. For extensive analyses of the equal protection doctrine, see A. BONNICKSEN, CIVIL RIGHTS AND LIBERTIES: PRINCIPLES OF INTERPRETATION ch. 5 (1982); Barret, *Judicial Supervision of Legislative Classifications—A More Modest Rule for Equal Protection?*, 1976 B.Y.U. L. REV. 89; Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 1979 COLUM. L. REV. 1023; *Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975).

II. MODERN EQUAL PROTECTION DOCTRINE

The United States Supreme Court's use of the due process clause during the early years of the twentieth century (to scrutinize and often to invalidate federal and state laws regulating the economy) provided the foundation for the later emergence of the equal protection clause as an important tool of judicial intervention. Chief Justice Stone's well-known "fourth footnote" in *United States v. Carolene Products Co.*,[4] signaled the Court's withdrawal from an intensive review of economic regulations and its movement toward the more lenient standard of "rational review." Stone's footnote also suggested an increased scrutiny of legislation infringing on the rights specifically protected by the Constitution, as well as the rights of "discrete and insular minorities."[5] Therefore, Stone's footnote in *Carolene Products* provided the basis for the development of the Court's double standard: deference to legislative decisions in the economic realm but activism in the area of personal rights. When Justice Douglas used the equal protection clause in *Skinner v. Oklahoma*[6] to invalidate a state law that provided for compulsory sterilization after multiple convictions for certain types of felonies, he emphasized that such legislation interfered with the fundamental liberties of marriage and procreation. In *Korematsu v. United States*,[7] Justice Black made explicit the notion that race is a suspect classification and, therefore, requires the most stringent standard of review.[8]

Justice Stone's footnote in *Carolene Products*, Douglas's em-

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4. 304 U.S. 144 (1938).
5. The fourth footnote of *Carolene Products* reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> 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 maybe 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.

304 U.S. 144, 152 n.4 (citations omitted).

6. 316 U.S. 535 (1942).
7. 323 U.S. 214 (1944).
8. *See* Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879) (suggesting for the first time that race may be a suspect classification).

phasis on fundamental rights in *Skinner*, and Black's reiteration, in Korematsu, that race is a suspect classification, provided the framework for what was to become the Warren Court's two-tier approach to equal protection: the traditional "rational basis" test, which required only that a classification be rationally related to achieving a legitimate end when economic regulations were challenged; and the "strict scrutiny" test, which required that a classification be the only means of achieving a compelling state interest when the challenged legislation involved racial classifications or fundamental rights.

Chief Justice Earl Warren, in describing the traditional rationality standard in *McGowen v. Maryland*,[9] stated:

> The Fourteenth Amendment permits the States a wide scope for discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.[10]

The fact that the rational basis test has resulted in the invalidation of only one classification since the 1930's,[11] reveals the deferential, inconsequential nature of the requirement of "rationality." In contrast, the strict scrutiny test has been characterized as "strict in theory, fatal in fact."[12] As Chief Justice Warren stated in *Loving v. Virginia*,[13] "if [racial classifications] are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[14] In short, with the two-tier approach, the Court's choice of the tier virtually predetermines the result.

Race was clearly one suspect classification that demanded strict scrutiny; but the Warren Court suggested that there might be additional suspect classifications—illegitimacy and wealth, for example.[15] The Court has also used the strict scrutiny test to in-

9. 366 U.S. 420 (1961).
10. *Id.* at 425-26.
11. Morey v. Doud, 354 U.S. 457 (1957), *overruled*, City of New Orleans v. Dukes, 427 U.S. 297 (1976).
12. G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 611 (10th ed. 1980).
13. 388 U.S. 1 (1976).
14. *Id.* at 11.
15. In Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), the Court invalidated state laws that distinguished between legitimate and illegitimate children for the purpose of recovering death benefits. Although the Court in *Levy* expressly used the rational basis test, Justice Douglas suggested that illegitimacy might be considered suspect when he stated: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly

validate legislative classifications which infringe fundamental interests. Such interests include: interstate travel,[16] voting,[17] criminal appeals,[18] and marriage.[19] In addition, the Warren Court issued tantalizing statements during the 1960's implying that there might be additional fundamental interests, such as welfare benefits, housing, and education, yet to be found within the text of the Constitution.[20]

Although the Burger Court has not rejected the fundamental interests concept established by the Warren Court, it has refused to extend this strand of equal protection beyond those fundamental interests established during the 1960's.[21] In particular, the Court has refused to extend the suspect label to classifications based on illegitimacy and sex. The Burger Court has, however, added a third standard of review to the Warren Court's two-tier approach: an intermediate standard that falls between the maximum scrutiny standard, which is demanded when racial classifications are challenged, and the minimum scrutiny standard, which is required when economic regulations are involved. The Burger court has used this intermediate standard to invalidate legislative classifications based on illegitimacy and sex without actually declaring those categories to be suspect. In doing so, the Court has held that classifications based on illegitimacy and sex must be substantially related to an important governmental interest.[22] This intermediate

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'persons' within the meaning of The Equal Protection Clause . . . ." Levy v. Louisiana, 391 U.S. 68, 70 (1968). Regarding wealth as a suspect classification, Justice Douglas stated: "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (citations omitted).

16. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).
17. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
18. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).
19. *See* Loving v. Virginia, 388 U.S. 1 (1967).
20. Much of the speculation about the possible expansion of fundamental interests arose over dicta contained in Shapiro v. Thompson, 394 U.S. 619 (1969). Justice Brennan's majority opinion in *Shapiro* interpreted the facts of the case as involving a denial of "welfare aid upon which may depend the ability of the families to obtain their very means to subsist—food, shelter, and other necessities of life." *Id.* at 627. Justice Harlan's dissent criticized Brennan's "cryptic suggestion, . . . that the 'compelling interest' test is applicable merely because the result of the classification may be to deny the appellees 'food, shelter, and other necessities of life'. . . ." *Id.* at 661.
21. In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), Justice Powell stated that wealth was not a suspect classification and education was not a fundamental interest.
22. For example, in Craig v. Boren, 429 U.S. 190 (1976), Justice Brennan stated that "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and

standard has not been accepted by all members of the Court; indeed, in those cases where the standard has been applied, the results have not been predictable. However, the intermediate standard has been regarded as one of the important innovations of the Burger Court, providing a realistic, flexible method of judging classifications based on legitimacy and sex.[23] Rehnquist, however, has remained adamantly opposed to the three-tier approach, preferring instead to adhere to his own version of the traditional two-tier analysis, i.e., that minimum scrutiny should be applied to all classifications except those based on race, and that the Court should carefully avoid the use of the maximum scrutiny test, even where racial classifications are involved. The basis for Rehnquist's opposition to the intermediate standard, as well as the basis for Rehnquist's judicial philosophy, has been articulated in his article, *The Living Constitution.*[24]

III. *THE LIVING CONSTITUTION*

In *The Living Constitution*, Rehnquist quotes Abraham Lincoln's first inaugural address to capture the essence of his judicial philosophy:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that extent tribunal.[25]

Rehnquist develops this theme throughout his article, presenting a view of the Constitution that is consistent with Lincoln's indictment of what Lincoln believed to be judicial usurpation of the democratic process.

Three closely related, and perhaps overlapping, premises can be identified in Rehnquist's professed judicial philosophy. The first premise is that the American political system, as envisioned by the framers of the Constitution and established by the Constitution, is a democracy. Second, in a democratic system, laws must be made according to the established process rather than imposed

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must be substantially related to [the] achievement of those objectives." *Id.* at 197.

23. Justice Marshall's "sliding scale" approach, which was first articulated in Dunn v. Blumstein, 405 U.S. 330 (1970), and elaborated in his dissent in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), reveals the inadequacies of the two-tier approach. Marshall refers to the Court's equal protection analysis as a spectrum of standards.

24. Rehnquist, *supra* note 2.

25. *Id.* at 702 (quoting THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (R. Basler ed. 1953)).

from outside the political arena. The third premise is that the only "democratic" method of interpreting the Constitution is to examine the words of the document and to interpret those words in conformity with the original intention of the framers of the Constitution. Taken together, these three premises prescribe a very limited judicial role in interpreting the Constitution. In fact, judicial review comes to be viewed as counter-majoritarian and ultimately as an undesirable obstacle to the democratic process.

Rehnquist views the Constitution as a democratic document, a document which represents the original will of the people as described by Chief Justice John Marshall in *Marbury v. Madison*.[26] But, while Marshall applied the notion of the Constitution as reflecting the original will of the people to defend judicial review (arguing that the judiciary was responsible for interpreting and giving meaning to the Constitution), Rehnquist uses this notion to limit and ultimately to condemn judicial intervention in the acts of other branches of government. Marshall, writing in 1803, was close enough in time to the ratification of the Constitution to argue convincingly that the Constitution was genuinely a fundamental charter that had emanated from the people.[27] Today, Rehnquist argues that judges are no longer guardians of the Constitution; instead, they constitute "a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers, concerning what is best for the country."[28] The judiciary has become the destroyer of democracy rather than its protector.

In Rehnquist's view, it is not the proper function of the judiciary to keep the political system in tune with the times; the Constitution gave this responsibility to the popularly elected branches of government. Moreover, while the limits placed on state and federal governments were designed to ensure that the government would not transgress the rights established in the Constitution, these limits should be viewed as procedural constraints rather than substantive directives. Although the Constitution provided for the separation of powers, it did not obligate the government to solve substantive problems—Congress, the Presidency, state legislatures and governors have the authority to choose not to take action to resolve problems. In Rehnquist's view, the judiciary's role becomes one of simply ensuring that the other branches of government do not go beyond the explicit limits of the authority vested in them by the Constitution, not one of judging the substance of their policies.

26. 5 U.S. 137 (1803).
27. Rehnquist, *supra* note 2, at 697.
28. *Id.* at 698.

The second premise of Rehnquist's argument in *The Living Constitution* has been characterized as a relativistic theory of constitutional interpretation.[29] Essentially, Rehnquist argues that no value can be demonstrated to be intrinsically superior to any other. A particular value is authoritative only when it is favored by a majority of the Court. Rehnquist states: "The laws that emerge after a typical political struggle in which various individual judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law."[30] Although the people may have strong, deeply felt values, those values remain merely personal until they become law, either by legislation or by Constitutional amendment. The minority has no authority to impose its value judgments on the country, even if the minority happens to be the Supreme Court. This element of Rehnquist's judicial philosophy constitutes a moral relativism that ultimately rests on majority rule to define society's values. As its necessary corollary, this theory removes from the judiciary the responsibility of keeping popular opinion in check. It does not consider the possibility that the majority may be wrong; rather, it denies the notion of the existence of natural law or rights. In essence, Rehnquist's relativism would lead to the rejection of the Supreme Court's role as the guardian of individual rights against an unjust or errant majority.

Finally, Rehnquist's approach to constitutional interpretation has also been aptly characterized as immanent positivistism.[31] His method of interpreting the Constitution is to rely on the words and clauses of the document itself, confining their meaning to the words of that text. Where the words do not suffice, he searches for the intent of the framers of the Constitution. As Walter Murphy has articulated, there are numerous problems with such an approach.[32] For example, it is questionable whether the true intent of the framers can ever be adequately discerned. However, such problems have not seemed to have deterred Rehnquist's emphasis on the American political system as a democracy, or on moral relativism and immanent positivism as an approach to interpreting the Constitution. Together, these theories add up to a philosophy of judicial restraint or, possibly, of wholesale judicial abdication of the Court's review power to the popularly elected branches of government.

29. Justice, *A Relativistic Constitution*, 52 U. COLO. L. REV. 19 (1980).
30. Rehnquist, *supra* note 2, at 704.
31. Harris, *Bonding Word and Polity: The Logic of American Constitutionalism*, 76 AM. POL. SCI. REV. 34 (1982).
32. *See, e.g.*, Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980); Murphy, Book Review, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L.J. 1752 (1978).

IV. REHNQUIST'S RATIONALITY REQUIREMENT: "FACILE ABSTRACTIONS . . . TO JUSTIFY A RESULT"

Justice Rehnquist has described the Supreme Court's decisions, with the exception of those involving classifications based on race, as "an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principles."[33] His scrupulously crafted dissents have proliferated in response to the majority's propensity toward invalidating legislative classifications based on sex, illegitimacy, or alienage. The Court's position with regard to each of these classifications will now be reviewed in greater detail.

A. *Sex Classifications*

The Supreme Court has determined that classifications based on sex "must serve important governmental objectives and must be substantially related to achievement of those objectives."[34] Furthermore, the governmental objectives of administrative ease and convenience are not themselves sufficient to sustain classifications which are based on archaic and overbroad generalizations and "gross, stereotyped distinctions between the sexes."[35] In fact, the Supreme Court has stated that under this standard, the state must show that a gender-neutral statute would be a less effective means of achieving the stated objective.[36]

During Rehnquist's tenure, the Court has invalidated sex classifications in nine out of the seventeen cases to reach the Court.[37] The list of sex-based laws which the Court has invalidated includes: an Oklahoma law which set the age for purchase of 3.2 beer at eighteen for females and twenty-one for males;[38] a provision of the social security laws which allowed a widower to receive survivors' benefits only if he was receiving one-half of his support from his wife;[39] an Alabama statute which required husbands, but not wives, to pay alimony;[40] a New York law that permitted an unwed mother, but not an unwed father, to block the adoption of a

33. Trimble v. Gordon, 430 U.S. 762, 777 (1977).
34. Craig v. Boren, 429 U.S. 190, 197 (1977).
35. Frontiero v. Richardson, 411 U.S. 677, 685 (1973).
36. Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980).
37. Sex classifications were invalidated in the following cases: Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengeler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1977); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).
38. Craig v. Boren, 429 U.S. 190 (1976).
39. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).
40. Orr v. Orr, 440 U.S. 268 (1979).

child by withholding consent;[41] and a provision of the Missouri workmen's compensation laws that denied a widower benefits from his wife's work-related death unless he proved dependence on her earnings, but granted a widow such benefits regardless of any dependence.[42]

Rehnquist has disagreed with the majority in seven of the nine cases in which the Court invalidated classifications based on sex.[43] His objections to the majority's decisions emanate from his theory of constitutional interpretation. Rehnquist argued in *The Living Constitution*[44] that the proper method of constitutional interpretation is to first look at the language of the document and then to the original intent of the framers. According to Rehnquist, the original legislative intent of the fourteenth amendment was to prohibit the states from treating blacks differently than whites. He argues that it is inappropriate for the Court to extend strict scrutiny of legislative classifications beyond the arena of racial discrimination. Therefore, while Rehnquist admits that racial classifications are presumptively invalid, he holds that, as to all other classifications, the principle of equal protection simply requires "that persons similarly situated should be treated similarly."[45]

Rehnquist also rejects the Court's intermediate standard of review as being too subjective. How is the Court to know what objectives are important, or whether a law is substantially related to the achievement of such an objective? Rehnquist argues that these phrases are so "diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legisla-

41. Caban v. Mohammed, 441 U.S. 380 (1979).

42. Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980).

43. Rehnquist agreed with the majority in two cases. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), was a unanimous decision in which the Court invalidated a provision of the Social Security Act that allowed a widower to receive survivor's benefits only if he could show that he had been receiving one-half of his support from his wife. Rehnquist wrote a concurring opinion in which he argued that there was no rational basis for distinguishing between mothers and fathers when the interest of the child in receiving the full time attention of the remaining parent was at stake.

In Kirchberg v. Feenstra, 450 U.S. 455 (1981), the Court unanimously invalidated a Louisiana statute that gave a husband, as "head and master" of property jointly owned with his wife, the right to dispose of jointly held property without the wife's consent. Rehnquist joined Stewart's concurring opinion which emphasized that the decision did not apply to transactions executed before the lower court decision.

44. *See supra* note 2.

45. The "similarly situated" language comes from F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920): "[T]he classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 415.

tion, masquerading as judgments whether such legislation is directed at 'important' objectives, or whether the relationship to those objectives is 'substantial' enough."[46] Questions concerning governmental objectives are appropriately left to elected officials; judges are simply not equipped with the data or the expertise to handle them. Since sex classifications do not warrant strict scrutiny and the intermediate standard of review is too subjective, the only standard which can be applied to test sex-based classifications under the Rehnquist approach is the rational basis test. He has argued that challenged sex classifications do not necessarily fail this minimum requirement.[47] Using language from opinions in which the Court has upheld economic regulations against equal protection challenges,[48] Rehnquist pays maximum deference to legislative decisions. If Rehnquist can discover any *conceivable* relationship, no matter how tenuous, between a classification and its stated purpose, he will vote to uphold the law. Thus, Rehnquist's standard of review clearly presupposes the result; it is an approach that renders the equal protection clause inconsequential when applied to sex-based classifications.

In gender-based classification cases, Rehnquist has added a curious line of reasoning to his objections to the use of the intermediate standard of review. He has argued that even if the Court were to use heightened scrutiny when women are discriminated against, men should not be able to challenge legislation that disadvantages them.[49] This is because our American society has no tradition of discrimination against males, implying that women need special protection because of past discriminatory practices. However, Rehnquist would be quick to add that, while women may need special protection, such protection is not to be found in the equal protection clause.

When a majority of the Court has invalidated sex classifications, Rehnquist has contended, in dissent, that under the proper standard of review the challenged legislation would easily stand. Although the Court has generally remained unreceptive to Rehnquist's argument, it has, on two occasions, used the rational basis test to invalidate legislative classifications based on sex.[50] One

46. Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).
47. *See*, e.g., Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976). Shapiro argued that Rehnquist's rational basis test requires only that a challenged classification not be entirely counterproductive with respect to the purposes of the legislation in which it is contained.
48. For example, Rehnquist often quotes from McGowan v. Maryland, 366 U.S. 420 (1961), and F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).
49. Craig v. Boren, 429 U.S. 190, 218-221 (1976) (Rehnquist, J., dissenting).
50. Michael M. v. Superior Court, 450 U.S. 464 (1981); Rostker v. Goldberg, 453 U.S. 57 (1981).

such case involved a California statutory rape law which made men criminally liable for engaging in sexual intercourse with females under the age of eighteen. The California Supreme Court subjected the law to strict scrutiny and found the classification to be justified by the compelling state interest of preventing teenage pregnancies. When the United States Supreme Court decided the case, Rehnquist, speaking for four justices, used the rational basis test to uphold the law. In doing so, he made only a slight concession to the Court's customary use of the intermediate standard of review for sex classifications: "[T]he traditional minimum rationality test takes on a *somewhat* 'sharper focus' when gender-based classifications are challenged."[51] The purpose of the law, he found, was to discourage illicit sexual intercourse with minor females. There may have been a variety of reasons for the state to seek such a purpose, e.g., concern about teenage pregnancies, protecting young females from physical injury, and promoting various religious and moral attitudes towards pre-marital sex. The state has a strong interest in such a purpose because illegitimate pregnancies often result in abortions and additions to the welfare rolls. Because only women become pregnant, it was obvious to Rehnquist that men and women are not similarly situated with respect to the problems and the risks of sexual intercourse.

Rehnquist's use of the phrase "similarly situated" shifts the focus of analysis away from the question of whether a classification is substantially related to an important governmental objective. In effect, Rehnquist employs this phrase in order to slide the standard of review to one of minimum scrutiny. While an important question under the intermediate standard is whether a sex-neutral statute would be as effective as the one which was challenged, under Rehnquist's "similarly situated" approach this element of the inquiry merely asks whether a sex-neutral classification would substantially advance important governmental interests.[52] In the California statutory rape case, for example, he asserted that a sex-neutral statute would not only be unenforceable, but also that young females suffer sufficiently from the consequences of sexual intercourse and, therefore, may reasonably be excluded from legal punishment—a criminal sanction that falls solely on males serves to equalize its deterrent effect. Thus, the inquiry has been turned on its head in the sense that sex-neutral classifications must be defended and compared with the challenged classifications that are based on sex.

The statutory rape case was a five-to-four decision, but Rehn-

51. Michael M. v Superior Court, 450 U.S. 464, 468 (1981).
52. Justice Brennan emphasized this point in his dissent. *Id.* at 488-89 (Brennan, J., dissenting).

quist's opinion commanded only a four-person plurality, indicating that a majority will not subscribe to the implications of the "similarly situated" analysis. However, in a case dealing with sex discrimination implicit in a draft registration requirement,[53] Rehnquist again used the "similarly situated" language, and there were no concurring opinions in the six-to-three decision. The Military Selective Service Act, which authorized the President to require the registration of men, but not women, was challenged as a violation of the equal protection component of the due process clause. Rehnquist emphasized that, normally great weight must be given to decisions of Congress, but that in this case even greater deference should be accorded to the legislative branch because the case arose in the context of Congress' authority over national defense and military affairs where "the scope of Congress' constitutional power . . . [is] broad, [and] the lack of competence on the part of the courts is marked."[54]

Distinguishing previous cases in which the Court invalidated sex classifications, Rehnquist asserted that the decision to exempt women from registration was not an accidental by-product of traditional thinking about women. Indeed, Congress had good reason to exempt women: "[Congress] determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops."[55] Since women by law were not eligible for combat, it was reasonable for Congress to conclude that they would not be needed in the event of a draft and that there was no reason to register them. Rehnquist's conclusion regarding combat restrictions on women was based on the fact that men and women are not similarly situated for purposes of a draft or registration for a draft. Although such a statement appears to invoke the rational basis standard, Rehnquist expressly declined to apply a specific standard of review to the draft registration scheme. He justified his reticence by stating that "[a]nnounced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result."[56]

The draft registration case was special in the sense that it in-

53. Rostker v. Goldberg, 453 U.S. 57 (1981).
54. *Id.* at 65.
55. *Id.* at 76.
56. *Id.* at 69. As Justices Marshall and White argued in their dissenting opinions, a substantial number of people in a conscripted military force would fill noncombat positions. Marshall contended that the exclusion of women from registration has no substantial relation to the government's interest in maintaining an effective defense. It was estimated that 80,000 people would have to be drafted for noncombat positions.

volved national defense. Thus, the majority's agreement with Rehnquist's deferential approach to the draft registration scheme is not at all surprising. Still, it must be noted that Rehnquist's deference to Congress in this area is consistent with his deferential approach to the Social Security Act. Rehnquist has objected to challenges to the Social Security Act's provisions on grounds that special deference should be given to social insurance legislation since it has undergone so many changes over the years that a nice fit between a classification and the objective of the legislation is impossible and because administrative convenience is particularly important to the success of entitlement programs.[57]

Rehnquist's opinions in the area of sex classifications are nothing if not consistent. His minimum scrutiny/maximum deference approach allows him to presume a rational basis for virtually any legislative scheme that treats men and women differently. Rehnquist's approach to sex classifications constitutes exactly what he purports to avoid: a set of "facile abstractions" used to justify a predetermined result—that of upholding the legislation against constitutional attack.

B. Illegitimacy

Legislative provisions that distinguish between illegitimate and legitimate children for purposes of inheritance,[58] the right to recovery for wrongful death,[59] welfare benefits,[60] and social security for surviving dependent children,[61] which have been challenged under the equal protection clause, have not been uniformly subjected to the intermediate standard of review. Although the level of scrutiny is less clear in the case of illegitimacy classifications than it is in sex classifications, the Court has invalidated illegitimacy classifications in five out of the ten cases that it has decided. Rehnquist dissented in each of the five cases.[62]

Rehnquist voices essentially the same objections to the majority's approach toward illegitimacy cases as he does to the Court's sex classification rulings. He argues that equal protection does not require that a states enactment be logical; rather, its only requirement is "that there be some conceivable set of facts that may jus-

57. Califano v. Goldfarb, 430 U.S. 199, 225 (1977) (Rehnquist, J., dissenting).
58. Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977).
59. Levy v. Louisiana, 391 U.S. 68 (1968).
60. New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).
61. Matthew v. Lucas, 427 U.S. 495 (1976).
62. The Court invalidated illegitimacy classifications in the following cases: Trimble v. Gordon, 430 U.S. 762 (1977); Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972).

tify the classification involved."[63] Rehnquist's dissent in *Trimble v. Gordon*[64] illustrates his approach in dealing with illegitimacy classifications as well as his general equal protection philosophy. The Court, in a five-to-four decision in *Trimble*, invalidated a provision in an Illinois law that allowed illegitimate children to inherit by intestate succession from their mothers only; yet legitimate children were allowed to inherit by intestate succession from both their fathers and mothers. Rehnquist complained that the Court's approach was confusing because it failed to specify the level of scrutiny employed. Additionally, he argued that the Court should not have focused its attention on the purpose of the law or the motive of the legislature in passing it. Because there will always be some imperfection in the fit between legislative motives and the means of accomplishing legislative goals, the Court, by examining such motives, has put itself in the position of deciding how much imperfection to allow and what alternative forms of legislation are available. The crux of the problem, according to Rehnquist, is that judges are no better equipped to make these assessments than are legislators. The result of this judicial "meddling" is that "we have created on the premises of the Equal Protection Clause a school for legislators, whereby opinions of this Court are written to instruct them in a better understanding of how to accomplish their ordinary legislative tasks."[65] In short, as far as Rehnquist is concerned, a standard of review which is more stringent than that of mere rationality necessarily results in the judicial interjection of the Court's values into the legislative democratic process.

C. *Alienage*

In 1971, the Supreme Court declared that "classifications based on alienage, like those based on . . . race, are inherently suspect and subject to close judicial scrutiny."[66] The Court, however, has not followed through on this pronouncement. When classifications based on alienage have been questioned, the Court's standard of review has been similarly undefined. Adding to this uncertainty is the fact that the Court employs a double standard with respect to federal and state alienage-based classifications: "[O]verriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a state."[67] However, there are two reasons that classifications based on alienage present a

63. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 183 (1972).
64. 439 U.S. 762 (1977).
65. *Id.* at 784.
66. Graham v. Richardson, 403 U.S. 365, 372 (1971).
67. Hampton v. Mow Sun Wong, 426 U.S. 88, 101 (1976).

somewhat different problem from those based on sex and illegitimacy. First, the concept of citizenship itself implies the existence of favored status for members of a specified group: alienage may be a relevant classification where illegitimacy and sex are not. Second, unlike illegitimacy or gender, alienage is not an irrevocable personal trait; an alien can eventually change his status by following specific procedures to obtain United States citizenship.

In 1973, the Supreme Court employed maximum scrutiny to invalidate a Connecticut statute that excluded resident aliens from law practice[68] and a New York law that excluded noncitizens from holding permanent positions in the competitive, classified civil service.[69] In a dissenting opinion which responded to both cases, Rehnquist emphasized the importance of the concept of citizenship. The Constitution, he argued, makes a distinction between citizens and aliens eleven times: "Citizenship [is symbolic of] a status in the relationship with a society which is continuing and more basic than mere presence or residence."[70] He asserted that the Court, without any constitutional basis, was arbitrarily awarding special protection to particular groups of people. He emphasized that aliens can change their status and become American citizens. In Justice Rehnquist's opinion, it is not unreasonable to require aliens to demonstrate an understanding of the American political and social structure and a dedication to American values by going through the naturalization process.[71]

Where classifications based on alienage are embedded in statutes controlling employment, the Court uniformally defers to the legislative wisdom of the state. For example, the Court, in 1978 and 1979, upheld certain state laws which barred aliens from employment as state troopers[72] and listed citizenship as a requirement for the certification of public school teachers.[73] In 1982, the Court upheld a California statute that made citizenship a prerequisite to employment in any state, county, or local governmental position which bestows upon the employee the powers of a peace officer.[74]

68. In re Griffiths, 413 U.S. 717 (1973).
69. Sugarman v. Dougall, 413 U.S. 634 (1973).
70. *Id.* at 652.
71. In Examining Bd. of Eng'rs., Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976), the majority, applying strict scrutiny, invalidated a Puerto Rico statute that permitted only United States citizens to practice as civil engineers. Rehnquist, dissenting in part, argued that the equal protection clause of the fourteenth amendment did not apply because Puerto Rico is not a state, and the equal protection component of the due process clause of the fifth amendment did not apply because the law in question was not enacted by Congress, but by the Puerto Rico legislature, instead.
72. Foley v. Connelie, 435 U.S. 291 (1978).
73. Ambach v. Norwick, 441 U.S. 68 (1979).
74. Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

Finally, in a 1973 case, the Court stated the exception to the rule of strict scrutiny of legislation involving alienage classifications: "[S]crutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."[75] The subsequent cases suggest that the exception has devoured the rule, and that, at least in the area of classifications based on alienage, it appears that Rehnquist's position now commands a majority.

Rehnquist's equal protection opinions involving classifications based on sex, legitimacy, and alienage clearly conform to his professed judicial philosophy. His insistence that the Court apply strict scrutiny only where racial classifications are involved is consistent with his positivistic approach to constitutional interpretation, i.e., that interpretation of the fourteenth amendment should adhere to the original intention of the framers of the Constitution. Rehnquist is undaunted by the problems that accompany such an approach. Additionally, his opinions are consistent with his view of the American constitutional system as a democracy in which the function of judicial review is simply to prevent the popularly elected branches from transgressing the limits of their authority, rather than one to solve substantive problems. Rehnquist's adamant objection to the judiciary's taking an active role in invalidating legislation that results from the political process is consistent with his emphasis on the democratic nature of the Constitution. Finally, Rehnquist's opinions are consistent with his assertion that policy should be made by the majority rather than imposed by a minority from outside the political arena. His reliance on majority rule is ultimately relativistic in the sense that policy made through proper procedures may discriminate against certain, nonracial, groups without violating the equal protection clause. Discrimination, per se, is not prohibited; conversely, equality is not an authoritative value. The equal protection clause, in Rehnquist's opinion, is clearly not a substantive guarantee of equality.

V. RACIAL EQUALITY: REHNQUIST'S OBSTACLE COURSE

One immediate purpose of the fourteenth amendment was to prevent states from passing legislation which treated blacks differently from whites. Classifications based on race are presumptively invalid. Therefore, cases involving racial classifications are relatively easy to decide. The determining factor for Rehnquist in these "relatively easy" decisions is the presence of purposeful discrimination through legislation or other official policy. In the absence of purposeful discrimination, there is no equal protection

75. Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

violation. Rehnquist has, in effect, erected obstacles to the utilization of the equal protection clause even when racial classifications are involved. His approach to the state action requirement and his approach to the closely related *de jure/de facto* distinction illustrates the limited nature of Rehnquist's interpretation of the equal protection clause.

A. *Significant State Involvement in Racial Discrimination: A New State Action Formula*

While the Supreme Court has consistently held that government involvement in racial discrimination is a prerequisite for invoking the protections of the fourteenth amendment, members of the Supreme Court have disagreed on the degree of involvement which is required. In *Moose Lodge No. 107 v. Irvis*,[76] a case involving a liquor licensing scheme of a private club which refused to admit blacks to its restaurant and cocktail lounge, Rehnquist, for the majority, expressed his view that the required degree of state action was absent. The state liquor license, he held, did not sufficiently implicate the state in the racial discrimination practiced by the club. He argued that the presence of "any sort of benefit or service at all from the state," or any state regulation, does not itself amount to significant state involvement.[77] He also distinguished an earlier case, *Burton v. Wilmington Parking Authority*,[78] in which the Supreme Court found that a restaurant that leased its space from a state agency, and was located within a building owned and operated by that agency, had a sufficiently close relationship with the state to come under the restrictions of the fourteenth amendment. In *Burton*, there was such a close relationship between the restaurant and the state that the latter was deemed a participant in the discriminatory activity. In contrast, the private club, as Rehnquist pointed out, was located on private land and was not open to the public—it was a private social club in a private building. The liquor license did not sufficiently implicate the state in racial discrimination despite the fact that the state arguably involved itself extensively in the operations of the business by virtue of its issuing a liquor license. *Burton* emphasized the impossibility of stating a precise formula for determining when government involvement is sufficient to call into question the equal protection clause.[79] Rehnquist, however, appeared to reject this flexible approach in favor of the more stringent requirement that the state must directly and specifically "foster or encourage racial discrimi-

76. 407 U.S. 163 (1972).
77. *Id.* at 173.
78. 365 U.S. 715 (1961).
79. *Id.* at 722.

nation" before any equal protection claim can arise.[80]

A more demanding state action requirement would make it more difficult for members of minority groups to challenge racially discriminatory practices which would indirectly result from state action. Rehnquist's approach to state action implies that state regulation of business or industry will not be sufficient to invoke the provisions of the fourteenth amendment when "private" entities directly engage in racially discriminatory practices.[81] Whatever its result, his approach to the state action requirement is predictible given his positivistic interpretation of the fourteenth amendment. A high level of government involvement must be present before action may be properly considered action of the state for fourteenth amendment purposes.

B. School Desegregation: The De Jure/De Facto *Distinction*

In 1968, exasperated by the slow pace at which school desegregation was occurring, in spite of the Court's mandate to use "all deliberate speed,"[82] the Supreme Court charged public school boards, which had operated dual school systems pursuant to state laws existing in 1954, with an affirmative duty to eliminate racial discrimination.[83] Thus, southern school systems that had practiced *de jure* segregation in 1954, and remained segregated, were clearly under an obligation to eliminate their dual systems. The legal status of segregated schools in northern cities, where proof of ongoing purposeful discrimination was made difficult by the fact that such segregation was not explicitly sanctioned by law, was unclear. Were such school systems obligated to desegregate?

Under the Supreme Court's early rulings in cases involving southern schools,[84] it was anticipated that northern school systems would not come under the Court's desegregation mandate; theoretically, since segregation of northern schools was not supported by state action, it must be considered to be *de facto*, as opposed to *de jure*, discrimination. Thus, such segregation would be considered to be beyond that ambit of the equal protection clause. A majority of the Court, however, has taken an approach to north-

80. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

81. Rehnquist authored two other opinions involving the state action question, but the cases did not involve racial discrimination or equal protection. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

82. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

83. Green v. County School Bd., 391 U.S 430 (1968).

84. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S 430 (1968).

ern school desegregation cases which renders the *de jure/de facto* distinction less clear than the earlier southern cases indicated.

The northern school desegregation issue was first presented to the United States Supreme Court a year after Justice Rehnquist took his position on the bench. Since that time, he has persistently objected to the way the majority has treated the issue of northern desegregation.[85] In 1973, Rehnquist lodged the sole dissent to the majority's holding that a district-wide desegregation plan in Denver was justified on a finding of intentional discrimination in only one part of the district.[86] Rehnquist emphasized the factual differences between the segregation that existed in the Denver schools from that which existed in the southern school systems. More basically, he objected to the Court's imposition in 1968 of the "affirmative duty" to desegregate, characterizing it as an unexplained extension of *Brown v. Board of Education*. While Rehnquist conceded that such a duty exists, he maintained that it should be applied only to southern school systems where segregation had once been mandated by law.

Rehnquist viewed the Court's reasoning in two northern school desegregation cases decided in 1979[87] as a further unwarranted departure from the *de jure/de facto* distinction. In both of these cases, the majority held that school boards which intentionally maintained dual school systems in 1954, and which continued to maintain them, must show why they have not taken necessary steps to desegregate. These school boards bear the heavy burden of showing that their actions, promoting the dual school systems, serve important and legitimate ends. In *Columbus Bd. of Educ. v. Penick*, the Court stated that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."[88] The Court still requires a finding of *de jure* segregation as shown by the school boards' (or administrators') purposeful segregative action in order to justify a legally imposed remedy for racially imbalanced schools. The 1979 cases, however, facilitate findings of purposeful segregation by their reliance on proof of intentional segregation in 1954, as well as on the "foreseeable and anticipated disparate impact" of school authorities' actions.

Rehnquist is adamantly opposed to what he refers to as the Court's "new methodology." First, he argues that there is no reason to look at a school's actions before 1954, unless the school has a

85. *Contra* Milliken v. Bradley, 418 U.S. 717 (1974).
86. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).
87. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*).
88. 443 U.S. 449, 464 (1979).

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history of legally mandated racial segregation. Presumably, this means that schools which were not *legally* segregated in 1954, should not be made to bear the responsibility of achieving a unitary system. Second, he argues that the burden of showing a discriminatory purpose should lie with the plaintiffs, and when there is no evidence to prove or disprove the justification offered by a school board for its actions, the Court should not hold that there is a violation of a constitutional right. Rehnquist's approach to desegregation is clear. In order to justify the imposition of a remedy for racially imbalanced schools, the lower courts must find some action on the part of the school board which intentionally discriminated against minority students. If such violations are found, the Court must then determine how great a segregative impact the violations have on the racial distribution of the schools. The remedy must only redress the difference; if past violations are found to have occurred, the proper remedy "is to restore those integrated educational opportunities that would now exist but for purposefully discriminatory school board conduct."[89] In short, Rehnquist's approach would make it considerably more difficult to challenge racially segregated schools. Rehnquist's approach would also limit the remedy to the correction of the actual violation.

Rehnquist has never voted to uphold a school desegregation plan.[90] In light of recent congressional overtures aimed at preventing the judiciary from expanding its policy of desegregation, it might be prudent for the Court to keep a low profile in this area. Should Congress actually attempt to limit the judiciary's remedial powers with regard to desegregation, Rehnquist could be expected to side with Congress. Indeed, Rehnquist might take advantage of such an opportunity and attempt to overturn many of the important school desegregation rulings handed down by the Supreme Court. Although Rehnquist surely would not go so far as to repudiate *Brown*,[91] he would interpret it narrowly as applying only to le-

89. *Id.* at 524.

90. In United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972), a unanimous decisions which involved a state law which created a new school district in Halifax County, North Carolina, the Court held that if the new school district hindered the dismantling of the dual system, the implementation of the legislation could be enjoined.

91. *But see* R. KLUGER, SIMPLE JUSTICE 606-11 (1975). As a law clerk, Rehnquist prepared a memo for Justice Robert Jackson to be used by Jackson in developing his arguments for conference on the *Brown* case. Rehnquist's memo, entitled "A Random Thought on the Segregation Cases," contained the following passage:

> One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed

gally authorized or mandated segregated schools, and would gladly repudiate its successors, which, in his view, have rendered the *de jure/de facto* distinction meaningless.

VI. REHNQUIST ASCENDANT? A VOTING ANALYSIS

Is Justice Rehnquist's influence among the other members of the Supreme Court increasing? Is his version of the equal protection clause likely to gain majority support? Are we likely to see him authoring more majority opinions upholding sex-, illegitimacy-, and alienage-based classifications, and invalidating school desegregation plans? After examining Rehnquist's judicial opinions in 1975, John R. Rydell concluded that Rehnquist's approach to equal protection was not likely to become the dominant view of the present Court.[92] Other contemporary observers of Rehnquist's behavior on the Court have asserted that he is the source of vision that currently informs the work of the Supreme Court. In 1982, Owen Fiss and Charles Krauthammer asserted that Rehnquist is emerging as the leader of a conservative bloc consisting of Burger, Powell, White, and O'Connor, and that his influence is likely to expand given his relative youth and the likely pattern of future appointments.[93] Thus, the early image of Rehnquist standing alone in "right field" may soon fade as he rises to prominence in the conservative Court of the 1980's.

While Rehnquist has been in the minority in many of the equal protection cases, he has also been a most vocal dissenter,[94] and he has also spoken for the majority in several important decisions. Thus, a reading of the Court's equal protection opinions seems to indicate that Rehnquist might be an emerging leader on the Court. To test this impression, this section provides an analysis of the votes in all of the equal protection cases which Rehnquist participated in through 1981.[95] Using data from eighty-eight cases, majority percentages and dissent rates for each justice, and interagreement scores for all pairs of justices, were computed in

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> off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying on the sentiments of a transient majority of nine men.
>
> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. . . .

92. Rydell, *supra* note 1, at 875.
93. Fiss & Krauthammer, *The Rehnquist Court*, THE NEW REPUBLIC, Mar. 10, 1982, at 14-21.
94. Rehnquist filed an opinion in twenty-four of the twenty-eight cases in which he dissented.
95. All non-unanimous equal protection cases decided in full, as well as *per curiam* decisions that elicited dissenting opinions, have been included in the analysis. A complete list of cases is available upon request from the author.

order to determine whether Rehnquist's interpretation of the equal protection clause is likely to be shared by a majority of the Supreme Court.

A. *Majority-Dissent Percentages*

As Table 1 indicates, Rehnquist voted with the majority in 67.8 percent of the non-unanimous cases in which he participated. This majority participation score indicates that five of the other Justices voted with the majority a higher percentage of the time than he did.[96] He dissented twenty-eight times; in eleven of those cases he dissented alone. Also, he filed an opinion in all but four of the twenty-eight cases.

TABLE 1
Dissents and Majority Participation (Non-unanimous Equal Protection cases 1972-1981)

Justice	Number of Cases	Majority Participation		Dissents	
		N	PCT	N	PCT
Powell	87	79	90.8	8	9.1
Blackman	88	76	86.4	12	13.6
Stewart	88	74	84.1	14	15.9
Burger	88	74	84.1	14	15.9
White	87	68	78.2	19	21.8
Rehnquist	87	59	67.8	28	32.2
Stevens	49	32	65.3	17	34.7
Brennan	88	39	44.3	49	55.7
Douglas	37	15	40.5	22	59.5
Marshall	87	34	39.1	53	60.9

A gross analysis of dissenting and majority participation rates is misleading because of the relatively large number of equal protection cases that involved challenges to economic legislation. In these cases, the Court used the rational basis test to uphold the law, and Rehnquist voted with the majority. If, however, the cases are divided into seven categories based on the type of classification which was challenged,[97] a clear pattern does emerge.[98] Rehnquist, in terms of majority participation, ranks sixth in race cases, eighth in gender cases, last in both alienage and illegitimacy cases, and fourth in economic regulation cases.

96. *See* Heck, *Civil Liberties Patterns in the Burger Court, 1975-78*, 34 W. POL. Q. 193 (1981).
97. The seven case types of challenged classifications are: race, gender, illegitimacy, alienage, voting, poverty, and other.
98. However the number of cases is far too small to provide statistical reliability of the findings.

B. Bloc and Time Series Analysis

The majority participation percentage permits a general assessment of Rehnquist's position in relation to the other members of the Court; this does not indicate, however, that the majority subscribes to his interpretation of the equal protection clause. The question of whether other members of the Court may be moving closer to Rehnquist's views remains; neither a "bloc" analysis, nor a "time series" analysis, currently supports an affirmative reply.

TABLE 2
Matrix of Interagreement: Non-unanimous Equal Protection Cases 1972-1981

MRSH	BRN	DOUG	STVN	WHTE	STEW	BLKM	POW	BURG	REHN
—	95.3	89.2	54.2	55.9	36.7	36.7	32.6	24.1	5.9
	—	86.5	61.3	60.8	39.8	42.0	36.8	28.2	11.4
		—	—	44.4	51.3	35.1	38.9	32.2	5.4
			—	53.1	57.2	57.1	70.1	46.9	43.8
				—	62.0	71.2	68.6	64.3	48.9
					—	75.0	81.5	81.8	70.1
						—	89.1	81.7	67.8
							—	86.2	72.1
								—	81.5
									—

Court cohesion = 55
Sprague criterion = 78

In the bloc analysis, the interagreement percentages indicate that "Rehnquist's bloc" consists of no more than two justices. There appear to be two blocs at opposite ends of the spectrum: Brennan and Marshall received a score of 95.3 percent on interagreement, and Burger and Rehnquist scored 81.5 percent on interagreement. The interagreement scores for Powell, Blackman, and Burger are all sufficiently high for them to be characterized as a bloc, with Rehnquist being a marginal member (at best). Thus, the "Rehnquist bloc" consists of only Rehnquist and Burger.

The time series analysis is even less useful on the important question of whether Rehnquist's influence has increased with his tenure on the Court. A comparison of Rehnquist's majority and dissenting votes by year is outlined in Table 3.

TABLE 3
Rehnquist's Majority/Dissent Votes 1972-1981

Court Term	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980
Majority Vote	3	8	9	3	7	8	3	10	2	5
Dissenting	2	7	3	1	2	5	1	4	3	0
Total	5	15	12	4	9	13	4	14	5	5
Percentage Majority	60	53.5	75	75	77.7	61.5	75	71.4	40	100

Although the collection of cases used was too small to provide statistically reliable results, no pattern of emerging leadership is discernible.

VII. CONCLUSION

In Rehnquist's view, the fourteenth amendment was not intended to be an affirmative guarantee of equality. Its purpose was simply to prohibit the states from treating blacks and whites differently under the law. Such a view is consistent with his belief in immanent positivism, requiring adherence to the text of the Constitution and reliance on the original intention of the framers of the Constitution—even if their intent is not discernable. Rehnquist consistently argues that the rational basis test is the proper standard of review where racial discrimination is not implicated. Even when race is involved, Rehnquist is very reluctant to use the equal protection clause unless he finds discrimination that is both purposeful and officially sanctioned. His approach to equal protection analysis flows from his view of the limited role of the judiciary in the American political system. Rehnquist believes the Supreme Court should pay maximum deference to the decisions of popularly elected officials. The states, in particular, should be given maximum leeway to determine the best solution to their problems. Rehnquist's faith in the ultimate fairness of majoritarianism seems to be the key to his emphasis on state autonomy and to his minimum scrutiny/maximum deference approach to equal protection.

The analysis of voting data does not support the thesis that Rehnquist's influence among the other members of the Court is increasing. However, the number of cases utilized in the analysis was clearly inadequate for the task of indicating patterns of change over time. Another variable which adversely affects the reliability of the analysis of the voting data is the fact that there is a new justice on the Court, and it is too soon to analyze her voting behavior. In the next few years, it will be important to observe whether Justice O'Connor will align herself with the Rehnquist/Burger bloc. Looking toward the future, it is clear that if two new Justices

are appointed by a conservative republican President, the balance of power could shift in Rehnquist's favor.

The possibility of a Supreme Court majority subscribing to Rehnquist's interpretation of the equal protection clause has serious implications. Despite Justice Stone's footnote in the 1938 case of *Carolene Products*, which suggested that the fourteenth amendment might give special protection to members of groups which have been traditionally disfavored and excluded from the political process,[99] the Supreme Court did not actually begin to give serious meaning to the equal protection clause until 1954. Since then, however, the Court has led the American political system—first in the quest for racial equality, and then in efforts to achieve equality for women and other traditionally powerless groups. By its willingness to take an active role in interpreting the equal protection clause, the Court has undertaken the responsibility of shaping and defining an evolving concept of equality. If a majority of the justices were to accept Rehnquist's view of equal protection, the Court would no longer perform such a role. Members of "discrete and insular" minorities, who have turned to the judicial system because relief was not available from the democratic process, would find the courts unresponsive as well. The result of a Rehnquist-led majority would be an equal protection clause that offers little protection to racial minorities; virtually no protection to women, aliens and illegitimates; and no "special" preferential treatment to members of traditionally disadvantaged groups. Members of such groups would have no legal recourse if the political process did not offer them an opportunity to challenge discriminatory policy. On a more general level, Rehnquist's relativistic version of the equal protection clause would render equality a value that would forever remain merely personal, and without intrinsic moral worth, since the goal of equality can never be enacted into law through a democratic process.

99. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).